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# THE PATH LESS TRAVELED: A NATURAL LAW CRITIQUE OF JUSTICE HOLMES' PATH OF THE LAW

*Alexander Hamilton*<sup>+</sup>

*“Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.”*<sup>1</sup>

There are many paths one can follow in the law. These paths can either be made or followed. Here only two are examined: natural law jurisprudence, which is followed, and that of Justice Oliver Wendell Holmes, Jr., which was created. Justice Holmes was a pioneer of American law, clearing the forest for generations of legal scholars, lawyers, and judges to come. He is often heralded as the greatest American legal scholar, and he heavily influenced the legal realism movement and the course of American law. Needless to say, Holmes' influence could be felt throughout the twentieth century and is still felt even today.

Holmes' jurisprudence stands as a general representation of American law: the path that is most frequently taken. However, there is another path—one rarely traveled—that really is different. Natural law jurisprudence is a narrow path focused on the common good<sup>2</sup> rather than an exaggerated individual liberty—which is why it is rarely taken. In fact, the only reason that it is narrow is precisely because it is rarely taken, and rarely taken because it is misunderstood. The phrase “natural law” is only ever heard in undergraduate philosophy courses via a passing mention of medieval ethics or in allegations of judicial activism<sup>3</sup>—and it certainly is never mentioned in the halls of a law school. To say that natural law should be the guiding principle of law is

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1. Robert Frost, *The Road Not Taken*, POETRY FOUNDATION, <https://www.poetryfoundation.org/poems/44272/the-road-not-taken> (last visited June 13, 2020).

2. See discussion *infra* note 41.

3. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 511–12 (1965) (Black, J., dissenting) (“If these formulas based on ‘natural justice,’ or others which mean the same thing are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary.”).

anathema in academia and society.<sup>4</sup> The few who do advocate it, however, seem to put forth distortions of natural law.<sup>5</sup>

The purpose of this Comment is to advocate the necessity of natural law jurisprudence for a just society by critiquing Justice Holmes' seminal work, *The Path of the Law*.<sup>6</sup> This Comment argues, from the Thomistic natural law tradition, that Holmes is fundamentally wrong about separating law from morality and logic. The three necessarily exist together—like the legs of a tripod—holding up society and government.

This Comment will proceed as follows. Section I provides a brief history of American jurisprudence. Our country's founders mostly ascribed to a derivation of natural law that was later overshadowed by the efforts of Justice Holmes and the Legal Realists. Section II lays out Holmes' argument in *The Path of the Law* and St. Thomas Aquinas' formulation of natural law in his *Summa Theologiae*. Section III critiques Holmes' jurisprudence as found in *The Path of the Law* using St. Thomas' thought. This Comment will attempt to show why choosing one path over the other makes a crucial difference. Section IV concludes by

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4. For an insightful article detailing the debate between Legal Realism and Catholic Legal Thought in the twentieth century see John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism*, 98 MARQ. L. REV. 1203 (2015). Breen and Strang offer a few explanations for why Catholic jurists' exposition of natural law did not make a foothold in American jurisprudence: natural lawyers were discredited and ignored by scholars and historians; natural law is met with an ingrained skepticism; scholars view natural law as synonymous with theology; and American society and academic culture have strong currents of anti-Catholicism. *Id.* at 1257–1311.

5. There seem to be three modes of belief about the natural law. The first views natural law as a vehicle through which morality is forced on an unwilling people. The second, from St. Thomas Aquinas, understands natural law as the rightly ordered nature of human beings created by God. For further discussion of this second mode see *infra* Section I.B of this Comment. The third view, espoused by New Natural Law Theorists, says that natural law is a system of morality created by the human intellect to provide a moral consensus between theists and nontheists, with no reference needed to the existence of God. For example, John Finnis sees natural law as a “set of basic practical principles” that everyone uses to acquire certain goods in life. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980). In other words, natural law is simply a rulebook that humans create to help them achieve a happy life. Finnis misread Aquinas when he stated, “for Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable.” *Id.* at 36. Finnis creates a false dichotomy. St. Thomas would characterize acting reasonably and acting in accordance with human nature as the same thing. 2 THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q.94, art. 2, at 1009 (Fathers of the English Dominican Province trans., Encyclopaedia Britannica, 1952) (“[A]ll those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.”). Our human nature can reveal to our reason what is good and, in turn, our reason can help us align our actions with our human nature. Finnis also constructs his theory of natural law “without needing to advert to the question of God's existence or nature or will.” FINNIS, *supra* note 5, at 49. See Section I.B for a discussion of why natural law can only be understood in the context of God's existence.

6. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

making the case that it is necessary to emphasize jurisprudence in law and legal education.

### I. ROOTS OF AMERICAN JURISPRUDENCE

There is a trend in modern jurisprudence to justify the use of natural law in America by claiming that the Founding Fathers wrote it into the Constitution.<sup>7</sup> It is evident that many founders followed John Locke's concept of natural rights, as distinguished from the Thomistic understanding of natural law.<sup>8</sup> Locke's idea that men retained certain spheres of action that were impenetrable from government interference was common throughout the founding generation and found its way into the Declaration of Independence and the Bill of Rights.<sup>9</sup> Lockean rights have been maintained in modern substantive due process theory as a means to preserve individual liberty from government intrusion. However, any concept of natural law in American law declined sharply over the nineteenth century.<sup>10</sup>

Justice Holmes and the Legal Realist movement had just as much—if not more—of a lasting effect on American law than did natural rights theory.<sup>11</sup> No American jurist is more acclaimed than Justice Holmes for his contributions to jurisprudence and free speech doctrine, among other accomplishments.<sup>12</sup>

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7. Many conservatives today who want to see a revival of traditional morals in American society via law will argue not only that morality can be legislated, but also that such morality was engrained into the American political system. These efforts ultimately fail, however, because the formulation of natural law tied to the Founding is Lockean and therefore rests on the shifting sands of the social compact. See Robert P. George, *Colloquium Natural Law: Colloquium Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2282 (2001); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 *REGENT U.L. REV.* 33, 44–47 (1997); Michael H. Hoffheimer, *Copying Constitutional Text: Natural Law, Constitutionalism, Authority*, 4 *S. CAL. INTERDIS. L.J.* 654, 658–59 (1996) (understanding natural law as Lockean theory to create natural rights and a functioning government); Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 *NOTRE DAME L. REV.* 9, 23 (1939).

8. Breen & Strang, *supra* note 4, at 1217; Kennedy, *supra* note 7, at 44–47. Brendan Brown argued that natural law was a phrase used to protect perceived individual rights and beckon social and legal reform, bringing scorn on the phrase “natural law” in American jurisprudence. Brown, *supra* note 7, at 14 (“[N]atural law was sometimes viewed as a specification of moral rights, which supported legal rights without any corresponding legal duties.”).

9. Kennedy, *supra* note 7, at 46–47.

10. Breen & Strang, *supra* note 4, at 1217–18.

11. See Patrick Glen, Student Article, *Why Plessy/Brown and Bowers/Lawrence are Correct: Thomistic Natural Law as the Content of a Moral Constitutional Interpretation*, 31 *OHIO N.U.L. REV.* 75, 77–80 (2005) (arguing that Holmes himself contributed to the decline of natural law in America).

12. See John M. Kang, *Prove Yourselves: Oliver Wendell Holmes and the Obsessions of Manliness*, 118 *W. VA. L. REV.* 1069 (2016) (arguing that Holmes' greatest influence was the virtue of courage); Breen & Strang, *supra* note 4, at 1220–21.

Holmes espoused ideas that laid the groundwork for legal realism,<sup>13</sup> an amorphous legal theory that swept the legal field in America in the 1920s and 1930s.<sup>14</sup> Although it did not formally survive World War II,<sup>15</sup> many of its tenets are still held today. To understand modern American law, one must first know its architects.

#### A. *Holmes and Legal Realism*

Oliver Wendell Holmes, Jr., fought in the Civil War,<sup>16</sup> graduated and taught at Harvard Law School, and sat as an Associate Justice on both the Massachusetts Supreme Judicial Court and the Supreme Court of the United States.<sup>17</sup> During his long career, Holmes gave speeches and wrote judicial opinions that have become part of the canon of American law. His influence on American law is unanimously acknowledged.<sup>18</sup> Walter Kennedy wrote of Holmes: “Reverting to his philosophical papers, it is clear that dominant traits of Holmes’ character were skepticism, cynicism of eternal values, dismissal of natural law and abhorrence of principles.”<sup>19</sup> Holmes lobbied relentlessly for

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13. Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 387, 389–90 (2006) (discussing the decline of Legal Realism after WWII due to totalitarian regimes’ use of separating law from morality). See also Walter B. Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362, 364 (1940) (naming Justice Oliver Wendell Holmes, Jr., the “father of real realism”).

