

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

2004

### Free Speech and Valuable Speech: Silence, Dante, and the 'Marketplace of Ideas'

James Boyd White

*University of Michigan Law School, [jbwhite@umich.edu](mailto:jbwhite@umich.edu)*

Available at: <https://repository.law.umich.edu/articles/2077>

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



Part of the [Entertainment, Arts, and Sports Law Commons](#), [First Amendment Commons](#), and the [Law and Society Commons](#)

---

#### Recommended Citation

White, James Boyd. "Free Speech and Valuable Speech: Silence, Dante, and the 'Marketplace of Ideas'." *UCLA L. Rev.* 51, no. 3 (2004): 799-824.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

FREE SPEECH AND VALUABLE SPEECH: SILENCE, DANTE,  
AND THE “MARKETPLACE OF IDEAS”

James Boyd White \*

*This Essay is a slightly expanded version of the inaugural Mellinkoff Lecture in Law and Humanities, presented at the UCLA School of Law last April in honor of the memory of Professor David Mellinkoff, the distinguished author of ground-breaking work on the nature of legal language.*

*It addresses four related questions. What is the nature of the kind of speech and expression that realizes most completely the human capacity for finding and expressing meaning? How does our own world of public speech measure up to that standard? How, indeed, does our own talk in the law measure up, especially our talk about free speech as a “marketplace of ideas”? Can we find a better way to imagine the activity of speech that is the subject of the First Amendment, and a better way to engage in it too, as legal writers and speakers?*

I. SILENCE AND SPEECH .....	800
II. SILENCE AND MEANING IN DANTE.....	802
III. NOISE .....	808
IV. OUR TALK ABOUT SPEECH IN THE LAW .....	810
A. Defects in the Image of the Market .....	812
B. The Larger Pattern .....	814
C. The Desire to Submit.....	816
V. OTHER POSSIBILITIES .....	818

*Only he who knows the empire of might, and how not to respect it, is  
capable of love and justice.*

—Simone Weil, *The Iliad, Poem of Might*

One day when I was a teenager I read about the monastic order of the Trappists, and its rule of continual silence. As a highly voluble young person this seemed horrible to me, unimaginable really, and I said so to a friend and teacher, who suggested: “Perhaps a life of silence would teach us how pointless and empty almost everything we say actually is.” This struck me powerfully at the time and lives in my mind still. Later in life I happened to spend several years as an active participant in the life of the

---

\* Hart Wright Professor of Law, Professor of English, Adjunct Professor of Classics, The University of Michigan.

Society of Friends, or Quakers, whose meetings for worship are almost entirely silent. The idea is that this shared silence is profoundly valuable, to be interrupted only when someone feels that they simply must speak. When someone does speak, what they say is given deep attention, of a kind made possible by the silence.

The practices of the Trappists depend upon and make real a sense of the deep value of silence itself, of a life without spoken words; those of the Quakers stress simultaneously the value of silence and the value of a certain kind of speech—speech taking place against silence, speech made possible by silence. In both cases the silence is communal: people are together yet not speaking, sharing silence.

Though the practices of the Trappists and Quakers are in a sense at the edges of our social world, they invite us to think about silence and speech—about the activity of speech and the silence against which it works—in ways that can be helpful to the rest of us, including, perhaps surprisingly, in the law.

## I. SILENCE AND SPEECH

To begin with silence: in an obvious sense silence is necessary to all meaningful speech or expression. Think of the silence that precedes the concert in an orchestra hall, or the lesser silences, called rests, that make up an essential part of the music. Or recall how a poem looks, printed on the page, surrounded by an expanse of white—a sort of visual silence that makes the poem itself stand out where it can be seen and responded to. Much the same kind of spatial silence can be observed on museum walls where pictures are displayed, and we all know that some museums are simply too crowded to permit any picture to be seen, to be heard as it were. Silence is plainly necessary to any kind of speech, for without silence the words and phrases and syllables cannot be distinguished from each other or from the noise that surrounds them; but it is especially necessary to significant speech—speech that makes a real claim upon one's attention and promises to reward it—for it is silence that makes attention possible.

Silence is a crucial element of speech in another way, for at least some utterances carry with them the shadows of other things: things that are not said but assumed, and which we must reconstruct or intuit or figure out from what is before us; and also things that might have been said instead, other versions of what we hear, which we half-consciously construct as we proceed. Think of the way you listen to a good legal argument, for example: wondering about what is unstated but assumed as a premise, asking why the speaker did not make it explicit and whether he leaves himself open to

attack at such a point; and at the same time contrasting what he does say, as his argument proceeds, with what you think that you or someone else might have said in his place.

In this kind of reading, or listening, we attend to what is before us partly by imagining what is not there, filling the spaces around the speech with our own thoughts and bringing them to bear upon it. This is an inherent part of the process by which we attend to what we read or hear. As we read we think we know what is coming next, though we are not sure; when it does come, it either confirms our judgment or surprises us by being different. And we look backwards as well as forwards, repeatedly going over in our minds what we have read or heard, tentatively putting it in retrospective order. When we get to the end we find that in both directions what *was* said derives much of its meaning from what was *not* said.

In such ways any expression worth real attention derives much of its meaning from silences, both external and internal. We cannot really imagine it, except as surrounded by silence; and if it invites and rewards the kind of attention I describe, it will seem to come not from the familiar part of the mind that is full of tags of remembered speech and gesture, rote pieces of speech that we assemble without thinking, but from some deep place within the self—silent, below the words, a place where language is made the subject of conscious attention and where it can be remade.

For an essential element of this kind of speech or writing is that its language is not automatic, but shaped or chosen. The speaker or writer tries to be aware of his language, and its limits, and invites his audience to be so too; this requires of both of them an inner as well as outer silence. And this silence is not simply empty space or time, an absence of words; it is a state or condition that must be attained, by work and art and discipline, and used, and used well. It is a crucial part of what we mean by the engagement of the whole mind.

Much of what we say and hear is of course not like this—not shaped by inner and outer silences—but is simply a stitching together of locutions in predictable and uninteresting ways, locutions that are not in any significant way made our own. On these occasions we speak as if our words and phrases were simply stored in an antechamber to the mind, ready for immediate use upon demand. Lawyers are all too familiar with this kind of work, of which a certain kind of brief can be taken as an example: one that pieces together rules and quotations, makes distinctions, argues to conclusions, but without ever making it the work of the individual mind—as though the writer is trying to approximate a platonic ideal of the brief that should be written in this case, an ideal that has its origins outside of his mind, which it is not his place to judge or shape but simply to aspire to. His effort is not

actually to think through the legal problem and express his thought in legal language—to say what he means in the language of the law—but to sound like someone doing those things: to sound like a lawyer, not to be one. Of course these habits of mind and expression can be found outside the law as well, wherever one can find clichés and received ideas and formulas and slogans presented as though they can carry the work of thought and writing, wherever we see a system of thought applied without regard to what else can be said. As readers or hearers we simply cannot attend to such utterances, nor do we want to, certainly not in the same way in which we attend to expressions more deeply shaped by the internal processes I describe, of which silence is an essential element.

