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METAPHYSICAL PERPLEXITY?

Steven D. Smith

My goal in this opening session is to give a distillation of the book, *Law’s Quandary*, in a way that will serve to explain the title to this conference. The program says that “the perplexity is metaphysical.” But what is the “perplexity” that afflicts modern law? And in what way is that perplexity “metaphysical”? What would it even mean for a perplexity to be “metaphysical”?

In trying to answer these questions, this is what I’m going to do: I will first offer a very rough preliminary statement of what the perplexity is, as I see it. Then I want to describe the thesis that, if correct, would explain how our perplexity is “metaphysical” in nature. The thesis, in a sentence, is that law-talk today (like so much of our talk) operates in an “ontological gap”; but that claim is hardly self-explanatory, so I will try to explain what I mean by that phrase. Next I want to summarize, very briefly, the main arguments for the thesis, after which I will try to restate more accurately what the “perplexity” or “quandary” is. Finally, I will briefly discuss several possible interpretations of our predicament—of our perplexity, or quandary.

IS LAW-TALK “JUST WORDS”?

So, what is the “perplexity” that afflicts law today? First let me say what the criticism is not. I’m not arguing that law is pervasively unjust. (Maybe it is, maybe it isn’t; but in any case that is not my argument.) Neither am I making the criticism that law, or legal reasoning, is indeterminate. That criticism is very familiar, but in my view the perceived indeterminacy of law is merely a symptom of a deeper difficulty.

Here is a first attempt at describing that deeper difficulty: the perplexity or quandary in which law currently finds itself lies in the fact that law-talk today is—or at least is widely perceived as being—“just words.” This was a recurring complaint throughout the twentieth century. In this vein, Karl Llewellyn attacked lawyers’ tendency to use “words that masquerade as things.” A good deal of legal discourse “is in terms of words,” he thought:

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* Warren Distinguished Professor of Law, University of San Diego. I thank Larry Alexander and Merina Smith for pre-conference comments on a version of this talk. For obvious reasons it would not be advisable to change this paper from the way in which it was presented. I very much appreciate the comments of other participants in the conference, however, and I thank Dean Wagner, Professor Lewis, and the Catholic University of America for organizing this conference.
"it centers on words; it has the utmost difficulty in getting beyond words."\textsuperscript{1} A couple of decades earlier, Roscoe Pound had said much the same thing: lawyerly argumentation, Pound thought, was pretty much just "empty words."\textsuperscript{2}

Fast forwarding, we find Alexander Aleinikoff criticizing an opinion of Justice Potter Stewart: "Although Stewart's opinion uses all the right words," Aleinikoff says, "in the end they are simply that: just words."\textsuperscript{3} Much the same might be said—is said, often—of many judicial opinions. Thus, Dan Farber observes that Supreme Court opinions seem "increasingly arid, formalistic, and lacking in intellectual value. . . . [They] almost seem designed to wear the reader into submission as much as actually to persuade."\textsuperscript{4}

And of course legal scholars are not guilt-free. On the contrary. In a recent survey of contemporary legal scholarship published in the Harvard Law Review, Deborah Rhode suggests that a good deal of legal scholarship deserves the description once given of Warren Harding's speeches: it is "'an army of pompous phrases moving over the landscape in search of an idea.'"\textsuperscript{5}

Except in an allusive way in the book's preface, I do not discuss the condition of contemporary writing on legal theory or jurisprudence specifically. But I think the same judgment—that "It's just a lot of words"—is widely shared. Indeed, many might view legal theory as an a fortiori case. So the story might recount how, starting maybe a half-century ago, an elite corps of legal theorists decided that their task was to elucidate something that they sometimes describe as the "concept" of law. But what sort of thing is the "concept" of law? What exactly are the theorists supposed to be elucidating? Not just ordinary usage of the word "law," surely: that seems a job for linguists. Not the real-world functioning of the institutions we associate with "law": that seems an empirical task for social scientists.

