

1987

# Law and Enchantment: The Place of Belief

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## Recommended Citation

Vining, Joseph. "Law and Enchantment: The Place of Belief." *Mich. L. Rev.* 86 (1987): 577-97.

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## ESSAYS

# LAW AND ENCHANTMENT: THE PLACE OF BELIEF†

*Joseph Vining\**

### I. THE QUESTION

The question I wish to raise is whether one must believe what one says when one makes a statement of law. The language of belief that we know, and from which moral discourse and the moral never stray far: do judges, lawyers, law participate in it?

Any such question is but an aspect of a larger question, indeed issue, of what we may call the objectivity of legal language. It is raised perhaps most acutely by the broad claims now being made for artificial intelligence and in particular for the computer programming of legal advice (as a species of what is called, in that field of applied science, an "expert system"). But it arises also when we contemplate legal texts bureaucratically produced — texts that are not written by the person who signs them. It is to this latter, more limited, and more familiar context that I will direct our consideration here. The shadow of Herbert Simon's *Sciences of the Artificial*<sup>1</sup> we will leave to flicker in the background.

Initially the question of believing what one says in legal discourse must be approached as a methodological problem, part of the perennial task of coming to grips with and trying to understand lawyers' method and particularly lawyers' close reading of legal texts. Certainly we will be attempting to do that here in some small way, keeping in mind that among working lawyers are judicial officers (judges) as well as legal advisers (officers of the court) and those lawyers (not officers at all) who teach and write in the schools.

But the question cannot be cast or left only as a problem of

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1. H. SIMON, *THE SCIENCES OF THE ARTIFICIAL* (2d ed. 1982).

method. It is a question of substance also. Any inquiry, however limited, into the place of belief of any kind in legal discourse inevitably takes us to the question of the degree to which law must be rooted in the concrete and historical ground of our existence, what we variously call the actual or the authentic. Law, in the course of its conception, makes a claim upon us, speaks to us and troubles us as we go about our business. If it does not, if we feel no claim, we may wonder whether that to which someone may be pointing with the word "law" *is* law.

This is why I have taken for a title "law and enchantment." I do not think we are enchanted by illusion. We are disenchanted when what appeared to us to be actual turns out to be an illusion. We know there is at the very least a drive for the actual and the authentic in law, revealed in any number of ways. Think of our interest in whether the facts of a case are actual facts or only hypothetical facts; or our interest in what the grounds of an administrative decision actually are, as opposed to a mere rationalization of the decision; or even our interest in what the actual words of a statute are as opposed to a paraphrase. What we want to ask, or begin to ask, is how far law's drive for the actual and the authentic goes. It may in fact be quite as pressing as the similar drives of literature, art, and philosophy — though most would be disposed to deny it: "Lawyers meaning what they say? Surely not. Belief? Surely that has nothing to do with law."

## II. LAW AND OBLIGATION, METHOD AND LAW, METHOD AND ATTITUDE

It will be useful to begin with a methodological excursion, in the form of some observations about discussions of legal obligation.

Moral and political philosophers sometimes, indeed I think more than sometimes, argue about legal obligation by posing some specific example — jaywalking, running a stop sign, parking across the sidewalk — and asking whether there is an absolute or *prima facie* obligation to obey the applicable law and what sorts of reasons (reasons of self-interest, reasons that themselves imply obligation) or what degrees of reason (loss of \$1,000, loss of \$10,000, loss of life or limb) are sufficient or necessary to counterbalance whatever obligation there is to obey the law. What they do not do as a general matter, at least in my experience of such arguments, is ask at the very beginning what the law is they are talking about, what its content is, what it actually commands or says or indicates to the person about whose obligations they are talking. Anthropologists are illustratively different in this regard, usually most careful to establish the details of the symbols, stories,

language, and grammar of the culture they study and the details of the example of the culture with which they work. But the philosopher and the political theorist rather readily commit the sin which the law student (like the anthropologist) is warned against from the beginning: of assuming what the law is, holding that constant, and then working out to other factors and other considerations. Before the launching upon what is of real interest — obligation, counter-obligation — hands are waved toward some statutory formulation or some citable judicial opinion and all (or all but the lawyer) move on. They are understandably impatient with the lawyer's tentativeness in the selection and reading of texts and the lawyer's worry over the translation of meaning. But in consequence their ensuing talk may be about a fiction, without roots in the world. There is of course nothing wrong in talking about fiction, but they do not purport to be speaking like novelists about imaginary worlds and seeking the truth of things in that way.

Now since the content of the law — what, if anything, the law is actually saying to us — is a question and not a fact which can be determined or intuited without the exercise of legal method, it is evident that lawyers and judges, and citizens too, must engage in some activity before anyone can even get to the point of asking whether there is an obligation to obey the law. And, as in other situations in life, in engaging in this activity there are two large and polar attitudes they can take toward the materials with which they work.

On the one hand they can read the materials searching for the purpose of a statement in the light of other statements made, asking what its meaning is. On the other hand they can hold the materials entirely outside themselves and approach them quite manipulatively and strategically. As law students go through school they are trained in both these skills, one of reading in what is called "good faith" and the other of reading in an adversarial and manipulative way. Students also learn that given enough time and money (and time is a commodity which can be sometimes bought and sometimes secured through manipulation) they can reduce a set of apparent commands to a virtual dead letter as far as its impact on their doing or their clients' doing what they wish to do. Law students learn this — indeed children learn this growing up, though less by training than by unintended example. They may be stumped by a set of words which are strung together in a grammatical way and which have some ordinarily perceived meanings of an abstract kind, they may be stumped for a while, but they will be stumped in the same way that someone in a canoe hitting a post in a river may be stumped for a while before he finds a way around it.

