Meaning What You Say

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MEANING WHAT YOU SAY

JAMES BOYD WHITE

Only he who knows the empire of might and how not to respect it is capable of love and justice.
—Simone Weil

In this essay I talk about a wide range of themes in the hope of establishing a connection among them: writing (including the teaching of writing) and what is at stake, for the writer and the rest of the world, in doing it well or badly; certain forces in our culture—hard to define and understand—that tend to reduce or trivialize human experience, indeed the very value of the human being; the conception of the human being, not trivial at all, that underlies our practices of self-government in general and constitutional democracy in particular; and the idea of justice at work, or potentially at work, in our legal system and its realization—or nonrealization—in the opinions of our courts, especially those opinions of the Supreme Court that elaborate the law of the First Amendment (which of course deals with both speech and writing). I think that these issues, or most of them, are present in every act of speech or writing, every engagement with language. As I hope to show, in each such instance it is a crucial question whether, and in what sense, the speaker or writer can be seen to mean what he is saying.

A preliminary word about the epigraph: it is taken from Simone Weil’s famous article “The Iliad, Poem of Might,” in which she reads that great poem as simultaneously defining and deeply opposing the human desire to dominate, enslave, and destroy other human beings—to use force or might to impose one’s will upon them. As I have just suggested, in my view this desire can be present, and destructively so, not only when people use spears and guns and bombs, but in our language, in the expectations we bring to speech and writing. One can deny humanity just as genuinely in the way one speaks as in the way one acts, and organized evil action always depends on forms of thought and speech—ideologies, habits of mind and language, ways of imagining the world—that deny or trivialize the reality and value of human beings, human experience.
DEATH AND LIFE IN SPEECH AND WRITING

I shall start with the writing of the very young, and with the teaching of writing, using some actual passages of student writing collected by David Holbrook in England during the 1960s. The writers are young boys of about twelve, but the questions their writing suggests are present as well in the work of more mature writers, in many fields. Here is one passage; ask yourself how you would respond to this paragraph, and to the boy who wrote it, if you were his teacher.

We started out on a beautiful morning with a bright sky above us and a cooling south wind. Nature was in her full glory, the air smelt sweet, birds were singing loudly, squirrels scampered up trees at our approach and rabbits' tails disappeared down burrows at our presence. Lambs jumped around friskily tormenting their mothers for nourishment. Cows lay lazily chewing their cud among the buttercups. A little foal galloped alongside her mother on its spindly legs. In another field a ploughman plodded along behind his horses furrowing the field. Butterflies fluttered from flower to flower.

And so our journey went on in the presence of Nature's glory. Oh what a wonderful thing to be alive!

At Langham we refueled ourselves and continued our journey.

As a teacher you would almost have to regard this as unexceptionable writing, indeed as very good: it is grammatical, clear, and full of specific detail. It has a beginning, middle, and end. It has the elegance of alliteration and manifests a certain undeniable energy. What more could you want, especially from a twelve-year-old child?

But look again. There is a sense in which this paragraph is simply a series of unelaborated clichés: beautiful morning, bright sky, cooling wind, nature in her full glory. These are phrases the writer has heard a hundred times, here replicated in their baldest form. He does nothing to make them his own. As for the details we are so eager to praise, in fact they are not organized into anything but consist rather of a list, a list of creatures—birds, squirrels, rabbits, lambs, cows—each doing what is expected of it—singing, scampering, disappearing, jumping, chewing. What relation is established among these actors and activities in this paragraph? What was the relation among them in the real world? There is no shape or sequence here, no sense of how these things actually happened, or in what order: there is no composition. When you try to imagine the scene, it has some of the quality of a Disney cartoon—in what other genre would rabbits' tails be constantly disappearing down burrows as the boy walked along? And how many rabbits do you think the boy actually saw, how many of them went down a burrow, and how did he know?
Likewise the lambs: how many did he see, and how many of them were “jumping friskily,” how many “tormenting their mothers”? Did he in fact see the buttercups in which the cows were lying? And exactly where were the flowers between which the butterflies were fluttering? In fact, how confident are you that this boy actually took the walk he described? Maybe he just stayed home that afternoon and wrote out the paragraph before dinner.

Obviously I don’t mean to pick on this twelve-year-old boy. If there is something troubling here, it is not with him but with the expectations he has been trained to meet, the ways he has been rewarded, the things he has been taught—something wrong, that is, in the world that is shaping him. But in his writing there is a quality simultaneously deeply false and deeply familiar, a quality that shows up in college essays, law school briefs and memos, official publications of all kinds, from university catalogs to EPA releases to judicial opinions, and I think it presents a danger to us all.

Look at the next to last paragraph, where the boy says that it is a wonderful thing to be alive. Of course it is, but this language invites us to ask what kind of life he reflects here: what kind of life as a walker in the woods, what kind of life as a writer? How wonderful is that? And what are we to make of the shift in tone in the very last sentence, from the self-consciously poetic to the utterly matter-of-fact—what does that imply? Has he brought his highly imitative, and in a deep sense insincere, performance to a close just a sentence too early?

Compare the following, also from a twelve-year-old boy:

Turning the last bend we came to a halt by the river. The village at this time of the year is so unfrequented. Even so, a number of small boys were dipping jam pots into the river to catch minnows. One had caught a crayfish. We propped our bicycles by the buttress at one end of the bridge, and turned round to look at the memorial cross cut in the hill. Then riding on up the opposite side of the valley, we noticed a flock of house-martins wheeling in clusters above a farmhouse. They could not have been in England long, even though most summer visitors arrived early this year. Underneath the overhang of the farmhouse roof a row of mud nests could be seen. Some hung down limp and useless; others were inhabited by sparrows; but a few remained in a fit state for the martins. The slope from then on grew steep—so much so that we stopped for a moment at one bend and rested our bikes on the bank. We were now high above the village, and even the conspicuous white rumps of the martins could hardly be seen. Where the hill was too steep for farmland, Scots pines...
were growing. On the move again we emerged from among them into the sunlight at the top of the hill.

What is the difference between these two pieces of writing, and does it really matter? One way to approach that question is to try to look through the writing to the mind of the boy producing it.

Suppose the first writer were your own son: What would you think he was doing when he wrote this? Would you be bothered by its clichéd and empty quality? Perhaps not, I imagine; he is after all succeeding in school, meeting the expectations others have of him, and doing so with great skill and apparent ease. The ability to whip off a paper that gets an A is one that, with certain transformations, will enable him to do well in college or law school, and beyond that in life. He is a successfully socialized person.

Do you have a worry that his mind is being marked by the clichés he so cheerfully uses, that it is learning to run in utterly predictable channels? This is a real question, but I think probably not, or not yet: he has learned how to write stuff he does not mean, could not mean, but, as I imagine him, he knows that perfectly well. This paper has nothing to do with what are to him the important things of life, nothing indeed to do with what happened on that afternoon, whether he took the walk or not. He may write in clichés, but that does not mean he experiences life in that way: the walk, if he took it, may have been full of interest and importance to him, the occasion for observation and reflection and questioning—as may have been whatever he did instead of taking the walk, if he in fact skipped it. The energy of the boy shines through in the exuberance with which he dishes up what his teacher will like, and he is probably in fine mental and intellectual health. The response to his situation he achieves in this writing, false as it is, may be both intelligent and sensible.