What I am saying then—and it is in one sense perfectly obvious—is that not all of our speech is of the same quality or nature, indeed not of the same value. And what I mean by “value” here is not some instrumental effect on the world, but the real value of the speech as such, for the speaker and his audience, the value of speech that invites and deserves and rewards real attention. At one extreme we have the reiteration of clichés, formulas, slogans—dead language really; at the other, speech that is deeply meant and alive, coming from a place of inner silence, directed to a similar place in its audience. This is the kind of speech that can express the workings of the individual mind and imagination. It is what makes possible the real—if always imperfect—communication of mind with mind, person with person. Indeed it is what enables any of us to be a person in the first place. This is the kind of speech that resists what Simone Weil in the epigraph to this Essay calls the empire of might.

## II. SILENCE AND MEANING IN DANTE

I want to pursue the themes of quality and silence, and their connection with each other and with the empire of might, by looking briefly at a very small part of a work of extraordinary quality, Dante’s *Divine Comedy*,<sup>1</sup> asking in particular how silence of various kinds is at work in it, and to what degree silence is in fact partly responsible for the nature of our experience in reading it.

Here is the famous opening of Dante’s *Inferno*:

Nel mezzo del cammin di nostra vita  
Mi ritrovai per una selva oscura,  
Che la diritta via era smarrita.<sup>2</sup>

---

1. DANTE ALIGHIERI, *LA DIVINA COMMEDIA* (C.H. Grandgent ed., Harvard University Press 1972) (1933).

2. *Id.* at 11.

Or, much more flatly: "In the middle of the road of our life I found myself in a dark wood, because the straight road was lost."<sup>3</sup>

Let us look at these three lines as a story. What does the narrator of the poem not tell us?

He does not tell us who he is; how the right path was lost; what the dark woods consist of; whether this is a dream or an allegory or an invention, or something else; he does not tell us why he is telling us this story, or who he imagines us to be, himself to be. He just gives us this sketch: I was lost, in the woods, at middle age.

Everything in the poem will come from this moment: the narrator's frustrated attempt to make his own way out of the woods; the sudden and mysterious appearance of Virgil, who will lead him, as it were, not out of his problem but through it—through the *Inferno* and almost all of *Purgatory* as well, where he will be handed over to Beatrice, his guide to *Paradise*. Much of the effect of these lines would be ruined if Dante rendered himself more particular, like a character in a novel, say—telling us about his prior history and education, his social location, his qualities of mind and aspiration, the special sense in which he is lost—for at the moment he is speaking for us as well as for himself. To overspecify would prevent us from reading our own way into the story, as people who can also imagine ourselves in the middle of life to have lost our way, surrounded by dark woods.

This kind of silence is also a way of posing questions, questions that will keep us engaged with this poem, one of which is surely: Who actually is this "Dante," the character in the story, and what relation has he with that other "Dante" who composed this poem? It will turn out that this Dante, our fellow traveler, is among other things himself a questioner, asking of Virgil, and those damned in the *Inferno*, and later of Beatrice, and those saved in *Paradise*, the most frank and embarrassing questions. He asks Piccarda, for instance, in the lowest level of the heavens, whether she would not rather have been placed higher; he asks Virgil why he is condemned to Limbo, with the other great figures of the classical world, instead of being placed in heaven—Virgil, who is obviously Dante's ideal figure, as artist and as mind; he asks Virgil whether the suffering of the damned will be greater or less after they are restored to their bodies at the Day of Judgment; he asks him how it is that the gluttonous in *Purgatory* can suffer the pangs of hunger when they have no need for food; and so on. He is a kind of *Candide* before his time, irrepressibly asking just the questions you can imagine yourself wanting to ask but being afraid to do so.

---

3. *Id.* (author's translation).

The most significant of these questions, repeated in one form or another over and over, has to do with the justice of the Deity. How can it be right that Virgil and Homer and Sophocles are consigned to the dark world of Limbo, where they huddle by the fire? Or that Paolo and Francesca should suffer forever, for what is after all human love? Or that the great Ulysses, the impassioned embodiment of the desire to know and understand, should be consigned to the Inferno? As readers we necessarily feel that the persistent questioning of Dante the traveler must present him with real dangers in a universe so evidently governed by a single omnipotent authority—its God—who punishes with such severity. Yet as this Dante exhibits his gift for insistent questioning, Dante the writer holds it out to the reader as a quality to admire. More than that: his questions are real for us as well as for him—he asks what we would like to ask—and they thus at once stimulate and confirm our own capacities for questioning. And the deepest question of all is this: What are we to think of this Universe and its Governor?

Consider the famous case of Paolo and Francesca, a man and woman who fell in love reading a book of romance, became adulterers, and now find themselves in the Inferno. Dante's original audience was raised on the romantic conventions of courtly love, of which at least the fantasy of adultery was an essential ingredient. Indeed his own first work, *La Vita Nuova*, was partly built on such premises. How can it be right that for this understandable, indeed culturally validated act, these two souls should drift empty in the dark, forever and ever? To think that this is right or just is nearly impossible for the reader of the poem, and the same is true of the disposition of many of the souls in each of the realms.

And let me stress that this is the poet's doing. We tend to forget it, but it is Dante who presents Paolo and Francesca so sympathetically. He does not find them in the Inferno, he places them there, and does so in such a way as to make us question the justice of God himself.

I think that it is in fact an essential part of the design of this poem that the reader be dissatisfied, over and over again, both with the disposition of many of the souls and with the explanations offered in justification. It is not against the intention of the poem but in accordance with it that you as a reader experience the resistance I describe. To put it another way: One central function of the poem, a central part of its meaning, is to constitute its reader as the kind of person who can learn to ask the questions Dante the character asks, questions the text in a real way makes inevitable, and learn to live with what this questioning habit means.

Suppose that this were not the case, and that as you read you found that the disposition of every soul, in each of the three realms, made perfect

sense to you. You had no objections, for the judgments accorded perfectly with your own. How long could you read such a poem, and what would it mean to you while you did so? There would be none of the tension essential to art, just a predictable elaboration of premises; there would be no life in the text, or in the reader. And, for our purposes crucial, this would be not an aesthetic failure only but a political one: in such a case you would be submitting to an ideology working out its iron logic without hitches or gaps or cracks, to a system of thought and imagination in which there was no place for you, except as a subordinate—no place for the independence of thought and judgment that Dante exhibits and stimulates. It would be an empire of might, perfectly authoritarian.

