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## The Filaments of the Vicarious

Joseph Vining

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

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## THE FILAMENTS OF THE VICARIOUS

JOSEPH VINING\*

**F**ORTY years is the unit of work in focus here. You have or will have units of forty years of your own, a unit of work like this. I hope what you are doing for me is also for you and your work and your encouragement about the decades behind you or to come. I can best respond to your generosity with a look back at the course of this effort of mine and its internal and external connections over time, to illustrate and help us keep in mind the way we mutually influence each other in our thought and lives. If the effort of one of us rounded into a unit is made an occasion to bring us together and a focus for reflection on where we are in our perception and development, it needs its context.

Origins and influences can begin with a biology teacher in secondary school, J. C. Catt, for whom I wrote a long paper on a drop of pond water. And I think origins can include the fact my writing was latinate, never I thought fluent (my school was a latin academy of sorts). I did have a freshman teacher of English in college, Richard Young, who gave me a real sense that I, even I, could see things in words, even perhaps ineffable things. Nonetheless I went into zoology as a major, and was drawn into embryology, the field focused on form developing from the formless. I remember C. H. Waddington's humane syntheses of the conceptual problems, I remember reading and returning to D'Arcy Thompson's truly beautiful *On Growth and Form*,<sup>1</sup> and I remember working with Hans Spemann's "organizers." A continuing influence on me in those years was the embryologist J. P. Trinkaus in whose laboratory I spent considerable time. The possibility of a life force still hovered in the field. It was something special to biology—a force that was not in chemistry or physics just as the force of law is not. But quite aside from that, the embryology of the time focused me from the start on wholes rather than parts and wholes not reducible to their parts.

Then there was a summer studentship at the Woods Hole Marine Biological Laboratory where a visceral sense took hold in me that something was missing from the inquiry and discussion, and I knew I should not devote my life to experimental science. A final graduate seminar with the gentle, careful, and open-minded G. Evelyn Hutchinson, a founder of scientific ecology (the seminar was of all things on limnology, again the study of ponds), and my writing of an undergraduate thesis for him on neotony (evolutionary branching from juvenile rather than adult forms), happily

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1. D'ARCY WENTWORTH THOMPSON, *ON GROWTH AND FORM* (2d ed. 1942) (1917).

left me with a lasting impression of the wisdom and culture that could be associated with professional scientific endeavor.<sup>2</sup> But I wrote my applications for overseas scholarships and simultaneously my law school application essay with the anticipation that law addressed the problem I needed to explore as science could not, the problem (as I put it then) of connecting “one unique life with other unique lives,” which was also “the problem of there being more than one person in the world.”

Evelyn Hutchinson was a bridge to Cambridge. He grew up and was educated and formed there. He gave me a postcard of the Backs at Cambridge and said it was man’s most beautiful creation. Perhaps since the Cambridge Backs were not designed in any individual’s mind, but developed (almost embryologically) over centuries until people said “yes,” he put in me the seed of a continuing conscious wonder about the beauty of nature, why it is beautiful.

At Cambridge where I read history, as a transition from biology to law, I came under the influence of Dom David Knowles, then Regius Professor of Modern History, an exalted position but him a modest man. Knowles introduced me to medieval nominalism and positivism, and the various Platonist and idealist opposites. He seemed to embody what he thought and taught. The same themes were there, reductionism, and form that could not be reduced. In a way the question of a life force was there in the enveloping medieval context, and certainly the question of organizations that were not reducible to their members, just as in embryology. (I was reading for the Medieval History Tripos, a rather backdoor introduction to epistemology, hermeneutics, and the other concerns of modern intellectual life). I also read Hegel and Rousseau, and puzzled over their own pointings to “something more” in organized life than positivism could conceive. The other intellectual force I remember was Walter Ullmann; an historian of the Papacy, whom I had as a supervisor for a time. Clearly the phenomenon of authority was being explored for me in internal ecclesiastical struggles and then in the secular struggle for legitimacy in what was called Christendom.

None of you has ever told me you have actually frozen on an examination, the stuff of examination dreams. I did once, at Cambridge. One of the papers we all had to write at the end of the Tripos, whatever our subject of study, was an essay of which we were given just the title. This, the so-called “English Essay,” was meant to be an open-ended examination of our general culture to be used at the margins in grading our other papers. There was a practice examination the year before the Tripos. I sat down in the examination room and before me was a sheet of paper with a couplet on it, on which I was to write for three or four hours—“That frost of

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2. Hutchinson’s autobiography can do the same. *See generally* G. EVELYN HUTCHINSON, *THE KINDLY FRUITS OF THE EARTH: RECOLLECTIONS OF AN EMBRYO ECOLOGIST* (1979).

fact, by which our wisdom gives/ Correctly stated death to all that lives.”<sup>3</sup> Masefield, though I didn’t know that: it might have been composed by the examiner. An hour in I still had nothing on the page. I got up, turned in a blank sheet of paper, and left. The next year I did get through the English Essay on the question set, which was “And did they really want cakes and ale?” But the couplet on which I froze stayed with me. James Boyd White pointed out to me that I have been trying to write my answer ever since.

