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### Authority and Reality

Joseph Vining

University of Michigan Law School, [jvining@umich.edu](mailto:jvining@umich.edu)

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# Authority and Reality

Joseph Vining

“Imagination” has been introduced as a term of art in discussion of the social and political world. Some years ago James Boyd White turned to it in *The Legal Imagination*,<sup>1</sup> his monumental work on the foundations of secular law and legal practice. A prominent example of its use today is Charles Taylor’s *Modern Social Imaginaries*,<sup>2</sup> tracing changes in the common mind leading to what we now call modernity.

The term can have a large scope and at the same time a rather definite meaning. “Imagination” is at the center of Mark Massa’s comments on the contrarian position of the Catholic Church in American life, contrasting David Tracy’s well-known and distinctively Catholic “analogical imagination” with imagination that is “dialectical.” American culture, it is said, is skeptical and even dismissive of tradition and authority. The “dialectical imagination” is allied with “individualism” and an “instrumental” approach to the world.<sup>3</sup> A similar picture of what lies at the roots of American social and political thought appears in the report of the American Catholics in the Public Square Project, referring repeatedly to the “individualist core” of American culture, which is a “culture of choice,” the very terms of debate being “set by radical individualism.”<sup>4</sup>

It is a useful term, “imagination” or “an imagination,” even if it has a tendency to squeeze out the normative aspirations clinging to the older term “ideal.” Certainly all that it brings to mind takes the sources of social and political arrangements beyond the total theories of mindless system and process being pressed so strongly today. It puts human capacity and experience into visions of the nature of “stars and stones and everything else”<sup>5</sup> and helps keep human society distinctively human.

But “imagination” does carry with it an implicit contrast with “reality,” and it is this I want to pick up and emphasize in this initial chapter, the reality that imagination feeds and is fed by. Imagination may mold reality. But the reality of things can mold the imagination, and I will suggest that the reality of things speaks clearly to any view of the social and political world that is skeptical and even dismissive of authority. Attending to this somewhat more than has been done can put Catholic experience in particular to the service of a realistic idealism or an idealistic reality (if I may use the older term “ideal”). Catholic thought can help ground secular imagination of a better world in what is possible.

### THE PERVASIVENESS OF AUTHORITY

It does seem to be a hallmark of modernity to dismiss “authority,” the very notion of it. But the truth is that authority and the response to it we call “deference” or, in its full presence, a “willing obedience,” are to be found everywhere in the modern world.<sup>6</sup> Nothing could be less atavistic or more modern. Authority is the heart of joint effort and organized human life, making the ideal of a universal regime of truly free contract between individuals more a bulwark against authoritarian tyranny than a real possibility. Founders even of the Chicago School of Economics<sup>7</sup> saw this and introduced it into the very definition of “free enterprise,” where exchange relationships of an arms-length kind are between “business entities” rather than between human individuals, and “authority” continues within the business entity.

If the “invisible hand” of a competitive economic system is marvelous in the way it makes joint life possible, so too is authority marvelous in what it makes possible. The language of the law of the authority of an agent, “agency law” on which the law of business entities such as the corporation is built, is startling on first encounter, with its three duties of “care,” “loyalty,” and “obedience.” Property law, joined with the law of contract and the law of business entities as the foundation of the modern world economic order, is not just or even primarily a law of relations between human beings and things, but is rather the context of “orders” constantly being given and heard everywhere. “Property” locates the human voice that will speak an order to another human being, and provides the sanction, exclusion from a flow of material goods or necessities if (a most important “if”) the law as a whole gives the order the authority of law. An illuminating analog of this aspect of “property” and its setting within the law as a whole is to be seen today in what we now and newly call “animal law” as a course of study and field of legal practice, in which a growing web of criminal, administrative, and constitutional provisions focuses

an “owner” of a “non-human sentient being” on the interests of the animal itself and requires they be taken into account in making decisions that can have the authority of law and be protected or enforced “in the name of the law.”<sup>8</sup>

Then of course there is government with its government agencies great and small, wrapped around with “administrative law,” which is entirely about a search for authority, for a reason to obey or for a reason to give up a challenge to an order.

Sometimes, it should be said, this decisionmaking on the part of one making a decision and speaking it, and then the decisionmaking on the part of one hearing it and making a decision to defer or obey, is discussed in terms of “power”—which fits more easily into an imagined universe in which things merely are and events merely happen. “Power relationships” is the phrase. But there is and always has been a distinction between power and authority in the law of human organization (as, for that matter, there is in the Gospels). Power is a negative thing, authority a positive. Employers may think to themselves that it is power to fire—to stop a flow of money and respect to an employee—and to countermand what the employee proposes, says, or orders, that enables them to cause employees to take initiatives into the unknown future for the sake of joint enterprise. But it is not their power, certainly not their power alone, but their authority, if they have it. With recognition of authority, the one who is ordered recognizes the other who is ordering as a source, and he puts his own imagination to the task. It is authority, not power, that releases imagination and initiative in the service of the goals of joint enterprise. Organized life, except on a most rudimentary level, would not be possible without it.