14. Breen & Strang, *supra* note 4, at 1219–20; Citron, *supra* note 13, at 386.

15. Citron, *supra* note 13, at 387.

16. See David J. Seipp, 125th Anniversary Essay, *Holmes’s Path*, 77 B.U. L. REV. 515, 518 (1997) (describing the various influences and circumstances surrounding Justice Holmes’ most famous speech, including his experience fighting in the Civil War).

17. Kang, *supra* note 12, at 1099; Seipp, *supra* note 16, at 519.

18. James W. Springer, *Natural Selection or Natural Law: A Reconsideration of the Jurisprudence of Oliver Wendell Holmes*, 3 GEO. J.L. & PUB. POL’Y 53, 53–55 (2005) (describing Holmes’ rejection of natural law and subsequent advocating of evolutionary theory); Seipp, *supra* note 16, at 516.

19. Walter B. Kennedy, *Portrait of the New Supreme Court*, 13 FORDHAM L. REV. 1, 9 (1944) (criticizing the Supreme Court’s new trend of ignoring precedent). At first glance, these principles of Holmes’ character don’t seem to translate into American law, but upon further observation, one can see their prevalence. The Supreme Court has shown much skepticism regarding the value of religion in the public sphere, especially in primary and secondary education. *Lee v. Weisman*, 505 U.S. 577, 594, 597 (1992). The Supreme Court displayed its skepticism in *Lee* by noting:

Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors’ rights . . . [T]he state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.

*Id.* For another example of such skepticism in education, see *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (finding a violation of the Establishment Clause when states “require[ed] the selection and reading at the opening of the school day from verses of the Holy Bible and the recitation of the Lord’s Prayer”). Likewise, the codification of the sexual revolution

lawyers and judges to view the law as separate from morality and logic.<sup>20</sup> He believed that law amounted to how judges decided cases and hoped that they would look to sociology and economics to guide their rulings instead of being bound to mere tradition.<sup>21</sup>

Legal realism arose in the 1920s and 1930s as a response to legal formalism.<sup>22</sup> Legal Realists critiqued the prevailing method of scientifically applying the law, which they pejoratively called “legal formalism.”<sup>23</sup> Although there was no formal school of legal realism, the Realists had several common beliefs.<sup>24</sup> They confessed a distrust of and skepticism about the neutrality of judges applying law, emphasized the importance of science and sociology in deciding cases,

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by *Griswold v. Connecticut*, *Roe v. Wade*, and *Obergefell v. Hodges* demonstrate the Supreme Court’s cynicism of eternal values of morality:

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). *See also* *Roe v. Wade*, 410 U.S. 113, 153, 159 (1973) (discussing a woman’s “right of privacy” in deciding whether to “terminate her pregnancy” and refusing to “resolve the difficult question of when life begins”); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”). Finally, the Supreme Court’s incessant use of substantive due process exercised via judicial activism shows an abhorrence of principles in favor of individual comprehensive doctrines. *See Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting) (arguing that the decision had “no . . . basis in the Constitution” and rested “on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry”).

20. Glen, *supra* note 11, at 99; Seipp, *supra* note 16, at 516. To avoid the appearance of a straw man attack, this Comment acknowledges that Holmes attempted to clarify his idea as a framework to learn the law by viewing it as separate from traditional notions of morality and logic, instead of outright claiming that the substance of law was separate from the two. *See* Holmes, *supra* note 6, at 459, 465 (1897) (“When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law. . . . The training of lawyers is a training in logic. . . . The language of judicial decision is mainly the language of logic.”). A close examination of Holmes’ propositions and their logical conclusions, however, reveals that his humility was mere rhetoric. This Comment demonstrates in the discussion below that he had the utmost suspicion of the use of morality and logic in law.

21. Breen & Strang, *supra* note 4, at 1221.

22. Citron, *supra* note 13, at 386; Philip E. Hesch & Christopher J. Grabarek, *Towards the Deconstruction of Legal Relativism*, 6 ST. THOMAS L. REV. 349, 360–62 (1994) (arguing that law should be grounded in an objective morality but presenting a natural law theory that is grounded in man’s reason, not God’s).

23. Breen & Strang, *supra* note 4, at 1224.

24. Breen & Strang, *supra* note 4, at 1223–24; Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235–38 (1931) (describing the common points of departure of the leading Legal Realist scholars of the time).

believed that law should adapt to a changing society, and argued that law should be considered as separate from normative morality.<sup>25</sup>

To say that legal realism influenced American law would be a gross understatement. Indeed, Walter Kennedy, writing in the 1940s, already attributed the change in Supreme Court handling of precedent to the influence of Holmes' and other Realists' skepticism and pragmatism in law.<sup>26</sup> Law schools, attorneys, and judges began to take some of the precepts of legal realism to heart and practice as the twentieth century progressed.<sup>27</sup> Law students today cannot escape the teachings of legal realism in the classroom, nor can lawyers avoid it in the courts. However, some Catholic scholars groaned to wake up and find America realist.

### B. Natural Law

The history of natural law would be an odd concept to cover. Rather, this brief discussion will highlight the history of the *understanding* of natural law. Immutability is the very nature of the natural law, so it would be silly to say that it has a history and imply that it changes. Natural law connects all men throughout all time, for it binds them to the same obligations. It is important to note, as this section will show, that natural law *per se* is not the same as natural law jurisprudence. Natural law exists both as a binding moral order on humanity and a measure of human law. Further distinctions will be made between natural law as it is and natural law as it has been misunderstood. Modernity has tended to separate religion, law, and morality in society. There is an urgent need to revive the understanding and practice of natural law in civilization. Brendan Brown summarized this need:

Legists should explain more adequately the meaning of natural law and its multitudinous functions. Perhaps this will necessitate the growth of a large group of jurists in this country who are sympathetic toward the restoration of the philosophy of natural law to its rightful place in the world of jurisprudence. But whatever the cost in terms of effort, contemporary civilization will be amply repaid. Indeed if natural law thinking continues in its present muddled state, so that it will play no decisive role in determining the future direction of the world hegemony of ideas, man will have betrayed his faculties.<sup>28</sup>

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25. Breen & Strang, *supra* note 4, at 1223–24; Hesch & Grabarek, *supra* note 22, at 360–62; Llewellyn, *supra* note 24, at 1236–37.

26. Kennedy, *supra* note 19, at 8–12.

27. Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 354–59 (2008) (describing the decline of debate over the Legal Realist movement).

28. Brown, *supra* note 7, at 18.

So long as the most popular natural law thinkers, such as John Finnis, preach a false understanding of natural law, society will not be healed of its ailments.<sup>29</sup> Only a few scattered Catholic scholars seem to hold the natural law in its true form, like the faithful remnant scattered abroad. Miriam Rooney stated the problem succinctly over 60 years ago: “Unfortunately there has been nowhere nearly enough written as yet to inform honest inquirers on any side as to what the natural law can offer toward the solution of contemporary legal problems.”<sup>30</sup> To do this great work of engaging modernity, there must be a grasp of what natural law is. Any work in natural law jurisprudence must be grounded in the work of St. Thomas Aquinas—the authority on natural law because he was the most learned of all the writers who came before him and wrote precisely and intelligibly in general terms so as to cover the most ground.<sup>31</sup> We now examine the various understandings of natural law and why St. Thomas is its exponent *par excellence*.

The earliest articulations of natural law can be found in the most prominent Greek and Roman philosophers, Aristotle and Cicero.<sup>32</sup> Cicero explained natural law as “right reason in harmony with nature[,]” an eternal measure of human action at all times and in all places.<sup>33</sup> The natural law is also mentioned in Emperor Justinian’s *Corpus Iurus Civilis* as the very foundation of the legal code.<sup>34</sup> The last group to work on the natural law before St. Thomas was the medieval canonists, most notably Gratian, who preceded St. Thomas in declaring that the natural law was given by God to man as a rule and measure of his actions.<sup>35</sup>

St. Thomas Aquinas was born in the year 1225 A.D. to minor noble parents.<sup>36</sup> Upon reaching maturity, he entered the Order of Preachers and lived his life as

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29. See Miriam T. Rooney, *The Philosophy of Natural Law of St. Thomas Aquinas*, 2 CATH. LAW. 22, 24 (1956). Rooney commented on this issue among natural law scholars:

Not only jurists and philosophers, but conquerors and revolutionaries, have sought justification for their activities in the name of the natural law. Is it fair to assume that all are talking about the same thing? If so, how can the disparities be reconciled and the confusion dispelled? It may well be that many of those who talk about the natural law, like those who call out, “Lord, Lord,” will not ultimately be found among the elect.

