

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

Spring 2008

### After Natural Law: A Hermeneutic Response to Law's Quandary

Francis J. Mootz III

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>

---

#### Recommended Citation

Mootz, Francis J. III, "After Natural Law: A Hermeneutic Response to Law's Quandary" (2008). *Scholarly Works*. 26.

<https://scholars.law.unlv.edu/facpub/26>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

## AFTER NATURAL LAW: A HERMENEUTICAL RESPONSE TO LAW'S QUANDARY

Francis J. Mootz III\*

### Introduction

Legal practice purports to be aligned with an objectively ascertainable entity: "The Law." Our fundamental commitment to the rule of law means that legal decisions are determined by "The Law," which stands apart from the subjective motivations of legal actors. As a result, a judge gives voice to "The Law," but is not himself "The Law."

But is "The Law" anything other than a conclusory platitude, an empty placeholder that is invoked to assert the legitimacy of exercises of power by legal actors? For centuries, natural law theories provided a persuasive account of "The Law" standing above the practice of law, but in the wake of the collapse of traditional natural law theories, there appears to be no ontological account of law that sustains the validity of legal practice in terms of "The Law." If natural law died along with God, we appear unable to avoid the Nietzschean conclusion that legal practice is just the play of will to power. Against the force of this Nietzschean challenge, legal positivism has utterly failed to fulfill its promise of providing guidance after the eclipse of natural law.

Using Steven Smith's *Law's Quandary*<sup>1</sup> as my touchstone, I offer a naturalistic ontology of law without relapsing to traditional natural law accounts. Drawing guidance from contemporary rhetoric and hermeneutics, I conclude that law's quandary is really just life's quandary, and that we can account for this quandary in satisfactory and productive ways.

### I. Law's Quandary

Smith has articulated law's quandary in an unsettling and straightforward manner, describing "how our understanding of law has deteriorated due to our wanton neglect (or, rather,

---

\* Samuel Weiss Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law, [fjmootz@psu.edu](mailto:fjmootz@psu.edu). I thank Steve Smith for graciously offering his comments on an earlier draft. A draft of this paper was presented at the Annual Meeting of the Association for the Study of Law, Culture and the Humanities at Georgetown University Law Center in March 2007. I thank the audience and my co-panelists for their comments and questions.

<sup>1</sup> STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

our systematic suppression) of its ontological dimensions.”<sup>2</sup> The problem arises because legal practice outstrips the ontological presuppositions of both everyday experience and natural science with its reference to “The Law.” However, the only other available option—the ontological inventory of religious concepts—is irredeemably divorced from law in our post-modern age.<sup>3</sup> More precisely, our quandary is that legal discourse depends upon something analogous to religious ontology, but we expressly disavow such an ontological grounding despite the character of our practices.<sup>4</sup>

Seeking a “practical metaphysics” of law, Smith goes behind the successful manipulation of legal discourse by lawyers and judges to discover the ontological commitments that anchor this everyday activity. Law cannot just be the discourse of lawyers and judges, because they continually refer to “The Law” as something driving their discourse. “That is the predicament of modern law and legal discourse: it seems that we cannot believe in ‘the law,’ and we also cannot live without quietly harboring something like this belief.”<sup>5</sup> For example, common law judges create legal rules and then retroactively apply them to the case at hand. Smith argues that this practice makes no sense unless one is committed to the reality of a preexisting “Law” that is discovered in the course of judicial application to the problem at hand.<sup>6</sup> Smith worries that much of what law professors and judges write about is nonsense, due to the deep chasm between legal practice and its justificatory rhetoric or critical assessment. He concludes:

[T]here is at least a strong *prima facie* case that modern legal discourse is operating in a sort of “ontological gap” that divides our explicit or owned ontological commitments (which preclude us from recognizing the reality of “the law”) from the ontological assumptions not only implicit in but essential to our discourse and practice (which seem to presuppose the reality of “the law”).

This assessment might help explain the malaise in legal scholarship, and law-talk generally . . . . We would hardly be the first generation in history to resort to bluster and obfuscation to hide the fact that we’re not really sure what we’re talking about (and not willing to acknowledge our ignorance).<sup>7</sup>

---

<sup>2</sup> *Id.* at ix. Smith later disavows such portentous phraseology in keeping with his very effective and disarming rhetorical device of plain-speaking, but I believe that this phrase captures his thesis precisely.

