

2007

Legal Commitments and Religious Commitments

Joseph Vining

University of Michigan Law School, jvining@umich.edu

Available at: <https://repository.law.umich.edu/articles/1666>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Law and Philosophy Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Vining, Joseph. "Legal Commitments and Religious Commitments." *San Diego L. Rev.* 44, no. 1 (2007): 69-84.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Legal Commitments and Religious Commitments

JOSEPH VINING*

TABLE OF CONTENTS

I.	INTRODUCTION	69
II.	PAST AND PRESENT	70
III.	REALITIES	72
IV.	WHAT IS REAL FOR LAW	76
V.	AFFINITY AND COMMITMENT	78
VI.	DIFFERENCE WITHOUT SEPARATION	80
VII.	ACKNOWLEDGMENT AND COMMITMENT	83

I. INTRODUCTION

In his elegant and accessible new book, *Law's Quandary*,¹ Steven Smith groups our various senses of what is real for us into ontological families: the mundane; the scientific, including mathematics; and the religious. These supply “lumberyards,” as it were, for thought and discussion about the world and action in it. Law itself is not one of

* Hutchins Professor of Law, University of Michigan Law School. This paper was prepared for a Lilly Endowment Roundtable Conference on Steven D. Smith's *Law's Quandary* at the University of Notre Dame, March 31, 2006. I have adapted some passages in it from my *Law's Own Ontology*, 55 CATH. U. L. REV. 695 (2006). I am grateful to Patrick McKinley Brennan for his response to this paper at the Roundtable Conference and to conference participants for their comments on it during the discussion.

1. STEVEN D. SMITH, *LAW'S QUANDARY* (2004). *Law's Quandary* is the most recent in a series of major contributions from Smith over the last decade, including *Getting Over Equality* (2001), *The Constitution and the Pride of Reason* (1998), and *Foreordained Failure* (1995).

them. Those involved in law, as citizens or professionals practicing law or speaking for or about law, are presented in the book as looking out from law to the ontological resources available in the lumberyards he describes.

The limitations or absences in the lumberyards that are marked ordinary life and modern science then produce the “ontological gap” in which law finds itself—a memorable and effective phrase—and bring us to the edge of the third ontological family law might look out to, the resources of religious thought, belief, imagination, and experience.

This structure, which is a process of elimination, is a strength of the book and part of its persuasive power. Certainly if you think of law as empty or derivative, or as a set of rules, a game—or worse, as an opiate or a conspiracy—then presenting to you at the beginning the thought that the legal mind is something to be reckoned with on its own terms would be unwise. It would be a drag on any hope that you will stay with the argument to the end. As with any injured person to whose inner resources one wants to appeal, gentling you along is the effective course.

But such characterizations of legal thought are concentrated today in academic writing. Smith notes this frequently, as he notes also that law is not academic. The university is not law’s home. Law is in the wider world and is pervasive there, in language, thought, and action. Everyone is imbued with it. Without denying the wisdom of the structure Smith chose for the book, I want to raise here the question whether law has an ontology of its own—whether there is a hidden lumberyard in addition to the mundane, the scientific or mathematical, and the religious—so that at the end the process of elimination need not leave us looking only to the ontology of religious life. In doing so, of course, I am asking us also to consider what makes religious life “religious.”

II. PAST AND PRESENT

Smith begins with an overarching sense of law—“classical” or “traditional”—preceding the developments of the twentieth century. One view, which he outlines, is that this overarching sense depended upon and linked human law to divine law with divine judgment and sanction. Smith describes this view as seeing in the pre-twentieth-century understanding a “theistically oriented metaphysics positing God as a sort of transcendent Legislator and the hidden source even of human law”²

2. SMITH, *supra* note 1, at 47.

As examples, he refers to Fortesque in the fifteenth century³ and Blackstone in the eighteenth.⁴

This is a conclusion about the past, especially the just pre-twentieth-century past, that I myself have to be wrestled toward. I recognize that I may mix current perception, including my own, with what predecessors actually thought a century ago, and that establishing and understanding the substance of their thought is something intellectual historians trained as such offer to do for us. But intellectual history is not the same as lawyers looking back, if only because of the disengagement from idea, belief, or commitment intellectual history displays and perhaps must display.

