

Michigan Law Review

Volume 94 | Issue 6

1996

All the Company of Heaven

Milner S. Ball
University of Georgia

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Natural Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Milner S. Ball, *All the Company of Heaven*, 94 MICH. L. REV. 2016 (1996).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss6/29>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ALL THE COMPANY OF HEAVEN

Milner S. Ball*

FROM NEWTON'S SLEEP. By Joseph Vining. Princeton: Princeton University Press. 1995. Pp. xvii, 398. \$24.95.

At my urging, the editors have included at the end of this review a response from Joseph Vining. I sent Professor Vining a copy of my manuscript and solicited his comments. I asked the editors to append his response in order to honor the aspiration that reviewers "approach books in a spirit of deference and attempt to promote (and to meditate in) a co-operative dialogue between authors and their readers."¹ His response like my review has been edited. — MSB

I. KING'S COLLEGE CHAPEL

The faculty news section in a recent issue of *Law Quadrangle Notes*,² the University of Michigan Law School's in-house magazine, carries a summary report of Joseph Vining's *From Newton's Sleep*.³ This report shares a page with the conclusion of another, on the visit of Vining's colleague Theodore St. Antoine to Cambridge, England.⁴ The travelogue has it that Professor St. Antoine and Sir Derek Oulton found themselves in the library at midnight, after dinner at Magdalene College, poring over the original report of *Hadley v. Baxendale*⁵ and discussing whether it was really a torts rather than a contracts case.⁶ "Cambridge is just magical," St. Antoine says. "To be present at Evensong in King's College Chapel is to be transported into another world."⁷

* Caldwell Professor of Constitutional Law, University of Georgia. A.B. 1958, Princeton; S.T.B. 1961, Harvard; J.D. 1971, Georgia. — Ed.

1. D.S., *NB*, *TIMES LIT. SUPP.*, Dec. 29, 1995, at 14 (quoting Patrick O'Brien). As a practical first step, O'Brien proposes offering authors of reviewed books "an immediate right of reply;" *Id.*

2. *Faculty: In Print*, UNIVERSITY OF MICHIGAN LAW QUADRANGLE NOTES, Summer 1995, at 23.

The magazine has the polished look of a publication for alumni and donors. However, since copies of it appear regularly in Georgia's faculty mailboxes, its celebration of Michigan Law School accomplishment must be intended as advertisement to a larger audience. It cannot be the purpose of this general distribution to arouse in us prideful loyalty to Michigan or an urge to send money.

3. Joseph Vining is the Harry Burns Hutchins Professor of Law, University of Michigan.

4. *Faculty: St. Antoine Enjoys Unforgettable Cambridge Semester*, UNIVERSITY OF MICHIGAN LAW QUADRANGLE NOTES, Summer 1995, at 22-23.

5. 156 Eng. Rep. 145 (1854).

6. *See Faculty: St. Antoine Enjoys Unforgettable Cambridge Semester*, *supra* note 4, at 23.

7. *Id.*

Upon St. Antoine's return, so I imagine, Vining would have suggested to him that the late-night venture in the library and the experience of Evensong were not different trips, or at least, not trips to different worlds. *From Newton's Sleep* supposes that the texts and discussions of law, as much as the texts and music of religion, provide transportation to that other destination: "Disciplined pursuit of law-laden questions leads to legal texts but then through them and out again, as light is seen narrowing down to go through a lens or prism and then expanding beyond" (p. 33). From the lightsource beyond, the law is to be heard, as God once was (pp. 34, 330-31).

II. THIS REVIEW

From Newton's Sleep consists of 242 mostly short meditations on legal thought. I despair of giving an accurate account of the complex whole, but I shall try my hand at putting some of the parts together as the author invites readers to do. Then I shall try a brief response to the sense the book makes in my own little arrangement of it.

III. LAW-RELIGION

Like religion, law for Vining requires faith and obedience for fulfillment and a disciplined attention to certain texts for legitimacy of statement. Both the texts and the discipline are peculiar.

A. Texts

The chosen texts are those to which the lawyer is drawn by the "person" or "mind" or "caring mind" beyond the words that makes the texts authoritative. This mind cannot be "known before it is searched for. Pulled by intimation of it, driven by faith in it, we are always groping for evidence of mind . . ." (p. 179). But lawyers will not find the law even in these texts. They will find at most "evidence of the law," which they then use to "arriv[e] at a statement of law" (p. 26).