That is all true, yet there is something missing here that is present in the second passage: the capacity to write in a real way about his experience, to put on paper, out in the world where others can see it, where he can see it, some of the processes of mind—of observation, of feeling, of imagination and understanding—in which he actually engaged. The second writer can do some of this. You really do know something about the nature of his experience, and about his capacity to think about it as he renders it into language. "Underneath the overhang of the farmhouse roof a row of mud nests could be seen. Some hung down limp and useless; others were inhabited by sparrows; but a few remained in a fit state for the martins." You know what happened, in what order, and the position from which he observed what he saw. You know something about him, for he is present in his prose.

This is writing that he can mean. And the fact that he is doing it in school, under compulsion, does not keep him from creating a passage with qualities
of immediacy, authenticity, and care—a passage that is of real significance to him and perhaps to others.

I have said that one cannot confidently infer from the first passage that the writer sees the world in clichés. This may be a way of talking he has learned in school, a language he must speak to succeed. Perhaps he can do it without much effort or sincerity, and hence without much consequence, beyond the important fact that he is not learning to do what the second writer achieves.³ But consider this passage:

On my return from school on Wednesday afternoon, my father invited me to accompany him on a visit to the Zoological Gardens. I answered in the affirmative, and we at once boarded a tramcar bound for the city. Here we caught the omnibus, and soon arrived at our destination.

We had heard such a lot of talk about the new polar bear pit, we decided to visit this modern structure first of all. After a good discussion on this piece of workmanship, we made our way to the Monkey Temple. Here we had a gay half-hour watching the peculiar antics of the monkeys, who seemed almost human in some respects. We then partook of a frugal tea, and continued our tour by a visit to the noisy parrot house. This was very interesting despite the deafening shrieks of the brightly coloured birds. Next came the most exciting time of our excursion—a call at the Ape House. Alfred, an ape, and Adam, a baby chimpanzee, were the chief entertainers. On looking at the clock we saw that it was twenty minutes past seven, so we concluded our journey by viewing the humming birds.

We soon arrived back at our abode, and I retired to bed, feeling that I had gleaned much knowledge during the evening.

What would you think if this were the work of your nephew say, or some other child in whose welfare you had an interest? I read it very differently from the first passage: here the boy is not simply manipulating empty forms to get his teacher off his back, but seems desperately anxious to manage forms of speech that are utterly dead. He is conforming to rigid and empty patterns, perhaps of his father, to which he has granted authority. He speaks in terms of conclusion—“good discussion,” “gay half-hour,” “frugal tea,” “exciting time,” “chief entertainers”—which he does not elaborate, does not define, by reference to his experience. We cannot know what these words mean. It is as though for him these things must be so. If only I can speak this way, he seems to say, I will be safe. Here there is no sense of a cheerful cynicism or manipulation but
a deadly serious need to acquire rigid, dead, hopeless forms of thought and speech, and as I imagine it not only in this paper, and in school, but in life more generally. I have difficulty imagining this boy rushing out into the schoolyard after class with a joyous shout, ready to engage in life after hours of imprisonment. He is building his own prison.

Just to complete a pattern, consider the following:

When I leave school I am going to be a comosole traveler [that is, a commercial traveler, British for traveling salesman], I would go to all sorts of shops and see what goods they want. I would go to the sweet shops espeshly. Why I would like to be a comosole traveler is because you get good money and on Sunday you can keep the car and go out to the seaside free. I have a long time to go before I leave school yet because I am only ten. My mother wants me to be a comosole traveler as well. At first my mother wanted me to be a macanicle engineer. She said you can pay up for a car weekly the boss would take it out of your wages but I would rather get a car free. If I would get the sack which I most probably will I would like to be a coal miner and dig coal from the pit. Theres one thing I would not like to happen to me or eney miner in the mine is the coal to fall in. What my mother thinks of it is too dangerous but I like using my muscles of course you have to have only a vest and trouses on. You get good mony on it because it is a dangrous job of course.

This writer is not in a prison of his own construction. He does as he will with his words. Neither spelling nor grammar is any restraint upon him. He expresses the run of his mind directly and authentically—this is not made up; he means it all—and it is all very attractive and appealing. As I read it, I find myself liking him, caring what happens to him, more really than any of the others.

Here we come to another aspect of the world in which all these boys are working, and one with which the first writer, for all the emptiness of the exercise, deals very well indeed. Although the last writer is not in a prison of his own imagination, of internalized expectations, he is in a prison of another kind, a social prison: unless he manages to learn how to spell, and to compose grammatical sentences, and to put it all in an order that meets the cultural demands of the classroom, he will have very limited opportunities in the world, not only in school but in the life that school can lead to. He will indeed “get the sack,” as he so cheerfully and touchingly foresees. This is one reason I find the passage so affecting: here is this boy, full of life and energy, full of appeal—where will he end up?
Think of these passages now from the point of view of the teacher of writing. You need to teach your students, in law school as in elementary school, how to master the forms of speech and writing that are authorized by the culture to which you are introducing them. Yet in both cases it is common for this to be an experience for the student, and sometimes the teacher, that alienates the student from his own mind and experience as he struggles to produce a simulacrum of expression—something that looks like something he ought to write rather than something he can actually mean. He learns to produce falsity and is rewarded for it.

It may be a sign of a certain kind of psychological health that writers like the first succeed in objectifying so completely the expectations they are meeting, reducing it all to an exercise, for in this they are distancing themselves from the empty. But this boy’s situation is in its way almost as tragic as that of the last student discussed, if it is true that he never learns to use language in a formal context—the class, the courtroom, the political speech, the academic article—to say what he means. Or, to put it another way: if he never gives himself a mind sufficiently engaged with life to be capable of meaning something of his own—something grounded in his distinctive experience and imagination—in the first place. He may in a sense succeed in life as a manipulator of forms, but that is its own species of lifelessness and despair.

The worst outcome, well known in college and law school and beyond, is represented in the third writer, who is so taken over by the forms that he uses that he is incapable of meaning anything except his desire to be defined by them. The consequences for him are serious indeed: a kind of emptiness of life, deadness of mind, that deprives him of what should be his birthright as a human being, namely, his capacity to use language to describe his experience and claim meaning for it, to express his own way of imagining himself and his world, to form real relations with others. He is the prisoner of the expectations that surround him, and this is in a real sense to be the prisoner of the empire of might. When speaking and thinking in such ways, he cannot be capable of love and justice, for he denies his own humanity—the reality and value of his own experience, his own mind—and this is necessarily to deny the humanity and reality of others as well. It is upon such deadness of mind and self that the propaganda of tyranny utterly depends for its force and power.