*Id.*

30. *Id.* at 23.

31. *Id.* at 25.

32. Brown, *supra* note 7, at 9; Glen, *supra* note 11, at 76; Kennedy, *supra* note 7, at 41–42. See also CHARLES P. NEMETH, *AQUINAS IN THE COURTROOM* 6–9 (2001) (discussing the influence of Aristotle and Cicero on St. Thomas’ legal thought).

33. Glen, *supra* note 11, at 83 (quoting MARCUS TULLIUS CICERO, *THE REPUBLIC* 68–69 (Niall Rudd trans., Jonathan Powell & Niall Rudd eds., Oxford Univ. Press 1998)).

34. *Id.* at 82–83.

35. *Id.* at 86–87; see also NEMETH, *supra* note 32, at 12 (discussing the influence of Gratian on St. Thomas’ legal thought).

36. Ralph McInerny & John O’Callaghan, *Saint Thomas Aquinas*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 23, 2014) <https://plato.stanford.edu/entries/aquinas/>.

a Dominican friar.<sup>37</sup> St. Thomas spent most of his life praying, teaching, and writing at the University of Paris.<sup>38</sup> His tour de force, the *Summa Theologiae*, sought to bring all that was good in theology and philosophy together.<sup>39</sup> Pulling from Christian and pagan sources alike, the *Summa* was St. Thomas' attempt to explain the relationship between God and His creation.<sup>40</sup> The Treatise on Law is nestled in the part of the *Summa* treating man's duties to God. It is important to note that St. Thomas' discussion on law is part of a greater work on morality. While he did not see them as synonymous, he saw them as playing off of each other.

St. Thomas began his Treatise on Law in the Aristotelian tradition of making distinctions. Law, in the Thomistic tradition, is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."<sup>41</sup> All four factors must be present for a law to be valid. St. Thomas uses these factors to distinguish between just and unjust laws.<sup>42</sup> If a

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37. *Id.*

38. *Id.*

39. *See id.* (noting that Saint Thomas Aquinas' most famous work, the *Summa Theologiae*, is most often cited by modern day philosophers as Saint Thomas Aquinas' view on the intersection of theology and philosophy).

40. *See id.* (noting that Saint Thomas Aquinas' work in *Summa Theologiae* emphasizes that theological and philosophical discourse begin with what God has revealed about Himself and His Creation and knowledge of the world, respectively).

41. 2 AQUINAS, *supra* note 5, pt. I-II, q.90, art. 4, at 995. A proper understanding of what the common good is must be established in order to comprehend what the purpose of law is, and what the law is in general. St. Thomas equated the act of being as good itself. 1 AQUINAS, *supra* note 5, pt. I-II, q.5, art. 1, at 23. David Crawford articulated three competing uses of the phrase "common good" and explained that only one can give law its full effect and meaning. David S. Crawford, *Gay Marriage, Public Reason, and the Common Good*, 41 COMMUNIO 380, 384-89 (2014). The first is a conception that the common good refers to the set of goods required for a healthy life—such as water, food, shelter, medicine, and infrastructure—however, this view fails because it lacks "commonness," as the goods are for *individual* health and well-being. *Id.* at 385-87. The second view focuses on the goodness of the individuals in a community; it also fails because it is not something held by the community, but only individually. *Id.* at 387-88. Crawford's final view, I think, exemplifies the Thomistic meaning of the "common good," as not only the good things of a community or the good things done by the community, but *is* the community itself, including the relationship of the parts of a community to their whole. *Id.* at 389-90. Combining the views of St. Thomas and Crawford, if the act of being is good, then the common good of a community is existing together, which includes proper relations between parts and the well-being of those parts. In the context of law, then, to legislate for the common good is to pass laws that are conducive to the proper relationships of the parts of a community to other parts and to the whole.

42. 2 AQUINAS, *supra* note 5, pt. I-II, q.96, art. 54, at 1020. St. Thomas said the following:

On the other hand laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above:—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive not to the common good but rather to his own cupidity or vainglory;—or in respect of the author, as when a man makes a law that goes beyond the power committed to him;—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws,

legislative act is not in accord with reason, is directed only toward a private good, is made by one without vested authority, or is enforced without notice, it fails as a law.<sup>43</sup>

St. Thomas identified four types of law, three of which are briefly defined here.<sup>44</sup> One can think of these three types of law as nesting dolls. The largest and broadest is the eternal law, which is God's "Divine Reason" governing the whole universe.<sup>45</sup> That is, God (the creator and proper authority of the universe) prescribes all that is good by ordering the entire universe (an ordinance of reason for the common good).<sup>46</sup>

The natural law is the "rational creature's participation of the eternal law . . . ."<sup>47</sup> In other words, natural law is the proper order of man's actions in conformity with all God has ordained as good for man. One can see how natural law fits nicely into eternal law like a nesting doll; natural law only governs humans, instead of the whole universe, and is entirely encompassed by eternal law. Now, there is an important distinction to make here. Natural law comes

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because, as Augustine says, *a law that is not just, seems to be no law at all*. Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matth. v. 40, 41: *If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two*.

Secondly, laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because, as stated in Acts v. 29, *we ought to obey God rather than men*.

*Id.*

43. *Id.*; see also RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 108–12 (2007) ("[A] human ordinance can be unjust in three ways: *ex fine*, 'laws' ordained to a private good; *ex auctore*, 'laws' enacted by one who has usurped authority; *ex forma*, 'laws' that unjustly distribute benefits and burdens."). The fourth disqualifier, notice, is found in the Due Process clauses of the Fifth and Fourteenth Amendments. U.S. CONST. amends. V, XIV.

44. See 2 AQUINAS, *supra* note 5, pt. I-II, q.91, arts. 1, 4, at 997–99; pt. I-II, q.93, art. 2, at 1004–05. The fourth, being the Divine law, pertains to positive decrees from God given by Divine revelation, *i.e.*, Scripture. *Id.* pt. I-II, q.91, art. 4, at 998. St. Thomas also discussed the Old Law and New Law, deriving from the Old and New Testaments, respectively, which can be understood under Divine Law. *Id.* pt. I-II, q.91, art. 5, at 999.

45. *Id.* pt. I-II, q.91, art. 1, at 996; see also Glen, *supra* note 11, at 88 ("[T]he world is governed by divine Providence, and since the world is so governed, it is subject to and regulated by the Eternal Law.").

46. 2 AQUINAS, *supra* note 5, pt. I-II, q.91, art. 1, at 996. Notice of the eternal law is hard to comprehend. *Id.* pt. I-II, q.91, art. 4, at 998–99; pt. I-II, q.93, art. 2, at 1004–05; see also Rooney, *supra* note 29, at 27 ("However, human knowledge of eternal law cannot be other than imperfect, since each person's knowledge of it is limited according to his own capacity. Furthermore, he can know it, not as it is in itself, but only in its effects. For these reasons, no person can judge of eternal law.").

47. 2 AQUINAS, *supra* note 5, pt. I-II, q.91, art. 2, at 997.

from God, and not from man.<sup>48</sup> The cardinal sin of new natural law theorists is basing their formulations of natural law on an act of reason by *man* and not *God*.<sup>49</sup> So, to define natural law under the definition of law given above, natural law is an ordinance of God's reason on how men ought to act for the common good of mankind.<sup>50</sup>

Now, the most common and most important objection arises: how do we know what natural law says?<sup>51</sup> New natural law theorists have shifted the foundations of natural law to avoid the tough answer. If we claim that natural law comes from God, citizens of our liberal republic will object that any moral or legal order that comes from it will be unsuitable to govern anyone of a different religious profession. New natural law theorists have reduced natural law to a common denominator of moral prescriptions to which everyone can agree, regardless of creed. If we shift this foundation, natural law loses its very authority and becomes a mere human moral code.<sup>52</sup> The United States was the first experiment

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48. See Brown, *supra* note 7, at 9 (“Thomas Aquinas subdivided the category *jus naturale* into the *lex aeterna* or the reason of the divine wisdom governing the whole universe, and the *lex naturalis* or the law of human nature which proceeded ultimately from God but immediately from human reason in which it was mirrored.”); HITTINGER, *supra* note 43, at 97 (“The law is called natural according to the mode of promulgation and reception, not the pedigree of legislation.”).

