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LEGAL KNOWLEDGE

*James Boyd White**

What do we know when we know the law? I asked a rabbi I know how he would answer that question with respect to Jewish law. Does someone know the law when he can repeat the rules that tell him what to do? Or when he can engage in the activity of reading them, separately or in conjunction with each other, and applying them sensibly to new circumstances? Is even that enough? My friend said it was not: he must know who he is in relation to the law, both as an individual and as a member of a people; this means that he must know that this law is part of a covenant with the God of Israel, and he must understand the story that connects that God with this people. In particular he must recognize that this law was given to the Hebrew people just after their escape from slavery, at the moment when they attained the free and autonomous state that made them capable of receiving the simultaneous gift and restraint of law.¹ Sketchy and incomplete as these remarks are, I want to take them as a model of a certain kind of legal knowledge.

Particularly in the academic world, knowledge is now often talked about quite differently, as something objective, stateable, verifiable — out there in the world, where it can be seen and passed around, as a kind of information. And it is often imagined not as the work of an individual mind, or group of minds, but as the product of a system or process of some kind. It is in this way objectified and reified, even commodified.

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¹ In *Ever Since Sinai*, Jakob Petuchowski makes an additional point: that one must come to see the law not simply as "legislation," that is as an impersonal and abstract system of obligations, but as "command," from one Person to another, both building upon and shaping the relationship between them. JAKOB PETUCHOWSKI, *EVER SINCE SINAI* 78-80 (1961). One might compare Zechariah Chafee's interesting observation that a constitutional provision like the First Amendment "is much more than an order to Congress not to cross the boundary which marks the extreme limits of unlawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary." Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *HARV. L. REV.* 932, 934 (1919). For a work giving striking content to the idea that the law is a gift, see ABRAHAM JOSHUA HESCHEL, *THE SABBATH* (1951).

But such an image will not work for legal knowledge, which is something of a puzzle. Contrary to the stereotype nonlawyers often have about it, the law cannot be reduced to a set of rules or other propositions. Every law student who has turned to a commercial outline of one of his courses comes to recognize this, sometimes painfully, when he takes the exam and sees that the knowledge of the law on which he is being tested is not simply the capacity to repeat the rules, but something else, including at the least the ability to think about them, to interpret them separately and in relation to each other, to bring them to bear — whatever that metaphor obscures — upon real and imagined events, and to do so both analytically and argumentatively. As I have often found myself arguing, knowledge of the law is like knowledge of a language: you never know all of it, you never know it perfectly, you cannot reduce your knowledge of it to a set of directions or descriptions or rules; rather, your competence consists of being able to use it more or less well, in one set of situations or another.² You learn the law in order to use it — in order to achieve a set of objectives, to establish and maintain a set of relations, to move yourself and others in a direction you wish to go, even to discover that direction. You never achieve perfect mutuality of understanding with other lawyers, with the court, or with your client, for that is always beyond us; rather, you use your ability to reduce, to define, to make more manageable the uncertainties that are present in every human situation. Legal knowledge is knowledge, but it is not an object, not restatable. It is a way of claiming meaning for experience.

Another friend of mine, an art historian and psychologist, once asked me, what is the law's interest in truth? His impression was that the law is a welter of confusing and competing claims, in which everyone is opposed to everyone else. It is the opposite of the kind of scientific community in which people act cooperatively towards the common goal of the discovery of truth. His implication was that the law was by comparison defective, maybe even contemptible.

I think he is right that the law is not organized towards truth in the way that science is, or towards a scientific kind of truth. But I do not at all think that it is for this reason contemptible: the main goal of law is not truth, but justice, a human value of at least equal dignity and

² See, e.g., JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973) [hereinafter WHITE, *THE LEGAL IMAGINATION*]; JAMES BOYD WHITE, *FROM EXPECTATION TO EXPERIENCE* 1-7, 73-80 (1999).

importance.³ But this fact at once shapes and makes puzzling what we can mean by legal knowledge. It is not like scientific knowledge: not propositional, not descriptive, in nature; not primarily conceptual, or analytic, or empirical; it is not about truth, but justice. Truth has a place in the law, a crucially important place, but it is hard to see and explain what this is.

