

THE HUMANITY OF LAW

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ALMOST exactly thirty years ago, Professor Mark Tushnet (then at Wisconsin, now at Harvard) wrote an interesting but also rather odd article entitled *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*.¹ Despite his use of the broader term “public law” in the subtitle, Professor Tushnet’s main concern in the article was with his own specialty, constitutional law, and the question he posed for the reader was how “constitutional law scholarship is to be intellectually respectable.”² There can be no doubt that Tushnet’s question remains as apt, and as difficult to address, today as it was in 1979, but my interest is not in the answer he tentatively proposed³ but in the peculiar strategy that he used to set up his inquiry.

Professor Tushnet’s diagnosis of 1970s constitutional-law scholarship was that it labored under the shadow of what he called “legal nihilism.” Tushnet never fully explained what he meant by nihilism, though he traced its origins back to a very early article by Justice Holmes in which Holmes expressed the “perception . . . there is no overall coherence to the law [and that] the set of rules and cases, when considered as a whole or in any of the usual divisions, is incoherent.”⁴ This in turn, Tushnet drily commented, “creates serious strains on the role of the legal academic,”⁵ or put more bluntly, what is one to do with oneself, if the job description calls for a sustained effort to display the meaning and coherence of a subject that has neither? The constitutional-law scholarship of the day, Tushnet argued, was the product of academics trying to square an intellectual circle, and thus was as predictably incoherent as the law they were discussing.

In order to exemplify his general claims, Professor Tushnet discussed the work of three other law professors, Jan Deutsch, Grant Gilmore, and

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1. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

2. *Id.* at 1308.

3. Perhaps more than any other leading constitutional-law scholar in the present, Professor Tushnet’s work falls into periods, rather like that of some more visual artists. He wrote *Truth, Justice, and the American Way* in his Red (or Marxist) Period, and probably would paint a somewhat different picture if he were to redo it today.

4. Tushnet, *supra* note 1, at 1309, 1346. The Holmes article was *The Gas-Stoker’s Strike*, 7 AM. L. REV. 582 (1873), and is well-known in Holmes scholarship. Tushnet himself had written on it previously in that regard. See Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1029-31 (1977).

5. Tushnet, *supra* note 1, at 1342.

Arthur Leff. And this is where the interesting oddness of the article centers, for only Deutsch could conceivably be described as a public-law, much less a constitutional-law, scholar. Tushnet, of course, was well aware of that fact and acknowledged it up front.⁶ The question remains, however, why Tushnet would invoke an unlikely set of writers, two of them far afield on the face of it from constitutional law, in order to talk about constitutional-law writing. To do so was to invite an immediate and obvious rebuttal: even if Holmes-derived nihilism about the coherence of law can be generalized (and why should that be so?), Professors Gilmore and Leff are hardly demonstrations of the phenomenon if you want to talk about constitutional, or even public-law scholarship.

I don't know of course what Professor Tushnet's conscious thinking was, but what he wrote about Professor Leff's work was provocative and revealing: from Tushnet's perspective, and despite Leff's remoteness from the subject-matter of constitutional law, Leff was a pure case of the problem of legal nihilism that Tushnet saw more fuzzily expressed by the constitutional lawyers.

Professor Leff developed a theory of American law as a game, to illustrate that it could as easily be viewed as a cultural artifact as a repository of economic rationality. But that it can be seen both ways is, to Professor Leff, merely interesting, for it can be seen in an infinite number of other ways as well. . . . [T]here are an infinite number of ways to understand a case or a group of cases, and none has any greater claim to validity than any other. It is, therefore, pointless to attempt to discover "the" meaning of a case; a case is the decision of a court and nothing more. . . . To Professor Leff, no case is related to any other . . .⁷

In itself, this doesn't say much more than that Leff accepted Holmes's "perception" that law is incoherent. But Tushnet's characterization of Leff suggests, in two ways, a somewhat more complex (if implicit) reason for using Leff, a "private law" scholar, to illustrate the pathology of public law scholarship.

First, in contrast to what Tushnet clearly thought of as the rather grim effort of conventional constitutional-law writers to make their work make sense, Tushnet saw Leff as committed to a ludic vision of law: law may not make sense in any grand sense, but it is a game worth playing, even if a game that we always, collectively lose (why? because winning would mean deciding cases in ways that make overall sense?). However that may be, Tushnet perceived, quite rightly, that Leff displayed a certain light-heartedness about his occupation and about the law. Of course, in itself that might prove its possessor superficial, but Leff was a morally serious person and Tushnet knew that. Tushnet, himself a morally serious per-

6. *Id.* at 1340.

