

LEGAL AFFINITIES

Explorations in the Legal Form of Thought

Edited by
Patrick McKinley Brennan, H. Jefferson Powell,
and Jack L. Sammons



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Introduction

Patrick McKinley Brennan

Is law possible? Is there something called “law” that is authoritative for us? These questions may seem otiose, and perhaps they should seem so. After all, Congress and state legislatures keep enacting statutes, federal and state courts continue to decide cases, and judgments are enforced in the name of the law every working day of the year (and sometimes on holidays and weekends).

For all that, we can ask whether law remains possible. We can inquire, in other words, whether such artifacts and outputs, undertakings and activities, and others like them, taken individually or collectively, deliver law. Or do they amount, in the end, to something categorically different, something only authoritarian and reducible to force?

It would be extravagant to suppose that humans have never made law. It would be unwise, however, to take for granted that what was once possible remains so. The authority with which earlier societies were shot through is no longer possible in the modern world, or so Hannah Arendt argued, and many have taken her startling claim seriously indeed. And privacy, to take another example, is disappearing before our (covered) eyes.

Without extravagance, therefore, we can ask whether it could be so with law. Could it be that pretenders to law remain, while the real thing is slipping unnoticed away into impossibility or dormancy?

Is law possible?

As a universal matter, a fact proves a possibility, and law is no exception to the universal. Our question, then, can be restated as follows: Is law a fact? Or, as is so often supposed today, is “law” just the deceptive

mask of power politics, or perhaps just an occasion for the technical expertise of other forms—more “scientific” forms—of social thought?

Over a period of four decades, in season and out, Joseph Vining has testified to the *possibility* of law not by describing—for it is difficult to describe law without destroying that which is most important in it—but by showing us the *fact* of law in the modern world. Vining has approached his task from oblique angles. Unlike legal philosophers in the tradition of John Austin, Vining does not assert a formal definition of law, and then ignore what does not fit within the narrow confines of the definition. In showing *that* law is, Vining shows *what* law is—and the *what* of law is not what is often asserted or supposed. Law is not, for example, any one artifact or some assemblage of the same (such as statutes and decided cases) that lawyers and others use in saying what the law is. The law, for Vining, is always more than the sum of its parts.

In his effort to show us the fact of law, Vining leaves nothing out. This is because law, as Vining reveals, leaves nothing out, or at least as little as possible. Vining attends, rather, to all that people do and do not do in the name of the law: every verbal parry and thrust, every claim and equivocation, every word and every silence—all of them so many manifestations of the human mind functioning in a unique and irreducible way. Vining, working by way of (what he describes as a) “distillation of vacillations,”¹ marshals all manner of evidence that law does not just lie there on the page, does not just get asserted or threatened, and speaks to us only through our conversations about it. “Law connects language to person, and person to action, through a form of thought that is not reducible to any other.”² Law is what is produced by “the legal mind.”³

A stranger to contemporary American law might think these platitudes, but in fact, the very ideas of the legal mind, and of law itself as a mode of thought and practice capacious enough to accommodate and interpret human experience, are under siege. Vining has written at length and persuasively against the prevalence in contemporary thought of “total theories” that in his view pursue their totalizing ambitions by harsh reductionisms that exclude from view much of what makes us

1. Joseph Vining, *From Newton's Sleep* (Princeton: Princeton University Press, 1993), 343.

2. *Ibid.*, 357.

3. Joseph Vining, “The Resilience of Law,” in H. Jefferson Powell and James Boyd White (eds.), *Law and Democracy in the Empire of Force* (Ann Arbor: The University of Michigan Press, 2009), 151, 165.

human. In academic discussion about law, this ambition regularly takes the form of the claim to see through or past the law itself to the “real” economic or sociological or political forces that control human society. For Vining, as for the other authors represented in this book, such claims are assertions of will rather than statements of necessity, and the continuing existence of the law, which deals with society and the human by interpreting them rather than by denying their full meaning, is an implicit disproof of the theorists’ hubris.

