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LAW'S OWN ONTOLOGY
A COMMENT ON LAW'S QUANDARY

Joseph Vining[+]

This is the last sentence of Steven Smith's elegant book, *Law's Quandary*: "[I]n the meantime . . . we would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."[1]

Being taken to this in the end justifies a life of work in law, which today especially needs constant defense and justification. For some the highest reason and sufficient justification is working toward peace, simply peace among people and, now, peace between us and the sentient world beyond us and even the earth itself. Justice is its highest reward for others. But for many more than would admit it—I myself might say all—the deep reward, the justification, for working in law is in this last sentence, to be brought even against one's own resistance to the anteroom of what we now call "belief" and there, in the end, to a more confident sense of one's own substance and reality that everyone thirsts for in and out of law. The late poet Czeslaw Milosz, who struggled with his own beliefs throughout his life, liked to quote Pascal, that "to deny, to believe, and to doubt absolutely—this is for man what running is for a horse."[2] Smith's book runs like a horse.

It runs and takes us with it because there is such a voice in it, that brings us as readers closer to the subject of the search he undertakes, "performatively" as it were. Law, if it is law, is authoritative, and the authoritative is voice, voice heard. And the book takes us along so well through fields of denial, belief, and doubting because it has a clearly maintained structure that makes you want to read it through, in the way the very structure itself of a piece of music contributes to your continuing to listen.

At the beginning Smith sets out commonly shared ontologies, languages, or terms used in describing what is real in the world around us or in the universe, to which we have been exposed in the twentieth century and which anyone growing up in the twenty-first century inherits, and to which we necessarily turn in discussing and solving our problems

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1. STEVEN D. SMITH, LAW'S QUANDARY 179 (2004).

2. CZESLAW MILOSZ, *If Only This Could Be Said*, *in* TO BEGIN WHERE I AM 314, 314 (Bogdana Carpenter & Madeline G. Levine eds., 2001).

in making sense of the world and deciding what to do individually or jointly. There are three, the ontologies of mundane, everyday experience, of science including mathematics, and of religion. He calls them, nicely, "ontological lumberyards."

He then shows law, living, functioning, and inescapably there, but working in a way that cannot be understood or explained if its practitioners are in fact confining themselves to the first two of his ontological lumberyards, mundane everyday experience, and modern science. This brings him and us to the question of faith or belief in realities not found in either one.

I should like to comment on both these strengths of the book, its voice and its structure, and then turn briefly to the special problem of the "constructive author" of the law to which the last part of the book is devoted.

AUTHORITY

First, voice, and the connection between voice, the phenomenon of authority, and the existence of law. The book's initial and continuing question, obviously felt but sometimes jauntily put as from a jester in the corner, is what is "the law" to which there is such constant reference and appeal? Is it something real, in and of itself? Does it exist, and if so how and in what way? All act as if it does, really does. But is there more than "as if" which is a pretense?—so that, to quote Smith on page 80, "the law is a sort of large-scale conspiracy to defraud the public and to preserve for the legal profession power that the public would not be willing to grant if it understood what is really going on"?

A straightforward answer to this straightforward question is that "the law" exists, it is real, it has effects on us and the world, if and when it is heard and attended to in all the swirl of voices in our heads including what we initially think of as our own. We regularly say that something in the legal world has been reduced to a "dead letter." We regularly say something in the legal world has become "fictional." But I think we do not say there is nothing, ever, that raises the thought of willing obedience or good faith response.

So I might suggest that when what is spoken of as "the law" has authority, it exists in the human world, is really there, and when it has no authority and is either ignored with a "So what, catch me if you can," or evaded through imagination, cleverness, and application, it is dead and with us only as the dead are. The question of "the reality of the law" and whether the law actually has a name when someone purports to speak "in the name of the law" can alternatively be put as the question, "What is the reality of authority, the reality of willing obedience?" Smith's discussion is often explicit in this regard and bears emphasizing, to bring

out of the shadows what is implicit for purposes of further discussion the book will generate. There is for instance a phrase that is repeated in the book, "how the law actually works." If we ask what does "work" mean in "how the law actually works," the answer would not be a description of the details of the processes of legal proceedings and legal institutions, but the bringing about of good-faith joint effort. That is when law "works."