<sup>3</sup> *Id.* at 36-37.

<sup>4</sup> *Id.* at 21.

<sup>5</sup> *Id.* at 50-51.

<sup>6</sup> *Id.* at 61-62.

<sup>7</sup> *Id.* at 63.

Smith describes not just a quandary, then, but a full-blown metaphysical crisis.

## II. The Failure of Traditional Approaches to Address the Quandary

Smith effectively demonstrates that the traditional means of explaining away law's quandary are utterly unpersuasive. First, the idea that law-talk has survived only as an anachronistic relic is rebutted by both its "dogged resilience" and "continuing vitality," and also because lawyers and judges do, in fact, rely on law-talk in some important sense.<sup>8</sup> Second, the claim that traditional legal discourse is just a form of bad faith that ignores the true state of affairs doesn't really address our quandary because legal actors appear to be doing the opposite of the paradigmatic bad faith priest who loses faith but continues to act as a religious intermediary. Instead, "they persist in the practice while *denying* its ontological presuppositions. They avow belief *in the practice*, that is, but not in the *metaphysical premises that seem necessary to support the practice*."<sup>9</sup> If there is bad faith, Smith concludes, it occurs when lawyers and judges disavow the metaphysical commitments that are implied by their practices. Finally, some theorists attempt to avoid the quandary by declaring that law is a primitive phenomenon about which we cannot say much more. However, avoiding a problem by re-characterizing it as the solution is certainly not a satisfactory answer.<sup>10</sup>

## III. Smith's Inability to Resolve the Quandary

At this point the reader anxiously awaits Smith's wisdom, but is disappointed to find only vague suggestions about how we might confront law's quandary. Smith suggests that Joseph Vining's efforts to discern the metaphysical commitments manifested in our actions provide us with an alternative account that might still be persuasive. Vining's "solution," however, is simply to acknowledge the necessity of faith in something beyond our practices.<sup>11</sup> In a talk delivered after publication of his book, Smith admits that the only plausible solution is to

---

<sup>8</sup> *Id.* at 159.

<sup>9</sup> *Id.* at 164 (citing Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674-75 (1983)).

<sup>10</sup> *Id.* at 170 (arguing that "a Platonist interpretation of our quandary seems not so much wrong as empty; it is not so much an interpretation at all as a description of our perplexed situation in different, perhaps more dignified, but mostly more obfuscating terms").

<sup>11</sup> *Id.* at 170-74. Smith acknowledges that he already has explained why the mainstream academy won't accept this solution, but he concludes that without faith in something we have nothing but ourselves, with the implicit point being that "The Law" must be beyond ourselves to fulfill its function.

acknowledge that the “eternal return of natural law” is inevitable if we are to make sense of our practices. He offers a “tentative and preliminary proposal” based on “half-baked notions” for how we might think about a satisfactory solution at this point in our legal and social history: legal discourse might best be construed as a form of “assisted recognition,” in which decision-makers are put in contact with dimly understood knowledge of justice that must be re-awakened in the manner that Socrates elicits tacit knowledge of geometry from a slave in the *Meno*.<sup>12</sup>

Smith’s tentative approaches to answering the quandary are no more satisfying than those he discards. If natural law is unacceptable to the modern mind, but necessary to underwrite our practices, then the quandary appears to be unavoidable. Smith fails to offer a robust solution in the form of a natural law account that fits with our modern theoretical commitments but also underwrites our ongoing practices sufficiently to bring practice and theory back into sync.

#### IV. Smith’s Tacit Knowledge of How to Confront the Quandary

A careful reader would not be surprised by Smith’s failure to provide a clear answer to our metaphysical quandary. In the first chapter, Smith warns the reader to prepare “for disappointment. It should not be too surprising if we end up where the Socratic dialogues do – that is, in the quandary of aporia, or of (a potentially fruitful) perplexity.”<sup>13</sup> On the final page of the book, he counsels the reader to admit that our contemporary metaphysical commitments cannot underwrite legal practice “and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.”<sup>14</sup>

More subtle statements at the beginning of the book not only tip Smith’s hand (some

---

<sup>12</sup> Steven D. Smith, *The (Always) Imminent Death of the Law*, available at <http://ssrn.com/abstract=929529> (last visited February 21, 2008).