As teachers we struggle to help our students master their forms of expression so that they can turn them to their own purposes, transforming them when appropriate, placing them in constructive relation with other ways of talking, and so on, thus producing pieces of writing that are both formally correct and actually meant by the writer—and in the process acquiring a new sense of what they can mean, a new sense of the possibility of expressive and active life, indeed a new sense of the self. I sometimes sum up what I am
looking for in the teaching of writing with the question “Knock! Knock! Anybody home?” If there is a person there, in the prose, we can readily deal with the problems of form and diction, the expectations of the audience, and so forth; if not, the struggle for the student is to try to change that, to find something to write that he can mean.4

Polonius and Hamlet

How far beyond the world of twelve-year-old English boys do the problems suggested by these passages run? Very far, I believe. Think for a moment of Polonius in Hamlet, who gives his famous advice to his son Laertes:

There; my blessing with thee!
And these few precepts in thy memory
Look thou character. Give thy thoughts no tongue,
Nor any unproportion’d thought his act.
Be thou familiar, but by no means vulgar.
The friends thou hast, and their adoption tried,
Grapple them to thy soul with hoops of steel,
But do not dull thy palm with entertainment
Of each new-hatch’d, unfledged comrade. Beware
Of entrance to a quarrel; but, being in,
Bear’t, that th’ opposed may beware of thee.
Give every man thine ear, but few thy voice;
Take each man’s censure, but reserve thy judgment.
Costly thy habit as thy purse can buy,
But not express’d in fancy; rich, not gaudy:
For the apparel oft proclaims the man;
And they in France of the best rank and station
Are most select and generous, chief in that.
Neither a borrower nor a lender be;
For loan oft loses both itself and friend,
And borrowing dulls the edge of husbandry.
This above all: to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man.
Farewell: my blessing season this in thee!

(Hamlet 1.3.57–81)

One of the main points of this speech is that Polonius does not mean it; in a sense no one could mean such a string of platitudes, all in a sense “true” but
adding up to nothing. When Polonius says “Give thy thoughts no tongue,” he is advising Laertes never to say anything he can mean, as he himself cannot mean this series of phrases that might have come from sixteenth-century advice books. He speaks of “friends,” but what kind of friendship could be expressed or maintained in such a language, between Polonius and Laertes—or between the person he is assuming Laertes to be and anyone else? This is a world of calculation and management, all expressed in terms that have a pretended not an actual meaning. The end of the passage gives it all away, making suddenly visible the secret of what he has been saying: “to thine own self be true” is an impossible phrase in this passage, for neither Polonius nor Laertes is in this speech imagined as having a self. You would not want to be spoken to in such a way by anyone, especially I imagine your father or mother.

What is Polonius really saying about how to live life, his ostensible subject? For that you have to turn to his conduct, including his use of Ophelia as bait to test Hamlet's madness—“I'll lose my daughter to him” (2.2.161)—and this shows him to be far worse than a purveyor of platitudes. Not the genial fool he is often thought to be, Polonius represents real evil, and evil of a highly particular form: he is utterly untrustworthy because utterly incapable of trust. In the quoted passage he offers his advice to Laertes as if he were a wise and kind old man, passing on the benefit of his wisdom, such as it is, to his son; this in turn implies a certain view of his son, as capable of understanding, of remembering, of following his advice, as a person who can and will respond to what he is saying. But this view is shown to be a lie when Polonius later sends spies to follow Laertes and report upon him. The platitudes are foolish, but they mask, as platitudes often do, something much more serious, both morally and psychologically. Polonius cannot mean what he says for he is not capable of coherent meaning. You could not listen to anything he said with the attention you accord someone you respect. There is in a real sense no one there.

Whether—and how—one can mean what one says is in fact a large theme of the play as a whole, perhaps its largest theme. This is what Hamlet struggles constantly to do, and finds impossible. He can never quite find a way to imagine the world, and himself and others within it, in such a way as to make possible coherent speech or intelligible action. He compares himself to the actor who is able to express a powerful lament for Hecuba in the play he is rehearsing and asks, “What’s he to Hecuba, or Hecuba to him that he should weep for her?” Think what this actor would be able to say, Hamlet goes on, if he had my real-world cause and ground for speech. But Hamlet can neither speak nor act effectively; it is not so much that there is no “objective correlative,” in Eliot’s famous phrase, to his internal life, as that his internal life itself has an incoherence that makes it impossible for him to ground action.
and speech upon it. Instead he becomes something of an increasingly despair­ing commentator on the events that thrust themselves upon him.

One of the major reasons for his failure is that he is surrounded by false speech: in Claudius, pretending to be a substitute father but eventually order­ing Hamlet’s murder; in Polonius, whom Hamlet understands and mocks with meaningless speech of his own; in Gertrude, who cannot face what she has done; and in his “friends” Rosencrantz and Guildenstern, who are the mur­derous agents of Claudius. He does to Ophelia what the world does to him, torturing her with inconsistent and unmeant claims, and drives her into despair­ing insanity. It is really only Horatio, who knows how to be silent, modest in his claims, who is solidly reliable—who can mean what he says—to whom Hamlet can speak. Our experience of this relation of trust in an untrustwor­thy world is, I think, the reason why Hamlet’s famous closing words are so deeply touching:

If thou didst ever hold me in thy heart,
Absent thee from felicity awhile,
And in this harsh world draw thy breath in pain,
To tell my story.

(5.2.333–36)

TEACHING WRITING

One question that naturally arises from a reading of the student papers about the walk in the woods (“nature in her full glory”) and the trip to the zoo (“gay half hour”), and the passage from Polonius as well, is how one might help one’s students, and in the process oneself, avoid such unsatisfactory forms of speech and learn to meet the dangers, for oneself and others, that they represent. In the terms I have been using, the idea would be to help our students become capable of “meaning what they say.” This would require both the develop­ment of capacities of mind that would enable them to have something to say, something of their own and not merely replicative of others, and at the same time an increased understanding of the languages they use and the arts of using and transforming them. How is such an education to proceed?

There can be no easy or schematic way of talking about this—just as there cannot be about good judging, or good lawyering, or good writing, or any other valuable human activity. But it is clear that a lot of what we do, in law school and college alike, cuts the wrong way, in the direction of teaching people how to manipulate forms, meet expectations, please their audiences, without much regard to whether the student can possibly mean what she says. I do not mean that it would be good for the student, assuming she could do so, simply
to dump out on the page everything that went through her mind, however empty, or vague, or clichéd; an essential part of the task is learning to think oneself to the point where one actually has something valuable to say, or do. But this is vastly more likely if from the beginning the student has some sense that it might be possible—should be possible—to say something that she means. At its best, this kind of teaching would move in the opposite direction from the forces of trivialization I have mentioned, leading to an increased and increasing sense of the value of the human being, the human mind, and human speech.

What would such teaching look like? How might one try to teach others, or to learn oneself, how to resist the clichés—the dogmas, doctrines, received ideas, unchallenged metaphors, standard phrases, hackneyed truths—that populate the mind, in their own way constituting an empire of might? How to reshape one’s linguistic inheritance with the aim of achieving an individual expression or statement?

Here I offer a brief account of one especially powerful effort to engage in this kind of teaching, of which I myself had experience, namely, the famous composition course designed by Theodore Baird and taught at Amherst College in the middle years of the twentieth century.5

Here is the first assignment that greeted one group of freshman, a couple of years after I graduated. I hope you can see it as addressing the themes and questions of this essay:

Assignment 1:

You are now a member of a community, a social organization, or rather of a number of communities (Amherst College, the freshman class, a particular dormitory, etc.). This world is often described as artificial and secluded, an Ivory Tower. (The origin of this metaphor is obscure.) You may yourself believe, you may feel, that you have left behind the Real World. After all this is “only” a college, you are “only” a college student, this is “only” a course.

In the form of an essay deal with the following questions:

1. What is real about the Real World?
2. How do you know when you really are in the Real World?
3. If you have been in the Real World, why did you get out of it?
4. If you are outside the Real World, how do you get into it?

Finally, define “The Real World.”

