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## The Glittering Eye of Law

Geoffrey P. Miller  
*University of Chicago Law School*

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# THE GLITTERING EYE OF LAW

Geoffrey P. Miller\*

THE AUTHORITATIVE AND THE AUTHORITARIAN. By *Joseph Vining*. Chicago: University of Chicago Press. 1986. Pp. xix, 261. \$25.

It is too soon to speak of a "Michigan School" of legal analysis. Academic schools announce their emergence with the founding of house journals, the canonization of texts, the establishment of positions on law faculties. None of that has happened in the case of the viewpoint most notably represented by James Boyd White and Joseph Vining of the University of Michigan Law School.

Yet the approach of White, Vining, and others is gathering momentum. Its most distinctive feature is a tenacious insistence that texts matter in legal analysis. The primacy of texts implies that law is and should be deeply concerned with problems of interpretation and meaning. Law's sister disciplines, accordingly, are not economics, sociology, politics, or any other social science, but the humanities, and particularly fields such as literature and theology that have long been organized around issues of textual interpretation. Law, according to these scholars, is better equipped than other hermeneutic disciplines to revitalize the problem of meaning for a modern age. Because it is indispensable, law has never lost credibility under the onslaught of the scientific method. Moreover, the legal imagination has always understood that cases are alloys of fact and value irrevocably fused in the furnace of litigation. The law, accordingly, has never fallen victim to the splitting of fact and value that underlies the scientific world view. The life of the law has not been experience: it has been the infusion of value and meaning into the world. The law's central value is that people should be treated as ends in themselves, not merely as means.<sup>1</sup>

Professor Vining's new book, *The Authoritative and the Authoritarian*, is a powerful exposition and defense of this approach. Difficult and profound, idiosyncratic and exasperating, the book is an important contribution to modern American jurisprudence. Its subject is a guiding question of legal philosophy: the difference between the au-

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\* Assistant Professor of Law, University of Chicago Law School. — Ed. The John M. Olin Foundation provided financial support for this project. I would like to thank Douglas G. Baird, Michael Perry, Carol Rose, Geoffrey R. Stone, and especially Cass R. Sunstein for helpful comments and Catherine Torgerson for valuable research assistance.

1. For James Boyd White's most significant contribution to this literature, see J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984). Vining's earlier work in this genre is J. VINING, *LEGAL IDENTITY* (1978). Scholars doing related work include Paul Brest, Robert Burt, Robert Cover, Owen Fiss, Michael Perry, and Cass Sunstein.

thoritative — a command that is legitimate and willingly obeyed — and the authoritarian — an order backed by threats. Vining touches matters as diverse as the increasing importance of law clerks in the work of the Supreme Court; the nature and value of hierarchy; the significance of time in legal method; the possibilities for freedom and authenticity in law and life; the relationship between faith and authority; and the reality of legal persons such as corporations or courts. It would be a disservice to Vining to represent in a headline or short sentence his conclusions about the nature of authority. But if he were forced to summarize, he might say something like this: a text is authoritative, rather than merely authoritarian, if it is a sincere expression of the mind of the speaker and if it finds acceptance in the mind of the hearer as reflecting who the hearer really is.

Part I of this review sets forth Vining's approach and places it in the context of other legal theories. Part II discusses possible objections to the book's picture of legitimate authority. Finally, Part III briefly addresses the problem of self-authentication as a way of highlighting Vining's contention that the meaning of a text is to be assessed in terms of the relationship between the mind of the speaker and the content of the thing spoken.

## I. THE BOOK

*The Authoritative and the Authoritarian* is more of an extended meditation than a rigorous argument. One searches in vain for hard-edged, clearly defined concepts or rigorous deductive reasoning. There are many concepts, to be sure, but they flow together without sharp distinction.<sup>2</sup> Each concept reflects a different facet of the same reality, just as the lawyer's experience of the world has different aspects, but "in the end it is one experience" (p. 5). There is argument here also, although Vining regrets its necessity (p. 5). But the book is not structured around a rigid conceptual skeleton. Vining describes it as a "walk through the problem of legal authority" (p. 196), a butterfly hunt in a great forest of oaks (p. 14).

What take the place of logic and argument are metaphor and symbol. The book is organized around a set of symbolic and metaphorical polarities. It presents us with a stark choice between two worlds: the world of the authoritative, a world of sanity, community, commitment, obedience, enchantment, trust, attention, seriousness, caring, authenticity, substance, freedom, life, activity, delight, humanity, faith, friendship, meaning, and law; and the world of the authoritarian, a world of madness, solitude, detachment, resistance, disillusionment, distrust, overlooking, mockery, indifference, strategy, process, bondage, death, passivity, pain, nature, doubt, enmity, meaningless-

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2. Vining would probably agree with this characterization. See, e.g., pp. 167-68.

ness, and power. Vining calls on us, as lawyers and as human beings, to opt for the authoritative and reject the authoritarian. Doing so may mitigate the lawyer's dilemma, which is the pain of searching for meaning yet professing to be able to do without it (pp. 3-4).

### A. *The Model*

At the core of this book is a theory of meaning in legal texts that stands in contrast to the leading twentieth-century philosophical approaches to meaning. One theory of meaning, associated with the early Wittgenstein<sup>3</sup> and A.J. Ayer,<sup>4</sup> views the meaningfulness of a proposition as depending on its verifiability. Meaning is, in some sense, a correspondence between a proposition and an object. The meaning of a word is the object to which it refers; and if the word does not refer to an object, then it is literally meaningless. The other theory of meaning, associated most prominently with the later Wittgenstein,<sup>5</sup> views the meaning of a word as its use in the language. Meaning is a phenomenon of culture, not a matter of individual choice. Indeed, in some sense a private language that did not depend on others for its meaning would be an impossibility.<sup>6</sup>

Vining's view of meaning has points of similarity and contrast with both of these theories. For Vining, a word, at least in legal analysis, has meaning if it is a truthful representation of the mind of the speaker. To say anything meaningful one must mean what one says (pp. 42-46). This is a correspondence theory of meaning, but the relevant correspondence is not between the word and the world, but between the word and a mind. This is also a social theory of meaning, in the sense that to be meaningful a word must open up the mind of the speaker and make it capable of being understood by others. But, unlike the later Wittgenstein, Vining insists that people and institutions have a degree of power over their language and are not in bondage to the meanings supplied by history or culture (pp. 89-100).