Lawyers' faithful groping after mind and evidence of law enters upon a special trial when it meets certain kinds of texts. Contracts, settlements, staff-brokered judicial opinions, and legislation often separate words from their supposed speakers because, for various reasons including negotiation, people will vote for or sign documents that do not contain their words and may in part contradict what they really believe and want to say. These documents do not speak for a caring person whose sensed presence behind constitutes authority. Legislation, the chief and most frequently recurrent example, must then lack authority, must represent "lawless behavior" (p. 253). And lawyers' faithful quest for the evidence within stat-

utes of the mind and law beyond must fail — “except that by a paradoxical trick” they make of legislation material “which [they] use in determining what law is.”⁸ They just do it. Snatched from defeat by this device, lawyers do not “yearn any the less for authenticity” (p. 308) in the texts they must read. The existence of caring mind behind the words continues to be the useful presupposition of their daily business.⁹

B. *Discipline*

That daily business is a particular kind of discipline. Law, like air, is everywhere and not seen. It must be brought to expression by lawyers who can at best make statements of the law. Lawyers must make those statements “in good faith, responsibly, after the exercise of legal method” (p. 111) and then subject them to challenge and argument.

Legal method is pivotal: “Legal method is the close reading of fragments, to reach the actuality of what is, and legal method is the putting together of fragments, to reach the actuality beyond what merely is.”¹⁰ It is priestly in character. Not surprisingly, in Vining’s view only the “ordained” may make statements of law (p. 314) — mere kings may not.¹¹

8. P. 253. One entry reads:

Lawyers are caught by legislation and their reading of it. Either they must believe what they do with legislation is often foolish and deceptive; or they do believe and confess a belief in an informing spirit in the legislated words that is beyond individual legislators. As in all large matters, there is mixture, the usual combination, of doubt and belief, made easier to live with, as usual, by strong doses of self-deception.

P. 200.

9. See p. 145. Ronald Dworkin once remarked upon a sustaining belief of some lawyers in a literal reality beyond the literal, what he called “celestial secret books.” Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1249 (1977). The belief unfolds this way: Legal rights are thought to come from books. In hard cases, however, rights cannot be deduced from propositions in the available books. “In that case judges, in purporting to decide hard cases on arguments about legal rights, are simply guessing what they would find in . . . secret books if only they could get at them.” *Id.* at 1248. More recently Dworkin has looked again to the heavens, this time for a sympathetic image descriptive of his own belief in the beyond of law as integrity: “Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behavior of the nearer planets. Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune.” RONALD DWORKIN, *LAW’S EMPIRE* 183 (1986). Our contemporary jurisprudes furnish us with an interesting array of possibilities for our self-image: astrologers and astronomers as well as knights and necromancers. Are we trying to keep our courage up against the earthier images most people presently have of us? In an earlier era, when I was growing up in a small Georgia town, all lawyers were called “Colonel.” In that community at that time, it was an expression of simple, sometimes well-earned respect.

10. P. 95. The fragmentary nature of *From Newton’s Sleep* deliberately reflects the nature of its subject.

11. We like to tell ourselves the tale of Lord Coke’s admonishment of the King when the King threatened to assume judicial power: law requires the peculiar reason of the lawyer. Robert Cover credited the nourishment provided by such myths:

IV. LEGAL THOUGHT VS. MATHEMATICAL THOUGHT

The legal form of thought actively opposes mathematical thought, whose spread “to linguistics, literary criticism, social theory, to the psychology of mind and even to theology makes ‘scientific thought’ too narrow a term for it” (p. 248). This aggressive, gathering enemy of humanity translates “reality into process or system, with axiomatic exclusion of substance that might transcend any process or system” (p. 248). While mathematical physicists, for example, may “search out a place for mind in their cosmology,” they “do not or cannot take the step lawyers must take, to find a place in thought for the real existence of caring mind” (p. 180). Cognitive scientists have a “view of man,” but one that is “a step back, a return to an earlier vision of demonic power — man as possessed by forces from without” (p. 176).