You can see how this works. The assignment makes the student’s own language an unavoidable problem: “The ‘real world’? What can that mean? I use
that phrase all the time, but what on earth do I mean by it, does anybody mean by it? How can I use it now?” The student thus faces this part of his inheritance, which he has always used thoughtlessly, and sees it as a problem for analysis and reflection, thought of a kind he can barely imagine. At the same time, the assignment makes the student’s actual experience of life a problem too: “Where actually am I when I am at Amherst College? In what community, or set of communities? And what is this place really—the buildings, the grounds, the people? A set of social and verbal practices? What are its boundaries? How can I possibly talk about it?” With respect to both the “real world” and his new set of communities, the “Ivory Tower,” the student will find himself saying, “I thought I knew, but I don’t. What can I possibly say?”

None of this will look like any paper assignment the student has ever seen before. There is nothing in it from which he can devise or figure out a set of expectations that these questions are designed to make him try to meet. There is no right answer. The student who wrote the first excerpt examined earlier (“nature in her full glory”)—who can in fact stand for all of us—would have no way of dealing with such an assignment. These questions do not call for a performance of the kind the student has been trained to make; rather, in their interest, originality, and difficulty, they suggest possibilities toward which the student might direct his energies. They are amusing, full of confidence and intelligence; their function is to create a vacuum it is the student’s task to fill. He is asked to speak to his reader as though he too is a person and a mind, capable of being interested and bored—as though his writing, like these questions, will achieve its completion only by the activity of reading by another intelligence. The task is to find a way to respond to the assignment with something like thought, something like an effort to mean what one says, and this is likely to seem very foreign indeed.

Here is the second assignment:

**Assignment 2:**

This is a genuine student’s paper submitted in a writing course at Harvard in 1893.

**The Paradise of Books**

*Books, I often think, are the best thing life has to offer us. No where else do we get pleasure that is so great and so lasting, that can charm us still, whatever our condition of mind and body. There we meet friends and lovers such as reality cannot acquaint us with, and adventures which furnish excitement without toil, and arouse sympathy without suffering. All the higher emotions, so incongruous*
with matter-of-fact existence, may be serenely enjoyed in the realm of poetry, and all the speculative flights which transcend cold common-sense may soar undisturbed in the aether of philosophy. As long as a man has eyes to read and brain to understand, he may feel sure of one unfailing resource which can amply compensate the strokes of fortune.

We call this single paragraph a Perfect Theme. (There is also the five paragraph theme, using the structure: Introduction, Body, and Conclusion.)

[One] reader’s comment on this Perfect Theme, “Simple and direct,” now seems all wrong. It is not simple: look at the sentence structure and vocabulary. It is not direct: who is it who could speak in this tone of voice and yet be considered direct? Can you imagine anyone speaking these sentences to anyone else under any circumstances? Is this opposition of books and literature to reality and matter-of-fact existence and cold common sense a simple one?

What comment do you make on this Perfect Theme? What adjectives do you apply to it?

Define on the evidence of this example the Perfect Theme.

What is the alternative to such writing? How do you proceed if you are going to write really simple and direct English? Where do you begin? What models, what authors, what books, for simple and direct writing do you have in mind? What books do you think of when you think of writing in the Real World?

This assignment makes the problem of formal writing explicit: the quoted passage is in a sense perfect English, flawlessly written with complete confidence, but it is in a more important sense perfectly empty. This is an antique version of the prose the student has been taught to admire, to emulate, but here it is held out as the object of scrutiny, a problem of some sort.

How is he supposed to speak in this paper, then? In a twentieth-century version of this perfect theme? What is expected of him?

In the third assignment, the student’s attention is drawn to the nature of his own language, the way he has learned to speak, in the following way.

Assignment 3:
This opposition between the Ivory Tower and the Real World becomes complicated when we consider how we ordinarily speak of education and of our private experience. A college, we know, protects the student from the outside world while it prepares him
for it. A student's fundamental beliefs are challenged, yet no belief ought to be offered as a substitute. Education is a purely academic endeavor, yet it also assumes a concern in those areas beyond the classroom. Student and professor join in the selfless pursuit of truth, while the aim of all our efforts is individual commitment. Education is learning how to use symbols, but the man who does not participate in the reality going on around him is uneducated. Both student and teacher pursue the ideal while they shape and are shaped by the real. And so on.

The paradoxes appear wherever we generalize. Amherst College should provide a controlled environment where inequality and competition and their inevitable disappointments do not exist, where at the same time the forces operating in the real world should have their full effect. Behavior taken for granted off the campus cannot be tolerated in our society, yet everyone has perfect freedom to follow the dictates of his own conscience. At the same time that societies are formed to make music and produce plays and take part in real politics and support particular religious organizations, everyone should be free to be himself. Team spirit is most important, yet the man we respect goes it alone.

Write an editorial, as if for the Student, in which you deal with this perplexing conflict. Do not be afraid of your own clichés and metaphors. The object here is to get at a vocabulary for talking about such matters. Everyone has at his command a large and useful stock of words. Give it an airing.

Here the student is asked to look simultaneously at his experience of the institution he has joined—not only Amherst College but the whole world of higher education—and at the clichés he is given by his culture as the language in which the life of that institution is to be imagined and talked about. For the lawyer it is easy to see similar questions being asked of the law, and the institutions and practices that make it up, from trial to brief writing to the idea of a court or legislature in the first place. Is one to imagine into existence an empire of might, thought about in the language of empire? What other possibility is there, and how is it to be attained?

This series of questions asks the student to begin to come to terms with what I have been calling the empire of might, in a form in which he has actually known it, namely, in the expectation that he will produce in his writing a simulacrum of something, a performance to be evaluated by how thoroughly it complies with rules of composition and grammar, of self-presentation, just as he might be judged by how appropriately he dressed or by his
table manners. The collection of clichés articulated in assignment 3 is just a sample of what we all have running in our head, and the challenge of the assignment is that you think about this material and not merely deploy it as the Harvard student deployed the material of his world. The hope implied here, and reiterated every assignment for a year, is that the student can discover that he has something to say that he can mean, something he can say in his own way; that he has—that he can give himself—experience worthy of the attention of another; that he can have interests and values and a style of his own—in short that he can be a grown-up individual person, as responsible for what he says as for what he does, making himself worthy of his own respect and interest. To put it in the terms suggested by our reading of the passages with which we began: the student is invited—urged, pressed, leaned on—to discover something of his own humanity, his own capacity as a mind and person, and to be present in his writing. This—although the course never, I think, explicitly suggested it—is necessary to his recognizing the humanity of another. In such ways these assignments put into question the student’s sense of his language, of his experience, of his self, of his world, of his education, calling on him to speak in a fresh way, his own way, about them.

The course asks students to write to such topics three times a week for a whole year. The bright student can of course find safe and empty things to say, time after time, but the pressure of the questions, asking you to think in ways you never thought possible, is relentless. If the course works well, you begin to speak in something like your own voice. To do that you have to know something of the empire of might, in the culture and in yourself, and how not to respect it.