49. For examples of rationalistic or new natural law theory, see FINNIS, *supra*, note 5, at 23; George, *supra* note 7 at 2275–76; Hesch & Grabarek, *supra* note 22, at 350, n.4; Hoffheimer, *supra* note 7, at 659; Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 881–82 (2018).

50. Notice of natural law is more apparent than that of eternal law. 2 AQUINAS, *supra* note 5, pt. I–II, q.94, art. 4, at 1011; pt. I–II, q.94, art. 6, at 1013 (“[T]here belong to the natural law, first, certain most common precepts, that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles.”). We are given notice of natural law because it is imprinted on us by God. *Id.* pt. I–II, q.94, art. 6, at 1012. However, knowledge of the natural law has been tainted. *Id.* pt. I–II, q.94, art. 6, at 1013 (commenting that “the natural law” can be “blotted out” by “concupiscence or some other passion,” “evil persuasion[,]” or “viscous customs and corrupt habits”). In His charity, God revealed the natural law in Divine law too so that no one would misunderstand His precepts. *Id.* pt. I–II, q.91, art. 4, at 998–99. See also Rooney, *supra* note 29, at 27–28 (“Human beings are moved to act in accordance with eternal law, first of all through being so inclined or disposed as other creatures are, but they are also moved to act by knowledge and understanding of the Divine commandment.”).

51. I would be remiss to not mention that Justice Holmes wrote a short piece summarizing his own views on natural law. See Oliver Wendell Holmes, *Natural law*, 32 HARV. L. REV. 40, 41–43 (1918) (objecting to natural law because it cannot be known outside of personal experience and stating “[t]he jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere”). For Holmes, natural law is a mere subjective belief—“determined largely by early associations and temperament, coupled with the desire to have an absolute guide”—about what people ought to do, amounting to a social contract of prescribed and proscribed actions to preserve one’s life. *Id.* at 42–3. Justice Holmes could not grasp natural law because his intellect could not get off the ground and make the first step of grasping an intelligible reality, denying a connection between nature and morality. This inability to learn from human nature predisposed him to disbelieve in a natural law that was universally binding.

52. The legal maxim *nemo iudex in sua causa* (no man shall judge his own case) is guiding here. If a person sits to judge his own case, there is a guarantee of bias in the judgment, or at least

of this ideology on a large scale. Instead of founding government on the authority of God,<sup>53</sup> the United States was founded on the sole authority of the people.<sup>54</sup> Any legislation pertaining to morals nowadays must be met with an approval of the majority, if it is even allowed. But this leads to an arbitrary power struggle, or a “might makes right” jurisprudence.<sup>55</sup> An arbitrary will cannot be the basis of law or morality. Therefore, God must remain in the picture when discussing natural law to retain its binding force on all people.<sup>56</sup>

Human law is the last type of law to consider. At first, it appears that human law would be something that everyone could define together, but its distinctions have caused the most furious debates in Western civilization. St. Thomas takes

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the sense of impropriety that would delegitimize the judgment, since no one would give themselves an unfavorable decision. The maxim applies equally to natural law as it does to human law: man cannot form a system for his own morality, for his passions and biases would lead him astray towards a self-serving moral code. See Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 386, 390–92 (2012) (describing the history of the maxim in American jurisprudence).

53. St. Paul stated in his Epistle to the Romans: “Let every soul be subject to higher powers: for there is no power but from God: and those that are, are ordained of God. Therefore, he that resisteth the power, resisteth the ordinance of God. And they that resist, purchase to themselves damnation.” *Romans* 13:1–2 (Douay Rheims). St. Paul says that God is the very origin of government. Temporal rulers only govern by the permission of God, so to deny this divine origin of authority sets the leviathan loose.

54. See U.S. CONST. pmbl. Pope Leo XIII proved the absurdity of this claim:

Man’s natural instinct moves him to live in civil society, for he cannot, if dwelling apart, provide himself with the necessary requirements of life, nor procure the means of developing his mental and moral faculties. Hence, it is divinely ordained that he should lead his life—be it family, or civil—with his fellow men, amongst whom alone his several wants can be adequately supplied. But, as no society can hold together unless some one be over all, directing all to strive earnestly for the common good, every body politic must have a ruling authority, and this authority, no less than society itself, has its source in nature, and has, consequently, God for its Author. Hence, it follows that all public power must proceed from God.

Pope Leo XIII, *Immortale Dei*, LIBRERIA EDITRICE VATICANA, [http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei.html](http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html) (last visited June 14, 2020). Furthermore, St. Thomas quoted St. Augustine: “If the people have a sense of moderation and responsibility, and are most careful guardians of the common weal, it is right to enact a law allowing such a people to choose their own magistrates for the government of the commonwealth.” 2 AQUINAS, *supra* note 5, pt. I–II, q.97, art. 1, at 1022. St. Thomas is not opposed to a republican form of government in principle, but he would never dispense with the biblical teaching of St. Paul that the authority of the civil government still rests in God.

55. Hesch & Grabarek, *supra* note 22, at 351 (“Absent a conceptual framework grounded in absolute presuppositions (*i.e.*, a natural law), legal decisions, as well as moral and value judgments, are inevitably left to a political process that can only justify its outcomes by a ‘might makes right’ philosophy.”).

56. JOHN PAUL II, *VERITATIS SPLENDOR* 19–20 (1993).

Only God can answer the question about the good, because he is the Good. But God has already given an answer to this question: he did so *by creating man and ordering him* with wisdom and love to his final end, through the law which is inscribed in his heart (cf. *Romans* 2:15), the “natural law[.]”

*Id.*

more time to discuss human law than eternal or natural law in the *Summa*.<sup>57</sup> Under this Comment's working definition of law, human law is an ordinance of man's reason, promulgated by the legislator for the common good of a state.<sup>58</sup> Most thoughtful Americans would agree with this statement, but St. Thomas goes deeper, arguing that human law must be rooted in natural law. Now one can see the final nesting doll. Both natural law and human law govern men's actions. Natural law is the eternal law inscribed in man, but there are two ways to make human law. The first is by way of conclusion from the natural law.<sup>59</sup> St. Thomas gives the example that murder is outlawed as a conclusion from the natural law principle that no one should harm another.<sup>60</sup> The second is by way of determination.<sup>61</sup> Because the natural law often only gives man general principles of justice—such as criminals should be punished and society ordered—it is left to the legislator to decide just how to punish criminals or on which side of the road to drive.<sup>62</sup>

There is one final point to make on human law. It must be noted that the natural law will not be legislated wholesale by the state. St. Thomas says that human law should not repress all vices because it would lay an impossible burden on men and frustrate the very purpose of law.<sup>63</sup> To quote St. Thomas in full:

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Therefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like.<sup>64</sup>

The legislator has his work cut out for him—his job is to reason what should and should not be proscribed in forming a just society. This plays into the purpose of law, discussed below. Let it suffice now to say that the purpose of law is to make men good.<sup>65</sup> Both natural law and human law are meant to order men's actions toward their proper end: God.

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57. Human law has three whole questions in the *Summa Theologiae* devoted to it, while eternal law and natural law have one each. 2 AQUINAS, *supra* note 5, pt. I-II, q.95-97, at 1013-25.

58. Here I use the word legislator to signify the proper authority to enact legislation, be it a king, legislature, parliament, etc.

59. 2 AQUINAS, *supra* note 5, pt. I-II, q.95, art. 2, at 1014-15.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* pt. I-II, q.96, art. 2, at 1018.

64. *Id.*

65. 2 AQUINAS, *supra* note 5, pt. I-II, q.92, art. 1, at 1001.

With the philosophical groundwork laid, this Comment can now move to consider Justice Holmes' thoughts in *The Path of the Law* and juxtapose them with St. Thomas' ideas on the same matters. Finally, this Comment shall attempt to show that the premises, conclusions, and effects of Holmes' jurisprudence do not lead to the justice which only natural law jurisprudence can provide.

## II. HOLMES' PATH OF THE LAW

Justice Holmes first delivered *The Path of the Law* as a speech at the Boston University School of Law's dedication ceremony for its new building on January 8, 1897.<sup>66</sup> His audience was comprised of law students, faculty, lawyers, and judges.<sup>67</sup> This speech would soon become one of the most influential works in American jurisprudence.<sup>68</sup> Holmes, with his characteristic rhetoric and flair, discussed the relationship between law, morality, and logic. He was severely critical of traditional notions of law—something that defined his career.<sup>69</sup> What follows is an analysis of Holmes' chief arguments.