Nonetheless, theorists continue to provide increasingly refined accounts of the "concept" of law, though it is unclear just what it is that they think they are clarifying. In this situation, it is not surprising that skeptics may conclude that highly technical jurisprudential discussions—battles between

\begin{itemize}
\item \textsuperscript{1} Karl N. Llewellyn, \textit{A Realistic Jurisprudence—The Next Step}, 30 COLUM. L. REV. 431, 443, 449 (1930) (emphasis added).
\item \textsuperscript{2} Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 COLUM. L. REV. 605, 621 (1908).
\item \textsuperscript{4} Daniel A. Farber, \textit{Missing the "Play of Intelligence,"} 36 WM. & MARY L. REV. 147, 147, 157 (1994).
\item \textsuperscript{5} Deborah L. Rhode, \textit{Legal Scholarship}, 115 HARV. L. REV. 1327, 1327 (2002) (quoting WILLIAM G. MCAODOO, CROWDED YEARS 389 (1931)).
\end{itemize}
"exclusive" and "inclusive" legal positivists, for example—are mostly verbal in nature.

So the suspicion that law-talk, whether emanating from scholars or courts, is "just words" is a recurring one. Indeed, even if they do not express the suspicion in quite this way, the numerous scholars over the last century who have tried to move away from conventional legal discourse in favor of some "law-and" discipline—law and economics, law and philosophy, law and whatever—are acting on the sense that law-talk in itself is somehow empty—"just words."

And yet . . . this is an enigmatic complaint. After all, what else would a form of discourse be if not "words"? So what are the critics complaining about? Might the criticism itself—the criticism that law-talk is "just words"—itself be "just words"? And how might this embarrassment be "metaphysical" in nature?

**Ontological Gaps**

Two or three generations ago a prominent movement in philosophy might have provided confident answers to these questions. I refer to the so-called logical positivists, who argued that all meaningful statements are either analytical in nature (like "all bachelors are unmarried") or else empirical (like "the duck is on the pond"): the rest of our talk amounts to a sort of "metaphysical nonsense." So unless translated into something more analytical or empirical, a statement like "It is morally wrong to cheat on your exams" is no more meaningful than "Twas brillig, and the slithy toves Did gyre and gimble in the wabe."6 In this way, the logical positivists dismissed as "nonsense" a whole host of talk and learning, including much of what is said about theology and morality.

And about law. On its face, after all, the proposition that, say, "a person owes a duty of care to other persons who are foreseeably endangered by his conduct" does not seem to be either analytical or empirical. I recall how, when I was in practice, an associate who was working with me on a uranium mine case asked me whether I thought our clients might have an "incorporeal hereditament" in the uranium, or the mine. I’d never heard of such a thing, but I suddenly had an image of the two of us feeling our way through a dark mine, with flashlights and Geiger counters, searching high and low for an "incorporeal hereditament." ("Is that one over there?" "No, it’s just the broken-off head of an old pickaxe.") Obviously, duties and hereditaments aren’t that sort of thing; they are not the kind of thing that can be empirically verified. So a generation of legal thinkers who were

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influenced by logical positivism—the so-called legal realists—concluded that all of these legal terms were meaningless. In this vein, Felix Cohen famously argued that a whole host of legal concepts were "transcendental nonsense."

Or, we might say, "just words."

By now the shortcomings of logical positivism are widely appreciated, and so we might well conclude (with relief . . . or maybe with disappointment) that it is not possible to talk "nonsense" in this core sense after all. And yet we still may not be able to shake the impression that at least in some settings, people do talk nonsense—nonsense not in the sense of rubbish, or lies, but non-sense. In any case, I am quite sure that I do (though I'll try hard to keep this to a minimum today). We might speak words that have no real meaning to us in an awkward social setting, or a catechism lesson—or a constitutional law class. You’ve learned the words, and you know what you’re supposed to say, but you might admit, candidly, off-the-record: "I don’t really know what any of this means," or "I don’t really understand what we’re talking about."