The reality of authority is not force, which would blend into a scientific ontology. I or others who say "it is not force" do not need, I think, to prove that force is ultimately inadequate. The unfoldingness and unpredictability of human life is enough to counter the contrary, that "force alone is real." What allows not only any one of us but humanity itself to navigate the material world is creativity, individual, then joint, then individual again. Authority unleashes creativity and pursuit of a purpose that is not just an individual purpose and that takes more than an individual arm and more than any merely calculating mind to achieve. We can all be confident of this, certainly all of us in law, even though so many who are the flower of contemporary university training devote their lives to trying to prove that a merely calculating mind can reach all there is or can be.

References to authority run through *Law's Quandary*. Authority makes an appearance on page 60, is taken up again in discussion of legal method on page 95 and again in the discussion of constructed authors on page 129, the phrase there being "authoritative guidance." It is inattention to the question of authority that makes what Smith calls "other paradigms" after the "classical" stumble as they have been advanced one by one during the twentieth century—legal "realism" (the opposite, we can note, of mathematical "realism," which is Platonic), or legal "positivism" sparked by a quasi-scientific and literalist view of language, or "law and policy" including economics, or "law and philosophy." On page 151, through his discussion of baseball and chess, Smith points out what those who have an impression of law really being rules (like the rules of games, or of arithmetic) do not immediately see, their own reliance on authority, and on the method used to reach it and the presuppositions of that method, as they go about working on law's "substantive content" and saying what they think the law says. The absence of authority is why, on pages 168-69, Smith finds Platonism as an ontological resource insufficient for law. Mathematical objects, however real and there to be discovered, do not command, especially not action or restraint of action.

The question of authority, and of resistance and evasion, shadows any discussion of law. Authority is surely also a problem.[3] Understanding it and its place and how it enters is perhaps more difficult today than in the past, though any sense that this is the case may only be a reflection of the quandary Smith presents. But foregrounding it even as a problem helps open law's own ontological contributions to view.

LAW'S ONTOLOGY

My second comment is on the structure of the book. It is very simply that, in the book, law itself is not among the modern ontological lumberyards Smith describes at the beginning, the mundane, the scientific, and the religious. Those in law, practicing law or speaking for or about law, are presented in the book as looking out from law to what ontological supplies there are in the lumberyards available. The limitations or absences in the lumberyards marked ordinary life and modern science produce the "ontological gap" in which law finds itself—a memorable and effective phrase—and bring us to the edge of the third "ontological family" those in law might look out to, the resources of religious thought, belief, imagination, and experience.

This structure, which is a process of elimination, is a strength of the book and part of its persuasive power. It is very different from the form I adopted in a book of mine, that Smith actually describes on page 171, with some amusement, as a "self-consciously meandering method."[4] But certainly if you do think of law as empty or derivative, or as a set of rules, a game, or, worse, as an opiate or a conspiracy, then presenting to you at the beginning the thought that the legal mind is something to be reckoned with on its own terms would be unwise. It would be a drag on any hope that you will stay with the argument to the end. As with any injured person to whose inner resources one wants to appeal, gentling you along is the effective course.

Now such characterizations of legal thought, empty in itself, derivative, are heavily concentrated in academic writing, as Smith notes frequently. When Smith or others of us, myself included, use the pronoun "we" or "us" in discussing law and its problems we are always in danger of conflating academe with the wider world. There is a picture of the world and of ourselves taught by so many, implicitly and explicitly (and not only in the physical and social sciences), that it might be broadbrushed as "the academic picture." It is definite enough. The teaching, with

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3. *See, e.g.*, AFTER AUTHORITY (Patrick McKinley Brennan ed., forthcoming).

4. I defended it, in "A Note on Form" at the end, as presenting the legal form of thought in the only way experience so connected to action, and so connected to an individual's own identity in the world, would not be lost in the presentation. *See* JOSEPH VINING, FROM NEWTON'S SLEEP 357 (1995).

examinations of course on how well it can be reproduced, is that the world we live in is entirely a world of systems and processes, and that we ourselves are only expressions of the interaction between the systems within us and the systems around us. "Complex adaptive systems" we are sometimes called, or "emergent properties" of systems, who are to be seen in turn as parts of higher order systems. Though the scientific community, in which this picture takes its strongest and most explicit form, does not like seeing itself and the cumulative insights of scientific investigation in these terms, the picture, that "this is all there is," we find all around us in academic life presented as the objective truth that ultimately all will come to embrace.

