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Lloyd L. Weinreb

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LAW'S QUEST FOR OBJECTIVITY

Lloyd L. Weinreb[+]

We are in Professor Smith's debt for a broad-ranging, richly provocative book,[1] which takes a fresh approach to questions about the nature of law and the source of its authority, questions that lie at the heart of jurisprudence. Close attention to his description of the dilemma of contemporary jurisprudence, "law's quandary" as he puts it, is therapeutic. He identifies a disorder and leads us, ever so gently, to, or at least toward, a cure. To pursue the medical metaphor one step further, however, although he reveals symptoms that ought to concern us, his diagnosis is, I think, mistaken and so also is his prescription. If I may make my own diagnosis, Professor Smith perceives law as in a quandary, because he is engaged, like those for whom he would prescribe, in a quest for a kind of objectivity that law cannot and need not attain. The "ontological gap"[2] that he describes is of his own making.

Professor Smith asks us to consider what "the law" is or, more precisely, whether "the law" really *is* at all. "[T]he most direct way to contemplate the quandary of modern law," he says, is to ask: "Does 'the Law' Exist?" which is the title of an important chapter of his book.[3] He acknowledges that the question is "unusual," "uncouth," and "irksome."[4] It is all of those things. It is also distinctly odd. Except under Professor Smith's instruction, it is a question that we should never ask, because the answer is so obvious. Of course it exists—if you want to speak in that curious way. But just as we never ask what time is but rather what time it is, so also we do not ask what law is or whether there is law. Rather we ask whether an offer is effective when it is sent or when it is received, whether the seller of a product is liable for an injury to a third party, what the speed limit is, and so forth. Nor should anyone be disconcerted if, like W.H. Auden,[5] he is not quite prepared to answer the general question. It will never appear on a bar exam. Formulating the issue as Professor Smith does has a point, although the point is, perhaps, not precisely the one that he has in mind. But in any case, we ought not to get tied up in knots about whether law exists.

+ Dane Professor of Law, Harvard Law School.

1. STEVEN D. SMITH, LAW'S QUANDARY (2004).
2. *Id.* at 157.
3. *Id.* at 97, 41.
4. *Id.* at 97.
5. *See* W.H. AUDEN, *Law Like Love*, *in* THE COLLECTED POETRY OF W.H. AUDEN 74 (1945).

The focus sharpens two chapters later, when Professor Smith tells us that he will approach the question of law's existence by asking a different question, "How Does Law Mean?"[6] That too is an odd question, but the reason for his asking it is clear. He wants us to consider not the meaning of any particular law but what we have in mind when we ask for a law's meaning. What sort of thing do we think law is, what ontological commitments do we make, when we speak of its meaning? The meaning of a law, he says, is semantic meaning, which is conveyed, or carried, by words.[7] It is not the sort of meaning that has to do with the causes and effects of physical events "in the real world," as we like to say. For example: "If the grass is wet, that means that it rained last night." The meaning there in question is nonsemantic; it resides not in words but in the causal relation between rain and a wet lawn. Few of us are likely to confuse those two kinds of meaning. Professor Smith sets them forth because the distinction highlights what he wants to say about the law's kind of meaning, semantic meaning.

When we confront a legal issue, Professor Smith says, we resolve it by inquiring "what the law is." Answering that question, we come upon a text composed of words, and we educe its semantic meaning, which tells us what the law is or, more simply, tells us the law about that issue. But semantic meaning (as opposed to that other kind of meaning), he says, is a matter of intention. It is what the author of the words intends them to communicate to the intended listener or reader. There are many reasons why communication may fail; the author and the recipient may use a critical word differently and so forth. But one cannot make sense of semantic meaning without reference to an intending author. That is, in Professor Smith's phrase, "the ontology of semantic meaning."[8]

There are a number of objections to this thesis, most of which Professor Smith parries by limiting his claim to the requirement that there be an authorial presence, without specifying any particular author. It may be the person who first spoke or wrote the words, or a collective author, or even a hypothetical ideal author, endowed with any human or superhuman qualities we care to designate. Familiar questions about authorial status and competence—whether there is such a thing as a collective legislative intention, whether judges interpreting and applying a statute qualify as authors, whether we should endow a hypothetical author with qualities of an ordinary person—*l'homme moyen*—or an extraordinary person—Rousseau's Legislator or Ronald Dworkin's Hercules—are all set aside. For the point that Professor Smith wants to

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6. SMITH, *supra* note 1, at 97. The question is the title of Chapter 5. *Id.* at 101.
7. *Id.* at 103–04.
8. *Id.* at 105.

make is that none of the possible candidates has the necessary credentials. They are all "grossly underqualified."[9] I shall not recite here his reasons for rejecting all the candidates, which seem to me generally persuasive. Perhaps the most telling point is his observation that a hypothetical author, however suitably endowed, does not suffice, because she or he is, well, hypothetical; one might as well speak of an intention at large, which subverts the very nature of semantic meaning.[10]

And so, to close the circle and complete the argument, when we speak of what "the law" is, we are dealing with semantic meaning. Semantic meaning presupposes an Author. But there is no Author nor, given law's nature, could there be. When, therefore, we refer to "the law," the words are empty; they refer to nothing. There is an "ontological gap."