In the poem as composed, Dante finds a way to present this highly judgmental order—eternal judgments by the Judge of the Universe!—yet at the same time to leave room for the reader; more than leave room, to stimulate and confirm in the reader the capacity to question, to insist; and thus to call into life a capacity in the individual mind that is essential to real thought, real action.

Not that our first instinct is always to be taken as right. As fallen creatures, our first response is often wrong, as we see those of Dante the character to be too. Like him, we are in need of education, an education the poem itself offers us, and a crucial part of it is that we can never be totally sure of our own judgments. We are forced upon our own resources, then challenged, then forced upon our own resources again, all in a definition of responsibility that is ultimately ours. For the reader of this poem is not simply put in a position in which he must exercise independence of judgment, ultimately in his own way; he is compelled at the same time to establish a relationship with an intellectual and juristic structure that is represented as having real authority. He is not pushed off, that is, to make his own way in a world of radical existential uncertainty, but, far more maturely and significantly, he is presented with the inescapable problem of reading, understanding, learning from, disagreeing with, and reimagining the reigning modes of thought of the time—of Dante's time—as they are represented in the theological world of the poem. It is not right answers that Dante offers us in the end, but a special kind of silence. He uses it to engage us in a process of imagination and thought and feeling in which we are constantly forming and reforming our own judgments, and to leave us with the responsibilities he has defined.

Is the tension I speak of ever resolved? At a formal level it is, for Dante the character receives answers to his questions and doubts, and these are generally offered and accepted as conclusive; but at an imaginative level it is not, for these resolutions are often unsatisfactory to the very part of us



that the poem has been calling into existence. And yet when we bring our dissatisfactions back to the text we sometimes find material for explanation and response, never articulated in the text, that will carry us to a somewhat more satisfactory position than any explicitly stated there. We shall discover on reflection, for example, that no one consigned to the Inferno sees that what he did was wrong and repents of it. Although in the implied narrative of the poem the soul is being punished for what it did, or who it was, before its human death, in a psychological sense the damnation is continuously chosen, even at the present moment. Of course the sinner does not like the pain he is subjected to, but he will not say, "I now see how wrong I was": rather, he confirms the sin, insists on it, even in the middle of his punishment. Francesca herself seems to speak of her eternity with her lover as a good, without any capacity to see it otherwise. She is in a sense a captive of the language of courtly love, and cannot see beyond or beneath its formulas to deeper possibilities of human definition and connection.

Likewise Ulysses, seemingly representing in purest form the impulse of human knowledge, is the prisoner of his own beautiful language. He says to the men he is leading to their doom:

Considerate la vostra semenza:  
fatti non foste a viver come bruti,  
ma per seguir virtute e canoscenza.

[Consider your origins: You were not made to live like beasts, but to follow virtue and knowledge.]<sup>4</sup>

Yet in saying this he calls his men and himself to certain destruction, as they sail west across the unknown sea, without any expressed awareness of the meaning of what he is doing.

A different kind of resolution occurs, at once imaginative and imperfect, in the closing Cantos of the *Paradiso*, where Dante and the reader are so caught up in the splendor, the light, the magnificence, the love, that everything else, in the *Inferno* and *Purgatorio* alike, are simply forgotten. The concerns of justice disappear in the light of truth and love. Perhaps that is after all the best answer possible; or, to put it another way, perhaps the closest the poem comes to a theological answer is no answer at all, again a kind of silence, the invocation of Mystery. In this it would be in a grand

---

4. DANTE, *supra* note 1, at 233 (author's translation). At one point Francesca says that the pleasure in Paolo that love gave her has never abandoned her, V.105, and at another that she will never be divided from him, V.135. The latter remark will be felt by the reader as grim indeed, and, on reflection, the first may come to seem a statement of what has in fact condemned Francesca to the Inferno, a misplaced love that she cannot give up. But I think we are to read her as being unaware of these significances.

tradition from Job to the present day. After all, no human being has ever been able adequately to reconcile the presumed power and goodness of the Deity with the sufferings and injustices of life.

My main point here is a simple one: that Dante's poem works by creating a crucial realm of silence defined by the unanswered questions, the unanswered questionings, that it stimulates in its reader. This is how it can present a complete and universal structure—an empire—without becoming an ideological apologist for it. In the terms of our quotation from Simone Weil, Dante keeps the highly juridical world that he imagines into existence in this poem from becoming an empire of might in part by creating silences that confirm—that make necessary—the presence and place and judgment of the reader.

The center of this poem, for me, thus lies in what it calls upon us as a reader to do and to be as we read it: a questioner, as I have said, and in this sense a resister; as one who must be satisfied in his or her own mind, and not simply rest on a set of authoritative declarations. It calls upon you to be present at the deepest place in your own imagination, as one person and mind engaged with another, facing the great question of the meaning of this or that human life, of human life itself. That there is no systemic structure of thought that can automatically meet the responsibilities it defines, that the authoritarian must always be resisted, is one of the great teachings of this poem.

Many of the souls that Dante the traveler meets in the *Inferno* and elsewhere sum up in a few lines the essence of their whole lives. This is in the end a matter of moral and spiritual quality. Everyone is a sinner, of course; the question is what attitude one has towards the damage one has done to others and oneself, what effort one makes to correct and improve, what kind and degree of trust one can attain, and so forth. Among other things, this means for the reader—however remote he may be from Dante's specific religious commitments and understandings—that an essential part of the experience of this text is a certain anxiety and doubt it generates: Where in this imagined world would I be placed? What would I have to say for myself, and what would it look like in this context? What kind of meaning does my own life have?

It may be surprising but I think it is nonetheless true that the deepest concerns of the *Divine Comedy* are actually not so very foreign to those of law, which also has at its center a question of meaning—the meaning both of human experience and of the languages, and other cultural forms, in which we represent and manage that experience. Every lawyer arguing a case makes a claim both for the meaning of the story he tells and for the meaning of the law that is to be brought to bear upon it—including the

meaning of our largest legal and constitutional arrangements, the meaning of our country's history and structure. The law is a system of meaning, and a very great deal of its value lies in the ways, large and small, in which it creates meaning for the individual, for the group, for the nation. Like Dante's poem it constantly raises the question, and for good or ill answers it, how we are to imagine ourselves into existence, into our future. Law has a character that can be understood and, as Dante suggests, judged.