<sup>13</sup> SMITH, *supra* note 1, at 21-22.

<sup>14</sup> *Id.* at 179. In his review of Smith’s book, Justice Scalia declares that the book is “a lively, thought-provoking romp through the philosophy of law. Like most romps, it has no destination, but the experience is worth it.” Antonin Scalia, *Law and Language*, 157 *FIRST THINGS* 37, 37 (2005), available at [http://www.firstthings.com/article.php3?id\\_article=245](http://www.firstthings.com/article.php3?id_article=245) (last visited February 21, 2008). Interestingly, Justice Scalia claims that his own combination of positivism and textualism eliminates any potential quandary, as if judges could assemble and use the law merely by carefully reading the instructions, and he argues that Smith’s refusal to accept Scalia’s (implausible) approach to law leads Smith to a conclusion that he simply cannot utter in contemporary academia. Justice Scalia puts words in the mouth of a hypothetical exasperated reader coming to the end of the book: “‘Say it, man! Say it! Say the G-word! G-G-G-G-God!’ Surely even academics can accept, as a hypothetical author [of ‘The Law’], a *hypothetical God!*” *Id.* at 46 (italics in original). One can appreciate Justice Scalia’s point even while regretting that he offers only a choice between the God of traditional natural law and the sterile and fantastic ideology of positivist textualism (which, of course, does not require Justice Scalia to disavow the God of traditional natural law).

might characterize his book as a sustained “bluff” because he raises a question that he doesn’t, and perhaps cannot, answer), they also indirectly suggest a path of productive inquiry for resolving the quandary. Smith dedicates the book to his father, his “tacit mentor” who “wouldn’t have needed any of this.”<sup>15</sup> It is presumptuous on my part, but it strikes me that this dedication is rich with meaning. Citing one’s father as a mentor is understandable enough, but why acknowledge him as a “tacit” mentor? Could this be an acknowledgment that some knowledge (perhaps the most important kind) can be transferred only tacitly, that there may be bodies of knowledge that simply cannot be laid out on a slab, dissected and mapped? And if his father indeed is a “tacit” teacher, does this explain why he might have no use for Smith’s book, which is an effort to provide an express answer to law’s quandary? In short, Smith might be acknowledging (indirectly) that he has raised questions that cannot be addressed in the manner that he is raising them.

A second foreshadowing occurs in Smith’s two principal acknowledgments. First, he acknowledges the openness, honesty and accessibility of the innovative giants of American jurisprudence: Holmes, Llewellyn and Fuller. While it is their “*qualities of mind*” he seeks to emulate, not their “*substantive philosophies*,” this begs the question: how did these cicerones err in their philosophies?<sup>16</sup> Smith bemoans their “anti-metaphysical animus,” implying that this is their great failing.<sup>17</sup> But surely it is far more productive to link their open and innovative confrontations of traditional jurisprudence with a new, even if only vaguely articulated, metaphysical position. Isn’t it possible that Smith errs by regarding their attack on reigning metaphysics to be simply an anti-metaphysical position?

Furthermore, Smith expresses a second debt of gratitude to his former colleagues at the University of Colorado School of Law. Specifically, he mentions the influential experience of discussing their “fundamentally different outlooks” with his colleague Pierre Schlag.<sup>18</sup> While Pierre seemed incapable of maintaining faith in the face of the law’s quandary, for Smith, “conversely . . . it seems that faith was and is inescapable, even though it is an ongoing and at times frustrating struggle—for me as for many others—to articulate the basis and content of that faith.”<sup>19</sup> Smith doesn’t consider that faith may be inescapable, which is to say that the goal of certain metaphysical knowledge is unattainable. That this situation is instructive in resolution of the quandary, rather than a simple expression of Smith’s personal predilection in the face of aporia that is no more valid than Schlag’s unrelenting critical posture.

I argue that Smith’s seemingly preparatory throat-clearings, taken together, point toward a productive response. The quandary described by Smith is real, but the problem lies in the

---

<sup>15</sup> SMITH, *supra* note 1, at *Dedication* (italics omitted).