The underqualification of authorial candidates is usually discussed as a problem of legal interpretation. Professor Smith avoids that characterization because his purpose is to explore not the interpretation but "the law" that is interpreted. He represents interpretive issues as a search for a hypostatized Author's communicative intention when he wrote a defined text. But that is rarely what is at stake. The equation of semantic meaning with an Author's intention works best in the simple case of a conversation between two persons. In that situation, there is little more to be said than, "What did he mean by that?"—a matter of fact, albeit not always a simple matter of fact, even for the person whose words they are. Professor Smith extrapolates from that case to questions about laws of all kinds: statutes enacted in an elaborate legislative process of hearings, committee reports, vote, and possibly veto, by a legislative body composed of many individuals, some of whom voted for and some against; constitutional provisions enacted for an indefinite future by persons long since dead; and so forth. He scarcely mentions laws that are derived from no single original text but are the product of the continuous, conglomerate effort of lawyers, judges, and scholars, like the common law. A great many rules of law combine elements of all these kinds. The difficulty of identifying an author or even a text in such circumstances is, indeed, what leads him to conclude that the ontological status of "the law" is so shaky. Before we accept that conclusion, we ought to ask whether there is not an entirely intelligible sense of semantic meaning that is not tied to authorial intention in a literal sense, as it is in Professor Smith's model, to which we refer when we speak of "the law" and which sustains law as we know it.

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9. *Id.* at 153; *see also id.* at 126–53.

10. *Id.* at 143–44. Reference to a hypothetical author "does not solicit the guidance of any act of mind directed to the real controversies or questions of policy we are seeking to address." *Id.* at 148–49.

In the first place, we ought not to be misled by grammatical or syntactical form. Such form may have profound epistemological significance or be no more than a linguistic quirk. Either way, it is an unreliable ontological guide. To put the matter overly simply, grammar and syntax have to do with words, and ontology has to do with what there is. The fact that we refer to "the law" nominatively need not entail, as Professor Smith suggests, that there is in our "ontological inventor[y]"[11] an entity that corresponds to it, any more than a reference to "the university" means that there is something distinct from the students, faculty, campus, and so forth, or a reference to courage means that there is something distinct from instances of individual courage, or, closer to our present concern, a reference to the decision of a case means that there is something distinct from the results that follow from it. Eschewing any view about the doctrine of Platonic Forms in general, Professor Smith sensibly rejects the application of what he calls "'ad hoc Platonism'" to law: the notion that the law is some sort of entity that can be conjured up as a referent whenever we use the words "the law."[12] But he does just that, when he refers to law, or the law, in general.

For all that he dismisses the notion of law as a "brooding omnipresence in the sky,"[13] Holmes's wonderful phrase, Professor Smith reifies the law in just that way. The question "how a law means" is, he says "familiar territory"[14] or, at any rate, more familiar territory than the question whether a law exists. Not all that familiar, however, for, as he allows, the usual question is about a particular law. And, in fact, the question usually is not framed as a question about the law's meaning but, more simply, as a question about what the law is: that is to say, the content of the particular law in question. Professor Smith's reformulation of the question as one about the law's meaning too easily suggests that the law and its meaning are two different things, which leads directly to his conclusion that the author of the law, whoever that may be, is uniquely qualified to specify its meaning. But that, as reflected in ordinary usage, is not so. What he refers to as the meaning of a law is, in ordinary usage, the law itself.

11. *Id.* at 8.

12. *Id.* at 165.

13. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Professor Smith dismisses Holmes's statement that the law consists of "[t]he prophecies of what the courts will do in fact, and nothing more pretentious," Oliver Wendell Holmes, 10 HARV. L. REV. 457, 461 (1897), as "grossly deficient"; it "leaves out," he says, "nearly everything that lawyers . . . do and say," SMITH, *supra* note 1, at 68. Holmes's point, surely, was simply to reject the reification of the phrase "the law" as some sort of entity ("brooding omnipresence"), not to give a general account of what law is.

14. SMITH, *supra* note 1, at 97.

Thus, in this roundabout way, Professor Smith asks us to consider whether there is not something inadequate or awry about the manner in which we arrive at conclusions of law and, therefore, the conclusions at which we arrive, which so profoundly affect people's lives. How, he asks, can we possibly know what the law is—not this time an abstraction in quotation marks, but the particular laws that are discussed and applied? The uncomplicated, sensible answer is that we ascertain what the law is by doing all the things that lawyers and judges do: parsing a statute, reading judicial opinions, perhaps studying a treatise. Having done all that conscientiously, we are in a position to say what the law is. Why is that not enough?

It is not enough for Professor Smith, I think, because conscientious lawyers and judges do all those things and reach contrary conclusions. Although we sometimes are able to pronounce decisively that one conclusion is better than another, often we are constrained to acknowledge that different conclusions are alike reasonable, and we, perforce, choose without being certain which is correct. Indeed, even when we are not in doubt about which conclusion is to be preferred, our certainty lacks a secure foundation. Validated by nothing more than contested human judgment, in the last analysis, the law that shapes our lives is a matter of will alone—the power to enforce—and not reason. Our claim to live under a rule of law, not of men, is illusory.