A Dilbert cartoon captures the experience. A goateed character (whose name I don’t know) exclaims, “Dilbert, my man, you’re stayin’ real and keepin’ to the core.” Dilbert asks “Is that good?” and the fellow with the goatee answers, “I don’t even know what it means.” In the final square, Dilbert wonders, “Why do you say things that have no meaning?”—to which the response is “DU-U-U-DE!”

So, what is happening in these instances in which we have the sense of speaking, or hearing, "nonsense"? Law’s Quandary offers an account of this experience that draws on two notions—those of an “ontological inventory” and an "ontological gap."

Our ontological inventory, simply put, is our list of the basic elements of "what there is"—of, as D.C. Williams puts it, "the primary constituents of this or any possible world, the very alphabet of being." Ontological inventories surely differ from culture to culture and even from person to person. Chapter two discusses three major ontological families that I suspect provide the raw materials for most of our inventories: I call these the ontologies of everyday experience, of science, and of religion. One whose ontological inventory is supplied largely by naturalistic science may not list elements—such as spirit, or God, or perhaps mind—that an inventory shaped by religion may contain.

My suggestion is that insofar as we can give an account of the things we say in terms of ontological inventories we hold, our statements are meaningful. They may not be true, of course, or reasonable, but they are meaningful. But if we say things that we cannot account for using the materials in our inventories, we speak "non-sense," in the almost literal sense I've been referring to.

Here's a frivolous comparison: The person who walks into a Burger King and asks for a Whopper has said something meaningful; the person who makes the same request in a Taco Bell has uttered "nonsense," because Whoppers do not appear on the Taco Bell ontological inventory.

But why would we—and how could we—commit this sort of nonsense? Unless we are being deliberately fantastic or perverse, wouldn't we necessarily talk only about things that are real, at least by our own ontological criteria?

This is where the notion of an ontological gap is helpful. The basic idea is that the ontological inventories that are presupposed by or embedded in the things we say and think can sometimes diverge from the ontologies that we are willing consciously and publicly to affirm. For example, I might scoff at the suggestion that "ghosts" exist in any substantial sense. But even so, I might talk and act as if ghosts are real. I'm afraid to go into old, dark houses, maybe, and if I am induced to enter I scream with fright when the wind makes a mournful sound in the window. I say, and consciously believe, that I don't believe in ghosts, but I live as if ghosts are real.

In the book I describe this situation as presenting an "ontological gap"—a gap between, on the one hand, the presupposed ontological inventories that inform the ways we talk and live and, on the other, the inventories we are willing to own up to. Nonsense (meaning non-sense) can occur when we live and speak in one of these ontological gaps. And we might properly subject our statements to an "ontological audit" (of which the early Socratic dialogues are good examples) to see whether or not we can give an account of them in terms of things we list on our owned ontological inventories: if we cannot, the suspicion is that we are within such a gap and we are uttering nonsense. Law's Quandary is an effort to perform that sort of Socratic ontological audit on contemporary law-talk.

CLASSICAL AND MODERN ACCOUNTS

The investigation begins by noting the large gulf between what we can call the classical and modern accounts of law. (These are simplifying composites, of course.) What I call the classical account operated with an ontological inventory that featured God as a central reality. God, it was believed, created and governs the world according to a providential plan, and law is a sort of participation in this plan. Perhaps the most developed
version of this view was offered by Thomas Aquinas, but leading thinkers over the centuries expressed similar views. We can limit ourselves to Blackstone’s statement: “This law of nature,” Blackstone explained, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. . . . No human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.9

By contrast, the modern view, working with an ontological inventory heavily informed by scientific naturalism, finds this account of law inadmissible, and so tries to develop accounts of law that shun exotic or what we might call “thick” ontological commitments and that instead depend entirely on more mundane realities.