At law school it was Lon Fuller’s first year class in contracts that gave me the experience of legal analysis or dialectic as something new, a pulling and tugging within the mind which was an approach to reality I had not seen or felt before. It left me with an experiential ground for believing legal thought not reducible to some other form of thought. The early realization that legal thought is not reducible fed the exploration of the legal form of thought as such that I started some twenty-five years later, in 1987, and finished with *Newton’s Sleep*<sup>4</sup> in 1993. I imagine my contracts class with Fuller was also where my conscious or analytic awareness of the non-literalness of meaningful language, and its connection to mind, began to stir. I would not say there was a shaft of light for me then, but illumination grew over time. Fuller certainly had a nascent sense of the metaphoricity of language itself. He was working against the near worship of Holmes in law schools, and against Holmsean “positivism” and the “realist” movement in law so unrealistically named, which reflected the ideals of symbolic logic and the behavioral psychology at large in the general thought of the time. I also took Fuller’s course in jurisprudence, one of a small number of students—most were across the hall learning too well to see law as “process” with its substance set aside—and I came to be known to him if not to know him. In one of his late books, in 1968,<sup>5</sup> he quoted a sentence from something I had written about thought divorced from the actualities of experience, that I took as a gentle warning about the risks of leaving practice for academic law.

I was drawn to criminal law in law school, partly by the personal warmth of Norval Morris visiting from Chicago, partly because I had taught in Borstals in England (perhaps as a kind of penance for taking so much from the world) and then, through a Phillips Brooks House program, was teaching again in a prison in Massachusetts. Both “doctrinally” and in its constant effort to justify what it allowed to be done to a human being found guilty, criminal law above all confronted a picture of the human mind as a conditioned system rather than as a center of responsible struggle with value. My first work in practice was in the Office of Criminal Justice in the Justice Department and then on the National Crime

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3. I JOHN MASEFIELD, *THE POEMS AND PLAYS OF JOHN MASEFIELD* 67 (collected ed. 1918).

4. JOSEPH VINING, *FROM NEWTON’S SLEEP* (paperback ed. 1996) (1995).

5. LON L. FULLER, *ANATOMY OF THE LAW* 10 (Penguin Books 1971) (1968).

Commission staff, and I began teaching general criminal law when I came to teach, eventually shifting to concentrate on organizational crime. I was fortunate to come to Michigan where Francis Allen was dean. I had seen him in action at the Justice Department, and thought him the most intellectually distinguished law school dean of the time, an elegant scholar in criminal law, and a good and moral man. He was also someone who wrote books, which was rare then in academic law. When Lee Bollinger became dean at Michigan midway through my forty years, he was like Frank in all these ways. Beyond Lee's influence on me through his example, his perceptions in his books on free speech and toleration that *inter alia* broke free from market-based theory, and his readings of what I was doing, he ensured for a time, a critical time for me, that Michigan continued to be a place where long term work could be done.

My principal specialization as a student in law school was not however in criminal law but in administrative law, the law creating and governing the great administrative agencies in particular regulatory fields—the law of public organizations. This was the door to consideration again of the phenomenon of authority. The basic question was whether an official was speaking on behalf of the agency so that it was the agency speaking, or whether the official was not, so that his orders had no force beyond his own puny voice and arm and did not have the “force of law” and would not be “enforced.” And this was the door also to seeing the connection between authority and perception of a person—here a supra-individual person. But any regulatory field was also a system, behaving like a system, rather like what was called a “field” in embryological development. A charismatic teacher, Paul Bator, introduced me to administrative law, and I took up an offer by the principal figure in the subject, Louis Jaffe, to write two chapters of a book he was finally putting together at the end of his career. This occupied a good deal of my third year in law school.

When I went into private practice in Washington it was administrative law work I was given, and when I came to teach at Michigan that became my field. In the summer before starting to teach I had read Geoffrey Vickers' *The Art of Judgment*,<sup>6</sup> on British administrative law, which beautifully sketched the interplay of human aspiration and the behavior of systems, and my initial articles worked on the systemic aspect of the administrative phenomenon. The first was on the importance of time and the effect on actors in a regulatory field of postponing correction of an unauthorized agency position (the question was known as one of “ripeness”). The second was on seeing political parties as administrative agencies, building on some experience as a Democratic Party Hearing Examiner enforcing the Party's rules.

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6. SIR GEOFFREY VICKERS, *THE ART OF JUDGMENT: A STUDY OF POLICY MAKING* (Henry D. Kass et al. eds., Sage Publ'ns 1995) (1965).

I am sure Vickers and one other book I read with leisure and care at the same time, Michael Polanyi's *Personal Knowledge*,<sup>7</sup> were particularly important books for me. Polanyi was a chemist, and *Personal Knowledge* raised to a new level the great question left by my undergraduate years, the nature and scope of scientific knowledge in a world of persons and individuals. In the matter of the serendipities of life, my father, on the faculty at Virginia, had been hospitable to Polanyi when he visited there for a term, and Polanyi had given him a copy of his book. It was that copy which was put into my hands and I read.

These events and influences were forty and more years ago. I think of my mind's development since then, and its contribution to the other kinds of development there are, as being the trajectory of the four books with which my mind was pretty much continuously occupied until this last decade of my sixties. And I think of their trajectory as more organic than governed by my own decision, as coming from the within that is mysterious to all of us except those who in their organized thought deny their own existence. Since Cambridge I had wanted to write the kind of short, personal, almost conversational book on a subject, a genre of the time, to which I had been introduced there. Such books had made me feel I was being pulled into an invisible world of thought, discussion, and even amusement where the authors themselves lived. Undergraduates at Cambridge fifty years ago were not allowed in the University Library. What we did was go out and buy books including books of this kind to prepare each week to write our essays, which we read out loud to our teachers.