The law does all this in part of course by creating a structure of rules and consequences, of ideas and images; but, in our tradition at least, it is also part of its task to struggle constantly to keep itself from making these structures absolute, beyond questioning or analysis. The materials of law are not orders to be slavishly followed, but the materials of thought, to be used and transformed. This is ensured partly by the fact that there are lawyers on both sides of every case, for by this arrangement the language of authority is simultaneously made conscious and rendered open to criticism and change. The very nature of legal argument creates a space—a silence—that calls upon the speakers, inviting them to fill it with the work of their minds. The law thus lives, insofar as it does live, by the energy and presence of individual minds, questioning and doubting, retelling and recasting, creating claims of meaning at once new and old. At its best, the law puts itself always in question, and may perhaps thus teach us what an empire of might is, and how not to respect it.

### III. NOISE

I want to turn now from the silent worlds of the Trappists and the Quakers, and from the text Dante has built partly out of silences, to look at the world that we ourselves inhabit, and ask a very general question, implied in my opening story about the Trappists: What is our own public speech world like? What is its value? In what respects is it an empire of might?

I will be brief, but it seems obvious to me, and I trust to you, that our world of public speech is very different indeed from the silences of the Trappists in their monastery, of the Quakers at their meeting, or of Dante in his great poem. While we each enjoy personal islands of peace and privacy, moments of silence, we are for the most part bombarded with speech of all kinds, in many formats and through many media, from newspapers to radio to TV to the telephone to the Internet, much of it insistent, blaring, demanding, and very little of it either making possible or rewarding real attention. We talk to each other constantly, on the cell phone and the Internet. We live in a very noisy world indeed, and we contribute to that noise. And, if I may say so, it is obvious, as my teacher and friend suggested

in his comment on the Trappists I quoted at the beginning of this Essay, that a great deal of what we say and hear is junk.

We ought not simply disregard this fact, for the bad can have real effects, including on our own minds, which it does not improve; and it necessarily tends to drive out the good, in part by simply swamping it, in part by destroying the silence that is the condition of all really meaningful speech. I think in fact that the noise I speak of is in its way as great a danger to the real value of speech as censorship would be, and needs to be resisted for much the same reasons.

It is a little embarrassing to talk in this way about the junkiness of our verbal world, for it makes me sound like a sourpuss, a repressive spoilsport, maybe a snob. But I do think we are out of balance. If you are inclined to resist, let me suggest that you pretend that you are told that you must spend an hour, or a day, thinking about the world in the terms established by TV or newspaper ads, billboards, newspaper editorials and op ed pieces, or, dare I say it, by presidential debates and speeches. You could not bear it because no self-respecting person could. This world consists mainly of one cliché or slogan after another; much of it is misleading or dishonest; and its tendency is to suppress, not stimulate, independence of thought and judgment. This speech does not come from inner silence, and it depends for its effect upon the fact that it does not take place in outer silence either, for it could not bear the attention that such silence would invite. To consider the most important case: When is the last time you felt that you were addressed by a candidate for public office, or someone who holds such an office, in a way that made you feel that he was speaking directly and honestly about a difficulty he thought was real and hard, and speaking to you as a person of independent mind and judgment?

Obviously I have only my own impressions to build on, and they are no better than anyone else's, but it certainly seems to me that far too much of our world of public speech consists of forms of expression that are designed simply to promote the sale of commodities or to advance a political position, and to do so with very little respect for the audience or regard for the truth. Speech of this character works not by appealing to the thought and experience of the person it addresses, imagined as a whole being and mind, but through the manipulation of instincts, instincts that it in fact does a lot to form. To put it in plain terms, I think our public world is dominated by the twin evils of advertising and propaganda; that these constitute in their own way an empire of might; and that what to think or say or do about this fact is a serious problem for us both as individual people and as lawyers.

This is not just a matter of aesthetics or taste; our public speech has substantive consequences too, for this part of our world is largely built upon a

diminished and diminishing image of the human being as merely a cluster of wants and desires, and upon a conception of human speech as the manipulation of those desires. The view that the good life is a life of the gratification of desire, without critical attention to the nature of the desire in question or to the nature of the proposed gratification—a life of consumption—is simply not an adequate conception of human felicity or an adequate image of the meaning of human experience. Our habituation to the forces in our culture that promote this view, in the economic and political arenas alike, makes it difficult for us to defend our most important institutions and values, those that imply and require a richer conception of human action, thought, and flourishing. I think here of our deep and admirable cultural commitments to human equality, to caring for others, to independence of judgment, to the practice of self-government—all of which presuppose a very different image of human life from that of the consuming economy or the politics of self-interested voting.

I need not go on. No one could sensibly argue or believe that the purpose of human life is acquisition or emulation of the kind stimulated by our advertising culture, or that this kind of life or talk is worthy of us in the political realm either. Imagine that we suddenly found ourselves to be collectively a character in Dante's poem: How would we talk to Dante the traveler, how would we explain our collective life and history? What kind of life would we represent ourselves as having, and what meaning would we claim for it? For Dante, what matters most is what he would call the state of your soul; we do not usually use that kind of language, at least in academic publications, but we do say something similar, that what matters most is who we are, who we are becoming, who we help each other become. This is the deepest question of life, and not only for us as individuals, but for us as a nation, and for an institution like the Supreme Court too. Not what we have, but who we are. And who we are, in the domain of public speech, is not so good.

#### IV. OUR TALK ABOUT SPEECH IN THE LAW

For a person interested in the quality of speech, in freedom of speech, and in the First Amendment, as I am, the disturbing point to which I have been building can be put this way: Our beloved free speech seems to have been at least sometimes the enemy of valuable speech, by creating the conditions on which it can be swamped or driven out or perverted. How do we think about this problem? How should we? What place should silence have in the way we ourselves think? In our larger world?

I want to focus on the first question—"How do we in fact think about this problem?"—as a way of directing attention to the quality of our own speech, especially our speech about speech, including in the law. Let me begin by asking you first to reflect on your own response to what I have just said about certain strains of speech in our culture of which I disapprove, especially my use of the word "junk." If you are like me, a side of you will have reacted very strongly, something like this: "Who are you to use the word *junk* of any speech? As Americans we are committed to our liberties, to our liberty of speech above all. The explosion of speech in our public spaces is an inherently good thing, not a bad one, even if you don't like it. What kind of elitist are you anyway?"