Holmes is the prophet of this modern approach. Holmes acknowledges that much law-talk seems to presuppose that law is “a transcendental body of law outside of any particular State but obligatory within it.” “It is very hard,” he admitted, “to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned.” But in fact there isn’t any such thing, Holmes said, and we know it.10 Law is not a “brooding omnipresence in the sky.” So he contended in the first sentence of his famous The Path of the Law essay that “[w]hen we study law we are not studying a mystery but a well known profession.”11

Much of twentieth century legal thought can be understood as a set of variations on this theme. Thus, legal thinkers have sought to explain away law’s apparent metaphysical commitments by giving an account of law not as a “mystery” but as a down-to-earth, “well known profession” not dependent upon any such commitments. Some accounts, like Holmes’s famous prediction theory of law, are behavioral in emphasis: law is the practice of lawyers making predictions about what judges will do, or perhaps the practices of legal officials generally. Other accounts are more discourse-oriented: law is the way lawyers and judges argue and talk.

But Law’s Quandary argues, not that these accounts are wrong, exactly—because they may be accurate as far as they go, and they may provide valuable insights into the workings of law—but that they are insufficient. They may tell us true and valuable things about law, but they do not explain away law’s metaphysical commitments: that is because these commitments pervade and inform the ways that lawyers talk and argue and predict and

9. WILLIAM BLACKSTONE, 1 COMMENTARIES *41.
that judges decide and justify. So modern theories of law are too often like explanations of a Rembrandt painting that instead of focusing on the artist's aesthetic vision would substitute detailed physiological accounts of the muscular movements in the arm and hand that pushed the brush.

This argument occupies several chapters, and I don't think I can try to present the argument here. (And of course I wouldn't want to take away anyone's incentive to read the book.) But perhaps I can give one example. Much legal discourse, especially in "common law" contexts, consists of the marshaling and analysis of case law in the effort to convince a court that "the law" requires a particular outcome in a controversy. Non-lawyers often find this practice curious—"weird or exotic," as Cass Sunstein acknowledges. In most areas of life, of course, we give some weight to what happened in the past, for a variety of reasons, but we typically do not engage in a refined, intricate, even apparently obsessive effort to extract some "rule of decision"—something that is supposed to be somehow lurking in past precedents—and then treat that rule as "binding" us in our present choice. So what is the point or function of this precedent-practice that is at the heart of law-talk?

In the classical account, it was a commonplace that "the decisions of courts" are not themselves law, exactly, but rather, as Blackstone explained, "the evidence of what is common law." Joseph Story famously wrote for the Supreme Court in Swift v. Tyson that "it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws." So it seems that the intricate analysis of precedents was in some sense a way of ascertaining some "law" that transcended the particular decisions. Quoting Richard Hooker's statement that law sits "in the bosom of God, her voice the harmony of the world," Robert Gordon observes that pre-Holmesian lawyers "had, as they saw it, a direct line to God's mind through their knowledge of the principles of legal science."

The modern view cannot accept this account, of course—indeed it was just this view that was the target of Holmes's scornful remark that law is not a "brooding omnipresence in the sky"—and so it tends to say that the

14. Blackstone, supra note 9, at *71 (emphasis added); see also Matthew Hale, The History of the Common Law of England 45 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713) (asserting that judicial decisions "are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons").
common law decisions and doctrines are "judge-made law." Common law judges are not finding or ascertaining law that in some mysterious sense is already there, but rather are acting as mini-legislators—interstitial legislators, we may say, to minimize the offense to the notion that law is supposed to come from elected legislators.

We say this. But if we pause to contemplate more closely how we talk and behave, it appears that, even today, we treat the precedents more as "evidence" of law. So we may say that a judicial decision is judge-made law. But in relying upon the decision, we do not treat everything the judge said as legally authoritative. Instead we search for "the holding" and dismiss the rest as "dicta." And that authoritative nugget—the holding—turns out to be elusive: the efforts of generations of theorists to figure out the method for extracting it have by now been effectively abandoned. In fact, the holding may not correspond to anything that was explicitly said in the decision.

Nor do we treat the individual decision as determinative in its own right. Instead, using the scores of different techniques that Karl Llewellyn so painstakingly charted, we try to harmonize it with other decisions to figure out what "the law" is. If a decision is in a so-called "case of first impression," or even if it overrules a past precedent, we do not hesitate to apply it even to conduct that occurred before the decision was rendered: due process or "ex post facto" type concerns are not violated, we say, because the decision did not "make law" but merely declared "what the law is" in some kind of perpetual present tense.