7. *Id.* at 1341 (footnote omitted).

son, was deliberately setting up Leff as such a person (one not committed to Tushnet's own solution to the problem)⁸ caught up in the web of legal nihilism.

Second, and here I think we may see why Professor Tushnet invoked Professor Leff in particular: from Tushnet's perspective Leff showed the utterly trivial and ultimately depressing outcome of setting a morally serious person in the nihilistic academic world that Holmes initiated and that contemporaneous constitutional-law scholarship carried through. Leff (according to Tushnet) could think of nothing for legal scholarship (or legal decision-making either) to be other than a game, one more way of arranging the counters, themselves empty in the final analysis, on a legal checkerboard, since he was unwilling to lie about legal scholarship being anything else. It's a game because there is nothing else any of us can think it might be. The cost is serious, the reduction of legal scholarship to a way to pass the time.⁹ Leff's personal response to nihilism, Tushnet claimed in a footnote, was to embrace it (no doubt sadly): "I think it is significant in this connection that Professor Leff is engaged in writing a legal dictionary, perhaps the ultimate expression, short of total silence, of nihilism."¹⁰

Let's stop at this point and consider momentarily Professor Tushnet's assumption: the creation of a legal dictionary, a guide to how lawyers talk, is more or less equivalent to a simple decision not to discuss how lawyers talk at all, or how they create meaning through what they say. Tushnet's nihilism is complete: not only is there nothing coherent to write about the subject, but the language in which one might try is itself incoherent, meaningless, a game of throwing words around. Against that background, the only real question is why Tushnet would spend any time worrying with Professor Leff and his games. Surely doing so isn't worthy of a decent and intelligent person's time playing (!) the role of an academic lawyer.¹¹ The answer, I think Tushnet assumed, is that Leff's playfulness and his concern with what lawyers (including judges) say, are all that is left for such a person to do in the nihilist world. Leff's relevance for constitutional law was that for whatever reason he was explicit about the implications of what the constitutional lawyers assumed but could not bear to admit. Although Tushnet was too polite to say so, on this view Leff showed the emptiness, the unbearable lightness, of any serious engagement with American public law, and perhaps with American law generally. Leff's candor simply unveiled what others endeavored to keep covered.

8. See *supra* note 2.

9. Tushnet invoked Leff's use of a baseball image: Tushnet, *supra* note 1, at 1342 ("Nihilism leads to a massive scaling down of the enterprise, from 'games' to 'innings' and, I suppose, ultimately to 'pitches.'")

10. *Id.* at 1343 n.154; see also *id.* at 1342. (Leff among others found legal nihilism "fairly disheartening").

11. Again, I am not concerned in this paper with Tushnet's 1979 solution to the problem.

I first read *Truth, Justice, and the American Way* a few years after Professor Tushnet wrote it, and also a few years after Professor Leff was my contract law teacher. My response, then and now, was that Tushnet had to have something wrong. The ludic, joyful, games-playing theme—a consistent and inspiring aspect of Leff's teaching in the classroom—and the deep, searching concern with the language of the law, both appeared to me accurate descriptions of his thinking, but the conclusion that they stemmed from a fundamentally nihilistic perspective (whatever nihilism might mean) just seemed a mistake. Teasing one of his colleagues, Leff apparently sometimes described his office as "some sort of nihilist abyss," and Tushnet was clearly right that Leff was troubled by the apparent groundlessness of the normative judgments that law necessarily entails, but the despair that Tushnet thought ought to follow from Leff's supposed nihilism simply did not seem present.¹² I have consistently failed to see Leff's tragically incomplete dictionary¹³ as the last stop short of defeated silence. Instead, as I have read its fragments against the background of his teaching and his articles,¹⁴ I have consistently found myself confronted with a lawyer, and an academic, who seemed convinced of the rich meaningfulness of the law's language. Leff in practice—whatever one can make out of sentences from his writings—left the impression of being an anti-nihilist, someone committed to law as something one can do intelligibly and morally, even if law is not an abstract set of propositions that one can know.¹⁵ For Arthur Leff, the law appeared to be an activity that could engage one's passions and one's heart, not simply provide a pay check. But how can that be? What can one make of a language purporting to be meaningful, and a practice claiming to be humane and humaniz-

12. See Owen Fiss's moving tribute to Leff, *Making Coffee and Other Duties of Citizenship*, 91 YALE L.J. 224, 228 (1981) ("[H]e tried to convince me [that his office] was some sort of nihilist abyss."). Fiss expressed uncertainty about how to reconcile Leff's personal qualities and what Fiss saw as at least potentially a nihilism in his thinking about law:

There was at times an appearance of indifference to Art, a certain casualness. These qualities surfaced in his scholarly work, and veered off in the direction of a nihilism. . . . I often told him that he was only pulling my leg—his professed nihilism was so inconsistent with all that I knew about him. You can imagine what he said about my search for objective truth. I will leave it to you n another occasion to determine who was fooling whom, but I must now insist that when it came to the important matters—to Arthur's relationship to other people; to national politics and the search for justice; or to the quality of acaemic life and the kind of contribution that an individual could make to that life—there was not a trace of indifference. About these matters Arthur Leff cared, he cared deeply.