<sup>16</sup> SMITH, *supra* note 1, at xii (italics in original).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at xiii.

<sup>19</sup> *Id.*

manner in which the pertinent questions are posed. Those with tacit knowledge about how to navigate life's complexities will not be disappointed by a failure to provide a concrete metaphysical orientation with a corresponding methodology for continuing our ongoing practices. Indeed, they will regard any demands for such grounding as misguided and superfluous. Llewellyn and Fuller both gestured toward a new metaphysics that would eliminate the increasingly tiresome questions of jurisprudence and instead incorporate the tacit knowledge of ongoing practices within its ambit. However, these departures rely on a measure of faith, at least when considered from the standpoint of traditional metaphysics, and so they are not simple and straightforward extensions of traditional metaphysics. Their inchoate metaphysics was not just a strategy for avoiding or evading the quandary; rather, it springs from the recognition that the quandary signals a dead-end in our self-understanding and demands that we cut a new path across the dense thicket of our intellectual history.

## V. After Natural Law: Rhetorical Knowledge and Law

The metaphysical response to law's quandary, suggested obliquely and perhaps unwittingly in Smith's acknowledgments, lies in recovering the hermeneutical and rhetorical dimensions of the practice. The philosophical projects undertaken by Hans-Georg Gadamer and Chaim Perelman provide important guidance, particularly because both philosophers regarded legal practice as exemplary for their philosophical insights.<sup>20</sup> First, though, it pays to recall Giambattista Vico's counsel at the dawn of the eighteenth century, after the battle of the ancients and moderns had resulted in a decisive victory for the latter. Vico championed the eloquence required of those making arguments in the civic realm and in the law courts as an achievement of the ancients that should not be cast aside in favor of the sole criterion of mathematical certainty.<sup>21</sup> Most importantly, he drew the important conclusion that "it is an error to apply to the prudent conduct of life the abstract criterion of reasoning that obtains in the domain of science."<sup>22</sup> Gadamer and Perelman have done much to show how we might extend Vico's

---

<sup>20</sup> It is quite ironic, of course, that I am urging legal theorists to turn to Gadamer and Perelman for guidance, after they both turned to the practice of law for guidance. *See generally* HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Pub., 2d rev. ed. 1999); CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* (1969). Gadamer is commonly regarded as one of the most important hermeneutical scholars of the twentieth century, and Perelman is commonly regarded as having a similar status with regard to rhetorical philosophy.

<sup>21</sup> GIAMBATTISTA VICO, *ON THE STUDY METHODS OF OUR TIMES* 5 (Elio Gianturco trans., 1990) (insisting "even if you know more than the Ancients in some fields, you should not accept knowing less in others").

<sup>22</sup> *Id.* at 35. He echoes Aristotle, who in his *Nicomachean Ethics* made clear that his analysis could not be held to the standards of a scientific argument:

Our account will be adequate if its clarity is in line with the subject-matter, because the

foresight to understand our contemporary intellectual crisis, a part of which is designated by Smith as law's quandary. Perhaps "The Law" has become opaque precisely because we remain in the thrall of the ideology that Vico described in its early stages, an ideology that culminates in the self-misunderstanding of law and other social practices.

Smith is correct to conclude legal practice can be grounded neither in the metaphysics of natural science nor in the metaphysics of religious discourse. The former is incompetent to the task; the latter is unavailing in contemporary public discourse.<sup>23</sup> However, the ontological inventory of "everyday experience" is richer and more diversified than Smith allows. The urge to move beyond the seemingly superficial discourse of everyday legal language by adopting a more specialized and precise discourse that will subject legal practice to external invariant truths can never be fulfilled. Legal practice does not participate in the certainties of truth; instead, it is consigned to work within the unfolding realm of the probable.

Smith is a wily Socrates who ensnares his readers by asking for a definition of "The Law" and then upsets their thinking by demonstrating that all proffered definitions are flawed.<sup>24</sup> But rather than despairing that there must be no such thing as "courage" or "The Law," we should conclude that the Socratic questioning has revealed the unproductive character of the question as posed. Smith paralyzes the reader by offering an either-or proposition: either "The Law" refers to something outside legal practice that can direct it, or it is just a nonsensical reference that exposes an ontological gap in which our discourse operates. These unsatisfactory alternatives obscure the fact that the rhetorical appeal to "The Law" is not an appeal to something that exists outside the practice of law. By attending more carefully to legal practice we can explain and justify our references to "The Law" as a part of legal practice.