The reduction of a set of texts to a dead letter, the skirting of them,

the draining of them of meaning and content, does not mean that they do not exist. Of course they exist and like posts they can have some effect, delaying or channeling. But they are not at all the same as a set of texts or words or commands that carry some obligation to pay attention to them for what they say and not merely as something to be manipulated. In cases of the first kind — the post to be gotten around — commands are heard and dealt with rather as the adolescent responds to the words of a cold adult. Only in cases of the second kind can one begin to talk about the authority of the law. In talking about it one is talking about obligation and blame, words that simply have no place in the game-playing and manipulation that are associated with the first attitude.

It may be a convenient summary to say that the question of obligation is to a large extent a question of attitude as one proceeds toward a statement of law, and is not a question whether there is or is not something attached to the something we call the law, which can be described as obligation or *prima facie* obligation. The content of the law, the obligation to obey it, and the definition of what obedience consists of, emerge not one after another in the mind — or in legal analysis — but together.<sup>2</sup>

This should not be thought a particularly odd or striking conclusion, since in fact the law does not exist in the world in what is often called an objective way, and lawyers have always known that. Insofar

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2. We should note here also the particular distinction lawyers make between statements that present a mere choice and statements that raise some degree of obligation. Not only is it unclear just what the law might be on, for example, sidewalk parking, not only would one have to do some work before one could conclude that in some actual situation someone had violated or disobeyed the law by parking across a sidewalk: even if all were to grant that there was a perfectly clear and understandable formula, a sidewalk parking example might still be treated as a species of channeling or choice-presenting of the kind that is often found in taxation, where essentially a price is sought to be put on a choice.

If, that is, one wants to risk a fine — if one wants to risk a certain amount of money — one can occupy the public space for a time, just as, to take the experience perhaps most common, one can park in a parking spot without putting a quarter in the meter if one wants to risk a \$5 ticket (or, rather uncommonly, can smoke marijuana in at least one university town if one is willing to risk a similar \$5 ticket for possession). There may be no real blame attached to the parking in the empty space or, perhaps, across the sidewalk. The question whether to park would be what is sometimes called a "private" one for the individual. The alternative and contrast are statements to be taken into the most serious account in the course of making a decision, and carrying with them a measure of not only obligation but the mirror image of obligation — blame — for not paying attention to them and taking them into account in an affirmative way. In some situations legal analysis moves to treat sanctions or the consequences as probabilistic events, costs of doing business which can be insured against, and (especially insofar as individuals rather than enterprises bear those costs) to providing for or allowing indemnification, so that a rather mechanical system of choices and incentives and channels may be set up, again in contrast to a set of statements which are to be listened to and responded to with a sense of obligation. The mechanical systems so conceived tend to be short-lived, in concept and in action, if for no other reason than that, for the well-advised, paying the price after the choice is made can become itself a matter of choice, between paying and whatever the alternative to paying might be in the world as it then is.

as there are formulations of law upon which lawyers would agree after the exercise of legal method, they are formulations of considerations directed at people deciding what to do. Some considerations are living and the words are living and some considerations are dead and the words that express them are dead. The living are voices which are heard and attended to. The dead are not voices which are heard or attended to; they are things which are handled.

Thus, and to end this excursion, if there is to be law it must be the product of legal method. You do not ask, Is there law here? or, What is the law here? without asking, What have judges, lawyers, or citizens done with the materials from which a statement of law is made? What have they done, how have they done it? You do not know whether there is law or what it is without asking about method; to criticize the method or execution of method by which a statement of law is reached, or to question the possibility of fulfilling methodological presuppositions, is to question the existence in the world or in fact of the law posited by the statement.

This said — and I think physical scientists no less than lawyers would find it a commonplace though they do occasionally talk as if their facts existed apart from their method — we are in a position to approach whether one must believe what one says if one is to make a statement of law. Of course lawyers and judges and others do make statements in which they do not believe, which they mean others of us to think are statements of law and want us to pay attention to: our question is whether such statements are statements of law.

I say we can approach our question. But if lawyers' method is so very implicated we must find a means of approaching it without backing ourselves into a professional corner which some may enter and some may not — a means of pursuing what is necessary to the life and perhaps the very existence of law in a way fruitful in itself and also accessible to those who are not lawyers, who do after all have an interest in the matter. It is never easy to straddle the line between professional discipline and the ordinary world. But law is more than most a mix of the ordinary and the specially disciplined, and I think we may be able to go some good distance considering even briefly the problem of imitation.

### III. IMITATION AND ATTITUDE

Imagine the following:

A law student visits a large law firm to be interviewed for a job. We will put the time in the late 1960s. In the course of a required conversation with a young associate the student describes the various

arguments in Professor Yale Kamisar's article *A Dissent from the Miranda Dissents*,<sup>3</sup> which he had been studying carefully and liked very much. Kamisar, the student says to the young associate, had engaged in a wonderfully close and thorough reading of the dissenting Justices in that celebrated 1966 case which is still today the focus for discussion of police interrogation in the United States. The article was quite long, the student remarks, but well worth working through.

Various things the student said ring bells in the young associate's mind. After the interview is over, he goes over to his shelf and pulls down a volume. And yes, there is his draft of a dissent in *Miranda*, joined by four Justices, which he had written as a clerk on the Court. It had been published with only a few editorial changes, he recalls proudly. It was some of his best work. It sounded just *like* the Justice. He muses on the fact that his own words had been the subject of Kamisar's painstaking analysis and had, in turn, taken up much of that student's time. Thousands and thousands had read what he had written. They had worked over his every nuance in the closest possible way.