THE LAW

Imagine that you are a lawyer or a litigant facing a judge who turns out to be the first writer discussed above (“nature in her full glory”), now grown up but still maintaining the same attitude toward speech and writing that he reveals in that passage. Or perhaps your judge is Polonius. How could you speak to such a mind? With what kind of honesty or authenticity? What kind of judicial opinion would you expect that person to issue? It would be a deep violation of justice to have a judge who could not, or did not, mean what he said, or one who was incapable of meaning anything, or one who did not understand the process in which he was involved, the language he was given to speak—any judge who had not made the case in an important way his own, the object of integrated thought and attention. Such a judge would unable to hear what you said, to attend to it, respond to it. Or imagine yourself as a client
and ask what you want from your lawyer. Not an empty and skillful manipulator; I think, or one who thinks in conclusions, but a person with a mind of his own, one who can think about the case, in its parts and as a whole, and reach judgments of his own about it; one who can hear what you have to say and respond to it; one who can turn from that conversation to the law and find ways to use legal language, transforming it if necessary, to say what he has come to mean about your case.

It is common for people to try to learn law as if it were a set of rules to be applied more or less routinely to the facts of cases as they arise, as a simple system of commands. But as almost every law student learns, often to his or her profound discomfort, this image of the law will not work, either in law school or in practice. The lawyer and judge are typically presented with real difficulties of interpretation and harmonization of the law, in relation to facts that are themselves uncertain, all defining a set of problems through which they must think their way as independent minds.

Good legal thought and writing accordingly involve the articulation of arguments that can be made both ways—for and against the characterization of the letter as an "offer," say, which can be "accepted" and thus form a "contract"—and their arrangement in a structure that leads to a conclusion that fairly reflects the force of opposing arguments. The good judicial opinion takes the reader through the process of thought the judge herself engages in, with a fair representation of doubts, uncertainties, and the force of countering arguments. It ends with a conclusion that is not predetermined, or shaped by considerations external to the opinion, but reached by the process of thought enacted in her writing.

The good brief is both different and similar: it too leads the reader through an idealized process of thought, but this one leads to a predetermined conclusion; it also gives weight to countering arguments, plausible claims the other way, and so forth, or it will fail. The opposite of this kind of writing is what in the law we call conclusory writing, cast in terms that bury argument and thought in one’s premises, reducing it all to a set of unargued assertions. The key element present in good legal writing, missing in bad legal writing, is a certain kind of life: the life of the mind, of thought and argument, that is generated by the recognition that we live in a world in which there are many valid things to say, from many points of view, with which it is the task of the legal mind to come to terms.  

Both in the law and out of it, then, the art required is that of finding a way to be present as a mind, a person, a voice, in a context that seems to invite the replication of standard forms, and in that context to learn what you can mean and how to express it. Think of the task of writing a note of sympathy to a friend who has lost a parent or spouse or child. What can you say?
occasion seems dominated by the language of the Hallmark card, which is not your language; what can you say that will be and sound real, written from the inside—that will be your speech? The lawyer who simply moves phrases around in his head and on the page, never really meaning anything he says—and there are plenty of them—is never actually thinking about the case, or the law, and is certainly incapable of saying something fresh or transformative. He will be thinking only about his effort at manipulation, not the merits of the question before him. I believe that once this is perceived, as it usually is by intelligent people, he will not be listened to by his audience. Why should he be? By contrast, there are lawyers who command respect and attention when they speak or write. I think one reason they do is that it is apparent that they mean what they say.

As for judges, the matter is even more crucial, for there are serious public consequences: the judge who simply articulates phrases, concepts, or ideas in an unmeaning way can likewise not be attended to, for he is not present as a mind or person. This means that his opinion cannot be read with the care and attention lawyers are trained to give authoritative texts in the law; it means, too, that he in a real way cannot be responsible for what he is doing. In some way he may in fact be seeking to avoid that responsibility by collapsing into a language of bureaucracy. This kind of writing, to use the distinction made prominent by my colleague Joseph Vining, is authoritarian, not authoritative. It is part of what Simone Weil would call the empire of might.

As an example of an argument—a kind of legal argument in fact—that is simultaneously shaped to one’s audience and actually meant, consider the following exchange between Abraham and the God of Israel, as recounted in Genesis (the King James Version). The Lord is contemplating the destruction of Sodom for its grievous sins and says to Himself:

\[
\text{Shall I hide from Abraham that thing which I do; seeing that Abraham shall surely become a great and mighty nation, and all the nations of the earth shall be blessed in him?}
\]

\[
\text{For I know him, that he will command his children and his household after him, and they shall keep the way of the Lord, to do justice and judgment; that the Lord may bring upon Abraham that which he hath spoken of him.}
\]

\[
\text{And the Lord said, Because the cry of Sodom and Gomorrah is great, and because their sin is very grievous; I will go down now, and see whether they have done altogether according to the cry of it, which is come unto me; and if not, I will know.}
\]
And the men [actually messengers of the Lord] turned their faces from thence, and went toward Sodom: but Abraham stood yet before the Lord.

And Abraham drew near, and said, Wilt thou also destroy the righteous with the wicked? Peradventure there be fifty righteous within the city: wilt thou also destroy and not spare the place for the fifty righteous that are therein?

That be far from thee to do after this manner, to slay the righteous with the wicked: and that the righteous should be as the wicked, that be far from thee: Shall not the Judge of all the earth do right?

And the Lord said, If I find in Sodom fifty righteous within the city, then I will spare all the place for their sakes.

And Abraham answered and said, Behold now, I have taken upon me to speak unto the Lord, which am but dust and ashes: Peradventure there shall lack five of the fifty righteous: wilt thou destroy all the city for lack of five? And he said, If I find there forty and five, I will not destroy it.

And he spake unto him yet again, and said, Peradventure there shall be forty found there. And he said, I will not do it for forty's sake.

And he said unto him, Oh let not the Lord be angry, and I will speak: Peradventure there shall thirty be found there. And he said, I will not do it, if I find thirty there.

And he said unto him, Behold now, I have taken upon me to speak unto the Lord: Peradventure there shall be twenty found there. And he said, I will not destroy it for twenty's sake.

And he said, Oh let not the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there. And he said, I will not destroy it for ten's sake.

And the Lord went his way, as soon as he had left communing with Abraham: and Abraham returned unto his place. (Gen. 18:17-33)

This is a highly complex moment, for not only does Abraham find words to say what he means—"Do not destroy the righteous with the wicked"—he does so in the form of an argument, a crossexamination really, of a kind familiar to the law. He is trying to persuade the Deity to a course of action. To do that he must speak the language of the Deity, appeal to his nature and character;
he must offer Him a way of speaking to the situation that would enable Him to withhold his punishment and explain why. This is persuasive but not manipulative. Such is the effort of the modern lawyer too, at his best: to say what he means and to offer his audience something he can mean too.

One way to state what is so remarkable about this passage, and indeed about the whole relationship between the Deity and Abraham (and Moses too), is to say that it shows that Abraham can trust the Deity with the truth—the truth of his perceptions, thoughts, feelings—even though to do so is obviously risky in the extreme. Likewise, the Deity trusts Abraham with the truth of his intentions, almost as though He is asking for a response of approval or criticism. Each can say to the other what is displeasing. The one without power can speak to the One with all the power, and make claims upon Him—can make in a sense the ultimate claim, based on the character and nature of the Awesome One: “Shall not the Judge of all the earth do right?” Through the pressure of questioning, Abraham forces the Deity to recognize something about the world and Himself. Trust is the condition that makes it possible for both to speak with such frankness and honesty across the enormous gap between them, that enables them to mean what they say to each other.