It may be noted too that within science, so central to any conception of modernity, authority and authorities are to be seen despite strenuous denial that there is anything of the kind. There are central texts. There is deference, there is good faith and taking-on-faith, there is office and exclusion from office, teaching and discipline of teaching—most of the detailed features associated with the creation and presence of joint effort and decisionmaking based on recognition and acceptance of authority. The phenomenon of authority within science is, I think, nicely revealed by the near universal hostility among scientists to its elimination through a folding or absorption of science itself into the very processes it undertakes to examine on the assumption that they are all there is.

### THE WORKINGS OF AUTHORITY

From this brief pointing to the pervasiveness and, indeed, modernity of authority, let me turn to the workings or structure of the phenomenon, if

“phenomenon” is not too neutral and static a term for something that is so much inside us and part of the promptings of life. Even in a sketch of it, I believe the contributions Catholic experience can make to the social and political imagination may be seen to emerge on their own.

I want to try some equations or equivalences for authority in practice, the way it emerges and fades, appears, disappears, and reappears. A book by a physicist on the basic phenomena of space and time will be found full of equations, each a summary, and a summary when knit together. We would not want to cast aside discussion and offer formulaic theses to take its place, but we can play with equations of a sort for the equally basic phenomenon of authority, and gain some of the brevity the device offers, perhaps even some of its mnemonic advantages.

Begin at the most particular level—that is, the sound or shape that identifies itself as the voice of a person—and consider that:

- Who a person says he or she is, and whether to start paying attention to what he says, may be the same.
- Whether a person is who he says he is, and whether to continue paying attention to what he says, may be the same.
- Whether to obey and whether to continue paying attention, may be the same.
- Therefore, who a speaking person is and whether to obey may be the same.

Introduce other terms of discussion and there can be other “equations” of such rough pointers to the presence or not of authority. For example:

- Whether to continue paying attention, and whether there is a mind perceived, may be the same.
- Whether there is a perceptible mind, and whether what appears to be a person is believed to be a person, may be the same.<sup>9</sup>

Now behind and beneath the ingredients and working of authority are presuppositions—of the existence at all of the mindful and the caring, of the responsibility of speakers for what they say, of the authenticity or not of statements made, of persons or “entities” beyond individuals, even of the transcendence of space and time as they are commonly conceived in ordinary life. The contribution of Catholic thought and experience to the understanding and further development of modern social and political organization may consist in some large part in making these presuppositions plausible, understandable, comfortable to entertain, and an ordinary part of what might still be called

secular thought. Contrarian the Church may be and remain, a witness and a challenge. But far from being set against the workings of the modern world, the Church's explicit acknowledgments, even its language, may be a reservoir of perception of what makes the modern world actually work.

### AUTHORITY AND THE PERSON

Principal among these is the person. Acknowledgment of and speaking of and, ultimately, believing in the person is also, to borrow the title of Steven D. Smith's new book, "law's quandary."<sup>10</sup> It is always an individual from whose thought and mouth speech comes, that most particular level at which playing with equations of authority would begin. The individual never fades from the picture. Recognition of the individual as of unique value, the individual as not fungible but irreplaceable, individuals as access to and sources of identity each for the other, is indeed the source of what we try to express as *equality*, whether in Catholic or secular thought.<sup>11</sup> But when an individual speaks with authority, he or she does not speak for himself or herself. "I order you to stop!" she may say. "So what?" is the natural reply. "Do you have longer legs or stronger arms?" When she goes on to say, "I order you in the name of . . ." and then comes a name of a person beyond herself, speaker and spoken-to both step into the world of authority. Living in those whom all of us refer to as "persons" are the connections between us as "individuals," and these living connections make possible the political, economic, or environmental arrangements by which we live as individuals. These living connections stretch far beyond our individual life spans. They make possible the very thought of sacrifice of any kind. They make possible science itself, the very thought of science.<sup>12</sup>

The world of true authority is one in which a person beyond the individual does exist, and the difference between a world in which authority can be present, and one without authority or the possibility of it, is the difference between a world that can work, a world of hope, and a world in which there can be nothing more than empty sound and forces playing upon forces. The latter, of course, is the cosmology of total theory in the physical and biological sciences to which I have referred, and most interestingly, those who urge it strenuously upon the rest of us demonstrate in so many ways that they do not believe it. They—call them "they"—are test cases for the relation between the modern imagination and reality. They do believe both in the unique value of the individual and in persons behind and beyond the individual, however hard it is for them to bring themselves to say so.<sup>13</sup>