But law is not academic. The university is not its home. Law is in the wider world and is pervasive there, in language, thought, and action. Every order given in a corporation, and every defense or challenge to it, every exercise of authority based on the law of property, and every defense or challenge to it, every encounter with an administrative agency, takes what we might think of as mundane or ordinary talk, decision, and action into the world of law, into law's language, and into the legal form of thought. Everyone is imbued with it.

Noting the danger of conflating academe with the wider world is not to deny the wisdom of the structure Smith chose for the book. But if you begin to contemplate law as itself an ontological resource, in addition to the mundane, the scientific or mathematical, and the religious, the consequence of the book's structure becomes clear—our looking at the end, by a process of elimination, only to the ontology of religious life.

Of course in pointing to law's home in the wider world and to how much a turn to law and the legal form of thought is part of ordinary life, I raise the possibility that instead of being left at the edge of religious life looking forward, we might look back. The legal form of thought might be merged into ordinary life in our understanding of it, and the ontology of it put in the family dynasty Smith designates as the mundane. But vast numbers are also imbued with thought and perception we call religious. When we speak of the religious we are not looking to the mentality of a limited professional group. We are talking of the ordinary. But we do not for that reason collapse the religious into the mundane. Instead we tend to see, with Cardinal Newman, the extraordinariness of the ordinary. In something of the same way the ontology of law goes beyond that of ordinary life, and I think that is Smith's view here also.

So let us look forward to the resources or "lumberyard" of religious life, then to the remaining of Smith's alternatives, the scientific, and then to what can be said for looking to law itself.

LAW AND THE COMMITMENTS OF RELIGION

Smith begins with an overarching sense of law, "classical" or "traditional," preceding the developments of the twentieth century. One view, which he outlines, is that this overarching sense depended upon and linked human law to divine law with divine judgment and sanction.[5] This is a conclusion about the past, especially the just-pre-twentieth century past, that I myself have to be wrestled toward. I recognize that I may mix current perception, including my own, with what predecessors actually thought a century ago, and that establishing and understanding the substance of their thought is something intellectual historians trained as such offer to do for us. But intellectual history is not the same as lawyers looking back, if only because of the disengagement from idea or belief intellectual history displays and perhaps must display.

Rather than depending on and linking to divine law and judgment, the "classical account," which reappears at the end of *Law's Quandary* as the "neoclassical," may present human law as having affinities with or sisterly resemblances to the practices, language, and self-reflections of religious life. They can remain affinities or sisterly resemblances however religious one's sense of the origins of the capacities that permit us to do what we do, work the way we do. "The law" and the persons that populate the world of law may be this side of the Divine though irreducible to individual human beings. The caring mind that is presupposed and sought in seeking to know or speak for law need not be, indeed cannot be a mind that comprehends the universe. The value of the individual in law—or the push for it, or the presumption of it—does lose force without a warrant that transcends anything human, to which the twentieth century is a witness. But in general and as an "overarching" matter, I have sought and I wonder whether Smith and others do not also seek an understanding of what an inclusive "we" do and think in law that someone without or before an ultimate commitment to the Divine could open herself or himself to.

Such a commitment is I think a very individual matter, quite apart from the size of the gap there may be, before such a commitment, between one's actual faith and what one says or says to oneself one

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5. Smith describes this view as seeing in the pre-twentieth century understanding a "theistically oriented metaphysics positing God as a sort of transcendent Legislator and the hidden source even of human law." As examples he refers to Fortesque in the fifteenth century ("'all laws that are promulgated by man are decreed by God'") and Blackstone in the eighteenth ("'This law of nature, . . . being . . . dictated by God himself, . . . such [human laws] as are valid derive all their force, and all their authority, mediately or immediately, from this original.'"). SMITH, *supra* note 1, at 47 (quoting SIR JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND 7 (Shelley Lockwood ed., 1997) (1471), and WILLIAM BLACKSTONE, 1 COMMENTARIES *41).

believes. Working with and in law, dealing constantly with suffering, purpose, authority, and authenticity, may open one to faith that is larger and deeper than the faith practiced in law. Working naturally with the personal beyond and behind any individual or individual life may make it only natural to look beyond that too. But, again, it is the individual that looks and says "Yes," and this is not a matter of perception only but of orientation of life and acceptance of demands over and above those of law.