It is especially difficult to understand the place of truth in law in light of the fact that we structure legal conversations about justice in part through the form of a contest, or what we call the adversary system. It is not the only way to do it, but it is our way, and it has the implication that what we say is always in principle contestable. Any claim that the law is this or that, or should be read in this or that way, must be made with the awareness that someone else, with adverse interests, may challenge it. In a case of sufficient magnitude, anything that can rationally be contested will be contested. The law is thus a way of constantly testing the limits of what can be said, what can be claimed, in our legal language. The effect is to create an odd double sense: first, that everything is up for grabs, uncertain, unstable in principle; and, on the other side, that what is unchallenged — what the lawyers share — is remarkably firm, for even these bright and assertive people, with every interest in challenging it, find that they cannot reasonably do so. Disagreement in the law is thus a way of establishing and confirming agreement. This is of course true not only in connection with the formal argument of cases but also in negotiation, where lawyers regularly come to rough agreement as to what the law means and requires. To carry on this double-edged conversational process one must have an important kind of knowledge, knowledge of what can and cannot be said. It is a kind of cultural knowledge.

But just as disagreement establishes what is agreed upon, one function of agreement is to define disagreement. I suppose all physicists agree about perhaps ninety or ninety-five percent of what the field establishes; one function of that agreement is to define, to make intelligible and accessible, what they do not know, what they disagree about. In this way agreement makes disagreement and discovery possible. The same is true in the law: it is our agreement about almost all the material available to us as lawyers in a particular case that enables us to define our disagreement in a useful way, to make it intelligible and amenable to resolution; and beyond that, it may lead us to the discovery of possibilities we had not contemplated. In both science and law

³ To avoid misunderstanding, perhaps I need to say that I do not mean that the law has no regard for truth. Obviously it does, not only in the trial of factual issues but in the interpretation of texts. Rather, my point is that its goal or end, what Aristotle would call its *telos*, is not to arrive at a true account of the world, as is the case with science, but at a decision or rule that will be just.

knowledge thus has the function of focusing our attention on what we do not know — though what we mean by knowledge and ignorance in the two cases is different.

So I want to begin by saying: law is not a body of knowledge that can be reduced to propositions or rules; its primary object is not truth, as if it were a kind of science, but justice. Legal knowledge is an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language; this may in fact be the closest analogy we have, for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world — how to use legal language to create legal meaning. Legal knowledge is in the end not factual but rhetorical and imaginative.

Of course the lawyer must in some sense know the rules and understand the conceptual relations they express or establish, complex as they may be, and she must be able to move with confidence into other fields, from history to technology, and be ready to learn facts of all kinds — historical, technical, scientific, and so on. But all of that knowledge, important as it is, is really the material upon which her other knowledge works, as she figures out what it is possible for her to say, and how best to say it. The lawyer's knowledge is a writer's knowledge.⁴

But the lawyer is a special kind of writer, with her own particular relations both to the language she uses and to the people she addresses. She is an advocate and an adviser, acting always in the interest of another, and she uses the language of the law, and her ability as a writer, to advance the welfare of her client. Does this mean that her use of language is inherently instrumental in nature — as a tool to achieve

⁴ The image of knowledge as purely objective and wholly shareable that is implicit in much of our talk about it may of course be wrong not only for the law but for many, perhaps all, other fields. After all, every attempt to communicate requires language, with all its uncertainties and pitfalls, and seeks to reach from one mind to another, a gap that can never be entirely bridged. For me the model of all communication is translation, which is always imperfect and thus always calls for what I call a writer's art. The particular kind of writing, of translation, that is open to the lawyer has its own problems, its own possibilities, some of which it is my aim to suggest in this Essay. For a fuller account of the lawyer as writer, see WHITE, *THE LEGAL IMAGINATION*, *supra* note 2.

objectives she does not state, for motives she does not reveal? Or has it an essential quality of sincerity or authenticity?

Sometimes, of course, the lawyer's speech and writing look wholly instrumental: in arguing a close point about jurisdiction or conflicts of laws, for example, the lawyer is not expressing what the client really believes or wants or understands. She is using this language to attain a result. But even here there is a sense in which she has to mean what she says, or her argument is false, and will likely be seen to be. She need not mean that she would decide the case the way she is arguing, if she were the judge; but she must mean that the argument she makes is a respectable one, the best that can be made on behalf of her client in fact, and that the judge could decently and honorably rest upon it. And "best" not only in the sense that it is the argument most likely to prevail; she is saying that this is the best formulation of her client's case that can be made in our legal language — the one that best serves the most fundamental purposes of law, most fully respects the decisions made by others (legislatures, judges, agencies) that bear upon the case, and most accurately identifies and interprets the texts that govern it. She is making the best case for her client that the materials of law permit, and the "best" as seen not only from her client's point of view but also from that of the law.⁵

Of course lots of lawyers do not in this sense mean what they say, but I think this costs them and their clients a great deal, for the people they address will often at some level recognize this fact and discount what they hear. The kind of lawyer who will obviously say anything she thinks will help her client — and there are plenty of them — will not be listened to by sensible judges. But there are lawyers who regularly command the respect of their audience — their judges actually want to hear what they have to say — and my impression is that this mainly happens when the audience is confident that the lawyer is speaking to them, in the special sense in which I mean the term, sincerely. While there is one sense, then, in which the lawyer's use of language is instrumental, her motives ulterior, there is another in which she can and should mean what she says. A crucial part of legal knowledge is knowing how to mean what you say in the language of the law.

