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What's Real for Law?

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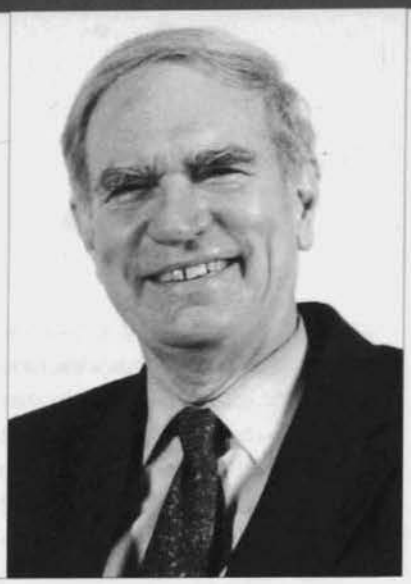

The following essay is adapted from a paper the author presented this March, at a Lilly Foundation conference at Notre Dame Law School, and a lecture given last October, at a symposium at the Center for Law, Philosophy, and Culture, Catholic University Law School. The October symposium and March conference explored issues and questions raised by University of San Diego Law Professor Steven D. Smith's Law's Quandary *(Harvard University Press, 2004). The complete lecture, together with lectures responding to the book given by Professor Patrick McKinley Brennan, Justice Antonin Scalia, and Professor Lloyd Weinreb, and a further presentation by Professor Smith, is being published in* 55 Catholic University Law Review *No. 3, 671-685 (Spring 2006).*

Law is not academic. The university is not its home. Law is in the wider world and is pervasive there, in language, thought, and action. Everyone is imbued with it. I want to raise here the question whether law might have an ontology of its own. In his elegant and accessible new book, *Law's Quandary* (Harvard University Press, 2004), Steven Smith groups our various senses of what is real for us into three "ontological families," the "mundane," the "scientific" including mathematics, and the "religious." Law today operates in an "ontological gap," he suggests, unless its practitioners are in fact drawing upon the resources of the third of these families, the religious, in understanding and explaining what they do and their authority for what they say.

There may be an additional and fourth such "ontological family," law's own.

When we turn to contemporary scientific and mathematical description and discussion we see how overt the ontological is all around us. Ontological claims are signaled generally by the verbs "is" and "exists" and of course by the adverb "really." They may be negative or positive. For instance, a prominent physicist, pleading recently to the general reader for greater understanding and acceptance of "indirect scientific evidence," presents "field theory" as "the theory I use that . . . describes objects existing throughout space that create and destroy particles." She speaks of "observing" as "involving a train of theoretical logic by which we can interpret what is 'seen'" and, with regard to space and the dimensions of space, "establish the existence of extra dimensions." In the end she turns to a form of majority rule, "the bulk of the scientific community" determining the "true story," but that her own claims are "ontological" in character is evident. "Do I believe in extra dimensions?" she writes elsewhere. "I confess I do. . . . Sometimes . . . an idea seems like it must contain a germ of truth. . . . I suddenly realized that I really believed that some form of extra dimensions must exist." (Lisa Randall, "Dangling Particles," *New York Times*, September 18, 2005; *Warped Passages* [2005], 3).

Against this background of overt ontology let me slip into law's with an example that cuts across the scientific, the legal, and the religious. A *New York Times* op-ed comment by Bernd Heinrich ("Talk to the Animals," August 26, 2005) on the popular 2005 documentary on the Antarctic penguin, *March of the Penguins*, argued with approval that we have become more comfortable calling what we see there "love." The comment was of the kind that proposes easing or eliminating the line between human beings and animals by pulling us across it toward them, rather than them across it toward us.

"I've long known the story of the Emperor penguins," the commentator says, "having told it to generations of biology students as a textbook example of adaptation. . . . In a broad physiological sense, we are practically identical not only with other mammals but also with birds . . . except for differences in detail of particular design specifications."

Then comes the ontological statement of interest. "Functionally," he says, "I suspect love is an often temporary chemical imbalance of the brain induced by sensory stimuli that causes us to maintain focus on something that carries an adaptive agenda." The ontological claim is made by the "is" in "love is. . . ." It is modified slightly by his term "functionally," but the point of his commentary is to urge us, the "us" that appears in his definition of love, not to be shy about using the word

"love" for what moves the penguin—what moves the penguin need be no different from what moves us, an often temporary chemical imbalance of the brain that is adaptive.

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

What would the legal mind do with a statement like this, in thinking about coming to some conclusion about love? In law we are all witnesses, as we often are also in personal life. When presented in law with this sentence about love, there would be interest in what this same individual said at home, what he meant when heard to say "I love you" to his wife or child, friend, or sister. Putting the two statements together, the one made at home and the one made professionally, as would be done in cross-examination on a witness stand, a lawyer or jury would conclude, I think, either that the word "love" in the one statement, made in class when teaching the penguin's love as a textbook example of a system operating in an adaptive way, means something different from "love" in the other statement at home, or, if the two words are meant to convey the same, that he doesn't believe what he is saying in class. It would not affect thinking about love, in the latter case, any more than any witness's statement is taken seriously if shown on cross examination to be one in which he does not believe. As for whether he might consistently conceive of love and himself in this way, a lawyer or jury would hear him speaking too in asking for trust and authority as a teacher, and in his gestures and in his self-restraint toward those he says he loves.