According to Vining, when lawyers analyze a legal text they search for its meaning in exactly this sense. They presuppose the existence of a mind that means what is said (p. 10). The presupposition of mind imposes constraints on interpretation. A text, as the product of a mind, should be thought of, at least initially, as internally consistent. Internal inconsistency in a mind is an abnormal state, a form of madness or schizophrenia (p. 79). Thus techniques of analysis are developed to "save" texts from self-contradiction by categorizing, by declaring some things important, some unimportant, and so on (pp. 32-33). Such saving techniques dominate the standard forms of doc-

3. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (1961).

4. A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1952).

5. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1958).

6. *See id.* at §§ 246-78.

trinal analysis of judicial opinions (pp. 36-37). Moreover, texts uttered by the same mind at different times should be consistent. Hence the impulse in legal analysis to transcend time, to view the "Court" of *Marbury v. Madison*<sup>7</sup> as the same mind as the Court of today, so that what is said today should be consistent with what the Court said in 1803.<sup>8</sup> The doctrine of precedent, Vining might say, presupposes a unifying mind behind the opinions of a court.

If a text is sincerely meant by the speaker — if it accurately corresponds to an organizing mind — then it is worthy of our attention. Indeed, texts with this kind of authenticity in some sense command us to pay attention. They hold us with the same "glittering eye" that the Ancient Mariner fixed upon the wedding guest.<sup>9</sup> Such texts are to be taken seriously, respected (p. 42).

On the other hand, some texts may turn out not to be sincerely meant by a speaker after all. Our interpretive labors may be insufficient to save a text from incoherence (pp. 37-38). A text may be manipulative, strategic, so that the speaker does not actually mean what he or she says, but merely hopes to get something out of the hearer (p. 18). Or a text may not be the product of the speaker's mind at all, but rather the artifact of some other, undisclosed mind, or even of some impersonal process (pp. 15, 19, 24-26, 47-48, 128-31). In all these cases we would conclude that nothing was actually said, that the words we were hearing were just meaningless sounds.<sup>10</sup> In the context of appellate review of judicial or administrative decisions, the natural response to this kind of text is to "vacate," to treat the statement as a nullity because it does not disclose the presence of a mind (pp. 50, 165-67).

Of particular concern to Vining is the phenomenon of bureaucratic speech. When a government agency makes a decision it often issues an explanatory memorandum that appears as the official opinion of the agency even though it is drafted by low-level functionaries. Such texts are not meaningful; they "offer no access to the workings of a mind" (p. 12). Vining explores this problem through the conceit of supposing that the opinions of the Supreme Court became as bureaucratized as those of the Interstate Commerce Commission. This thought experiment is not completely fanciful. Already, Vining notes, the Court is

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7. 5 U.S. (1 Cranch) 137 (1803).

8. Pp. 9-10. Vining observes that Supreme Court opinions often refer to decisions of "this Court" even if the makeup of the Court at the time of the earlier decision was entirely different. P. 9. Of interest in this connection is the policy of some Justices to use the word "we" to refer to the Court only for decisions rendered after the Justice's appointment; prior decisions are referred to as decisions of "the Court."

9. P. 14. This striking image is developed throughout the book as the symbol of legitimate authority. See, e.g., pp. 75, 159, 168, 186.

10. Vining's discussion here resembles in some respects Jürgen Habermas' distinction between "lifeworld" and "system." See 1 J. HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 13 (1984); McCarthy, *Translator's introduction to id.* at xxiii.

evolving towards a more hierarchical organization, with numerous law clerks and even levels of responsibility among clerks (pp. 10-11). The lamentable result, according to Vining, has been a general loss of prestige and authoritativeness of Supreme Court opinions. Continue the trend and the Court's opinions will cease to be authoritative at all and will instead become orders to be worked around, resisted, and treated strategically, rather than being willingly obeyed.

The link between meaning and authority is authenticity (pp. 41-59). An authentic text is one in which the author "mean[s] what he says" (p. 42). Thus one must not be deliberately deceptive, ambiguous, or imitative (p. 42). Only texts that are authentic deserve to be taken seriously (p. 46) or paid attention to (pp. 57-58, 231). Vining's concern with authenticity has philosophical resonances.<sup>11</sup> His objection to inauthentic statements, for example, is Kantian in tone. Such statements, he says, are "manipulative, treating you as a thing" (p. 46) — i.e., as a means and not an end.<sup>12</sup> And while Vining might not go so far as Kant in saying that one may not deceive even the murderer at the door who asks whether the master is in,<sup>13</sup> his stern injunction against insincerity is probably stricter than the approach advocated by many moral philosophers.<sup>14</sup> If Vining's stand against lying resembles Kant, his concern with authenticity recalls twentieth-century existential philosophers, particularly Heidegger and Sartre.<sup>15</sup> At one point Vining gives an almost clinical description of anxiety<sup>16</sup> followed by a transition to a state of care<sup>17</sup> that parallels rather remarkably the discussions of the same subjects in Heidegger's *Being and Time*.<sup>18</sup>

An authentic statement, for Vining, is one that deserves our attention (pp. 57-58, 231). But whether the listener pays attention to the speaker, and whether the speaker has authority for the listener, are the same thing (p. 58). Thus the notion of authority is expressly connected to attention and authenticity. Vining's remarks on the impor-

11. For modern philosophical work explicitly concerned with problems of authority, see *AUTHORITY: A PHILOSOPHICAL ANALYSIS* (R.B. Harris ed. 1976); E.D. WATT, *AUTHORITY* (1982); Raz, *Authority and Justification*, 14 *PHIL. & PUB. AFF.* 3 (1985).

12. Cf. I. KANT, *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* (1949).

13. See I. KANT, *On a Supposed Right to Lie From Altruistic Motives*, in *id.* at 346; I. KANT, *The Metaphysical Principles of Virtue*, in *ETHICAL PHILOSOPHY* (1983).