**THE JUDICIAL OPINION**

*Virginia Pharmacy Board v. Consumer Council*

I now turn to an instance of modern legal writing, a passage from Justice Blackmun’s opinion for the Court in *Virginia Pharmacy Board v. Consumer Council*, with what we have read in mind. 7

First, some background. This case called into question the constitutionality (under the First Amendment) of a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs. The stated reason for the statute was to protect the real and perceived professionalism of pharmacists, on the theory that price competition of the kind prohibited would lead pharmacists to work to a lower margin of profit, which would in turn lead them to take shortcuts both in the preparation of drugs and in the consultations they have with prescribing doctors and with the patients themselves. Further, it was thought that price advertising would damage the image of the profession, reducing the confidence the public has in it as a profession and not merely a business. As for any free speech interests involved, the pharmacists were free to reveal their prices when asked, and consumer groups, such as the plaintiffs here, were of course free to publish their own price surveys. All that is prohibited is price advertising by the pharmacists themselves.
As an economic regulation, this statute is of course not beyond challenge. Under its regime, drugs are sold, as one would expect, at widely differing prices in different stores in the same city, which seems to be unfair in general and to disadvantage the less sophisticated customer in particular. On the other hand, the defenders of the statute might say, price competition might itself lead to results that would be damaging to certain customers, particularly if it led to the concentration of the profession in a small number of high-volume, cut-price drugstores, which would in the nature of things be difficult and expensive for many people to reach. But that would not necessarily follow, the opponents of the statute would argue; perhaps small local drugstores would stay in business, charging more than the cut-price places but being less expensive to reach. In this way those who wanted convenience would pay for that, and those who preferred to travel for bargains would do that.

The arguments on the wisdom of the statute go back and forth in what looks like a classic case of economic regulation. But if this is how the case is regarded, the statute should almost certainly be upheld, for courts normally defer to legislative judgments about the probable real-world effects of alternative economic regimes—judgments the courts are not well situated to make or to review, depending as they do on information not readily available to the courts. The Court concedes as much.

The crucial question for the Court is thus the bearing, if any, of the First Amendment upon the case, on the grounds that the conduct regulated here takes the form of “speech.” The obvious problem with this line of argument is that this speech is commercial in character, simply a way of doing business. Although there are many proposed rationales for the First Amendment, most of them conceive of it as protecting political speech, or the discovery of socially valuable truth, or the autonomy and dignity of the speaker, not purely economic processes. And, not surprisingly, when first presented with the question decades ago, the Court held that commercial speech was simply beyond the protection of the First Amendment.

Later cases complicate this picture, however, making clear that speech is not unprotected simply because money is spent to convey it, as in a political advertisement; nor because it is sold for profit, as a book or newspaper is; nor because it has a commercial subject—surely one would have a First Amendment right to complain that the anti-advertising rules in this very case were unjust, for example. Nor is it disqualified because the motives of the speaker are primarily economic, for the First Amendment protects certain forms of speech in labor disputes, not to mention forms of highly commodified speech of rather doubtful quality, from B films to television shows to romance novels. But none of these cases presents the question in its purest form, as Virginia Pharmacy Board does: here there is a simple proposal to engage in an
economic transaction without any further artistic, ideational, political, literary, or other value. As the Court frankly says, “the ‘idea’ [the speaker] wishes to communicate is simply this: ‘I will sell you the X prescription drug at the Y price’” (761).

The Court nonetheless holds that the First Amendment should indeed reach this form of speech, saying that the interest of the particular consumer in “the free flow of commercial information” may be “as keen, if not keener by far, than his interest in the day’s most urgent political debate” (763). It expresses the core of its position in these terms:

Advertising, however tasteless and excessive it may sometimes seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and for what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal. (765)

I do not mean to suggest that this passage, or the opinion from which it is drawn, is identical to any of the passages of student writing read earlier, but I do think that those passages may help us approach this one. The main question here, as in our earlier reading, can be put in terms of language: what kind of language does Blackmun use, and what is his relation to it?

To begin with, although this is a First Amendment case, Blackmun does not really talk in First Amendment terms. He never discusses the aims of that amendment, or the nature of the speech it is designed to protect, either as a theoretical matter or in connection with his reading of the cases. What is wrong with this scheme of regulation, in his view, is not that it suppresses an independently valuable activity called speech but that it interferes with the efficiencies of the market. He might have struck the statute down on those grounds, but, as I suggested earlier, such a course would have been inconsistent with the law the Court had been making for decades concerning economic
regulation. This looks like a case in which the Court disapproves of the regulation on economic grounds, but, having no way to strike it down for such reasons, reaches for the First Amendment instead. It is hard to regard Blackmun as actually meaning what he says about the First Amendment here.

In looking at Blackmun's use of economic language, we may be reminded of the young boy writing about "nature's glory" or of Polonius, each speaking as though his words were effective but without regard to whether they were meant. One might imagine market language used in a different way, metaphorically, with an awareness of its obvious difficulties—of what it leaves out—and as part of a larger vision of human life and our constitutional system. But that is not what we have here. Instead we have a dull replication of an ideology. Blackmun virtually constitutionalizes the "free enterprise system," for example, without any recognition of the fact that our economy is profoundly managed, by regulation, by taxation, and by government spending. The phrase as he uses it is really just a cliché, and much the same can be said of the rest of the formulaic language he employs. This is language that in a profound sense no one could mean.

Consider, for example, the passage already quoted in which Blackmun says that the "particular consumer's interest in the free flow of commercial information" may be "as keen, if not keener by far, than his interest in the day's most urgent political debate." You can see where this sentence comes from: a person with crippling pharmaceutical bills and little political engagement is indeed likely to focus his or her attention on the former, not the latter. But aside from the fact that many "consumers" do not fit that example, there is a deep ambiguity in the word "interest": it can mean actual engagement of attention, or even simple curiosity, on the part of an individual; or it can be the equivalent of value or worth, as in the citizen's "interest" in free elections. Although it may be factually true that some people care more about prices than politics, to say that they have a greater interest in "the free flow of commercial information" than in "the day's most urgent political debate" is to suggest either that the former is, as a matter of public truth, of greater worth or value than the latter, or that this is what the people in question think. The former position seems directly contrary to the choice made in the Constitution itself, which declares the primary value of "freedom of speech," with no suggestion that this value has any economic dimension. As for the second claim, the Court may be right that, if asked, many consumers would say the price of drugs is more important to them than a political debate. But under our constitutional system, our "interests" are defined not only by our present sense of need and desire but structurally, in the instrument of our government, one function of which is to make commitments for us that we do not have to make over and over again—to create, as it were, the conditions under
which we can lead our typically more self-centered and private-valued existences. If you were to ask our citizens not whether their drug bills were a great burden to them but whether they would like to live in a world without the kinds of complex commitments made in an enduring way by the Constitution, I think and hope that a great many would revise the judgment the Court attributes to them. And in any event, a judicial opinion by the United States Supreme Court is the place above all at which the larger commitments and values of the Constitution should be given force, especially as opposed to unsupported judicial estimates as to the way our citizens rank their values—citizens whom it trivializes in this context to label as mere “consumers.”