I have not mentioned corporate law. I had one securities law case in practice, representing doctors who helped treat civilians burned by the napalm being used in the Vietnam War. They owned Dow Chemical stock and were seeking a shareholder vote on their proposal to stop Dow from manufacturing napalm. The Securities and Exchange Commission had a rule against inclusion in corporate voting materials any shareholder proposal motivated by anything other than profit. How these doctors came to me I do not remember—I was one of I think comparatively few at my firm who opposed the Vietnam War, and the case involved some intricacies of administrative law. They won in the D.C. Circuit,<sup>8</sup> the SEC rule was amended, and eventually Dow stopped making napalm though not just because of the shareholder proposal. Work on the case fired me, at the administrative level and then in involvement with the formidable litigator Roberts Owen who was drawn into it, preparing memoranda for his brief and argument in the Court of Appeals. Behind the rule being challenged was a vision, put forward as a legal norm to govern real life, of decision-making that was entirely free of any authentic concern for value and without any but an ultimately selfish concern for consequences to others. Cor-

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7. MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY* (paperback ed. 1974) (1958).

8. See *Med. Comm. on Human Rights v. Sec. & Exch. Comm'n*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

porate law, the law of “private” organizations, I viewed as setting itself against this vision precisely because it was law.

But here this vision was, and strong and pervasive in the literature too, always surfacing as a position in litigation. I saw the connection between this kind of thinking in economics and a kind of thinking in biology, which now was moving away from any residual sense of life in an organization (including one of us). And I saw the connection between private government under corporate law and public government under administrative law—and the connection between the nature of business corporate bodies and the nature of administrative agencies—together with the connection between the questions in each about who the persons were whose voices, if heard in an individual’s voice speaking for them, were authoritative, and if heard would lead to enforcement by public force. When I came to teach I offered to teach corporate law as well as criminal law and administrative law, and my first seminar was built on the Dow Chemical case. I linked the theoretical vision of indifference to value in the case to the *mens rea* of general criminal law, which was the same indifference to value as such. Soon thereafter I began to teach corporate crime, before casebooks on the subject appeared. I might have whipped my materials into shape for a published casebook, but my time was always put to my other books, and the principal effect I had was in introducing my students to the problems. One who has been like a colleague to me, Larry Thompson, generalized and formalized federal criminal prosecution of the corporate entity itself when he became Deputy Attorney General.<sup>9</sup>

Happily I taught from and talked with Alfred Conard at Michigan, following his lead into the corporate field. I still think of his as among the finest and broadest minds put to corporate law and its associated subjects. Teaching corporations, associations, partnership, agency, and securities allowed me, forced me, to come up against not just the question of a profit maximizing mentality, quasi-biological in conception, and the question what the alternative to that is, but also the question of the irreducibility and independent reality, to whatever degree, of the supra-individual corporate person who was indeed a person in all the language of legal analysis.

Nothing matched the thrusts and struggles of corporate law thinking in what I read in organizational theory from any of the social sciences. It was sometimes helpful but usually tied to crude presuppositions foreclosing anything of a phenomenological kind that might touch the reality of living organizations and individuals’ ways of identification with one another. When I say I was forced to come up against these questions I have the method of law school teaching to thank. I could not read lectures in

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9. See Memorandum on Principles of Federal Prosecution of Business Organizations from Larry D. Thompson, Deputy Att’y Gen., Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys (Jan. 20, 2003) (the “Thompson Memorandum”), reprinted in 72 *Crim. L. Rep.* (BNA) 481 (2003).

my classes. However prepared I was, in each class I had to persuade other adults that the questions were real questions and to open myself to being pressed on them, which I am sure pushed me this way and that as the years passed.

Thus corporate and “business” law were always in the background in my mind and work. Friends were surprised at my continuing with it, thinking it sterile, a study in manipulation and disingenuousness and a distraction from thinking about important things. I thought the usual building blocks of substantive legal analysis, contract, property, tort, crime, constitutional law, could not be understood today without it. I was also something of an odd duck among people who concentrated on corporate and business law as their specialty. But I involved myself in the field here and there, and in the American Law Institute’s project on the principles of corporate law, even perhaps helping keep “profit maximization” out of its final statement of business corporate purpose.<sup>10</sup> Amazingly I was once brought down to Washington to be interviewed for a seat on the Securities and Exchange Commission, no doubt because a friend of mine with whom I had sparred on various questions was on the Commission. I soon withdrew from consideration, which I couldn’t believe serious anyway, out of several concerns including financial ones, but large in them was the fact that I would have had to stop writing my books, which had hold of my mind. We all have our ways of searching for or finding understanding and meaning, and my own seemed to lie in that activity and direction.