*The Path of the Law* is loosely divided into two parts: the first dealing with the relationship between law and morality, and the second dealing with law and logic.<sup>70</sup> Holmes began with his famous prediction theory.<sup>71</sup> He said that the study of law amounts to nothing other than predicting what courts will do, because they decide how the law applies to people.<sup>72</sup> Everything in law, even duties, only exists to explain what happens to the person who does not follow the law.<sup>73</sup> Holmes derided “text writers” who say that law is a “system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decision.”<sup>74</sup> Any definition of law for Holmes deals only with how law is interpreted and applied, not how it is made.<sup>75</sup>

Holmes used this prediction theory to explain why he thought law is separate from morals. He argued that people obey the law in order to avoid punishments, not necessarily because it is the right thing to do.<sup>76</sup> Holmes introduced his infamous “bad man” here:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and

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66. Seipp, *supra* note 16, at 545–46. The speech was later published in the Boston Law Magazine and Harvard Law Review. *Id.* at 515–16; Holmes, *supra* note 6, at 457 n.1.

67. Seipp, *supra* note 16, at 547.

68. *See id.* at 516.

69. *Id.* at 517.

70. *Id.* at 516–17.

71. *Id.* at 516; Holmes, *supra* note 6, at 457.

72. Holmes, *supra* note 620, at 457.

73. *Id.* at 458.

74. *Id.* at 460.

75. *Id.* at 460–61 (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

76. *Id.* at 457–62.

therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.<sup>77</sup>

The purpose of Holmes' "bad man" is to understand the law because he is concerned about the law being convoluted with morals.<sup>78</sup> While he conceded that "[t]he law is full of phraseology drawn from morals," he did not want lawyers to "pass from one domain to the other without perceiving it."<sup>79</sup> For Holmes, morality concerned only a personal justification for action or inaction.<sup>80</sup> The law, on the other hand, is not made up of morally good or bad laws, but only enforceable ones.<sup>81</sup> Justice Holmes did not much consider what *can* or *should* be law, but only what is *enforced*.<sup>82</sup> A law can be valid even if just one wise man or all the people dislike it, or invalid despite broad support; whether or not a law is enforced is the only concern for Holmes in discovering what the law is.<sup>83</sup>

Justice Holmes used several examples to explain his distinction. First, he said that a taking by eminent domain is no different from a taking by wrongful conversion because both actors have to pay the full value for the property.<sup>84</sup> The moral distinction between the acts is irrelevant because the consequences are the same.<sup>85</sup> Second, Holmes said that a contract doesn't so much create a duty to perform as much as it imposes a threat of damages in the case of nonperformance.<sup>86</sup> Again, a contract creates no moral obligations, but only a legal liability.

Holmes also attacked the confounding of legal language with moral language. His first example was the meaning of malice, which "in a moral sense" means

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77. *Id.* at 459.

78. Holmes, *supra* note 6, at 460 ("The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy.").

79. *Id.* at 459.

80. *Id.* at 460, 463 ("Morals deal with the actual internal state of the individual's mind, what he actually intends.").

81. *Id.* at 460.

82. *Id.* ("A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced.").

83. *Id.*

84. Holmes, *supra* note 6, at 461.

85. *Id.* Justice Holmes elaborated:

What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow.

*Id.*

86. *Id.* at 462.

“a malevolent motive[.]” but in the legal sense it only describes conduct that causes “temporal harm,” with no consideration of motive.<sup>87</sup> The second example was the contract doctrine of the meeting of the minds.<sup>88</sup> Holmes said that contracts can exist contrary to parties’ intentions because courts will enforce terms to which neither party agreed.<sup>89</sup> Morality is an internal, personal matter—not a controlling factor on law.

The second half of *The Path of the Law* deals with the relationship between law and logic. While Justice Holmes did not deny that logic is used in legal reasoning, he did deny that it is the definitive tool to reach truth.<sup>90</sup> He stated his precise objection thusly: “The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”<sup>91</sup> Holmes’ skepticism about the use of logic came from a distrust of impartial judging.<sup>92</sup> He wrote that logic can be used to justify any conclusion; the real force behind judgments are the “belief,” “opinion,” or “attitude” of a judge, which cannot be articulated but merely influence the position by which the judge then reasons.<sup>93</sup> In other words, judges decide a case due to a certain bias, then use logic to justify their decision.

Next, Justice Holmes talked briefly about the role of the judge. Instead of using legal principles to deduce a decision mechanically, Holmes said that judges ought to consider the social advantage of such laws and decisions.<sup>94</sup> By reviewing the social advantage of laws, judges can be more reflective on the biases that guide them and rule more honestly.<sup>95</sup> Holmes then made an observation that seems to be reminiscent of our times as well: “[P]eople who no longer hope to control the legislatures . . . look to the courts as expounders of

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87. *Id.* at 463.

88. *Id.*

89. *Id.* at 464 (“In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties’ having *meant* the same thing but on their having *said* the same thing.”).

90. Holmes, *supra* note 6, at 465–66.

91. *Id.* at 465 (“[J]udicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.”).

92. *Id.*

93. *Id.* at 465–66.

But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.

*Id.*

94. *Id.* at 467.

95. Holmes, *supra* note 620, at 467.

the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments[.]”<sup>96</sup> Here, Holmes predicted the now-prevailing notion that courts can assert new rights when a claimant makes a compelling social claim to that right.<sup>97</sup>

Finally, Justice Holmes discusses the relevance of history and tradition in law. Holmes seems more skeptical than usual here since he commits the entire second half of the lecture to this very topic. He concedes that the “study of law is . . . the study of history[.]” but only insofar as it helps to critique and reform the law.<sup>98</sup> Holmes is worried about a “blind imitation of the past,” of following a law for “no better reason than that our fathers have . . .”<sup>99</sup> Instead, Holmes says that lawyers ought to be well-versed in statistics and economics.<sup>100</sup> The law is grounded in and changes due to its societal benefits.<sup>101</sup>

### III. COMMENT

To this point, this Comment has aimed to lay before the reader the thoughts of two great legal minds, and described the life, influence, and jurisprudence of Justice Oliver Wendell Holmes and St. Thomas Aquinas. St. Thomas was the great expounder of natural law *par excellence*, and Justice Holmes was the most influential, if not the most notable, American jurist. This Comment will now proceed to expose the flaws in Justice Holmes’ jurisprudence as found in *The Path of the Law* via Thomistic natural law. The first order of business will be to explain why law and morality are related by exposing the corruption in Holmes’ definition of law in his theories of prediction and the “bad man” through demonstrating why his theories and examples are wrong. Secondly, this Comment will show that law necessarily pertains to reason. Next, it will discuss the proper role of a judge. Last, but certainly not least, it will explain that tradition and history are critical imports of law. Throughout the analysis, this

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96. *Id.* at 467.

97. See HITTINGER, *supra* note 43, at 132 (“[C]itizens are encouraged to play a legal version of atomic warfare. Partisan groups look to the courts to rewrite the fundamental law on their behalf . . . [V]ictory in a constitutional court wins the power to shape basic constitutional values . . . . Some rights are not supposed to be up for grabs.”).

98. Holmes, *supra* note 6, at 469. Holmes continued:

We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.

*Id.* at 474.

99. *Id.* at 468–69. Here we get one of Holmes’ most famous aphorisms: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.” *Id.* at 469.

100. *Id.* at 469 (“For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”).

101. *Id.* at 470–71.

Comment will set out the benefits of the natural law tradition and the harms of Holmes' ideas.

The first step is to clarify the definition of law. Holmes' definition would begin at the end of the path; law to him is only what a judge will do.<sup>102</sup> This begs the question: How do judges or lawyers know what the law is before it is applied? Holmes puts the cart before the horse despite charging traditional jurists with committing the same fallacy.<sup>103</sup> The prediction theory often gets the law wrong. Appellate and supreme courts exist for one reason: lower courts sometimes get the law wrong. Relying solely on a judge's exposition of the law is building one's house on sand, for when the wind blows and the storm comes, the house falls. The problem with Holmes' theory of law is the same as the fallacy of pragmatism. He asks what works in practice before asking what works in theory.

Law must depend on immutable principles of justice, including its foundation. St. Thomas says that reason is the beginning of all action.<sup>104</sup> A law cannot be made without an act of the legislator's intellect. St. Thomas gives his definition of law in a very Catholic way; the law begins at the moment of its conception.<sup>105</sup> Law, in the Thomistic tradition, can only come from the proper authority.<sup>106</sup> In the United States, legislatures make law in accordance with constitutions. A judge, by definition, decides particular cases before him or her, and has no competence to make law. Judicial decisions depend on constitutions, statutes, and principles of law—and Holmes should, too.

