

# Is There an Implicit Theology in the Practice of Ordinary Law?

by Joseph Vining\*

We should have a text to help us—lawyers and theologians almost always do. Consider this from Wordsworth, and ask whether it goes too far if Wordsworth were thought to be speaking to the practicing lawyer:

Here you stand,  
Adore, and worship, when you know it not;  
Pious beyond the intention of your thought;  
Devout above the meaning of your will.  
—Yes, you have felt, and may not cease to feel.  
The estate of Man would be indeed forlorn  
If false conclusions of the reasoning Power  
Made the Eye blind, and closed the passages  
Through which the Ear converses with the heart.<sup>1</sup>

This is a wonderful passage in Wordsworth's long *Excursion*, said to be the only wonderful passage in what Wordsworth considered his great work. It captures the question we are addressing today. Whether it gives too strong an answer, with its references to worship, piety, and the devout, depends on what piety leans toward and what worship is of. On this, Wordsworth himself is nicely enigmatic. But in staying so he does not close us off from the possibility of touching something universal in exploring the connections between law in the world and theology in the world.

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1. WILLIAM WORDSWORTH, *THE EXCURSION*, Book IV, 192 (Woodstock Books 1991) (1814).

Any connection between worlds of human endeavor is in at least three strands: what practitioners do; what they presuppose or presume or take as starting points; and what they believe. Natural scientists and social scientists may be compared along these lines and, connected thus together, may then be contrasted with practicing lawyers and practicing theologians.

Theology and law are first pulled together in a negative way—in what their practitioners do *not* presuppose or, perhaps, do not believe. That which they seek and which guides them is not just a process.

We talk much about law being a process, an open and ongoing discourse, and “process” has its place also in theological description. But you do not die for or embrace poverty for what is merely, only, no more than a process. Nor, in law, do you move against someone (with what can only be called violence) or restrain someone (again with violence) in the name of what in the end is only a process, things interacting producing things that interact, on and on, just that and no more than that.

There is of course an implication of the substantive in this negative, the “*not* only” and the “*not* merely,” at the very least an opening to an irreducible, in both the legal and the theological. Or, leaving behind this contrast with the once popular “reductionism” of other fields, we can cast the difference in the now popular language of “emergent properties” and “complex systems” being used to describe the nature of things and the human.

“Properties,” nicely defined, emerge but are not predictable from the “properties” of their component parts, which parts in turn emerge but are not predictable from the “properties” of their own components. We ourselves, some of us are saying to others of us, are complex systems, properties, and wholly explicable in terms of the selection of properties competing for survival under precisely defined rules at each ascending level of complexity.

Put in these current terms of discussion, the contrast in legal or theological thought is a willingness to start at the top rather than the bottom of the emergent pyramid of processes so conceived and to see that pictured efflorescence as operating in reverse. Down from us, this vision of processes that are only processes, rather than up to and including us. We are, after all, the ones who paint this picture. Legal thought knows the law of property and how limited it is. What law works with—and theology—escapes too often the precisely defined and the systems of “property” or “properties” that depend upon precise definition.

This shaking off inadequate form in a reach for substance, this “*not* only” and “*not* merely,” can occur whether or not the word “spirit” enters conversation. In law no less than theology, the reach for the “real,” the

“bona fide,” the “actual,” which usually ends in inquiry into the mind of a speaker, is so common as almost to pass notice. But spirit does enter. In method, the legal and the theological are both text-based in some fashion. Both speak openly of the spirit informing the “letter” of their texts. It is not gabbling to speak of the spirit of the law even today. If pressed for wider reference on the nature of that spirit which is presupposed in the search for it, lawyers and theologians have principally each other to turn to, perhaps to their surprise.

The substantive in law and theology puts them in a most definite contrast now with other worlds of thought, experimental science, statistical analysis perhaps of every kind, and, I wonder, historians’ work also, including intellectual history in which historians stand apart from their subject matter. Certainly legal and theological practice and analysis are open-ended, and thus continuing, and thus in process. Nonetheless they have a substantive object, however variously described. They are not even merely worlds of “practice.”