In fact, and in the most general way, what draws one of us to another of us is a sense of the authentic or the real in that other. In situation after situation, field after field of study and discussion, what makes us turn to a voice we hear, and stay with it among all the competing claims on our attention, is perception of the authentic, the real. So too, it should be said, what draws individuals to the Church is not primarily "neediness," which would and does give rise to the charge of imaginative wish fulfillment. We all certainly do have needs and are needy, but that is to the side of the primary thing, which is movement toward and opening up to what is most real. Deliverance from need, from bondage, from exile, there certainly is in this movement, and it touches on all that is meant by salvation. But the deliverance from bondage is from bondage to the inauthentic, the unreal, the not really meant; the exile is the strangeness of being away from home, which is what is most real. "Truth," it is sometimes called. This was the novelist Walker Percy's answer to those who pressed him on his adult conversion. It was not comfort that drew him. It was, he said, "that what the Catholic Church proposes is true."<sup>14</sup>

These connections between authority, reality, and the personal are obvious to some, but I know they are not obvious to others. Most of us surely believe in an objective truth about the material world, that there is such even if we do not grasp it all. We believe in a historical and physical reality. We believe in historical time and a past. We believe in a future ahead. We believe in science and medicine and engineering and each day show that we do. But it may take a very long time to realize with any clarity that most of what we know and believe about the reality of the physical, social, and historical world, the "real world" we say, is what I, or you, don't actually have direct, hands-on experience of. Nor does any scientist or mathematician have it, however fine or broadly competent. Life's too short. I am too limited as an individual and I venture to say you are and they are. Most of what we know and believe comes from what others testify, say to us, tell us. We trust them. We may choose whom to trust and believe, but we can't get away from that reliance and that trust in the person.

To believe anything full and rounded about the objective real world, to do that, we must first believe in each other and believe each other. The person is primary, first, the bedrock. The person whom we listen to and join with isn't a product, something manufactured by all this mighty world around us. It's the other way around. All this mighty world depends on the reality of the person, as does the Church. I hardly dare essay here anything about the Eucharist and what the Eucharist does, but I will try because it is pertinent to our subject, almost *is* our subject. The Eucharist is a celebration of ultimate reality. It is a celebration of the personal and the person in which we are joined and in whom we live without losing ourselves. But not just a celebration of the person or the personal as if

what is celebrated were somewhere else. It is touching the thing itself, which of course is not a thing—a being—with that, a taking that reality into ourselves and identification with that reality, coming as close as we can come to the authentic, the bedrock, and leaving it each time refreshed, more real, more at one with oneself, and more anchored in the world.

An unremarkable thing to say, I hope, that this is what the Church offers, but it may not be realized how much to the point it is. Look home to the real or reality as a source, perhaps the source, of the various contributions Catholicism can make to the secular world. Within Christianity, Catholicism is marked by the fullness of its commitment to the actuality of spirit in the world, not called to mind as if from memory by symbol of it, but present. Spirit present, apprehended as a person. To the question who or what is Catholic, one could not do better than starting there; and if the connections between us that allow any of us to survive in the here and now, not to say flourish, are to be aided by a distinctive contribution from Catholics, Catholics could not do better than start with this. No backwardness, shyness, or embarrassment about it, no giving over the “real world” to imaginary visions that have no place for spirit or person in the general social and political world, any more than appeal to the empirical can be given over to those who categorically deny large parts of human experience.

### REALITY AND THE PERSON

Let me continue with this connection between the personal and the real, to which we come through the connection there is between the authoritative and the personal.

Admittedly, any person takes us as individuals beyond place and ordinary passing time. Human language is but vibrations and marks without a voice heard through it. Hearing a voice takes attention, work, and time. The very undertaking to understand the meaning of the always changing physical evidence of sounds and sights by associating some of the evidence with a voice and some not, continuing throughout to pay attention despite all the competing claims on attention, fairly leaps beyond ordinary space and time.

It is also true that as persons, for we are persons and individuals both, we are mutually created as we seek the authentic in the different bits of evidence we each present to ourselves and others over the passage of ordinary time, and that others present back to us. Creation is continuously “at work,” as we who work might say, in our seeing persons around us: those whom we name with “proper names,” those with more general names like “Church” or “People of Israel” or “Court” or “Congress,” and those with the largest names.



But though transcendence of time is involved, and creation is at work, when a person is seen and heard the person is here and now, as real as anything else in the here and now.

In the same way, authority is real—not just pervasive in any realistic appraisal of the present state of affairs, but real in itself. Someone facing the authoritative does not choose to grant authority—authority is not a matter of choice. One can deny it, because one can deny anything. But one does not deny authority without striking at one's own integrity, one's identity, and one's own reality.

