2009

The Resilience of Law

Joseph Vining
University of Michigan Law School

Publication Information & Recommended Citation

Vining, Joseph. "The Resilience of Law." In Law and Democracy in the Empire of Force, edited by H. J. Powell and J. B. White, 151-71. Ann Arbor, Mich.: University of Michigan Press, 2009.

The Resilience of Law

Joseph Vining

One of the striking developments in academic law in the past half century is the reconception of law as one of the social sciences. The idea at work in this movement, as Joseph Vining says in this essay, is not that the law should use the findings of other disciplines for its own purposes and in its own way, but that in some deep way law itself—legal thinking, legal life—can and ought to proceed on the premises of social science, indeed of science itself. This is in one sense obviously impossible: a scientific rule is a prediction of future events based upon prior experience; a legal rule is the expression of a mind speaking to other minds—to other persons—seeking to affect their behavior by shaping their sense of the meaning as well as the consequences of what they do. Law works by an appeal from mind to mind.

Yet in academic law, as in the culture more generally, the image of science as the paradigm of thought, including legal thought, has enormous presence and force. The inherent dehumanization of this kind of thought—the erasure of the human person, the voice, the mind, the elimination of human value and hope—threatens both law and democracy at their core. Vining's deep claim is that even in the face of these forces of dehumanization and trivialization law retains a life and vigor, a resilience, upon which we can found our hopes and seek to build.

After my first year in law school and a summer at a New York law firm, which I loved, I was home for a bit before returning to my second year. It was 1962. My father, an economist who had studied under Frank Knight and Oskar Lange at Chicago in the 1940s, came into my room with the manuscript of a book he was working on. Its title was *On Appraising the Performance of an Economic System: What an Economic System Is, and the Norms Implied in Observers' Adverse Reactions to the Outcome of Its Working.* This was going to be my legacy, he said. If he did not finish it, he hoped I would.

The book's argument was that an economic system was in fact a sys-

tem of legislated rules, within the bounds of which economic actors made their decisions, responding of course to incentives and disincentives and others' actions under these conditions. It was a "mechanism," the behavior of which, in the sense of outcomes of its overall action over time, was to be described statistically. What the economist participating in the legislative process was to do was to determine and set out for legislators considering a change in a rule what the statistical consequence of the change would be, with respect to one or another parameter such as income inequality or employment in which legislators were interested because they were dissatisfied. For clarity he proposed a notation: "The modifiable operating mechanism, the thing for which *economic system* is the name . . . , I shall denote by {θ,S}." The *S* represented the collection of statistical mechanisms that depended upon the θ, and "the θ," he said, "is to represent a set of constraining and prescriptive rules," that part of the thing that is "directly" modifiable, a "system" of "statutory law and administrative rule." To be useful or even relevant, economists were to start with the set of rules that could be so denoted by the abstract symbol θ.

I read into the manuscript and eventually came to my father and said I could not help him. I could not help him because my sense of a "law" or a collection of "laws" was so very different. Law, I had already seen, was expressed in words spoken by responsible human beings to one another, who were listening to one another, and it was reexpressed and respoken over time. The meaning and effect of a "piece" of human law in the world, its very existence beyond the shadow existence a "dead letter" has, depended upon its authority, which came from constant mutual work with it. Laws might have systematic qualities but law was alive in a way rules that make a system are not. Law could die as well as live. There is a world of difference, I might have said if I had been older, between the authoritative and the authoritarian.

My father took the manuscript away. The problem I had was too central, the difference between us unbridgeable. He published the book twenty years later,[1] two years before I published *The Authoritative and the Authoritarian,*[2] and in one of those strange encounters of life, indeed as something of a sign of what has happened, his editor at Cambridge University Press came to where I was working, to head up the University of Michigan Press.

The gulf between human law and rules that can be represented by an abstract symbol remains as large today. My father's work was a chapter in

the history of those who were involved in economics waking up to law, which was then in time followed by those in law waking up to economics. If they were academic lawyers—rather than practitioners, judges, or prosecutors and attorneys general carrying on the everyday work of law—larger and larger numbers of them entered a period of trying to accede to the claims of economics upon our thought, and beyond economics, the claims of social science, and beyond social science, the claims of scientific thought generally. The last were claims to a total occupation of the mind that grew so much over this same period, connected, I think, to twentieth-century experimentation with totalisms of various other kinds.

James Buchanan, whose *Calculus of Consent*[3] appeared in 1962, the same year as my conversation with my father, and who received the 1986 Nobel Prize in Economics for "public choice theory," speaks of the "economic theory of politics" involving "the extension of *homo economicus* to behavior under observed institutional rules." He treats my father's work as its precursor in several ways, principally in "initiating what was to become a centrally important component . . . , the stress on rules as contrasted with the then universal stress on policy alternatives within rules."[4] Like "public choice theory," "mechanism design theory" in current economics also has evident affinities with what *On Appraising the Performance of an Economic System* was seeking to achieve in its focus on law.[5] I do not think my father, in his work, participated in the elimination of public value and the melding of the premises of social science with those of natural science that is encapsulated in Buchanan's phrase *homo economicus.* My father's choosers and modifiers of rules legislatively or administratively still acted on behalf of a larger entity. But he was first of all a statistician. He repeatedly presented the true form of a rule as the rule of an ordinary game and was enamored of game theory which was then new.[6] He was himself a "player," to use that term for a successful academic lawyer heard commonly in law schools now—he was devoted to football. He thought of mathematics as the ultimately serious form of thought—hence the abstract symbol θ precisely denoting the "set" of rules. While he might have demurred in life, he would have understood in his professional capacity how the geneticist and Nobelist François Jacob could say in his *Logic of Life,* published contemporaneously with *On Appraising the Performance of an Economic System,* that there is "no longer a difference in nature between the living and the inanimate worlds," that "statistical analysis and the theory of probability have supplied the rules for the logic of the whole world," and that "large numbers

are studied not so much because it is impossible to investigate the individual units, but mainly because their behavior is of no interest at all."[7]