These practices all seem congruent with the classical presupposition that judicial decisions are not "legislation," or "judge-made law," but rather evidence of law. As Lon Fuller perceptively explained:

[I]t is not too much to say that the judges are always ready to look behind the words of a precedent to what the previous court was trying to say, or to what it would have said if it could have foreseen the nature of the cases that were later to arise, or if its perception of the relevant factors in the case had been more acute. There is, then, a real sense in which the written words of the reported decisions are merely the gateway to something lying behind them that may be called, without any excess of poetic license, "unwritten law."


Judges . . . are apt to talk as if they were all working together in bringing to adequate expression a preexisting thing called "The Law."!

17. LON L. FULLER, ANATOMY OF THE LAW 92, 98 (1968) (emphasis added). Fuller noted that this characterization would typically be dismissed today as a "childish fiction," and
My example has been taken from common law. Enacted law presents different questions, which occupy two chapters of the book. I'm not going to try even to summarize that argument, but will only indicate the conclusion: I think that much of enacted law can be accounted for without presupposing anything metaphysically exotic. But in our more ambitious or pretentious performances—in much constitutional law under the First or Fourteenth Amendments, for example—much of what we do with enacted law makes little sense except on the assumption that this law is in some sense the product of an author who transcends the mundane legislators or enactors who sit in Congress or the state legislatures. Indeed, Ronald Dworkin's influential account in effect asserts as much. Thus, Dworkin argues that judges need to "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author . . . expressing a coherent conception of justice and fairness"—a single author who would be a fitting conversation partner for his renowned and superhuman interpreter Hercules.

I think Dworkin is onto something here: law (and the ambitious pronouncements of courts that Dworkin has spent much of his career justifying) would indeed be authoritative for us in the way he wants it to be if law and the decisions it informs were in fact the product of such a prodigious author. And, conversely, those pronouncements have little or no claim on our respect if law is not the product of such an author. The baffling part of Dworkin's account—for me, anyway—is his assumption that a merely fictional "as if" author can satisfy that need.

In short, both in our common law practices and in our treatment of enacted law, we continue to do and say a great deal that might make sense on classical assumptions—I'm noncommittal on that—but that is hard to account for or justify using only the sparser, modern ontological commitments.

If this assessment of our situation is accurate, then it appears that we are living—at least when we do and talk law—in an ontological gap. Brian Simpson, the eminent legal historian, gives a succinct statement of our situation:

For lawyers, to quote E.P. Thompson, writing in 1975 of what he calls "the greatest of all legal fictions", "the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity . . ." There is, of course, a sense in which nobody really believes this any more, but it remains the case that much legal

he accepted the characterization while pointing out that the fiction was often a useful one. Id. at 98.

behaviour proceeds on the assumption that the law is like that. For example, all legal argument in court makes this assumption.\textsuperscript{19}

Simpson's observation allows us to restate the perplexity that, I argue, afflicts contemporary law-talk. Earlier I said that the perplexity lies in the fact that so much of law-talk seems to be "just words." Now we can say that the perplexity lies in a disjunction between what our talk and practices seem to presuppose that law is and what, when directly confronted, we say we believe law is (and is not).

The puzzle reflects what Duncan Kennedy has described as "[t]he simultaneously critical and 'believing' character of American legal consciousness, its paradoxical combination of skepticism and faith."\textsuperscript{20} We scoff at the idea that law could be the sort of metaphysically thick reality that our ancestors said it was. We chuckle at the idea of law as "a brooding omnipresence in the sky." And yet... we continue to act and talk as if law were something like that.