The reality of authority is rather like physical reality, which one also does not deny except at great cost or by a seeming self-delusion to which one is a knowing party. It is not wholly like physical reality, of course. There is a passivity in acknowledgment of physical reality—less passivity perhaps than might once have been thought, for experimental psychology suggests much activity at semiconscious or unconscious levels before the simplest perception, but there is at least a sense of passivity in physical experience, which happens *to* me though I may struggle to evade it. In the experience of authority there is no passivity at all. The authoritative that one recognizes takes work to find. Activity precedes recognition—listening, discarding, and listening again. But there are ample incentives to the work however hard the work may be, in either the Christian community or secular life, and all who work are working toward that which they must acknowledge. There is choice in choosing to work. In the end, those who do the work do not choose whether to hear what they hear.

## AUTHORITY AND VALUE

All this has much to do with one further aspect of the phenomenon of authority, with which we will end this sketch of it. That is the internalization of value that accompanies recognition of authority and perception of a person.

The achievement of a sense that someone asking for attention does have the identity or "name" that is initially claimed is an achievement through work, action really, "creation," as we have noted. With it comes a living connection with value that, we assume in all our practices, can be felt within and seen from without. Individuals grow into the world asking, "What should I do or say or think?" and grown individuals wander the world asking the same. They ask the same when moving to speak for the persons they are also. There are responses, voices back, and then responses in turn to those. When what we commonly call "value" animates the response—animates, in a living way—then those asking and those responding are in the world of authority. We have noted that the world of author-

ity is one in which the person, the very notion of a person, can and does exist. The world of authority is marked by that possibility and presence. The line and difference between what is within us and what is outside us also marks the border of the world of authority, and on the question of the internal, Catholics can speak and show and speak and show again.

The person to whom we listen and respond in good faith is not outside our skin but brought within us. That which we of the genuinely puzzled question "What should I do?"—we of the here and now—have a part in creating, is part of us. This is the source of our response in good faith, of our true willingness in what we call "willing obedience" (to the degree we are indeed truly willing to do what we do in our response and in our continued listening): that all this that is beyond our hereness and nowness is *within*, as much within as our hereness and nowness is within.

Authority "commands," it is said. Authority "orders" thought and action. But there are two polar attitudes toward any "command," and the choice to range toward one or the other is always open. One possibility is to take the command into account in good faith in making one's decisions—after, of course, coming to some conclusion about how to read it. The other is not to take the command into account except insofar as we are forced to or it is convenient and good strategy to do so. The one attitude partakes of faith; the language of faith, "good" faith, is found everywhere salting descriptions and prescriptions of secular social and political organization, private and public, local, national, and international.<sup>15</sup> The other attitude turns us to pursue our various ends to gain whatever advantage we can until superior force comes after us and makes us stop. We take the initiative with respect to the purpose and sense of the command, understanding it as having purpose and sense. Or we are begrudging, passive. We shift the burden of initiative to those seeking to affect our behavior, and we use the advantages of delay and congestion—two of the givens of the here and now, real limits of space and of passage of time, always hold those advantages out to us. We externalize the command, keeping it quite at arm's length. Or we internalize it.

If it remains not internalized, that does not mean that someone has not given an order, that a decision has not been made or conveyed by someone, or a statement has not been issued, or that the decision or the statement will have no factual effect, no effect on history. It does mean that the hearer will not be actually guided by it and instead will work against or around it. That will be the reality, whatever the soothing appearances. But it is equally a reality of human life that to the extent the statement or decision is not worked against or around, it is internalized. It is part of one to that extent; it animates and directs one's affirmative seeking. Indeed, an authoritative statement is a piece of the evidence of what oneself believes.

I think I need hardly add, in speaking of authority and internalization, that we don't take poison into ourselves. Nor do we need to add an equation to our earlier set of sentence-propositions about authority to reflect this. Whatever is merely a system may not be a mind at all, but a "mindless system" that spins or grinds on without regard, respect, or care. What is wholly self-aggrandizing, wholly competitive and manipulative, can make no authentic statement about a value that might be internalized, and could not be or speak for a person that is a living connection between us as individuals. This is obviously true in secular law that speaks openly of authority, in the "name of the law," and obviously true in the Church. But it is equally true in the business entities where so much of the experience of secular authority in daily life occurs. They do not, either in legal contemplation or in practice, have the face economic theory paints. The possibility of the authoritarian, that uses you and does you in if it is internalized, always shadows the experience of authority, but authoritative voices are heard often enough and for long enough to make life together possible and sometimes (as we say) absorbing.

In fact, the very way authority comes to be through internalization can serve to nourish the essential equality of individuals to which we alluded earlier, since it may be thought that each must presuppose and come close to concluding that the mind and voice constructed and heard cares about *him* and his own, *her* and her own, not merely him or her as a fungible and dispensable part of a system. There is a mutuality in the way authority comes to be. The listener, as individual, asks and learns, but on the understanding that she is learning something about herself.