Smith expressly argues against the easy solution of positing a self-justifying practice,

---

same degree of precision is not to be sought in all discussions, any more than in works of craftsmanship. The spheres of what is noble and what is just, which political science examines, admit of a good deal of diversity and variation, so that they seem to exist only by convention and not by nature. . . . Indeed, the details of our claims, then, should be looked at in the same way, since it is a mark of an educated person to look in each area for only that degree of accuracy that the nature of the subject permits. Accepting from a mathematician claims that are mere probabilities seems rather like demanding logical proofs from a rhetorician.

ARISTOTLE, NICOMACHEAN ETHICS 4-5 [1094b] (Roger Crisp, ed. and trans., 2000).

<sup>23</sup> It is true that many believers find that the ontological family of religious discourse is up to the task of grounding legal practice, but this metaphysical solution at the individual level simply is no longer plausible for a heterogeneous polity such as the United States. In this environment, it is perfectly sensible for an individual (such as Justice Scalia, *see supra* note 14) to embrace a religious metaphysics on a personal level but then to ground legal practice on other (non-contradictory) grounds in his public discourse.

<sup>24</sup> SMITH, *supra* note 1, at 39.



asking how “The Law” can just be legal discourse when everyday discourse purports to point outside of itself to “The Law.”<sup>25</sup> But this argument misses the mark by conflating the everyday manipulation of legal discourse by lawyers and judges with the practices of justification in which legal practitioners refer to “The Law” as something that guides particular elaborations of doctrine. Legal practice has historical and normative depth that always vastly exceeds any particular legal argument.

Consider the situation facing lawyers who are litigating a case of first impression regarding enterprise liability for drug manufacturers when the maker of the drug ingested by the plaintiff cannot be determined. Lawyers from both sides will argue strenuously that the law requires a verdict in favor of their client, which means that there is an appeal to something beyond the equities attendant to the particular case before them.

The beyond, however, is the historical trajectory of the ongoing practice brought to bear on the case before the parties. Lawyers cannot generate a uniquely correct result for the case at hand by means of dialectical reasoning (despite their rhetorical conventions that purport to do so), but in their appeals to the legal tradition they can generate plausible arguments for a rhetorical elaboration of what “The Law” requires in the case at hand. Smith regards the retroactivity of the common law as an indication that there is something at work other than practical reasoning, but it is a mistake to characterize common law reasoning as either responding to pre-given verities or being imposed retroactively.<sup>26</sup> The law of the case is not applied retroactively in the full sense of the word precisely because a common law ruling is determined only in the dynamic application of a long tradition to the present case, and is not a case of a judge suddenly announcing the rule and only then applying it to behavior that occurred prior to the creation and announcement of the rule.

## **VI. Responding to Potential Criticisms of a Rhetoric Approach to Law’s Quandary**

My solution to law’s quandary is simple rather than esoteric. Critics will quickly offer (at least) two fundamental challenges to my claim that the historical trajectory of legal practice generates resources (which we term “The Law”) sufficient to underwrite the practice. First, it is unclear that we can underwrite this simple solution with a credible theoretical justification. More important, it is unclear that this solution, even if properly underwritten, is much of a solution at all. I will briefly outline how these objections can be met, but leave the detailed elaboration for another day.<sup>27</sup>

Contemporary rhetorical philosophy has developed Vico’s insights to provide the basic

---

<sup>25</sup> SMITH, *supra* note 1, at 50, 51.

<sup>26</sup> *Id.* at 62.

<sup>27</sup> My detailed elaboration of the solution, although it is not directly responsive to Smith’s book, can be found in FRANCIS J. MOOTZ III, *RHETORICAL KNOWLEDGE IN LEGAL PRACTICE AND CRITICAL LEGAL THEORY* (2006).

theoretical justification for a conception of legal practice that includes an appeal to “The Law.” Chaim Perelman’s work following the Second World War set the stage for a new elaboration of a rhetorical understanding of legal practice. In Perelman’s account, “The Law” is best conceptualized as a set of commonplaces, or topics, from which one can draw in making an argument in a particular case.<sup>28</sup> The topoi establishing “The Law” are real and provide guidance, but they are no more determinative of specific legal disputes than modern natural law theory (which sees itself as a form of reasoning rather than a set of answers). Reference to “The Law” merely makes a general reference to its topoi and from there one can argue for a specific result. Consequently, “The Law” is neither empty nor sufficient in itself to determine answers to legal questions.