The gap that Professor Smith perceives is not ontological—the universe is not missing some furniture that ought to be there—but normative. It is a gap between the law's normative demands and its perceived lack of rational force. If much of our lives are lived in such a state, it is not enough for the law, which, claiming allegiance and demanding compliance, must be not merely reasonable but determined certainly and absolutely by reason. And so, Professor Smith concludes: "[W]e would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."[15] In this, the concluding three lines of the book, the import of the ontological cast of his argument is revealed. His criticism of theories of legal meaning and interpretation is not merely a call for a better interpretive theory; it is intended to display the fundamental inadequacy of law grounded in fallible human reason alone, and to take us to the brink of a philosophy whereby law transcends the limits of human reason and attains, as he says, the objectivity of a richer reality and greater power than our own. So understood, as an effort to clear the way for

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15. *Id.* at 179.

recognition of an other-than-human, transcendent source of law, Professor Smith's book is a prolegomenon to a philosophy of natural law.

As the debate between natural law and legal positivism unfolded in the twentieth century, the search for objectivity had special urgency, as an anguished reaction to the phenomenon of Nazism. Law, it was thought, can, because it must, be grounded in something more secure than the law of the state, so-called positive law. The events of the war having now receded, the debate has lost its intensity. In this country, the search for objectivity is now more narrowly focused on the foundations of constitutionalism: whether constitutional law has a solid, unchanging base in the Constitution's text and the intentions of those who drafted it or is an evolving definition of our nationhood, to be read and reread in the context of the nation's life. I shall not here rehearse the substantial arguments that have been made on both sides of each of those debates.[16] Rather, I want to suggest that whatever form it takes, however it is expressed, the search for objectivity of a kind that overcomes the fallibility and uncertainty of human reason is misguided; far from confirming the rule of law, as is supposed, the search for objectivity undermines it and frustrates the goal that inspires the search.

Law has many dimensions. It affects our lives in many and various ways. But in the end, its operation, directly or indirectly, contemplates the application of a general rule, what we call "the law," to the particular facts of a concrete case. Without that connection between a rule and the circumstances in which it is applied, the law remains an abstract flight of reason that, however elegant in design, leaves us untouched. For that reason, the avenues to certain truth that are within the capacity of human reason are unavailing. Rules may be related to other rules in the manner of deductive inference, the truth of the premises guaranteeing the truth of the conclusion. An inductive argument is not formally bound in the same way, but the accumulation of observed facts may point to some further fact or to a generalization that further experimentation validates or not. The accuracy of the application of a rule to a fact or to any set of facts, however complex, cannot be established in either of those ways. Rules, like the words that compose them, do not map onto the things of the world—objects, persons, events, circumstances—by a one-to-one correspondence. There is no guarantee in logic or in experience or experiment of the correspondence between a word or a concept and the actual phenomena to which it applies that does not call for human judgment.[17]

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16. For a summary, see LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 97–126 (1987).

17. *See* W. V. QUINE, *Natural Kinds*, *in* ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 114 (1969), *reprinted in* NATURALIZING EPISTEMOLOGY 57 (Hilary Kornblith

That is not to say that there is no way to tell "a hawk from a handsaw."[18] Something that looks like a duck, quacks like a duck, and waddles like a duck is a duck, not a rabbit. The ability to recognize similarities among distinct things and, disregarding all the dissimilarities, to identify them as the same sort of thing—ducks and not rabbits—is at the heart of all thought, for without it we should not be able to refer to anything at all except demonstratively ("This, not that!"). How we are able to do that is a deep philosophical problem with a long lineage; whether the problem is epistemological or ontological is itself unclear. (It is, incidentally, the problem for which Plato's ειδος or ιδεα—Form or Idea—offers a solution.) But that we are able to do it is not in question. It arises in human beings very early and is present to some degree in most animals.[19] In law, as pervasively in ordinary life, that ability enables us to engage in analogical reasoning, or reasoning by example: solving a problem by noticing a resemblance to a similar problem for which the solution is known.

It is a commonplace that analogical reasoning is used constantly in legal reasoning, so much so that it is regarded as its hallmark. The use is frequently criticized or deprecated, nonetheless, because analogical reasoning lacks the credentials of deductive or inductive reasoning.[20] That is a great mistake, prompted, I believe, by the same yearning for certainty that motivates Professor Smith. Careful analogical reasoning, albeit not certain, is as reliable in law as it is in the ordinary affairs of life. But more important, it is unavoidable. There is a gap between facts and rule(s) that no rule, by itself or with others, can bridge, for a rule is general and the set of facts is particular. Even when the application of the rule seems beyond question—a case, as we say, "on all fours" with another—the gap is not fully closed, as the Court's ability to overrule a prior case by limiting it "to its own facts" makes clear.[21] I have discussed the use of analogical reasoning in the law at length in another place and shall not extend the discussion here.[22] The points that I want to make are: that analogical reasoning is essential for the application of a rule to a particular instance covered by the rule, and is, therefore, an essential

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ed., 2d ed. 1994). For a discussion of the application of rules to facts, in the context of adjudication, see LLOYD L. WEINREB, LEGAL REASON 82–92 (2005).

18. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

19. *See* WEINREB, *supra* note 17, at 124–32.

20. *E.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 & n.5 (1949); RICHARD A. POSNER, OVERCOMING LAW 519 (1995); Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 86 (1996); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371 (1997).

21. *E.g.*, Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (limiting the holding in Escobedo v. Illinois, 378 U.S. 478 (1964)).

22. WEINREB, *supra* note 17, at 65–122.

component of legal reasoning; that analogical reasoning is not unusual but altogether ordinary in life and in law; and that although there are well understood criteria for successful analogical reasoning, it lacks the certainty that may attach to deductive or inductive reasoning.