Person, understanding, authority, and internalization thus flow together. A claim of authority—and this extends to the secular world in general and secular law in general—is an asking. It is, again, an asking for willingness, or "good will," and good faith. A claim of authority is not asking for obedience based on habit and unthinking reflex, which at the very least would be exasperating and unreliable in a changing world, nor for obedience based on fear, however much fear is in the picture, which would have nothing to do with a sense of obligation and the opening of the imagination that comes with it, the "devoting" of oneself as we say even in secular life. In this asking for willing obedience, and in the fashioning of statements legal or otherwise that when read as a whole over time actually can be willingly obeyed, lies the merger of speaker and listener—the same merger, it may be noted, that has always been at the center of Catholic perception of the world.

An authoritative statement incorporates what is to be done by the one wondering what ought to be done or said or thought in a brief appearance in a vast, complex, and changing world. An authoritative statement is very nearly a responsive definition of the one wondering, a definition at least of-

ferred, and what happens when authority appears happens in the mind of the listener quite as much as in the mind of the speaker. The same statement is also a definition of the person speaking the statement—again, not the individual speaking but the person—and as the statement is developed, understood, and internalized, and values that animate the speaker come to animate the listener and be the listener's own, the two are pulled together.

As to value as such, when a decision is being made or a statement written that is to be offered as authoritative, it is often said that "considerations" or "factors" are *weighed* or given *weight*, or are the *grounds* for what is offered. If an end sought or consequence contemplated bears on the decision, it is marked for notice as a factor or consideration, and indeed the particularity of a person speaking or deciding authoritatively is produced by or found in the particular factors or considerations that person is authorized to take into account and does in an authentic way. "Grounds" and "weighing" are geographical and gravity-derived images. But in a human decision cast into human language, "factors" become values for the listener seeking to understand, as much as for the speaker and decider. They are no longer something outside and weighing on one, to which attention is paid because it must be paid as one acknowledges the weight of one's leg and takes it into account because gravity outside oneself requires that one pay attention to its weight. They are warm, because inside, and the authoritative decisionmaker is warm toward them. They are not so much restraining and limiting as animating and feeding thought. Their place is not in past time, with causation in the nature of a push, but in the future, from which they pull like a voice calling. Defined though they may be by the very course of human decision and response, it does not go too far to say that they have something at least like life themselves.

In secular discussion the phrase "living value" comes often and easily to the tongue, and there is no suggestion that it is not at all really meant. In fact, in criminal law analysis, both in the development of a sense of what it is that makes an action criminal, the so-called mental element of the crime that is essential to "true" crime, and in determinations of criminal sanctions based in any degree on retribution with the possibility of remorse and forgiveness, discussion often and quite naturally paints a picture of the value itself as injured, and the object of prosecution, conviction, and punishment as restoration or maintenance of the value as a living force in the human world.

#### AUTHORITY AND THE SENSE OF LIFE

This leads me to suggest, but only suggest, that the Catholic sense of life, so very far from the sense of anything that is merely a "product" of a system

and part of a system, may contribute at the same basic level we have been trying to explore. No confident claim about the nature of the reality of value has to be made here. It is enough to think of the possibility of adding a breath of life into secular discussion of value.

I will illustrate with a contemporary example—the ongoing discussion in the United States of the legal status of torture—where the need for such help seems very clear.

In an “instrumental” vision of the world, there are only systemic costs and systemic benefits. This is axiomatic in the biological sciences and in economics, and there is a push to think the same in all secular social and political affairs. Catholic moral and social thought is very different. There can be and there are some things you just do not do, some considerations that are paramount, some values that are, as is said, “absolute.” There are in Judaism, ancient and contemporary—I think of Rabbi Jonathan Sacks’s fine book of a decade ago, *Faith in the Future*—“in the entire created universe there is only one thing of absolute value . . . the human individual. Any human individual.”<sup>16</sup>

But in the modern secular world there is at least one value that has been designated by international treaty and national statute as absolute, its violation unjustifiable in any circumstance and not to be done whatever the cost. It stands against torture of even a single human being by one in a position of authority. There is never authority for torture. The international Convention Against Torture, emerging from the horrors of the twentieth century, is quite explicit, and it is a felony now under federal law for any agent of the United States to torture a human being.

In 2002, eight years after American ratification and implementation of the Convention Against Torture, lawyers in the United States Department of Justice undertook to make statements about the meaning of torture that would have the authority of their offices in government behind them. What they wrote was received with widespread revulsion and eventually disavowed, but most certainly conveys a recognizable cast of mind.<sup>17</sup>

They asked, “If this is a thing you just don’t do, what is the *thing*?” and they took a somewhat scientific stance of open-minded ignorance (though it should be said that experimental scientists less and less take such a stance where in question is the torture of animals who are legally protected against it, “it” being “torture” without elaboration). They were in this sense cold, as they went about the business they had set themselves. They dwelt on examples, writing in sentences that might be pasted in a manual for torture and not look out of place. They went to the dictionary looking for a definition. They sought to quantify suffering, and turned to statutes and decisions on flows of quantities of compensatory money or health insurance, looking for a calculus of pain. They sought to fold the question of torture into the likelihood a judge and jury might move

against an official accused of torture and make him suffer in some way himself, implying that the question "Am I a torturer?" is not "What will happen to this creature in my hands?" but rather "Will someone stop me?" as in the world imagined by Oliver Wendell Holmes, which his official biographer called "bleak and terrifying,"<sup>18</sup> where that is the only question.