Having already almost arrived there through what is not the case, we can take a step into the positive that pulls together the legal and the theological—the positively presupposed, perhaps positively believed.

Substance, or that ultimately uncapturable “spirit” of secular parlance, can be described as a person. It is best described so in legal thought and in three of the great world religions. Some looking at and hearing of the Buddha might add Buddhism as a fourth; some might add Hinduism.

Each practitioner is a person too—they are persons speaking for persons.

Beyond this, practitioners of both the legal and the theological recognize the individual from whose mind and mouth speech comes, in a way that other worlds of thought do not. Indeed, in any world of thought that is statistically or probabilistically based, or mechanically based, in which systems and processes are produced and governed by self-sufficient rules, there is really no place for the unique value of an individual. The particularity of the individual recognized in law and theology is not that of what in biology is called the “phenotype,” product of the interaction of two systems, the internal system, called “genotype,” and the external system, called “environment.” One need only look at the criminal law’s twentieth-century experiment with and ultimate rejection of such a view of the individual. The individual’s unique value, that the rabbis say is the only absolute value in all the universe, is not in any way to be equated with the uniqueness of each pebble in a stream. A pebble is thrown and smashed without thought, though it is likely the only such pebble in the universe. Not only internal system and external system but a third element in the recognized individual is there, unnamed at least in law.

Then as recognition of the individual deepens, becomes more real, more serious as it were, it touches the roots of what theologies of many faiths try to express as *equality*. Seeing another as fully individual, not fungible but irreplaceable, is inescapably a move toward a sense of equality. It is in law and legal thought, perhaps there alone, that theology can look at a matching struggle with real recognition and with equality amidst difference that is so very unlike the equality of number. A defining contrast, again, is the contemporary geneticist James D. Watson's argument for "genetic analysis to help work out the biochemical pathways underlying memory and clear thinking. . . . [O]nly by reducing the differences in human beings will we ever have a society in which we can effectively view all individuals as truly equal."<sup>2</sup>

But in neither law nor theology are persons the same as individuals. To introduce once more a line from Wordsworth, persons are apprehended in a "mighty world [o]f eye and ear, both what they half-create, [a]nd what perceive."<sup>3</sup> Living in those we refer to as persons are the connections between us as individuals. Those living connections make possible the very thought of sacrifice, one for another—explicitly so in law and theology, implicitly in political, economic, or environmental arrangements, or in medicine and science.

Common features of "time" are also presupposed in the common reach for substance. Time is in a sense part of the substantive, for the persons of our experience are very much associated with the experience and sense of time in life and in fact. "Time" may prove not confined or confinable to one or another of the worlds of thought and practice that works with it. We can say time in law and theology is not time as defined for purposes of other fields. Or, we can say there is an easy and pervasive transcendence of time in law and theology, if conceiving of time as a sequence of identical units stretching out on either side of a Janus figure is too convenient to give up. No Supreme Court that in 1997 can be heard to say "In 1895 we rejected this argument"<sup>4</sup> is living by the clock. No endeavor is confined to the clock that has such analytic difficulty, seen especially in administrative and constitutional law, in distinguishing past and future, past facts and future facts, the prospective and the *ex post facto*.

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2. JAMES D. WATSON (co-discoverer of DNA), COLD SPRING HARBOR LABORATORY ANNUAL REPORT (quoted in ROBERT POLLACK, *THE MISSING MOMENT* 121-22 (1999)).

3. William Wordsworth, *Lines Written a Few Miles Above Tintern Abbey* in WILLIAM WORDSWORTH: *THE MAJOR WORKS* 134 (Stephen Gill ed., Oxford University Press 2000).