Gene Garver recently described the rhetorical rationality at work in legal argumentation in a manner that makes sense of what we mean by “The Law.” Using *Brown v. Board of Education* as an example, Garver describes the “ethical surplus” of the case that follows from the fact that legal decisionmaking is rhetorical in nature rather than logical.<sup>29</sup> When we appeal to “The Law” we appeal to the ethical surplus of the practice, which supports claims that are grounded yet not logically compelling. Garver argues that Philip Bobbitt’s description of the modalities of constitutional argument is important because it shows that argumentative modalities arise within legal practice rather than purporting to be criteria that are employed from outside practice as a means of guiding practice.<sup>30</sup>

---

<sup>28</sup> CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* (William Kluback et. al. trans., 1980).

<sup>29</sup> EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF* 74 (2004).

As a chain of deductions, the line from the Fourteenth Amendment through *Brown* to *Loving* fails. *Brown* relied on the place of education in society. That justification does no work in the further cases. *Brown* transmits something more than the holding and less than the reasoning to further cases. The meaning of *Brown*—its *ethos*—survives in the ethical surplus of the argument. That ethical surplus is the antidiscrimination model by which it commits the Court to desegregation beyond schools

<sup>30</sup> Garver explains:

The six modes of interpretation that Bobbitt offers are not generated by some theory of either justice or hermeneutics. They emerge from the developing practice of constitutional argument and interpretation itself. . . . The demarcation between legitimate and illegitimate modes of argument, like the boundary between the rational and the irrational, is always subject to rhetorical negotiation. They would not be appropriate or rational in all circumstances.

*Id.* at 163 (discussing PHILIP BOBBITT, *CONSTITUTIONAL FATE, THEORY OF THE CONSTITUTION* (1982)).

A rhetorical understanding of legal argumentation has deep connections to a hermeneutical account of understanding, especially the philosophical hermeneutics promoted by Hans-Georg Gadamer. In particular, Gadamer's focus on the role of tradition in human understanding helps to clarify the role of "The Law" in legal discourse. The traditional character of human understanding precludes a God's-eye view, but is also always subject to inventive developments as the tradition is brought to bear in changing circumstances, an event that Gadamer terms the "fusion of horizons."<sup>31</sup> When we speak of "The Law," we refer to the

---

The point of Bobbitt's topology is that it describes the moves within legal argumentation. Each of Bobbitt's modalities:

is an argumentative *ethos* and not an *ethos* rooted in something outside argument itself. Each can degenerate into ideology, special pleading, and idolatry. Unlike scientific theories, maxims and most of interpretation are universally accessible, a part of democratic knowledge and the rational as civilized. Yet the modes, like maxims, can be used with greater or less effectiveness. They are universally available, but not universally appropriate.

*Id.* at 169.

<sup>31</sup> Gadamer describes tradition as a mode of being rather than as something that is outside of, and foreign to, the individual.

Our usual relationship to the past is not characterized by distancing and freeing ourselves from tradition [as if it were an external entity]. Rather, we are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us, a model or exemplar, a kind of cognizance that our later historical judgment would hardly regard as a kind of knowledge but as the most ingenuous affinity with tradition.

GADAMER, *supra* note 20, at 282.

Gadamer explains that understanding occurs in the continual process of the confrontation of tradition and a question posed in the present by a prejudiced—that is, a finite and historically-conditioned—individual. He writes that:

[T]he horizon of the present is continually in the process of being formed because we are continually having to test all our prejudices. An important part of this testing occurs in encountering the past and in understanding the tradition from which we come. Hence the horizon of the present cannot be formed without the past. There is no more an isolated horizon of the present in itself than there are historical horizons which have to be acquired. *Rather, understanding is always the fusion of these horizons supposedly existing by themselves.*

traditional character (in Gadamer's philosophical sense) of legal practice. Rhetorical elaboration of the legal tradition in a particular case naturally appeals to "The Law" as well as to more localized topoi.