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

Such a commitment is I think a very individual matter, quite apart from the size of the gap there may be, before such a commitment, between one’s actual faith and what one says or says to oneself one believes. Working with and in law, dealing constantly with suffering, purpose, authority, and authenticity, may open one to faith that is larger and deeper than the faith practiced in law. Working naturally with the

3. “[A]ll laws that are promulgated by man are decreed by God.” *Id.*

4. The “law of nature, being . . . dictated by God himself, . . . such [human laws] as are valid derive all their force, and all their authority, mediately or immediately, from this original.” *Id.*

personal beyond and behind any individual or individual life may make it only natural to look beyond that too. But, again, it is the individual that looks and says “Yes,” and this is not a matter of perception only but of orientation of life and acceptance of demands over and above those of law.

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

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

III. REALITIES

This concern or possible difference in view should not shadow Smith’s achievement. How justified he is in pressing us to speak openly of “reality” in discussing law, its foundations and its claims. *Law’s Quandary* is in standard jurisprudential terms “realist” by contrast with

“formalist,” but Smith’s is a twenty-first-century realism open to the full range of human experience. It is an enormous contribution to self-reflection in law that he accurately and vividly describes as stymied for more than a century, and all the more welcome with more and more reliance being placed throughout the world on “the rule of law.”

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.”⁵ 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.”⁶ 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.⁷ She writes elsewhere, “Do I believe in extra dimensions? I confess I do. . . . Sometimes, . . . an idea seems like it must contain a germ of truth. . . . I suddenly realized that I really believed that some form of extra dimensions must exist.”⁸

Against this background of overt ontology, let me slip into law’s ontological commitments with an example that cuts across the scientific, the legal, and the religious. A *New York Times* op-ed comment discussing the popular 2005 documentary on the Antarctic emperor penguin, *March of the Penguins*, argued with approval that we have become more comfortable calling what we see there “love.”⁹ 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.

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

6. *Id.*

7. *Id.* For a general review of the scientific and mathematical ontological “family,” see the concluding reflections of the mathematician and physicist Roger Penrose in *THE ROAD TO REALITY: A COMPLETE GUIDE TO THE LAWS OF THE UNIVERSE* 1024-45 (2004).

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

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

“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.” He continues, “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.”¹⁰

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.”¹¹ The ontological claim is made by the “is” in “love is.” It is modified slightly by his term “functionally,” but the point of his commentary is to urge us, the “us” that appears in his definition of love, not to be shy about using the word “love” for what moves the penguin. What moves the penguin need be no different from what moves us—an often temporary chemical imbalance of the brain that is adaptive.

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

What would the legal mind do with a statement like this, in thinking about coming to some conclusion about love? In law we are all witnesses, as 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, 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 does not 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 this witness 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 specially articulated sense of love, though if law did, it would be expressed in John Noonan’s very beautiful response to

10. *Id.*

11. *Id.*

Richard Posner's view of moral and political theory.¹² 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 in the most basic way to what is beyond both law and science. If the "individual" and "life," which we noted before, can be thought to pass back and forth through the windows of the anteroom where lawyers work, love may pass through the walls themselves. Such a basic linkage, which we will consider again, may indeed be what Smith has in mind to suggest in discussing the "classical account" at the beginning of the book, and in his ending.