* * *

Legal knowledge is thus constantly created and recreated, differently by different minds on different occasions. We say that any good

⁵ For a fuller statement of this position, see JAMES BOYD WHITE, *HERACLES' BOW* 215-37 (1985).

lawyer would know that a certain case or statute bore upon the case before him, and that any would make, in a general way, some of the same arguments — for want of jurisdiction over the person, for example, or for the application of Illinois law. But we also know that these arguments would be made in very different ways by different lawyers, even — or especially — by very good lawyers, and that it is in these differences that many of the most important qualities of professional and intellectual excellence can be discerned. An essential part of legal knowledge is invention.

And not only invention: criticism, for in using legal language the lawyer must be ready to subject it to critical judgment, from the outside as well as the inside, and to propose, or perform, transformations of it. A convention that drives this process, really makes it possible, is our principle of legal argument that the lawyer must show that the result for which he argues is compelled both by the law, as he defines and redefines it, and by justice.⁶ To admit either that the result for which you argue is unjust, though compelled by the law, or that it is not warranted by the law, though it is just, would in our system be fatal — and fatal in a judicial opinion as well as in an argument. Suppose for example that you are trying to enforce a contractual penalty for nonperformance, which the other side says is too severe to be enforced. You will argue not only that the penalty is permissible under relevant case and statutory law, but that the rule validating it is a just one: it respects the free choices of the contracting parties; it tends to produce efficient results because it encourages bargained allocation of risk; it makes possible certain high risk investment by placing the loss on the party whose anticipated benefits are typically highest; and so forth. The lawyer on the other side will maintain not only that a penalty in excess of actual damages is unjust, but that the relevant case and statutory law, properly interpreted, prohibit it at least in this egregious form. And a judge too will struggle to show not only that the penalty is valid or invalid under existing law, but that the law as he reads it is fair and sensible and proper.

Of course there will be argument about what “justice” means in a particular case, just as there will be about the “law” that bears upon it. And I do not mean that there is or should be one single conception of justice to which all lawyers appeal. My point is about the structure of legal argument, which is in a serious way imperfect or incomplete if it does not include the topic of justice as well as that of law. In our ar-

⁶ Of course the terms “law” and “justice” interact and shape each other, for it is often most just for a judge to uphold a rule or principle with which she disagrees on the merits, in an expression of what might be called institutional rather than substantive justice. And it is hardly possible to think about what justice would require, as an abstract matter, without imagining as well a set of rules, institutions, and procedures to give it content.

guments the result must be justified by law *and* justice. We are in this sense both positivists and natural lawyers at the same time. The effect of this principle is to subject law itself to constant pressure and criticism. The lawyer must always be prepared to ask where the law itself has gone wrong, what voices or claims or understandings it improperly excludes or admits. Our law is capable of great evil, and the lawyer must be ready to see how that is so; ready, that is, to reimagine if necessary both the world and the law.⁷

Such are the themes that I shall pursue in this Essay. They will, I assume, for the most part be familiar to the practicing lawyer and law teacher alike. My aim is to give them specificity by examining two or three particular legal contexts that seem to me to define legal knowledge in especially interesting ways.

I. THE MODEL PENAL CODE

How can we begin to think about the art of expression that on the view I am urging lies at the heart of legal knowledge? One place to start is with the moment at which the lawyer's mind meets the language she is required to use — the language of the law — and with a set of questions about that language: What is this language like? What does it leave out, distort, or exclude? What does it enable her to do, and what does it inhibit or prevent? When we have some sense of possible answers to these questions, we can begin to ask the next one: By what art is this language used well, that is, with both practical and ethical success? What does it mean to "know" the language of a particular field of law, to understand and to be able to use its rules, principles, cases, and other materials?

A.

As my first instance of legal knowledge I want to look at the criminal law, which has been the object of especially intelligent and thoroughgoing efforts at reform and integration. I shall of necessity be rather brief, but I think that it may be helpful to take even a superficial look at the language of a whole field, asking what opportunities and difficulties it creates for the lawyer or judge — or legislator — who tries to speak in the ways it makes possible.