So, despite my father walking out of the room with his manuscript in 1962, that manuscript was a legacy to me. The fundamental premises of its thought began to appear in academic law about the time I entered it. It was not just economics in the form celebrated by Buchanan's Nobel Prize. It was the turn toward social science more generally and, despite doubts going back to its beginning, the turn of social science to the natural sciences. Into law—the most linguistic of disciplines, person speaking to person, individuals listening and speaking on behalf of persons—was imported the view that the discipline of law was a branch of social science. The American Academy of Arts and Sciences makes it such today, and academic lawyers post their online papers on the Social Science Research Network.

The public treatment of human language in academic law reflects these developments in an important way. In 1961, Paul Freund, a name still known in constitutional law, gave a little talk to my first-year moot court club to introduce us to the world of law. He would say "a few things about words, and then a few words about things." His theme was the problem, for law, of writing dictionaries on the assumption that the difference between the "statistical" norm and the "normative" norm could be eliminated—the problem this presented for nuance in expression, the problem of the "impoverishment of language." Freund noted that law "lived by metaphor, advanced by simile." It "created," really, in its "overarching concepts." Speaking of the development of number theory in mathematics, which he viewed as analogous but not the same, he said to us "the legal achievement is no less a grand and important thing." A generation later, in 2006, I listened to a younger colleague give a talk on a public occasion in which he implied everyone knew that "there was no sharp line between language and law." I inwardly nodded. Then he went on, "and no sharp line between language and logic, or between logic and mathematics."

This ultimate turn, to mathematics, indicates how far the fact we are speaking together can disappear from view. There are Vicos and Collingwoods still arguing, and Alfred Marshall's introduction to *The Principles of Economics* is still there to be read,[8] but social science cannot escape its connection to the natural sciences and the premises or commitments of the natural scientist today. Most social scientists would not want to escape them. As the recent report of the quite representative commission setting

up the new Life Sciences Initiative at the University of Michigan observed,

> Closely allied to the life sciences are the social sciences, which, though distinctive in their definition, are in fact concerned with a particular level of analysis in living organisms (usually humans). Indeed the boundaries between neuroscience (a life science) and psychology (a social science) are rather indistinct and are becoming increasingly more so. . . . [T]he laws of physics and chemistry should, in principle, be able to explain and predict biological phenomena in a precise manner. Understanding these aspects of the life sciences in the terms of mathematical modeling and theoretical applications of universal laws and principles is one of our greatest challenges for the next century.[9]

In light of these premises of the natural scientist, so fruitful in exploration of what we may call the world of force and its "mechanisms"—to use my father's word—finding a place for human purpose is an effort, to say the least. It is a long step from a working-day "methodological naturalism" to denying or to thinking one must deny the real existence of purpose even in the evening. But the step is taken, to an "ontological naturalism" declared and taught. A proper attention to the way things are, to which the development of statistical techniques and analysis can contribute, is joined to a cosmic impossibility of an ought and the way things might be. We see all around how easily this happens. Then with the departure of purpose goes value, beyond "preference" which is the leaning of a system. And with the departure of value, the distinctively legal meaning of "norm" in "legal norm" is stripped away, as Paul Freund feared even in 1961.

But purpose and value are everywhere in the discipline of law. They always have been, they are now, and they signal the first and immediate difference between law and social science, the nature of a "legal rule." Different in the most basic way is what goes by the name "rule" in social science, what must be ultimately its character, from what goes by the name "rule" in law, this somewhat static form turning in the mind toward a more energetic form in the domestic and international hope for the "rule of law." Of course it is a proper question and it is asked by lawyers themselves: why can't a "legal rule" become like a "rule" conceived within the terms of social science; why indeed is that not an ideal by the law's own lights, something graspable, predictable, "objectively" existing apart from the intentions,

good faith, assent, and meaning of individuals and persons—like a rule of chess? Much of the answer, I think, is that life is not a game, despite what we all sometimes say about life.

Life is not a game and law is not, however much contest is brought into law as a device in inquiry and reflection. Insofar as we are persons acting in positions that are not ours alone, that connect us to other individuals and that are defined by public value, there is an authenticity sought that is completely foreign to what we call "gaming." Games that are "play" are relief and time-out from life, which is serious, painful, often tragic, as real as can be. Sometimes we have to turn from the relief games give and, cliché though it is, say to ourselves, our friends, our children, "This is for real, not a game." Games can be good. They can be an entry into playfulness and its creativity. There may be an aesthetic experience in games, a dance in them. But games, as games, are empty, and their emptiness is a source of their relief and pleasure, the unconflicted joy in the exercise of capacities that they allow. It makes no difference what the outcome is, really. The end of the game, as game, is only a prelude to the beginning of another.