In view of what may at first sound like a rather rarified or romanticized account of law, one may wonder if Vining concedes, or at least worries, that law, like authority before it and privacy today, is becoming outdated. Vining anticipates the question, with this answer: “The legal form of thought is not waning—rather the reverse.”⁴ For Vining this is cause for hope. So it is for us and the other authors we represent in this book. This is because, as Vining discloses, law is evidence not of threat, not of assertion, not of intimidation but, instead, of the “caring mind” at work on behalf of the community and of all the individuals who comprise it. “Law,” as Vining sees it, “is evidence of view and belief far stronger than academic statement or introspection can provide.”⁵ What is *said* about law by some academics can be cause for despair; Vining illustrates that what is *done* in the name of the law, at least much of the time, is cause for hope. The “legal mind” struggles to leave nothing out.

Nevertheless, as Vining also teaches, law needs its preservers: those who, like the authors of the chapters collected here, join him in seeking to prevent despair from becoming common sense in these complex and violent times when we ask so very much of law. Each chapter began as a talk (lectures would make them sound more scripted than most of them were) at a conference convened at Villanova University School of Law for the purpose of celebrating Vining’s *oeuvre* and encouraging exploration of its implications for the future. Although the conference coincided with Vining’s retirement from the University of Michigan Law School, where he taught for forty years, this volume is by no means in the nature of a *festschrift*, at least to the extent that word would connote completion or ending. Yes, this book is intended, as the conference itself was intended, to honor Vining, who has been an inspiration to all of the authors, but

4. Vining, *From Newton’s Sleep*, 357.

5. *Ibid.*, 5.

even more, the book is intended to raise up and to thematize, without oversimplifying or systematizing, the reasons for hope, both for ourselves and our cultures, that Vining has shared with us. The book is intended to build on, and so to invite others to build on, the work Vining has begun so beautifully, and to reassure them in their hope as Vining has reassured us.

In retrospect, we see that the conference at Villanova instantiated and captured, for a day and we dare to hope more than a day, something that is happening and, we believe, should continue to happen throughout our American legal culture. It is our shared sense that the drift—sometimes verging on a march—of much of that legal culture has been in the direction of force, frequently taking the form of argument or *ipse dixit* according to which words and texts in law amount to objects to be manipulated, rather than serve as the carriers of human meanings to be discovered. The chapters that follow collect evidence of this phenomenon and those related to it. Over against this force-driven elimination of the personal from law, the contributors to this volume share the sense, nowhere more richly articulated than in the work of Vining, that law engages and serves whole persons, appealing to and thus honoring their freedom. The Jesuit philosopher and theologian Bernard Lonergan once asked, “Is everyone to use force against everyone to convince everyone that force is beside the point?”⁶ Vining and the other authors who join him here answer that law, at least as it should be, answers Lonergan’s question with a respectful but decisive “no.”

It is our hope that this volume will serve its readers as something of an extension of what its authors shared together, on the occasion of the conference. We believe that our experience then is by no means unique: when persons who are concerned with law as a practice that involves whole and free persons engage honestly and openly with one another, it becomes possible to ask the human questions with which we come, and believe we *ought* to come, to lawyers’ work. In a society in which even the articulation of questions about the meaning of humanity and personhood is difficult, identifying modes in which they can be addressed is of interest to many others besides those who are schooled in law. That there can be legal truths, as there are poetic truths, is not just a subject for lawyers. As Vining puts it in the last sentence of his book, *From Newton’s*

6. Bernard J.F. Lonergan, *Insight: A Study of Human Understanding* (New York: Harper & Row, 1978) (1958), 632.

Sleep: “[The legal form of thought] may yet move to take a place beside the forms of thought of other disciplines that are self-reflective, as something to be reckoned with, in its own terms, in coming to any general understanding of the working of the world.”⁷

In the chapter that opens this book, “The Filaments of the Vicarious,” Vining, addressing the authors of the chapters which follow his, recalls and weaves together into a narrative the cross-currents that led in turn to his four books and to his many other writings. With particular poignancy, he recalls his early need 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.’” Interconnectivity, though he does not use the word, is a theme that, we think, runs through and animates Vining’s work. How are we separate individuals to work out and to build up the life-increasing connections of which we are capable and needful? Vining’s answer: By recognizing and honoring *both* the personhood that we share *and* the individuality that each of us embodies, even, and perhaps especially, in law, through the discovery or creation of affinities.

