Volume 55 | Issue 6 Article 3

2010

Through Papers to Persons

John T. Noonan Jr.

2010]

THROUGH PAPERS TO PERSONS

JOHN T. NOONAN, JR.*

THE candor, the freshness, the freedom from cliché and jargon and unnecessary citation of impressive but irrelevant authority—these distinctions mark Joe Vining's work and invite emulation. Vining confronts the law as he has experienced it. The best of teachers, he teaches by example. His example is before me as I reflect on my experience as an appellate judge reading, interpreting, applying the law.

In his nomination hearings Robert Bork famously declared that he looked forward to "an intellectual feast." Vining would not, I think, despite his own very strong intellectual interests, use Bork's metaphor to describe what a justice or a judge must partake of. Vining is not centered on the solutions to intellectual conundrums. His hunger is for the real.

I. PAPER

To paraphrase the old song, "It's Only A Paper Moon":

> It's only a paper pile
>
> Spilling over the chamber's desks.
>
> Thousands of individual sheets of it—
>
> Four hundred to four thousand pages of what are unblushingly identified as "excerpts of record," compilations of what was said or happened in the entity from which appeal has been taken; compilations meant to contain the essential but unconfined by any measure and often filled with the extraneous.
>
> Three printed briefs, limited by rule to a total of about 100 pages of argument, multiplied by 20 or 30 depending on the number of cases on the monthly calendar.
>
> Petitions for rehearing and rehearing en banc, 10 to 20 pages apiece, times say, 10, all pointing to great and gross mistakes in the opinions that the judge has authored or approved.
>
> Opinions, memoranda dispositions, dissents, and drafts, all of them putative judicial acts, totaling from 100 to 200 pages floating in the chambers at one time and calling for response.
>
> Correspondence from the A.O., the Administrative Office of the federal courts; letters from the committee supervising the judges' financial reports; admonitions, bulletins, updates from the chief judge or administrative units of the circuit.

> Memoranda on current cases from law clerks and externs, one's own and those of other judges on the current panel—say 6 memos at 25 pages apiece.
>
> And when one turns from the immediate paper pile, there is all the paper within the covers supplying the structure of the law:
>
> 201 volumes of federal statutes, annotated, occupying 19 feet of shelf space with a total of 134,723 pages.
>
> 574 volumes of F.3d, the reports of federal appellate cases beginning in 1993, plus some remaining volumes of F.2d, each reporter containing about 1,400 pages.
>
> Over 500 volumes of United States Reports, setting out the opinions of the United States Supreme Court, the early volumes as slim as 450 pages, the recent ones fat with 1,314 pages; a total of 545 volumes, at an average of 1,100 pages.

I will not enumerate all that is in a library two floors away but there lurk the learned treatises; the insightful law reviews assaying the law with academic impartiality and student energy; and, as it might seem, the final word, that of the Restatements issued by the American Law Institute. Each of such "sources" of law is indispensable, depending on the case, to the art of identifying relevant precedent or making a needed advance.

All these pieces of paper and not a human person on any page! But wait. These pages are not created by machinery. A human being composed each paper.

The conventions of judicial writing favor the artificial or, if you like, the make-believe, suppressing the persons in action. First, "the plaintiff" and "the defendant" or, even more abstractly, "the appellant" and "the appellee" replace the names of the actual parties, turning them from human figures into legal figments. Second, the arguments made by their lawyers are described by the opinion-writing judge as made by these figments. The most abstruse constitutional contention will be attributed to the most untutored of litigants. Third, the judges do not acknowledge that they have had aid in writing an opinion. Scientific articles are attributed to teams of investigators. Not so with judges' work. They rarely credit a brief with an insight. They never say that the draft of the opinion was by a law clerk. The judge has done it all or, in some cases, signaled by the signature "per curiam," the court has done it all.

The real litigants are given legal labels. The real lawyers speak as if they were the litigants. The court speaks as though an impersonal body announced the laws. These ways are survivals from past practice. I doubt that any are essential. I am sure that reformation of them would be resisted. By these ways the persons in the process disappear or are obscured. Vining has been a pioneer in looking for the persons beyond the make-believe.

The writer of the bench memo or the draft of a memdispo coming from one of my own law clerks or externs is a person I know. The writer of an opinion or memdispo coming from another chambers of our court is, in form, a judge, who undoubtedly has approved it but who may not have actually written it. When I read the opinions of other courts I am even more in doubt as to the author—the judge, the judge's law clerk or clerks, or a combination of the judge and his clerks? Does the judge's name on the opinion sufficiently decide this question?

When I turn to the statutes that govern the case, I confront the work of some collectivity—the committees which approved the legislation, the joint committee that composed the differences between the House and Senate drafts, the Congress itself which adopted and amended what it got from the joint committee. What persons speak in the final text?