This difference in present character and ultimate ideal between legal rules and scientific rules is wrapped up with the centrality of authority in law, a phenomenon from which a social scientist would backpedal as if his or her very identity as scientist depended on distance from it. Listen to the distinguished contemporary neuroscientist Jean-Pierre Changeux, turning to the question whether the ordering of society might be "elevated" to the rank of a science. Changeaux speaks of the "task of devising precise rules of conduct," "the various prescriptions that regulate behavior at a given moment of the history of a society," that "entire set of rules of interactions among the individual members of a social group." He observes, as did the commission on the Life Sciences Initiative at Michigan which I quoted earlier, that ultimately those "precise rules," those "prescriptions that regulate behavior," "that entire set of rules of interaction," must be translatable into "hierarchical and parallel sets of neurons [that] contribute to the cognitive functions that jointly construct a code of right action," and must be understood in terms of natural selection, not just as the grounding of work in biology, but as a total theory of the world. "Darwinian variations of social representations," Changeux says, working from the unstated premises of many today in his and in related fields—by "Darwinian variations," he means differences in "social representations" thrown up by chance on the model of genetic mutation—are "propagated from one brain to another,

selected at the level of the community, and finally retained in the minds of lawmakers."[10]

What is critical in law is nowhere to be seen in this or any formulation like it, including that with which I began this essay—my father's "{θ,S}," "an operating, working modifiable mechanism . . . the modifiable component of which is a system of constraining and prescriptive law and rule."[11] Implicit even in references to "precise rules of conduct" and "the entire set of rules of interactions among members of a social group," emanating from the neural structures of "lawmakers," is the order that might be given after someone says, "But that would be illegal," whether referring to taking a baby from her mother or drilling for oil in the Arctic wilderness; the order that might be given after saying, "Yes, that is legitimate," again whether referring to taking a baby from her mother or drilling for oil;[12] or, indeed, the order implicit in opinions issued through an appellate hierarchy on how to structure ongoing thinking and argument. Orders are implicit, but what is forgotten, and forgotten throughout discussion of law in social scientific terms translatable into basic science, is the correlative of an order, obedience.[13] Never reached is why others out there obey, repeating the order in their own voice and words with their own sense of it, and implementing it or responding to it in good faith—not so much why they should obey, but why they do obey, pay attention, and continue to pay attention when there are so often so many reasons not to, when so much is at stake. What is forgotten, in short, is authority, the premise and the object of legal thinking, legal argument, and legal conclusion, kept untouched by modernity's challenges to authority elsewhere, and not only kept but expanded with expanded claims for law, the "rule" of law, "law" expanding around the world.[14]

One reason for forgetting the presence of authority in law—and the inevitable issuing of orders and question of obedience—is the historical association of the development of scientific and social scientific work with struggles for freedom of thought accompanying the political struggles of the last few centuries, freedom of thought that, in an ironic turn, total theorists in the sciences today are so strenuously trying to limit. But more basic in the forgetting is the erasure of the individual in scientific and social scientific thought, both the individual facing a claim of authority, listening and himself or herself judging while listening, and the individual contemplated and protected in and by law. Neither is the person really there in scientific and social scientific thought, the individual person or the corporate

or institutional person, other than as a linguistic shorthand for a system. Nor is there living value that makes claims on us. Authority, person, value, individual—none are there, ultimately, in social science. All are there at the center of law.

After the experience of the twentieth century, its struggles and its horrors, the erasure of the individual is the most glaring. Units of one kind or another of course figure in any professional thought and discussion. It is widely said today that as interacting units you and I are "adaptive systems." Someone using this term in professional scientific discourse would add, if pushed, "and nothing more," an addition critical to the difference between such professional thought and legal thought. Pictured in this way, a human being at any particular point in the course of life is a snapshot of the particular and changing outcome of two factors interacting over time: internal system and external system, nature and nurture, genetic endowment and environment. In 2007, journalists sought out expert commentary on why a man waiting for the subway with his two daughters leapt to press down between the tracks and save the life of a man who had suffered a seizure and fallen in front of an oncoming train. What was offered was that he had within him an "impulse" that was "followed spontaneously, either by virtue of genetic disposition or childhood/cultural training."[15] These were the two sources of what this human unit was.

But this is not the way we think about the individual—not me thinking, not you I imagine, not even those who speak in these terms. The word for the unique product of the action and interaction of the two factors, internal system and external system, is in fact not "individual" but "phenotype." The way we do think about the individual is reflected in law and legal thought and includes something more than internal and external system, something "in" the individual—you, me, the scientist and social scientist too—which holds all of us back from vivisecting each other, which almost holds us back from torture.[16] That is something real in social scientists' minds and hearts and lives. It is real in law and legal thought, in which they themselves participate, not least when they are facing an order or asked to carry one out. Its reality, its presence, is alone enough to keep law from being a social science or ever becoming a social science.[17]

It is almost embarrassing to make these points, they are so obvious, so unoriginal. Making them is like looking up and saying there is a sun in the sky. But they do need to be made, and made more explicitly than they have been. I have painted law as proceeding rather on its own, too important to

be affected at its core by what has happened in academic law over the last half century. But of course law has been affected. That is why it is better to think of law, with all it presupposes and makes real in human life and thought, as "resilient" rather than impervious.