The effort of reform I speak of received its fullest and most influential expression a half century ago in the Model Penal Code, which has

⁷ This is, I think, the main achievement of feminist legal scholars. See, e.g., Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); ROBIN WEST, *CARING FOR JUSTICE* (1997).

since helped shape statutory reform in almost every state.⁸ The goal of the Code was to offer a method of thought, both for the drafters and for the readers of criminal statutes, that would transform the confused and contradictory field of criminal law into a coherent system. At its center is the idea of blameworthiness or culpability, which is used both to determine criminality itself and to assess its degree. Blameworthiness in turn is conceived of as a function of intentionality or state of mind, and here the Code made an important advance. Instead of simply asking the crude question of much of prior law — whether the defendant had a “guilty” or “bad” mind (*mens rea*) as a kind of raw moral judgment — the Code engages in a much more refined process. It first identifies each of the material elements of the offense — in a hypothetical crime of home invasion, say, “breaking and entering” a “home” in the “nighttime” — then assigns one of four different states of mind (or degrees of culpability) to each of the elements: purpose, knowledge, recklessness, or negligence.⁹ The legislative assignment of degrees of culpability to the different elements is to be the product of a reasoned judgment based upon the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness. This is the way in which the purposes of the criminal law can rationally be attained.¹⁰ Of course, in all of this

⁸ For interesting background, see Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 (1978).

⁹ Thus the Code might in the hypothetical case require “knowledge” that the building is a dwelling house, but “negligence” with respect to the time, on the ground that the former element is more important to the assessment of the culpability of the action and actor. If so, a conviction could only be obtained if the prosecution proved that the defendant actually knew the building was a dwelling house, but it need show only that the defendant should have known that it was nighttime. For definitions of the degrees of culpability, see MODEL PENAL CODE § 2.02 (1962).

It would of course be possible to assign “strict liability” as the degree of culpability for one or more elements — for example, “nighttime” in our hypothetical — but the Code explicitly refuses to do that, insisting on one of the four degrees of culpability denominated above for each material element of an offense. It does permit strict liability with respect to elements that are not “material,” such as those relating to jurisdiction, venue, and periods of limitation. See *id.* (establishing purpose, knowledge, recklessness, and negligence as the degrees of culpability for material elements of an offense); *id.* § 1.13(10) (listing nonmaterial elements).

The earlier law drew rather rough distinctions with respect to state of mind because it drew rather rough distinctions in the definition of crimes, and punishments, as well. At common law, the main question of grading was whether the defendant committed a felony, for which death and forfeiture were the usual penalties, or only a misdemeanor. For these purposes a rather basic language of “guilty mind” (*mens rea*), “bad motive,” “wickedness,” and so forth might be thought to work well enough. The Code’s fine elaboration of degrees of culpability is thus directly related to its effort to grade crimes carefully according to blameworthiness.

¹⁰ Traditionally, criminal law is conceived to have four purposes: general deterrence, restraint, rehabilitation, and retribution. The Model Penal Code rejected retribution as a proper goal and added several others, among them: to protect conduct that is without fault from condemnation as criminal; to give fair warning of criminal prohibitions; to safeguard against excessive, disproportionate, or arbitrary punishment; to coordinate and harmonize the duties of courts and administrative agencies dealing with crime and offenders; and to advance the use of scientific methods in

the Code is not writing on a clean slate, as a total innovation, but trying to draw on the best of the preexisting tradition.

As I suggest above, the Code implicitly provides a method not only for the drafting of statutes but also for their interpretation; one can take a statute drafted in the old days, in much cruder terms — speaking say of “willfulness” or “unlawfulness” or “wantonness” — and say that the real question to be asked by lawyers and judges is what degree of culpability (as defined by the Code) the statute should be construed to require with respect to each of its material elements. Its method is thus in important respects transformational, for it provides a language of greater refinement and complexity into which conversations traditionally couched in other terms can usefully be translated. For example, consider the standard common law doctrine that a “mistake of fact” is no defense to a “general intent” crime, but may be a defense to a “special intent” crime, while “mistake of law” is never a defense. In the textbook case of *State v. Woods*¹¹ — where a woman charged with sleeping with “another woman’s husband” raised as a defense that she (as it turns out erroneously) believed the man to have had a valid divorce — the Vermont court approached the question by asking whether the concededly good faith mistake was one of “law” or “fact.”¹² But in this context these words are virtually empty terms of conclusion; what should shape the conversation is the question whether it is a wise reading of this language to punish this woman, and people similarly situated, under this statute, given the language and purpose of the statute and the purposes of the criminal law more generally. This is exactly the consequence of the Code’s method, which asks what degree of culpability this statute should be read to require with respect to the central element, “another woman’s husband.” Should she be punished only if she actually knew she was sleeping with someone validly married to another, or should it be enough that she was reckless or negligent with respect to this circumstance? Or should it be the case, as the Vermont court actually held, that she should be punished even if she was wholly innocent of the

the sentencing and treatment of offenders. *See id.* § 1.02. The Code has of course been criticized, especially for its attempted elimination of retribution, which some consider the foundation of criminal law, especially since its central concept of culpability seems to suggest a measure of responsibility based upon desert. For a helpful summary treatment of the purposes of punishment, see Kent Greenawalt, *Punishment*, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1336 (Sanford H. Kadish ed., 1983), as well as the collection of materials in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 113–85 (5th ed. 1989).