Mathematical thought would visit upon us what Vining identifies, following William Blake, as “Newton’s Sleep.” Legal thought would save us from it. Legal thought holds us up to walk the floor and stay awake, talking to each other, against the spiritual narcolepsy of mathematical thought. Because the “[t]ranscendence of time and of process and of the merely extant remains necessary to law in its everydayness,” legal thought “works to keep each of us from” dropping finally into mathematical thought (p. 210). “Legal thought is the daily exercise that not only allows us to sleep in peace, but keeps us from Newton’s Sleep.”¹²

The last word of the book is one of affirmation:

Law connects language to person, and person to action, through a form of thought that is not reducible to any other. The legal form of thought is not waning — rather the reverse. It may yet move to take a place beside the forms of thought of other disciplines that are self-reflective, as something to be reckoned with, in its own terms, in coming to any general understanding of the working of the world. [p. 357]

Myth is the part of reality we create and choose to remember in order to *reenact* History is a countermove bringing us back to reality, requiring that we test the aspiration objectively and prudentially. History corrects for the scale of heroics that we would otherwise project upon the past. Only myth tells us who we would become; only history can tell us how hard it will really be to become that.

The Folktales of Justice: Tales of Jurisdiction, 14 *CAP. U. L. REV.* 179, 190 (1985). In Cover’s view, the folktales are folktales of *justice*. They are meant not to maintain independent professional privileges but to nourish the prophetic aspiration to speak truth to power. Judges are to “be other than the King not because of the need for specialists in dispute resolution, but because of the need to institutionalize the office of the Prophet.” *Id.* at 189.

12. P. 210. The book’s other summary formulations of the subject make it plainer that “Newton’s Sleep” is a metaphor for death. Law is then understood as a lifesaving or redeeming alternative. For example:

Madness, self-destruction, death, and senseless command: against these is set the authority of law; these set law’s ultimate undertaking and function in the world. Throughout [Kafka’s] *The Trial* there is appeal to the Law. Had it been answered, had law appeared, what was absent would be present: identity; reality; persons.

V. A SUMMARY ASSESSMENT

From Newton's Sleep is a creative book that covers more and more varied terrain than I could survey here. Scholars experimenting with ways to write law will particularly welcome its non-traditional form. This welcome will embrace both the *pensees* mode and the fact that the reader is not left to guess whether a caring mind exists behind the fragments. Here we encounter a real, humane professor of the law who is committed to animation of legal thought's assumptions and who would engage us in conversation in hope of reforming the way we think about law.

This is a full as well as a creative book. Readers will find in their own samplings and arrangements of it their own private versions of pleasure, reward, provocation, instruction, surprise, puzzlement, and mystification — a rich serving indeed for the money spent buying and the time spent reading it.

VI. RECOMMENDED COMPANION READING

The author suggests that the book's meditations "may be picked up separately, as time and occasion allow" (p. 357). Twice the dust jacket proposes that the time and occasion be evening hours. To those who read *From Newton's Sleep* just before their own, I recommend two other recently published books for noontime and morning. They, too, can be profitably read a piece at a time.

At noon try Walt Bachman's *Law v. Life*.¹³ Bachman, a successful litigator, cares for the law and the profession, but his rigorous way of caring leads me to advise that you had best read him in the warming, comforting light of mid-day. He organizes his short book around nine lessons. An example: "*Law is the only learned profession in which one is ethically obligated to hurt people.*"¹⁴ Another: "*Law school depresses students through gloomy immersion in the risks of life, the glorification of dispute, and a process of moral neutering.*"¹⁵

For a bracing start to the day, read *A Keeper of the Word*,¹⁶ the selected writings of William Stringfellow. Although he died in 1985, his remarkable, fresh writing will be new to most readers, and this book makes his insights available in accessible, short selections. Stringfellow practiced law on the streets of Harlem. He also practiced theology — fine, nonacademic theology. He was more than suspicious of religion and of law as religion, and he said so in plain

13. WALT BACHMAN, *LAW V. LIFE* (1995).

14. *Id.* at 36.

15. *Id.* at 52.

16. WILLIAM STRINGFELLOW, *A KEEPER OF THE WORD* (Bill Wylie Kellenmann ed., 1994).

terms. "Initiation into the legal profession," he observed for example, "as it is played out at a place like the Harvard Law School, is, as one would expect, elaborately mythologized, asserts an aura of tradition, and retains a reputation for civility. All of these insinuate that this process is benign, though, both empirically and in principle, it is demonic."¹⁷

Stringfellow also addressed the question of death in law or of law as death. "[I]f the law's aggressions against blacks are admitted," he wrote, "and, for the sake of maintaining the illusion that institutions are or can be made truly viable, it is suggested that the law in America remains, nonetheless, viable for white citizens," then a crucial issue emerges:

[I]f the American legal system seems viable for me and other white Americans but is not so for citizens who are black, or for any others, then *how*, as the dual commandment would ask, in the *name of humanity*, can it be affirmed as viable for me or for any human being?¹⁸

At day's end, after Bachman and Stringfellow, you will be well-situated to reach over to your nightstand for your copy of *From Newton's Sleep*.