In a sense there is nothing at all novel in this observation. For generations now, theorists have noted this discrepancy, and over and over again, from Holmes on, they have confidently predicted that law-talk will soon be transformed into something very different—something more congruent with modern notions of what law is. And yet, also over and over again, the revolution fails to occur, and lawyers and judges go on talking more or less as they have for generations, even centuries. Thus, the historian and law professor Norman Cantor observes that "[a] London barrister of 1540, quick-frozen and revived in New York today, would only need a year's brush-up course at NYU School of Law to begin civil practice as a partner in a midtown or Wall Street corporate-law firm."\textsuperscript{21} In his less sanguine moments, even Judge Posner admits as much. He laments that "[t]his traditional conception of law... is as orthodox today... as it was a century ago."\textsuperscript{22}

This is law's quandary. So, what should we make of this peculiar situation?

WHERE (AND HOW) ARE WE?

The final chapter of \textit{Law's Quandary} discusses four possible accounts of our situation: for now I'm going to briefly describe three of these (leaving


\textsuperscript{20} DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] 79 (1997).

\textsuperscript{21} NORMAN F. CANTOR, IMAGINING THE LAW 192 (1997).

out the account that asserts that we are what I call "ad hoc Platonists"). Each of these accounts may contain some measure of truth, but each also provokes doubts or objections.

One possibility is that law-talk today is basically a sort of holdover, or survival, from an older, more classical world. Law-talk once made sense, maybe, based on the classical ontological assumptions that prevailed, and though those assumptions have long since been abandoned, we continue to talk in much the same way, maybe from tradition or habit. So lawyers are like erstwhile religionists who, though they have lost the faith, still instinctively cross themselves, or utter traditional prayers, or engage in other forms of religion that made sense under beliefs they formerly held. Just as these neophyte nonbelievers persist in certain religious practices out of habit, conventional law-talk continues on the strength of tradition.

The "survival" account is a familiar one: Holmes and his descendants have often viewed the persistence of conventional legal discourse in this way. But as time passes, the account begins to lose some of its credibility; that is because the evident tenacity of legal discourse seems hard to explain as a mere lifeless holdover. For example, in the 1930s Felix Cohen described the "Restatement" project as "the last long-drawn-out gasp of a dying tradition."23 Maybe . . . but seventy years later the tradition seems to be taking an awfully long time to die: on the contrary, it continues gasping away cheerfully and vigorously, and it shows no signs of stopping any time soon.

So are there any other possibilities?

A second account can be described as the "bad faith" or "idolatry" interpretation. In this view, law has come to serve as a resource for satisfying our personal and collective needs for transcendent meaning. Holmes wrote that "[t]here is in all men a demand for the superlative," and that demand is so inexorable that "the poor devil who has no other way of reaching it attains it by getting drunk."

24 But there are better satisfactions than getting drunk. The "demand for the superlative" points many of us to religion, but if "religion" is rejected, the need nonetheless persists, and it will strive to find satisfaction elsewhere. "'Man cannot exist without bowing before something,'" Dostoevsky said. "'Let him reject God, and he will bow before an idol.'"

The role of idol can be filled by various objects of devotion. Among the more eligible objects of veneration, however, law surely ranks near the top.

23. Cohen, supra note 7, at 823, 833 (arguing that "[o]ur legal system is filled with supernatural concepts").


Its power, its majesty, its imperial scope, its deep roots in tradition, and its well-honed ceremonialism all fit it for the role.

Law's function as a religion-substitute becomes apparent when it is considered in its social and political context. Morton Horwitz observes that

[i]f you look at the relationship between law and religion in American society, you will see the tremendous connection between the two and the ways in which law came in the late nineteenth century to replace religion as one of the dominant forms of certainty and legitimacy in social life. 26

Numerous constitutional scholars have noticed the ways in which law—especially constitutional law—has operated in a way analogous to religion, or has performed the functions elsewhere served by religion. 27

If law is conscripted to perform the functions of religion, however, we should hardly be surprised if law comes to be endowed with some of the attributes of religion—including some of religion's references to more transcendent realities or sources of meaning. Scholars like Robert Bellah have studied how law makes up part of a "civil religion" in American society. 28 And in a more jurisprudential vein, Pierre Schlag describes modern legal thought as "the Continuation of God by Other Means." 29