In some cases, there is the Constitution itself to be attended to—a comparatively slim document of 7 articles and 27 amendments, but annotated by over 9,500 opinions of the Supreme Court, to name only its most authoritative annotator. The constitutional texts emerge from committee choices or compromises, some of them made more than two centuries ago in a fledgling country. The annotations come from different Supreme Courts, sometimes contradicting each other. In 1932, Justice Brandeis observed after citing the multitude of cases in which the Supreme Court, explicitly or implicitly, had overruled or abandoned its own earlier interpretations of the Constitution:

> The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial functions.[1]

When the Constitution, glossed and re-glossed, speaks, whose voice is heard?

Joe Vining has advised us to look at the ontology—that is, the real—in the law. Persons are there. Persons with purposes are there. Rational human beings are there, engaged in rational communications with other human beings. The persons embody and embrace values to be preserved and promoted. Can we find the persons, the purposes, the values in the mass of verbiage unrolled on paper?

II. PROCESS

Another reality is also present wherever there is law—the community organized as government, empowering particular persons to act for the community and to regulate the lives of persons within it. The person in origin and in end transcends the community. The person as he or she

1. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

exists is one part of the community. The problem of relating power to love is the problem of relating the community to the person.

The place of precedent in the law illustrates the problem. Every case is different. But many cases are so similar that they can be classed as falling under the same precedent. Otherwise, the legal system would not work. Our circuit decides over 5,000 cases a year. If each case were truly different, we would need 5,000 opinions to decide them. We actually issue about 850 opinions annually. Precedent, applied, decides the rest.

In a pointed review of the jurisprudence of Richard Posner, David Levi, speaking from his experience as a district judge, observed that it was remarkable how Posner disdained the "average" case.[2] Average cases, run-of-the-mill cases, routine cases—these make up most of every court's calendar.

The ordinary work of the law, Levi observed, is done by precedent. Precedent requires classification. The person speaking in the precedent is submerged. An old saw about the two Hands ran, "Quote Learned, but follow Gus." What did the saying mean except that precedent spoke more forcefully than the voice of the best of the Second Circuit?

The memdispo, as I call it, addresses the average case. It decides a case whose governing rule is indisputable and the facts to which the rule applies are clear. Occasionally, the memdispo is used by a panel to smuggle in a controversial decision so that it won't attract review and reversal. Even more occasionally, the Supreme Court pounces on such a rogue memdispo and does reverse it. By and large the memdispo serves the useful purpose of informing the parties that the court has read their briefs and identified the rule governing their case. Memdispos are normally written by law clerks. They do not appear in the federal reports. Persons are affected by them but are subordinated to the process.

When precedent is so palpably controlling, could one devise a slot-machine that would decide the outcome if a clerk selected and fed in the facts? I once knew a judge who was called "Automatic Al," or something like it, on account of his rapid, predictable, precedent-driven responses. Could we install a machine-made Automatic Al to dispose of the routine? It might be occasionally mistaken. But so is every judge. Probable correctness is the best we achieve. Against the introduction of Automatic Al, I hear the voice of Vining.

Precedent provides not personal voices but rules. So do all the writings of the collective bodies from Congress to the courts. We don't know the individual draftsman. We know the collective conclusion. We know that the text is addressed to persona. We read it as rational, purposeful, value-laden human beings. Do we need to do more?

2. *See* David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1801 (2009).

Joe Vining has suggested that we do, at least that we should acknowledge that "the real" in law depends on what is beyond the law.[3] With vigilant acumen, Vining has shown how different the legal order is from the order of physics or even the order of biology. We cannot manage to have a legal system by calculating forces and reactions nor can we have one by assuming that our only distinction from other animals is our ability to talk.

Suppose one does not share Vining's belief? Is the concept of a person with purposes and values make-believe? Are those treated as persons really distinguishable from other natural forces or other active animals? Many modern lawyers, law teachers, and judges abstain from asking such questions that Vining's work pushes us to ask. Abstaining, these agnostics do not confront head-on the question of how persons are subject to the power of the community.

III. POWER

What is meant by power in the legal context? It is not the physical force of a steam engine. It is not water power or electrical power. Yet it seems to have an impact and leave an imprint. No metric measures it, but at times the impact is palpable, cutting through the paper morass, touching the flesh, the fortune, the home, the existence of the persons it reaches.

Courts do issue mandates. But most of a judicial decision is not a command, but an act of reasoning and persuading. A justice is not a general. The judges in the legal system are not soldiers.

"You have the power." The speaker was Byron White, an associate justice of the United States Supreme Court. The addressees were a group of judges recently appointed to the federal circuit courts. The implication of Justice White's remark was that the real power lay not with the Supreme Court, able to handle a minuscule number of cases a year. The power is with the circuits that decided fifty thousand or more. Like almost all participants in the power conferred by law, Justice White was convinced that its exercise was mostly enjoyed by someone other than himself.