Particularly striking, I think, has been the attempt to fit the law of the central private institution of our time, the business corporation, to the premises of social science. Twentieth-century corporate law developed along lines analogous to the development of public administrative law, with the focus on the decision being made on behalf of the corporate body, and the questions being the authority of the decision maker, the enforcement of the decision if challenged, and the values and considerations procedural and substantive taken into account by the decision maker, or not taken into account.[18] In the 1970s and 1980s a push began to replace this analysis—which assumed that profit in a competitive market was the primary but not exclusive consideration if the corporation was a business corporation—with analysis on the assumption that the legal standard for decisions on behalf of business corporations was "maximization" of profit. The very notion of maximization was drawn from Western microeconomic theory and from biology, where "maximization" describes what must be done to survive in evolutionary competition or competition in a "perfect market." In terms of the process of decision making, what began to be taught in law schools as well as business schools was that "business" thinking was supposed to be wholly calculating and manipulative, with no place in it for any genuine concern for effects on employees, retirees, the surrounding community, the nation, or the world.

This push, coincident with the movement of James Buchanan's *homo economicus* into the academic picture of legislative drafting, administrative regulation, and judicial decision making, reached the American Law Institute in the 1980s and early 1990s. It was proposed that the institute state that the purpose of the business corporation should be "long-term maximization" of corporate profit and shareholder gain. This was rejected as a reading of the law, judicial or statutory. The reason was explicit, that it referred to "maximization" which, the council of the institute observed, would eliminate any authentic consideration of public value. In the institute's statement of what a "business purpose" was in corporate law, "maximization" of profit was replaced by "conduct of business activities with a view to enhancing" profit.[19]

But the teaching of maximization in its economic and biological sense

continued even after the Enron case laid bare just what was being taught. The response of the law, that in the "name" of which individuals speak, was to move during this same period to the application of the criminal law to the corporate entity itself—criminal law, in which the attitude toward public value described by "maximization" precisely fits the standard formulation of what makes action or inaction criminal, the element of *mens rea,* the criminal mind. As an example, causing death (a fact) becomes murder (a crime) as a result of "extreme indifference to the value of human life."[20] That development in corporate criminality, state and federal, substantively and in sentencing, legislatively and administratively, reintroduces taking into account values for their own sake in decisions made on behalf of a business corporation. It has been fought in turn, and the struggle continues today. The struggle points up not only the effect of the effort to push economic premises into legal thought, but law's resilience: here it is living value, pushed out at one point, that can be seen reentering analysis at another point.

On a larger canvas, there has been an attempt to introduce into legal thought generally a form of "cost-benefit" analysis that excludes all else, in line with the totalizing thought called "scientific" so frequently today. There is, as is said, "nothing sacred," nothing that is just not done, nothing that is not touched. It shows in the reopening of the question of torture.[21] "What does that mean, 'outrages upon personal dignity'?" the U.S. president asked in the struggle over the criminality of violations of the Geneva Conventions. "That's a statement that is wide open to interpretation," he continued. "And what I am proposing is that there be clarity in the law so that our professionals will have no doubt that what they are doing is legal. . . . They don't want to be tried as war criminals. They don't want to break the law."[22] What the president was reflecting is a view of law very much affected by its identification with social science. There are large implications—this is one of them—of the absence there of person, purpose, value, individual, all folded into the term "human dignity" found in the various conventions against inhumane treatment of human beings. Person, purpose, value, individual are mocked, and not just in discussions of torture, as being vague, too "imprecise" to affect "rational" decision making—"rational," of course, only in the sense defined by the deliberately limited presuppositions of social science.

It should not be overlooked that the current biological view of the living world may well have grown out of economics, rather than the reverse.

The axiomatic hostility to what modern biology calls "vitalism" mirrors the cynicism—the moral stance—of a view of the human as intrinsically alone, ruthlessly self-seeking for a self that is axiomatically limited. The denial of the humane in the human is not everywhere in biology and economics, but it is prominent enough; and with and through these disciplines there has been imported into thought and discussion in law the dichotomy seen in both, between the "selfish" and the "altruistic," with the selfish the undeniably basic and with the altruistic an illusion eventually to be understood in a way consistent with the selfish. Not for nothing is the widespread popularity in academic discussion of the "prisoner's dilemma." Its imagery, imprisonment and threat from others of pain or death, fits an underlying vision of what it is to be human—utterly alone in the world and knowing that one is utterly alone in the world.

But again this is not the view of law, which over time has more and more protected the humane in the human. The individual contains the whole world, but is not alone. The individual is connected with others through participation in the life of living value, to which legal language makes constant reference, participation indeed in the creation of living value. As Alasdair MacIntyre has recently shown so well in his *Dependent Rational Animals,*[23] there is no such dichotomy of the selfish and altruistic in the real world, which is the world of law, where we are all dependent or disabled at some point in our lives, receiving from those whom we cannot repay and giving to those who cannot repay us, unpredictably and disproportionately in both the giving and the receiving. In this connection too I might note as another example of law's resilience that the acknowledgment of the full range of living value, which developed during the first three-quarters of the twentieth century in the law of standing and the very conception of who a legal person can be, still stands despite pressure on it from biological and economic thinking. The decoupling of the common law of judicial jurisdiction from "property" and "contract," the abandonment of the so-called legal interest test of an earlier time, remains undisturbed by the presence of *homo economicus* in academic teaching and discussion.[24]

The attempt to challenge the absolute prohibition in law of the torture of human beings is emblematic, as is the attempt to reconceive the nature of the legal persons we call business corporations. The language and the way of thinking shown in this challenge and this reconception are case studies in the implications of identifying law with social science. But there

is a canvas larger still that may include the question of torture. On it can be projected not only the implications of the pressure on law from this identification but law's resilience under this pressure: the pushing back, which the mind can feel, of the individual, the person, purpose, responsibility, living value.