It may seem a large jump from analysis of a judicial opinion to the eternal verities and broad principles of natural law; but for purposes of the present discussion, the connection is clear. Natural law is a broad-ranging philosophy that embraces a great deal more than jurisprudence. Although its statement by Thomas Aquinas in the thirteenth century is now regarded as classic, the doctrine that he expounded had roots in quite different philosophic debates that took place in Athens more than a thousand years earlier, debates that were not significantly about jurisprudence at all; they were about the nature of reality and humankind's place in it.[23] Natural law transformed itself again later and became the underpinning for the political philosophy of natural rights.[24] There is much within all of those developments with which one may agree, without accepting the whole. And, indeed, in all those transformations, natural law seems to me to speak a deep truth about the human condition, which has profound implications for the law, as it does for all human activities. Set against that large panorama, the particular jurisprudence of natural law seems to me a narrow, lesser thing. It is far from obvious to me what natural law as a distinctly jurisprudential matter is all about. But for the reference to law, occasioned by Cicero's lax Latin rendering of Greek thought, we might better have done without the phrase.[25] If natural law has any distinct jurisprudential meaning, it is that there is a true or correct law that can, at least sometimes, be known certainly. To use Ronald Dworkin's catchword, there is a "right answer" to a legal question.[26] Natural law, then, proffers a way out of Professor Smith's quandary, as he strongly intimates. But the supposition that there is a right answer that can be known with certainty contradicts the rule of law itself.

The most penetrating and influential discussion of the jurisprudence of natural law in the past several decades is that of John Finnis, in his book *Natural Law and Natural Rights* (1980), which may serve as an example. Professor Finnis asserts that there are seven basic "forms of human good" that are "obvious ('self-evident') and even unquestionable";[27]

23. *See* WEINREB, *supra* note 16, at 15–66.

24. *Id.* at 67–96.

25. *See id.* at 39–41.

26. *See, e.g.*, Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978), *reprinted in* RONALD DWORKIN, A MATTER OF PRINCIPLE 119–45 (1985).

27. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59 (1980).

knowledge is one, as are life, play, sociability, and some others.[28] There are also nine basic requirements of practical reasonableness, which are "fundamental, underived, [and] irreducible," among which are "a coherent plan of life," "no arbitrary preferences amongst values" or "amongst persons," "detachment and commitment," and others.[29] Professor Finnis's discussion of those catalogues is subtle, powerful, and, if not incontrovertible, persuasive. He provides a prescription for a good life, with the general outline of which, at least, one is not likely to disagree. He goes on, however, and crosses from moral reasoning to jurisprudence. He asserts that his catalogues of basic goods and rules of practical reasonableness together provide the basic principles of any legal system that is conformable to reason.[30] I have argued elsewhere (and have been taken to task for arguing) that to sustain the *jurisprudential* claim, Finnis must show that in at least a considerable number of cases his catalogues determine what the law is—or ought to be—with the same certainty that he attributes to the catalogues themselves.[31] And this they do not do. He asserts that they determine "[t]he central principle of the law of murder, of theft, of marriage, of contract" and so forth.[32] It seems to me little more than whistling in the dark to assert that there are such central principles and that they are known certainly. To mention only one example, it may have seemed in 1980, when *Natural Law and Natural Rights* was published, that the central principle of the law of

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28. *Id.* at 86–90. Finnis surrounds his discussion of basic goods with disclaimers and qualifications. Even so, it is far from clear what he has in mind. The following seems close: to say that something is a basic good "is simply to say that reference to the pursuit of [it] . . . makes intelligible . . . any particular instance of the human activity and commitment involved in such pursuit." *Id.* at 62. As the multitude of disclaimers and qualifications indicates, nothing more definite and concrete is plausibly a basic good. Finnis specifically disclaims characterizing the basic goods as good in any other sense; he says that to think of a basic good "as a value is not, as such, to think of it as a 'moral' value." *Id.* If, then, the basic goods are self-evidently things to be pursued, that seems to reflect only the nature of humankind as a striving, self-preserving, self-satisfying creature rather than intelligible value. Finnis's ambiguous use of words like "good" and "value" repeatedly suggests that they are more than that, his disclaimer notwithstanding. And, indeed, unless they are more, it is difficult to understand how, together with the "basic requirements of *practical* reasonableness" they add up, as he says, to "morality." *Id.* at 126–27 (emphasis added).

29. *Id.* at 102, 103–26.

30. *Id.* at 289. Finnis is emphatic that the derivation of positive laws from basic principles is a complex process that is not fully determined by the principles themselves. *See id.* at 281–90.

31. *Id.* at 113–15; *see also* Lloyd L. Weinreb, *The Moral Point of View*, *in* NATURAL LAW, LIBERALISM, AND MORALITY 195, 198–99 (Robert P. George ed., 1996), a rebuttal to which is found in Robert P. George, *Natural Law and Human Nature*, *in* NATURAL LAW THEORY 31, 36 (Robert P. George ed., 1992).

32. FINNIS, *supra* note 27, at 289.

marriage was certain. Can that possibly be said in 2005, in the midst of a national debate about precisely that question? Finnis is certain what the central principle of marriage is, and he asserts that anyone who disagrees is simply mistaken.[33] He is entitled to his opinion; but it is only that. Even if one were to agree that there are such certain central principles, however, and to agree also about their content, they do not begin to determine the multitude of legal issues that ordinarily concern us. Nor could they. For especially if it is a matter of principles so broadly and openly stated as those he has in mind, it is only by the use of humanly fallible (analogical) reasoning that the principles can be applied. That is not to say that the catalogues are therefore without merit, but that they do not achieve distinctly jurisprudential significance.