When they did turn to other responsible authorities that might genuinely have wrestled with what is protected by the prohibition against torture—that might have wrestled even in the biblical sense with What protects—they were publicly charged with methodological "incompetence." Incompetent, because they did not do the work necessary to hear, themselves, an authoritative voice—they did not look to the whole but picked out a single statement here or there from statements succeeding one another in ordinary time as the statements of any living voice do. Moreover, as when wondering what sufficiently "rends" a human being's personality in the use of mind-altering drugs as part of modern torture, they picked out statutory terms (such as "profound" from "disrupt profoundly the senses or the personality") as if Congress legislating was approaching torture in the same way they were, setting up rules with which would-be torturers would have to contend. There is more than a suggestion that tax law, with its rules and categorizations and interpretations of it scaled according to their relative "aggressiveness," was the model of law itself they had in mind; and tax law may indeed have edged into the center of secular legal thought today, the more so because it matches law as the purely "economic man" would have it. Distinctively, and explicitly, tax law imposes little or no obligation to seek the ends it seeks. There is no value at its heart meant to be internalized by those to whom it is addressed. It hardly has a heart. That is its peculiarity as law.

Why the official disowning of what they did,<sup>19</sup> and why the widespread fear for ourselves that it was done? Is it not the absence of any sense that they were dealing not with a thing, but a value? They were seeking how close they could get to "it," how close to a line without "crossing the line," when, as in the case of any crime, you are not to go close to the line—if in truth there is any such thing as a "line" in the "definition" of crime. We commonly use instead the language of "respect" and "violation," respecting a value as if it were a person. A value has a glow and indistinct edges. It beckons and is fragile and can be injured like anything alive. What the prohibition of torture speaks of is a value of such a kind that when near it you take off your shoes.

While no doubt there were Catholics involved in the interrogations of terror suspects, Catholics might be particularly expected to see that these statements about torture were untouched and unguided by any sense of the sacred. And while Catholic lawyers too might try to respond to a plea

for help from interrogators, they would think as Catholics think, from the beginning, of life and what lives and death and what is dead. They would have in mind not just the mortal individuals whose fates might be in their hands but, in some real way, the fate of that to which they looked for hope. They would, as Catholics, be serious as the authors of these statements were not serious, engaged as these authors were detached, warm as these authors were cold. It would not be beside the point for Catholic lawyers, though it might be for those they could help, that it is a crucifix that might be on their wall at home, and that in reality, and with time as it actually is, Christ's suffering is not only an "event" that occurred but occurs now, all around the world.

Let us end this brief look at the ways in which Catholic thought can serve as something in the nature of a reality check for the secular world by returning to science that plays such a large part in giving the modern world its secular cast. The well-known Cambridge paleobiologist Simon Conway Morris's recent book, *Life's Solution*, reviews the evidence for and against adaptational trajectories and inevitabilities in evolution as it is now understood—as opposed to everything we see now being entirely "accident," happy or unhappy. He ends his preface saying, "Contrary to popular belief, the science of evolution does not belittle us. As I argue, something like ourselves is an evolutionary inevitability, and our existence also reaffirms our one-ness with the rest of Creation." "Nevertheless," what "we are given allows us to make a choice." He then ends the book with the "special dilemma" of modernity, the human possession now of tools that "treat the world as endlessly malleable," open, as he says earlier, to "limitless manipulation."<sup>20</sup>

The place of authority is in Conway Morris's words "we" and "us." Authority resides there. Authority makes it possible to think of an "us" making a choice that has some hope of effect. That to which his "we" and "us" refer is, I think, a reality for Conway Morris and a reality for others throughout science and throughout the secular world. That reality, however, many shy from acknowledging, with consequences they themselves lament. Acknowledgment of reality has its own way of healing, in social and political affairs as much as in personal life. Here Catholic thought, in its conscious affirmation of persons beyond, behind, within, and greater than the individual, can be quite specifically helpful to the secular world. This is only one of the ways.

## NOTES

1. James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown and Company, 1973).

2. Charles Taylor, *Modern Social Imaginaries* (Durham, N.C.: Duke University Press, 2004), 49–58, 185–94.

3. Mark S. Massa, *Anti-Catholicism in America: The Last Acceptable Prejudice* (New York: Crossroads, 2003), especially 51–58; Eugene McCarragher, “Some Things Never Change,” review of *Anti-Catholicism In America*, by Mark S. Massa, *Commonweal* 130, no. 15 (September 2003): 38–40. See generally John T. McGreevy, *Catholicism and American Freedom: A History* (New York: W. W. Norton, 2003), and its sensitive review and summary in Richard W. Garnett, “American Conversations With(in) Catholicism,” 102 *Michigan Law Review* 1191 (2004). On “analogical” imagination, see David Tracy, *The Analogical Imagination: Christian Theology and the Culture of Pluralism* (New York: Crossroads, 1981).