Id. (citations omitted).

13. Leff died tragically in 1981 of cancer, robbing academic law of one of its most distinctive and engaging voices.

14. And his wonderful, if substantively slighter book *SWINDLING AND SELLING* (1976).

15. See Arthur Leff, *Law and*, 87 YALE L.J. 989, 1011 (1978) ("Ultimately, the law is not something that we know, but something that we do.").

ing, that float (it seems) on an underlying sea of incoherent and conflicting commitments? Enter Professor Joseph Vining.

* * *

For a very long time, as I read his work, Professor Vining has been thinking about his own version of the question I just posed. He's written in particular about lawyers and scientists, but it's clear that he thinks the puzzle is even more general. Lawyers, physical scientists, social scientists, historians and others talk in certain ways *about* their disciplines that are quite different than the ways they talk when acting *within* their disciplines. The more intellectually ambitious among them (or us) set the creation and maintenance of this gap between *talking about* and *acting within* as an agenda for conscious development, and theirs is the sort of ambition that percolates down to the rest of us in ways often unnoticed and unexamined. It is, such ambition assumes, the external perspective, the language of *talking about*, the theory of the discipline or its subject, that truly matters. And among the truly ambitious, this agenda become the search for total theory, the comprehensive perspective, the ultimate means for *talking about* everything. Such total theory shares with its more discipline-bound precursors and analogues the gap or disconnection that the disciplinary theories display with respect to the ordinary language and practice of the respective disciplines. Since total theory is about everything, the cosmos, the disconnection there is with all of life as ordinarily lived.

I don't want to be obscure, so let me give a very simple example of the distinction I mean to make. Imagine two lawyers discussing whether the Supreme Court will hold that the second amendment is incorporated into the fourteenth and thus applies against state and local governments.¹⁶ One might argue that a constitutional right to bear arms can hardly be thought to be "implicit in the concept of ordered liberty" since in her judgment it could hardly be said that "neither liberty nor justice would exist if [such a right] were sacrificed" in the pursuit of social good.¹⁷ The other lawyer might respond that later cases than the one invoked adopt a different approach, asking instead if a particular right is "necessary to an Anglo-American regime of ordered liberty."¹⁸ And so their conversation might take off, involving the close reading of Supreme Court opinions, the role of precedent, the consequences of a decision one way or the other, legal judgments about the nature and significance of a right to bear arms, and (let me add) personal moral and political convictions about the social

16. When this essay was delivered, the Supreme Court had agreed to review *McDonald v. Chicago*, but had not yet decided the case. See 130 S. Ct. 48 (2009) (granting certiorari to address the issue of the second amendment's incorporation into the fourteenth amendment). The Court subsequently held that the second amendment is incorporated and thus applies to the states through the fourteenth. See 130 S. Ct. 3020 (2010).

17. See *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

18. See *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

value of such a right. That would be a conversation *within* the discipline of law, and it would not be less so because the lawyers were both sophisticated and self-conscious about the role of their personal convictions, or the influence of the ideologies of the Supreme Court's members, on any plausible argument and outcome.

But now imagine a rather different conversation. The first lawyer begins in the same way, worrying over legal concepts such as "ordered liberty" and how they should be used in analyzing the impact of denying the right to bear arms on the existence of justice and freedom, but her conversation-partner (it hardly matters if he is a lawyer or not) interrupts. "You're missing the point. The Supreme Court's decisions are entirely determined by economic considerations, and in particular by the interest of the justices, individually and collectively, in maximizing their power and importance. The Court will hold that the right to bear arms applies against the states, and it will no doubt use the sort of rhetoric that mesmerizes you, but the reason it will do so is that that is the decision that furthers the justices' interest in enhancing their power and prestige." This second speaker is a theorist in Professor Vining's sense, and indeed a proponent of a total theory, at least with respect to law. If the first lawyer is cowed by the second speaker's confidence and statistical analyses, this would be a conversation (or maybe I should say a monologue with witness) that is *about* the law but not within it. If the first lawyer resists the theorist's claims, we end up with a shouting match.