There is an oddness in this, an irony? Perhaps, for some, a madness? If you are struck so, however faintly, the sense is worth pursuing. Oddness, irony, hint of madness if tracked down can lead to a clearer understanding of what it is to be a lawyer or indeed anything else; even, I hope, to a clearer understanding of why lawyers themselves fall so often into a manipulative stance toward what they call the law.

What we have in the vignette I have related is of course the presence of imitation in the field of law, and not simply the inevitable imitation that is acknowledgment of influence and found in every work and activity. Let us move outside law and approach the problem, which writing of this kind raises for the lawyer, through the general problem of imitation sights and sounds. Or almost outside law — I shall use a legal case to start with. Talk about law is very difficult to avoid.

Some years ago the Federal Trade Commission charged the Colgate-Palmolive Company with deceptive advertising in claiming to demonstrate visually on television that Rapid Shave Shaving Cream could shave sandpaper. What was being photographed by the television camera was not sandpaper but plexiglas with sand sprinkled on it.

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3. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966) (on *Miranda v. Arizona*, 384 U.S. 436 (1966)), revised and reprinted in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 41-76 (1980).

On one side of the screen was an athlete shaving his sandpapery beard. On the other was this mock sandpaper being shaved. The voice-over chanted "Apply, soak, off with a stroke."

The company and the Association of Advertising Agencies argued that this was not deceptive advertising since what the viewer saw was true. The difference between plexiglas and sandpaper was immaterial. The company was simply solving a practical difficulty by using what was called in the trade a *mockup*. When televised, sandpaper looked like ordinary paper; only sand on plexiglas looked like sandpaper. If what the viewers saw was true then it made no difference that what they were seeing was not what they thought they were seeing. What they saw in fact, the manufacturer went on, was what they saw on the television screen.

The Supreme Court agreed with the FTC prosecutors that the undisclosed use of a mockup in the sandpaper case was deceptive advertising within the meaning of the Federal Trade Commission Act. Although mockups could not be entirely prohibited, the advertiser could at least be required to disclose with some frequency that it was using a mockup. The case was not a clean one for consideration of the issue. The fact was that Rapid Shave could not shave sandpaper except after an extraordinarily long soak (which the athlete whose beard the sandpaper was being compared to would never have tolerated). But the issues of the use of the mockup, on the one hand, and the transmission of an inaccurate message, on the other, were nominally separated in the litigation, and the opinion put in question the use of mockups generally<sup>4</sup> — the use of mashed potatoes rather than ice cream in ice cream commercials because studio lights melt ice cream while it is being photographed, the use of soap to produce a foaming head on seductively foaming drinks, or the substitution of colored water for wine sipped by actors instructed to ad lib semi-sophisticated conversation during scenes shot for wine advertisements, because of the dozens of retakes often necessary to produce an acceptable commercial and the consequent danger of incoherence and wild behavior on the part of the actors.

We can agree that the reasons for using mockups are often unex-

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4. *Federal Trade Commn. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Court proposed a distinction between an undisclosed mockup of a true testimonial, televised so that viewers could see it for themselves, and an undisclosed mockup of a true demonstration or experiment televised for the same purpose; the former acceptable, the latter not, on the ground that the proof being offered in the latter was not the experiment itself but the viewer's own observation of the experiment. But the opinion went on to suggest that the undisclosed use of any mockup, even mashed potato ice cream, that became important or "strategic" in a commercial's implicit invitation to observe for oneself might be found to be a material deception.



ceptionable. Why then did advertisers object and why do they object still to disclosing that they use mockups? Their reply might invoke the language of experimental psychology, but it would amount to saying that the spell would be broken if they told. The viewer would be disenchanted. He would cease to pay attention, or at least the kind of attention desired: he would not take in, take into himself, absorb what was being said, focus upon it, be absorbed by it. He would not be spellbound, but instead removed, thinking of other things as he listened, if indeed he listened at all. And to help understand why the spell would be broken and the televised picture lose its persuasive force, we may recall the puzzling importance of the original in art. One reason is the trust necessary when working with something that is an imitation of the true or authentic thing. When one is presented with a work of art that is to be taken seriously, one is asked to do a great deal, to pay much attention to it and spend much time on it instead of the other claimants competing for one's limited time and attention, and most of all to take it into oneself, with the possibility that one may change oneself as a result. If one is told that what one is seeing is an imitation, one is at the mercy of another. One must invest trusting the imitator's good faith, and will hedge and protect oneself from too great vulnerability.

Quite apart from the necessity of relying upon another's word in so important a matter, there is also the possibility that a small flaw in the imitation may make all the difference. There is judgment involved in determining what is a material and what is an immaterial difference between the authentic object and the imitation. In architecture a few degrees in the pitch of a roof or the change of a single window may change the face of a building. In literature close reading attends to detail, to nuance, individual word, the actual punctuation used. Thus the new and better editions of a much-read novel, the variorum editions of the poets.<sup>5</sup> A mockup cannot be trusted to hang together as the real thing can, or perhaps it should be said that the presupposition that actuality hangs together cannot be entertained when one is dealing with constructed appearances, because a line, a pointer, an evidence, a word, a tone that does not make sense may be — even if not an attempt at manipulation — a simple mistake or poor judgment on the part of the imitator, rather than a revelation that should drive one on in one's seeking to understand the whole.