¹¹ 179 A. 1 (Vt. 1935).

¹² *See id.* at 2–3.

fact that he was still married to another?¹³ To frame the question this way directs attention away from an empty clash of conclusions to the language and policy of the statute and to the purposes of criminal punishment itself.¹⁴

Or consider a statute that defines rape as "sexual intercourse by a man with a woman against her will." The defendant admits sexual intercourse, but claims he believed that the woman was consenting; she says that she was not, and that his contrary belief was unreasonable. Under prior law, it was usual to ask whether the statute should be read to imply an unstated requirement of *mens rea*, or a "guilty mind," with respect to her nonconsent; if so, it would require for conviction that he actually knew that she was not consenting; if not, he would be guilty of rape even if his belief in her consent was honest and reasonable. The Model Penal Code offers two intermediate alternatives, "negligence" and "recklessness": under the first, the defendant can be guilty of rape if his good faith belief is unreasonable; under the second, he can be guilty if he recognizes and consciously disregards the risk that she is not consenting.

The Code is thus telling legislatures to choose the degree of culpability explicitly, for each of the elements, and to assign punishments that are proportional to the blameworthiness so defined. Although it does not say so outright, in effect it also tells the court (and lawyers) facing a statute that does not in plain terms assign degrees of culpability in the way the Code contemplates that the question of culpability is still present, for each of the elements, and should be decided on a principled basis. In every case the issue is what degree of culpability the statute in question should be read to require with respect to each of its material elements. This all adds up to what might be called a discourse, a rhetoric, or, as I prefer to say, a language: a set of topics and materials for thought and argument. The lawyer now has something to say about the cases that come to him that he would not have to say if the Code did not exist. It is an effort to make the whole of criminal law coherent.

A subsidiary purpose (or at least effect) of this effort is to reduce the role and function of the jury, which is asked to decide questions that are much more precise and factual under the Code, less open-ended and value-laden, than was generally true under earlier law.

¹³ See *id.* at 3. On the merits of this question, the Code would preclude the last possibility — that she should be punished even if she were without fault as to this material element of the offense — under the principles of section 2.02(1). See MODEL PENAL CODE § 2.02(1).

¹⁴ For the Model Penal Code approach to mistakes, see MODEL PENAL CODE § 2.04. Note that the Code never distinguishes between questions of law and fact, although section 2.02(9) provides that mistakes regarding either the existence of an offense or the meaning of legal terms are not defenses.

Under the old regime of "willful" and "wanton" and "malicious," the jury was almost of necessity making its own judgments of blameworthiness, which were in the nature of things not rendered explicit, nor could they be made consistent with other judgments by other juries, a situation the Code seems designed to alter.

B.

If this or something like it will do as a sketch of the aims and structure of the Model Penal Code, we can now ask: what would it be like to try to use this language as lawyer or judge, to try to put it to work as the material of thought? Or, to speak in terms of my title: what kind of legal knowledge does it create, require, and make possible in those who use it?

The first step in learning this language would not be to try to master its particular rules (though at a certain stage that would be necessary) but to try to understand the purposes the Code is trying to serve and its basic method for doing so, as I have described them above. What we need most to understand, that is, is the way the Code imagines itself, the world, and what it is trying to do.

The Code's self-conception is reflected not only in its statements of purpose and method, but also in a story of a certain kind: the world of the criminal law before the Code is a morass of confusion and contradiction, disorganization, and ignorance, all amounting to serious injustice unworthy of an enlightened state. The Code applies careful, sustained, and collective thought to render this body of law coherent, orderly, and just — and just not only in the sense that the law is predictable, that results in like cases are similar, and so forth, but just in a more substantive sense, for all this is achieved in the name of a coherent and sensible set of purposes that are themselves shaped by a ruling conception of justice. Like all legislation, the Code is in a sense incomplete, for it is not self-executing; but it gives directions to its own use, in its purposes and methods, which should enable lawyers and judges to use it rationally and coherently. Unlike the law of which the rabbi spoke, the Code is not a gift to the people upon their becoming free, but it is deeply related to human freedom nonetheless, for it is an exercise of freedom and reason, an effort to function wisely and well. Such is the promise of the Code, and it is to a remarkable extent realized.