I hope it is clear that this is a highly stylized and over-simplified example. No intelligent lawyer concerned about the making of good legal arguments would dismiss out of hand the value of what it is currently popular to call empirical research about the behavior of the courts, and one attribute of a great lawyer is a sense, sometimes more intuitive than explicit, of the intellectual shape and structure of the areas of law in which he or she is a master. Most intelligent legal theorists (I think) recognize that there are limits to their approach, that it is not, or not quite, a total theory about the law. I do think, nevertheless, that my example captures some of the flavor of a great deal of current discussion within the legal academy and the impact of what is essentially total theory on that discussion. Historically, for Anglo-American lawyers, "[l]aw is practice, not a theoretical representation of it."¹⁹ For many contemporary American legal academics, the theory is what matters.

Professor Vining's diagnosis of the ambition for total theory and its implications for both science and public life is chillingly persuasive: behind its beautiful and poignant title, Vining's 2004 *The Song Sparrow and the Child* offers one of the most alarming analyses of recent intellectual life that I know. In this paper, however, I want to remain where I believe Vining's exploration of the ambition for total theory began, with his and

19. Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMW. L.J. 1, 6 (2003).

my discipline, the law. My thesis is that Vining's work provides the key element for a satisfactory answer to the question that I've claimed the Tushnet article and its treatment of Leff suggests.

Let me begin with some remarks Vining wrote over a decade ago (I think their substance runs through his work before and after the essay in which they appear). The attempt by lawyers to find ways to *talk about* the law (and hence about their own activities as lawyers), Vining argued, is in radical conflict with the ways in which they talk and *act within* their profession. The error, for in the end this is what I believe Vining thinks it to be, isn't confined to academic lawyers, or to self-conscious theorizing about the law: it's present in that most common of simplifications, the picture of the law as a set of rules.

Lawyers speak the language of rules, but when they engage in law and are observed to engage in law, their rules are nowhere to be found. There is only a vast surround of legal texts, from which they draw in coming to a responsible decision, what to do, what to advise, what to order, which responsible decision of their own they may cast in the form of a rule, just before it takes its place among competing statements in the great surround of texts upon which other lawyers are drawing.²⁰

Law students, especially first-year law students, regularly complain about law professors who won't give them the black-letter rule, and their teachers complain just as regularly in reverse, but when they do, both student and teacher are participating in a misleading form of speech, one which the teacher at least knows or ought to know is misleading. Of course there are "rules," but the law, and the activity of lawyering, does not consist of rules but of the activities that lead to responsible decisions on matters within the purview of the legal system. Those activities, directly or indirectly, invariably relate, in this legal system at any rate, to texts, many of which contain statements "cast in the form of a rule," but one doesn't know either the law or how to act as a lawyer simply by memorizing any set of such statements, no matter how large.

Practicing lawyers are largely protected against any serious harm from the law-is-rules mistake by the necessities of their practice, and most law students, apprentice lawyers that they are, usually find their way beyond it as well in fairly short order. But lawyers whose primary participation in the law is not to practice it but to talk about it do not enjoy the same safeguard, and they easily fall into a more radical, and radically misleading, error. Allured by the sort of thinking that leads in the sciences to what Vining later named total theory, legal scholars all too easily come to see their attempts at external descriptions or explanations of the law as all-encompassing truth, and the actual practice as caught in an illusion—or

20. Joseph Vining, *Theorists' Belief: A Comment on the Moral Tradition of American Constitutionalism*, 72 NOTRE DAME L. REV. 15, 23 (1996).

delusion. The result is radical conflict between the language necessary to the activities of the lawyer, and the theories that allegedly explain it. When the lawyer acting within her profession strives to come to responsible decision in whatever capacity, she assumes the reality of the social world in its full, rich, human qualities; when she succumbs to the temptation of theory, she abstracts away from all this.

Professor Tushnet, you will recall, started off with Holmes as the progenitor of legal nihilism. Professor Vining suggested a somewhat similar view: Holmes as a paradigm of the legal theorist.