Vining’s law school classmate and lifelong friend, John McCausland, long a lawyer but now also an Episcopal priest, next brings the largely implicit and unsystematic theology of Vining’s thought into focus. McCausland does this through reflection on the theology of mystery developed by Karl Rahner, S.J., whom some regard as the preeminent Catholic theologian of the twentieth century. In his chapter, “Finding a Footing: A Theological Perspective on Law and the Work of Joseph Vining,” McCausland suggests the underlying foundation of Vining’s legal thought—the footing on which Vining believes law is ultimately founded—is the mystery of grace. This assertion may seem a startling one to make about a distinguished legal scholar in the contemporary American law school world: we can best put it in McCausland’s own words:

If we follow Rahner’s thought here, I think we can say that the work of Joseph Vining has been an exercise in demonstrating the importance of recognizing Grace in the operation of the law. That would be a shocking, even risible, statement in the secular legal academy today. Joe knows the patronizing politeness with which, at best, the academic establishment can greet efforts

7. Vining, *From Newton’s Sleep*, 357.

to speak of Grace, even if one avoids using this term. That is why much of Joe's argument has had to be "through the back door," a *via negativa*, showing the sterility and danger of proceeding to treat law as though something like Grace did not and could not exist.

McCausland's chapter reaches its climax as it draws on what he—and Vining—see as the graced-filled lessons of the mystery of the Holy Trinity, God in God's relationality. In this light, it is by recognizing, enabling, and enhancing the relations of human individual persons in community that law, as Vining sees, achieves its gracious and God-given purposes. We should note that in McCausland's essay, more than in other chapters of the book, we have retained the style of address and the references that bespeak one old friend understanding another. They are a testimony to the way affinity works.

Law's work of relating is at the core of Judge John T. Noonan's chapter, "Through Papers to Persons." Drawing on more than a quarter-century of work as a United States appellate judge, Noonan confirms that the legal order does not work by calculating forces or reactions but, as Vining teaches, by persons responding to persons, through processes and papers and the "sources of law." Judges do possess powers, including the power to coerce. In the act of judgment at its best, however, "power is related to love." Acting in the name of and for the good of the community, the judge reaches a legal judgment that, unless it be overruled, creates the terms by which the particular parties are to be related to the community of which they and the judge himself or herself are a part.

James Boyd White's chapter, "The Creation of Authority in a Sermon by St. Augustine," takes up the question of the nature of authority, the topic of Vining's book *The Authoritative and the Authoritarian*. White does so by turning to theology (which Vining has identified as law's true sister discipline) and the way in which theological authority is created by St. Augustine in a sermon. Like the judge or lawyer carefully drawing on the "sources of law" to which Noonan referred, the Christian preacher creates authority for his message by embodying in his own performance the way in which the "Word is driven by love" for the persons to whom it is spoken. The preacher with authority, Augustine, does not wield sharp-edged words of Scripture as tools with which to bludgeon his congregation; instead, the authoritative preacher of the Word, like the judge or lawyer, develops his or her authority, and avoids the authoritarian, by

embodying “the relation each should have with the external authorities” that can be invoked.

One aspect of Vining’s demonstrating the *fact* of law is showing that law is not this or that legal artifact or output, nor even the ensemble of them. As Jack Sammons explains in his chapter, “Law as Melody,” law is not something “external.” But is it, then, something (merely) “internal”? Sammons uses the analogy of music to suggest that, like music, law is neither external/physical nor internal/psychic, though we cannot describe either law or music without using these or similar categories. Just as “[n]othing in the physical event corresponds to the tone as a musical event,” so nothing in the world external to law corresponds to the law as a legal event. Law, like music, is in part a non-conceptual way of liberating things so that they can reveal themselves to us. Developing an aesthetic of law, Sammons concludes that the relationship of the lawyer or judge to what he is producing must be the same as that of the good musician to his or her music: justice, the virtue of taking things *as they are*. Sammons, like Vining, warns against any aspiration to put an end to music’s capacity or law’s to reveal the world and that part of it that is our very selves.