Some such response—in you and me and all of us—is I think deeply built into in our minds and our culture. It is an instinctive reaction so well established among us as to be a kind of second nature. At the faintest signs of what looks like censorship or even disapproval of any form of speech we are likely to find ourselves resisting strongly. We boldly say that we are cheerfully willing to pay the price of too much speech—and of trivial or even dangerous speech—and for several very good reasons: in order to avoid the evil of government censorship; in order to make truly democratic politics possible; and in order to respect the right of the individual to form her mind, and her relations with others, in such manner as seems to her best. Free speech is an aspect of autonomy, of the sovereignty of the individual over himself. We believe that if speakers are, within quite generous limits, simply allowed to say whatever they want this will be productive of great public and private good. As Voltaire is supposed to have said, we may detest what you say but we will fight to the death to preserve your right to say it. This is a key part of what it means to be an American.

Notice that in its dominant formulation this view is based upon deep scepticism: scepticism about anyone's claim to be able to judge in any enduring way the value of another's speech—to call it junk, for example. Yet, with happy inconsistency, we join this scepticism with an affirmation of the deep faith that over time the best speech will prevail in the process we label, in Holmes's metaphor, the "marketplace of ideas."

I mean this as a statement in the briefest possible terms of what I take to be a standard view of free speech in our country, not only among lawyers but in the culture more generally. It is simply a part of our minds. It is what I myself think and say, most of the time at least. There are of course many competing theories and visions of the First Amendment, but when I think of the responses of my colleagues, students, and indeed of myself, none of them begins to have the force and staying power of the image of the

“marketplace of ideas.” This is the position we instinctively resort to when someone challenges the idea that speech should be free.

A. Defects in the Image of the Market

What interests me at the moment is the peculiar fact that we—I include myself—tend to hold on to this position even though we know, as every First Amendment class teaches, that there are serious difficulties with it—difficulties so serious that in its usual formulations at least it is really not tenable.

Consider this, for example. When we really do believe that speech can advance truth—or when we value what it can do for other reasons—we normally do not free it from constraint, but instead do the opposite: we regulate it, sometimes with extreme severity, and we do so in ways that directly reflect a collective judgment of usefulness or quality or value. Take the courtroom, for example: this is an institution that works almost entirely by words, but in it there is very little of what one would call freedom of speech. The law of procedure and evidence is actually a way of declaring who can say what, on what occasion, and to whom, and one is not free to deviate from what it declares. No trial judge would be receptive to the argument that your freedom of speech entitled you to disregard his courtroom rulings. Likewise the classroom—a bastion of freedom for the professor—is a place of radically controlled speech. Normally a student may speak only when called on and only to the issue. Scientific journals strictly regulate what can be published, and under what conditions. One can readily think of other examples. Despite our commitment to freedom of speech, we regulate it all the time.

It is important to see that this kind of regulation has the aim not of suppressing truth, or some other social value, but of making its discovery or expression possible. And, to return to my first theme, notice that in each of these cases regulation works to a large degree through compelled silence: Silence is the sculptor's chisel that shapes the speech, that creates the context that makes sustained attention to it possible and in this way enables one to build upon it. It is almost as though, despite our claims for the importance of freedom of speech, we allow speech to be relatively unconstrained only when we think it does not much matter. In fact all institutions regulate speech, from museums and theaters to businesses and churches to sports teams. In a sense, that is what an institution is: a complex set of expectations about the use of language, all of which are ways of repressing and excluding speech as well as enabling it. And in many cases at least the idea is to foster or make possible speech of a high quality, for it is upon such speech that the success of the institution depends.

Second: Despite what we say about the “marketplace of ideas,” we also know, if we allow ourselves to reflect on it, that we simply cannot trust any such process to winnow out the bad and promote the good. We know that dreadful speech can survive and flourish, like a poisonous plant: think of *The Protocols of the Meetings of the Learned Elders of Zion*, a venomous antisemitic text that has been wholly discredited for over a century, but, as a quick web-search will show, is still in robust circulation. Or think of American racism, which—formed and maintained by speech—infects the mind of every person who lives in our country, including yours and mine. Each of us is partly made by the world we inhabit; this means that our most private and personal and apparently independent choices, the root of our imagination, may be corrupted by something wrong, or evil, or demeaning, or trivializing in our world, something we have internalized. This in turn means that our choices in the world of speech, and those of others, ought not be granted perfect and unquestioned authority, either on the grounds that speech is harmless, or that more speech is always all to the good. Think once more of the white child growing up in a system of black racial slavery, or of the black child doing so; the minds of both, their ways of imagining the world and themselves and others, will be perverted by the cultural system of which they are a part. In fact we owe it to ourselves and our world not to abandon our collective powers of judgment, as the marketplace metaphor invites us to do, but to train and develop them, with the constant awareness that what now seems to us natural and right in us or our world may in time come to seem false and wrong. Not to do this would be to abandon an essential human responsibility. What we say, and what others say, matters enormously to all of us. It is a form of action.

A third difficulty is this: The standard ideology of free speech assumes as its model an independent-minded individual who is speaking unwelcome truths to the world, resisting power, and competing with others in an open market that will test both fact and value. It is with such speakers that we easily identify; it is they whose right to say what we detest we would die to defend. But very little of the speech that makes up our shared world takes this form. Rather, the bulk of our public speech is commercially and politically driven and as such is naturally dominated by a cluster of institutions, businesses, interests, and political organizations of great power. The “market” for public speech, if one is to use such a metaphor, is not individual and not a truly open one. This means that important threats to speech of the very kind we imagine ourselves as valuing most—freedom of speech in the individual person—may emanate from these immensely powerful private speakers as well as from the government. For, like the government, the nongovernmental world is a world of power, including power over speech. It shapes



and suppresses speech—it drives out speech—both by the speech it fosters in others and by the speech it disseminates. Think for example of the way a few TV networks dominate the ways in which we conceive of and imagine what is happening in the world. We tend to assume that if the government just leaves the world alone a garden of speech will spring into existence, but in some ways what we have is closer to a desert.

#### B. The Larger Pattern

Here then is the problem to which I want to draw attention: In our very talk about speech, and freedom of speech—as evidenced by the force of the image of the “marketplace of ideas”—we can be seen to collapse into slogans and clichés of our own, signally failing to attain and manifest the qualities of mind and expression for which speech itself at its best is properly valued. Why is this so? You could put the question this way: If the image of the “marketplace of ideas” has the rather obvious defects I describe, why does it have such force and power in our minds? Why can we in fact hardly remember its defects, when in some sense we know them perfectly well?

This feature of our experience, this fact of our psychology, is for my purposes crucial, for this is a point at which we can actually catch ourselves succumbing to the temptation to fall into slogan or cliché—into talk of a kind that in fact supports the empire of might, which works by just such formulations. And we do this just at the point at which we think of ourselves as most powerfully taking a stand for freedom of speech, as resisting the authoritarian, as protecting the individual mind, and so on.