Before us is a prospect of a kind different from the movement into law of biological thinking and such social scientific thinking that blends into it—economic, psychological, sociological, historicist. We are faced in law with the achievements of biological science within its own sphere and with developments in technology that permit manipulation in light of its achievements. The very real possibility now of the creation of forms of being that are hybrids of humans and animals, the circumvention of the breeding barrier that has heretofore identified an individual as of one or another kind, or species, raises the old question of slavery in a new context. And as Kazuo Ishiguro has explored quietly and effectively,[25] the possibility of beings genetically engineered for organ donation also raises that old question of the association of property with human flesh. What is human, what is less than human, law and lawyers will be asked, what or who is an individual in the sense in which we speak of individuals in law, what or who is a person, what material forms of being human or almost human can be bought and sold and exploited, and, yes, treated as animal? In addition to this—the question of slavery—the genetic engineering of individuals, the possibility of human clones, and the selecting of embryos "in" or "out" in human reproductive technology all raise the eugenic question again in a twenty-first-century context.

Slavery and eugenics—one would have thought the one was resolved by the late nineteenth century and the other by the mid-twentieth. The struggle with them is before us still. If anyone is dubious about the seriousness of the conflict when biological and eugenic thinking come to the front of the legal mind, I suggest reading or reading again the Supreme Court's decision on race and slavery in *Dred Scott,* that creatures with traces of African blood in them could never reach a position of full human dignity and responsibility. There were two dissents, with Justice McLean's dissent pointing away from the biological and eugenic in a clear statement not so much of law as of law's difference, a statement of what law can comprehend that is simply not comprehensible within the framework being pressed upon it: "A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to

an endless existence."[26] Or read the Court's decision in *Buck v. Bell* on eugenics, that the poor, the less clever in calculating, the delinquent were less than fully human and should not contribute to the future material of the human form of being. This was the 1927 Court of Holmes, Stone, Brandeis, and Taft. There was one dissent without opinion.[27] It may be notable that this sole dissent was by the only member of the Catholic Church on the Court, Justice Butler, who went to Mass every morning, and that the church's teaching was pointing by 1927 toward the universal human dignity latent in law's distinctive recognition of the individual.[28]

Dred Scott was overruled by John Brown, Harriet Beecher Stowe, a war, and a century of internal legal development, but we are not certainly away from it yet. *Buck v. Bell* has been reviled but never overruled or repudiated. The questions of slavery and eugenics persist, as questions. How then can it be thought law will stay resilient under these pressures and in face of such enormous demands as these, when the very grounding of the human may be shifting underfoot?

Law will stay resilient because the individual at home in law is the bedrock, prior to any discussion of history or process, or presently existing system, or scientific conclusion—in fact, prior to any discussion of "the individual." Though some individual waves his wand at us again and again, we are not changed from the individuals we are into products or statistical notions. Beyond that bedrock—our actual presence to one another—I should say there is some assurance in the fact that law, with its presuppositions and, more than presupposition, its ontology, is the one thing other than food that we cannot do without. Social scientists, too, cannot do without it.

Among the particulars that might be noted as we look forward, the worldwide development of human rights law,[29] anticipated and perhaps in some way affected by the evidence of the lonely dissents in *Dred Scott* and *Buck v. Bell,* is founded on a vision of the individual and of the nature of value that social science cannot share, and insofar as domestic law is pressed by that mode of thought, international law can reach back and recall. Even while law in general was being identified in teaching and discussion with social science in general, international law emerging from the revelatory horrors of "our" century was making implausible the identification of "legal rules" that live in human minds and speech with rules that can be conceived in the terms of social science. Indeed the development of the web of international conventions on genocide, on torture, on human experimentation, on inhumane treatment, on behalf of

the disabled, on behalf of women and children has been loosening our own law from the positivism that began to affect it and thinking about it, at least in academic law, in the nineteenth and early twentieth centuries, before the fifty years past that are our concern here.

One of these international developments, proceeding from the mid-century Nuremberg Trials, has been especially important in protecting the understanding of the human individual as something more than the product of genetic and environmental systems. These are the legal limitations on experimentation on human individuals, that arena where the legal vision of the human being and the scientific and social scientific vision explicitly confront one another. Such experimentation in the United States had its own eugenic and authoritarian cast—its subjects disproportionately children, the poor, the military, or those who had some forebears who had suffered slavery—and it was not pulled back substantially until the 1970s and 1980s.

I would add as important also the developing conception in law of the sentient beings we call animals, the other part of the hybrids I have mentioned. This development is another reason to believe that commitments to living value, to the individual, and to a dimension of reality that sustains and attracts what we might call law's eschatological thrust have been fundamentally unaffected. It too has its international side. Legally recognizing interests that are not proxies of human interests and acknowledging a shared sentience and special human responsibility for its protection has something of an a fortiori effect. In many ways the treatment of animals was the horror in the revelatory events of the twentieth century, as human beings were treated as animals so systematically and so cruelly, and when it comes to our own behavior toward each other we should eventually be able to exclaim, "Why, you would not do this to an animal!" Pulling the treatment of animals toward the treatment or the "legitimate" treatment of human beings, rather than the treatment of human beings toward the treatment of animals, is a working out of something within law, pushed not only by law's restlessness with incoherence but also by law's eschatological thrust, the pointing to a whole from the partial, which can be seen whenever the word "justice" is mentioned in the same breath as the word "law." In secular terms, that might be thought "Hegelian" or "Platonic," though Hegel had contempt for the American experiment, and there is the possibility Plato might have. I prefer to think in terms of John Noonan's articulation of the way an inner logic of a human institution works itself out over

long periods of time, on slavery, on torture, and on the ownership and exploitation of women and children.[30]