4. See, e.g., *Salinas v. United States*, 522 U.S. 52, 64 (1997); *Hudson v. United States*, 522 U.S. 93, 101 (1997).

The real Janus figure, in legal thought and in the theological, is not looking at such sequences of units, hours, years, going on of their own, like processes, but is looking rather on the one side to the individual and on the other to the person. Each and both are part of the understanding of time that animates practice and, it may be, comes close to belief: the individual who dies, the person who lives beyond; the individual who half-creates and half-perceives, the person who is half-created and half-perceived; the individual who is different, the person who connects. Any person exists, for us as individuals, beyond place and ordinary passing time. The very undertaking to understand the meaning of the always changing physical evidence of sounds and sights by constructing a voice from it, half-creating, associating the evidence (or not) with the voice we presuppose is there—else we would not do the work—leaps beyond ordinary time and space.

Then, odd though it may seem to some, “creation” and “creativity” are involved in what we have here called the substantive. Lawyers and theologians take away the quotation marks or inverted commas around the words.

As persons we are mutually created as we each seek the authentic in the different bits of evidence that we each present to ourselves and others over the passage of “ordinary” time, and that others present back to us. Creation is continuously “at work,” as we who work might say, in our seeing persons around us: those with first and last names, those with more general names like “Church” and “People of Israel” and “Congress,” and those with the largest names. But this is only an instance of something more general and distinctive in both law and theology. Elsewhere it can be said, or heard, that “things just happen,” force “just is,” a given of “the world.” In law and theology, practitioners themselves experience, and judge in others and evoke from them, what is close to the will-to-live itself—they experience the dynamic force of purpose, the force that stays forceful only so long as force is breathed into it, the being-within motion and utterance rather than outside them. The phenomenon of creation, the sense of it and acceptance of the reality of it, is shared by the legal and theological worlds. The ease of both with it is part of the difference they display when put beside other worlds.

There remains the movement from presupposition to belief.

Perhaps that move need not be made. Perhaps it cannot be made. Faith this side of committed belief may alone be where we, as observers, can be confident legal practice and the theological can meet. But presuppositions in legal practice are no less good starting points for movement toward belief—or even directly felt knowledge—than for movement toward faith. For example, legal practitioners are particularly aware that shapes and sounds of words without a person speaking

them are meaningless. Or such words mean only what the listener means—the shapes and sounds of words without speakers are all around us, emblems of aloneness, especially today. But are words from a multi-member court or legislature meaningless? Do practitioners or citizens say, “No, they are not meaningless”? If they or we actually say, “No, not meaningless,” we must look at the implication. Then we must look at the implications of the detailed way these words, of court and legislature, are interpreted. The implications are ontological, to use that large word—implications of what exists, of the nature of what is real for us.

Or, instead of saying “implications” we may say there are consequences, ontological consequences, of our successful life together. Law fades if it has no authority, is not responded to in good faith, internalized, and merged with; it becomes transparent, or as we say, “full of holes.” In law the achieved perception of court or legislature as a person speaking is achievement of some sense of internal connection with the voice and some sense of obligation that everywhere attends movement from outside a joint effort, to inside. Without this achievement there is only calculation about violence, in infinite regress. Mere violence is known not to be enough. Rules pictured like what other fields, such as physics, call “laws,” which would be enforced by force and acquire their reality and efficacy in the world from threat of violence, simply cannot be shown in law. In law rules are cast in human words and words alone. Those words change and are supplemented with each new voice speaking them. Authority and the methods (interpretative and institutional) that create and maintain the authoritative—always against the threat of the authoritarian—depend upon basic presuppositions that we might judge solid starting points in movement toward belief or knowledge.

These basic presuppositions in law are of mind, rather than the mindlessness of the processes and systems studied and conceived in other fields; of caring mind, which may be a step beyond mind itself; and, perhaps, of a “single mind.” There, the legal would tremble at the scope and depth of the analogy with the theological, which point to kinship rather than analogy, a real connection.