Over a period of years, in a large body of writing, Ronald Dworkin has developed a theory of law that has been described as within the general ambit of natural law. Although the theory has affinities with natural law and Dworkin himself, at least sometimes, has not resisted that designation,[34] it scarcely resembles the classic theory. He does not rely at all on metaphysical foundations of the kind that Professor Smith commends. Nor does he argue, as Finnis does, that the central principles of the law are straightforward derivations of self-evident truths about the human condition. On the contrary, his conception of law, or "the law," is built not from the top down but from the bottom up.

Dworkin starts from the core idea of adjudication, by which a rule of law is applied to the circumstances of a concrete case. A judge's commitment, he says, is not to find any answer, one among a number that might be available, but to find an answer that she believes is right. The very nature of adjudication, therefore, commits a judge (as well as other participants in the adjudicative enterprise and anyone who accepts it on those terms) to the view that there is, indeed, a right answer.[35] Dworkin does not thereby refute the palpable fact that conscientious lawyers and judges frequently disagree about what the right answer is.[36] Nor does he offer a method to determine certainly what it is or how to tell certainly when one has found it.

The more substantial part of Dworkin's theory is what he calls "law as integrity," which is an account of how a conscientious judge is to go

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33. *See id.* at 127.

34. *See* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165 (1982).

35. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), *reprinted in* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81–130 (1977); Dworkin, *supra* note 26.

36. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1977).

about finding the right answer.[37] Like Professor Smith, Dworkin believes that the task is an exercise in interpretation—and is not at all ontologically stressed, as Professor Smith is, by referring to what is interpreted as "the law." Law, he says, is "an interpretive concept."[38] "Law as integrity" calls for a judge deciding a case to reach the result that makes the law "the best it can be."[39] He must respect the past by taking account of the law's "text"—statutes, judicial opinions, scholarly treatises—and look to the future by taking account of the effects of one decision or another. He acknowledges that the task is Herculean and does not suppose that a real judge will have the capacity, time, or inclination to carry it out fully.[40] Decisions will not always be up to the mark. But that is the task.

Making the law the best it can be means that a decision must fit within a seamless body of rules and principles coherently ordered vertically and horizontally; it must be "consistent with principles taken to provide the justification of higher levels" and "must also be consistent with the justification offered for other decisions at that level."[41] Furthermore, this "justificatory ascent,"[42] as he has called it, embraces at the top general principles of political morality.[43] Nothing less fully satisfies what is meant by interpretation. Professor Smith and others have derided the suggestion that a judge does or ought to undertake so Herculean a task in even a single case, much less every case.[44] Dworkin does not say otherwise. But, he says, that is what interpretation means.

Although this assertion is much contested, in fact, what else *could* interpretation mean? Reduced to a few words, "law as integrity," making the law "the best it can be," means being true to the text. What would be the point of attending to the text all the while and then, arriving at some intellectual crossroad with no clearly marked road signs, tossing the text out the window and flipping a coin? Dworkin develops that quite simple notion in a richly detailed account of how it applies to a continuous, continuously evolving "text" composed of statutes, judicial decisions, treatises, and the rest, prepared by a multitude of persons known and unknown, working together and separately over hundreds of

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37. RONALD DWORKIN, LAW'S EMPIRE 94 (9th reprint 1995) (1986). The fully developed argument is set forth *id.* at 87–275.

38. *Id.* at 87.

39. *Id.* at 77.

40. *Id.* at 265.

41. DWORKIN, *supra* note 36, at 117.

42. Dworkin, *supra* note 20, at 357.

43. In a democratic society, in which judges have a limited role, respect for and consideration of the views of others would presumably be among the principles of political morality given the greatest weight.

44. SMITH, *supra* note 1, at 83–85, 133.

years. I believe that his account is largely correct and that it resolves many conundrums and disposes of a great deal of confusion. In particular, it allows us to speak of "the law" without falling into an "ontological gap" or conjuring the phantasm of an impossible Author.

At two critical points, however, at the bottom and at the top of the justificatory pyramid, the determinateness of the hierarchical structure that Dworkin envisions and that distinguishes his theory from less fully elaborated interpretive theories of legal positivism fails. First, at the bottom. The glue that holds the pyramidal structure together is deductive reasoning—the requirement of consistency among rules and principles. At the point where a rule of law is to be applied to the facts of a case, deductive reasoning is inoperative, for the question is not one of consistency among rules but of determining which among the myriad factual similarities and dissimilarities to other cases count, so as to bring the facts within one rule or another. The judge must implicitly or explicitly rely on analogical reasoning, as to which, not to coin a phrase, there is "no right answer," although there may be grounds for preferring one analogy to another.

Second, at the top. Making the law "the best it can be" is crucially ambiguous. Is the criterion to be found in the law itself or is it some external standard? Interpreting a statute the apparent purpose of which is invidiously to discriminate against a group of persons, ought a judge, looking to the law itself, interpret the law to fulfill that purpose or, looking to a standard external to the law, to subvert it? Such questions arise not only with respect to the gross excesses of the Nazi regime but also with respect to small matters about which a law may be thought unjust and wrong. Is the best interpretation of such a law one that works toward a more pure and consistent expression of the original iniquity, or is it one that confines it as narrowly as possible?