Of course I do not claim to understand all the reasons for the force of this slogan or cliché, but part of it I think is that the metaphor of the “marketplace of ideas” replicates in the field of speech a cultural system or mentality that is so widely prevalent in our world, in the law and out of it, that it is hard to resist in any context. What I refer to, as I suggested earlier, is the habit of imagining human life simply as the satisfaction, or not, of human wants or desires. This is the principle upon which our advertising culture and much political propaganda rest. If I want it, I should presumably have it. This is a premise of economic thought, for example, which takes human wishes for granted and conceives of itself as the science of their satisfaction; and it is also said, erroneously in my view, to be a premise of democracy as well. When we are thinking in this mode, we imagine a world of competent adult people, each making choices that will serve what they believe to be their interests; and we believe that so long as they do not interfere unduly with the rights of others, each should be free to act and

speak with maximum liberty. In that way the desires and wants and values, or what are called tastes, of each—and all—will be achieved to the maximum possible extent. Our image of speech as a market thus acquires much of its force and staying power from our larger ideological commitment to that kind of thinking—our imagining democracy as a market, life itself as a market. Consumer choice, electoral choice, are alike: you will try to get what you want, I will try to get what I want; the function of government is to protect this process in a value-neutral way.

As I suggested earlier, this seems to me as a general matter, and not only with respect to speech, to rest upon a highly exaggerated faith. Just as our experience tells us that the cultural processes we call the “marketplace of ideas” will not always lead to truth or justice or fairness, so it tells us that the basic assumption that a series of “rationally self-interested choices” will lead to the best possible outcome is not true. Aside from the dubious rationality of many of our choices in the first place, it is perfectly possible for a series of individual choices, each in some sense “rational” on the conditions presented, to produce a result that no one could sensibly want. Our patterns of land use demonstrate this as well as anything: no one would want a highway leading into a beautiful and historic resort town to look like the standard American strip, with gigantic signs, bright lights, ugly buildings. But this is all too often what we have, and it is the result of individual “rational” decisions. The person who owns a piece of land on the highway, and wants to use it for business purposes, is compelled to compete for attention by contributing to the visual blare, even if he thinks it hideous. Or think of the new style American suburb, which owes its origins to similar processes. Under current conditions, it is rational for developers to create housing subdivisions that are wasteful of scarce resources and for people to buy them, given the alternatives available, even if all the actors agreed that it is not good to live without the shops, restaurants, sidewalks, and neighborhood life that denser housing patterns make possible.

Much the same is true in the field of speech, with similar results. Who would for a minute think that what our TV networks produce is worthy of a great people? Only one who could see no farther than his ideology of private choice would let him. The market cannot be an automatic test of value, as our ideology insists, for to use my earlier term, it so often produces junk. This ideology refuses on the surface to make “value choices,” supposedly leaving them to be worked out by consumers in the market, but in fact it is deeply resonant of value, especially in its way of imagining what a human being is, its sense of what motives drive us, and its image of what would constitute a fulfilled human existence.

The image of the market seems to me even more obviously wrong as a way of thinking about democratic government. My idea of democracy is not

that it provides a framework in which the maximum number of things can be done or said, shaped only by human will and preference. I think the point of democracy is to give a nation a special character, to subject it to a special discipline, one that will make it capable of moral and ethical action on behalf of its citizens in a new way; this should in turn give the nation the possibility of a meaningful past, a meaningful future, of a new kind. Democracy is a method by which the people choose their collective values, shape their collective conduct, and assume their collective responsibilities as a nation. Or, to put it slightly differently, it is a way in which people commit to a shared identity and history while they struggle over these things. It is not about the pursuit of self-interest. Quite the reverse: for democracy to be real it requires what it makes possible, an identification of the individual with his government—his sense of pride or shame at the moral history of his nation, at what is said and done in his name. It is built upon, and requires, a sense of public responsibility leading to collective self-education. In a sense the test of any nation is the willingness of people to die on its behalf, and I think no one would willingly die for enhanced economic welfare. For that sacrifice, without which one cannot have a nation, one needs such a thing as justice, or glory, or truth.

As for the economic model itself, it is of course a way of looking at life, not life itself. One could look at life in other ways. One might begin by noticing for example that no person is in fact independent of all others, as the economic model assumes. We all live in relations of dependency, or caring, from birth until death. We are in fact all a bit like parents and children to one another, working out of relations in which one person cares for another: sibling, friend, teacher, doctor, lawyer. It is in networks of such relations, in which we find ourselves constantly alternating roles, that most of our life actually takes place. The arm's length "deal," except in the life of a trader, and then only a part of it, is a small part of life, surely not a model of human experience as a whole. On this view the fundamental question about human life and relations could be put this way: When are we good and bad parents, and children, and friends, in these relations? When do we take good care of each other, when not? What kinds of structures and relations promote care for each other? What kind of community?<sup>5</sup>

### C. The Desire to Submit

The Trappist—or Dante—might see more clearly than we can that the part of our culture that works through advertising and propaganda, and that

---

5. Cf. Robin West, *Caring for Justice* (1999), which works out a vision of the world somewhat similar to the one I sketch here.

imagines the world of speech as just another market, represents a fundamental emptiness. And he might also see more readily than we can that it creates a force in our minds that makes it very difficult to think about the question I have been elaborating from the beginning of this Essay, namely the tension between free speech and valuable speech. And this is what interests me at the moment: the pressure that the image of the “marketplace of ideas” exerts in our minds, so strong as to make us forget its obvious defects and limits.

Prevalent though its assumptions are, as I suggested above, I do not think this image has the power it does for this reason alone, but because there is something in us that leads us to want to reiterate it, to resort to it, even when we know how inadequate it is, in a way because it is inadequate. It is a kind of slogan, the function of which is to suppress independent thought and judgment; its power comes in the end from our very desire to submit to that kind of language, that kind of thought, because it is easier than engaging in responsible intellectual and moral life. It comes from our desire to submit to the empire of might.