14. Compare S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978). For a modern Kantian's attempt to reconcile Kant's prescription against lying with the exigencies of an imperfect world, see Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, *PHIL. & PUB. AFF.* (forthcoming).

15. M. HEIDEGGER, *BEING AND TIME* (1962); J.P. SARTRE, *BEING AND NOTHINGNESS* (1966).

16. "[A] form of self-consciousness that can afflict an individual, a pulling back and observing of oneself in action, which can be destructive to the point of madness." P. 186.

17. "[T]o say what [one] believes and commit [one]self to it, to act with responsibility for pain and harm, vulnerable, affected by the consequences of what [one] does." P. 186.

18. M. HEIDEGGER, *supra* note 15, at ¶ 40 (anxiety), ¶¶ 41-42 (care).

tance of attention in the establishment of legitimate authority are insightful and convincing.<sup>19</sup>

Vining's account, up to this point, offers no explanation for the fact that certain statements seem to have special authority by virtue of their being made on behalf of an institution with a recognized role in a hierarchical organization. Part II of the book addresses the problems of hierarchy for an account of legitimate authority. The author explores this issue through a second conceit concerning the Supreme Court — supposing, not that the Court has become a bureaucracy, but that the Court has been eliminated altogether. For Vining this is a natural extension of the first thought experiment, since the eventual consequence of bureaucratization, in his view, is to eliminate the speaker as a voice that need be listened to, and therefore effectively to make it disappear from consciousness (p. 11).

Vining's guiding image here is the pyramid, the ultimate symbol of hierarchy and raw political force (e.g., p. 63). For Vining, hierarchy itself has no special claim to authority; to the contrary, the distance between above and below implied by hierarchy is inconsistent with the candor between speaker and listener presupposed by the legal method (p. 76). Yet a pyramid, when turned on its side, resembles a focus, with the apex, once the highest point, now the center (p. 100). Vining literally turns the image on its side. He proposes that the authority that seems to flow from hierarchy is more accurately seen as deriving from a center for attention and action (p. 77). A center provides consistency, thus enhancing the concentration of attention necessary for the firm establishment of authority (p. 80). Perhaps more importantly, a center provides a focal point from which it is possible to work on language (p. 86). An individual has little control over his or her language, because language itself is a social phenomenon: “[W]e are all helpless before our language, which comes to us, together with its structure, organizing concepts, and categories, in organized form . . .” (p. 90). A center, however, provides the kind of organization that is needed if we are to have an effect on the language. Thus the Supreme Court, when it decides cases, has the power to change meanings of words (pp. 82-85) and may even modify the “structure of thought” embedded in language.<sup>20</sup> The presence of a center facilitates greater self-determination through the operation on language of a unifying, freely-choosing mind.<sup>21</sup>

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19. E.g., pp. 77-80. Vining's concern with attention perhaps reflects the influence of Max Weber's account of charismatic authority. See M. WEBER, *The Nature of Charismatic Authority and its Routinization*, in *ON CHARISMA AND INSTITUTION BUILDING* 48 (S. Eisenstadt ed. 1968).

20. Pp. 96-100. By “structure of thought” Vining apparently means pervasive concepts such as the entity theory of the corporation in corporate law.

21. Vining's comments surely overstate the Supreme Court's power to affect the growth and development of the language. One is reminded of the notorious inefficacy of the French Acad-

Where, then, is the authoritative to be found? For Vining, the authoritative depends on the assent of the person who is asked to obey (pp. 146-47). The proposition that legitimate political authority rests on the consent of the governed is anything but new. Vining's original contribution is to derive that assent, not from some real or hypothetical original contract, or from some form of democratic procedure, but rather from a theory of meaning and authenticity. The assent that establishes authority "rests upon perception of a mind and a person in place of [some impersonal] system" (p. 147).

The mechanism by which assent is called forth is the direct communication from mind to mind through the medium of an authentic text (p. 185). The authoritative "mak[es] values come alive" (p. 179) for both the speaker and the hearer. The hearer who accepts a statement as authoritative does so by internalizing it, so that "the ends that animate the speaker come to animate the listener and to be his own, [and] the two are pulled together" (p. 185). The statement comes to be experienced by the listener, not as "outside," as the imposition of a force to be resisted — an order backed by threats — but as "inside," as something that the listener willingly obeys because the voice speaking has become, in a sense, the hearer's own (pp. 179-84). Legitimate authority is obedience to one's self. The self that one obeys, however, becomes authentic and real only through its relationships with others:

[I]t may be true that one cannot find oneself without finding [others], feel substance oneself without seeing their substance, love oneself without loving them. It may be that one cannot find the authoritative for oneself without also freeing others to will and to act. It may be that one can find the authoritative only by ceasing to look down, that one finds meaning only by looking directly into another's eyes. [p. 186]<sup>22</sup>

### B. *The Theory in Context*

Vining's theory of meaning has strong methodological implications, for it leads to a sustained and often slashing critique of most of the leading analytical techniques and legal schools of the twentieth century.

At the most abstract level Vining's attack is directed at a family of methodological presuppositions associated with the philosophy of positivism in social theory. These presuppositions include nominalism — the proposition that there are no real entities or universals beyond the

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emy's attempt to dictate "proper" usage. If it is all but impossible to stop the development of language in its tracks, it is surely almost equally difficult to move it forward in any particular direction by an act of will. At most, the Supreme Court is likely to affect the meaning of specifically legal words; but if this is the limit of its effectiveness the Court hardly does much to advance our sense of autonomy in the face of an impersonal and socially given language.