Dworkin does not say clearly. But his answer presumably is found in the requirement that the particular issue be set within the whole body of the law, including, as I have said, at the highest and most abstract level principles of political morality.[45] The task is not to make the particular rule that decides the case as good as it can be, but in each instance to make the whole body of the law as good as it can be.[46] Since coherence is

45. "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." DWORKIN, *supra* note 37, at 225. Dworkin has sometimes emphasized democratic values as contained in correct principles of political morality. *See* Ronald Dworkin, *Judge Roberts on Trial*, N.Y. REV. BOOKS, Oct. 20, 2005, at 14 [hereinafter Dworkin, *Judge Roberts on Trial*]; *cf.* DWORKIN, *supra* note 37, at 398–99.

46. DWORKIN, *supra* note 37, at vii, 400.

itself an important criterion and a broader principle subsumes one that is narrower, the principles of political morality pull a particular law in their direction. Unlike the right answer thesis, "law as integrity" implicates substantive principles.

But that only removes the problem of interpretation to a higher level. Which substantive principles? Principles having to do with justice, fairness, and procedural regularity,[47] Dworkin tells us, and we may all agree. But what is their content? Such principles are deeply controversial. Is there any room for differential treatment of persons according to group affiliations that are not voluntarily chosen? Does political morality prefer equality of opportunity or equality of result? Does it protect the liberty to go as far as one can with what one has, or does it constrain what one has in order to increase the liberty of those who have less? More concretely, does political morality protect a woman's liberty to use her body as she wishes or does it preserve the life of an unwanted fetus? Does it validate prevailing heterosexual practices exclusively or does it validate individual sexual liberty and responsibility? Dworkin has spoken out forcefully on many issues of this kind.[48] But whether at the level of concrete issues or general principles, there is no way for us to tell whether his answers are the right answers. One can only agree or disagree, and many disagree.

Dworkin evidently believes, as Lon Fuller did, "that coherence and goodness have more affinity than coherence and evil."[49] That may be so. But unless we can discern the affinity, even if one were to complete the justificatory ascent that law as integrity requires, there would be no assurance that one had found the right answer. Proceeding from the bottom up, Dworkin comes out in the same place as Finnis, proceeding from the top down (although it is noteworthy that on concrete issues, their answers are generally not the same). Like Finnis, he makes a convincing case for the relevance of moral considerations in the elaboration of the law. Beyond that, although he does not quite say so,

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47. *See supra* note 45.

48. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION (1993) (abortion, euthanasia); DWORKIN, *supra* note 36, at 240–58 (criminalization of homosexual practices).

49. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958). Dworkin sometimes suggests that the concept of law as providing "a justification for the use of collective power against individual citizens or groups," DWORKIN, *supra* note 37, at 109, determines the content of the principles of political morality at the apex of a legal order, *see, e.g.*, *id.* at 109, 190. In view of the ways in which the state's collective power has historically been used, in the name of some asserted good, one has to view such a suggestion with profound skepticism. Elsewhere he intimates that a commitment to democratic values determines their content. *See, e.g.*, Dworkin, *Judge Roberts on Trial*, *supra* note 45, at 14.

at the end of the day, Dworkin's thesis depends as much on self-evidence, that is to say personal conviction, as Finnis's.

Since its emergence in the postwar years, the search for objectivity in the guise of natural law—what Professor Smith calls the "classical account"[50]—has been confined largely to jurisprudential circles heavily influenced by Catholic thought. In its stead, there has developed a rich dialogue about constitutional interpretation, in which a place akin to that of natural law in the larger jurisprudential debate is occupied by those who assert that the answer to constitutional questions is to be found in the plain meaning of the relevant constitutional text and, more particularly, that nothing that is not found there can be regarded as constitutional law. It will perhaps seem odd to associate natural law with a point of view so heavily dependent on a text that is itself the product of human contention and compromise.[51] The common thread is the effort to ground the law in an authoritative source from which concrete rules are derived certainly and other rules, equally certainly, are excluded.

That the plain meaning of a law's text is to be applied, one might suppose, is a proposition with which no one would quarrel. As it turns out, however, the plain-meaning school of constitutional interpretation gives that phrase a very particular and far more controversial meaning. In their view, a text's plain meaning stays very close to the *words* of the text, so that what is not expressly stated is excluded from its meaning.[52]

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50. SMITH, *supra* note 1, at 45; *see also id.* at 45–48, 151–53.

51. It should be noted that those who rely on plain meaning to resolve constitutional questions may find themselves obliged to uphold an interpretation of the Constitution at odds with what they believe on other (perhaps natural law) grounds to be correct. They might, for example, conclude that the Cruel and Unusual Punishment Clause, U.S. CONST. amend. VIII, does not forbid capital punishment and at the same time believe that capital punishment is a violation of a human (or "natural") right.

52. Justice Scalia, who calls himself a "textualist," subscribes to this view. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23–24 (1997).

> To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.
>
> Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be constructed reasonably, to contain all that it fairly means. . . .
>
> *But while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.*

Id. (emphasis added) (footnote omitted). The sting is in the tail.