The presuppositions of legal method have been at war—that is not too strong a term—with the all-embracing mechanics, devoid of substance, ultimately quantitative, that Holmes gave a glimpse of within himself. They are presuppositions of a human language that is expressive rather than definitive, of mind that is not mere process, of voice and person beyond text or texts, of good faith in reading and in writing, of living value, of phenomena of experience that cannot be captured but are no less real than those that can be captured, of a spirit to things that is acknowledged and accepted by many, perhaps most, perhaps all in actual fact.²¹

Law—law seen or better lived from within—is not accurately captured or described by the attempts of the legal theorist to abstract away from the realities of personal voice and presence, communication as more than the transmission of data, responsibility as more than the assignment of consequences, decision as more than the solving of equations. A world in which these realities are denied is not, he suggested, livable even for the legal theorist, and it is not the world in which people (not computers) engage in law (not number-crunching); such a world is not merely abstracted but depersonalized. Law, like human life more generally, takes place in “a world,” to quote *The Song Sparrow and the Child*, “that really does include ourselves.”²²

In the essay I’ve been quoting, Vining used Grant Gilmore (one of the legal nihilists according to Tushnet) to demonstrate the irony that a theorist cannot consistently practice his own theory of depersonalized law. When Gilmore spoke “as a practitioner stating law from the inside, rather than as theorist characterizing law from the outside,” Vining wrote, he came to legal judgments—responsible decisions—not in some abstracted fashion, but as a person,

[one] committed to his conclusions, putting aside this opinion or precedent, arguing for the weight of that opinion or statute, revealing as he works with legal materials his presupposition of mind and person extending beyond time and place and of the

21. *Id.* at 16.

22. JOSEPH VINING, *THE SONG SPARROW AND THE CHILD* 3 (2004).

suitability of language, uttered in a good faith equal to his, for close and meticulous reading.²³

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 . . . but if that is so, then law and the activity of lawyering are very much like, indeed they are part of, ordinary human life with its presumption that you and I are persons who can and often must act and interact as persons. Law is human, Vining insists, and the world of law is the ordinary world of persons. The lawyer in his or her activity of lawyering unavoidably, necessarily makes assumptions about other people, and acts on those assumptions him or herself, of the sort that we make unself-consciously in what we call—curious but telling expression—our personal lives: that other people are moral actors, that they respond and can be responded to as such, with respect to issues such as candor, good faith, commitment, reasonability and the like. Of course, any adult is aware of the possibility of deceit, bad faith, hypocrisy, irrationality but we treat that as the possibility of failure in relationship, in trustworthiness, in good sense, not as a sign that our now-defeated assumptions were a category mistake or the vestige of some ancient superstition.

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The problem at this point, I fear, is that I am turning Professor Vining's critique of the abstractions of theory into something itself too abstract and theoretical, so I want to explore a particular theme, that of good faith. In Vining's wonderful book *From Newton's Sleep*, Vining builds on his seminal work distinguishing genuine authority from authoritarian forms of control. In a section in that book entitled "The Authority of the Past," Vining rejects the common complaint that the law's concerns with constitutional provisions, statutes, and precedents of all sorts is a surrender of the present to the dead hand control of the past.

The past and its texts enter the experience of legal authority through legal method and its presuppositions . . . [but the] [e]xperience of authority . . . is experience of true attention to something in itself, attention that has as its ultimate effect an embracing and perhaps a merging, such that thought and action that are associated with what is attended to can be said to come from within. There are all manners or words or phrases in law that point to attention, to embracing, and to the within as part of the phenomenon of authority—or respect—or true deference. Many such characterizing words or phrases invoke "faith," which is a notion in some academic trouble. "In good faith" is one of them, peppering statute, rule, opinion, doctrine, and discourse. . . . Lawyers, legislators, and judges do not bracket [such

23. Vining, *supra* note 20, at 24.

terms] when using them. They are used rather unselfconsciously What cannot sustain true attention is not part of the experience of authority.²⁴

Vining is making a very complex argument here, and I have ruthlessly edited my quotation so that much of his overall thesis is obscured: I want to focus on his claim that the authority of the legal text, or of important legal texts—an act of Congress or section five of the fourteenth amendment or a Supreme Court opinion, say—rests, at least as the lawyer *as lawyer* experiences it, in the attention it demands and rewards. Just as what you say over the lunch table really matters in that I attend to it, accept it (or reject it!), and treat it as something that you *mean* not that just as words you are mouthing, so with the law and the authority of what law-makers and law-interpreters write. Vining again, from later in the book: “the lawyer judges what is read. There is a judgment of the good faith of the speaker, that the speaker is in what is said, that the speaker believes what he or she says.”²⁵ If that legal judgment is negative, if the lawyer concludes that the maker of would-be authoritative words is engaged in a joke or deception, the words have no authority. It is insofar as I can and do give true attention to the words written, and not just bow to the authoritarian power of the one writing them, that the words have true authority, can provide the basis not just of the infamous bottom line that the words ordain (something the most authoritarian *Diktat* provides), but the basis of further thought and argument on my part.

