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Book Review: The Authoritative and the Authoritarian. by Joseph Vining.

Stanley C. Brubaker

> Chief Justice Warren used an argument structurally similar to the one that Justice Brown had used in upholding Louisiana's conclusion that separation promoted the public's welfare. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, Warren held, the trial court's factual finding [in *Brown*] was amply supported by modern authority, a statement he [Warren] then documented through his soon-controversial Footnote Eleven, which cited seven studies by social scientists. In 1896, it is true, the Court had deferred to legislative judgment about "facts" of race, while in 1954 it deferred to a lower court's judgment, but in each instance conclusions about such "facts" entered into the reasoning. The Chief Justice himself saw his social science authorities as important because they rebutted Justice Brown's social science.

Let us be clear. The principle of no-discrimination (Justice Harlan's "color-blind Constitution") has three advantages over the social engineering approach adopted by Warren. First, an historical argument can be made in support of it—not quite the one Harlan himself made, but a plausible one. More important, no-discrimination (no governmental use of race as a category for classifying people) is a neutral legal principle; that is, it is the kind of basis of decision which provides guidance for the future and which gives the quality of law (and thus legitimacy) to the Court's decisions. Most important, a decision on the basis of a no-discrimination principle would have removed the equal protection clause from the shifting tides of fashionable opinion about which government policies will or will not lead to better race relations.

THE AUTHORITATIVE AND THE AUTHORITARIAN.

By Joseph Vining.[1] Chicago, Il.: University of Chicago Press. 1986. Pp. xx, 268. $25.00.

Stanley C. Brubaker[2]

Beginning with a poem, ending with a poem, and covering such topics as "MIND," "NATURE," "AUTHENTICITY," "TIME," and "FAITH," Professor Joseph Vining wishes to lay bare the "lawyer's dilemma" and its resulting "pain." The dilemma, the reader quickly discovers, does not concern insider trading, and the pain is not from reaching one's quota of billable hours. His book identifies the lawyer's dilemma with the fundamental choices of life and death, hope and despair. Its approach is more evocative than analytic, its form more rumination than argument, and its diction more metaphoric than literal. It thus defies and mocks attempts

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to summarize it. But if it is, as Professor Vining suggests, the pain of the lawyer to search for purpose in the apparently purposeless, it is the duty of the reviewer to summarize the seemingly unsummarizable.

The modern lawyer has been reared in the age of science, skepticism, and relativism. His training still proceeds in the shadow of the effort to render law a science through rigorous description. The neophyte is told, in echoes from Holmes, to focus on what the judge does, not what he says; forget the moral pretensions of the law and look at it instead as would the bad man, simply as a prediction of what the courts will do in fact. Vining observes, however, that looking at the law in this way makes it a mere force, like nature's gravity, heat, or motion. (And it must be emphasized that for Vining all nature is mere force, mere fact, with no normative lessons for mankind.) Like gravity, the force of law so understood does exercise power over us, threatening us with punishment, but it is the power of the authoritarian, not the authoritative. Law as external force reduces its subjects to mere things, subject to its pushes and pulls.

If law is to be more than force, if it is to have authority, it must be placed apart from the disciplines of science. We see the correctness of this placement when we ask the judge to employ the scientific, predictive understanding of the law. How can he possibly find the law in a prediction of what he will do? The scientific notion of the law is seen for the nonsense that it is. When the lawyer or judge seeks to understand the law as it presents itself, as normative, the search is distinctly nonscientific. The lawyer can make sense of his activity of poring over texts, searching for superficial inconsistencies and deeper unities, only with the presupposition that behind the text lies more than alien force. As with law's kindred disciplines, literature, philosophy, and cultural history, we want and need to believe, Vining tells us, that behind the text lies "Mind." If one knew that the text of *Hamlet* resulted from a chance pecking at typewriters of billions of monkeys over billions of years, one could hardly invest great energy in pondering why Hamlet delays. Thus the concern with "authenticity" in these disciplines. And thus the greater attention a lawyer will invest in the opinions of courts than in those of administrative agencies. Since the latter result from an impersonal "process," not a mind, there is not much point in investing one's own mind in a search for their meaning.

If the tension in the lawyer's life were simply that of being trained in the spirit of science, but practicing in the spirit of the humanities, the matter would cause no dilemma and little pain.

The problem is that our contemporary institutions make it increasingly difficult to indulge the presupposition of mind. Vining sharpens this point by focusing on the texts where lawyers (perhaps more accurately, law professors) are most likely to lavish the greatest attention and most deeply indulge the presupposition of mind: the opinions of the Supreme Court. Then he asks us to imagine further development of the current bureaucratic tendencies of the Court—expansion of staff, delegation of responsibilities, compromises, and bargains—to the point where it is no longer possible to say that the opinion is the product of an actual mind. What would be lost? According to Vining, what we would lose is not the peak of a pyramid, and final pronouncements from on high. Vining tells us to lay the pyramid on its side, or to view it from above. It is a center, a starting point, a focal point, driving us "towards consistency" that would be lost. It is this focal point or center, he tells us, that serves the cause of freedom; it gives us a subject matter for determining who we are and an organization for effectuating that freedom.