In this way, with a minimal amount of slack, the text supplies an objective reference that certifies an interpretation as correct—or not—and thereby provides a barrier against "the ingenuity of language-stretching judges."[53]

So, in *Katz v. United States*, rejecting the application of the Fourth Amendment's prohibition of unreasonable searches to electronic eavesdropping, Justice Black wrote: "I do not believe that the words of the Amendment will bear the meaning given them by today's decision . . . . A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized."[54] Similarly, in *Minnesota v. Carter*, concluding that the Fourth Amendment gives no protection to a person in another person's home, Justice Scalia has written that because the text protects "'[t]he right of the people to be secure in *their* persons, houses, papers, and effects'" and the reference to "their persons" must refer to each person individually, so also must the reference to "houses" refer to the house of each.[55] It is not, he has said, "linguistically possible" to read the Amendment differently.[56]

Interpretive questions arise concretely from the need to apply a constitutional text to a particular set of facts: to the FBI's eavesdropping on Katz's telephone conversations from a public telephone booth in the former case and to a police officer's observation of Carter in another person's apartment in the latter.[57] As I have said, the application of words to concrete particulars, events in these cases, is not susceptible to deductive proof or inductive verification; it is, rather, a matter of perceiving resemblance and difference and distinguishing the relevant from the irrelevant. When the text is found in the Constitution, the matter is greatly complicated. For the meaning that is sought is (as Professor Smith tells us) semantic meaning, which depends on authorial intention—what is intended by the text to be communicated by a suppositious writer to a suppositious reader. Authorial intention

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53. Katz v. United States, 389 U.S. 347, 366 (Black, J., dissenting).

54. *Id.* at 364–65.

55. Minnesota v. Carter, 525 U.S. 83, 92 (1998) (Scalia, J., concurring) (alterations in original) (quoting U.S. CONST. amend. IV).

56. *Id.* There is a suggestion in the *Katz* opinion that by entering a telephone booth and depositing a coin, one *rents* the booth and makes it temporarily his dwelling. *See Katz*, 389 U.S. at 352. Is that a permissible interpretation of the textual reference to "houses" and a like interpretation with respect to a friend's house not? Justice Scalia's reading of the Fourth Amendment commits him either to the view that the decision in *Katz* (and a legion of subsequent cases) was wrong or that the Fourth Amendment confers greater privacy when one is in a public telephone booth than when he is in a friend's home.

57. *Carter*, 525 U.S. at 85; *Katz*, 389 U.S. at 348.

implicates the reader as much as the writer, for the writer's intention is to communicate to someone who is not an abstract figure but, like the author himself, has identifiable characteristics appropriate to a time and place. So, in 1787, it was possible to refer to "We the People of the United States" without including about eighteen percent of the non-native population, whose ancestors had come to this continent as long ago as anyone.[58] No one could say that the meaning of those words today is the same. That is not an application of Humpty-Dumpty's famous dictum.[59] It is, rather, part of the complex nature of language. Ordinarily, we do not need to choose between writer and reader, for they are in a general way part of the same community. When we interpret the Constitution, however, we do, because writer and reader are separated by more than 200 years, during which there have occurred vast technological, social, economic, and political changes.

Simply as a matter of what "meaning" means in such circumstances, it is not at all obvious, as both Justices Black and Scalia assume it is, that the plain meaning of the text is what an author 200-plus years ago would have intended to communicate to a reader 200-plus years ago. Especially is that not obvious if the author is presumed to be aware that he is writing a Constitution, for readers who will come along in the indefinite future. It seems to me a most dubious assertion that, knowing nothing whatever about electronic eavesdropping, the authors of the Fourth Amendment intended not to include it within the applications of the word "search," or that having no thought about a professional police force or the social conventions of modern life, they intended that the privacy of one's person not include protection against being secretly observed by the police when one is in another person's home. But even if one were prepared to make that leap in the dark, it is far from clear that that is the plain meaning of the text today.

To say otherwise is not to alter the text, but to apply it. That is to say, I believe that Justice Black and Justice Scalia, having to apply the Fourth Amendment to the facts of the case, did exactly what they ought to have done. They sought the meaning of the text. But they got it wrong. So to open up the inquiry into meaning is to abandon certainty. The constitutional issues that have engendered the greatest controversy affect

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58. The total non-native population of the United States in 1790 was 3,929,000, U.S. CENSUS BUREAU, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 16 (124th ed. 2004), of whom 697,624 were slaves, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NEGRO POPULATION: 1790–1915, at 57 (1918).

59. "'When *I* use a word,' Humpty Dumpty said, . . . 'it means just what I choose it to mean—neither more nor less. . . . The question is . . . which is to be master—that's all.'" LEWIS CARROLL, THROUGH THE LOOKING-GLASS 94 (spec. ed., Random House 1946) (1871).

matters of the deepest concern for a great many people. It is unsurprising that they, as well as the rest of us including the judges themselves, want the answers that the courts give to be right—certainly right. Sometimes, indeed, it is difficult to avoid the conviction that certainty about what the right answer is dictates how the text is interpreted, so that certainty is assured. But one need not suppose that. We may, and often do, have a reasonable certitude about what the right answer is. Beyond that, objectivity, not in the sense of correspondence with some reality that is out there or comprehensive self-validating coherence, but in the sense of demonstrable certainty, is not to be had.