I suggest the prior, companion reading for a reason. I, too, care about law and lawyers and clients. I, too, profess the law. It does not in the least compromise my caring and my profession, and, in fact, gives them moment, that I also know that law does not save — from Newton's Sleep or from death. I find as much addictive sleep in law as in mathematical thought, and as much waking good. Both are, in Stringfellow's terms, fallen institutions. And both are subject to overriding redemption.

Experience has taught me thoroughly enough two lessons: that those who do not always repeatedly say "yes" to American law will be taken as saying only "no"; and that speaking dialectically (yes and no) in theological terms (fallenness and redemption) is to be taken as speaking in tongues by both religionists on the right and secular legal academics on the left.

The Authoritative and the Authoritarian, Professor Vining's most recent book before this one, provided me with occasion to raise the religious issue in a review that paid serious tribute to his work, as I intend this one to do.¹⁹ In the present instance I am content simply to propose that you read Vining at night, but also the caustic, curing, nonreligious book of Bachman at noon and, at the beginning of

17. WILLIAM STRINGFELLOW, *A Lawyer's Work*, in STRINGFELLOW, *supra* note 16, at 30, 31.

18. WILLIAM STRINGFELLOW, *The Law as Aggressor*, in STRINGFELLOW, *supra* note 16, at 242, 243, 244.

19. See Milner S. Ball, *Humanizing Law*, 35 UCLA L. REV. 547, 554-56 (1988) (reviewing JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986)).

the day, the prophetic, rousing, nonreligious-theological writings of Stringfellow. The three together will constitute for you perhaps a course of study and certainly an awakening.

VII. REVISITING KING'S COLLEGE CHAPEL

Vining addresses King's College Chapel expressly twice (pp. 98, 347) and impliedly three times (pp. 312, 341, 350). For him, it is a metaphor of law and the work of lawyers. The Chapel stonemasons have long labored at restoration, and they may eventually replace all of its stones:

That it is 'King's College Chapel' would then be taken by the observer on faith, a faith that reflected an assumption of good faith among the restorers, and in saying 'restorers' in the plural it becomes evident that the chapel persists in its form only in records and the mind of more than one individual. [p. 98]

So is it, too, with law and the caring mind beyond.

For me also, King's College Chapel, with the breathtaking fan vault it substitutes for the heavens, can serve as a metaphor of law and of religion. It is a striking architectural statement. But of what? Who do the limestone and oak celebrate?

A brochure published by King's College forthrightly explains that, "[f]rom the first, the College's buildings were intended to be a magnificent display of the power of royal patronage, and Henry [VI] went to great lengths to ensure that [the] Chapel would be without equal in size and beauty."²⁰ Everywhere the stones and wood are stamped with abundant indicia of earthly royalty. Dominating the interior and fully occupying the eye is a huge, heavy, dark, ornate oak screen that boasts the initials of Henry VIII, its donor, and of Anne Boleyn. When Henry later had Anne executed, he did not trouble to have her initials struck from the screen. I suspect that this was not an oversight but a calculated little reminder to the subject academic community to keep their heads.

As both fact and metaphor, King's College Chapel stimulates dialectics. It is a monumental display of crushing political power and princely self-indulgence, and I find it profanely lewd and oppressive. But, then I see J.M.W. Turner's 1796 painting of it and read the poetry of William Wordsworth inspired by it.²¹ And then, especially, I hear in it the choir and the Festival of Nine Lessons and Carols on Christmas Eve and, like St. Antoine, I am transported to another world of another politics and power, right from the start of the procession, when the opening phrase of the begin-

20. The quoted language appears in a pamphlet, published in 1994, distributed to visitors of King's College.

21. See, e.g., WILLIAM WORDSWORTH, *Ecclesiastical Sonnets in Series*, in 2 THE POEMS 447, at 501-02.

ning carol is sung, at first from a distance by a lone, small boy with a high, fragile, clear voice: "Once in royal David's city . . ." And then the stones and the oak, in spite of their lifelessness and their dedication to vainglory, ring with praise to the glory of God.

* * *

Vining writes: "Law lies somewhere between Nature or the God of the theologians, at one end, and an artifact or individual, at the other" (p. 215). I am chary of elevating law. However, if you, with Vining, raise law to a position a little lower than God and higher than a person, you place it at the level of angels. Law then belongs to the company of Gabriel. But also to the company of Lucifer.