This point is not an esoteric one, although for the most part lawyers acting as lawyers are not self-conscious about it. Imagine yourself a litigator writing a brief. There certainly are ways in which you can and will take into account the known inclinations of the decisionmaker you are briefing. But if you are making an argument that rests in any way on statute, regulation, formal policy or caselaw, you will find yourself—precisely because you are a competent and zealous advocate—writing as if what is said in the statute, regs, policies or case matters. You will construct your arguments on the assumption that the premises, the reasoning, the language chosen, the alternatives accepted and those dismissed, are meant seriously and to be taken seriously. Even if you adopt the most cynical of assumptions—I am just an advocate and no one thinks I mean what I say, the decisionmaker is just another kind of advocate and will rule for my position or against it for reasons wholly unrelated to the legal arguments I put in the brief—you can’t brief itself carrying those assumptions on its face. You have to write as if you meant your arguments, in the sense that our tradition expects advocates to do so, and as if the decisionmaker will consider them seriously. There is no other way to do a competent brief as zealous advocacy requires. Our entire institutional structure and culture

24. JOSEPH VINING, FROM NEWTON’S SLEEP 110 (1995).

25. *Id.* at 166.

of legal conflict requires the appearance of attention, by advocate and decisionmaker, to the words that are used.

Of course the cynic has a response: our legal tradition requires the appearance of attention of words, not the reality. Professor Leff's dictionary was an admission of nihilism because all a dictionary can do is tell the user what the words it defines will appear to mean, not what the user of the words does mean, or what the reader should understand is meant. *From Newton's Sleep* addresses this response in a section entitled "The Equality of Difficulties":

Of course it is hard to believe what you say. And it is hard to say it yourself and not parrot someone else's or an assistant's words. . . . It is always hard not to be mechanical and mindless.

But it is also hard to say things you don't believe, and it is hard to listen to things said by others who don't believe what they say.²⁶

This passage identifies, I think, three difficulties. First, it is hard to listen to other people who don't believe what they say: every teacher of introductory constitutional law, not herself a cynic, knows well the disheartening feeling that settles on many of her students when they realize, early or late, that they simply don't believe, much of the time, that the justices of the Supreme Court mean what they write in their opinions. And, second, it is hard to say things you don't believe: in our system the lawyer writing a brief is not stating what he thinks the law is or should be in the abstract, but as I said a moment ago he can hardly do his work if he doesn't believe that the arguments he is making are legal arguments, ones to be taken seriously, worth the time and effort he invests in constructing and (presumably) the decisionmaker's work evaluating them. But, third, it is also hard, terribly hard, to believe what you yourself say, in the world bequeathed to us by Marx and Nietzsche and Freud . . . and Holmes and the Legal Realists and Professor Tushnet's nihilists. We have every reason to be suspicious of our own complicity in cynicism, our own entanglement in self-interest and power and unconscious motivation.

I don't read Professor Vining to deny the genuine insights of the so-called masters of suspicion, but I do take him to reject the inevitability of legal nihilism. We are self-interested, we live in the context of institutions structured by the use and abuse of authoritarian power, we are driven by desires and fears that we ourselves often fail to see . . . and yet we still live our lives as if human candor and commitment are possible, and lawyers still write and read briefs as though legal arguments can be meant, not just mouthed, and on the assumption that genuine authority can exist, authority that rests on the ability of persons to mean what they say. The nihilism generated by depersonalized theory runs aground on its own disconnection from reality. In *The Song Sparrow and the Child*, Vining writes about

26. *Id.* at 234.

“[t]he fact of human law . . . the presence of good faith in the world. Small or large as its presence may be thought to be, what we call good faith is a fact and an actively helping fact.”²⁷ The presence of good faith, the reality of authority in Vining’s sense, and the possibility of candor, are facts just as much as are self-interest and empty speech.

The world, it seems, will not operate without systems and manipulation, without negotiation, strategy, bluff, feints, traps, triumph and defeat, without privacy and secrets indeed. It is not total candor that can realistically be asked. . . . [But] [a]t least some things are treated in good faith and approached in good faith, some human beings at some times, if not all at all times, even some texts . . . or what we call institutions. They are not to be used, or not to be only used, not to be merely manipulated, and not to be destroyed—not without suffering in doing so, which is itself recognition of a limit.²⁸

The claims of law, and of lawyers in practice, to be and do more than the theorists can describe come to reality when the brief-writer takes her task of constructing arguments seriously and the decisionmaker responds with a close reading of both her brief and the texts she cites, when the legal advisor gives advice shaped by an awareness of his responsibility as counsel and of his client’s as a member of society, when the academic lawyer expresses judgments in which he or she is invested as a person and a participant in a community of persons.