To be sure, whenever the border between human and animal is opened to any extent, there can be migration in both directions across it. Hearing the "cry of animals" as human cries are heard can reverse and can become hearing human cries as the cries of animals. An essay by a neurologist featured in the *Chronicle of Higher Education* a few years ago proposed that human language and literature "grow out of a biological system for attempting to fill needs," and the piece argued for "reuniting language with the screams and cries of animal communication, looking at it as a secretion of one of the spongiest organs in the body."[31] But I think the movement across today's more porous border between human and animal is rather in the other direction, as the evolutionary biologist Simon Conway Morris has so eloquently argued.[32]

Mention of a view of language as "a secretion of one of the spongiest organs in the body" leads me to two final indications of the essential health of the legal mind. One is the growing sophistication about the nature of human language and its constitutive action in law. I was exposed to a precursor of it studying under Lon Fuller in the 1960s.[33] But a full focus on the importance of language began at about the same time as the development of "public choice theory" and similar schools of thought in economics and their movement in various ways into academic law. That full focus is the work of James Boyd White, in volume after volume.[34] White has made clear that the sounds made by isolated competitors contending with one another, or the sounds made in advertising or political manipulation, are not the language of a person and not language with the force of law, but the sounds of force and force alone. I emphasize "alone" because they fit a vision of the human world, indeed the universe itself, in which there are ultimately only forces (as Oliver Wendell Holmes once said). This is not the world of law. Because of White and his work, it can be said with confidence that when Steven Pinker or Herbert Simon and the disciplines with which they are associated speak of language, its origins, mechanisms, and meaning, they are not talking about human language, or about the language of law, but about something else, in rather the same way that so many who set out to study the idea of God are not thinking about God, but about something else.[35]

There is, secondly, a new openness of mind among figures prominent in discussion of organized human life. The representative figure outside

law may be Jürgen Habermas, whose grappling with the issues raised by our new capacities for manipulation of the material substrate of the human has led him to acknowledge the sometime dependence of secular discussion on a dimension of reality that is not secular—in his words, "to the reasonable attitude of keeping one's distance from religion without closing one's mind to the perspective it offers," or "keeping a distance . . . from a religious tradition whose normative substance we nevertheless feed on," or acknowledging "moral feelings which only religious language has as yet been able to give a sufficiently differentiated expression."[36]

This openness, which can be seen more widely in arriving at consensus at each stage in the expansion of universal human rights, is beginning to be matched within law by an increasingly explicit acknowledgment of an uninterrupted ontological commitment in law to a dimension of reality that, whether or not it is or is called religious, has no place in scientific work or social science. Perhaps it can never have and should not have a place, given the power of the scientific method in understanding and possibly freeing us to some degree from the blind systems of the world with which and within which we live. The representative figure I would point to in this connection is Steven Douglas Smith, whose work and contributions to law's self-understanding have also been developing alongside the movements with which I began.[37] Habermas and those who work with his work, White and those who work with his, Smith and those who work with his, other examples from this volume—all these are not going to go away. If law and the legal mind were a rough tough animal, they are nourishing its bones and sinew. There is, both within law, even in academic law, and outside law, even in academic social science and social theory, increasing awareness that the human which the humanist insists is "all we have got" includes an open dimension to which there is really no limit.

This should not be surprising. The world of the active mathematician is not accessible to many, even though the operation and application of mathematics may be. But it is a familiar thing to hear that mathematicians who call themselves realists acknowledge a dimension of reality that transcends the here and now of our developing physical existence. They say—and invite us to accept—that natural selection as a "theory of everything" does not reach and cannot explain mathematics, which is not, in itself, reducible to the organization of neural tissue, but is real in a realm of its own. Lawyers and all those actively participating in law who are realistic about their thought and action acknowledge a dimension of human experience

of reality that is not at all the same as that of realist mathematicians but, like theirs, lies both beneath and beyond the realities admitted by the rules and presuppositions of the natural and social sciences.

Law will be tough enough in the future. We can speculate why it has not been tougher in the past. There are tensions within law, as there are in your and my own thought, and there always have been. Identification of law with social science can have been an effort to escape them. Social science and science behind it perhaps need not have pressed so. They might just have offered themselves, for there is a constant pull toward the authoritarian, the meaningless, the automatic, away from responsibility, away from facing grief for what we ourselves do. Work in law even has an element of the frightening in it, which must be handled in some way. Just as there is biblical awe, dread, and fear, so too can it be positively frightening to think that what is necessary to authenticity of any kind at any level—and necessary therefore to authority and therefore to law—runs straight up to a transcendent dimension of the universe. This is a problem the social scientist of our time, thinking as a social scientist, does not have. But the lawyer does.

NOTES

1. Rutledge Vining, *On Appraising the Performance of an Economic System: What an Economic System Is, and the Norms Implied in Observers' Adverse Reactions to the Outcome of Its Working* (Cambridge: Cambridge University Press, 1984). For the material previously quoted, see 6, 9, 16 n. 8, 23, 26.