There is, too, a question underlying my own sense that in the anteroom of religious life to which Smith brings us there is ontological lumber of law's own—a question whether translation of it into religious terms can sit well with faith in our freedom and acceptance of our own responsibility for what we do and fail to do. The longer the perspective, what we fail to do seems the more important; and the very contemplation in law of "inaction," "omission," "negligence," and "criminal negligence" is connected to the real possibility of initiative instead of mere response, connected to purpose that may be in law's own lumberyard and to living value (though now "lumber" has the disadvantage of its deadness, to be put beside its evocatory advantage in pointing to what we construct and create). And what we do *not* fail to do, what we do manage, is connected to the question of authority shadowing all work in law, authority there in its degrees making possible joint initiative and joint purpose, and connected thus to the responsibility we ourselves bear as individuals when we undertake to speak and act in a position of authority.

Even the fundamental values that animate initiative and by which responsibility is measured, that are real in some sense in ordinary life and real in some sense in law (and not real at all in "scientific" ontology), do not seem to me best seen as drawing their reality directly from what is beyond the anteroom of religious faith. I think it is fair to say, just as a matter of observation, that they have something like life themselves. Not only ordinary talk but the considered language of law and lawyers speaks of "respect" for a value, "regard" for a value, no-respect and disregard—language used when an individual or an animal is concerned, a living sentient being. "Life," "living," "to be alive," does more than arguably have for us an element of the transcendental. Nonetheless it is our work that keeps living value alive, in the same way that it is our work that keeps a person we hear and perceive real for us and alive to us.

LAW AND ONTOLOGICAL STATEMENTS IN SCIENCE

When we turn to the remaining ontological family in *Law's Quandary*, the scientific and mathematical, we see how overt the ontological is all around us in contemporary scientific and mathematical description and discussion and how justified Smith is in taking the bold step of speaking

openly here about "reality." Ontological claims are signaled generally by the verbs "is" and "exists" and of course by the adverb "really." They may be negative or positive. For instance, a prominent philosopher of science writing recently on "mathematical infinity" for general readers[6] speaks of "serious doubts about whether it really exists," of his personally not accepting that mathematical procedures "give rise to actual infinities," and of the paradoxes that "seem[] to follow once such completed infinities were thought of as real." He goes on to ask, "[H]ow can we seriously suppose that infinite sets really exist?" Or a prominent physicist, pleading recently to the general reader for greater understanding and acceptance of "indirect scientific evidence," presents "field theory" as "the theory I use that . . . describes objects existing throughout space that create and destroy particles." She speaks of "observing" as "involving a train of theoretical logic by which we can interpret what is 'seen'" and, with regard to space and the dimensions of space, "establish the existence of extra dimensions." In the end she turns to a form of majority rule, "the bulk of the scientific community" determining the "true story," but that her own positive claims are "ontological" in character is evident.[7] "Do I believe in extra dimensions?" she writes elsewhere. "I confess I do. . . . Sometimes . . . an idea seems like it must contain a germ of truth. . . . I suddenly realized that I really believed that some form of extra dimensions must exist."[8]

Against this background of overt ontology we can slip into law's with an example that I think cuts across the scientific, the legal, and the religious. A *New York Times* op-ed comment[9] on the recent documentary on the Antarctic emperor penguin, *March of the Penguins*, argued with approval that we have become more comfortable calling what we see there "love." The comment was of the kind that proposes easing or eliminating the line between human beings and animals by pulling us across it toward them, rather than them across it toward us. "I've long known the story of the emperor penguins," the commentator says, "having told it to generations of biology students as a textbook example of adaptation . . . . In a broad physiological sense, we are practically identical not only with other mammals but also with birds . . . except for differences in detail of particular design specifications."

Then comes the ontological statement of interest. "Functionally," he says, "I suspect love is an often temporary chemical imbalance of the

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6. David Papineau, *Room for One More*, N.Y. TIMES BOOK REV., Nov. 16, 2003, at 54 (reviewing DAVID FOSTER WALLACE, EVERYTHING AND MORE: A COMPACT HISTORY OF ∞ (2005)).

7. *See* Lisa Randall, Op-Ed, *Dangling Particles*, N.Y. TIMES, Sept. 18, 2005, at 13.

8. LISA RANDALL, WARPED PASSAGES 3 (2005).

9. Bernd Heinrich, Op-Ed, *Talk to the Animals*, N.Y. TIMES, Aug. 26, 2005, at A19.

brain induced by sensory stimuli that causes us to maintain focus on something that carries an adaptive agenda." The ontological claim is made by the "is" in "love is . . . ." It is modified slightly by his term "functionally," but the point of his commentary is to urge us, the "us" that appears in his definition of love, not to be shy about using the word "love" for what moves the penguin—what moves the penguin need be no different from what moves us, an often temporary chemical imbalance of the brain that is adaptive.