Think also of the slogan “the free flow of commercial information,” appearing both here and at the end of the following passage: “even if the first amendment were thought to be an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.” This language too has the quality of cliché, obscuring both thought and reality. It takes no account, for example, of the fact that the information in question is already available to anyone who makes a phone call to the drugstore, and that, if more systematic dissemination were thought valuable, those of the plaintiffs who are not individuals but consumer groups could assemble the price data and communicate it to their members or to the public. Even more significantly, it draws attention away from the fact that the flow of information established by this decision is not really “free,” since many of the speakers (that is, the pharmacists) presumably do not wish to engage in the “speech” protected here. They will in fact be compelled to speak, as a practical matter, for if one of them advertises they will all have to do so. It is therefore not their choice that the Court is respecting but quite the opposite; the Court is establishing a regime of effectively mandatory speech, in the form of advertising, for the purpose of enhancing the recipients’ range of economic choices. As a way of imagining the First Amendment, the process of speech in the world, or the reasons why speech is valuable and should be protected by the Court, the opinion is hopeless.

True and meaningful speech, in the world and in the law, requires the living presence of a person in the words—the person of an author, the person of a reader. This opinion erases person, in both capacities, substituting a routine application of dead formulae and clichés. This opinion is the iteration of an ideology that has no distinctive place for speech in the world it imagines—and thus cannot work as a language for thinking about a First Amendment case—and also no significant place for speech in the world it enacts or performs, for it cannot manifest in its own composition a conception of valuable speech. Although it adheres to the forms of legal thought, and cites and
distinguishes appropriate authority, at the deepest level it lacks the most important kind of legal knowledge. Try reading the opinion as you might read the student papers with which we began, or the speech of Polonius: as holding out a promise of a world, of a life to be lived on its terms; as an invitation to join the writer in this way of thinking and imagining, this way of writing, about speech and the Constitution—how would you respond? Blackmun, like our third student writer, is in a prison of his own, defined by the language he accepts without being able to put it into question. This means that he cannot act as a responsible and independent mind, and cannot claim the authority that such action grants; it means that his writing in the deepest sense lacks the life that alone can justify its claims to power. This opinion is thus one that in a real sense he does not, and cannot, mean.

All this is not to say that the outcome in Virginia Pharmacy Board is necessarily wrong. The Court might evolve a doctrine of economic due process under the Fourteenth Amendment that would constitutionalize the market, at least to the extent of requiring the state to justify interferences with it by making factual showings that are here only presumed. This would be especially appropriate where there is a grounded suspicion that the legislation is really designed to protect the special interests of a politically distinct and effective group, here pharmacists themselves. But such a move should be made explicitly, and on due process grounds not First Amendment ones, for only then would the case be framed and argued in appropriate terms.

There remains one more dimension of this case. It is by no means easy to do what Blackmun did not attempt to do, namely, to try to say why speech should be singled out for special protection, as it is by the First Amendment. Efforts to produce theories that describe the law of the past and shape the law of the future have not worked well, to put it mildly. This means that it is especially important to have what might be called performative or enacted definitions of the value of speech in the judicial opinion itself. If the real reason for the constitutional guarantee is to make possible serious and thoughtful deliberation on issues of public concern, for example, the Court itself can show us (or fail to show us) that kind of deliberation in action.

We are right to ask of an opinion in this field, then, not only how the Court imagines the speaking person, and the activity of speech itself, but how it engages in speech. Does the Court in its performance trivialize this occasion for speech, and speech more generally, or does it recognize the dignity of—or confer dignity upon—this crucial aspect of human life? Whatever the First Amendment means, it surely points in the latter, not the former, direction. Yet we can turn back to the opinion in Virginia Pharmacy Board and ask: how could this opinion possibly recognize what is of real
value in speech, when it reduces speech to the transfer of information or a
signal of a willingness to do business?

In this case Blackmun allows his mind to be taken over by a system of
thought, an ideology really, in a way that leads him to slide over the issues
actually presented in the case, producing a surface that does not open itself
up to argument, as an opinion should, but closes it off. You either believe, as
he does, in the adequacy of the language of the market to explain what is at
stake here, or, like me, you do not. The consequences are especially serious
because of a larger cultural fact, which is that in our world at large the ideol­
ogy of the market has taken over so much of public talk and action. Obviously
economics has an appropriate role as a method of thought, but its language
must always be used with great care, and certainly not as a comprehensive
mode of organizing life. For economic language imagines human life in an
extremely impoverished way, as a set of choices designed to serve selfinter­
est, and it has no way to conceive of community, or collective life, except as
a series of deals, and no way to imagine the natural world, upon which we
depend, except as a set of resources.¹⁰ To my mind, this is a an empty way
to think of human relations, human motivation, human achievement, but it is
what we live with, and for Blackmun to convert what could have been a moment
for talking about the value of speech as such into another application of this
ideology, which sees speech simply as an aid or adjunct to economic life, is a
genuine lost moment, both for him as a writer and for us as readers.

Let me add here the important point that although the language of cliche
Blackmun uses happens to be the language of economics, it would be all too
possible to use the language of law in such a way, or the language of left-wing
politics, or the language of religion or of human rights. The real question is
whether the language and ideology in question dominate the mind and the
text, or whether, by contrast, the writer finds a way to assert against such forces
the presence, and the value, of his or her own mind and experience. For it is
only through the assertion of the individual mind, speaking in a voice of its
own, that the empire of might can ever really be resisted.

We are in fact all susceptible to the failure to which I see Blackmun succumb.
This is the possibility against which we must work whenever we write and speak,
knowing that at best we will succeed only sometimes, and only in part.

Thomas v. Collins

Is it possible for a judicial writer to speak differently, or is Blackmun here
really an example of what we must expect? It may be useful now to look briefly
at a passage of judicial prose that I think to be of quite another kind. Here is
Justice Jackson speaking in *Thomas v. Collins*, a case considering the constitutionality of a Texas statute that required a labor organizer to register with a state official before soliciting memberships in a union:

As frequently is the case, this controversy is determined as soon as it is decided which of two well-established, but at times overlapping, constitutional principles will be applied to it. The State of Texas stands on its well-settled right reasonably to regulate the pursuit of a vocation, including—we may assume—the occupation of labor organizer. Thomas, on the other hand, stands on the equally clear proposition that Texas may not interfere with the right of any person peaceably and freely to address a lawful assembly of workmen intent on considering labor grievances.

Though the one may shade into the other, a rough distinction always exists, I think, which is more shortly illustrated than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state is empowered to protect. The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.
But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy. (544-45)

This passage bears on the same general question as does Virginia Pharmacy Board, namely, the role of the First Amendment in the area of economic activity, and it shows that in the discussion of ideas as well as facts, it is possible to engage in thought and writing that are vivid, clear, comprehensive, and deeply meant. Jackson does exactly what Blackmun does not do, which is to think of the case in First Amendment terms; more than that, he gives a kind of performative content to value of speech itself by the way he writes. He is obviously present before us in this prose, saying what he thinks and why, and doing so in way that does not trivialize the activity of thought and speech in which he is engaged but, quite the opposite, confers upon it an essential dignity.

Part of the force of the opinion lies in his recognition that he is faced not with a question simply of categorization—"Is it a 'calling' or is it 'speech'?"—but with a question of judgment in a case in which the basic principles are in tension, shading into one another at the borderlines. The undoubted power of the state to regulate professions and employment necessarily includes the power to regulate some speech. But not all speech, as he shows with his examples of the nonlawyer speaking to issues of fundamental human and legal rights, of the nondoctor urging one or another school of medical thought. How is one to draw the line? By understanding the reasons why the state has plenary power to protect the public against "the untrustworthy, the incompetent, or the
irresponsible” in the practice of callings, but not against “false doctrine,” where
the people, and not the government, must serve as the protectors of truth.