For the same reason I never entered the “battles” going on in law reviews and workshops over issues my books took up or touched upon. Lee Bollinger chided me for not promoting my books as others did. I stayed with my gratitude to those who undertook to review them, though I responded publicly to a review once when the reviewer asked me to do it. During and after the writing of my first book, which worked with “standing” to be heard in a court, I did not contribute to the stream of articles on standing in the law reviews. The book was really about something else, and I felt I had to get on. When writing my second, I gave what became the first chapter as a public lecture in Canada on the growing bureaucratization of the courts, and was challenged in print by a former colleague and friend, Harry Edwards, who had become a prominent judge. I did not take up the debate. Others did a bit, but it faded away, actually because it

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10. The original formulation of corporate purpose in AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 2.01(a) (Council Draft No. 1, 1981), read “The objective of the business corporation is to conduct business activities with a view to the maximization of long-run corporate profit and shareholder gain.” After ALI Council review and discussion of the meaning “maximization” would have in this proposed statement of law, “maximization” was eliminated and replaced by “enhancing,” and § 2.01(a) in its final form in AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994), reads “[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”



is too painful a subject. I had to get on with the book that began with that lecture, a book in which bureaucratization was only a device, as standing had been in the first.

There was one book I did not get on with. From early on I had in mind a book on corporations centered on the problem of profit maximization originally put so sharply to me in the Dow Chemical case. I had file boxes of notes labeled "Corporate Paper" (so as not to be daunted by "book"), rising stacks of references from keeping up with the literature. But I never wrote the book. I applied for grants and sabbaticals using it as a proposal. But then, if given time and money, I would write something else. My first book in fact grew out of something I was going to get out of the way before the corporate book. Whether everyone has a phantom book in the background I do not know. It made my writing time stolen time just a bit, more precious and more pressed, and my writing what I wrote a doing of what I should not be doing, a form of defiance of myself, which strangely may have freed me. Perhaps I knew by instinct I had not resolved the questions I would be writing about and that they were perhaps not resolvable, though that should have been a signal to try writing it all out.<sup>11</sup> I think also I respected technical questions and those who worked on them, and it seemed in this instance that the investment in pursuing them and evaluating others' work on them would keep me away too long from following my mind, swallow me even, as would have taking up the work of the Securities Exchange Commission.

The four written books then. So much of what I will say here in summary form you will already know. Some of you I met through the books, reason enough to write them. After the first book, in one combination or another you made possible the time to write them, you read them in manuscript, affected their final form, saw them through publication with me, reviewed them for publishers. Steven Smith went so far as to let me read the last book through his eyes in a published review. I won't repeat what I said in successive prefaces to you and about you and your impact on them. I mentioned earlier the special risks in academic law of losing touch with the legal world beyond. I know the sensitivity of each of you to those risks has kept them alive to my mind, and I am also indebted, to a degree that can only be acknowledged, to John Noonan and David Souter speaking to me from judicial experience over the years, and to Thomas Wright,

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11. Those taking up the questions might start with their history, as I would have, and perhaps with what I think is still, though little known, the finest piece in English on corporate purpose and the nature of a corporate entity, W. M. Geldart, Inaugural Lecture before the University of Oxford: *LEGAL PERSONALITY* (Nov. 5, 1910) (1924). A piece of my own on these questions might have been found in the middle of the unwritten book, *Corporate Crime and the Religious Sensibility*, 5 *PUNISHMENT & SOCIETY* 313 (2003), to which there was a helpful reply, Tracy Fessenden, *Response to Joseph Vining's "Corporate Crime and the Religious Sensibility"*, 6 *PUNISHMENT & SOCIETY* 105 (2004). This was one of those undertakings in the decade of my sixties that I owe to Patrick Brennan.

Princeton University's legendary General Counsel, doing the same from his experience in legal practice.

The trajectory was first a focus on the person who speaks to a court about the law, then a focus on the person who speaks for the law, speaks back as it were, and then a focus on the law that is heard. Each was a system and also not a system. Finally there was a focus on the place of speaking persons in general beliefs about the nature of the world, on locating a place for them in a general view, or, if no place appeared to be there, finding an opening which speaking persons, and law, were slipping through into our world. Pressing in at each turn was a growing awareness, on my part, of the difference between an individual and a person, whether individual person or supra-individual person, and the implications of this difference for law and for other forms of thought as well. Personhood is nothing new in history. It is the ancient and continuing reality of the vicarious in human experience. But I have realized that personhood begins with and from where we are, each of us as an individual at the center of the universe as we know it. History and especially history many of us have lived through has had much to do with perception of this, my own and more generally, though the individual, rather like mathematical truth which is often and revealingly called miracle or mystery by those who have direct contact with it, is not a product of history, neither intellectual history—Charles Taylor notwithstanding—nor cultural, nor economic, nor political history, any more than the center of our being is in sequential time.

The first book, originally titled "Person, Property, and Public Law," became *Legal Identity*.<sup>12</sup> The second book was originally titled "The Shaking Perspective Glass," after Bunyan and his pilgrims' means of seeing "something like the gate" of the Celestial City and "also some of the glory of the place."<sup>13</sup> That became *The Authoritative and the Authoritarian*.<sup>14</sup> The third book was "The Legal Form of Thought." It became *From Newton's Sleep*,<sup>15</sup> after Blake's "May God us keep/From Single vision and Newton's sleep!"<sup>16</sup> The title of the fourth was from the start *The Song Sparrow and*

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12. JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978).

13. JOHN BUNYAN, *THE PILGRIM'S PROGRESS* 119 (W. R. Owens ed., Oxford Univ. Press 2003) (1678).

14. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (paperback ed. 1988) (1986).