This is a textbook example of ontology that wishes to be thought scientific, chosen for wide publication. To reflect here for a moment on how law might approach this statement and claim may bring out aspects of what I would want to call law's own ontology.

What would the legal mind do with a statement like this, in thinking about coming to some conclusion about love? In law we are all witnesses, as I think we also are very much in personal life. When presented in law with this sentence about love, there would be interest in what this same individual said at home, what he meant when heard to say "I *love* you" to his wife, child, friend, or sister. Putting the two statements together, the one made at home and the one made professionally, as would be done in cross-examination on a witness stand, a lawyer or jury would conclude either that the word "love" in the one statement, made in class when teaching the penguin's love as a textbook example of a system operating in an adaptive way, means something different from "love" in the other statement at home; or, if the two words are meant to convey the same, that he doesn't believe what he is saying in class, in which case it would not affect thinking about love, any more than any witness's statement shown on cross-examination to be one in which he does not believe is taken seriously.[10]

Law does not have a special sense of love, though if law did, it would be expressed in John Noonan's very beautiful response to Richard Posner's view of moral and political theory.[11] But law does not stop with a scientific sense of love, if this teaching is in any way an example of it. Law could not stop with the scientific, not because law is intrinsically ordinary on the one hand or religious on the other, but because of law's own various underlying commitments that can be fairly called ontological: commitment to looking to all the evidence in a way neither

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10. As for the thought he might consistently conceive of love and himself this latter way, law would hear him speaking in asking for trust and authority as a teacher, and speaking also in what he does, in his gestures and in his self-restraint toward those he says he loves.

11. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998); *see also* MICHAEL J. PERRY, LOVE AND POWER (1991) (drawing its title from Noonan's work); *cf.* VINING, *supra* note 4, at 264-65.

the mundane nor the scientific does; commitment to the presence of persons whose statements and actions may be spread over time both within and beyond an individual span of life; commitment to the possibility of authenticity in those statements; commitment to the sense of language Smith notes, that linguistic meaning is the meaning of a person, always, whatever we pretend—is always metaphorical if you will; and finally, commitment to a first fact, basic, on which other conclusions are built, the fact we are more than one, and, when one of us speaks, about anything, he or she is only one.

It is true that many call *love* the something more in the very structure of the universe than form (that merely is). I have mentioned John Noonan in law. This something more—call it love—makes possible a human mind that cares. It is necessary to human authority and authenticity toward which lawyers work, as necessary to lawyers' work as oxygen. Since it has no place in the ontological family of science and mathematics (as oxygen has), its reality for law, lawyers, and legal thought may be drawn from the "resources" of the other ontological family that is not mundane, linking law directly in the most basic way to what is beyond both law and science. If the "individual" and "life," which we noted before, can be thought to pass back and forth through the windows of the anteroom where lawyers work, love may pass through the walls themselves. Such a basic linkage may indeed be what Smith has in mind to suggest in discussing the "classical account" at the beginning of the book, and in his ending.

But to return to the structure of the book and its three "ontological lumberyards," law can still be viewed as having a lumberyard distinctively legal. All that is necessary to law is not in law's own lumberyard. All that is necessary to science is not in science's own. Perhaps what is most necessary to scientific work, individual freedom, even creativity and trust, would be hard to find "existing" there. But science remains distinct, as can law. The human individual remains distinct, one's reality one's own, even though one's own resources of mind and spirit are manifestly inadequate.

THE "ONTOLOGICAL INVENTORY" OF LAW

Pulling ontological claims generally into the open, as Smith does, will I think bring the "ontological inventory" of law into the open over time. Authority is there, as a reality. Purpose is there, and inquiry into purpose, significant against the background of current presentations of scientific method in ontological terms—Jacques Monod's is the classic statement of this kind, that postulates of purpose anywhere in nature, which would include us, "exist at odds with objective knowledge, face

away from truth, and are strangers and fundamentally *hostile* to science."[12]

The legal mind has its own sense of time, very much associated with supra-individual persons in law, and with the connection of any conclusion in law to action, which follows acknowledgement of authority. Time is the realest thing in the world, we may be inclined to think and continue to think despite hearing some in physics happily making the ontological statement that it can be shown to be only an illusion.[13] But the definition or sense of this "it" in one context—ordinary individual life or the astronomical or the religious or the musical—may not serve at all well in another, even though carried from context to context is the experience of reaching to express the same thing, "time." Law is one of these contexts in and of itself.