4. Commonweal Foundation, “American Catholics in the Public Square: A Report to the Catholic Community,” *Commonweal* 131, no. 13 (July 2004): A1–15.

5. This nice phrase, a variant of “the universe and everything in it,” is from Steven Weinberg, *Dreams of a Final Theory: The Search for the Fundamental Laws of Nature* (New York: Pantheon, 1992), 242: “A ‘final’ or ‘total’ theory (the offering of imagination and ready to be replaced by it) is ‘the book of rules that governs stars and stones and everything else.’” Like the individual offering visions of this kind or the individual listening to one offering them, human imagination is not governed by a “book of rules.” Nor is law’s authority. Charles Taylor’s *Modern Social Imaginaries*, which is offered as a work of intellectual and cultural history, might be read to the contrary, but for Taylor’s response (p. 51) to his own question whether “ontically” human response to “some human-transcending spiritual reality” is an “inescapable dimension of human life,” or whether instead, in the working of cultural evolution “exclusively within the psyches of human beings,” “humans can eventually put [their ‘common religious capacity’] behind them.” “Obviously,” Taylor says, he himself has “strong hunches” on the matter.

6. Free societies do not have easy words for what might be called the second half of the phenomenon of authority. I have used “deference” before, e.g., “Authority and Responsibility: The Jurisprudence of Deference,” 43 *Administrative Law Review* 135 (1991). It may have too passive a connotation, but it includes in one term both one’s response to a direct order and one’s response to an “authority’s” action or statement that changes the world without a direct order to oneself. “Deference” also includes respect for responsible decisionmaking, and may operate down a hierarchy, from one above to one below, as well as in the more conventionally imagined direction up. Philip Soper has written recently of the “ethics of deference” in *The Ethics of Deference: Learning from Law’s Morals* (Cambridge: Cambridge University Press, 2002).

7. See, e.g., Frank H. Knight, *The Economic Organization* (New York: Augustus M. Kelly, 1951), 28–30.

8. The most perceptive and detailed treatment of relationships of authority between human beings and animals is Vicki Hearne’s *Adam’s Task: Calling Animals by Name* (New York: Alfred A. Knopf, 1987).

9. There is some further playing with such “equations” in my *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1988), 230–234. For contrast with the terms in which these are cast, see, e.g., Murray Gell-Mann, *The Quark and the Jaguar: Adventures in the Simple and the Complex* (New York: W. H.



Freeman, 1994), 117: "At Caltech, it is mostly the brain that is studied. The mind is neglected, and in some circles even the word is suspect (a friend of mine calls it the M-word)."

There are in fact attempts to use equational or quasi-mathematical notation in a quite serious way in discussion of authority and human law. See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1983), 64–65; and John Searle, *The Construction of Social Reality* (New York: Free Press, 1995), 43–51. For my own comments on such reduction and fixing of what speakers have in mind, see "The Gift of Language," 73 *Notre Dame Law Review* 1581, 1582–85, 1594–95, 1597–98 (1998).

10. Steven D. Smith, *Law's Quandary* (Cambridge, Mass.: Harvard University Press, 2004). See also Smith's concluding chapter in this volume and his essay, "Metaphysical Complexity?" 55 *Catholic University Law Review* 639 (2006).

11. Cf. Patrick McKinley Brennan, "Meaning's Edge, Love's Priority," 101 *Michigan Law Review* 2060, 2072–73, 2082 (2003); John E. Coons and Patrick McKinley Brennan, *By Nature Equal: The Anatomy of a Western Insight* (Princeton, N.J.: Princeton University Press, 1999).

12. The life in the individual and in the person of the human world becomes more insistent, in thinking of them, when contrasted with the "individual" and "identity" in scientific thought. See Peter Pesic's interesting account of the latter in *Seeing Double: Shared Identities in Physics, Philosophy, and Literature* (Cambridge, Mass.: MIT Press, 2002).

13. See note 3 *supra*. My own *The Song Sparrow and The Child: Claims of Science and Humanity* (Notre Dame, Ind.: Notre Dame University Press, 2004) is an exploration of the relation between human law and total or final theories.

14. "Why Are You a Catholic?" in *Living Philosophies: The Reflections of Some Eminent Men and Women of Our Time*, ed. Clifton Fadiman (New York: Doubleday, 1990), reprinted in *Why I Am Still a Catholic*, ed. Kevin Ryan and Marilyn Ryan (New York: Penguin-Riverhead, 1998).