15. See generally Vining, *supra* note 4.

16. WILLIAM BLAKE, *THE PORTABLE BLAKE* 209-10 (Alfred Kazin ed., Penguin Books 1976) ("Now I a fourfold vision see/And a fourfold vision is given to me;/ 'Tis fourfold in my supreme delight/And threefold in soft Beulah's night/And twofold Always. May God us keep/From Single vision & Newton's sleep!"). These six lines are the last verse of the poem beginning "With happiness stretch'd across the hills," which like Blake's "Jerusalem" first appeared set into another text without a title of its own.

*the Child*.<sup>17</sup>

The first, second, and last books were written around a thread. The thread of the first was the law of standing, but I wanted very much to write something that would survive changes in the law of standing. The way the book came about was my taking up for a possible essay the then recent case of *Sierra Club v. Morton*<sup>18</sup> on standing to challenge the legality of environmental harm. I moved back to general questions, and realized rather quickly that in form and style I was writing a book rather than an essay or article, and that it was on the relation of person and all that is subsumed under the notion of property. *Sierra Club* itself ended as a long footnote in a chapter, the only footnote not moved to the endnotes.

The thread of the second book was the bureaucratization of the courts. As I have mentioned, the book proceeded from a lecture-essay, which was on the problems presented by a text when it is not written by the person responsible for it and speaking it, and the related problems presented by a text written by many hands. After *Legal Identity* where I had worked with close reading of opinions, I had become troubled at what we, I and others, were doing in our method, on or off the courts, in academic law or in practice. What could we come up with to say that could warrant attention, deference, even (as we say) "obedience"? One choice was to become cynical about the enterprise, as many of my colleagues were becoming. The enterprise was too important for that. I thought of people in prison, and need only refer today to Jefferson Powell's response to cynicism in law. What I could do with my own troubledness was to mine it for some understanding of authority itself. Without authority law was not law, as my colleague Philip Soper was simultaneously insisting in the book he was writing, *A Theory of Law*.<sup>19</sup> Indeed his book turned out to end with the question of bureaucratization my manuscript was taking up as its thread.

During this time the person to whom I had been intellectually closest as friends in law school left his highly successful practice of law to become an Anglican priest. This event in John McCausland's life I am sure acted as an anchor for my mind in the sea of academic temptation, then and later. Except that the Michigan Law School was a tolerant and civil place, I was not in an academic or intellectual atmosphere congenial to what I was doing. I thought more than once that "The Shaking Perspective Glass" might be a letter to John, even in its form and style. The last chapter took me into theology as the sister discipline of law, by comparison with any other disciplines that might be put beside law, and this led to several years of ordering my reading, with John's help and that of the Ca-

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17. JOSEPH VINING, *THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY* (2004). My title here, "The Filaments of the Vicarious," was drawn from page 122 of this book, "More filaments of the vicarious connect us than we can unravel or count," but it would be truer to say David Souter's taking especial delight in the thought is my source.

18. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

19. PHILIP SOPER, *A THEORY OF LAW* (1984).

nadian theologian Philip Lee, by offering a seminar in law and theology. This in turn led to my discovery of Jack Sammons and his work and his invitation to me to pursue the connection with him, which I doubt now I will ever do as I should.

During this time also my sensitivity to the linguistic aspects of law was being sharpened. I offered a seminar to work through and discuss William Bishin's and Christopher Stone's new and wide-ranging *Law, Language, and Ethics*.<sup>20</sup> Because of *Legal Identity*, the Chicago Press sent me the manuscript of James Boyd White's *When Words Lose Their Meaning*<sup>21</sup> to read for them, and I embraced the mind behind it. Jim then came from Chicago to Michigan, introduced me to *The Legal Imagination*,<sup>22</sup> painted a cover for "The Shaking Perspective Glass," and then painted another for Jacques Barzun's suggested title for it, "The Voice Behind the Scales." (Jim also marked up, criticized, and encouraged what was to go behind his covers.) Jim and the linguist and anthropologist Alton Becker set up an interdisciplinary discussion group on language and culture and generously asked me to join, and I was never after allowed to forget or avoid the problem of human language in anything I did.

The third book did not have its origin in a particular problem that could become a thread in it. Its origin was in an event in my life, a brush apparently with death from septicemia, six weeks in the hospital fighting the infection, and then a long convalescence. I began writing poetry, unable really to write anything else, but also unable not to write it. It was not an absolutely new experience—the prologue and epilogue of the second book were poems of a sort. But the experience of responding to what came, whatever it was, was new, as was the experience of rounding a piece of writing in a small package, finishing it until it could be finished no more, in itself and not as part of a larger effort. The muse stayed on my shoulder for two or three years, and then gradually left. She came back to give me a little epilogue to my fourth book, but is quite quiet now.

The residue of this was an inclination to listen to my own mind more than trying to direct it, and, on the questions of law to which I returned, to push each response or offering to its limit, finishing it rather than thinking of it as a part or step in a larger enterprise. I began writing what I came to call fragments, giving them titles and retrievable numbers, which filled binders marked "New Work." I had an extraordinary secretary who devised ways of keeping track of them, which otherwise would have been like leaves on the ground. Some fragments were presented to the discussion group on language and culture and then reworked. Again, I was not in entirely new territory. Attached to the end of the second book were

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20. WILLIAM R. BISHIN & CHRISTOPHER D. STONE, *LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD* (1972).

21. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (paperback ed. 1985) (1984).

22. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

what its editor came to call "Amplifications," short essays linked by superscripts to the text (the endnotes using word links to the text rather than superscripts), which some readers had told me they liked.

At some point, I do not remember when, I understood that these fragments had a coherence, and accepted that their connections to each other should not be surprising since they were proceeding from a mind to which I was listening and giving way to, letting it have its head as it were. Jacques Barzun, today in his eleventh decade of life, whose *Darwin, Marx, Wagner*<sup>23</sup> had drawn me to bring the first draft of "The Shaking Perspective Glass" to him, once told me his advice to any writer was never to fail to stop and note down whatever occurred to you whenever it occurred wherever you were. What I was doing here was not different, except that I developed and finished the occurrence rather than holding it for use in a planned and linear text.

Jim White encouraged me, generously, importantly, to think they could be put together in a book. Cyril Connolly's *The Unquiet Grave*,<sup>24</sup> a collection of fragments, had been a favorite book of mine at Cambridge. I knew of Pascal and his fragments collected and ordered on strings, though I had not read Pascal or reflections on him until I thought I must add a fragment on him (or, perhaps, my mind wanted to pursue a question raised by what I knew of Pascal). I also realized that here in my own perception of coherence and connections in these fragments, and in what a reader would be doing in pulling coherence from them or sensing it, was a mirror of legal method or a recapitulation of it (to use an embryological term). Here was in fact the experience of reading legal materials and hearing a voice in them, which could be conveyed in the form of the book itself. I began to organize the fragments into sections reflecting aspects of legal thought, and then organize them within sections. I laid them out on the floors at home to see better how they connected forward and backward, where the repetitions were, and whether repetition should be kept. They became "The Legal Form of Thought," with an explanatory prologue and epilogue.

An editor from Princeton, Malcolm DeBevoise, came by the office I think to ask about the ever possible corporate book. I rather hesitantly said I had this manuscript instead. He took it and took to it, and surprisingly so did his anonymous readers. It went also to John Tryneski at Chicago, who had had faith in the second book despite its peculiarities, and I found he and his readers liked it too. I ended with Princeton. My work and correspondence with DeBevoise over the next years struck me as the most absorbing sustained intellectual experience of my life. He turned out to be a distinguished translator on his own, which was not irrelevant to

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23. JACQUES BARZUN, *DARWIN, MARX, WAGNER: CRITIQUE OF A HERITAGE* (Univ. of Chicago Press 1981) (1941). The epigraph from Barzun in *The Authoritative and the Authoritarian* (p. vii) is taken from page 322 of *Darwin, Marx, Wagner*.

24. CYRIL CONNOLLY, *THE UNQUIET GRAVE: A WORD-CYCLE BY PALINURUS* (Penguin Books 1957) (1944).

the problems I was trying to face (and I should say Jim White's work on justice as translation was very much in the air at this time, and as well Alton Becker's emphasis on the residue of the non-translatable in any human language). What DeBevoise principally translated was French science and philosophy—the fit was providential.

DeBevoise removed the discursive prologue and epilogue to the fragments, which was right, and conspired to enrich the title. We probably went too far, but I remember Jim White in the hall shouting “Yes! From Newton's Sleep,” and my wife Alice was in on this also, poring over the possibilities that included something going equally far based on *Tintern Abbey's* wonderful lines, “all the mighty world/ Of eye and ear, both what they half-create,/ And what perceive.”<sup>25</sup> DeBevoise undertook to make it a beautiful book, which Princeton especially could do. I participated in the decisions, and when *From Newton's Sleep* came out it won the only prize any book of mine has won, for its design.

During these years I was also working on a linear text, a lecture exploring the similarity between the problem of authenticity in art, the problem for instance of the imitative, or the jointly created, or the presentation of a natural object as art (the “objet trouvé”), and the problem of authenticity in law, almost identical to the problem of authority. I gave that lecture, with slides, four times at various places and at various stages of its development, with titles like “The Venus di Milo With Arms” or “Law as Art, Law as Science.” I have never published it, but I am sure its ultimate (and unanswered) question, whether nature itself has meaning—or how nature might have meaning—was pulling on the mind to which I was listening. At the very least it was feeding my growing sense that we participate in creation at the most basic level, each one of us, or “half-create” as Wordsworth nicely put it.<sup>26</sup> Here too was being highlighted the difference between the legal form of thought and other forms of thought that explicitly excluded any creation or participation in it.

After this third book was finished I faced for the first time a deliberate decision what to turn to. The corporate book (of course), or instead what I found myself collecting notes on and writing new fragments about and labeling “total theory.” I dictated an “Agenda” in 1996: “The second project,” I told myself,

is more general. Being more general, not rooted in evidence that I can bring forward and am qualified to bring forward, I realize it is less likely to have impact or success in either the academic or the nonacademic world. But its question is what drives me . . .

It is an inquiry into the ultimate vision that underlies what we think and do, which may be different from what we say we

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

26. *Id.*

think and how we characterize what we do. It is questioning the ultimacy, the basicness, the grounding in the end of everything, human and material, in system and process.

It has its negative side, an inquiry into the impossibility of such a vision, its absence in fact from our minds, its inconceivability as an actual alternative.

And it has its positive side, to which it is most improbable I can make any real contribution, of what we do and can believe, beyond what we can be sure we do not believe.