But it is not surprising for a lawyer to learn that in practice things do not entirely work out in this orderly and coherent way. To start with, the lawyer would quickly see that she had to master not just one discourse, that of the Code, but two others with which it is often in tension: the prior criminal law, which the Code was intended to reform (both for the points at which the Code differs from it and for the continuing assumptions that connect the two bodies of thought); and a

more general language of goal and limit, philosophical in kind, since nearly every case can be the occasion for asking what the proper goals of the criminal law should be and what limits should be placed upon it.¹⁵ The Code must be read, that is, as poised between two other systems of discourse with which it is, potentially at least, always in tension.

In addition, there are conflicts among the purposes of the criminal law upon which the Code relies for its claims to coherence, and these present obvious difficulties for anyone trying to use it. The Code assumes that its purposes are harmonious or, if they do conflict in a particular case, that they permit a kind of trade-off, of one "good" for another. But none of the purposes is itself entirely coherent, and there are severe tensions among them. There is, for example, in the idea of restraint alone no principle of limit — one would restrain forever anyone who presented any threat of criminality, except for other considerations of fairness and utility not implicit in the term itself. Much the same can be said about deterrence, for it is hard to see how, simply in terms of deterrence alone, you can have too much or too frequent punishment. Responsible thought thus requires the consideration of other and incompatible values. Rehabilitation does have the inherent limit that one will stop when the cure has occurred, but this is difficult in the extreme to assess and may lead to releases that are too early, or too late, when measured by other values, such as the seriousness of the offense. As for retribution, it is usually supposed to have an implicit limit, though I think in fact people typically want more than an eye for an eye. And in any event, by what scale is one to say that such and such a term in prison is an act of retribution proportionate to an arson attempt, say, or a physical assault or filing a false tax return? The Code seems to assume that what we call trade-offs can occur among these various purposes, but it does not tell us what tradeoffs are to be made, nor is it clear that they can in fact be made in a rational and satisfactory manner. How does one decide how much deterrence or rehabilitation to insist on, or to give up? The goals are not simply competing desiderata, but are often in true opposition with each other.

¹⁵ In our system this conversation has occasionally taken on the character of law, for our Constitution has been read to address such questions — what kind of "notice" a statute must give a person to whom it is addressed, for example, whether a state may punish a "status" or "disease," and what procedures, including procedures of proof, the state must follow if it is not to violate the Due Process Clause. *See, e.g., Powell v. Texas*, 392 U.S. 514 (1968) (deciding whether the Eighth and Fourteenth Amendments prohibit a state from convicting an alcoholic for violating a statute that forbids being drunk in public); *Robinson v. California*, 370 U.S. 660 (1962) (holding that a California statute that criminalizes the status of being "addicted to the use of narcotics" violates the Eighth and Fourteenth Amendments); *Lambert v. California*, 355 U.S. 225 (1957) (striking down a Los Angeles criminal registration ordinance as applied to a person who had no actual knowledge of the duty to register).

This is especially true of deterrence and rehabilitation, for these forms of punishment imply radically different relations between the state and the individual — one kind of punishment treating him as an end in himself, the other simply as a means for the effectuation of social policy — between which no compromise is possible. You cannot say simultaneously that you care about another person and that you do not.¹⁶

There is also an even more basic question: whether the practice of punishment can ever be rationally shaped to a set of stateable purposes in the way the Code assumes it can. It may be, that is, that punishment is an activity that human communities have always engaged in for motives that cannot be wholly articulated or even completely understood, and that the kind of rationalization the Code attempts creates an intolerable fiction. One might well doubt, for example, whether it is possible to eliminate the retributive element from punishment by simply saying so, as the Code attempts to do.¹⁷ The lawyer or judge using the Code must accordingly always be ready to ask how — on what understandings, with what qualifications — it is possible to use, in a sensible way, a language that purports to shape the criminal law by reference to what it declares to be its purposes, an effort that must always be to some degree fictional.¹⁸

One might have similar doubts about whether the Code's fundamental idea — that one can precisely determine blameworthiness by making fine judgments of states of mind, or degrees of culpability, with respect to the various elements of an offense — really works. Is

¹⁶ For an elaboration of the incoherence this conflict creates, see WHITE, *supra* note 5, at 192-214.

¹⁷ See *supra* note 10.

¹⁸ The Code's central conception that punishment should be allocated solely according to the defendant's moral blameworthiness also runs counter to a basic human instinct, one that will inevitably find expression in the working of the law: that the consequences of conduct, and not only its blameworthiness, are relevant to criminal responsibility. At least on a certain conception of morality, consequences are really irrelevant: the question is what the defendant himself did and with what degree of culpability. It is often fortuitous whether his conduct happens to produce a harmful result or not, and he ought to be punished according to his blameworthiness, not according to the outcome. This kind of morality teaches us that the drunk driver who happens to make it home without incident is just as guilty as the driver, perhaps less inebriated, who causes a fatal accident. But the facts of human nature, in our culture at least, seem to prevent the law from working this way, perhaps on the view that we are each entitled to our good luck.