But to return to the structure of the book and its three "ontological lumberyards," law can still be viewed as having a lumberyard distinctively

12. John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1775 (1998); see also MICHAEL PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 7 (1991) (drawing its title from Noonan's work); cf. JOSEPH VINING, FROM NEWTON'S SLEEP 264-65 (1995).

legal. All that is necessary to law need not be in law's own lumberyard. 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. But science remains distinct, as can law. The human individual remains distinct, one's reality one's own, even though one's own resources of mind and spirit are manifestly inadequate.¹³

IV. WHAT IS REAL FOR LAW

Pulling ontological claims generally into the open helps pull into the open what is real for law, 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."¹⁴

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 might be shown to be only an illusion.¹⁵ But the definition or sense of this "it" in one context, ordinary individual life or the astronomical or the religious or the musical, may not serve at all well in another, even though carried from context to context is the experience of reaching to express the same thing—"time." Law is one of these contexts in and of itself.

Perhaps most irreplaceably, the individual lives in law's ontological inventory, the human individual, and, to an increasing degree, the individual animal. Law's commitment to the fact that we are more than one is fundamental, not to be shut out of thought methodologically or ontologically. The individual is real in law, and consequences flow from

13. For further exploration of dependencies of this kind, see JOSEPH VINING, *THE SONG SPARROW AND THE CHILD: CLAIMS OF SCIENCE AND HUMANITY* (2004); Joseph Vining, *Authority and Reality*, in *CIVILIZING AUTHORITY* (Patrick McKinley Brennan ed., forthcoming 2007) (ch. 1).

14. JACQUES MONOD, *CHANCE AND NECESSITY* 171 (Austryn Wainhouse trans., 1971) (emphasis in original).

15. See e.g., Dennis Overbye, *String Theory*, at 20, *Explains It All (or Not)*, N.Y. TIMES, Dec. 7, 2004, at F1 (discussing the views of Dr. Edward Witten of the Institute for Advanced Study in Princeton, New Jersey).

it. 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 self-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.¹⁶ Reasoning or the rational has for most an ontological aspect, a quality some beings have and others do not. Rationality might be viewed as everywhere and essentially just consciously staying open to the evidence and fitting means to ends, with something of a moral component added, in what we call “reasonableness,” some degree of respect for and attention to others’ judgments. But “reason” 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

16. *E.g.*, STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998); Steven D. Smith, *Recovering (From) Enlightenment?*, 41 *SAN DIEGO L. REV.* 1263, 1282-1306 (2004).

force of law, that proceeds from human imagination and creativity, is brought to bear on a situation and the future emerging from it.

V. AFFINITY AND COMMITMENT

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* observes the 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, 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 life 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 the same, these worlds, these dimensions of experience, these commitments?

I have indicated why I suggest there can be a fourth ontological family, why law need not be viewed as living in an "ontological gap" if what is real for lawyers and ordinary citizens responding to and speaking for law is not understood to be reflecting a religious commitment. As for what I seek or want, what motivates my and I think Smith's and others' attention, noticing, and doing the work of weighing, articulating, and staying true to observation, it is an understanding of law that is open to as wide a number as are committed to law. Smith is right that an understanding of law that contains only what is real in a scientific or mathematical ontology is too narrow for law, to the vanishing point. Most people in the world do not and could not subscribe to it and I would say, I think with Smith, that not just most do not but all do not. The band of those who even purport to limit themselves so is very small. But so saying leaves open what it is individuals bring to one another, in law, that is real beyond the limits of the working "lumberyard" of science and mathematics, or indeed, the lumberyard fairly marked off as that of "everyday life" even though law, legal thought, and legal language are inextricably mixed with "everyday life."

My first reason for suggesting law has an ontology of its own proceeds from a sense that seems to me more than a presumption, of the limits of the human mind and capacities—my own, what I observe over a lifetime of others', what I observe others also sense and themselves

observe of others'. The mindful and the caring, as consistent and comprehensive as work in law can make them, are surely this side of mind and care that comprehend the universe.

