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### How Theology Might Learn from Law (Symposium: The Theology of the Practice of Law)

James Boyd White

*University of Michigan Law School, jbwhite@umich.edu*

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# How Theology Might Learn From Law

by James Boyd White\*

## I.

I want to start today with an account of the way lawyers think and speak, and then ask whether it might be useful for the theologically minded to take these practices and procedures seriously as a ground of comparison from which to look at their own. In doing this I shall look at the practice of law with an emphasis not on its social effects or ethical difficulties but on the nature of the activity itself, viewed from the inside, asking in particular what kind of knowledge it requires and creates in its practitioner. What does the lawyer learn from the activity in which he engages? What does he have to know to do it at all, or to do it well? Can that knowledge be of value to others?

## A.

The lawyer begins with the recognition that there is something in the world that does not work, something wrong, a problem people cannot solve, for this is why his clients come to him. Most of the time people in the world can manage their own affairs well enough, including the settlement of their disputes, without needing to call on a lawyer. But sometimes they cannot, and it is these occasions on which the lawyer is called: to negotiate or try a case, to draft a contract, to appear before the zoning commission. The lawyer always addresses the actuality or possibility of breakdown in someone's life, past, present, or future. And usually there is no problem-free solution to the breakdown; in fact, there

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\* Hart Wright Professor of Law, Professor of English, and Adjunct Professor of Classical Studies, University of Michigan. Amherst College (1960); Harvard Graduate School (1961); Harvard Law School (1964). Member: American Law Institute; American Academy of Arts and Sciences. Author: *The Edge of Meaning* (2001); *From Expectation to Experience: Essays on Law and Legal Education* (2000).

is normally no easy and authoritative way to describe either the facts or the law, and thus to provide a basis upon which a solution might rest, for both facts and law are uncertain or contested. The lawyer is called to life and action by difficulty in the world.

The lawyer thus begins with a consciousness that he is facing something real in the world that cannot be reduced in any easy way to existing forms of thought. He is called upon to make something new, as he speaks and writes in a series of conversations, in ordinary English and the law, to a wide range of audiences. He knows that his language will not work automatically or routinely in any of the contexts in which he will use it; it will have to be remade, refashioned, in a perpetual activity of testing and invention.

To do this well, the lawyer must be aware that every event in the world, and every proposed transformation of it, looks different to different people, who will articulate these things differently and see different meanings in them. This in turn means that every human being is a center of meaning, and in this respect equal to every other. Everyone speaks from his own experience, his own situation; everyone speaks differently to different audiences; and everyone, including the lawyer, must use a language that has its origins outside of him in the world.

These languages define our audience—we speak to people who speak our language—and they articulate its criteria of intelligibility and value. To an extent they define our own minds, for they have done much to shape them and we cannot entirely escape from them. We cannot see things in a language-free way.

The languages the lawyer must use make thought of certain kinds possible; yet they are themselves always imperfect, evasive, obstructing as well as enabling thought. Perfect communication is impossible; imperfect communication is the art, most difficult to perform well, that the lawyer practices.

The language of the law, in which the lawyer specializes, is a second language, into which the languages of ordinary life, and other professional discourses as well, are regularly translated—a language in which the events of the client's life, otherwise talked about in quite different ways, are suddenly seen as presenting questions of law and justice, and thus as connected through the law with other such events, other conversations. This language is an inheritance, a gift from the past of priceless value, but it is also imperfect, and everyone knows it.

Every act of speech in the law is an opportunity to confirm or change that language, for the law is in a constant process of transformation, turning metaphor into reality. Yet the lawyer cannot change it all at once; even to propose a modification, she must use the terms and

conventions of the language as a whole, and in doing so she will affirm what she uses. To try to change these resources for meaning calls upon her every capacity to think well not only about that language but about the deepest questions of individual and social value.

In our acts of speech as lawyers we together create institutions and practices, imagined realities—the Constitution, the idea of a judge—which are in some sense fictional, easy to debunk in the name of “realism,” but in another sense real, the realest thing we have. The constructions we create are not literally true; but they are what we believe in.

Likewise, the process of legal thinking itself stimulates a hope for what in some sense can never be: real and permanent justice; but the stimulation of this hope, our insistence upon it, is one of our great gifts to the world, and the fact that it can never be realized does not destroy its value. Quite the reverse, in fact.

### B.

So the lawyer begins with the experience of the client; she moves into the world of legal texts and legal language; she ends as she began, with the experience of people in the world, now touched and transformed by the law. In engaging in this movement, if she is working well, she pays a special kind of attention—alone and in connection with her clients and other lawyers—both to the facts and to the law, an attention that brings to light questions and meanings, patterns and significances, that were there in the material but hidden from sight.