When the degree of culpability is high, as in attempt cases, the Code largely disregards the upshot and punishes the defendant for what he tried to do, even if he failed, pretty much as though he had succeeded. When, however, the degree of culpability is lower, as in recklessness or negligence crimes, the Code, like prior law, treats the defendant whose conduct actually caused damage, especially death or bodily injury, more severely than one equally negligent or reckless — or more so — whose behavior had no such consequences. The Code does have a crime of "reckless endangerment," but it is punished much less seriously than reckless homicide. MODEL PENAL CODE § 211.2.

this something juries or judges or lawyers can actually do? Or are we actually better off with vaguer terms like "willful" and "wrongful," which leave to the trier of fact a larger question of net moral evaluation?¹⁹

Finally, and most tellingly, there is a deep tension between the rational and enlightened way the Code tries to make the trial of guilt proceed and the way the other stages of the criminal process work. Think for example of the police officer's decision to arrest, the prosecutor's judgment whether to indict or to accept a plea bargain, the judge's sentencing decision (itself often based on a report made by the probation department), and the parole board's decision to release or restrain — none of these judgments is or should be reducible to the clear cut forms of argument described above. And this is not a matter of intellectual incoherence only: there is a profound and disturbing conflict between the rationality and idealism of the Code's method for determining who should be punished and the often hideous realities of criminal law in practice, especially the brutality of punishment itself as often inflicted in our country.²⁰ The shouting chasm between the pre-

¹⁹ Consider also the tension inherent in the claim that the criminal trial should focus exclusively on what the defendant *did*, leaving the larger question, who the defendant *is*, for determination at the sentencing hearing. This is an artificial distinction: jury members naturally want to know as much as they can about the defendant's character and history, and the lawyers, when it is to their advantage to do so, struggle to tell them. Sometimes — as in deciding whether a killing is "provoked" and therefore manslaughter, with "malice" and therefore murder, or "premeditated" and therefore murder in the first degree — it is virtually impossible to separate the two kinds of question.

Similarly, the basic conception of the human actor at work in the criminal law is not wholly coherent, and the Code cannot make it so. Most of the time the law assumes that the individual is a free and autonomous actor, responsible for his conduct and its consequences. Defenses are fashioned to remove from liability those who are thought not to be in control of their lives — the insane, the sleepwalking, and the like. But the truth is much more muddy than this suggests: we are all the products of circumstance; no one is entirely free; yet almost all of us have a residue of autonomy and hence responsibility. Neither of the two extreme images of human freedom is entirely valid, but the law has great difficulty reflecting this fact. What this means for the user of this language, whether lawyer or judge, is that he tends to vacillate uncomfortably between two incompatible and impossible positions, without any way of saying what he believes to be true about human freedom and determinism.

²⁰ Rehabilitation is not, as far as I can see, in any real sense the object of our penitentiaries; restraint is, but it is usually temporary, and the convicts are often treated in ways that make it more likely, not less, that they will commit crimes in the future. Retribution is perhaps achieved, but it is often brutal, uncivilized, and costly; deterrence may or may not be much achieved by this system — one certainly doubts whether it is achieved to a higher degree than it would be by a humane or civilized system of penology. We have both an astonishingly high percentage of our population in prison and an astonishingly high rate of crime and recidivism. On the other hand, it is important to say that the idealism of the Code can be seen as essential to its achievement, which is to refine and elevate our discourse by holding out a higher standard of rationality and decency than we can normally attain and thus to make possible an effective criticism of what we do.

tenses of the law and its reality is of course even worse when race and class are taken into account.

When you try to understand the motives and premises of the Code, what it is trying to do with prior law, its conception of culpability or blameworthiness, its effort to render a mass of contradictory and confusing material coherent, all so that you can read with intelligence the provisions of the Code itself and use them sensibly in thought and argument — so that you can become, that is, a speaker as well as a reader of this language — you discover that the Code falls very far short of the coherence at which it aims. It is riven with unavoidable and unresolvable tensions and contradictions, which go to the very center of its way of imagining the defendant, the trier of fact, and the process of punishment itself — and I am sure there are more than I have listed. One who wishes to master this language, then, and to use it effectively, must understand it not simply as a logical system but must learn how to live with its particular incoherencies, its splits and breakdowns. One kind of legal knowledge it thus requires is a capacity to face and manage internal contradiction and tension.

Although I cannot prove it, I think that what is true of the Model Penal Code would be true, in different ways and degrees, of any attempt to produce a comprehensive and coherent code regulating a field of law. To the extent I am right, the capacity that I say the Code calls upon in its user — a capacity to use a language despite its incoherencies, to recognize what it omits or distorts — is an essential part of legal knowledge more generally.