Further, the "bad man" theory is a faulty one because it misses the purpose of the law. Holmes offered us this theoretical sinner to lure lawyers into thinking that law can only be understood as consequence. This is a very narrow understanding of law. St. Thomas not only said that law is made for the common good, but also that it forms the populace in virtue.<sup>107</sup> Law must be understood in the good that it does. Every law is enacted to order society and promote justice, be it by ordering traffic well or punishing criminals. The purpose of the law that the "bad man" reluctantly obeys is to protect the people he would hurt—and it has one other crucial purpose that Holmes completely ignored.<sup>108</sup> When

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102. *Id.* at 457, 461.

103. *Id.* at 458.

104. 2 AQUINAS, *supra* note 5, pt. I-II, q.90, art. 1, at 993.

105. *Id.* pt. I-II, q.91, art. 1, at 996.

106. *Id.* pt. I-II, q.90, art. 3, at 994-95.

107. *Id.* pt. I-II, q.90, art. 2, at 994; pt. I-II, q.92, art. 1, at 1001-02.

108. Once again, I wish to avoid attacking a straw man. Holmes said the following:

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.

Holmes, *supra* note 6, at 459. Once again, I think Holmes was misleading us and trying to dull the shock of his ideas. In the same breath, Holmes said that law makes men good, but denies its effect on the bad man:

the “bad man” reluctantly obeys the law, his actions are rightly ordered. In other words, he is forming good habits.<sup>109</sup> Therefore, Holmes’ “bad man” is defeated by his own prudence in obeying law and becomes a good man.<sup>110</sup>

The emphasis of Justice Holmes and the Legal Realists on separating law and morality was crucial in the development of law in the twentieth century.<sup>111</sup> Therefore, a response needs to be made to correct this false distinction.<sup>112</sup> As stated above, St. Thomas placed his Treatise on Law within a greater work on morality.<sup>113</sup> It was also noted in the immediately preceding paragraph that law is necessarily directed towards the common good and forms citizens in virtue. For legislators to act with the common good in mind is to act morally; to form laws with the object of making a just society is a very good and morally commendable thing to do. Furthermore, that the very effect of laws is to habituate citizens to virtue demonstrates well how law is tied to morality.<sup>114</sup>

Nevertheless, Holmes could still view this process of making laws for a just society and ordering people to obey them as a pragmatic exercise to make people get along, law being functional and not moral. One final consideration will dispel this objection. St. Thomas explains how acts of all the virtues and vices can be prescribed and proscribed, respectively.<sup>115</sup> Law is ordered towards the common good, and therefore requires citizens to do certain good actions and refrain from certain bad ones. The underlying problem is that Holmes personally

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If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

*Id.*

109. See 2 AQUINAS, *supra* note 5, pt. I–II, q.92, art. 1, at 1001–02; see also MIRIAM THERESA ROONEY, LAWLESSNESS, LAW, AND SANCTION 122 (1937) (“Suffice it to say in regard to Mr. Justice Holmes, that in maintaining the notion of law as prediction, and in regarding it from the point of view of the bad man, he proposes a very impoverished and inadequate definition of law, which fails to consider its primary function of rule-making for the guidance of those who desire to abide by it.”).

110. St. Thomas said that all are subject to the law, but in a sense, only bad men are because their wills are not aligned to that of the lawgiver, whereas good men are not subject to, or threatened by, the law because their conduct conforms to it:

[A] man is said to be subject to a law as the coerced is subject to the coercer. In this way the virtuous and the just are not subject to the law, but only the wicked. Because coercion and violence are contrary to the will; but the will of the good is in harmony with the law, while the will of the wicked is discordant from it. Therefore in this sense the good are not subject to the law, but only the wicked.

2 AQUINAS, *supra* note 5, pt. I–II, q.96, art. 5, at 1020–21.

111. Citron, *supra* note 13, at 386; Holmes, *supra* note 6, at 457–64; Kennedy, *supra* note 19, at 9–10.

112. Kennedy, *supra* note 7, at 48.

113. See discussion *supra* Section I.B.

114. Defining morality is beyond the scope of this paper. For a thorough discussion on morality *per se*, see 2 AQUINAS, *supra* note 5, pt. I–II, q.49–89, at 793–992 (Treatise on Habits).

115. *Id.*, pt. I–II, q. 96, art. 2, at 1018.

denied any objective moral principles; while he would concede that laws force people to act or refrain from acting, he would never call such actions good or bad.<sup>116</sup> To overcome Holmes' prejudice, one must turn to his own examples and demonstrate that he is wrong on his own grounds.<sup>117</sup>

Holmes claimed that law has no inherent need of a morality because a taking by eminent domain will have the same consequence as a taking by wrongful conversion with no possibility of restoration: the defendant must pay fair value.<sup>118</sup> However, a distinction can be made. A taking by eminent domain, an action of the state, entails no morally reprehensible conduct. The state pays the original owner the fair value of the property because it is his due; the scales of justice require the balance. A taking by conversion, on the other hand, is reprimanded both because it is due the plaintiff *and* the defendant must be chastised so as to form the habit of refraining from such a vice. A similar argument can be made against Holmes' coloring of contracts.<sup>119</sup> A contract creates a duty towards another person. When what is due is not given, the breaching party is reprimanded under law to castigate the vice of breaking promises and inculcate the virtue of performing duties.

Holmes' distinctions of certain legal words were likewise nonstarters. He denied the very import of the word malice when it is an element of a crime, relegating malice to describe the action and not the intent.<sup>120</sup> This separation of action and intention defies the very nature of human action. As St. Thomas said, "Although the end is the last in the order of execution, yet it is first in the order of the agent's intention."<sup>121</sup> A person's actions shed light on his intentions and vice versa.<sup>122</sup> Therefore, a malicious act is evidence of a malicious will. Holmes then denied any moral implications when referring to what a contract means.<sup>123</sup> However, he overlooked the possibility of a party's bad intention being thwarted. In *Lucy v. Zehmer*, a contract was enforced against a party who only

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116. Glen, *supra* note 11, at 79–80, 99; Kennedy, *supra* note 19, at 9–10.

117. G. K. Chesterton, in his insightful little book on St. Thomas Aquinas, cut to the heart of ideal philosophical debate while describing a debate by the saintly friar:

It is no good to tell an atheist that he is an atheist; or to charge a denier of immortality with the infamy of denying it; or to imagine that one can force an opponent to admit he is wrong, by proving that he is wrong on somebody else's principles, but not on his own. After the great example of St. Thomas . . . we must either not argue with a man at all, or we must argue on his grounds and not ours.

G. K. CHESTERTON, *ST. THOMAS AQUINAS* 56 (Dover ed., 2009).

118. Holmes, *supra* note 6, at 461.

119. See discussion *supra* Section II.

120. Holmes, *supra* note 6, at 463.

121. 2 AQUINAS, *supra* note 5, pt. I–II, q.1, art. 1, at 610 (ST I–II q. 1 art. 1) ("Now man is master of his actions through his reason and will; whence, too, the free-will is defined as the *faculty and will of reason*. Therefore those actions are properly called human which proceed from a deliberate will.")

122. Holmes defeated himself, however, because he later found a causal link between a judge's intentions and the act of judging. Holmes, *supra* note 6, at 465–66.

123. *Id.* at 463–64.

signed it as a joke.<sup>124</sup> The law of contract reprimanded the defendant for misleading the plaintiff, a bad action that frustrated an honest transaction. From these considerations, it is easy to conclude that law certainly has something to do with morality.

Justice Holmes' next error was his distrust of the use of logic in law.<sup>125</sup> His skepticism drove him to believe that reason was only a mask for ulterior motives.<sup>126</sup> But this very argument undermines itself because Holmes could have made this claim to justify one of his own ulterior motives, and so on his own ground he says that we should not trust him—especially because he was a sitting justice at the time. St. Thomas said that law necessarily pertains to reason because reason is the proper origin of action; because laws govern actions, they must pertain to reason.<sup>127</sup> The very definition of law in the Thomistic tradition requires the function of reason.<sup>128</sup> Furthermore, Miriam Rooney points out the oddity that a “rationalist” like Holmes doesn't appeal to people's reason to obey reasonable laws.<sup>129</sup>

Now to consider the role of the judge. Holmes wished for judges to decide cases based on a decision's social advantage.<sup>130</sup> In other words, he thought that

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124. *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

125. Holmes, *supra* note 6, at 465–66.

126. Kennedy, *supra* note 19, at 9.

127. 2 AQUINAS, *supra* note 5, pt. I–II, q.90, art. 1, at 993.