In all of this Jackson is obviously present as a mind and person, willing
to accept responsibility for his judgment, reasoning to a coherent conclu­sion, and demonstrating in his work how it is that we—the people—can
indeed be “watchmen for truth.” He is teaching us how to live with the recog­nition that virtually anything can be contested, often by scurrilous means,
yet nonetheless to be able to speak and read and think with confidence. And
this teaching is not dependent on our agreement with the particular out­come: he could have written just as good an opinion, in the sense I mean,
coming out the other way. He is not in a prison either of his own construc­tion or made by the habits of thought he adopts; he is in this sense free and
responsible. This is judicial writing that is meant, and it encourages us to
say what we mean, to mean what we say, as well.

The force of mind at work in this case—stating the issues, seeing the facts,
deﬁning principles, making a judgment and standing by it—is showing us a
way of resisting, of not respecting, the empire of might. Jackson insists on the
value of individual judgment, in him and in his reader, in the speaker and the
public, for he insists that the case make sense to him, and he invites the reader
to do likewise. This is not the replication of an ideology but the opposite:
thought that puts into question its own methods and materials, in the inter­est of reaching and explaining a judgment, deﬁned as an individual act of mind,
for which he is responsible. To say this is to say that Jackson here achieves an
important kind of justice.

In this essay I have tried to elaborate the claim that what Simone Weil calls
the “empire of might” is not simply a matter of military force but also of lan­guage, and the use of language—a matter of writing, in short. A mind like that
of our ﬁrst student writer—and all of our minds share this quality more fully
than we should wish—is full of a repertoire of standard moves, received ideas
and images, ways of thinking and writing, that it has acquired by imitation
from those whose approval matters. It is full of what I call clichés. This is
not just a matter of private but public concern, as Blackmun’s opinion shows,
for, at least in my view, this too is full of received and unquestioned images
and phrases, not thought through. And this is how the political empire of might
maintains itself: through public speech that is dead and irresponsible, and
through the habits of acquiescence present in all of us that make such speech
effective—a willingness to talk the way we hear others talk, without testing it
against our own experience, our own thought.

Writing by the manipulation of expected phrases in expected ways has the
effect of distancing the writer from his or her own experience, from his or her
own mind, as we saw in the first and third student writers above and I believe in Blackmun too. It closes off thought, both in the writer and in the reader, creating a false image of the world and of the mind. It creates belief in what should not be believed. And all this has political as well as personal consequences, for this is how an ideology is created and maintained—any ideology that erases the experience of others, especially the poor and weak, in our country and abroad, that makes us blind to the common humanity of all people and our common dependence on a healthy natural world.

What Weil calls “knowing the empire” consists to a large extent in knowing the ideologies, the clichés, the false languages that surround us, and knowing as well our own susceptibilities to their appeal—our susceptibilities to the pleasure and satisfaction of earning the approval of the powerful and thus having power ourselves. “Knowing how to resist it” means knowing not only where a regime may be politically vulnerable but, much more deeply, knowing how to resist the appeal of false language, false writing, to our own minds. In his own way Justice Jackson, in this rather routine case, finds a way to talk that resists the empire of might—resists it through the force of his own voice and presence, his insistence on reason, his respect for arrangements external to him and to his reader alike. The temptations of acquiescence are present whenever we speak or write; resisting them means the struggle to emerge as a mind saying something true or real or valuable, something you can really mean, in the law and in the rest of life.

Without such knowledge of the empire, and how to resist it, we are as Weil says incapable of justice, for we will accept false ways of thinking and imagining and talking that obscure the reality of human suffering and cruelty and greed. We will accept talk about the “national interest” or “our friends abroad” or the “evil” of those who are different or the “rising tide that floats all boats” without examining it, or the reality it obscures. If we cannot imagine the lives of others—the half of the world’s population that lives on less than two dollars a day, for example—we cannot be capable of justice toward them, for imagination is the root of justice. And if we cannot see others as they are, and understand our own role in systems of wealth and power, we certainly are incapable of love toward them too.

NOTES


3. It is also possible that the dullness and deadness of the last sentence may express his true condition of mind. This would be far less favorable than the possibility I have been suggesting in the text.


6. One might resist what I have just said, insisting that lawyer and judge actually use the forms of legal discourse in purely instrumental ways, in efforts simply to persuade or to justify. On this view the whole thing is artificial, initiatory, a form of manipulation, to be tested by results, not by what is said. I think this is quite wrong. It is true that the lawyer’s speech situation has special features—a professional language, a set of professional audiences, and the fact that she speaks always for another—that complicate her situation in interesting ways, but in essence it is like that of the student writer discussed earlier, or any writer in fact. For everyone must speak a language that has its origins outside of him or herself, with its own limits and enablements; everyone must speak to particular audiences, defined by the expectations they bring to the occasion; and everyone has fidelities that run beyond the self, if only to the truth of the event of which he or she speaks. The lawyer and judge alike should mean what they say and say what they mean; this requires both that they give themselves minds capable of meaning something of their own in a genuine way.


8. In some respects the Court’s opinion follows the established forms of legal thought rather well: explaining clearly the grounds on which Virginia had adopted the statute, addressing the technical but important question of the standing of the plaintiffs to bring this action, and describing fairly the relevant cases the Court had earlier decided on the subject of commercial speech. But this compliance with formal expectations turns out, on closer reading, to be superficial—a bit like the similar compliance demonstrated by the first student writer discussed earlier. This is true especially in Blackmun’s treatment of precedent, where he summarizes the outcomes of the earlier cases clearly and fairly enough, but does so simply in terms of rules they adopt, without seeing the judgments as motivated by competing visions and understandings of the purposes of the First Amendment, of the nature and importance of speech, and so forth. This can be seen as a kind of legalistic, not legal, thought, the reduction of purpose and reason and vision to rule. Likewise, Blackmun’s basic articulation of the question before him skews his thinking: it is whether this communications is “wholly outside” the First Amendment or lacks “all first amendment protection” (748). This is one way to put the issue of course; but even if you decide that the Court should not dismiss entirely any claim of protection for this kind of speech, you need to face the question whether price advertising should be protected exactly like other forms of speech, those that are plainly central to the First Amendment concerns—like political debate, for example—or to a lesser degree, and why. The reasons and factors that had once led the Court to exclude entirely
this kind of commercial speech from protection might still have force after that position had been abandoned and lead the Court to protect advertising significantly less than speech that is more central to the aims of the First Amendment. But, apart from a few observations at the end of the opinion, Blackmun regards his task as mainly done when he has argued to the conclusion that this kind of advertising should not be entirely without protection, when in fact his main work still lies before him, namely, to explain how it should be protected, to what degree, and why.

Finally, Blackmun never really addresses the question of the relation between the Court and the legislature: he thinks price advertising desirable, the legislature thinks otherwise, both making their judgments on the basis of facts and expectations about human behavior. By what warrant does the Court substitute its judgment for that of the legislature here? There may be reasons, but Blackmun does not give them.

9. This would involve a revival of the doctrine of *Lochner v. New York*, 198 U.S. 45 (1905), which at the time of *Virginia Pharmacy Board* was thoroughly discredited.

10. For a more full explication of this point, and for treatment of economic language as a challenge to the writer, see James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), chap. 3.


12. Or listen to the opening sentence of his dissenting opinion in *Shaughnessy v. Mezei*, 345 U.S. 206, 218 (1953), which is not without relevance for our own day: “Fortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial.”