Preface

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Modern thought has always possessed as a distinctive characteristic a kind of self-referential quality. The ancients didn't ask what it meant to be “ancient” or inquire as to distinctively “ancient” problems. This is not only because they were first and so incapable of distinguishing between “ancient” and “modern,” although they were and they could not (not in the way we do, anyway). There is a directness about ancient thought that connects it to life itself. We moderns are accustomed to looking at life through the lens of a tradition and to distinguish ourselves from the past in the process of measuring both the past and ourselves. We interpret practice on the basis of theories that emerge from and against that tradition of thought. And the self-referential quality of modern thought is partly a function of the fact that the modern world has been so powerfully altered in practice precisely by modern thought. But not all of it, and not all of it to the same degree. In many respects theory and practice sit in ambiguous relation to one another.

This is as true in jurisprudence as in philosophy more generally. Bentham first distinguished between the student of jurisprudence as expositor and censor, and this in the service of a self-conscious and massively ambitious effort to modernize the law. It was Blackstone against whom Bentham framed his project, a project that was indeed the founding of modern analytic jurisprudence. This context is important to keep in mind when taking up Steven Smith's Law's Quandary. Law's Quandary has many virtues, not least its clear prose, lightly worn erudition, and wit; but also its posing for us as a central question of jurisprudence the gap between our theories and our practice in law. The contemporary philosophical book that Law's Quandary brings to mind immediately is Alasdair MacIntyre's now classic After Virtue. There MacIntyre argued powerfully that our moral language is incoherent precisely because in the transition to modernity what had been a

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coherent account of the moral life was rent asunder, leaving fragmentary survivals, none of which could stand on its own as a fully defensible explanation.

*Law's Quandary* can be read in some respects as exploring the state of jurisprudence within the conditions described by MacIntyre in *After Virtue*. In a sense, the book, notwithstanding some important differences, might, therefore, be expected to become known as the *After Virtue* of jurisprudence. At bottom, Smith’s argument is that the abandonment of what he calls the “classical” account of law, embodied in diverse thinkers including Aquinas and—importantly for the founders of the modern project, like Bentham—Blackstone, has left an “ontological gap” between how we treat law in practice and what we think it is using the language and concepts of modern philosophy and jurisprudence. One can say that the shift in our larger views about the world and human affairs related to the intellectual revolution of the Enlightenment and modern science have deprived us of the concepts which traditionally made practices that reach back into the premodern stage of our legal system intelligible. Smith’s conclusions, among the most important of which is an injunction to practice a kind of renewed Socratic humility in facing these perplexities, are less apocalyptic than MacIntyre’s, not least because of Smith’s observation that in our legal practices we have not followed suite with our professed academic convictions that abandon a metaphysics of law. A source of this relatively more hopeful quality of Professor Smith’s vision may be found in Professor Joseph Vining’s observation in his symposium essay below that, in contrast to the philosophy of a MacIntyre, which Vining would see as “unmoored to the assent of individuals,” “the force of law,” Smith’s specific concern, orients itself to “the continuous unfoldingness of things and the reality of the necessity of assent to characterizations of perception.” In contrast to philosophy, which “has been generated without any intrinsic connection to outcomes in the world or responsibility for outcomes,” Vining observes that law “proceeds from the human imagination and creativity” to be “brought to bear on a situation and the future emerging from it.”

Put another way, the concrete connectedness to human affairs that is definitive of legal thought, at least in the case of Professor Smith, may, in that very concreteness, be uniquely able to provide openings for postponing a kind of MacIntyrean Apocalyptic for measured present hope.

The symposium papers which follow, with Dean Wagner’s introduction, are the outcome of an extraordinary symposium on *Law's*...
Quandary that took place at the Catholic University of America on October 25, 2005. The symposium was sponsored by the Center for Law, Philosophy and Culture, and the Catholic University Law Review. This symposium was first conceived in conversations between my colleague in the Catholic University Columbus School of Law, William Wagner, and me, in which we explored the implications of Professor Smith’s book from our respective disciplines, philosophy, in my own case, and law, in Dean Wagner’s. In initiating those conversations, I had at first merely hoped to gain an elucidation of the significance of Law’s Quandary for my own study of current options in jurisprudence, but as our conversation proceeded it occurred to me that the topic was ripe for a larger discussion. Dean Wagner readily agreed and so began our joint effort toward the symposium, the fruits of which follow.

I know Dean Wagner joins me in expressing our gratitude to Professor Steven Smith for occasioning this collaboration which Dean Wagner and I have both found very rewarding, and which has further strengthened the ties between our University’s School of Philosophy and School of Law. We would like to thank President David M. O’Connell, C.M. for graciously agreeing to fund our project, the Board of Student Editors of the Catholic University Law Review who co-sponsored the symposium and have now so efficiently published these symposium proceedings, as well as our respective deans, Veryl V. Miles (Law) and Kurt Pritzl, O.P. (Philosophy), who have given us much encouragement and support in our endeavor.

As you consider the viewpoints on Professor Smith’s book that are expressed in the essays that follow, we hope that you find yourself drawn into a conversation transcending the particular issues of our symposium and stimulated to search out and contribute to a revival in the state of American discourse on basic questions in jurisprudence. Ours is not the only scheduled academic conference on Professor Smith’s book. Law’s Quandary has given a fresh jolt of energy to jurisprudential discussion in the United States, and we are pleased to hope that by your reading and thinking about the essays published here you may be encouraged to read the book itself and thus take a place in the important conversation it has initiated.