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5. *E.g.*, THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS (P. Allt & R. Alspach eds. 1957); THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UN-ABRIDGED 529-82 (E. Latham ed. 1969); J. JOYCE, ULYSSES: THE CORRECTED TEXT ix-xiv, 647-50 (H. Gabler ed. 1986).

The advertiser in the mockup case did not wish to disclose that it was using mockups. I doubt that anyone knows how much attention inveterate television viewers pay to what they see in commercials on the screen and how much close reading of them they do, and therefore how important the telling detail is in the advertising context; but advertisers certainly could suppose that a viewer would have no reason to trust advertisers' avowals that a mockup was a true reproduction: advertisers have every reason to believe that such spell as is cast by the vision of ice cream or sandpaper would be lost if they were required to say that what is being transmitted is mashed potatoes made to look like ice cream or plexiglas made to look like sandpaper. Judges stand in a somewhat different position. Judges are surely more worthy of trust than advertisers. One may ask therefore why they might not wish to disclose that their opinions are drafted in whole or in part by clerks or a central staff when that is the case. If, for instance, the famous footnote four of *United States v. Carolene Products Co.*,<sup>6</sup> viewed by many as the charter for modern judicial review of legislation in the United States, was written by Professor Louis Lusky as a clerk and approved by Chief Justice Stone, why was the opinion, or part of the opinion, not signed by both Lusky and Stone, or signed Stone, As Told To Lusky?<sup>7</sup> The problem in law, I suggest, is much more the problem of imitation itself and its suitability for close reading, its capacity, if you will, to persuade another to invest himself in its analysis. For legal texts are asking listeners not just to buy a can of shaving cream but to act in ways that affect their lives, and legal texts are put forth not in a thirty second spot but as material for years of analysis and argument.

We spoke of a spell being broken when what is thought to be authentic is revealed to be imitation and a mockup. The viewer, listener, or reader is disenchanted when the spell a thing has cast on his attention is broken and he turns away from it. But of course when we are not disenchanted, we are on the other side. We are enchanted. And that may be troubling. There is magic in enchantment, being in the grip of an illusion perhaps. But when all is said and done, it is the sense of the actual that enchants and draws out our action from us. That we also know. And that, drawing out our action from us, is the reason for law's drive for the actual in all the ways in which law reveals that drive.

I suggested at the beginning that law's drive for the actual may be

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6. 304 U.S. 144, 152 n.4 (1938).

7. Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 513 (1956).

fully as pressing as any that one can perceive in other disciplines, and related, like those of other disciplines, to the thirst for the sense of the actual in everyday life. Consider the rather complicated enchantment of the theater, which in imitating the actual has its own mimetic authenticities. As one sits in the dark listening to galloping horses coming to the rescue of a maiden, one does not really want to know that those galloping horses are toilet plungers being pressed by the sound man against his chest. A dubbed film, in which the dialogue is written to fit the movements of the mouths of the actors rather as a ghost-writer will write to fit the mouth of a purported author, is not quite the same theatrical experience as the foreign film with subtitles. Or take Tarzan. A boy or man sits watching a movie Tarzan swinging through the woods uttering a victory cry and admires that cry, wondering half-secretly whether that might be his cry too. It is deflating to learn that Tarzan's yell is no human expression, but a sound track brew consisting of a dog's bark, a camel's bleat, a hyena's yowl and some snatches of Johnny Weissmuller. Consider the modern experience of music. The rock-and-roll fan basking at last in the televised presence of his favorite band feels somewhat less close to them when he realizes that in their performance before him they are simply mouthing the words and pretending to play their instruments, with the sound coming from a tape played over the speaker system. (It often has to be a tape because of the way a rock-and-roll song is typically produced, with instrument recorded over instrument, voices and pieces of voices fed in, funneled through echo chambers, modulated and variously amplified.) The opera lover swooning to a beautifully executed duet on the radio between two sopranos, listening to the rising interplay of the voices and thinking that the perfect unity of two souls might be a real possibility, is jolted when the announcer tells him that he has just heard Elly Ameling singing with herself in a splendid demonstration of electronic technology. He may still like what he heard, but his thoughts do not fit. Occasionally disenchantment is depicted for us in a way that makes it possible to laugh about the loss. At the beginning of *Monty Python and the Holy Grail* the galloping and clomping of horses' hooves are heard in a forest. Then a knight appears trotting along as if he were on a horse, but on foot, and behind him appears his squire laden down with backpacks and pots and pans, clip-clopping together two coconuts to give the effect of a horse.

There is a difference, however, between ordinary experience and the experience of law or the various other disciplines of inquiry. We might be better off thrilling to the rescue of the maiden, admiring the victory cry of the noble savage, basking in the presence of the rock

band and swooning to the duet, if the price is merely being deceived. That may be a matter of choice upon which one need not take too definite a position. But the disciplines of inquiry, including law, do not have quite the same choice, for their methods are designed to unmask the unauthentic. They probe and they probe. That is what they do. That is the business of the practitioner of the discipline. And if their material dissolves in their hands they are not better off, except insofar as the act of close reading was a pleasurable exercise in itself.

But I do not think there is that much difference between the disciplines of inquiry and ordinary experience. Music and the theater come to an end and we go out into the dark. We keep only whatever of the actual and the authentic was captured there. Thrilling, admiring, basking are not just passive states. They push the person on to act in various ways, to take one turn rather than another in his life. One who admires will emulate, and if he tries a Tarzan's yell that is in fact made up of hyenas, dogs, and camels, he will find, like the legal analyst, that his material is not much use to him.