As an example, the mundane and apparently clear line between past and future is does not hold in law. No present day Supreme Court that says in a perfectly natural way "in 1895 we rejected this argument" is living in time as experienced by individuals—the Court of Justices long dead is still "this Court." No endeavor is confined to the clock that has such difficulty, seen especially in administrative and constitutional law, in distinguishing past and future, past or "judicial" facts and future or "legislative" facts, the ex post facto and the prospective. What must be set aside as subject only to reflection or savoring with delight or regret (the "past," which is in repose) is not determined in law by the "passing" of time, scientific or ordinary. What is or is not put behind is a matter of some choice in law; and whether decisions and events can be remedially cancelled, or replayed, so that they are really as if they never were, and do not control individual expectations, is not argued or determined by invoking usual categories of time past, present, and future. Past, present, and future are terms that in law mostly express conclusions about where and how far to direct the force of law—that peculiar force in the world beyond the weak and the strong.

Perhaps most irreplaceably, the individual lives in law's ontological inventory, the human individual and, to an increasing degree, the individual animal. Law's commitment to the fact that we are more than one is fundamental, not to be shut out of thought methodologically or ontologically, and I will refer here to James Boyd White's work.[14] This

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12. JACQUES MONOD, CHANCE AND NECESSITY 171 (Austryn Wainhouse trans., Vintage Books ed. 1972) (1971).

13. *E.g.*, Dennis Overbye, *String Theory, at 20, Explains It All (or Not)*, N.Y. TIMES, Dec. 7, 2004, at F1 (discussing the view of Dr. Edward Witten, Institute for Advanced Study, Princeton University).

14. *E.g.*, JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (forthcoming 2006).

can be said noting, all the while, that violent imposition of pure will occurs through legal processes, and that power is exercised in the name of the law by those who can secure for the moment some extension of their individual strength. Oppression, deadening, blind grinding up of lives, success of efforts to use and manipulate through the processes of law, all can be admitted—they can hardly be denied. But these are what "the law," ontologically speaking, sets its face against.[15] So often these are just what legal argument is about. Law contains the terms of its own most powerful and effective criticism, which look to, maintain, and perhaps it could be said almost give us the individual, together with the person, and purpose, and living value. Disposing of the disputes of the day and bringing closure to them before a new day begins disappoints the hopes of individuals, to be sure, and that closure is done with force if necessary. But even if closure is forced, attention to and concern for the disappointed individual can still mark the decision and fuel imagining new ways to respond in the future. The strength of the individual in legal thought is not unlike the strength of natural selection in biological thought, or of force in physics.

We can go so far as "reason" itself, on which Smith has written eloquently here and elsewhere.[16] Reasoning or the rational has for most an ontological aspect. Its presence is often thought to differentiate the human from the animal. Rationality might be viewed as everywhere and essentially just consciously staying open to the evidence and fitting means to ends. But reasoning "scientific" or "logical" often involves capturing a perception or phenomenon, "time" for instance, or "love," or "life," so that it can be boxed and manipulated, and then unitizing it so that it can be put with other "like" phenomena in a class or group that can also be manipulated. Any kind of probability or statistics involves both these, capture and unitizing. They seem to be necessary whenever seeing something as a system or part of a system, which may in turn be necessary for manipulation.

Legal thought eventually departs from this. Capturing eliminates the continuous unfoldingness of things and the reality of the necessity of assent to characterizations of perception, unitizing eliminates the reality of individuality—both realities, again, being part of the "ontological inventory" of law. The signal of a move from the rational and reasoning in law to the rational and reasoning as it proceeds in other fields often is substitution of an abstract symbol for a word, phrase, or sentence of human language. This is not to say that capturing and unitizing are not

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15. *See* Joseph Vining, *The Cosmological Question: A Response to Milner S. Ball's* All the Company of Heaven, 94 MICH. L. REV. 2024 (1996).