128. *Id.*

129. ROONEY, *supra* note 109, at 134.

He not only ignores the function of direction, guidance, and rule in the command part of law to the extent of making the secondary, contingent penalizing part, primary, but he also fails to make any appeal to the reason and intelligence of subjects of law, by devoting his whole attention to instincts, feelings, and the senses. This is curious in a rationalist, but obviously inadequate in providing a satisfactory accounting for some very important psychological facts. To it more than to anything else can be attributed the real breakdown of sanction, for free men will not be coerced into abiding by law which does not seem to them reasonable or just . . . Any legal theory which fails to realize the importance of appealing to the intelligence in securing voluntary obedience to law, has within it the seeds of its own destruction.

*Id.*

130. Holmes, *supra* note 620, at 467. A discussion on the prudence of favoring social advantage in judicial decision making is out of the scope of this paper. Miriam Rooney, in reference to Holmes' jurisprudence, put the matter succinctly:

To say that the function of law is to maintain the social welfare raises a question regarding the character that that welfare should have in view of the composition of society. Society has no existence apart from the individuals who compose it. It is as dependent upon them as they are upon it. Consequently both must of necessity work together and neither can succeed otherwise. This is a condition of existence. When either element strives to advance at the expense of the other, the essential relationship is thrown out of order and conflict arises. Human law was devised to maintain order and avoid conflict. It does this by tending always toward justice—the rendering to every one of his own. When it becomes subservient to a dominant power, whether that be one individual or a selective group which knows no law but force, it fails of attainment in the fundamental purpose of its existence and becomes a defective instrument, if not a wicked thing.

judges can alter what the law is. This is a dangerous ideology. Although otherwise known for his ideas on judicial restraint,<sup>131</sup> Holmes allowed a judge to commit an act that would change the law. If, under his own definition, law is only what judges will do, then as the social advantage of different statutes and cases changes, judges will unilaterally have to change the law. This flies in the face of the very nature of the American system of checks and balances. A judge, acting on his own perceived social advantage, violates due process: parties' cases will not be decided based on the law, but rather on personal policy. A judge, by nature, *cannot* and *should not* legislate. St. Thomas stated the matter plainly:

As the Philosopher says, "*it is better that all things be regulated by law, than left to be decided by judges*": and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws than to find the many who would be necessary to judge aright of each single case.—Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact.—Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity, wherefore their judgment is perverted.<sup>132</sup>

Holmes was wrong to say that generalities do not determine concrete cases; concrete cases do not make generalities.<sup>133</sup> It is the role of legislators to make the law because they can bring a vast array of considerations into the laws, including social advantage. A judge, however, has a very limited tool kit. When judges try to think outside of their box, it often leads to ruin.

This then begs the question: what does a judge do when given a defunct law to apply? Leaving the changing of law in the ordinary circumstance to the legislator is fine, but what if the legislature is acting too slowly and applying a certain law would produce an unjust result? As a general rule, St. Thomas said that human law should not be changed unless the common good requires it.<sup>134</sup> Stable laws make a stable society. When a change is in question, legislators must use their prudence. If laws change too often, those who execute the law might not do so properly, but if laws grow stale, they will do more harm than good.

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ROONEY, *supra* note 109, at 134–35.

131. See David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 453, 461 (1994) (arguing that Justice Holmes' conception of judicial restraint was flawed).

132. 2 AQUINAS, *supra* note 5, pt. I–II, q.95, art. 1, at 1014.

133. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

134. 2 AQUINAS, *supra* note 5, pt. I–II, q. 97, art. 2, at 1023.

St. Thomas only laid out two possibilities for a law to change outside of the normal course of business, which is bicameralism and presentment in the United States. First, he said that a person may act beside the letter of the law if an occasion arises “wherein the observance of that law would be hurtful to the general welfare.”<sup>135</sup> Because legislators make broad laws, they will not fit the particulars of every case perfectly.<sup>136</sup> St. Thomas stressed that this diversion from the rule is only to occur in cases of necessity; he gave the example of raising a city gate to let in retreating soldiers despite a law to keep the gates closed during a siege.<sup>137</sup> The second way for a law to change in this way is for the lawgiver to grant a dispensation.<sup>138</sup> When the application of a law would do evil or hinder good, but the case is not a matter of necessity, only the proper authority may provide the dispensation.<sup>139</sup> Only the lawgiver can grant the dispensation in this situation because he has the authority to say what the law is. In this latter case, a judge could not dispense from such a law because he is not a lawgiver and does not have the authority to change the law. In the even rarer case of an unjust law, St. Thomas required the judge not to rule according to the law and instead required him to remit the matter to the sovereign.<sup>140</sup> Russell Hittinger puts the matter succinctly: “If the legislator cannot make unjust laws bind in conscience neither can the *iudex*. And if the sentence of a judge is not binding, it is no sentence at all. That is to say, he has not judged as a judge.”<sup>141</sup>

Lastly, this Comment must respond to Holmes’ distrust of tradition in law. His idea reeks of the utmost contempt for elders and ancestors. It seems to stem from his bias against immutable moral principles. Holmes believed that truth was only what the current majority said it was.<sup>142</sup> In quoting Gratian, St. Thomas made the opposite claim: “It is absurd, and a detestable shame, that we should suffer those traditions to be changed which we have received from the fathers of old.”<sup>143</sup> St. Thomas then went on to say that custom can obtain the force of

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135. *Id.* pt. I–II, q.96, art. 6, at 1021.

136. *Id.*

137. *Id.*

138. *Id.* pt. I–II, q.97, art. 4, at 1024–25.

139. *Id.* (“Consequently he who is placed over a community is empowered to dispense in a human law that rests upon his authority, so that, when the law fails in its application to persons or circumstances, he may allow the precept of the law not to be observed.”).

140. HITTINGER, *supra* note 43, at 107.

141. *Id.* at 109.

142. See Glen, *supra* note 11, at 77.

143. 2 AQUINAS, *supra* note 5, pt. I–II, q.97, art. 2, at 1023. The disrespect for tradition easily becomes a lack of faith in *stare decisis*:

The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know

law.<sup>144</sup> Because law can be promulgated by speech, so too can it be promulgated by actions.<sup>145</sup> Therefore, we ought to give great deference to the laws and traditions of our forefathers, for their experience and wisdom far outweigh our own.

Now to answer the reader's inevitable question: What does Justice Holmes have to do with the law today? This Comment has alluded to his influence several times. The final task in this Comment is to demonstrate three things: Holmes' living influence, its detriments, and how Thomistic natural law jurisprudence produces better results for society.

Tracing Holmes' influence and fully explaining why it is bad for our country and why Thomism is more conducive to justice and happiness is a task too large for the last few pages of this Comment. It can, however, spur the conversation. It has been the case for quite some time that there is no philosophy in American law, meaning that there is no *intentional* philosophy. The legal atmosphere in this country teems with political advocacy and agendas, but there is no philosophy in an academic sense. While policies can be traced to differing philosophies, their direct causes are more often a perceived majoritarian belief. The Supreme Court never grounds decisions in the thought of St. Thomas, Nietzsche, or even Holmes, but how often do its members appeal to changing mores? Pragmatic judicial decision-making based on the rule of the majority and social policy is precisely what Justice Holmes wanted. The most sensational and serious fights in the law over the last fifty years have been over no-fault divorce, contraception, abortion, and same-sex marriage—all related to family life. The winners of these power-struggles have a shared philosophy with Justice Holmes. The results have been anything but good for society. America has seen a swift breakdown in family life. Had these issues been decided by Thomistic natural law, the result would be a happier country.

Every judge and lawyer remembers the casebook method from law school, and any law student is still suffering through it. The casebook method involves reading court cases to learn the law. Students become familiar with reading judicial opinions and how a point of law is applied to a set of facts. Although the method precedes Holmes, it is a direct application of the prediction theory.<sup>146</sup>

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whether to litigate or to settle for they will have no assurance that a declared rule will be followed. *But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.*

Kennedy, *supra* note 19, at 5 (quoting *Mahnich v. S.S.S. Co.*, 321 U.S. 96, 112–13 (1944) (Roberts, J., dissenting)).

144. 2 AQUINAS, *supra* note 5, pt. I–II, q.97, art. 2, at 1023.