15. As with other aspects and conditions of authority, secular reliance and insistence on "good faith" can be helped. Under increasing pressure from the thrust in Western thought that positively wants to see each of us and each of our institutions as only systems reacting to the actions of other systems, never as responsible and choosing, it just may be that over time the secular language of "good faith" will become too feeble to do its work without aid from its more robust source. Tacit acknowledgment can sometimes be enough—the chemist Michael Polanyi has often referred to the "tacit dimension" of any knowledge, including the scientific. But under such constant pressure, the social and political sensibility may need some more conscious apprehension of the actual faith there is within the secular sense of "good faith."

16. Jonathan Sacks, *Faith in the Future* (London: Darton, Longman and Todd, 1995), 86.

17. Their memorandum to the Counsel to the President remained the official position of the Department of Justice for two years, 2002–2004, before being withdrawn and replaced by a new memorandum of a different tenor, prepared for release to the public as theirs was not. The text can be found at [www.washingtonpost.com](http://www.washingtonpost.com) and other websites, under the title "Standards of Conduct for

Interrogation under 18 U.S.C. §§2340–2340A, August 1, 2002,” and in *The Torture Papers: The Road to Abu Ghraib*, ed. Karen J. Greenberg and Joshua L. Dratel (Cambridge: Cambridge University Press, 2005), 172. It is discussed and quoted in its public replacement, “Legal Standards Applicable Under 18 U.S.C. §§2340–2340A, December 30, 2004,” at [www.usdoj.gov](http://www.usdoj.gov). “This memorandum supersedes the August 1, 2002, Memorandum in its entirety.” Ibid. See Adam Liptak, “Legal Scholars Criticize Torture Memos,” *New York Times*, 25 June 2004; Kate Zernike, “Defining Torture,” and Adam Liptak, “How Far Can a Government Lawyer Go?” *New York Times*, 27 June 2004; Douglas Jehl and David Johnston, “C.I.A. Expands Its Inquiry into Interrogation Tactics,” *New York Times*, 29 August 2004; *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States*, 109th Cong., 1st sess., 6 January 2005, 157–70 (testimony of Harold H. Koh); David Johnston, Neil A. Lewis, and Douglas Jehl, “Nominee Gave Advice To C. I. A. on Torture Law,” *New York Times*, 28 January 2005. But see, “Can Torture Ever Be Justified?” *Bulletin of the American Academy of Arts and Sciences* (Summer 2004): 3–4; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, N.J.: Princeton University Press, 2004); and essays in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004). For a discussion of the historical and international background see Rod Morgan, “The Utilitarian Justification of Torture,” *Punishment & Society* 2, no. 2 (April 2000): 181–96.

18. Holmes’s official biographers fell away from their encounter with Holmes’s imagined world, one by one. In the words of one of them, Holmes himself was “savage, harsh, and cruel.” But cruelty was in fact meaningless in the world in which Holmes tried to live or thought he lived, since it was without persons, or indeed individuals. Law, for Holmes, was “like everything else” in the universe and “[t]he postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents.” Oliver Wendell Holmes Jr., “The Path of the Law,” 10 *Harvard Law Review* 457, 478 (1897). See Grant Gilmore, *The Ages of American Law* (New Haven, Conn.: Yale University Press, 1977), 48–49; Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: The University of Chicago Press, 2000), 31–33; and my “The Cosmological Question,” 94 *Michigan Law Review* 2024–25 (1996).

19. What they wrote was replaced “in its entirety”; see note 17. Public argument then shifted to treatment that current language separates from torture—the “cruel,” the “degrading,” the “inhuman,” “outrages against personal dignity,” in the words of the Geneva Conventions or the Universal Declaration of Human Rights. The same pursuit of quantification and self-executing “definition” occurred, as if law were present or absent to the degree of mathematical clarity in its expression—though all knew that neither murder nor manslaughter is definable apart from regard for the value of individual life. The galvanizing problem was, again, not fear of committing a crime against humanity but fear of suffering for doing so. For a sampling of contemporaneous description of the debate see, e.g., Tim Golden, “Senior Lawyer at Pentagon Broke Ranks on Detainees,” *New York Times*, 20 February 2006; Jane Mayer, “The Memo,” *New Yorker*, 27 February 2006, 32–41; Jim Rutenberg and Sheryl Gay Stolberg, “Bush Says G.O.P. Rebels Are

Putting Nation at Risk," *New York Times*, 16 September 2006; Scott Shane, "The Question of Liability Stirs Concern at the C.I.A.," *New York Times*, 16 September 2006; and Kate Zernike, "Top Republicans Reach an Accord on a Detainee Bill," *New York Times*, 22 September 2006.

20. Simon Conway Morris, *Life's Solution: Inevitable Humans in a Lonely Universe* (Cambridge: Cambridge University Press, 2003), xv–xvi, 2, 328–29. See also Conway Morris, *The Gifford Lectures, 2007: "What Organic Evolution Tells Us about Our Place in the Universe."*