Law does not have a special sense of love, though if law did, it would be expressed in John Noonan's very beautiful response to Richard Posner's view of moral and political theory. But law does not stop with a scientific sense of love, if this teaching is in any way an example of it. Law could not stop with the scientific, not because law is intrinsically ordinary on the one hand or religious on the other, but because of law's own various underlying commitments that can be fairly called ontological:

- Commitment to the presence of persons whose statements and actions may be spread over time both within and beyond an individual span of life;
- Commitment to the possibility of authenticity in those statements;
- Commitment to the sense of language Smith explores in *Law's Quandary*, that linguistic meaning is the meaning of a person, always, whatever we pretend—is always metaphorical if you will; and, finally,
- Commitment to a first fact, basic, on which other conclusions are built, the fact we are more than one, and, when one of us speaks, about anything, he or she is only one.

It is true that many call "love" the something more in the very structure of the universe than form (that merely is). I have mentioned John Noonan in law. This something more—call it love—makes possible a human mind that cares. It is necessary to human authority and authenticity toward which lawyers work, as necessary to lawyers' work as oxygen. Since it has no place in the ontological family of science and mathematics (as oxygen has), its reality for law, lawyers, and legal thought may be drawn from the "resources" of the other ontological family that is not mundane, linking law directly in the most basic way to what is beyond both law and science. But all that is necessary to law is not in law's own ontology. All that is necessary to science is not in science's own. What is perhaps most necessary to scientific work, individual freedom, even creativity and trust, would be hard to find "existing" there. Science remains distinct, as can law. The human individual remains distinct, one's reality one's own, even though one's own resources of mind and spirit are manifestly inadequate.

Pulling ontological claims generally into the open, as Smith does in his book, will I think bring what is real for law into the open over time, its "ontological inventory," in Smith's nice phrase. Authority is there, as a reality. Purpose is there, and inquiry into purpose, significant against the background of current presentations of scientific method in ontological terms—Jacques Monod's is the classic statement of this kind, that postulates of purpose anywhere in nature, which would include us, "exist at odds with objective knowledge, face away from truth, and are strangers and fundamentally hostile to science."

The legal mind has its own sense of time, very much associated with supra-individual persons in law, and with the connection of any conclusion in law to action, which follows acknowledgement of authority. Time is the realest thing in the world, we may be inclined to think and continue to think despite hearing some in physics happily making the ontological statement that it can be shown to be only an illusion. But the definition or sense of this "it" in one context—ordinary indi-

vidual life or the astronomical or the religious or the musical—may not serve at all well in another, even through carried from context to context is the experience of reaching to express the same thing, "time." Law is one of these contexts in and of itself.

Perhaps most irreplaceably, the individual lives in law's ontological inventory, the human individual and, to an increasing degree, the individual animal. Law's commitment to the fact we are more than one is fundamental, not to be shut out of thought methodologically or ontologically. This can be said noting, all the while, that violent imposition of pure will occurs through legal processes, and that power is exercised in the name of the law by those who can secure for the moment some extension of their individual strength. But this is what "the law," ontologically speaking, sets its face against. So often this is just what legal argument is about. Law contains the terms of its own powerful and effective criticism, which look to and maintain the individual in the world, along with the person, purpose, and living value. The strength of the individual in legal thought is not unlike the strength of natural selection in biological thought, or of force in physics.

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

Legal thought eventually departs from this. Capturing eliminates the continuous unfoldingness of things and the reality of the necessity of assent to characterizations of perception, unitizing eliminates the reality of individuality—both realities, again, being part of the "ontological inventory" of law. The signal of a move from the rational and reasoning in law to the rational and reasoning as it proceeds in other fields often is substitution of an abstract symbol for a word, phrase, or sentence of human language. This is not to say that capturing and unitizing are not useful in human affairs. But it may be to say that the usefulness in human affairs of such reasoning extends only to the point where the force of law, that proceeds from human imagination and creativity, is brought to bear on a situation and the future emerging from it.

Large words these, creativity, time, person, reason, individual, purpose, value, authority. But they are no larger than dimension, universe, reason, time, or force in scientific and mathematical discussion. Can these be realities as well as words for law, without making a commitment to law into a religious commitment? *Law's Quandary* more than suggests there is an implicit commitment to the "existence" or "reality" of these things that are not just things when one acts and takes responsibility in the name of the law. It is commitment in the absence of which one could often not bring oneself to do what one does, I think, or be able to do it needing the help or forbearance of others who are also implicitly so committed and who judge the authenticity of one's own. Can the affinities between the world of law and the world of religious commitment be as close as they are—so close that lawyers may be said to work at the very least in an anteroom to the home of religious commitment—without leading one empirically or introspectively to conclude they are in fact the same?

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