This was part of the purpose of *Newton's Sleep*, to clear the decks, to push back the claims of process and system as such on our conscious thinking and accepted vision, by pointing to and trying to evoke the reality of the legal form of thought. The continuing larger project, for which I have yet to construct a form or vehicle, may try to go as far beyond law as I can allow and trust myself to go.

Huda Akil, a much-honored neuroscientist working on the brain, had joined Jim White's ongoing discussion group on language and culture, and I found myself both galvanized and tempered by discussions with her there. Early fragments from 1995—I continued collecting fragments into notebooks—were titled “Questions After a Discussion with Huda Akil (2/95)” and “Notes After Discussion of Total Theory (4/17/95).” Malcolm DeBevoise sent me page proofs of a book he was editing and translating, *Conversations on Mind, Matter, and Mathematics*<sup>27</sup> by Jean Pierre Changeux, a well-known neurobiologist, and Alain Connes, an equally well-known mathematician. I read it enthralled, sentence by sentence, taking almost as many notes as there were words on the page. He had already given me the extraordinary reflections of one of the founders of computer programming, Joseph Weizenbaum's *Computer Power and Human Reason*,<sup>28</sup> that I had found as gripping as Weizenbaum had found his need to write them out. I was also teaching a seminar at the time, “Evil and the Problem of Punishment,” which had grown out of my course in corporate crime and a “Theme Semester” in the undergraduate college in the University on the subject or question of evil, for which I had been on a planning committee. The materials I put together for the seminar took me from individual crime to corporate crime, to the Holocaust, and then to Nuremberg and human experimentation.

All this simmered until one night, sitting on a sofa in Vermont reading Lewis Thomas's *The Fragile Species*,<sup>29</sup> I turned to Alice and said “I have a

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27. JEAN PIERRE CHANGEUX & ALAIN CONNES, *CONVERSATIONS ON MIND, MATTER, AND MATHEMATICS* (M. B. DeBevoise ed. and trans., Princeton Univ. Press 1995) (1989).

28. JOSEPH WEIZENBAUM, *COMPUTER POWER AND HUMAN REASON: FROM JUDGMENT TO CALCULATION* (Penguin Books 1984) (1976).

29. LEWIS THOMAS, *THE FRAGILE SPECIES* (Simon & Schuster 1996) (1992).

book.” The contending total cosmologies of mathematics and biology, most immediately Connes’ and Changeux’s, which were words or thought, and human and animal experimentation, which was action, came together in my mind, a test of actual belief when combined. The phenomenon of human law was pertinent to belief or not in total theory, and the method of law, reading action as well as statement, and reading a person as a whole, was applicable in pursuit of what total theorists truly believed as much as it was applicable in pursuit of what a witness believed, or a court believed, or I believe, or my readers might conclude they themselves believed. Being on sabbatical, I immediately collected my notes and began writing, this time not in fragments, but from a beginning to an end. Why not, really, treat a child as a song sparrow is treated in experiments on the development of speech—that very speech by which total theories are proposed? I put a picture, side by side, of my new grandson and a song sparrow on the first page of the manuscript that I had titled *The Song Sparrow and the Child*.

A sub-title that I eventually discarded was “Belief in Science,” with the “in” pointing both to what scientists actually believe and what open-minded nonscientists believe living in the modern world. George Levine, a literary and cultural critic and author of *Darwin and the Novelists*<sup>30</sup> which I had read, had picked up and read *Newton’s Sleep*. He asked for a draft of the *Song Sparrow* after I met him by chance and we each discovered who the other was—another serendipity, and he was a passionate birder with a love of song sparrows. Moving he thought toward an acceptance on his part of a fully Darwinian view of the universe, he criticized the draft extensively, took a trip to come argue with me, and from then on steadily encouraged and supported me despite what he claimed were very different views of his own. He was surprised I think by law. I wrote new sections, cut, and redrafted in response. I dedicated the book to Levine and Malcolm Debevoise. Malcolm, who had left publishing for translation and writing, argued vigorously with what I sent him not wanting to let him go, and he led me into more excisions and redraftings and then was strong in his support. You and others generously read it and pushed me into yet more—I turned to John Noonan more than once as the manuscript began to circulate beyond my friends and proved more upsetting than I had imagined it would. The language and culture group I have mentioned saw a number of chapters and gave them back to me covered with comments. I had never worked in such a milieu, or in so leisurely a way, as if I had time.

The last part of *The Song Sparrow and the Child*, “The Claim of the Sparrow,” had brought me to the treatment of animals. After finishing the book I turned to this particularly and began to explore the legal view of animals in a new seminar on the contrast between human and animal ex-

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30. GEORGE LEVINE, *DARWIN AND THE NOVELISTS: PATTERNS OF SCIENCE IN VICTORIAN FICTION* (paperback ed. 1992) (1988).



perimentation. The book had built on the good faith of experimental scientists today in not doing to human beings what they did to animals, their not holding law or the legal form of thought outside themselves as whole persons, their not biding their time until they could treat human beings like animals. But now it seemed to me that the legal protection of animals, nationally and increasingly internationally, had a much deeper significance. What struck me was not the difference in the protection but the very fact and extent of it, and I saw that it was being grounded, increasingly so, not just in concern for systems, utilitarian, ecological, but in recognition of individuality in animals. In this, law was in fact being aided by scientific investigation. I introduced a course in Animal Law to the curriculum, returning in a way to the biological preoccupations of my young years, and undertook a form of field work, three years of weekly and sleep-disturbing participation in the federal regulation of Michigan's vast program of animal experimentation as a member of the University's "Institutional Animal Care and Use Committee."