It is of course a matter for discussion that the divine be so characterized. *Law's Quandary* raises the question what is "religious" when "religion" is "tolerated" or "not tolerated," and is recognized in either case, or enters an individual's life.¹⁷ It is also true that implicit in such a characterization is a felt capacity in us to contemplate such mind and care, linked with the very capacity to contemplate "the universe," which pushes beyond our limitations. That is why so many testify that awareness both of "the universe" and mind and care beyond our own comes "from outside" rather than emerging from within, from a reaching to us rather than a reaching by us.¹⁸ But that implicates the question to which I will turn in a moment, how we characterize also the nature or substance of "the human," most particularly in and grounding law.

My second reason is an attempt to recognize the individuality in an individual's relationship to what I, or others, or most others, or all others would recognize as divinity even though we were far from such a relationship ourselves. I wish not to forget the force of the response to such assertions as "God does not exist" or "God is an emergent property in cultural evolution," that what the speaker is talking about has little to do with God (even perhaps in the speaker's own mind), just as a physicist might say that what a layman is declaring about particles has little to do with subatomic reality. The force of this response can extend to anyone's speaking about an individual's relationship with the divine, at least to some measure. While it is true that any of us may be more religious than we know, just as we may love more than we know (and have more capacity for cruelty than we know), there is a question whether commitment to the realities we call religious is not especially "subjective," with respect to both the "whatness" of those realities, and the assent involved that does not make us mad if we withhold it, as our withholding assent to gravity or heat might leave us mad.

Such freedom in matters of religion can perhaps be acknowledged while at the same time thinking that a moral sense, to which appeal can be made, touches upon a dimension of reality for all human beings if they are not mad. The "sociopathic," without moral sense, does raise the

17. See, e.g., SMITH, *supra* note 1, at 29-37.

18. Cf. *id.* at 179.

question of insanity. We can perhaps say this about the moral sense that can be spoken to in some way, because law and commitment to the realities of law lead to and are inextricably involved with action and responsibility for it. But again the openness to and response to living value in the moral dimension must put in question any absolute separation of it from the religious.

My third reason for wanting a difference and thinking too that I observe a difference between the legal and the religious springs from this responsibility that is demanded and exercised in law. To think that legal decision and the authority of law, the life and character of value, the voice and nature of the persons of law that are not individuals—from states to legislatures to courts to agencies to lawyers themselves—flow through human beings as vehicles from a dimension beyond the human is to deny responsibility for what these are and for the consequences rippling through the systems of the world, that they are as they are. To think human beings are vehicles denies the clearest thing that we can observe about human beings, and about many animals, that they can be passive, do nothing, be dependent, and die. And it denies what one sees, “objectively,” at first look at the activity of law, at the selection in reading, the “construction” in listening and writing, the effort, carefulness, discipline, skill, argument, judgment, acceptance, and teaching. Initiative and hard human work are involved before what is real for law can be seen or heard. Our minds neither mirror templates nor record “properties” that just “are” and that emerge from the interaction of systems. Within our limits we ourselves truly create, create in this sublunary world.

VI. DIFFERENCE WITHOUT SEPARATION

But having said this in arguing for an ontology of law’s own that the language of everyday life does not quite reach, that is not limited to the ontology of science and mathematics, and that is not absorbed into religious life, let me go back to Smith’s language in *Law’s Quandary*.

I concentrated above on Smith’s quotations from Fortesque and Blackstone, and his summary of a pre-twentieth-century view of law. His surrounding quotations from Aquinas, that “every human law has just so much of the nature of law as it is derived from the law of nature”¹⁹ and that “if at any point [the human law] deflects from the law of nature, it is no longer a law . . . ,”²⁰ and from Edward Coke, that a common law decision “agrees with the judicial law of god, on which our law is in every point founded,” are similar, with their “at any point” and

19. *Id.* at 46.