2. Joseph Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986; paperback ed., 1988).

3. James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).

4. James M. Buchanan, *Better than Plowing, and Other Personal Essays* (Chicago: University of Chicago Press, 1992), at 13, 79, 94, 95–96, 98, 103. See also *The Calculus of Consent* (1962), supra n. 3, at 346 n. 7; Gordan Tullock, "Theoretical Forerunners," appendix 2 to *The Calculus of Consent,* at 339 ("The work of Rutledge Vining had a major effect on both of us, largely through his emphasis on the necessity of separating consideration of what 'rules of the game' were most satisfactory from the consideration of the strategy to be followed under a given set of 'rules'"), 326, 359 n. 3 ("Game theory studies the behavior of individuals in a 'game' with given rules. Economics does the same, but the end or purpose of the investigation in economics is to choose between alternative sets of rules. . . . As many economists will already have guessed, I am indebted to Professor Rutledge Vining for this point.").

Rutledge Vining was known sometimes as an "institutionalist" in economics. See Malcolm Rutherford, "Chicago Economics and Institutionalism," http://web.uvic.ca/~rutherfo/Chicago4.pdf, at 20–21.

5. See Leonid Hurwicz and Stanley Reiter, *Designing Economic Mechanisms* (Cambridge: Cambridge University Press, 2006); Roger B. Myerson, "Fundamental Theory of Institutions: A Lecture in Honor of Leo Hurwicz," http://home.uchicago.edu/~rmyerson/research/hurwicz.pdf.

6. See John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior* (Princeton: Princeton University Press, 1944).

7. François Jacob, *The Logic of Life: A History of Heredity,* trans. Betty S. Spillmann (London: Penguin, 1982), at 245, 196.

8. Alfred Marshall, *Principles of Economics,* 8th ed. (London: Macmillan, 1920) (reprinted 1982), at 1–11. "Economics" in the large has its fields and schools, and an interest in "economics" can and does ground sensitive inquiries into human experience in community and with institutional life. Indeed, there can be an internal dispute about the nature of the connection between "economics" and science and mathematics, as there can be disputes about the meaning of "science" or "mathematics" among scientists or mathematicians mutually recognizing one another as such. This was in part the subject of *On Appraising the Performance of an Economic System* (supra n. 1), e.g., at 23: "If there is to be a science whose subject is the economic system—a cumulation of knowledge about how a thing of this sort works . . ." In this regard, it was not only experience of a year in law school and a summer of practice that stood between me and my father in 1962. Looking forward to graduate study and law school four years before our conversation about his book, I had written on law as a science of the human by contrast with the biological sciences, which had been my principal subject up to that time.

9. *Report of the President's Commission on the Life Sciences* (University of Michigan, 1999), at ix, 5, 61.

10. Jean-Pierre Changeux and Alain Connes, *Conversations on Mind, Matter, and Mathematics,* ed. and trans. M. B. DeBevoise (Princeton: Princeton University Press, 1995), at 210–12, 216, 219, 231.

11. *On Appraising the Performance of an Economic System,* supra n. 1, at 7, 12. See also 16 n. 8, 23.

12. An example at the international level would be orders given with respect to enriching uranium into material suitable for nuclear warfare. Consider the words used and the reach for the force in them, the "force of law," in Iran's 2007 statement to the UN Security Council when Iran rejected calls for suspension of its uranium enrichment program: "The world must know—and it does—that even the harshest political and economic sanctions or other threats are far too weak to coerce the Iranian nation to retreat from their legal and legitimate demands" (Alexandra Olson, "Penalty to Iran: Assets Frozen: UN Ban on Arms Exports Is Among Sanctions Iran Rejects," Associated Press, 25 March 2007).

13. H. Jefferson Powell's essay in this volume, "Law as a Tool," addresses the authority of statutes, particularly their authority for those enforcing and administering them.

14. A. W. Brian Simpson is known for his work on legal method and the nature

of the "rule of law," and on the difference between a "legal rule" and rules presupposed in the "economic analysis of law." See, e.g., his essay in this volume, "Anti-Social Behaviour Orders in the United Kingdom." In his comments in 2005–6 on H. L. A. Hart's still much-discussed *The Concept of Law* (Oxford: Clarendon, 1961), he picks up the absence of authority in the "concept" proposed by Hart (A. W. B. Simpson, "Stag Hunter and Mole," *Times Literary Supplement,* 11 February 2005, at 7; "Herbert Hart Elucidated," 104 *Michigan Law Review* 1437, 1457 (2006)).

What is necessary to the "existence" of a legal "system" is authority, and in practice and fact the availability of willing executioners is not the source of it. Hart's *Concept of Law* appeared (not entirely coincidentally, I think) at almost the same time as Buchanan's *Calculus of Consent* and the filial conversation with which I begin. The distance of *The Concept of Law* from the reality of law was noted by those of us who read it as law students then, when it was new and before it became a text central to academic discussion.

15. Cara Buckley, "Why Our Hero Leapt onto the Tracks and We Might Not," *New York Times* 7 January 2007, sec. 4, at 3.

16. Or—even with regard to a past or future slave who is not a legal person—it might hold "us" back from accepting, as a justification for working to death, that it is cheaper to purchase a replacement than to provide adequate food, medical care, and rest.

17. Science in the sense of "knowledge" could disavow precision as an ideal, but certainly the "precise rules" sought in all scientific inquiries that hope ultimately to link their conclusions to mathematics—and to what Eugene Wigner famously called the "miracle" of mathematics, its "unreasonable effectiveness"—require units of reference that can be "defined." Units of reference in law cannot be corralled so. They are living, they spill over any boundaries set for them. Any statement of law, including a statement of law implicitly or explicitly defining a legal unit of reference, can be and regularly is challenged; and the conclusion of the challenge becomes simply one more statement of law.