I passed on earlier a story — would it make a difference if the facts of that story were true or only put forth as if they were true? — about a law student and law professor and the clerk who had written the words which student and professor had parsed in their effort to understand the law of police interrogation in the United States. There is another story to be told about those same texts — the professor's law review article and the opinions of the Justices which the professor had used in his article.

The student had read the professor's article carefully, mulled it over and considered it. The professor had read the dissents to the *Miranda* opinion carefully, mulled them over and considered them. The title of the article, after all, was *A Dissent from the Miranda Dissents*. But both, student and professor, had also of course read closely the majority opinion in the case, the opinion for the Court. Professor Kamisar had sought not merely to demolish the dissents. He maintained that the constitutional prohibition against interrogation in the absence of counsel extended well beyond the police station, where the interrogation in *Miranda* itself had occurred. In support he naturally cited, inter alia, the opinion for the Court in *Miranda*. Three times it defined "custodial interrogation" as questioning initiated by law enforcement officers after a person had been taken into custody "or otherwise deprived of his freedom."<sup>8</sup> When the definition was initially stated in the opinion it seemed to include a qualification. The phrase

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8. *Miranda v. Arizona*, 384 U.S. 436, 444, 477, 478 (1966).

"in any significant way" followed the phrase "deprived of his freedom." But at the two other places including the final summation where "custodial interrogation" was explained, "significant" was dropped. At one point the phrase was deprived of his freedom "in any way." At another it was simply "deprived of his freedom," without more. Kamisar read the opinion as a whole and put forth his interpretation in an effort to answer a major question for those seeking in good faith to know the law and to apply it — lawyers, appellate judges, trial judges, prosecutors, police: whether police interrogation, without prior warning of the right to a lawyer, could take place outside the police station, on the streets for instance, or in a person's home. (The doctrinal question channeling and molding distinctions on such particulars, it should be said, was whether interrogation itself, or instead deprivation of bodily liberty, was to be the primary analytic focus.)

After Professor Kamisar published his article, a judge who had read the article as carefully as Kamisar had read the opinion, and who had checked Kamisar's citations, wrote that Kamisar had misread the majority opinion on this point. The initial "in any significant way" was not, as Kamisar argued, a throwaway phrase. It appeared in conjunction with each reference in the opinion to deprivation of freedom. Kamisar rushed to the bound report on the shelves. The words were indeed there, as the judge said. But like Winston in Orwell's *1984* he knew the words were not there when he had written his article and participated in a dozen colloquia on the subject of police questioning after *Miranda*. What had happened?

What had happened was that he had relied upon the Preliminary Prints of the official United States Reports, which are sent out many months after the initial release of an opinion and before the binding of those prints into an annual volume. His article had been published between the time of the appearance of the preliminary prints and the time of binding. Before the prints were bound, the type had been broken and the words inserted in the two places where they were not to be found before,<sup>9</sup> something it would never occur to anyone to do to paragraphs of journalism in the daily newspaper at the point of binding them for the shelves; but then judicial opinions are not journalism, even though like the newspaper there is always next day's opinion to read.

No one outside the Court knows whether it was the public discussions at conferences reflected in the article which had prompted the

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9. Compare *Miranda*, 384 U.S. 436, 444, 477, 478 (preliminary print), with *Miranda*, 384 U.S. 436, 444, 477, 478 (bound volume).

change, or who suggested the change, or how the change was explained to the Justices who had agreed to the opinion, or whether the busy Justices let their clerks decide if the change was acceptable. But there is no question that someone at the Court, like the professor, the judge, and the student, was proceeding upon a methodological presupposition of close reading, to which such a matter as symmetry of phraseology is important (hardly, of course, dispositive: nothing is dispositive except a final satisfaction of a desire to understand; but then, too, nothing is unimportant). This is scarcely surprising, since close reading is the method of the law and what is principally taught in law schools.

But we cannot stop there. Close reading itself proceeds upon a presupposition, that what is read is suitable for close reading, which means generally that at the least it is not an imitation, not a mockup.

#### IV. THE PRESUPPOSITION OF AUTHENTICITY

From this, what we may call the presupposition of authenticity in legal method, much of what is distinctive about law and being a lawyer can be drawn, and from the difficulty of maintaining the presupposition of authenticity in practice arise many of the dilemmas of law and the lawyer. The situation in which our student and professor would find themselves if they had to confront a discovery that the material they were using from the Supreme Court was written by a recent law graduate, who could have been one of the professor's students just past, is something like the situation in which art critics and art historians found themselves when a number of Etruscan statues at the Metropolitan Museum of Art turned out, after decades of being admired, to be imitation Etruscan statues. When the statues were moved to the basement, so were the Ph.D. dissertations and scholarly articles based upon them. Or, to use an analogy less fine, student and professor, discovering that they had pored over words that were not the Justice's own words but an imitation that the Justice had adopted, might well feel somewhat like a teenage boy or girl captivated by a movie star, who goes to a movie over and over again to see the nude scenes and then discovers that the star's nude scenes are always played by a double, selected by the star and the star's mother. They are cheated, but more importantly, they are distanced from the material they are working with. It is not just the lack of disclosure that the body is not the star's, or that the art object is not an original, or that a judge's opinion is a piece of writing constructed by someone else to look enough like the writing of a judge to pass. It is the imitation, the lack of authenticity itself, that is the problem.