Justice Black, who was unable to find an application to electronic eavesdropping in the Fourth Amendment's protection against unreasonable searches and seizures was the author of the Supreme Court's opinion in *Wesberry v. Sanders*,[60] one of the legislative apportionment cases that the Court decided in 1964. He wrote that the provision in Article I, Section 2 of the Constitution that members of the House of Representatives shall be chosen "'by the People of the several States'" means that the principle of "one person, one vote" is constitutionally required.[61] As a statement of the plain meaning of the phrase "by the People" at the time the Constitution was adopted, that proposition is preposterous. I was law clerk to Justice Harlan that year. He set me to work studying the history of that provision and others on which the majority relied in other legislative apportionment cases.[62] There was a good deal of history in addition to the apparent meaning of the text that contradicted the majority's decision. In the way of someone who has worked hard to support a particular result, in the way of law clerks in particular, I was fully convinced by Justice Harlan's dissent. I asked myself and asked Justice Harlan whether there was any form of words that could have been employed in the Constitution that would have prevented the majority from deciding as it did, and I concluded that on the face of things, there was not. At the time, that seemed to me a knock-down, drag-out argument that the majority was mistaken. Else, what, finally, was the value of the Constitution? I now believe that, indeed, there may have been no such form of words and that, nevertheless, the majority was correct.

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60. 376 U.S. 1 (1964).

61. *Id.* at 7–8 (quoting U.S. CONST. art. I, § 2).

62. Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964). Justice Harlan's dissenting opinion in *Wesberry v. Sanders* is at 376 U.S. 1, 20. He wrote a single dissenting opinion applicable to all the other cases. *Reynolds*, 377 U.S. at 589.

And so we are brought back to Professor Smith's challenging conclusion that it would be well for us "to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."[63] Although he does not say what the "richer realities and greater powers" might be, it is clear that his solution for law's quandary, like the problem, is ontological, or metaphysical. The various alternative solutions that I have canvassed suggest why that is a road that should not be taken. Whether there is a transcendent reality or power of the kind that Professor Smith contemplates is a matter about which I have nothing to say. Even if so, barring a constant, recurring intervention that displaces human reason altogether, the quandary remains.[64] We have no way to apply general rules to concrete facts, no way to honor the rule of law, other than as we do, reasoning analogically from case to case.[65] The only kinds of certainty that we know are unavailing. Finnis's defense of natural law is a sufficient illustration. Even if one grants that his fundamental principles are self-evident—a way of avoiding the question, "How do you know?"—as Finnis concedes, all the issues that trouble us concretely remain to be determined, perforce, by uncertain, fallible human reason. Similarly, Dworkin, who sets himself firmly against ontological solutions, affirms that there is a right answer; but, it turns out, he means only that we ought to and do apply our capacity to reason, fallibly, to legal problems. The argument of those who rely on the plain meaning of the Constitution might be repeated in other contexts where there is a definite text to consider; but words do not and cannot guarantee their own meaning and enable us to dispense with, again, fallible human reason.

I should restate law's quandary this way: How are we to meet the requirement that the law's demands be defensible not as an expression of will, or power, but as a reasonable accommodation of the diverse needs and interests of people living together in a community? In different ways, both the classical natural law view expressed by Finnis, and the contemporary reformulation of Dworkin, give an important piece of the solution. Natural law affirms that the natural order is a moral order, that

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63. SMITH, *supra* note 1, at 179.

64. "[I]t is evident, that whatsoever we believe, upon no other reason, than what is drawn from authority of men only, and their writings; whether they be sent from God or not, is faith in men only." THOMAS HOBBES, LEVIATHAN 58 (Michael Oakeshott ed., Collier Books 1962) (1651).

65. No case is wholly unlike prior cases. Even in a case of "first impression," such as a case applying a recently enacted statute for the first time, there are always similarities, which can be noticed or disregarded. If, up close, the facts seem unique, from further away the details blur and a more general similarity emerges. *See* WEINREB, *supra* note 17, at 98–99.

the normative imperatives of human conduct are not superimposed but are immanent—"real," if you like that word. So also, Dworkin's affirmation that there is a right answer insists that searching for the right answer is not, after all, an empty exercise. Neither proposes seriously to lead us certainly to the normative reality—the right answer—that it proclaims. If that is what is required, the quandary is inescapable. But it should not be required.

For the past two centuries, the shadow of Immanuel Kant has loomed over us. With rare dissent, it has been and is taken for granted that the claim of reason is a claim to be guided by principles, which appears to implicate a requirement that normative reasoning be validated down to (or up from) the ground. Quite recently, it has been argued generally, with great force, that such a requirement is a mistake. The moral dimension of our existence arises, it is urged, not from reason but out of our experience.[66] As *persons*, we are aware directly and incontrovertibly that we are responsible beings and that the choices that we make are neither random nor, what amounts to the same thing, the product of causes external to ourselves.[67] Furthermore, the moral issues that confront us and the principles that we bring to bear are deeply contextual, the context being not a body of abstract principles but the circumstances—physical, social, historical, intellectual—of our actual lives. There is a great deal of evidence to support this position, not least of which is our inability to give a rational account of the human condition itself—the experience of freedom and responsibility in a causally ordered universe. If we start from there, our inability to achieve certainty, to find the one right answer, is not a defeat. It is simply an aspect of the human condition. There is no quandary, although we shall often be in a quandary about what is in that instance the right thing to do. In place of certainty, we may have only a reasonable certitude, based on conscientious effort to avoid bias, prejudice, indifference, self-interest, callousness toward others—all the all-too-human sources of error. What Professor Smith sees as a quandary seems to me rather an opportunity.

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66. *See* MARK JOHNSON, MORAL IMAGINATION (1993). In the specific context of law, *see* STEVEN L. WINTER, A CLEARING IN THE FOREST (2001).

67. One may want to describe this awareness as self-evident, but that tends to suggest, incorrectly, that what one is aware of is propositional, which removes the matter again to the domain of reason.