22. Cf. McCarthy, *Translator's introduction* to J. HABERMAS, *supra* note 10, at xxi ("Habermas is after a notion of ego identity that centers around the ability to realize *oneself* under conditions of *communicatively shared intersubjectivity*." (emphasis in original)).



individual; rationalism — the belief that reality can be captured with the methods of mathematical logic; and individualism — the general orientation in political and ethical philosophy of allowing individuals to make their own decisions for good or ill (pp. 105-06). For Vining, each of these assumptions, and the overall philosophy of positivism they implement, are profoundly misguided as applied to legal analysis.<sup>23</sup> Rationalism presents a vision of “drift and meaninglessness,” able to mark out only a tiny island of clarity in an infinite sea of the unknown, and justified even by its proponents only on the pragmatic ground that it serves as a stimulus to action (p. 106). Individualism may have some value in combating paternalism; but it has “never reached the heart of the law” (p. 106). Nominalism too is foreign to legal analysis, since the law “never rejected entities beyond the individual” (p. 106).

Vining would replace these misguided principles with ones better suited for the task of legal study. For nominalism he would substitute personification, the construction in legal analysis of artificial persons such as corporations or courts.<sup>24</sup> For individualism he would substitute individuality, the recognition that although each person is unique we share “an likeness of spirit” (p. 107). For rationalism he would substitute something he might call constructivism, a unifying approach that does not insist on breaking the universe into abstractions and then relating them according to the rules of formal logic. Vining’s discussion of these matters is occasionally trite. Our uniqueness, he says, “seems to be equaled in the uniqueness of snowflakes. But the fact is presumably not troubling to a snowflake” (p. 106). And a few pages later he asks, “Does not life in the face of death suggest who we are, and does not who we are explain life going on in the face of death” (p. 149)?

Vining’s attack is particularly pointed when it comes to schools of legal analysis. Justice Holmes’ early view that “prophecies of what the courts will do in fact . . . are what I mean by the law”<sup>25</sup> is mocked as a “bad boy’s” philosophy that “appeals to the juvenile and the fearful side of ourselves” (p. 39). Equally biting are Vining’s comments on the legal realist movement, which he pillories as a “breakfast theory of justice” for saying that what a judge does is determined by the breakfast he or she eats in the morning:

When at the end of one’s search for law one finds oneself deposited in a small white room staring at a fried egg, one has the choice of giving up the enterprise, for one really has nothing useful or interesting to say and

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23. Vining’s attack on positivism is part of a growing antipositivist movement in the social sciences. See generally the authorities cited in W. BOOTH, *MODERN DOGMA AND THE RHETORIC OF ASSENT* 207 app. (1974).

24. *E.g.*, pp. 106, 149, 198.

25. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

no one to say it to; or one can come out of the room and creep back to one's fellows. [p. 18]

Vining is somewhat kinder on a personal level, but no less opposed intellectually, to theorists who view law as the outcome of institutional processes. Presumably — Vining does not say — he has in mind the approach advocated by Hart and Sacks in their famous unpublished “Legal Process” materials.<sup>26</sup> Also perhaps included within this critique are contemporary theorists such as John Hart Ely.<sup>27</sup> Process theories suffer from the same underlying defect as legal realism: by viewing the law as some sort of system, some impersonal process (p. 19), they leave the active, organizing mind out of their picture of the law.

Especially vehement is Vining's critique of the application of scientific methods to the law. Although such methods have an appropriate place in law practice (p. 19), it is an error of profound dimensions to assume that science can capture what law is really about.<sup>28</sup> Law is a discipline concerned with meaning, with analyzing texts to determine the structure of the mind behind them. But the application of scientific methods to law — what Vining sometimes calls “sociological jurisprudence” — utterly fails to take account of mind. It replaces the question of meaning — what did the speaker really mean by these words? — with one of causality — what caused the speaker to utter them (p. 18)? Here we have left the realm of the authoritative and entered that of the authoritarian. A theory of law that seeks to explain everything in terms of cause and effect, and thereby excludes mind from the analysis, partakes of nature, not of man; it discloses only laws of nature, which “are nothing to be obeyed or respected” (p. 21).

Vining doesn't condescend to mention the two most significant modern jurisprudential schools — the law and economics and critical legal studies movements. It is not difficult, however, to extend the trajectory of his views to these theories. Law and economics, Vining would say, is simply a new form of legal science, a fried egg made even more unpalatable because it has been allowed to cool for a time and then reheated. Law and economics views judicial decisions not as the product of an organizing mind but as the consequence of various outside pressures. Its obsession with precision and calculation leads it to “replac[e] the individual with an integer,” to insist on using tools that are “not appropriate to the task of . . . experience” (p. 106). Its analytic technique is infected by a “false marginalism” (pp. 182-87) that, by focusing on decisions made at the margin, renders opaque the reality of what the decision is all about. Law and economics commits

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26. H. Hart & A. Sacks, *The Legal Process* (1958) (unpublished).

27. See J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

28. For a related attack on the presuppositions of economic science, see D. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985).

the sin (to Vining) of looking for "venality, duplicity, . . . [and] ambition" (p. 34) in the material it analyzes. And law and economics, like neoclassical economics generally, falls into error when it accepts as given the preferences revealed by individuals in their behavior. Law and economics therefore provides us with "no way of thinking that will order our wants" (p. 4). It ignores the fact that people, as autonomous, self-defining individuals, have a choice to make about their preferences (pp. 94-96). Law and economics is, accordingly, incapable of grasping or understanding what is authoritative in law.

Critical legal studies, for its part, would no doubt come in for equal condemnation. CLS in some respects is concerned with themes that Vining also stresses: authenticity, alienation, community, the importance of doctrine. But CLS views existing legal doctrines as mystifications, smokescreens to cover insidious motives such as class or racial bias, desire to establish and maintain regimes of hierarchy and dominance, and the like.<sup>29</sup> Such an approach is directly contrary to Vining's insistence that the legal analyst assume the good will of the speaker. Vining, unlike his contemporaries in the CLS movement, believes in the possibilities of law, its traditional methods, and its autonomy. Moreover, some CLS theorists, notably Duncan Kennedy, have endorsed deliberately strategic and even deceptive techniques in the pursuit of their political objectives.<sup>30</sup> Such mendacious behavior is rankest heresy for Vining. If Holmes is a "bad boy" for his somewhat cynical views, Kennedy and his cohorts must be very, very bad boys.