16. *E.g.*, Steven D. Smith, *Recovering (From) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1282-1306 (2004).

useful in human affairs. But it may be to say that the usefulness in human affairs of such reasoning extends only to the point where the force of law, that proceeds from human imagination and creativity, is brought to bear on a situation and the future emerging from it. We can note that philosophy has some of law's rationality, since the practice of philosophy is often discussion of similar questions in something of the same way but using a different set of central texts. But there is to be seen in philosophy far more a floating logic, unmoored to the assent of individuals or the expression of a person in whom individuals are joined, and, to go with it, a floating meaning for propositions, unconnected to any person, that flirts with literalness in language; and this may be because focal texts organizing discussion have been generated without any intrinsic connection to outcomes in the world or responsibility for outcomes.

FILLING THE "ONTOLOGICAL GAP"

As Smith proceeds in his discussion, I think he cannot help at least starting to fill the "ontological gap" in which law lives with items from law's own ontological inventory, point by point, item by item. But there is a prior matter to be addressed in connection with what he calls "reigning" ontological orthodoxies. That is a claim made for some of them to totality, a quality recalling the totalitarian cosmologies in twentieth century social and political thought—the absence of the individual in them being the most evident connection. Smith is very much addressing this also in the structure of *Law's Quandary*. The process of elimination in the book does away with their "dynastic" aspect, to use his nice word, not the ontological families themselves. One can still hear the Big Bang, love one's primate cousins as cousins, and fly in airplanes with confidence after Smith is through.

Totality is the first claim to be addressed for purposes just of understanding, which I think is Smith's first object and is reflected in his title word "Quandary." Just understanding, to help with a state of confusion, perplexity, oddness—pressing more and more, he notes, as early twentieth-century confidence faded that law's difference would fade. To go perhaps one step beyond, the twentieth century that we can now look back on was a century in which, far from merely persisting, the legal mind demonstrated new strength, protecting against the seduction of totalities of all kinds that emerged and were tried, and then, finally, protecting against the individual isolation and radical ignorance celebrated in the short-lived academic orthodoxy of postmodernism at the century's end.

Understanding, however, is only the first of Smith's purposes. The situation he is offering to sort out and help with is not psychological only,

most certainly not academic only. In fact, within the family or dynasty Smith calls "scientific" there is competition for a total occupation of the human mind, "realist" mathematicians competing with some schools of biologists and some schools of physicists; some schools of physicists competing with some schools of biologists; all of them set against historicists in the social sciences—history of science, cultural history, sociology and anthropology. A lawyer might leave them to work it out over time and move themselves away from each wanting all, to the point where they acknowledge other ontological worlds than their own, had the twentieth century not shown the stakes to be so high in human life and suffering if any one of these total claims should come to occupy the field, which is the human mind. Where Smith leaves us is a safer place than we were before.

THE NATURALNESS OF THE CONSTRUCTED AUTHOR

Let me move finally from the question whether law has an "ontological family" of its own to the question that occupies almost a third of the book, the question of the "constructed author." My comment here is that the phrase "constructed author" should not be taken to suggest artificiality as opposed to, shall we say, "naturalness." Judges listening for the voice of the law, for which or whom they will speak, do what we all do when we listen to an individual speak over time and sort out what to take seriously and what not, how to read words as used, and what to treat as a mistake or as spoken when the individual is "not himself."[17] That "himself" is a perception of our own, built up over time. Being our own, and ourselves having done the work of sorting to build it up, it is something of a creation of our own. But we would not do the work without faith or belief in the fact that there is a person to be heard that we are trying to hear. I think again and again how well Wordsworth presented "all the mighty world [o]f eye and ear," with which he unabashedly said he was in love: "[o]f eye and ear," he said, "both what they half-create, [a]nd what perceive."[18] We do half-create, but only half-create—what we see and hear and love is real. We sort and choose and decide, within the structure of a sentence, within the confines of a text, in

17. How do you read Smith, for example, in the last sentence of Part II of the book, on page 96: "Thus far, it seems, the suspicion of low-talk as nonsense stands unrebutted"? And I can hope readers' eyes blur as a quotation from me passes before them, "'[W]hat are it and our own but points to a larger mind[?]'" with missing letters sliding in so that "points" becomes "pointers." SMITH, *supra* note 1, at 173 (quoting VINING, *supra* note 4, at 220).

18. WILLIAM WORDSWORTH, *Lines Written a Few Miles Above Tintern Abbey*, *in* WILLIAM WORDSWORTH: THE MAJOR WORKS 131, 134 (Stephen Gill ed., rev. ed. 2000).

a conversation extending over a lifetime. We do this too in the universe of texts we admit into "legislation" or "precedent."