Idolatry? Blasphemy? That would be a question too, but a question that is possible only because of the connection. Might the theological even find in the legal some comfort and help for its own conundrums, such as those of “reigning” and “ruling?” Paul Ricoeur, contemporary individual to whom we can move from the individual Wordsworth of two centuries ago (if only to point up how present is the voice of each), has wondered whether the “all-powerful” and “the almighty,” in religious language and image, might give way in our time to a perception of the

“all-weakness” of love.<sup>5</sup> In law I rather think there is no summoning up of an image of king or emperor reigning or ruling. There is instead a mighty world of eye and ear. The rule of law has always been set apart from and often against king and emperor.

The individual, the person, creation, time—all these and more may come together in a common engagement with life. Creation and life run together in both law and theology. The persons that populate legal thought and language are living in more than appearance. The values out of which legal decisions and statements of law are woven, and for which legal inquiry searches in the minds of individuals in the course of legal challenges to action, are very much living. Their place is not in past time with causation in the nature of a push, but in the future, from which they pull, like a voice calling. We may even wonder whether hierarchy of text and office, so often undisguised, quite open in both the legal and the theological, is not at all anachronistic as we might think today. It may instead be necessary to focus in human discussion and thus to the ultimate presence of authority and the life together true authority makes possible. Though we shudder at the thought of hierarchy after experience of the authoritarian, hierarchy of text and hierarchy of office remain with us everywhere and may just possibly be an essential part of jointly building life in place of violence, confinement, and death.

Not only engagement but awe of life may mark and join together the legal and theological. Awe is expressed in law in a thousand ways, even in its shyness and embarrassment about counting costs in relative numbers of lives or putting a dollar number on the value of an individual human life, which runs as a resistance or presumption throughout legal doctrine and interpretation. In this, again, the legal and theological are lit as in bas relief when seen with the other worlds of thought to which they are necessarily attached. The contrast of biology’s internal war against “vitalism” is an instructive example. It lasted from before the middle of the nineteenth century until after the middle of the twentieth; some think pockets of vitalism still remain in biology. The language used in this internal war is striking, as are the emotions breaking through and the strategies of argument. The pioneering French physiologist Claude Bernard was an eloquent participant. He sealed his disengagement from awe of life in his disciplined

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5. JEAN-PIERRE CHANGEUX & PAUL RICOEUR, *WHAT MAKES US THINK?* 271, 276-77, 278 (2000).

thought—though not in the living of his life—with a phrase that has echoed since: “Life is nothing but a word which means ignorance.”<sup>6</sup>

But thought is not all that is at stake. Action follows thought, as action follows sight and action follows blindness. Obviously and pervasively, action follows thought and sight in law; it does so also in the impact of theological work. The same great figure Bernard, who persuaded himself he thought life nothing but a word, wrote of the physiologist: “he is a man of science, absorbed by the scientific idea which he pursues: he no longer hears the cry of animals, he no longer sees the blood that flows, he sees only his idea and perceives only organisms concealing problems which he intends to solve.”<sup>7</sup> Historically this was at the beginning of the modern Western controversy over the actual treatment of living things, including individual human beings, in the pursuit of knowledge and social good. That controversy over action paralleled the war over “vitalism” within science, and continues prominently today here and in the European Union, in debate, for example, on the recent amendment of the Union’s constituent treaties to present animals as “sentient beings,” or on the coverage of the Animal Welfare Act or experimentation on human subjects in the United States.

Is there faith or belief in life, in modern thought? When law or theology enter they do not simply engage life off by themselves. They act. They pull back great and valuable contributors, the Bernards of history, from *not* hearing and *not* seeing, and keep them pointed to the mighty world of eye and ear, what they half-create and what perceive. The happiest connection between law and theology may be that they each protect life in worlds of thought other than their own.

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6. CLAUDE BERNARD, AN INTRODUCTION TO THE STUDY OF EXPERIMENTAL MEDICINE 201 (Henry Copley Greene trans., 1957).

7. *Id.* at 103.