20. *Id.*

“in every point.”²¹ Quite aside from the directness of connection between human law and the divine suggested in these quotations, there is an invitation in them to imagine law in a way false to the practice of law before the twentieth century, or during it, or now, law as rules, brittle and hard, rather than, let us say, a tissue of living value that can evoke a good faith response in individuals going about their lives. Indeed it is this imagined picture of an authoritarian law that leads those working in physics, chemistry, biology, or mathematics to borrow the term “law” and call their rules “laws.”

But it is also true that Smith is quick to guard against a “misconception,” a “caricature,” of the pre-twentieth-century position, that human law was a “photocopy” of “natural law” or the “judicial law of God” or “laws . . . decreed by God.”²² Homicide, he suggests, might be “derived directly,” but the “legal status” of statements was dependent on their “indirect derivation” which was to inform their interpretation.²³ In a later essay describing *Law’s Quandary*, Smith ends with an appeal to a Socratic “perplexity” open to a connection with or an “echo” of a “wisdom more than human”—openness, which he emphasizes in the Epilogue of *Law’s Quandary*.²⁴ Then, in a chapter of Smith’s that ends a later multi-authored book on authority in the modern world, he writes that the legal enterprise is one through which there can be a “glimpse” of “the dearest freshness deep down things,” in Gerald Manley Hopkins’ affecting line.²⁵

I think that is true. That is why I have suggested here that law might be placed in an anteroom to the world of religious commitment and that even there the walls are not blank or barriers. Whenever justice is spoken of in the same breath as law there is something of an opening and the possibility of a glimpse.²⁶ The value of human “life” in law is not drawn from the relative complexity of its systems, or its capacity to replicate its systems, or the adaptability of its systems to its environment. It

21. *Id.* at 46-47.

22. *Id.* at 47.

23. *Id.*

24. *Id.* at 178-79; Steven D. Smith, *Metaphysical Perplexity?*, 55 CATH. U. L. REV. 639, 654 (2006).

25. Steven D. Smith, *Hollow Men? Law and the Declension of Belief*, in CIVILIZING AUTHORITY, *supra* note 13 (ch. 10) (quoting Gerald Manley Hopkins, *God’s Grandeur*, in THE NEW OXFORD BOOK OF ENGLISH VERSE 786 (Helen Gardner ed., 1972)).

26. On connections between smaller and larger purposes, compare *Prologue* and *Epilogue* in JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN, at xvii-xix, 203-04 (1986). See also *id.* at 143, 161-62 (discussing images of law and their significance).

is drawn from beyond the “merely” human. So too the value of the individual in law—the treatment of the individual (the human individual and now also some among the animals), the very sense of what an individual is, including ourselves each looking within ourselves—takes us beyond particularity or uniqueness to an element of spirit that is not the same as spirit in the universe (any more than the spirit of a human being and the spirit recognized in an animal are the same), but is not separate either.²⁷ Love that is part of the very fabric of the universe is not the same as what characterizes and animates the minds sought, constructed, recognized, and maintained in law, the minds of persons for whom individuals speak that cannot be reduced to individuals, but it is not separate either.

Do we not face here really the question what is human and what is “not human” and whether we think what is behind the human or beyond the human, below the human or above the human, can be untangled or separated from the human, the sentience of the animal “below,” the divine “above”? The question is familiar enough. In any contemporary discussion of our understanding of biological evolution as it pertains to us ourselves, there is argument—overt or hidden—over what a human being is, what it is to be human. And then, so far as what places us as “human” is our responsibility and the measure of freedom we have without which we could not be responsible, including freedom to deny, reject, even not to live, do we not also face the question how far this freedom of ours extends to our own conclusion about what is real and what is not? I have mentioned insanity already, determination of which is given over to law where action in the world turns on it. We would generally take issue with one who said he did not accept the realities of the physical world and was in a state of actual “unbelief” with respect to them. We would take issue and action too. What of the realities of religious life? Despite my wanting to hold law back in my understanding of it, does law, just human law, take us to them and make them real for us, so that the choice is not between their reality and unreality but only whether to “acknowledge” their reality, as the last sentence of *Law’s Quandary*²⁸ would put our situation to us?