All of these schools — legal realism, process theories, sociological jurisprudence, law and economics, and critical legal studies — are rejected for essentially the same reason: they are concerned with doing, not with saying (pp. 39-40); with cause and effect, not with an autonomous mind. But with so many points of view excluded, what approach to legal analysis qualifies for inclusion within Vining's charmed circle? Vining approves of doctrinal analysis of the type lawyers and law professors have been doing since time immemorial: analysis that seeks to place the text in context (p. 32), to reconcile it with other texts by the same speaker (p. 32), to connect past and present by giving meaning to texts written in an earlier day (pp. 31-32), and to assume, at least until the contrary is established, that behind the text is a unifying mind ("the Court") speaking with sincerity and authenticity (pp. 34-35).

This type of legal analysis, says Vining, finds its true intellectual home within the family of the liberal arts, not the sciences. The "cousin disciplines" of law (p. 28) are those concerned with textual

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29. See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

30. E.g., Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Kennedy, *First Year Law Teaching as Political Action*, 1 LAW & SOC. PROBS. 47 (1981).

analysis: cultural history, literary criticism, certain kinds of philosophy (p. 28), creative writing (pp. 29-30), and art criticism (p. 41). Surpassing all of these as the law's closest living relative is modern theology. Vining professes some diffidence about proposing this analogy, on the ground that theology has become alien to the modern sensibility (p. 187). But he finds the similarities between theology and law to be compelling: lawyers are bound by custom to pay obeisance to robed figures of authority; to address them with ancient titles ("your honor"); to engage in elaborate supplications known as "pleadings" in which they "pray" for relief; to rely on the authority of the ages; and to adopt an attitude of faith towards the statements of the courts (pp. 188-90). Even the methodological evils are similar: both law and theology are plagued by the problems of legalism (treating texts as external objects of manipulation rather than internalized authorities) (pp. 196-97) and idolatry (confusing the signifier with the signified.)<sup>31</sup> To those who find the analogy between law and theology somewhat strained, Vining's response might be: to him who has ears to hear, let him hear.<sup>32</sup>

### C. *The Book as Exemplar*

*The Authoritative and the Authoritarian* speaks of meaning and authority in texts, and is itself a text that purports to be authoritative. Accordingly, the book presents complex issues of self-reference. If it is to be taken seriously it must in some sense stand as an exemplar of its own method. Otherwise it is contradictory and incoherent. By examining the book as a self-application of its own prescriptions, it may be possible both to understand those prescriptions better and to place in context some of the more unusual features of Vining's approach.

One might expect that a book about interpretation and authoritativeness would itself interpret and cite to other works. But Vining insists on being an oracle rather than an interpreter. He does not rely on the authority of others.<sup>33</sup> The authentication that Vining claims for his book is self-authentication, not some endorsement from without.

The task of self-authentication is the implicit project of the book. If the work is to be authoritative according to its own terms, it must be the authentic product of a guiding mind, and it must evoke willing assent in its audience. Thus Vining starts by providing every possible evidence that there is a single mind underlying his text. The thematic

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31. Pp. 198-99; cf. pp. 45-46, discussing the sin of the Hebrews in worshipping the golden calf.

32. Cf. *Matthew* 13:43. For another jurisprudential work ending on a theological note, see Roberto Unger's inspirational *KNOWLEDGE AND POLITICS* 290-95 (1981).

33. Vining's failure to situate his theory within the pre-existing intellectual landscape can be quite frustrating to those who, like the present reviewer, have tried to understand his views within the broader context of existing intellectual trends.

metaphors and organizing symbols that pervade the book give it a kind of literary coherence that would be lacking in any text drafted by a committee or farmed out to a research assistant. Moreover, the book is quirky and idiosyncratic in any number of respects, from the unusual (for legal texts) chapter headings ("Time," "Illusion," "Mind," etc.), to the strange system of footnotes (which Vining calls "amplifications"), to the bad poems that open and close the narrative. In many respects this book is an editor's nightmare; but there is no doubt that Vining stands behind it as the author. Nor is there any doubt that he means what he says. The book drips sincerity even to the point of sacrificing humor.<sup>34</sup> Thus at least the initial conditions for authority, as Vining defines them, are fully satisfied: the book is the product of a guiding mind that sincerely means what it says.

The book is equally self-consistent in its move from authenticity to authority. Vining's task is to evoke an attitude of willing, uncoerced assent in his reader. Consistent with this project, Vining does not engage in much argument in the traditional sense. For Vining, argument is distasteful because it carries the implication of wishing to coerce the assent of the reader in the context of an adversarial debate. We can expect, therefore, that in place of argument Vining will appeal to the readers' own experiences and values. This is exactly his method. He asks the reader to "search yourself" (p. 46), to draw on "personal experience" (p. 46), to consider the things that "everybody knows" (p. 178). The method is not a rationalist method, for Vining does not ask the reader to accept a system of postulates or restrictive assumptions and then to follow a chain of deductive reasoning. Vining appeals to the caring, wanting, hoping, desiring sides of people as well as to their rational capacities. While his reluctance to take on an argument is self-consistent, it weakens the persuasive impact of his theory. In the absence of argument, Vining's approach is likely to appeal primarily to people who were inclined to accept its premises in the first place. Vining might reply, with some merit, that argument of the traditional form rarely changes people's minds, because people will tend to credit the arguments that they were inclined to believe in the first place. Even so, Vining sacrifices some of the benefit that an argument gives to the uncommitted reader who wishes to work through the pros and cons of a position and arrive at his or her own independent view on the subject.

We might also expect that Vining's claim to authority will not make a rigid distinction between fact and value. Vining's theory does not split into normative and descriptive elements. It is all normative and all descriptive. Its concepts are value-charged. The attributes of the authoritative — seriousness, trust, caring, enchantment, and so on

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34. Vining approves of texts that are to be taken "seriously" and denigrates those that induce "laughter," "joke[s]," "smile[s]," and like reactions. *See, e.g.*, pp. 41, 42, 54, 55.

— are good things, while the “fearful opposites” (p. 23) that pertain to the authoritarian are equally bad. Vining’s style may be offputting to those schooled in the ostensibly value-neutral rhetoric of academic legal analysis.