Writing the *Song Sparrow* at this point in my life was also a step in my own acceptance of the faith and hope that are in me, and a chapter in my own opening to what my fellow human beings truly say to me and who they are when they speak. I became a Catholic eight years ago, but the path to the Church stretched out behind me. In this you who have been companions to my mind have also been models for me in your lives. You have had the same effect saints are meant to have. But while I have found it possible in the last few years to speak explicitly here and there about religious commitment, I have all along wanted to speak about law to those to whom law speaks, whether or not they believed they had a religious commitment. I think this is true of you too. My correspondence and discussions with Steve Smith go back quite far on all the questions surrounding this faith that assumptions need not divide us in our empirical work on something that is so part of us all and critical to us all, and Patrick Brennan joined these discussions soon after he and I met. Jeff Powell's work also, Jim White's, Jack Sammons', Lee Bollinger's, John McCausland's, John Noonan's, all of you I read as continuously wrestling with the question of openness and change against a background perception of something universal. Indeed the Church wrestles with it too.

For me, ending with work on the evolving legal status of animals has been lifting a corner on a dawning realization about the nature of the world that I think will grow into a major preoccupation of legal thought. I am happy for you to think of this ending simply as an individual gesture of recompense on my part for what humans do to animals. But I have been struck each year by students telling me that the central question they take away from the study of law relating to animals is the question what makes us human. My reply is that this is as it should be since the central purpose of law is to keep us human. Animal law in fact has a long history, at least from the eighteenth century, in which the sentience, the suffering, and the individuality of nonhuman creatures have gradually entered legisla-

tive, judicial, administrative, and lay jury deliberations about what humans are going to require or allow themselves to do. As this continues, the human world may change in large ways. Recognition of something beyond the genetic and the environmental in the existences of the sentient creatures around us, a third factor to put it most neutrally, makes it much more difficult to deny the same in each other as so much in our language and our minds today presses us to do. In consequence of it we may even reset our course toward that holy mountain we have never really tried to climb.

There is at least that possibility. There are reasons for optimism that were not there when I was born just before World War II and the Cold War. One of those reasons is you in this room and what you represent. I do think there has been for many years a tendency and temptation within the legal world to mechanize and depersonalize law, even while in the world in general there has been greater and greater hope placed on the rule of law and its claims. The work you have done and will do directly sustains the humane in law, its life, the hope for what it can do for us. It is work that is rooted in an open-minded empiricism quite as much as the best work in natural science. I recently reread R. G. Collingwood's *Autobiography*,<sup>31</sup> written in 1938 as my life was just beginning and published in 1939. Looking back from 1938 Collingwood viewed himself as having worked all his life against this same tendency and temptation to a "realism" that was not realistic, which he saw in his own fields, philosophy and history including intellectual history. He thought their effect on his contemporaries was directly connected to what he saw happening and about to happen in the world, which he would not but we would now call the loss of law. I marked the similarity between the themes as he saw them in his time, and the themes as they have emerged in ours. But as I look about me I am not discouraged. There is a difference between 2009 and 1939 because of what happened after 1939, which is still uncovering and revealing ourselves to ourselves. Animal law is in fact an indication of the difference. Most I know would think it a small one, but it is not so small as it may seem.

What work with the specifics of animal law has confirmed for me is the power of the legal form of thought, and a deep structure that can be perceived in it, somewhat like, only somewhat but at least somewhat, John Noonan's extraordinary perception of the change that is no change in the Church's response to human slavery. The *Song Sparrow* ended not just with the possibility and perhaps inevitability of the movement from the human world into some part of the animal world of a line that is not to be crossed in the treatment of an individual. It also raised the question whether, since experimentation on animals has been critical to so many achievements of modern science, the movement of this line, this line drawn by law at work in the mind, may mean in practice an intrinsic limit

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31. R. G. COLLINGWOOD, *AN AUTOBIOGRAPHY* (paperback ed. 1970) (1939).

on what science will contribute to our human future, and a convergence in which its form of thought comes to resemble more the legal form of thought. I cannot but think that you and others will bring the fact and implications of individuality into our consciousness of connections with each other and the rest of the sentient world. The effort would be for me the natural progression if I had the years. I hope too that it will be not only others but I myself that will awake further to what touches the unique existences I know and see, and with filaments of the vicarious joins you to each other, and me to you, and all of us to the unique existences to come after our time.

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Patrick Brennan has been the generative force in our coming together in this way. A decade ago Patrick and I met as I was entering my sixties. After bringing out the *Song Sparrow* midway through that decade, I think it possible that I might have laid down the pen if Patrick had not kept me writing. He pushed me to summarize, to criticize, to move from the implicit to the explicit, all the while in his own work he was setting the flag for me beyond the finish line, as it were, going where I had not quite allowed myself to go. There are very grand words for someone who takes such a role in another's life, the word *ezer* in biblical Hebrew probably the grandest and the best. Our connection lies behind my enthusiastic endorsement now of our sixties as a time of life much to be looked forward to. Patrick's work is on the life in living values, the call and pull and claim of living values, the way they make us human together. If all of us who are human together were ever really to try to climb the holy mountain, I think we would find Patrick on the slope ahead of us, asking us to join him.