18. A brief review of the development of corporate law and practice in the first half of the twentieth century can be found in Adolf A. Berle Jr., *The Twentieth Century Capitalist Revolution* (New York: Harcourt Brace, 1954), at 164–69.

19. This history is detailed in my "China, Business Law, and Finance—Accession to the World Trade Organization," 2001/2 Manuscripts of Public Lectures, Sir Edward Youde Memorial Visiting Professorship Scheme (2003), http://www.sfaa.gov.hk/doc/en/scholar/seym/Prof_Joseph_Vinings_report.doc.

20. E.g., American Law Institute, *Model Penal Code,* Official Draft, 1962, § 210.2(1)(b).

21. Prominent academic lawyers have been involved in reopening the question of torture. See James Boyd White's essay "Law, Economics, and Torture" in this volume. See also, e.g., Philippe Sands, "Extraordinary Rendition: Complicity and Its Consequences" (lecture, JUSTICE, London, 15 May 2006), at paragraphs 10–17; Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006), at 82–87. Of course, the reopening is occurring in more than legal discussion. See "Can Torture Ever Be Justified?" *Bulletin of the American Academy of Arts and Sciences,* Summer 2004, 3–4; Michael Ig-

natieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004); and essays in *Torture: A Collection,* ed. Sanford Levinson (New York: Oxford University Press, 2004). But in all discussion today the law's impact, "legitimacy," must be faced.

22. Jim Rutenberg and Sheryl Gay Stolberg, "Bush Says G.O.P. Rebels Are Putting Nation at Risk: Excerpt from Bush's Remarks," *New York Times,* 16 September 2006.

23. Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago: Open Court, 2001).

24. I explored this decoupling in *Legal Identity: The Coming of Age of Public Law* (New Haven: Yale University Press, 1978). For examples and summary of development since, see Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir., en banc, 1998); Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438 (2007).

25. Kazuo Ishiguro, *Never Let Me Go* (New York: Alfred A. Knopf, 2005).

26. Dred Scott v. Sandford, 60 U.S. 393, 550 (1857).

27. Buck v. Bell, 274 U.S. 200 (1927). The well-known opinion ("Three generations of imbeciles are enough") was by Justice Holmes.

28. The human eugenics movement and evolutionary biology stated in terms of high and low emerged at the same time in the mid-nineteenth century. It is intriguing that the human eugenics movement, looking to the elimination of categories of human beings, also emerged at the same time as enslavement was being taken away as an optional course of action after perceiving a human being as of a lesser kind.

The question or problem is often set out and discussed today, how to "explain" religious experience or human dignity in terms of our current perception of organic evolution and its mechanisms. This becomes something of an academic exercise. The pressing question is rather the reverse, how to explain our current perception of organic evolution, our admiration for it, fascination with it, and persuasion to it, while staying realistic and acknowledging our actual presence to one another, the mutual recognition of individual, person, and spirit on which we build any kind of belief about the world.

29. For a beautiful introduction to human rights law and its early history, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). On the significance of international developments for human self-understanding, and on the human future they may make possible, see Philip Allott, *Eunomia: New Order for a New World,* 2d ed. (Oxford: Oxford University Press, 2001), and *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002). On the individual, human experimentation, and eugenic practices, see also, e.g., Charter of Fundamental Rights of the European Union, preamble and chap. 1 (Dignity), available at http://www.eucharter.org/.

30. See John T. Noonan's essay "Conscience and the Constitution" in this volume and his *A Church That Can and Cannot Change* (Notre Dame, IN: University of Notre Dame Press, 2005).

31. Alice Weaver Flaherty, "Writing Like Crazy: A Word on the Brain," *Chronicle of Higher Education (Chronicle Review)* 50, no. 13 (21 November 2003), at B6.

32. See, e.g., Simon Conway Morris, *Life's Solution* (Cambridge: Cambridge University Press, 2003), and his Gifford Lectures for 2007, *What Organic Evolution Tells Us about Our Place in the Universe, Not Least in Terms of Religious Perspectives and Natural Theology* (forthcoming).

33. See *Rediscovering Fuller: Essays on Implicit Law and Institutional Design,* ed. W. Witteveen and W. van der Burg (Amsterdam: Amsterdam University Press, 1999), and my chapter in that collection, "Fuller and Language," at 453.

34. See, e.g., James Boyd White, *The Legal Imagination* (Boston: Little, Brown, 1973); *Justice as Translation* (Chicago: University of Chicago Press, 1990); *Living Speech* (Princeton: Princeton University Press, 2006).

35. In this connection too, a classic work on computers and language should be noted: *Computer Power and Human Reason* (New York: W. H. Freeman, 1976) by Joseph Weizenbaum, a pioneer in computer programming.

36. Jürgen Habermas, *The Future of Human Nature* (Oxford: Blackwell, 2003), at 113, 108, 114. I have tried to explore this openness further in "Legal Commitments and Religious Commitments," 44 *San Diego Law Review* 69 (2007), and "The Mystery of the Individual in Modern Law," 52 *Villanova Law Review* 1 (2007).

37. See, e.g., Steven Douglas Smith, *Law's Quandary* (Harvard: Harvard University Press, 2004). As well as the implicit and increasingly explicit, there is overt acknowledgment with an unbroken history. See, e.g., Patrick McKinley Brennan, "A Quandary in Law? A (Qualified) Catholic Denial," 44 *San Diego Law Review* 97 (2007), and "Locating Authority in Law," chap. 9 in *Civilizing Authority: Society, State, and Church,* ed. P. M. Brennan (Lanham, MD: Lexington Books, 2007), at 161.