27. See Joseph Vining, *The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1 (2007).

28. Smith wrote:

So we will surely continue, as Socrates did, to seek to enhance our understandings, or to fill in our ontological gaps. But in the meantime—and we look to be in the meantime for quite a while— . . . , we would perhaps be wise to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of.

SMITH, *supra* note 1, at 179.

VII. ACKNOWLEDGMENT AND COMMITMENT

Return to what is immediately distinctive about law by contrast with philosophy or even moral discussion, “mundane” or otherwise. Law’s connection with action in the world touches every aspect of law. Legal thought proceeds not just to a conclusion, and not just to a belief that satisfies the mind, but to the heart-wrenching, to force, that operates on the future quite as much as the “weak” and the “strong” forces of physics. We noted this above in connection with “reason” and Smith’s discussion of reason. It puts law most certainly in contrast with mathematics, or science, or social science, except insofar as science or social science involves that form of action we call “experimentation.” Judicial writing is read for its meaning against judicial action, and indeed the connection between legal thought and responsible action is one of the affinities between legal thought and religious thought (though the action may not be the same). This is what makes it truer to experience to speak of “commitment” in law as not quite only a synonym for belief that might be like the belief of the contemporary physicist I quoted above, asking and answering, “Do I believe in extra dimensions? I confess I do”²⁹ This is also what makes it so hard to escape the ontological question Smith puts.

Just as authority in law comes into reality from an asking and an acceptance, so a religious commitment involves an offering and a response. Is it the case that if an individual rejects the offer, denies it has been heard, or does not respond at all, the religious dimension is not present for the individual? I think we should be slow to conclude there is no response at all, or that there is denial that the offer has been heard, or that there is active rejection of it. You look at an individual’s whole life, everything she says and does, before any such large conclusion about her, and you may still be looking at another’s whole life up to the point of your own death. But suppose you did come to some negative conclusion, that for this individual a religious dimension was not real for herself, and that she could not enter vicariously into the religious dimension in which others live and could not think it real for them either. Again, her capacity to sense the religious and specially tolerate it, her very toleration itself, may undermine her confidence and the confidence of those tolerated who are observing her, that “in reality” she

29. RANDALL, *supra* note 8, at 3.

denied the reality of a religious dimension and what is “there,” even that she had no part in a response to an offering “here.” But suppose you considered yourself convinced? Would you then have concluded that the realities of law, the legal dimension, she must deny also?

Or, to turn the question back, how do you handle, among all that an individual says and does, her turn to, claims on, and speaking for law, when you judge whether her world has truly no religious dimension?

These are the questions. The answers we learn from each other in discussion as always, and from further experience of life. For my part, I think now there is no such thing as the “merely human.” The human cannot be confined to a sphere exclusively its own. Our freedom to draw our own conclusions about what is real is not full freedom. It is limited not so much by the brute fact that we do work to live—we do not *have* to live—but by the conditional in life, that we must work to live, work, work hard, learn and teach, individually and with others. I do think now that if in the case of an individual you were convinced that a religious dimension was not real for him or her, it would then be true, in that case, that the legal dimension where so much lives that has no place in other dimensions of human consciousness and belief was not real for him or her either. But by the same token, the work of law and the action based on that work, real work, real action, with real consequences, make it almost impossible to come to this conclusion about an individual who is involved in law professionally or as a citizen of a country or the world, of whom there are very many. And of course the individual about whom you were thinking could be yourself.

But we can still say there is a difference between the legal dimension and the religious dimension, and between legal commitments and religious commitments. Even acknowledging the reality of the religious dimension one can still not be “religious.” That involves an ultimate assent, a commitment as large as that to which the commitment is made. Law does not embrace all of life by any means. The hope given in religious commitment is not the tempered hope of human law. And as for the dimensions, what is real in the legal and what is real in the religious, though they are not separate, they are, I think, not the same.