145. *Id.*

146. See Gary D. Finley, Note, *Landgell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating Moby-Dick*, 97 CORNELL L. REV. 159, 162–64, 168–69 (2011) (describing the history of Dean Langdell first implementing the casebook method at Harvard Law School in the late 19<sup>th</sup> century).

Law students and lawyers tend to focus on what a judge will do in fact, rather than what law is. One should only study how the law is applied after one has studied what the law is and ought to be. While reading judicial opinions has great educational merit, law students first need to learn the principles that should guide the law and on what the law itself is judged. It is rare for a Jurisprudence class to be offered at a law school, let alone required. The only class that discusses standards for law, Constitutional Law, is a mere recitation of Supreme Court opinions. The law as it stands in the United States lacks a rigorous philosophical examination, and Holmes' pragmatic approach of predicting how a case will resolve rules the day. The casebook method is a single example of Justice Holmes' influence on American law. The upside down view of the casebook method is consonant with Holmes' distrust of logic in law. St. Thomas' exposition of natural law provides a different way, one that encourages people and lawmakers to create just laws and expects judges to abide by the law and set legal maxims, instead of leaving the last word on the law to a few justices.

The detriments and cures of Holmes' philosophy cannot be discussed until more foundational issues are addressed. In *The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism*, John M. Breen and Lee J. Strang analyzed the twentieth century debate between natural lawyers and Legal Realists.<sup>147</sup> From the 1920s to the 1940s, the two groups produced many writings explaining their respective jurisprudences, including critiquing one another.<sup>148</sup> Natural lawyers, composed of Catholic legal scholars, argued the following:

- (1) the natural law—the basis of positive law—is neutral and independent;
- (2) the positive law should be judged based on its correspondence, or lack thereof, to the natural law;
- (3) the current American legal system, though flawed, was fundamentally sound;
- (4) although the law is not fully determinate, it is significantly so; and
- (5) judges should utilize natural law norms and prudence to decide, or as aids in deciding, underdetermined cases.<sup>149</sup>

Legal Realists, however, made little to no effort to respond to these charges.<sup>150</sup> Catholic scholars were only able to publish their works in Catholic law school journals, while the Realists had prestigious, widely circulated journals in which to publish.<sup>151</sup> During an academic dialogue, Walter Kennedy, a natural law scholar at Fordham, and Felix Cohen, a Legal Realist at Columbia, exchanged several articles published in their respective journals.<sup>152</sup> However, Cohen was

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147. Breen & Strang, *supra* note 4, at 1207–08.

148. *Id.* at 1217–56.

149. *Id.* at 1243.

150. *Id.* at 1251.

151. *Id.*

152. *Id.* at 1251–52.

able to publish his articles in both schools' journals, while Columbia rejected Kennedy's articles, giving his responses a smaller circulation in a less prestigious Catholic law journal.<sup>153</sup> Legal Realists did not take natural law to be a worthwhile legal philosophy, so they did not spend their energy responding to it.<sup>154</sup>

The American legal field is no more receptive to natural law today than it was eighty years ago. Justice Holmes' separation of law from morality and logic persists. There is a philosophical gulf that predisposes antagonism to the natural law that must be filled before Holmes' ideas can be properly remedied. In discussing the rejection of natural law scholarship in both American law and historical treatises on American jurisprudence, Breen and Strang provided three reasons for the animus against natural law in America: "(1) skepticism concerning natural law; (2) the confounding of natural law and religion; and (3) secularism and anti-Catholicism in American society and academic culture."<sup>155</sup>

Modernity is predisposed to disbelieve natural law because it rejects objective values. American legal scholars—and academia in general—have rejected a teleological perspective of human nature in favor of ethical relativism.<sup>156</sup> In other words, there is no objective value system of human behavior based on human reason's knowledge of nature; one cannot derive what *ought* to be from what *is*.<sup>157</sup> Because natural law is the marriage of reason and nature, it is automatically discredited as "pre-scientific" by modern legal scholars, closing off any potential debate.<sup>158</sup>

A hallmark of American law and society is the separation of church and state. Unfortunately, this doctrine is often interpreted as precluding religious beliefs from being codified. Religious pluralism in law means no religion in law. Another reason for the rejection of natural law in American law is that natural law is conflated as Catholic theology.<sup>159</sup> Academia usually views religious beliefs as "personal . . . subjective . . . and irrational."<sup>160</sup> To quote Breen and Strang: "Because the religious character of an idea is thought to disqualify it from consideration as a basis for law, the coupling of natural law with religion is a convenient way in which to dismiss a lengthy tradition of thought and inquiry with little effort."<sup>161</sup> Until American society and academia can see religion as a rational intellectual pursuit, natural law will continue to be regarded

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153. Breen & Strang, *supra* note 4, at 1252.

154. *Id.* at 1251.

155. *Id.* at 1271.

156. *Id.* at 1271–73.

157. *Id.*

158. *Id.* at 1272 (quoting JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 15 (1984)).

159. Breen & Strang, *supra* note 4, at 1275.

160. *Id.* at 1276.

161. *Id.* at 1277.

as a religious tenet that cannot be codified and imposed on a religiously pluralistic society.<sup>162</sup>

Finally, Breen and Strang forcefully pointed out that “anti-Catholicism is deeply rooted in the history of the nation.”<sup>163</sup> The United States was dominated by a Protestant culture before it was transformed into a secular one.<sup>164</sup> Both Protestantism and secularism are fundamentally opposed to Catholicism, and this antagonism has appeared in the form of social prejudice and legal bias throughout this country’s history.<sup>165</sup> Breen and Strang said that anti-Catholic bias is “concerned with the ideas associated with traditional Catholic moral teaching, especially as these ideas may influence both law and social practice.”<sup>166</sup> A distrust of the Catholic worldview is a nonstarter. There is a great need for Catholic intellectuals in all fields of society to boldly proclaim the beauty of the Catholic tradition and the good it can offer to society. Catholics must have a seat at the proverbial community and academic tables before they can effectively teach others about natural law.

#### IV. CONCLUSION

By now, the reader should have a firm grasp on the main tenets of Justice Holmes’ jurisprudence and Thomistic natural law. The reader should also see that the two are fundamentally opposed to one another. Justice Holmes was only influential because of his powerful rhetoric and progressive ideas. His jurisprudence justified the alienation of morality from American law. Once a people’s laws do not discriminate between virtues and vices, it doesn’t take long for the people to follow. Natural law—in the Thomistic tradition—understands human nature, and is therefore capable of framing a proper foundation for laws conducive to human flourishing. Justice is obtained by following the natural law, not by majoritarian rule.

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162. At this point, the reader might object that natural law must be inherently religious because this Comment argued that natural law can only be properly understood as being rooted in God’s reason. Breen and Strang dispel this objection:

It is worth noting, moreover, that such a capacious understanding of “religion” would not only consign the Declaration of Independence to the ranks of the religious, it would also relegate much of Western philosophy to the same status. Many philosophers—not only Aquinas, but Plato, Aristotle, Descartes, Leibniz, Spinoza, Pascal, among others—refer to God or conclude that God exists, not by invoking the privileged authority of some sacred text or revelation, but based on the exercise of human reason.

*Id.* at 1280.

163. *Id.* at 1282.

164. *Id.*

165. Breen & Strang, *supra* note 4, at 1282–1310.

166. *Id.* at 1298. Breen and Strang further explained:

[T]he mere act of opposing a given position that the Catholic Church happens to endorse . . . does not in and of itself constitute an act of anti-Catholic bias . . . . The specter of anti-Catholicism is present, however, when a person strategically invokes religion as a way of dismissing a point of view with which he or she disagrees.

*Id.* at 1299.

This Comment hopes to revive a serious consideration of Thomistic natural law in American law. Catholic judges, lawyers, and scholars need to embrace their intellectual heritage by synthesizing American law and natural law in scholarship and other materials. Catholic law schools, in particular, have a duty to lead this revival in producing natural law scholarship and teaching the next generation of lawyers the natural law. This Comment also hopes the Catholic University Law Review will regain its purpose, expounded by its founder Dean Brendan Brown in 1950, “not [to] be just another periodical, but rather the voice of The School of Natural Law Jurisprudence in America, scientifically and systematically appraising and evaluating current trends in the legal ordering of the United States.”<sup>167</sup>

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167. Brendan F. Brown, *Foreword*, 1 CATH. U. L. REV. xiv (1951). Dean Brown also said that a “major aim of the Review will be to combat secularism in the law.” *Id.*