In thinking about this kind of speech, and our susceptibility to it, I am often reminded of Robert Frost’s most famous poem, *The Road Not Taken*, which as you remember closes by celebrating the choice of the “road less traveled by.”<sup>6</sup> I am sure it is read at high school graduations all over the country, as a way of urging young people to follow their own path, even if unpopular—to listen to the drummer only they can hear. But, as you may recall, in the poem itself we are explicitly told, when the choice of path is described, that the two roads were in fact not different but virtually the same. The narrator says that “he looked down one,” as far as he could,

Then took the other, as just as fair,  
And having perhaps the better claim,  
Because it was grassy and wanted wear;  
Though as for that the passing there  
Had worn them really about the same,  
  
And both that morning equally lay  
In leaves no step had trodden black.<sup>7</sup>

We are told this explicitly; yet when we get to the end—“Two roads diverged in a yellow wood and I/I took the one less traveled by/And that has made

---

6. ROBERT FROST, *The Road Not Taken*, in ROBERT FROST, POETRY AND PROSE 51 (Edward Connery Latham & Lawrence Thompson eds., 1972).

7. *Id.* (emphasis added).

all the difference”<sup>8</sup>—we find we have forgotten it utterly. We accept the false and sentimental phrase despite our prior knowledge.

We forget what we know. Our desire for an image of sentimental meaning—for an apt phrase to slide over the true difficulties of describing and judging experience, and thus to give us an illusion of significance and control—is just too deep. This is the real subject of the poem, in fact; not the nature of human choices, but the way in which a phrase or slogan—like “the marketplace of ideas”—can take over the imagination, colonizing it, making the mind no longer fully one’s own. The aim of the poem is to resist the very impulse toward cliché that it stimulates in us and captures, and freezes in amber, and holds up for our examination.

## V. OTHER POSSIBILITIES

I think we are right to value speech, or some speech, very highly indeed, but for a reason very different in kind from our commitment to the ideology of the market: a deep intuition that speech is somehow essential to our humanity, to what it means to be human; in particular, that our full dignity as individual people and as a culture depends upon our being able to claim meaning for our lives and experience. We are meaning-making creatures. This is what distinguishes us from other animals. This capacity is the deepest nerve of our life, and our instinct to protect it and its freedom at almost any cost is a right one. This is not a view of speech as a market, or even as an evolutionary process, quite the opposite; and the kind of speech we hope for with this part of ourselves is not advertising and propaganda but speech that is deeply meant, that expresses and offers engagement of the mind, that invites and rewards attention—speech that comes from inner silence and takes place in outer silence.

The question to which I have been building, and which I would like to leave with you is whether it is imaginable that the law could be a place for this kind of speech. This question actually has two distinct dimensions. The first is this: Can we in the law find a way to imagine the speech of others—the speech that is the subject of the First Amendment, say—as exhibiting the possibilities, positive and negative, that I have been trying to describe in this talk? This would mean recognizing that our speech falls on a spectrum, from speech that has extraordinary value, for us as individuals and for the world, to speech that is destructive of these very values. Our speech has real value for us and for the world—it is worthy of real attention—insofar as it is deep, original, self-testing, aware of the

---

8. *Id.*

limits and resources of its language; insofar as it calls upon the reader or hearer to respond in a deep, not superficial, way; insofar as it has genuineness of voice, and character, and relation; and insofar as it has a life and shape of its own that works against the various reductive and dehumanizing forces in the world that I have been calling the empire of might. Our most valuable speech asserts the reality and importance of human experience, of the human imagination, and of our capacity to create communities of meaning, in texts and in the world, that will call upon each of us to realize our best and deepest self. At the other end of the spectrum is what I call advertising and propaganda (though other instances could of course be given): speech that trivializes the human mind and imagination, and treats its audience and its subjects with fundamental disrespect. This is the language of system, and bureaucracy, and empire.

Not, I hasten to add, that I think the Supreme Court should interpret the Constitution as permitting us to prohibit all speech that has low value on this scale. But the Court should reflect, in the way it imagines the world and talks about it, the cost of a decision to have virtually unlimited speech. It ought not be enough simply to say that someone is using words, or that his conduct is in some way expressive, as though that answered all important questions. When the Court, or any other agency for that matter, tolerates what it believes to be base, empty, manipulative, dead, or disgusting, it should recognize and express what it is doing.

If the Court were to follow this course it would not abandon the idea of free speech, quite the opposite; but it might find itself less ready than it has been to assume without much thought that the principle of free speech reaches and protects purely commercial advertising, what it calls “indecent but not obscene” films and videos, the burning of crosses, racial and religious epithets, and naked dancing in strip bars. Perhaps all of these ought to be protected; but they ought to be protected by the collective mind of a Court that recognizes in a real way the destructiveness and trivializing force of the expression at issue.

This brings me to the second dimension of our question: speech not in the world, but in the law, and especially in the judicial opinions, for it is here, if anywhere, that the recognition I speak of will be expressed. This will not happen through routine or formal protestations, but only if the Court itself can exemplify the qualities of mind and speech we ought to value most. Thus we can properly ask of an opinion whether in it we see the presence of a distinctive mind speaking out of inner silence to a similar place in the reader; whether we see a composition that is not the reiteration of dead and routine forms, but has a figure and life of its own that resists the appeal of ideology, slogan, and cliché; whether we see a text that defines its

reader as an independent mind and offers him or her an opportunity to make a judgment on the merits, a judgment that the opinion will inform but not dictate. The writer of an opinion that worked this way would reveal an awareness of the temptations that are always working in our minds and in the law to create an empire of might, and a desire not to respect them. To put it in a phrase, the hope would be that that we in the law could create a community of minds engaged in a conversation that proceeded from and to the deepest place in the human mind, the point at which it imagines itself and the world anew. If we could do this, we would advance in a most important and immediate way the fundamental value upon which democracy rests, namely the essential dignity of human experience and identity. If we fail, we fail in this, perhaps the most important of human endeavors.

Is it possible for us to succeed, and to what degree, and when and how? These are questions I shall have to leave for another occasion. But I can say that I think that the law is perhaps surprisingly a place where the kind of valuable speech I have been trying to identify can be heard, perhaps more often than in most other segments of our culture. And there are good reasons for this. The oppositional nature of legal thought tends to put in question both the assumptions we bring to an argument and the language in which we express them. Legal thought and argument is inherently individual, not in the sense that it is not cooperative, but in the sense that there is—or should be—always an individual mind behind whatever is said, and responsible for it. And law works, or should work, under the persistent pressure of silences: silences that shape the argument, recognizing what cannot be said, or should not be said; silences that recognize the limits of our understanding; silences that create the possibility of real attention to what is said. Our hope for a law that can talk about speech in a deeper and truer way than we now do, and itself exemplify or embody speech at its best—not trivializing human experience but conferring dignity upon it—will ultimately rest in our capacity to speak out of silent places within ourselves, to places of silence in others. So long as the law does not collapse into the language of theory—the authoritarian impulse to claim to know all, to explain all—or, even worse, into political cant and slogan, it may remain a discourse in which new truths can be discovered and expressed.