Moreover, the very meaning of the words being read is constructed at the same time the author is constructed, both of them in tandem, and there is surely no one to say what the necessary meaning of a word is, no one anywhere with authority of that kind: the meaning given and taken may be almost new. The difference between the experience of listening to a person to whom we give an individual name, and the equally natural experience of listening to the persons that populate law and are not enfleshed, does not lie in what is heard in the mind. The persons in law to whom we give names like "The Court" or "Congress" or "The Commission" speak through us when we speak for them, and the moment any of us speaks for such a person, the statement is taken up by others to be sorted, interpreted, discarded, and otherwise decided about in a way that is not very different from what others do with what we say on our own behalf. How far we can go toward the existence of such persons equivalent to the existence of individual persons I do not know.[19] But we cannot ignore how far we do go, how virtually all in law actually act and speak today, and it is one of the achievements of *Law's Quandary* to make us look at it.

There are special difficulties and differences when we move to multi-authored legal texts, or texts that are reauthored when put to a vote insofar as the understanding of the voter is thought to be a source of the text's meaning. (I say "insofar" because in perhaps all cases of voting the body within which votes are cast, and in whose name these words and sentences are uttered, is itself read as speaking not for itself but for another.) Smith surveys the difficulties without resolution. The marks on paper that we call legislation are read, and not as products of the forces that made them in the legislative machinery. They are read in the closest way. The mere fact of such close reading can be taken as evidence of belief we are not ready to admit, or, as I have suggested elsewhere,[20] it may be a necessary and even desirable playing of a trick upon ourselves, tearing arbitrary holes in what would otherwise be too confining a structure constantly being built up. A generation ago Grant Gilmore and Guido Calabresi after him[21] proposed that as a matter of empirical observation, lawyers and courts approach the extensive

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19. A helpful exploration can be found in W. M. GELDART, LEGAL PERSONALITY (1924).

20. *See* JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 110-41 (1986); Joseph Vining, *Generalization in Interpretive Theory*, REPRESENTATIONS, Spring 1990, at 1, *reprinted in* LAW AND THE ORDER OF CULTURE 1 (Robert Post ed., 1991).

21. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); GRANT GILMORE, THE AGES OF AMERICAN LAW 95-98 (1977).

modern landscape of legislative materials rather as they approach common law materials. It does seem that in any particular instance of legislation it is possible for a spirit to grip a fractured group and lead them toward a joint expression. We see such a spirit constantly searched for in holding corporate bodies genuinely responsible for *disregard* of values expressed and protected in law, the *Andersen*[22] case being only the most recent.

We go back to the actual ontology of law and to the question of entertaining the reality of inspiration, knitting things together over time in ways we are surprised by and happy to accept. "Inspiration," that Smith takes up in his discussion of Socrates at the very end, is one of the great questions and a live issue in arguments about the status of jointly authored texts and texts reauthored through voting on them. "Inspiration" may be there in the inventory of legal ontology. Certainly it has no place in systems of thought that deny or have no place for spirit. Inspiration, spirit, and, I think, the truly creative are bound together. All are there, or none are there, and as Smith helps us see, none are there in those forms of thought that are so widely imagined to be the ultimate end of thinking itself.

Law's Quandary is in part life's quandary. We hardly know what we ourselves think, individually, in advance of trying to speak or write. We discover it. We should not be surprised that we hardly know what we think about the nature of law, so necessary to ordinary life, necessary even to science. We discover that too, and we work on it, and most significantly, none of us has much time to do it. We enter into law, and we leave as others are taking it up. But occasionally we can jump ahead of our own work and discovery, reading a book as a revelation—those are books we keep in a special place, and everyone has his or her own collection. Steven Smith's book will be entering many of those collections. And then too, always in the background of speaking about law is hearing and speaking for law, which we are also doing, and the one does blend with the other. The very capacity to read this book together, with varying responses we put to one another, is a demonstration of that basic ontological faith, law's faith, that beyond the individual speaking who is only one speaking, there is a "we," in reality, with whom we individually are identified during our time in the most wonderful way, never starting from scratch, and whom we wish well in the undertaking to understand and protect that will go on beyond our time.

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22. Arthur Andersen LLP v. United States, 125 S. Ct. 2129 (2005).