Finally, we might expect that the book would show the kind of “internalization” that the author considers a prerequisite to the establishment of legitimate authority generally. The concept of internalization, as Vining uses it, implies the existence of an inside and an outside (pp. 179-84). Those who are inside are our “friends”; those left out are our “enemies” (pp. 21, 25, 59). True to form, this book clearly establishes an in-crowd and an out-crowd. The Supreme Court is In; the Interstate Commerce Commission is Out; courts in general are In; legislatures are Out; theology and literary criticism are In; sociological jurisprudence and law and economics are Out; and so on. In a subtle way the cliquishness of all this is part of its rhetorical appeal. Although Vining sweet-talks the reader with words of friendship, love, and commitment, implicit in his method, as in any splitting between ins and outs, is the danger of banishment and exile if one does not grant him the authoritativeness he claims. Vining shows scant compassion for his intellectual opponents. In one particularly unpleasant passage he gleefully tells three fables in which his enemies cause their own downfall. One of the characters is a Chicago School economist (Milton Friedman?) who retires to an “institution congenial to his principles.” The economist is shunned and ignored by his new colleagues. “[W]hen finally, in some desolation, he complain[s] to another member of the faculty that he ha[s] no friends, he [is] told, ‘Why don’t you go out and buy some’ ” (p. 118)? There is a meanness of spirit in this that detracts from the otherwise high moral tone of the book.

## II. SOME POSSIBLE OBJECTIONS

Any account of legitimate authority is subject to attack on two grounds: that it is overinclusive, in that it would make some things authoritative that are not so; and that it is underinclusive, in that it would exclude some things that in fact are authoritative. Vining’s theory can be criticized on both grounds.

His approach is overinclusive in that it fails to require that the authoritative be a command backed by some kind of threat. For Vining, a statement is authoritative if it is authentic and evokes an attitude of assent in the hearer. But any number of statements that we don’t think of as authoritative would satisfy these criteria. I could authentically say, for example, that “the sun will rise tomorrow,” and this may evoke the willing assent of the listener; but my statement is hardly authoritative. Even if we include the element of a command we have not narrowed the category sufficiently. I could say “come here!” to

somebody in a tone of command, and the person could willingly assent and come; but my statement would not qualify as authoritative if we both knew that there would be absolutely no consequences if the person did not come. What is necessary is that my statement be a command backed by some kind of threat. More than this is required, for standing alone a command backed by threats is nothing but the authoritarian. But it appears that some kind of threat is at least a necessary, if not a sufficient, condition for the authoritative.

Now Vining might respond that there are plenty of texts which we regard as authoritative that are not backed by threats. The *Oxford English Dictionary* may be the most authoritative popular dictionary of the English language, but surely it carries no threat if its definitions are violated. There are two answers to this. First, the word "authoritative" may be used in quite different senses as applied to a dictionary, on the one hand, and an exercise of political power, on the other. We might risk serious confusion if we equate the usages. Second, to the extent the usages are similar, it seems likely that there actually is some sort of threat or sanction lurking behind the dictionary example. When we say that the *Oxford English Dictionary* is "authoritative" we usually have in mind some kind of real or potential dispute about the meaning of a word. If the *OED* is truly authoritative, then one rejects its definitions at one's peril.

A more troubling objection is that Vining's theory is underinclusive. The most serious drawback is that the theory fails to account for how authority may be legitimate even when it is necessary to exert force against someone. Vining's theory rests ultimately on the hearer's assent. But what if the hearer does not assent? Surely it is still permissible and legitimate for the state to force the hearer to obey in some cases. A complete theory of the authoritative should both justify the application of state coercion in some cases and provide a means for distinguishing when coercion is permissible and when it is not. Vining's assent-based approach does not easily support a theory that justifies the application of force to an unwilling subject.

A second sense in which the theory may be underinclusive concerns its treatment of bureaucratic speech. Vining asserts that bureaucratic speech is not authoritative. But why not? Lawyers often treat the opinions of bureaucratic agencies with exactly the same techniques they apply to opinions of the Supreme Court. Elaborate bodies of precedent exist in many of these agencies, precedents which are cited by the parties and which appear to influence results. Vining's answer is that when lawyers cite the precedents of administrative agencies they are actually treating the text as strategic rather than authoritative (p. 13). But don't lawyers treat Supreme Court texts as strategic also? Isn't treating texts strategically basic to the lawyer's craft in an adversary system? The distinction between lawyers' treatment of agency

decisions and judicial opinions is not nearly as clear-cut as Vining would have it.

Moreover, Vining surely overstates the claim that Supreme Court opinions represent an authentic statement of a guiding mind. Vining's Supreme Court is today a bureaucracy and always has been to some extent. In any multi-member court in which one judge writes for others there is necessarily going to be a fair amount of intentional ambiguity, trading on points of doctrine, even out-and-out ghostwriting. All these forms of writing are inauthentic under Vining's system.<sup>35</sup> Vining attempts to explain away these inconvenient features of the Supreme Court. He suggests that the Justices do not actually engage in negotiation and compromise on substantive points of doctrine, but rather exchange qualifications, drop connections between ideas, adopt different analytic approaches at different points in the opinion, and so on (p. 112). Moreover, says Vining, the Supreme Court is small and therefore supports the presupposition of mind more readily than does a sprawling bureaucracy (p. 113). These attempts to meet the objection are pallid and ineffectual.