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But what about the academic *constitutional* lawyer, with whose vulnerability to nihilism Professor Tushnet was concerned long ago? After all, as my last quotation from *The Song Sparrow and the Child* expressly states, this isn’t an all or nothing proposition. Perhaps there are areas of law—federal taxation comes to mind—where the threat of legal nihilism is less pressing, and perhaps even in constitutional law (as I implied earlier) the tasks of the advocate and the lower-court judge enable them to work within a world of good faith argument. But the scholar and the Supreme Court justice—do they not inhabit a world that is essentially unfettered by the limitations that free others to mean what they say? By social convention the justice, and much of the time the scholar, write words that have the form of arguments of law: “the Constitution requires X,” or “implicit in due process is the principle that Y,” or “it follows from the Court’s decision in *McCulloch v. Maryland* that Z.” On the face of it, such sentences are appeals by one person to another, based on words and texts and lines of reasoning that are shared. But isn’t that merely a social convention? Isn’t

27. VINING, *supra* note 22, at 111.

28. *Id.* at 113.

it the case that no one really expects the justices, or the scholars, to be personally committed to the words they use about “constitutional” issues?

There’s plenty of evidence to support the nihilistic answer. I’ll use a couple of examples from the Court’s work, examples that I dealt with only a few weeks ago in class, as I do every year, with a sense of dread. In *Eisenstadt v. Baird*, decided in 1972, the Court extended the constitutional right to the use of contraception to unmarried persons. In its first contraception decision a few years earlier, *Griswold v. Connecticut*, the opinion of the Court appeared to ground the constitutional right in the special nature of the marriage relationship, “an association,” the Court announced, “for as noble a purpose as any involved in our prior decisions” protecting the freedom of association.²⁹ In *Eisenstadt*, the entirety of the Court’s explanation for why the right described in *Griswold* in terms of marriage applies to the unmarried was as follows: “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion.”³⁰ Now there are a great many things that can be said about *Griswold* and *Eisenstadt* and the constitutional right to use contraceptives, but one thing that cannot be said, with a straight face and expecting to be taken seriously, is that if the right of marital privacy announced in *Griswold* means “anything,” it must be a right belonging to individuals regardless of marital status. The Court’s assertion to the contrary was sheer cynicism. My second example can be stated more briefly: the justices who would have overruled *Roe v. Wade* in the 1992 *Casey* decision all joined opinions that state the following: first, “a woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause” and second, “I am sure” that this interest is *not* “a liberty protected by the Constitution.”³¹ You can think one or the other; you cannot think both. As Professor Vining says, “it is hard to listen to things said by others who don’t believe what they say.”

Despite this sort of evidence, I believe that Vining’s anti-nihilistic view of law applies even to constitutional law. Consider the examples I just used. The justices who wrote or joined the opinions I quoted were insincere in their reasoning, but what they said was structured in terms of the familiar forms of constitutional argument, what Philip Bobbitt calls the modalities of constitutional interpretation. The lawyers who argued before the justices in *Eisenstadt* and *Casey* had no choice but to use these modalities, and as Vining has argued, it is impossible to make such arguments without attention to the ways in which the arguments would make sense if the writer meant them. One literally cannot construct such an argument without at least a temporary commitment to making sense, to speaking as if one meant what one said. The same was true of the lower-

29. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

30. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

31. *Planned Parenthood v. Casey*, 505 U.S. 833, 966, 980 (1992) (opinions concurring in the judgment in part and dissenting in part).

court judges who had to consider the advocates' arguments in the light of existing Supreme Court caselaw, and I believe it was and is true of the Supreme Court's critics, at least in part. Some academic criticism takes the form of simple disagreement with the Court's outcomes, but most of the time critics who are scholars spend at least part of their energy in showing the defects of what the justices said their reasoning was. Indeed, my ability to assert, and yours to evaluate, the charge that the justices acted cynically in these cases is dependent on the existence, at least as a normative ideal, of constitutional-law reasoning as something not cynical, a form of discussion in which persons can commit themselves to the meaningfulness of what they say . . . and in which they can proffer arguments that they themselves do not take seriously.