Bureaucratic writing of judicial opinions is now widespread in both federal and state courts in the United States and knowledge of how such texts are produced is becoming widespread. I do not think that the impact of this development will be merely that judges will lose the special respect that Brandeis attributed to their being the only government officials who do their own work — though the relative respect in which judges are in fact held is enormously important. The risk, the danger, the cost is, I think, loss of authority and with it loss of law itself, not just respect for judges as individuals, but respect for law. And the reason has much to do with legal method, the method that is taught in law schools and that lawyers use when asked to say what the law is. They read the authorities, principally the opinions of judges, closely and critically. And just as literary critics feel foolish in applying elaborate techniques of literary analysis to segments of a book that turn out to have been ghostwritten by an editor, lawyers simply have to have difficulty reading ghostwritten texts as if they were authentic. Lawyers cannot read the bureaucratic product of administrative agencies as they read or want to read judges' opinions. They are cynical and manipulative toward what comes out of a large agency.<sup>10</sup> And it is precisely not being manipulative, it is approaching a source of law such as a judicial opinion in a good faith effort to understand it and follow its meaning, that the authority of law is about. Of course all of us are manipulative to an extent, and little if any writing is fully authentic in the sense that it reflects only what the author truly believes — about what the law is, or anything else. Pointing to a loss of authority is no assertion that anything less than the fully authentic is unacceptable, or that it is an easy matter to discern what the fully authentic is or would be or how that which rings true rings truer through irony, obliqueness, and the other means of expression that are sometimes contrasted with what is thought to be sincere talk. What is to be concluded is simply that there is a price paid for not fulfilling the presuppositions of legal reasoning, which include the presupposition that there is a responsible mind behind judicial writing, not imitating a judge, but being a judge. The price paid is the relative loss of the sense of obligation.

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10. This has been a source of contention in American administrative law for well over a generation. A representative example of the expressed disquiet is the "Hector Memorandum" to President Eisenhower, a portion of which was published as *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A.B.A. J. 45 (1959). For the full text, see Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960), especially at 931-32, 939-48. Discussion by litigation may be said to have begun with the *Morgan* cases in the late 1930s. *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*); *Morgan v. United States*, 304 U.S. 1 (1938) (*Morgan II*); *United States v. Morgan*, 313 U.S. 409 (1941) (*Morgan IV*).

Could it be said that law is convention only, and is not at all like a movie star's body, or even an Etruscan statue? Whatever the judge adopts, even if he or she has not read it, *that* is by definition the law? Judges strumming their rubber-stringed guitars are giving out the law because that is what law is and all law is? Convention does not work for the adopting author himself. President Reagan, when challenged during the 1980 campaign on the ground that a position he was taking was inconsistent with what he had said in one of his syndicated newspaper columns, candidly responded that he had not written that column. It had been ghostwritten, and was not evidence of what he believed; therefore he was not inconsistent. No sitting president would look to his speeches to determine what he believed if he was thinking about a subject in a perplexed way. His speeches would not help him, being in the main ghostwritten by a large staff, and it cannot be imagined that a judge would look back to a published opinion drafted by a clerk if he later finds it has starting points, structure, nuances and phrases which were not his and did not reflect his thought. "Did I say that? Dear me. Let me see how I can *handle* it." And handle it he would: he would turn the opinion into a fiction, distinguish it, reinterpret it, or conveniently ignore it. Thus, perhaps, the reluctance of many courts to allow unpublished opinions drafted by central staff in cases deemed routine by the staff to be cited and given precedential weight, though those cases are decided in the name of the court and the opinions may be signed *per curiam*.<sup>11</sup>

The lawyer outside the court would be in a somewhat different position from that of the judge within. He would not know what the judge knew. But his method, his close reading, might lead him to suspicion and more. And if it were revealed, if he were told that the work was not the judge's own, then he would be very much in the judge's position. That, we may fear, is what is happening as judicial bureaucratization is being ever more widely perceived. It is very doubtful that convention can overcome the problem of imitation — the problem of its suitability for close reading, the problem of its capacity to persuade someone to invest himself in its analysis in any serious way. Trying to make oneself pretend that what one is reading is something one knows it is not puts one into a world like the world of 1984. This is of course the classic difficulty with administrative bureaucracy. It seems efficient, but it is alienating. The responsible head is not really responsible for what happens, certainly not for what hap-

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11. See, e.g., Reynolds & Richmond, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 573-74 & n.4, 624-25 & n.154 (1981); N.Y. Times, Feb. 21, 1983, at B1, col. 1.



pens in the particular. There is no one responsible in that central sense, from which the notion of "civil" and "political" responsibility was derived before being detached.<sup>12</sup> The outcome is just the result of the system or the process, and nothing more.

There is the associated general question why any discipline that depends upon authority is interested in historical authenticity, or what I think Judith Thomson would call "causal embeddedness" or "embeddedness in history"<sup>13</sup> — to which we should at least allude because it is part of the context of our discussion here. Why really would it make a difference if it turned out that the Constitutional Convention was a hoax, an illusion fabricated by clever propagandists, or that the fourteenth amendment was more flawed in its adoption than is already known, or that the facts of a precedent were entirely made up, or indeed that Christ did not actually live but was only supposed to have lived? An interest in historical authenticity seems associated with asking others to rely upon one's claim. In citing a particularized legislative statement, constitution, or event of significance, decisionmaking individuals are not themselves taking a stick and punishing someone. They are ordering someone or setting the conditions for someone to be ordered, with public force to follow. A juror trying fact wants (as does the law of evidence), Thomson suggests, causal embeddedness in a

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12. Even in the extreme case of complete delegation, of which the Queen of England, adviser rather than advisee, may be taken as an example, an official may continue to sign statements with her name and announce decisions in her voice. We might be tempted to think she remains responsible, simply as a matter of definition. But in this we would not be true to law's usage. There is a difficulty, to be sure, but law's use of the term *responsible* handles the difficulty by moving through appearances to the actuality of persons.