Even more troubling for Vining's theory is the legislature. Vining admits that legislatures display the classic indicia of inauthenticity. Statutes are drafted by bureaucratic staffs on Capitol Hill, by executive branch agencies, even by private lobbyists. Votes are traded as in a marketplace. Legislators act strategically or because they are in thrall to special interests. There is nothing of authenticity here. Yet everyone agrees that statutes are authoritative. They even trump the Supreme Court except where the Constitution (itself a statutory enactment) is involved. The fact that legislation is commonly perceived as authoritative suggests that political legitimacy may often be explained as a function of electoral accountability and majority rule. Yet Vining holds this traditional and widely accepted explanation to be an incomplete and flawed account of legitimate authority (e.g., p. 141). How, then, does Vining explain such a towering counter-example to his theory as the existence of a legislative body emitting authoritative commands? Amazingly, his answer is that we should fool ourselves into thinking the legislature is something that it is not, that we should indulge in an illusion, a "sleight of hand" (p. 123). We are allowed, says Vining, to "play one trick upon ourselves, to have a thing which does not make sense introduced into our thinking as if it did make sense" (p. 123). This is an astounding response by a scholar to a gaping hole

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35. A strict application of Vining's principles would seem to call for *seriatim* opinions of the type, still popular in England, that existed in the Supreme Court before the institution of the opinion "of the Court" during Chief Justice Marshall's tenure. The closest the Court comes to *seriatim* opinions today are those notorious cases where the Justices file seven or eight opinions agreeing with various sections and subsections of each other's opinions. But it is exactly such cases that have drawn the most fire as representing a diminution in the authoritativeness and value of the Court's work product.



in his theory.<sup>36</sup>

A final area in which Vining's theory may be underinclusive is its rejection of mendacious or deceptive speech. Certainly speech that is deliberately false and intended to deceive has few claims to being authoritative. But there are any number of half-truths, nondisclosures, overlookings, white lies, diplomatic circumlocutions, and the like that seem to be necessities in government and in life.<sup>37</sup> Many of these are ordinarily thought of as authoritative.

Government especially seems to be pervaded by these partial truths. The point can be illustrated by looking at Vining's Supreme Court. These days few would dispute that the explanations the Court gives in opinions are sometimes post hoc rationalizations rather than steps in an analytical trail leading from the facts to the judgment. Is the Court inauthentic because it presents justifications as explanations, or conclusions as reasons? Surely not. Few also would dispute that the Court willfully blinks at reality in many areas. In reviewing the constitutionality of state regulation of economic matters, for example, the Court regularly professes to believe the most incredible stories cooked up by state's attorneys to rationalize special interest legislation.<sup>38</sup> Either the Justices are remarkably dense or they are saying something that they do not really believe in these cases. Yet apparently such exaggerated deference to state legislatures fills some important function for a national court in a federal system of government. Finally, few would dispute that the Justices are well aware of the prejudices, predilections, and talents of the judges and courts whose opinions come before them for review. These subtle assessments surely influence the decisions in some cases. Yet the Court is restrained by the strictest rules of etiquette from admitting that such considerations have entered its thinking.

In all these cases the Court is engaging in deception. But such deception does not appear to reduce the authority of the Court and may actually enhance it by contributing to the smooth functioning of a system of separation of powers and divided government.

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36. Vining's willingness to engage in this charade does not mean that he approves of legislation. He recommends that courts resist and undercut statutes that make fundamental changes in the body of the law. "Getting around legislated words is usually possible in the stream of life if our attitude toward them is cool enough and we see them as mute obstacles. But like getting around a post in a stream on a canoe trip, this takes time." P. 126.

37. For a penetrating discussion of some of these forms of falsehoods, see S. BOK, *supra* note 14.

38. For examples, see Miller, *Interstate Banking and the Court*, 1985 SUP. CT. REV. 179 (discrimination against New York banks); Miller, *A Judicial Footnote Cemented the New Deal*, WALL ST. J., Sept. 13, 1984, §1, at 28, col. 3 (eastern ed.) (discrimination against vegetable oil producers). For a powerful critique of the Court's leniency in this area, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

## III. SELF-AUTHENTICATION

Vining's theory of legitimate authority may therefore be incomplete in several significant respects. Nevertheless, it does capture something important and valuable. Vining is right that at least some speech that is deceptive, manipulative, and insincere is less authoritative than speech that reflects what the speaker deeply believes. This appears to be true regardless of the content of the speech. Even if the speaker is saying something that would ordinarily command our assent, we are much less likely to accept the statement as authoritative if we know that the speaker did not actually believe it. Vining's major contribution may be his emphasis on the importance of authenticity in the establishment of legitimate authority.

The connection between the speaker and the spoken is an aspect of the broader phenomenon of self-authentication. Every time a person makes a statement, the question arises as to whether the statement is consistent with itself or with the life of the person who made it. If it is, then the statement is self-authenticating in some sense; if not it is self-refuting. There is a remarkable amount of interest in this issue of self-authentication, both at the level of theory and that of popular culture. The issue grips the imagination in a fashion that tends to substantiate Vining's emphasis on the importance of authenticity and authentication.

Consider first instances of self-refutation. Texts may refute themselves. At issue is not the problem of internal inconsistency, as when an author asserts "X" at one place and "not X" elsewhere. The subject here is paradox. The Cretan who says that Cretans always lie and the barber who claims to shave everyone who does not shave himself both make statements that have a bizarre quality of self-refutation. If the Cretan tells the truth then he lies; if he lies then he tells the truth. If the barber shaves himself then he doesn't shave himself; if he doesn't shave himself then he does. These kinds of paradoxes occur most often in philosophical or religious speech. The early Wittgenstein, in attempting to show that the propositions of metaphysics were meaningless, ended up proving that his own statements were equally meaningless.<sup>39</sup> Religious statements become paradoxical when they describe a God that is asserted to be ineffable.<sup>40</sup> The paradoxical quality is particularly acute in Buddhism because of its rejection of dualistic thinking. To say that dualistic statements are false is to self-refute because the statement itself is dualistic. Buddhist texts, particularly

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39. In the end the early Wittgenstein advised silence on the problems of metaphysics: "whereof one cannot speak, thereof one must be silent." L. WITTGENSTEIN, *supra* note 3, at § 7.

40. This difficulty is especially pronounced for statements of a primitive or fundamentalist variety. Sophisticated modern theologians are well aware of the problem of God's ineffability, and attempt to account for religious statements in a way that does not entail their being descriptions of God. The actual function of religious statements, however, then becomes a problem of considerable complexity.

those of the Mahayana school, tend to address this problem by deliberately indulging in the wildest paradoxes. There is something eerie and fascinating about the underlying structure of these instances.