A lawyer is in this way called into a certain kind of life and activity by the law, and she knows that it will carry her into complexities and realities she can at the beginning only imagine. The law leads us into the richness of the world; into the difficulty of thinking and talking about it; into a recognition of the weakness, but also the strength, of our own minds and imaginations.

This is a view of the life of the lawyer as a series of opportunities to claim meaning for experience, on the conditions on which it is granted us to do so, with all our imperfections of mind and language. Yet by an art in some ways like the poet’s art we do manage to do this—to create significances, moments of coherence, glimmers of possibility. All our achievements are, in the nature of things, temporary; no sooner have we finished than, like the poet or painter perhaps, we find that we must begin again, with a new problem, or a new complication in an old one, resisting once more the continuing forces of entropy around us. In the process, when we do well, we keep alive and sometimes even improve a culture, a language, a set of resources for meaning; and, because every

act of speech in the law is deeply social, we reshape a set of relations in the world, we hope for the better. From our point of view the experience is one of responding to a call, a call to a life of thought and imagination and action.

C.

This is not the vision of law and law practice, perhaps I need not say, with which students usually show up in law school. One must struggle to attain it, against insistences within ourselves, and in our world—including certain law classes—that law is really far simpler, and less interesting: a set of rules that guide conduct, a system or structure that can be adequately described and learned, simply a machine for the effectuation of social policy. We are sometimes even told that social policy is the really important and interesting thing, the law a kind of verbal and institutional technology for its implementation. The student must struggle against such views—present though they are in the world, in course outlines, in the advice of older students, in the contempt with which law is often spoken of—to see the law as a place where his or her own mind can work and live, a place of puzzle and invention and life.

A central challenge for the student or lawyer can be put this way: Can you find a way to mean what you say in the official language of the law? Can you speak with your own voice—make a voice with which you can speak—on the occasions of the law and in its language? For only if you can do these things will you be able fully to meet the challenges and opportunities the law presents.

II.

What happens when we turn from law to theology and ask whether it works, or might work, in similar ways, on similar understandings? This is a question I address with considerable diffidence, not to say embarrassment, since I am not a theologian in any sense of the term. But perhaps even the first efforts of an amateur may be of interest to those who know more than I. You can take what follows as an initial sketch of what one version of theological thought might be like, regarded as an activity of mind and imagination.

I said that law begins with a problem in the world, a breakdown of some kind—or the desire to avoid one. How does theological thought begin? I suppose it might start with an abstract question of some kind, but in my own experience it too begins with particulars: with a particular text or experience, or a combination of both—not a breakdown exactly, but a puzzle or uncertainty or incoherence, what looks like a defect in the smooth running of the world.

Let me give you a simple example, drawn from my own recent experience. This year on the Sunday after Epiphany, which is in the Episcopal church I attend marked as especially appropriate for baptisms, the main reading was Matthew's account of the baptism of Jesus. Let us imagine that there are baptisms that day of both adults and infants and that we are in the congregation, watching, listening, participating, and thinking.

Matthew tells us that John has been baptizing great numbers of people; that Jesus goes to him to be baptized; that John demurs, saying that Jesus should rather baptize *him*; that Jesus insists, saying we should "fulfill all righteousness,"<sup>1</sup> and is baptized. When Jesus emerges from the water, he sees the spirit of God descending like a dove, and a voice says, from heaven, "This is my beloved Son in whom I am well pleased."<sup>2</sup>

This is a situation that calls for thought simultaneously about the text—the language, the tradition, the past—and about present human experience, on that day, in that location. How might that thought proceed?

#### A.

A host of factual and interpretive questions naturally present themselves. What kind of baptism is John performing in the Jordan? Is it a version of the baptism used in Jewish conversion rites? A different kind of baptism, of repentance and renewal, based on other practices, say those of the Essenes? Is this baptism a once-in-a-lifetime transition, or a repeated ritual of lustration? And in any event, what is the connection between this baptism and the end of time John seems to see approaching?

Then: How about the baptism of Jesus himself? This certainly was not a conversion baptism, nor apparently the joining of a community. Maybe what we have here is the transformation of a repeated rite of purification into a life-stage transition—a kind of ritual invention. This baptism could then be seen as an act of commissioning, for it marks the beginning of Jesus's public ministry.

Without pursuing these questions further, notice one thing about the nature of our investigation. First, as in the law, our subject is by its nature a question of meaning—the meaning of a story, a text, as part of a larger story, a larger text. It follows that the question is necessarily conjectural, or interpretative, and hence open to argument. Neither pure

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1. *Matthew* 3:15 (King James).