In law, when we insist that someone *did* do or say something and *is* responsible, we generally mean she should take the consequences of her acts and statements. She is civilly responsible, and should be a source of compensation. She is criminally responsible, and should be deterred or punished. She is politically responsible, and may be replaced.

But if what is at stake is the very *making of the decision with respect to allocation of civil liability* or the very *statement of the considerations to be taken into account to avoid condemnation*, then we are not interested in money payments, deterrence, or punishment. We do not say the speaker or actor *is* responsible. We say she *should* be responsible, or we *want* her to be, because we want the *decision* or *statement* to be a responsible one. (And if it continues to be the case that no one is responsible, political replacement is of no avail.) The decision or statement must be responsibly made before we can truly take account of it — before it itself can have much in the way of consequences in the world.

In this context the legal term *responsible* is used somewhat (though not entirely) differently from the way it is used in the phrases "civil responsibility," "criminal responsibility," or "political responsibility," for we are in some sense prior to the structures of discussion by which we determine responsibility of these latter kinds. It is thus possible to say that a person not responsible for a decision *did not make it*, and that what she appeared to do *she* did not do (as in the case of the Queen). Human action and responsibility are still conjoined, but the mind's movement is from responsibility to speech or action, rather than from speech or action to responsibility. Connections with the law's conception and expression of insanity are evident.

13. J. Thomson, remarks presented at Sunderland Fellowship Colloquium, Michigan Law School (Feb. 18, 1986) (discussing Thomson, *Liability and Individualized Evidence*, in *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* 225-50 (W. Parent ed. 1986)).

case, some particularized or "individualized" evidence linking the defendant to the harm as well as evidence of general probability, because she is going to have others do something on the basis of her conclusion. The judge searching for law may also want historical authenticity in the materials with which she works because, again it may be suggested, she is going to do and have others do something in the world in reliance on them. Both touch upon authority, both have something to do with the mystery of the real and the possibility of faith, in the real but in no other. The connection that is demanded, however, is not, I think, to any wholly external truth, but rather to belief. Those relying upon authoritative texts want to rely upon the belief of those who uttered them. Those relying upon a determination of fact can want similarly to rely upon the belief of those who determined the fact. Belief is associated with responsibility, and ultimately with faith. But more, in law a determination of fact is always a determination of value. It involves the application of rules of inference — if one may call them rules; they are not mathematical — which are adopted in pursuit of values ("this evidence is sufficient for this conclusion for these purposes"). The belief to which there is connection and desire for connection is belief in those values, which is, after all, what makes them live.

And here may be the appropriate point to remark one of the ways the materials of law may indeed be unlike an Etruscan statue. One might think that even in a crude imitation there is at least the gross form of the original, enough of the spirit of it to discern and be guided by,<sup>14</sup> just as there is in a poor performance of a score or a script. But law may not be a performance, since the script is changed forever, in what would in law be analogous to performance, because the elements of the script are living. Though the mysterious attraction of art, its authority, is a matter of constant debate, there is at least the possibility that art is in the settled smiling beyond. Law never is. Similarly, in law there may not be the theoretical possibility of the perfect imitation (put aside the problem of method, the application and attention that must be sustained by a presupposition of authenticity) that there may be thought to be in art, since in law, as in life and the detection of a phoney person or the phoney in a person by a child, *what* is being imitated is not *there* and settled.

Again, the question is not just what is practically possible. The question is what the true costs and benefits are as we go about trying to solve the difficult problems of communal life in one way or another.

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14. See Arnheim, *On Duplication*, in *THE FORGER'S ART* 232 (D. Dutton ed. 1983).

Legislatures and legislation and the reading of them must be left to another day.<sup>15</sup> Here we need note only that to the extent the writing of the judicial branch, or of the lawyer giving advice on what the law is, is the outcome of bureaucratic processes, to that extent it is in danger of losing its claim upon us and failing to leave us with a sense of obligation and willing obedience after we read and hear it. If it is simply impossible in the modern world to sustain the conditions in which a sense of willing obedience or obligation can arise, then that may be a source of modern malaise about which nothing can be done. Max Weber spoke of the iron cage<sup>16</sup> of bureaucratic capitalism, the self-regulating and self-sustaining system into which we all had blundered and from which he despaired of our ever extricating ourselves. This that we see happening may be an aspect of the cage — the law involved in the structure of Weber's iron cage, internal bureaucratization in law a growth of his cage, produced perhaps by the same conditions that produced the cage itself.

But in this too may lie an opening. Weber, I think, took the law as a given, a phenomenon *there* and given from without. But the law is not a given. It is created anew in every live class that is taught where mind meets mind, in every argument in court where mind meets mind, in every late-night wrestling of a legal adviser with his materials when he is responsible for the consequences of his advice and cannot leave the matter to a judge. If law does not live, it becomes something to be dealt with by ingenuity, and lawyers' ingenuity with dead words is hardly less than engineers' more visible ingenuity with the problems presented to them by the lifeless material world. Law sustains Weber's cage, but law does not sustain itself. Law is sustained by lawyers, and their method leads them to dissolve away the dead.