There can be no cynicism, in constitutional law or elsewhere, without a baseline of sincerity, sincerity that is humanly possible, even if human beings often exhibit it only as a gesture rather than a commitment. The central task of the academic constitutional lawyer who rejects Professor Tushnet's threatened nihilism is to defend this baseline, which can exist only in virtue of shared forms of argument, shared norms of reasoning, and even shared conclusions about times when the Court and the tradition have gone astray. The second Justice Harlan, for many of us an exemplar of the anti-nihilistic constitutional lawyer, once described the American tradition of constitutional liberty as "a living thing." "A decision of this Court," he went on, "which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."³² Harlan's criterion was, as he fully recognized, one that can be applied only in retrospect: its application necessarily depends on the process of criticism that itself takes seriously the words the Court uses, and more broadly the language in which constitutional issues are debated, and subjects them to the harsh light of judgment, not only of the formal validity of the reasoning but of the good faith with which the reasoning appears to be offered. Harlan's point is akin to, and yet not identical with, the "legal process" thought of his era, because it encompasses but is not limited to the technicalities of lawyers' arguments. The good faith that academic criticism should seek and can invoke is not just about logic, but also about experience, the experience of the extent to which the lawyers' arguments have actually served, or disserved, what Harlan called "respect for the liberty of the individual . . . and the demands of organized society."³³ We will never agree entirely on how to find this "balance" between liberty and authority, but that does not make us unable to reach conclusions about the success with which the justices—and others—have tried to find it. There is nothing nihilistic in the search, nor need we be cynical in discussing it.

32. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

33. *Id.*

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Let me end where I began, with Professor Tushnet and Professor Leff. You will recall that Tushnet saw Leff's turn to the making of a legal dictionary as "perhaps the ultimate expression, short of total silence, of nihilism."³⁴ That was not a silly conclusion, I think, given Tushnet's perspective, but I believe that it was nonetheless quite wrong. Tushnet assumed that the coherence of public law, and thus the possibility of a non-nihilistic scholarship about that law, depends on a thick set of shared substantive commitments—without such commitments, he reasoned, on what basis could one say anything beyond observing that this decision was X and that one Y? Leff, whatever his own qualms about the law's ultimate foundations, sensed the possibility of a different form of commitment, a commitment to the employment, in good faith, of a shared language.³⁵ Leff, unlike Tushnet perhaps, saw that such a commitment need not be superficial in the vicious sense: as Professor Vining has taught us to see, the activities of constructing and reading legal arguments entail a commitment, at least for the moment and in the role one inhabits, to making sense, to saying things one can mean.

Tushnet found proof of Leff's nihilism in his comment that "[u]ltimately, the law is not something that we know, but something that we do."³⁶

If you believe that talking *about* law is the point of academic law, then this does sound nihilistic. But Leff, unlike Tushnet, was immersed in the law as a human activity, and if you are *within* the law, as Leff was, that location changes your perspective radically. Human action is, at least for some purposes, the very point of human thought, not because thought is empty but because to be meaningful action must be thoughtful. The law, Leff knew, is action by human beings brought to bear on human beings, and as such it must be meaningful if it is not to become hateful. Leff, "a very human man,"³⁷ took joy in and took seriously the task of dealing with persons recognizing that they are persons, and not just factors in an equation. Writing a dictionary was his way of tending to that task, which he thought the common lawyer's job since the action of making law argu-

34. Tushnet, *supra* note 1, at 1343 n.154.

35. In a brief note he wrote to accompany a symposium the Yale Law Journal published in his honor, Leff expressed his own motivation for doing legal scholarship in words that seem to me to be both close to, and infinitely remote from, the view Tushnet ascribed to him: "to have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too." Arthur Leff, *Afterword*, 90 YALE L.J. 1296, 1296 (1981). Note that Leff described his goal not simply to say something well, but to say something *true*.

36. Tushnet, *supra* note 1, at 1342 (quoting Leff, *Law and*, *supra* note 15, at 1011).

37. C.P. SNOW, *THE MASTERS* 207 (1951). I wonder if this tribute, which is given in SNOW's novel by an antagonist of someone who has just died, is in danger of becoming meaningless. If so, that is evidence of Professor Vining's general concerns.

ments is a form of the most basic human calling. I believe that Leff would have vigorously agreed with Vining that “[e]very use of a term in law is a metaphorical use. . . . If a term has different lights in a succession of statements, its lights are blended by looking to person and meaning as a whole, which as in all metaphor is the only referent.”³⁸

The question then becomes, not just for advisor and advocate and lower-court judge, but for justice and professor as well, “how can I do this well, how can I respect the language I share with those I oppose in a way that recognizes that I have not left the ordinary human world when I act as a lawyer?”

Understanding how the words we use convey meaning—the way the Leff dictionary plainly was intended to do—could be one way to do that. It was the way in which Leff decided to carry out his particular vocation as an academic lawyer. That vocation, itself a shared one, is the calling to help us all to argue, and to advise, and to decide as judges, and in all those roles to exercise responsible judgment, as persons who act in good faith, who mean what they say. I know of no one who has done more to illuminate this vocation than Joseph Vining.

38. VINING, *supra* note 24, at 120.