2. *Id.* 3:17.

logic nor the facts will lead us to a conclusion we can fairly regard as compelling the assent of others. Second, it is a question internal to a tradition, on which only a member of that tradition can genuinely speak and only in the language of that tradition. The historian can of course tell us much more than I know about Jewish conversion rites, analagous conversion rites in other religions, other uses of water and immersion in symbolic and ritual systems, the history of baptism in Christian practice; the philologist can tell us a lot about the Greek in which our text is written, about the Aramaic in which the reported conversations are assumed to have taken place, and so forth; other experts can add to our knowledge in other ways; but when it comes to the meaning of these baptisms—John's baptisms of the others, the baptism of Jesus, the baptisms of the child and adult in our sanctuary in January 2002—that question is internal to a culture, a language, a religion, a community; to speak to it you must use the rest of that language. I think you cannot do that hypothetically: you must believe in the language you are using. The question must be real to you. And the aim of such an investigation is never simply to resolve a factual or logical matter, or to attain a kind of intellectual consistency, but to tell a truth that can only be said in that language and culture.

*B.*

One crucial dimension of the meaning of the passage from Matthew on this occasion is its connection, if any, with the actual baptisms taking place on that Sunday morning. The text presents the question: What are we doing when we baptize, especially when we baptize infants? Making sure that they will not be damned or sent to Limbo if they die before making a mature choice of their own? Creating a context for their early lives, a set of expectations that will surround them, and may help shape them? Engaging in a mysteriously efficacious act that affects the condition of their souls? Affirming the immeasurable importance of every single human being, including—especially—a baby? And what connection is there, can there be, between these baptisms and the account of the baptism of Jesus?

I shall not address these questions, but want only to stress again how completely internal the conversation is, not only to the community in question, but to the individual. The reason you care about the meaning of the passage is that you witness and participate in the rite of baptism. It is your own experience you want to understand. And that experience is in the end not fully expressible, certainly not in words, and not fully communicable, even in ritual. The fact that all that we are able to say floats as it were on the surface of an inexpressible ocean of experience is as crucial to theological work as it is to the law.

The world of theological thought must thus recognize its boundaries in three directions: in its relation to other languages, into which it cannot be translated and which it cannot itself claim to translate, without enormous loss; in its relation to the inner experience of the person, which is, at the deepest, beyond the reach of any language; and in its relation to the external Reality of which it speaks, which cannot be directly apprehended by human language or the human mind.

C.

This is a tiny example, but it suggests to me certain lines of thought, especially in connection with the account of law I gave earlier. Let me trace out one of these in particular.

You will remember that I described the lawyer's experience as that of a mind confronting the intractability of language, of facts, of other minds—of his own mind—all in an effort to claim a meaning for experience that must, in the nature of things, be impermanent, provisional, open to question. He lives in a world that is marked above all by the existence of competing yet valid things to say.

This may be more nearly true of the person engaged in theological work than we are likely at first to think. To begin with, she will begin, and usually end, in the language of a particular tradition, addressing questions which arise only in those terms. Like the lawyer, she is the speaker of a particular language, and she will address others who share the tradition that language defines. This is the language of a community, and it is only in that community that what is said will be fully intelligible; and it will be intelligible only in light of the shared history and experience of that community, that language.

In this sense theology begins inside an already existing world of thought and imagination and practice. Like the law, it is a way of reflecting on that language and culture, examining its resources of action and meaning not in isolation but in connection with lived present human experience. And, as in the law, the person engaged in theological work cannot question or examine everything at once, but must use the language and images and habits of her tradition to ask her questions and to propose her answers. She must thus affirm, even as she criticizes, and doubts, and questions, for she works from inside—as the lawyer does too. You cannot be a theologian, in the sense in which I am using the term, of a religion in which you do not participate.

Theology is thus different from two other ways of talking about religion: anthropology and philosophy. Anthropology—the study of the religions of others—is done from the outside. The anthropologist can and should be respectful, even envious, of the lives of the people he is studying, but he has to know that it is not his own world of meaning he



describes and thinks about. Philosophy too works from the outside, speaking not to the world of a particular religion, but to the secular intellectual world defined by its own tradition. Philosophy cannot use the language of a particular religion to define its questions or methods, for it cannot affirm what that use would affirm. To take what is perhaps the largest question, the existence of God, philosophy can only debate the existence of a God defined in its terms—a God of Philosophy—not the Divine Being defined in the language and ritual and imagination of Judaism, for example, or Islam. How could philosophy possibly address a question like the meaning of the Exodus, or the baptism of Jesus? You can only ask those questions in terms of the language and culture of which they are a part.