We are not really very far away from Weber's time. The consequences of what is called rational bureaucratic organization of the social world have hardly yet begun to unfold, and such an opening up of an iron cage almost of its own accord, through internal bureaucratization and law's losing its grip upon us, may be one of the consequences. Where would we be if we stepped through the opening? Back before Weber's time? Or in a new reign of terror — where nothing even mas-

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15. What can be hoped for in this connection I have touched upon in J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* chs. 9 & 10 (1986). An example of current questioning within the profession of the special status of statutes and the spell they cast is G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

16. M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181-83 (T. Parsons trans. 1958). An analysis of Weber's view of law, and his *Rechtssoziologie* in particular, is to be found in A. KRONMAN, *MAX WEBER* (1983). See especially *id.* at 11, 22, 28, 45, 53, 73, 89-91.

querades as law and words and texts are not the vehicles of commands? The cage (or now the illusion of the cage) might be better. But we must not enter into such speculation. Those who have some sense of journey in human history, of truth that is not simply replacement of one illusion by another, of the opening out of human perception and self-knowledge and of movement, however halting and however long drawn out, toward freedom and justice at the end, would soon be pitted against those who have not any vestige of such faith — or who think they have none; and perhaps you and I would not know which side to take in the fray. That would be an embarrassment that no guest should bring upon his hosts.

## V. THE QUESTION AGAIN

From this brief discussion of spells, which began as a discussion of authenticity and which has been in the main a discussion of bureaucracy, I return to the question of whether one must believe or (as we also say) mean what one says when one oneself makes a statement of law. When one oneself mechanically fashions a statement and it is not one's *own* because one does not believe it, or for that matter disbelieve it — it being fashioned merely by imitative manipulation — speaker and spoken are separated quite as much as they are in bureaucratic writing. Such statements by an individual lawyer or judge are not just “no less unsuitable” for legal analysis — dissolved “no less” by good legal analysis — than statements of bureaucratic origin. Are they not *the same*?

If we are inclined to say they are, we may dare to think and play with the thought that there must indeed be the element of belief in what one says if one is to make a statement of law. Law and legal language are perhaps not so impersonal as is commonly thought. Not long ago Grant Gilmore commented in his summing up, *The Ages of American Law*, that “[t]he function of the lawyer is to preserve a sceptical relativism.”<sup>17</sup> Gilmore himself was evidence to the contrary. He certainly believed this or that with respect to the substantive law in his field. His writings declare his confidence in his own work and perception. But it is evidently and always a trouble to lawyers that belief might be demanded of them professionally, and I think the reason is not so much popular role definitions like that repeated by even so sophisticated a commentator as Gilmore; nor the subtly daunting necessity of implicitly resolving open questions of legal method as best they can in doing the best they can to arrive at statements that are

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17. G. GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977).

their own; nor even the burden of responsibility imposed on them by political theory, being now developed by Philip Soper, which grounds citizens' obligation on the belief of legal officers in the justice of what they officially do.<sup>18</sup> Rather the reason for lawyers' trouble with belief lies in great part, I think, in their difficulty in seeing how a willingness to change one's mind or belief can be consistent with any belief, a difficulty shared by any reflective and open-minded person in the modern world, professional or not.

But hard as believing with an open mind is to do, men and women do seem to do it. I have commented on this elsewhere, and particularly on the question who it is who is really doing the believing. Let me suggest here — and in doing so refer also to the beautiful recent work of James Boyd White on law and language<sup>19</sup> — that in *defining* what we believe we enter into notions that open out into the future, not into closed systems. The very terms of our descriptions of what we believe or think we believe, our noun-like terms, in fact have the quality of verbs as well as nouns; a true description of what one believed earlier has in it the seeds of reconciliation with what one believes now. Put mathematics and mathematical analogies aside. Despite what we may have been taught in elementary school, distinctions between noun and verb do not hold: in the very statement of *what* one believes at a particular point one is carried forward from that time toward the realization of a hope. And though that hope may not be realized or be possible to realize in one's individual life, still one cannot divorce oneself from its realization.

The general run of people putting belief into words may sense this with less difficulty than the disciplined professional, whose discipline is very likely to be enamored still with the possibility of substituting mathematics for human language.<sup>20</sup> Large numbers of the general run (those whose use of language provides the material for professional study of language) listen with every evidence of understanding to Christian and Jewish theologians and ministers explicating the name of God, and one cannot help but be struck by the standard observation in Biblical commentary<sup>21</sup> that when Jehovah replies to Moses' insis-

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18. P. SOPER, *A THEORY OF LAW* (1984).

19. J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); J.B. WHITE, *HERACLES' BOW* (1985).

20. Mathematics, that is, as it is generally conceived both inside and outside the professional discipline of mathematics. For a partial objection to the characterization of mathematics I have here in mind, see the Introduction to I. LAKATOS, *PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY* (1976).

21. *E.g.*, "God, Names of" in 2 *THE INTERPRETER'S DICTIONARY OF THE BIBLE* 409-11 (G. Buttrick ed. 1962); B. CHILDS, *THE BOOK OF EXODUS: A CRITICAL, THEOLOGICAL COMMENTARY* 60-67 (1974).

tence on a *name* to take back to the Israelites, the Hebrew of his reply — “I am that I am, that is who I am, tell them I am sent you” — has a quality not just of being but of becoming. The translation into English using our static English “be,” “am,” “is,” is read as the ancient Hebrew, and without much difficulty, suggesting not only much about translation and its affinities with the act of reading itself, but a capacity within to understand the thought of the ancient Hebrew. We are not limited by our nouns and verbs, as an artificial intelligence would be. Or, to say the same, the apparent meaning of words and their actual meaning are not the same, as the objectivist would have them be: our nouns, like our verb “to be,” only appear to be static. And it is of interest that in much Western theology this openness and movement in human language is connected in an explicit way with the personhood of God. The ultimate object of knowledge and belief, toward which our descriptive terms so full of movement move, is within the world of theology a person, as I think it is also in worlds that today know nothing of theology.