In his chapter on “The Humanity of Law,” Jeff Powell begins by considering an old assertion that the great contracts teacher, Arthur Allen Leff, was a nihilist about the law and that his final, tragically uncompleted project, a dictionary of law, was proof of his nihilism. In actual fact, Powell argues, Leff, like Vining, understood the law as a practice demanding the very qualities of thought and responsible judgment human life calls for in general. “Commitment, argument, the presuppositions of mind and person, the meaningfulness of language both uttered and received: legal work, good legal work demands all of this.” A practice so completely grounded in the commitment to good faith in human relationship is the opposite, not the exemplar, of nihilism, and Leff’s dictionary was one lawyer’s means of tending to the common task of keeping the language in which *lawyers* relate living and meaningful.

Also inquiring into what we might call law’s ontology, Steven Smith, in his chapter, “Persons All the Way Up,” takes as his point of departure the question whether law is an objective phenomenon or a subjective one. Situating this choice (law as objective vs. law as subjective) within the history of Western philosophy, Smith suggests that “perhaps *the* central purpose” of Vining’s work has been to resist the reduction of law to the world measured (or measurable) by science. Smith argues that Vining’s work

has been a defense of “personalism in a thoroughly personalist way,” a focus on the “actual qualities of persons.” Among those qualities is faith—faith that others are there, are concerned, and are capable of knowing and sharing meaning and value. Smith concludes by suggesting that all of this faith depends, if it is not mere deception, on there being a Person whose universe is “more than mindless articles in pointless motion.”

But if for Vining it is thus “persons all the way up,” is it also *law* all the way up? This is the theme of Brennan’s chapter, “Are Legislation and Rules a Problem in Law?,” which asks whether Vining has given a legal, or a non-legal, account of how humans succeed in making law for their communities. In other words, is Vining’s personalism of a piece with the bulk of that modern thought that postulates a God who creates but does not rule through law? Or does it offer a counter-cultural claim that the human practice of law-making is itself governed by a law that bears a divine pedigree and yet respects human freedom? Brennan suggests that legislation, which is for Vining a problem in human law, provides the pattern of all law, inasmuch as humans make law, rather than something less, by freely obeying the divine ordinance to “do and pursue the good and avoid evil.” Vining’s understanding of the “legal mind” takes on new significance when the human mind is understood not just as the generator of law, but first as the recipient of a higher law according to which human goods are legally commanded.

If this Introduction has succeeded in showing something of the affinities among the minds that have contributed to this book about our vision of law, we may also hope that it has also succeeded in suggesting the ways in which law itself is an affinitive undertaking. In chemistry, “affinity” refers to the capacity of chemical substances to form compounds. In biology, “affinity” refers to the phylogenetic relationship between two organisms or groups resulting in a resemblance in general structure. In the context of marriage, “affinity” refers to relational ties other than those of blood. In the context of law, by contrast, “affinity” refers to the connections, which are neither chemical nor biological nor consanguineous, by which persons are freely connected to other persons as valued. To the extent law succeeds in its affinitive aspirations, it leaves nothing out, and in this way resembles theology, as Vining has seen:

Theology may not be law any more than any metaphor is the same as that which it reflects. But it has the perhaps unique advantage that, like law, it leaves nothing out, not person, nor

present, nor freedom, nor will, nor madness, nor individual, nor the delight of a child, nor the eyes of a fellow human being, nor our sense of the ultimate, in its effort to make sense of our experience and make statements that are consistent and understandable in light of it all.⁸

The authors of this volume whom we represent write in the spirit Vining exemplifies, that of leaving nothing out. This is not the direction of much jurisprudence today, and Vining has shown why jurisprudence stands to learn from law and its affinities. The fact of law that leaves nothing out proves the possibility.

8. Joseph Vining, *The Authoritative and the Authoritarian* (Chicago: The University of Chicago Press, 1986), 201.