There can then be no anthropological or philosophical—or historical or psychological or economic—answer to a theological question, which is always a question of the meaning of something (a ritual, a story, a phrase or formula or prayer), a meaning that depends upon the rest of the inheritance. The same is true of the law. The historian, the psychologist, the sociologist, the economist, may have useful things to say about the world, even about the history and workings of legal institutions, but they will say these things from the outside and can have nothing to say about the question internal to law, which is one of meaning—the meaning of a text, or a story, seen as part of a larger text and story, all defined by the language in which it is told and argued about.

In both law and theology, then, the essential question is the meaning of a text (or practice) within a tradition, which only that tradition can supply. And in both fields the practice of thought requires not only the use of but a commitment to the tradition: it must be real, and real to you; the meaning we seek is not purely analytic, but far deeper than that, a way of making sense of our world in the language we have inherited.

If I am right about all this, it has an extraordinary and somewhat puzzling consequence. Theology is in its most basic sense, “reasoning about God.” The kind of reasoning in which it engages, I have just been arguing, is not abstract or universal, but proceeds in the terms established by an inherited language and tradition. The real question is: How does this God reveal himself to these people in this story, these symbols, these practices, this language? The question, “Does God exist?” is in this sense not really a theological question at all, for his (or her) existence is the premise of theological thought. I have just said that it is not a very fruitful philosophical question either, for the very idea of “God” requires a tradition to give it meaning, and philosophy as we know it has no such tradition. Here is the puzzle: does it follow, as it seems to,

that the question, "Does God exist?" cannot be intelligibly asked or answered, in the affirmative or the negative, in any human system of thought and discourse?

Whatever the answer to that question, I would say this: that theology cannot have as its goal the articulation of universal truths stated in a universal language; that the practice of theology presupposes a world of religious meaning and significance, which defines its questions and many of its materials of thought and analysis; that this is only one such world, among many, and that there is no place within our tradition from which we can adjudicate its relation to another. Like the lawyer, the theologian uses the materials of his language and culture reflexively, to think about that language or culture itself. He seeks a transformation, but always a transformation of something, not a replacement of it by something else. Like the lawyer, the theologian should know that his language will not work automatically or routinely in any context in which he uses it; that it, like the law, will have to be remade, reformed, to make something fresh and alive. It is by means of such acts of creation that we can approach the object of our thought and effort, in one case what we call God, in the other Justice.

I said earlier that one great task for the lawyer is to learn how to make a voice of his or her own in the law: to speak as a person and mind, and to use his language not in a mechanical way, as though it carried all the meaning by itself, but as a resource for his own action and expression. Something similar is I think true of the person engaged in theological work: there is a temptation to shift phrases, concepts, fragments of doctrine around in the mind, as though they had a kind of automatic authority and without making them one's own. But the question in the end is a question of meaning, including meaning for you; in theology as in law one's task includes making the questions real, real for you and your audience, and speaking out of the experience of your own mind—not out of a dead inheritance, but in such a way as to make it live. Like the law, theology creates realities—like baptism or circumcision or fasting—that can easily be debunked, but realities nonetheless, that endure, and work, and give meaning to human life. Like the law, theology stimulates hopes that cannot be attained, at least in this life, but as with the law this apparent defect is part of its gift.

In theological discussions of the kind I mean to define, and in the law as well, you read the text in relation to lived experience; you find a question or a puzzle; you begin to pursue it, by bringing to bear upon it other relevant parts of your tradition; this leads to other questions, to none of which you find firm answers but rather a kind of complication;

in the process you are attending to something outside yourself in a way that leads to the discovery of what is latent in the material, in the world, but as yet unseen by you. This is a way of opening up your own mind and self to what the world has to offer.

Both law and theology have their own forms of thought and authority—in the words of the great common lawyer Coke, both have their own “artificial reason.” Both should be acutely aware of the limits of these forms of reason, these languages, which exist in a world of many kinds of reason, many kinds of language, each in its own way valid, and in a world of radically inexpressible experience too. Both are properly and ultimately in the service of that which can never be fully defined—in one case “Justice,” in the other “God,”—but which, nonetheless, calls for our deepest efforts of mind and imagination. Both at their best call for whole-minded thought, in the faith that this kind of attention and conversation will open us to the truth of the world.

And both are subject to similar pathologies, for example: mechanical thought; overconfidence in vocabulary; close-mindedness; self-sureness; authoritarianism. Both have within them tendencies, sometimes very strong, to support what Simone Weil has called the Empire of Might;<sup>3</sup> but both also, in other forms, are our best hopes for resisting that empire. Both can be engines of moral and intellectual and even physical death; but both have it within them as well to be radical sources of life and newness. It is up to us.

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3. “Only he who knows the empire of might and knows how not to respect it is capable of love and justice.” SIMONE WEIL, *THE SIMONE WEIL READER* 153, 181 (George A. Panichas, ed., 1977).