At this point, the second criticism looms even larger: if I am correct that references to "The Law" are features of the rhetorical and hermeneutical character of the practice of law, is this theoretical underwriting sufficient to quiet that angst that Smith has stirred? If law just is an ongoing practice, does this mean that everything is up for grabs in a frighteningly nihilistic world that has no natural law constraint? The answer, perhaps surprisingly, is no. Ironically, my account provides precisely what Smith seeks: a naturalistic account of "The Law" that provides a basis for our faith that legal practice can be a reasonable activity with integrity.

Gadamer and Perelman both recuperated the Aristotelian account of natural law as a changeable feature of human existence, offering an antidote to the post-Thomistic understanding.<sup>32</sup> Working within the legal tradition to apply the topoi to a case at hand is to participate in a truly "natural" law that resides in structured human practices rather than in the "unnatural" realm of eternal truth.

For Aristotle, [the fact that natural law is not timeless and unchanging] is wholly compatible with the fact that it is "natural law. . . . [Unlike, for example, establishing that cars will drive on the right side of the road rather than the left, there are] things that do not admit of regulation by mere human convention

---

*Id.* at 306. Gadamer explains that by "fusion" he does not mean a collapse into univocity, and this is where Perelman's rhetorical focus is helpful.

Every encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and the present. The hermeneutic task consists in not covering up this tension by attempting a naive assimilation of the two but in consciously bringing it out.

. . . In the process of understanding, a real fusing of horizons occurs—which means that as the historical horizon is projected, it is simultaneously superseded. To bring about this fusion in a regulated way is the task of what we called historically affected consciousness. . . . It is the problem of *application*, which is to be found in all understanding.

*Id.* at 306-07. We can think of the "fusion" as an ongoing rhetorical activity in which "The Law" is articulated in the context of a legal dispute.

<sup>32</sup> MOOTZ, *supra* note 27, at 15-16 (discussing Gadamer) and 27-28 (discussing Perelman). Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 YALE J. OF LAW AND THE HUMANITIES 311-82 (1999).

because the “nature of the thing” constantly asserts itself. Thus it is quite legitimate to call such things “natural law.” In that the nature of the thing still allows some room for play, natural law is still changeable.

. . . .  
. . . [The guiding principles of Aristotle’s natural law] are not norms to be found in the stars, nor do they have an unchanging place in a natural moral universe, so that all that would be necessary would be to perceive them. Nor are they mere conventions, but really do correspond to the nature of the thing—except that the latter is always itself determined in each case [contextually].<sup>33</sup>

Rhetorical elaborations of law can take place only within the “natural” reality of an existing hermeneutical-rhetorical practice.

The idea of natural law is also misconceived when it is posed in ontological terms. . . . natural law is better considered as a body of general principles or loci . . . all of which are capable of being applied in different ways. It is the task of the legislator or judge to decide which of the not unreasonable solutions should become a rule of positive law.<sup>34</sup>

We find a natural law solution to law’s quandary in the account offered by contemporary rhetorical and hermeneutical philosophy, even if it is very different from the traditional natural law accounts that shape Smith’s anticipation of a suitable resolution of the quandary.

## VII. Conclusion

Law’s quandary is not a unique problem. Law’s quandary is really life’s quandary. It is certainly legitimate to ask how we can persist in the drama of human life with nothing but human life to sustain us. If there is a God, she stands mute in the face of this question, prodding us to answer it ourselves. We must find within our human practices the resources to continue those practices with integrity. Aristotle provided us with guidance, but his wisdom has been overcome by the fool’s errand to secure indubitable truths by which to guide our behavior. Perhaps ironically, it is only by acknowledging the all-too-human foundations of our social practices that we might catch a glimpse of the radical finitude of our striving, and thereby appreciate the mystery that is God. But we must constantly recall that this appreciation is a momentary glimpse that is far removed from the practice of rendering “The Law” concrete by applying it in the present moment of our humble, human lives.

---

<sup>33</sup> GADAMER, *supra* note 20, at 319-20.

<sup>34</sup> CHAIM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS* 33 (William Kluback et. al. trans., 1979).