But the bureaucratization of the Court and the dissolving of its "mind" into process is only the beginning of the tension between our legal presuppositions and institutional structure. Contemporary academics, Vining notes, tell us to look at the act of legislation as mere process, a game among "petty strategist[s]." And if we look for authority beneath the legislature in the electoral process, in "Democracy," we are sure to be disappointed. For majority rule as such has no authority, and the elements of chance and contingency in the electoral process deplete its claim to produce a singular authentic voice of the people.

Obliged by his role to counsel obedience when he sees only contingency and chance, forced by his method to presuppose mind "when the evidence points to the contrary," the lawyer suffers "pain"—or at least Vining thinks that the properly reflective lawyer should suffer it. Some of the pain, Vining admits, may be self-imposed. More mind is present than he may initially have allowed. If congressmen may be largely absorbed in a process, what they produce is a statement; if there is no single mind behind the legislation, there still may be an authentic voice in "a speaker personified by the listener"; if the electoral process is fraught with chance, legislation is still usually "congruent with the spirit of the age"; if there is something arbitrary about majority rule, usually "the outcome is understandable and appeals to at least some part of the mind of the individual who found himself in the minority."

And for Vining more mind is present than the lawyer's language would suggest. For example, the metaphors of "weight" in

legal reasoning—assigning so much to this factor and so much to that—reduces legal reasoning to a cold model of calculations and plunges the reasoner into an infinite regression: what process assigned the weights, what process led to the process of assigning weights, and so on. When we reflect more accurately on what it means to take some value into account, we realize, according to Vining, that it is not a matter of giving the value "due weight." For weight is a lifeless force—"dead weight." Truly taking a value into account means linking oneself with it, a thought more accurately captured, he tells us, in the phrases "good faith" and "warmth." "It is this warmth and its animation in legal values that helps, if only a bit, in holding the inquiring analyst back from infinite regression . . . ."

"[W]anting to achieve an end" that is embodied in the law is equivalent, we are told, to "being inside an entity." This image of being "inside" is central to Vining's understanding of authority. Authoritarianism is distinguished by its being *outside*, alien to us. Democracy marks an advance over the authoritarian by rejecting its alien claims; democracy gains authority for itself through the affirmation of "fraternity," through the merging of the self with others to put them all on the inside of the entity that is the body politic.

But what is it that links us? What is the bond that goes from the self to yield authority? In a work that uses the word "mind" so repeatedly, the answer is surprising: "The merger of the self with the entity takes place through *desire, not through knowledge* . . . ." "Self-consciousness"—which we might associate with self-awareness or self-understanding, the goal of philosophy since Socrates appropriated the Delphic inscription, "Know Thyself," and which we might have thought the fitting conclusion of a work emphasizing mind—becomes the obstacle. Self-consciousness gets in the way of caring and feeling. When one escapes self-consciousness through desire and commitment of will, when "[o]ne embraces rather than observes, one ceases to stay outside, one commits oneself as oneself . . . ."

Since the "stuff" of self is not knowledge or self-awareness, it is not surprising that Vining finds law's closest kin in theology rather than philosophy. To carry forward the project of the law, we need "faith in the possibility of meaning." He concludes: "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 the 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 all."

Vining has accurately and convincingly portrayed the inadequacies of a scientific understanding of the law, the necessary presupposition of mind in the work of the law, and the strains placed on that presupposition by bureaucracy and by the social scientists' view of politics and law as process. A daring work, his book contains no footnotes and refers to no other work for its authority, relying instead on its own powers of persuasion. Filling only 200 pages of text, it is a big book, the product of one who has felt the boundaries of pain and joy in life and law and who has reflected deeply on that experience. But it is also a vague book and a troubling one.

Meanings are often couched in language of such complex evocations that though the reader may be moved, in the end he's not sure towards what. Consider, for example, Vining's concluding meditation on children, emptiness, and meaning:

> A child can be a joy at twelve, and not just in anticipation of the man or woman of forty, and the joy the child gives at twelve is not open to doubt because of the absolute certainty that it cannot last. One could not, indeed, specify just what man it is—the man of twenty-five, of forty, or of seventy—that one's joy in a child might be in anticipation of, were that to be thought its source; and if later reflection suggests that what one saw, when the child of twelve glowed before one and one responded then and there, was something more than what must pass and did pass, then there is the thought that it is only the whole person over his whole lifetime, glimpsed all at once, or the things still of the present that a child before one permits one to see again in one's adulthood, that one can be seeing and, on reflection, conceive of oneself as having reference to.