Self-refutation also can occur when an author's own life or behavior contradicts propositions that the author would have others believe. Sometimes an author asserts that the system he or she propounds is esoteric and can only be fully understood by those who qualify, either by virtue of their status at birth or through undergoing life experiences or rituals of initiation. Marx, for example, was of the opinion that a person's thoughts and beliefs were ineluctably determined by his or her class position.<sup>41</sup> Yet Marx himself was a solid product of the bourgeoisie who by his own tenets should never have been able to come up with the theory he proposed. Freud stressed the powerful impulse to banish uncomfortable emotional material into the unconscious and the equally powerful resistance to allowing that material to become conscious in the process of psychoanalysis.<sup>42</sup> Yet Freud himself arrived at many of his theories through what he asserted was a successful self-analysis, something that would be virtually impossible according to the tenets of his own theory.<sup>43</sup>

Often self-refutation takes a particularly spectacular turn when some individual is exposed doing exactly what he or she claims one should not do. In a recent case the author of a book on ethical philosophy forged the signature of the Chairman of the Harvard University Department of Philosophy on a letter of recommendation to the publisher extolling the book's virtues.<sup>44</sup> Every year in popular culture there are many such cases: the Swami who advocates sexual abstinence caught sleeping with his secretaries; the religious fundamentalist confessing an extramarital affair; the right-wing congressman admitting to alcoholism and homosexuality; the advice columnist disclosing the breakup of her marriage; the health food advocate dying young; the faith healer afflicted by disease; the fitness expert struck down by a heart attack while jogging; and so on. The popular fascination with these events suggests that there is a powerful intuitive connection between a person's life and the content of what he or she is saying.

There is a special poignancy to cases of self-refutation occurring long after a structure of legitimacy has been established. This is prob-

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41. See K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY* (1938); K. MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859).

42. See, e.g., 16 S. FREUD, *THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 286-302 (1963).

43. Much of the interest in Freud's account of his self-analysis in *The Interpretation of Dreams* stems from this tension in his thinking.

44. T. COONEY, *TELLING RIGHT FROM WRONG* (1985). The book was apparently quite well done and would have been accepted even without the recommendation. For a favorable review, see Hook, *Would it Destroy the World?*, N.Y. Times, June 30, 1985, § 7 (Book Review), at 13, col. 1.

ably part of the explanation for the public fascination with the Dead Sea Scrolls during the years following their discovery. It was possible that the Scrolls contained some record of an early Christian community, or at least some account of primitive Christianity different from that set forth in the gospels.<sup>45</sup> A more recent example from the field of religion is the discovery of early Mormon documents that cast doubt on the authenticity of Joseph Smith's revelation.<sup>46</sup> Or consider the case of Ludwig Wittgenstein, who after heeding his own injunction about silence for several years returned to the world of philosophy and refuted his own prior work with tremendous intellectual power.<sup>47</sup> In all these cases the reality or threat of a belated self-refutation presented those working within the established tradition with the problem of how to maintain their system of beliefs and values in the face of the new evidence undercutting some apparently fundamental tenet of their faith. It is noteworthy that in none of these cases was it even conceivable that the self-refutation would dissolve the existing institutional structures of belief and value.<sup>48</sup> The resiliency of institutions to this kind of shock suggests that over time institutions develop claims to legitimacy that become largely independent of the authority of their founders.

Interesting features are also found when we examine cases of self-authentication as opposed to self-refutation. There is, first, the phenomenon of textual self-authentication explored above in the specific context of Vining's book.<sup>49</sup> There is also the self-authentication of a life lived in conformity with the author's stated philosophy. Plato understood the importance of the fact that Socrates drank the hemlock instead of escaping as he could so easily have done.<sup>50</sup> If Socrates had escaped, his philosophy would not have changed in any verbal sense. But it is clear that the power of his thoughts would have been diminished if he had failed to live up to his beliefs when put to the ultimate test.

Self-authentication is especially significant in religious contexts in which a prophet or sage claims to have received a message from God.

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45. See generally L. MOWRY, *THE DEAD SEA SCROLLS AND THE EARLY CHURCH* (1962).

46. See Lindsey, *The Mormons — Growth, Prosperity and Controversy*, N.Y. Times, Jan. 12, 1986, § 6 (Magazine), at 18. One of the letters reported that the Angel Moroni appeared to Smith in the form of a white salamander, possibly indicating that the founder of Mormonism dabbled in magic before starting his career as a spiritual leader.

47. L. WITTGENSTEIN, *supra* note 5.

48. As one leading Mormon put it, the newly discovered letters "have no real relevancy to the question of the authenticity of the church or the divine origin of the Book of Mormon." Lindsey, *supra* note 46, at 42, col. 4. According to another Mormon, even if honest scholarship proved that some Mormon doctrines were faulty, "the church could adjust to it and perhaps even be strengthened by it." *Id.* at 46, col. 2.

49. See Part I.C *supra*.

50. See PLATO: *THE COLLECTED DIALOGUES* 27 (E. Hamilton & H. Cairns eds. 1961) (Crito).

Many of the supernatural trappings of religion are intended specifically for the purpose of authenticating the leader's claim. Here we see such phenomena as miraculous births; astounding displays of early intellectual or spiritual prowess; performances of healing miracles and other demonstrations of supernatural power; and amazing incidents surrounding the leader's death, such as incorruptibility or resurrection. Martyrdom has a special significance in religious self-authentication as well, for it is the ultimate sign of faith on the part of the believer. For primitive Christianity the martyrdom of Jesus presented both a problem of self-refutation and the potential for self-authentication. How could the Son of God be delivered into the hands of man and killed? Some of the core institutions of Christian theology — the Resurrection and the tenet that Christ died for the sins of humankind — trace directly to this problem of self-reference.

The beliefs and events described immediately above differ from each other in any number of respects. They do, however, seem to point to the special importance of the relationship between author and text. Professor Vining's book brings that relationship into the forefront. The book is sweeping, ambitious, original, and unflaggingly interesting. It proposes a new and worthwhile approach to the problem of political authority — one that is not free of problems, but that nevertheless merits careful consideration by those interested in pondering the difficult and perplexing question of the relationship between texts that are authoritative and legitimate and those that are merely authoritarian.