Schlag explores parallels between the classic philosophical arguments for the existence of God and the defenses of the enterprise of law made by modern thinkers ranging from formalists such as Joseph Beale to contemporary mainstream, pragmatist, and postmodern scholars like Owen Fiss, Margaret Jane Radin, Frank Michelman, and Jack Balkin. 30 These legal thinkers do not explicitly or consciously embrace the theological framework that they inadvertently imitate. Even so, Schlag argues that their ways of thinking and arguing show that they are engaged in a "residually theological discourse." 31


30. Id. at 428-37.

31. Id. at 439; cf. Cohen, supra note 7, at 833 (describing conventional approach to law as "legal theology").
Of course, any endowment of law with transcendent qualities will clash with prevailing modern assumptions. Law is not really a proper object of worship, we think. Law is made by and for human beings: it is not a superhuman source of wisdom. From a religious perspective, therefore, treating law as if it had such qualities is a form of idolatry. From a more secular perspective, a similar judgment might be expressed in terms of “bad faith.” Thus, Schlag suggests that the modern practice of law is pervasively in “bad faith.” In a similar spirit, Roberto Unger famously described the legal professoriate as “a priesthood that had lost their faith and kept their jobs.”

More recently, Duncan Kennedy has offered an extensive and nuanced diagnosis of modern legal culture that pervasively depends on ascriptions of bad faith. And Kennedy may have a surprising ally... in Justice Scalia. Dan Farber and Suzanna Sherry quote a provocative statement in which Scalia observes: “That is why, by the way, I never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it.” Farber and Sherry suggest that although Scalia advocates a rigorously formalist view of law, “there is some evidence that he views [this account of law] as a sort of noble myth to which judges ought to give their allegiance even if it is not wholly true.”

Although in some respects this seems a plausible interpretation of our situation, I think the “bad faith” or “noble myth” account fails to register the full complexities of the internal dissonance in contemporary legal culture. In ordinary bad faith, a person professes (to others, and perhaps to himself as well) to believe in something that at some deeper level he does not really believe. His hypocrisy or self-deception serves his interests, because without an inauthentic profession of belief he would have to relinquish something he values. In contemporary legal culture, on the contrary, practitioners profess not to believe in something—the metaphysical law—that their talk and practice would suggest they do, at some level, believe in. And since their practice—or, more generally, the “rule of law” itself—is something that they evidently value, their dissonant professions of unbelief in the presuppositions of law are not self-serving in any straightforward sense.

32. See, e.g., Steven D. Smith, Idolatry in Constitutional Interpretation, in AGAINST THE LAW 157, 159 (Paul F. Campos et al. eds., 1996)
34. KENNEDY, supra note 20, at 339-40.
36. Id.
To put the point differently, if lawyers were practicing bad faith in the typical sense, then we might expect them to protect their practice by avowing the assumptions presupposed in the practice, not by disavowing those assumptions. Disillusioned ministers or pastors are said to do this; they pretend to believe in God or the soul or the resurrection even though in fact they regard these doctrines as useful myths. Unger's comparison of law professors to a "priesthood that had lost their faith but kept their jobs" draws on this sort of comparison. But on closer examination, it seems that lawyers and law professors do just the opposite of the bad faith pastor: they persist in the practice while denying its ontological presuppositions. They avow belief in the practice, but not in the metaphysical premises that seem necessary to support the practice.

Or, to shift to the religious vocabulary, if contemporary law is a species of idolatry, it is a peculiar and confusing sort of idolatry in which the devotees regularly deny that the idol has the transcendent qualities it would need to have to justify the uses they make of it.