The Founders had the power to write the Constitution and the electorate had the power to accept it and amend it. Congress has the power to make the laws. Once the constitution and the laws are in place, room for further exercise of power is circumscribed. The president has the power to pick the judges who will interpret and apply the law. In the criminal area, the prosecutor has the power to decide who will be prosecuted, to plea bargain, to request a sentence, to appeal a sentence. The lawyers in any case have the power to bring a case, defend it, settle it, appeal it, to make the myriad decisions that shape a case. A jury in a jury case has the power to believe the witnesses or not and within some limits to exhibit

3. *See* Joseph Vining, *Law's Own Ontology—A Comment on Law's Quandary*, 55 CATH. U.L. REV. 695 (2006).

severity or compassion. The trial judge has the power to make rulings on the need for a trial, on admissibility of evidence, on the weight of the evidence that will determine what kind of an appeal goes to the circuit. Past precedents of the circuit set the boundaries for circuit action, as do decisions of the Supreme Court. Any power that exists is limited, channeled, parceled out in small packets of paper.

Within the panel of three that will address the issues on appeal to my court there is a further diminution of power. Each judge has one vote. The presiding judge has the power of assigning the opinion but may lose this power if the panel divides and he or she is the dissenter. The one who writes the opinion must retain the vote of at least one member. The opinion is not the expression of a single mind.

The power of a circuit court judge, then, cannot be visualized as the power of a man with a gun that can shoot at will, or the power of a dictator able to declare what is the law. Power as material energy is applied by multiple human interactions. The application is made through means that depend for their operation on human language, memory, and reasoning. The power exercised by the judge will have physical consequences: the transfer of money, the release or jailing or deportation of another person, even an execution. But the exercise of power itself is by a communication. It is in the realm of words that analogies to it must be found or distinguished. The judicial action culminates in an order affecting a particular person or persons, an order usually preceded by an explanation. It is not a declaration of love that may be rejected by the addressee. It is not a lecture that may be half-heard or forgotten. It is a set of instructions that are to be followed by another judge or court officials or lawyers or litigants. The power exercised is not only in the conclusion of the instructions but in their framing.

The consequences of the exercise of power, partial and limited as it is, may last a lifetime for those affected by it and longer than a lifetime if the opinion, improbably, survives a generation or two. The exercise itself is brief. For the case before the court, the exercise of power to decide it and exhaustion of the power coincide.

For millions of persons the law is not more precise than the pile of paper in the judge's chambers. They do not know the text of any statute, the holding of any opinion, the exact wording of any provision in the Constitution. They are law-abiding persons. They know they must pay their taxes and their debts, keep their contracts, drive carefully, and refrain from injuring others. Imitation and habit sustain them in these practices. They do not need a lawyer or a judge to tell them what to do to observe the law.

These practices are not natural phenomena nor are they biological interactions. They derive their existence from the current of power that runs through law. They depend upon the belief—no make-believe—that persons exercise that power.

The place of power should not be exaggerated. Law can coerce. But often it offers options. You can combine your assets with another and make a contract. You can pool your assets with others and form a corporation to do business or bestow charity. You can bequeath your assets to anyone. No law will compel you to adopt any of these options. The law creates the opportunity. The law channels your choice, providing forms for action.

The law also is constantly teaching—teaching not only in the imprecise and habitual ways that law enlists the law-abiding person, but teaching precisely by procedural rules meant for professionals. What are most judicial opinions but pedagogy for lawyers and judges? A few lines conveys whatever power is at work. Most of an opinion is reasoning directed at minds.

The mass or mess of papers in the judge's chambers is not the law for the case before the court in the precise sense of the words that will decide that case. Those words have to be extracted from the papers surrounding the judge, then set in order, made coherent and intelligibly related to the case. A human mind, not a computer, will do the extracting, relating, and making intelligible. In the ideal modern court, the mind will be that of the writing judge, aided and prodded by the minds of colleagues and the mind of a law clerk and by the challenging mind of a dissenter and by the lawyers' minds disclosed by the lawyers in their briefs. The resulting opinion, if not overruled, will be the law of the case, the law of the circuit, the law for now on this subject.

The process of producing this immediate, almost tangible law is not bureaucratic. A bureaucrat is an official who knows the rules but does not know that the purpose of the rules is to guide persons. The judge, as I suppose the judge to be, is intensely aware that the judge's opinion will affect the flesh or the fortune of other persons.

Still, the opinion is not the speech of a single person. It is not what the judge would write if the judge were not acting for the community, not what the judge would write solo without contribution of colleagues, clerks, briefs, and "the sources of law."

What the judge writes is not what the judge would write if attending only to the persons before the court. The opinion speaks to these persons in the name of the community. The judge has in mind the persons before the court. The judge has in mind the community. In the act of judging—the act of applying the power of the community to the persons in the case—the judge tries to do the best that can be done to take into account both the persons before the court and the community. In that act power is related to love.