Wow! Whew! What???

Vining finds the authoritative, in contrast to the authoritarian, in "warmth" and "being inside an entity," an extension of the self to others, parent to child, and lovers to each other. But if this sort of union forms the basis for authority, how far can we extend it before the self stretches so thin that it just peters out? How small must the community be before it can maintain the force of law rather than simply exert the force of naked power? He affirms a notion of equality where "each individual has claims upon us, shares and is a source of our very thinking and all that we seek . . . ." He also speaks of the legislators' duty, imploring, "Don't leave any one out"; this flows directly from the child's cry, "I was left out." The reach of these statements is indefinite, and he gives a rather murky hint of a world state. Yet if love of family is spread across four billion people, it is hard to imagine enough feeling of unity to inspire the sense of authority. And, although Vining is not explicit, we must doubt that he considers a world state a possibility.

Historically, those who sought authority in a sort of fraternity emphasized the need to limit drastically the size of the country so that it would be possible to share a well-defined way of life, to rule and be ruled in turn by people enough like yourself to give self-government authentic meaning. Or if they sought to have both a large country and to base its authority on the principle of self-government, as did the framers of our Constitution, they sharply limited the scope of governmental power and thus limited the reach upon the self in whose name it acted.

Vining speaks neither of limiting the size of the country nor the scope of its power, and here we reach the more troubling aspects of his thesis. For totalitarianism gives us a state that can be large and achieve a unity of exceptional warmth, especially in time of warfare, which it often seeks if only to preserve that unity. As Vining employs his terms, the totalitarian seeks, at least in concept, the authoritative rather than the authoritarian, for while the authoritarian expresses itself as foreign to the will of the individual, the totalitarian seeks to meld the individual's will with that of the whole nation. I should emphasize that I do not accuse Vining's work, exuding a tone of generous compassion, of supporting totalitarian authority. But the vagueness of his argument and his reluctance to speak of such mundane problems as size and scope of government, federalism, and separation of powers, does not permit us to draw a sharp distinction between his notion of authority and totalitarian government. And this problem is compounded by Vining's notion of reason.

As for Heidegger and Nietzsche, reason for Vining in the form of self-awareness has become the disease of man. Man finds himself by abandoning his self-consciousness and by embracing desire and will. The danger of this turn from reason is masked by Vining's metaphor of religion and faith. But here too, his vision seems Nietzschean; though he is not explicit on the question, it appears that for Vining God is dead. What he celebrates is not so much religion as religiosity—man's tendency to believe, to bow down, look up, to utter phrases of reverence. Established religions seem the product of great illusion makers. "Moses and Joseph Smith put forward their putative authors to gain attention." Somehow, though again Vining is not explicit, man's religiosity seems to push him forward in a sort of Hegelian movement of history toward the end of justice.

Vining's work struggles against despair but ends with hope. Since that hope can rest neither on nature, reason, nor (metaphorical suggestions to the contrary) on religion, its foundation, composed of man's religiosity and the movement of history, seems thin

at best. His is perhaps an authentic voice of our age (though an extraordinarily vague one), and he properly expresses the difficulty of finding the authoritative under the horizons that science and modern thought have given us. But if he had reflected on the great tradition of political philosophy instead of casually abandoning it for contemporary theology, he might have found that those horizons have shifted more than they have expanded the realm of human knowledge and that there is more to nature than is dreamt of either in science or in Vining's religiosity.

CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS. By Paul C. Vitz.[1] Ann Arbor, Mi.: Servant Books. 1986. Pp. xv, 142. Paper, $6.95.

Maurice J. Holland[2]

Although this book is not about government censorship, it has strong constitutional implications. Professor Paul Vitz's topic is the ideas in textbooks, and his thesis is pertinent to the Supreme Court's treatment of aid to parochial schools.

In reacting to this book one is likely to be torn between depression and indignation. Conservatives, traditionalists, and readers holding religious convictions will probably incline more toward indignation, but some considerable measure of sheer depression would seem unavoidable on the part of anyone concerned about the quality of American public school education, regardless of ideological stance. Professor Vitz has provided a telling demonstration, albeit somewhat limited in its scope, of the wretchedly tendentious, ideologically skewed, and intellectually impoverished characteristics of many of the elementary readers and history and social studies textbooks that have been widely adopted throughout the country. Even those whose religious or political sensibilities are not especially affronted by the pervasive distortions and the calculated omissions which pervade the works surveyed by Vitz will nonetheless find themselves profoundly disheartened by their stultifying vapidity and zestless inanity.

Vitz states his general thesis as follows:

> [T]he central issue is: tens of millions of Americans are paying school taxes . . . to support a system that fails to represent their beliefs, values, history, and heritage.

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