This perplexing condition invites us to consider a different and almost opposite possibility: Could it be that at some level legal practitioners do sincerely believe in the metaphysical law, and that if they are guilty of "bad faith," their misrepresentation or self-deception occurs not when they engage in the practice and discourse of law, but rather when they disavow its metaphysical commitments? In short, the behavior of lawyers and judges suggests that if they are guilty of "bad faith," the self-deception occurs not when they practice law but when they theorize about it—and when in the course of such theorizing they deny the metaphysical commitments that at some level they actually hold.37

This observation leads to a third possible interpretation of our situation, which I call the neo-classical position. This is a position that in some respects is reflected in certain natural law theorists—though not so much, it seems to me, in what is sometimes called the "new natural law" advocated by people like John Finnis. But perhaps the most provocative proponent is Joseph Vining. Law's Quandary devotes several pages to an attempt to present Vining's views, but since it is not an easy task to summarize those views, and since we have the good fortune of having Vining here with us, I'm not going to try to do it here.

I'll say just this much: Vining challenges the assumption that most of us hold, probably quite unreflectively, that we have privileged and unproblematic access to our own beliefs. We discover what we genuinely

37. There is still another possibility: Lawyers might be in bad faith both in their practice and in their theorizing. They might in fact adhere to a kind of faith that they hide or disavow in their explicit theorizing; but that faith might not be one that would support the current operations of legal practice.
believe, he suggests, not through a quick inward glance at our mental landscape, but rather only by careful reflection on what we think we believe as well as the ways we speak and the ways we act. Our deepest beliefs are not immediately and reliably observable (even to ourselves), but rather are what animate and are presupposed by our ways of talking and living. And the ways we talk and live in the law provide valuable material for this reflective inquiry into what we genuinely believe.

Conducting that inquiry, Vining argues that we discover in our practice of law a commitment to authority, and not just to the authoritarian. We discover a commitment, in other words, to something that has a legitimate call on our attention and respect. But the authority possessing those features could not be an inanimate rule, or a faceless bureaucrat, or even a wise but long-dead “framer.” It would need to be something personal in nature, and something that cares about us and speaks to us, now. In short, something (or rather someone) transcendent.

Vining concedes that if it is approached in this way, law becomes “an object of amazement to the modern and postmodern mentality.” And he points out that, reflectively studied, law and its presuppositions will be “subversive” of twentieth century thought—of the materialism evident in so much work in the sciences and social sciences, but also of “what goes by the name postmodernism in literary and philosophic studies.” Here is what he says:

But if, the way we and the world and the universe are, we cannot do without authority, without saying you ought, you must, we will produce suffering and take responsibility for it, I ought, I must, I must suffer if I do not—and if authority is impossible should this something more not exist—then we have some evidence that what we must believe, is. What we must believe, must be, not because it exists if we believe it exists, but because we exist and have been given the means, by our work, to continue existing.

CONCLUSION

I find Vining’s reflections intriguing, even inspiring, but I am not sure whether I think they are wholly persuasive. So I have doubts about his account, as I have doubts about the “survival” and “bad faith” accounts. So if I can use Vining’s terms, I would say that my own reflective inquiry into what I genuinely believe doesn’t seem to have reached a comfortable resting point. Much less can I tell readers where their own inquiries should settle.

39. Id. at 208.
40. Id. at 264-65.
I know that some readers find this ending disappointing. A really good book would offer a prescription for a cure, or a remedy for our quandary. At the very least it would give a more definitive diagnosis of our situation. I apologize for these deficiencies, but I try to make the best of a bad situation by ending the book on the same Socratic theme with which it began. Many of the Socratic dialogues end in perplexity, after all, and Socrates seemed to think that attaining perplexity was a sort of achievement (though probably not the highest achievement). In part that was because, as he put it, “it is the most blameworthy ignorance to believe that one knows what one does not know.”[^4] And in part it was because an admission of perplexity might make us open, as Socrates said was true in his own case, to a “wisdom more than human,” or to the kind of inner “voice” that he himself heard and took to be a “divine or spiritual sign.”[^42] If Socrates was right in this, then it might be that, unlikely as it may seem, reflecting on jurisprudence might do after all what Holmes said it should do: it might allow us to “connect [the] subject with the universe and catch an echo of the infinite.”[^43]

[^42]: Id. 20e, at 21, 22c, at 22, 31d, at 29.
[^43]: Holmes, supra note 12, at 478.