As a brief example of what the Court can sometimes do, let me point to the opinions in *West Virginia State Board of Education v. Barnette*,<sup>9</sup> the famous flag salute case. The question is the constitutionality of a West Virginia statute requiring all children in public school to salute the flag, and pledge

---

9. 319 U.S. 624 (1943).

allegiance to it. The two main opinions are by Justices Jackson and Frankfurter, the first writing for the Court in striking down the salute requirement, the second, in dissent, arguing that it should not be held unconstitutional.

For Jackson the requirement of the salute is a form of forced expression, of which he speaks in these terms:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>10</sup>

If you think of the flag salute along the lines I have been suggesting in this Essay, it is an example par excellence of a slogan or cliché: a ritually repeated gesture that is not complicated or individualized or varied by context. As Jackson puts it, the issue is whether the “slow and easily neglected route” to national loyalty, which consists of education in the history and structure of our government, can be “short-cut by substituting a compulsory salute and slogan.”<sup>11</sup> He thus imagines the world of speech as important and complex, crucial to the life of the individual person and to the development of his or her capacities of judgment, and here he protects it against an imposition of untoward simplicity. Yet at the same time he recognizes that any of us might find ourselves sharing the impulse lying behind such an imposition: “Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men.”<sup>12</sup> It is from our own temptations and proclivities to tyranny, then, not just those of other people, that the Constitution, and this opinion, seek to protect us. And Jackson sees that what is at stake in enforced conformity of speech reaches more than speech: “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.”<sup>13</sup>

For Justice Frankfurter much of this makes sense. “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.”<sup>14</sup> His own inclination is strongly against the wisdom of such a salute requirement. But here the Court is faced with a judgment reached by the West Virginia legislature, and it must hesitate to substitute its own view, especially where the Court’s only mode of action is so severe, the permanent invalidation of a statute. The core of Frankfurter’s argument is that the Court should

---

10. *Id.* at 642.

11. *Id.* at 631.

12. *Id.* at 640.

13. *Id.* at 641.

14. *Id.* at 646 (Frankfurter, J., dissenting).



systematically exercise self-restraint in striking down laws that are the product of the democratic process, both in the field of economic regulation, as several of his New Deal colleagues readily agreed, and with respect to civil rights and liberties, as they did not. For him, self-restraint is essential alike to the integrity of the Court's thought and to its continued authority. Frankfurter says this about the requirement that children participate in this symbolic gesture: "[I]t is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes."<sup>15</sup>

Both Justices speak out of evident conviction; both find something external to themselves to respect—Jackson the speaker's freedom, Frankfurter the legislature's judgment; neither reduces his position to a cliché or slogan, in fact each of them, in his own way, resists that kind of thought. Both opinions are shaped by respect for silence, not only in the usual way in which an opinion is set apart from other texts, but in their structure: Frankfurter's deepest claim is that the Court should be silent on the matter of the salute, and Jackson's is that one must permit the children to be silent. And especially as the opinions work together they do indeed define a place of independent judgment for the reader of these opinions. This is not simply a matter of choosing the opinion you prefer, because each is so markedly the actual work of a distinctive mind that you could not adopt it as your own. Rather, they compel, or at least invite, you to work through to your own judgment, expressed in your own terms. In this both opinions resist the forces of dehumanization and do so on behalf of the life and value of the individual mind.

In the law, as Dante shows us in another context, the effort should be to resist the empires of might that seek to dominate our minds by the use of thin, manipulative, or empty speech, and to do so by insisting on the presence of the individual mind and person, both as speaker and as hearer. Only by such an insistence can we resist the force of the advertising and propaganda that dominate so much of our public culture, and correct our own disposition to think in terms of cliché or slogan. Much more important than the outcome of any particular case, or the adoption or rejection of a particular rule, it is only through such insistence, repeated over and over again, as actors in the law and as critics of it, that we can hope to create the life—the intellectual and moral life—upon which democracy depends.

---

15. *Id.* at 662 (Frankfurter, J., dissenting).

I want to close with a small example of the kind of achievement I have in mind, not by Dante or Robert Frost, but by an American public man and political actor. Here is Abraham Lincoln's letter of appointment to General Hooker, which in a rather surprising way turns out to involve the issue of freedom of speech. Lincoln leaves neither us nor Hooker in any doubt as to his judgment on Hooker's acts of speech, but as you will see he tolerates it nonetheless. This is one mind speaking the truth to another, insisting on it in fact, and doing so in such a way as to invite the other to act out of his best self, not his worst. It can stand as a model of what I would call responsible speech, the opposite of advertising and propaganda, of slogan and cliché. Though I will not stop to trace them out, I think you will see that it is shaped in no small part by its significant silences. And notice too that Lincoln is here resisting, in a direct and effective way, the impulse towards what he calls dictatorship, and what I have been calling the empire of might; and that this resistance is achieved both in his definition of himself as a mind responsible for what he says and does and in the demand he makes upon his reader for independence of mind and judgment.

LETTER TO GENERAL J. HOOKER

Executive Mansion,

Washington, D.C., January 26, 1863

GENERAL: I have placed you at the head of the Army of the Potomac. Of course I have done this upon what appear to be to be sufficient reasons, and yet I think it best for you to know that there are some things in regard to which I am not quite satisfied with you. I believe you to be a brace and skilful soldier, which of course I like. I also believe you do not mix politics with your profession, in which you are right. You have confidence in yourself, which is a valuable if not an indispensable quality. You are ambitious, which, within reasonable bounds, does good rather than harm; but I think that during General Burnside's command of the army you have taken counsel of your ambition and thwarted him as much as you could, in which you did a great wrong to the country and to a most meritorious and honorable brother officer. I have heard, in such a way as to believe it, of your recently saying that both the Army and the government needed a dictator. Of course it was not for this, but in spite of it, that I have given you the command. Only those generals who gain successes can set up dictators. What I now ask of you is military success, and I will risk the dictatorship. The government will support you to the utmost of its ability, which is neither more nor less than it has done and will do for all commanders. I much fear that the spirit

which you have aided to infuse into the army, of criticizing their commander and withholding confidence from him, will now turn upon you. I shall assist you as far as I can to put it down. Neither you nor Napoleon, if he were alive again, could get any good out of an army while such a spirit prevails in it; and now beware of rashness. Beware of rashness, but with energy and sleepless vigilance go forward and give us victories.

Yours very truly, A. LINCOLN<sup>16</sup>

---

16. Letter from Abraham Lincoln to General J. Hooker (Jan. 26, 1863), in 8 COMPLETE WORKS OF ABRAHAM LINCOLN, at 206–07 (John G. Nicolay & John Hay eds., 1894).