What attitude should we take towards these tensions and fissures within the Code? One possibility is to deplore them as proofs of failure, even to give up on it all as a sham or façade. But this I think is to yield too readily to disappointment and frustration; one can see these aspects of the Code more benignly, as defining over and over again, and thus making available to argument and thought, the most profound and disturbing questions about the nature of punishment and the structure of our society. It is far better that these tensions and contradictions be recognized, made overt, and thus become the object of concern and distress, than the most obvious alternatives, which are to bury them in language too opaque to work in this way, or to insist against the facts upon the fairness and rationality of our system of criminal law. There are good reasons why the Code is marked by tension and contradiction, namely that the questions it addresses simply cannot be rationalized into a perfect system or order. The conflicts exist in the material and in our minds, not just in the language of the Code. In a real sense, the failures of the Code are noble ones; like other efforts at producing knowledge, a central part of the achievement of the Code lies in its definitions of what we do not “know” — and “know” not in a purely conceptual or factual or analytic way, but in the far more important sense in which I have been using “knowl-

edge" throughout this Essay, as a form and ground of action. The Code helps us see what we do not know how to say, or to do.

To return to my beginning point, knowledge of the criminal law is not reducible to knowledge of the rules, or even the principles, of the Model Penal Code or of a statute based upon it. It requires us to know how to use this language, and the other languages with which it is connected, including those of common law crimes and of the Constitution; and how to use them not only when they seem to work as designed but when they break down, collapsing into tension and contradiction. The Code is itself a masterly achievement of what I am calling "writing," but in the nature of things it cannot complete its task unaided. The knowledge it requires in those who use it is not merely skill at interpretation, as that term is usually meant, but the knowledge of an art, an art of writing: a way of resisting what looks like entropy, as system after system, text after text, reveals incoherencies that cannot be rationalized away. It obviously cannot be taught or learned in a mechanical or routine way, but calls upon capacities of invention and imagination. This is the kind of knowledge — a writer's knowledge — that the Code calls upon us to have.

II. HOLMES'S OPINIONS IN *SCHENCK* AND *ABRAMS*

For my next example of legal knowledge, I shall turn from the remarkable challenges and opportunities presented to the writing mind by the Model Penal Code to a legal moment quite different in kind: the movement from Justice Holmes's opinion for the Court in *Schenck v. United States*²¹ to his dissenting opinion in *Abrams v. United States*.²² These were of course two of the first cases decided by the Supreme Court under the First Amendment,²³ both deservedly famous, and Holmes's opinion in *Abrams* is an achievement of indubitable brilliance and significance, the beginning in fact of modern First Amendment jurisprudence. Yet I hope that the Model Penal Code will still be relevant, in that it may help us see both of these cases, as the Court

²¹ 249 U.S. 47 (1919).

²² 250 U.S. 616 (1919).

²³ The most important predecessor to these two cases was *Patterson v. Colorado*, 205 U.S. 454 (1907), in which Justice Holmes plainly suggested that the effect of the First Amendment was only to outlaw prior restraints and prohibitions on speech. *Id.* at 462. This was an idea of some currency, tracing its roots to Blackstone's statement of the principle of freedom of speech in English law. On this view, speech once uttered could be punished if it fell within certain established classes of torts or crimes or was otherwise inimical to the public good, just as other conduct could be. But to say that the Supreme Court had not spoken before *Patterson* does not mean that there had been no debate and no law on freedom of speech in other institutional contexts. For the fullest and most helpful account of the First Amendment before *Schenck* and *Abrams*, and of the reasoning in these cases, see DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 285-98, 342-71 (1997).

initially saw them, in terms of the criminal law. I also mean to suggest something more general by the juxtaposition of Code and opinion, namely that the kind of striking accomplishment achieved by Holmes, and later by Brandeis, can mark possibilities for the imaginative lawyer that may exist elsewhere in the law, perhaps even in the most ordinary cases.

A.

The provision of the Espionage Act of 1917 at issue in *Schenck* made it criminal "willfully . . . to obstruct the recruiting and enlistment service of the United States," or to conspire to do so.²⁴ The defendants in that case sent circulars to men who had been called for the draft, denouncing the draft itself as a violation of the Thirteenth Amendment and the war as a design to enrich the capitalist class, but containing little if any language that could be construed as explicit advice or encouragement to refuse the draft.

Today we would see this case as presenting serious First Amendment issues, but in 1918, when there was little or no First Amendment jurisprudence to rely on, it was natural for the Court to see it simply as a criminal law matter. If we looked at it that way, and in pre-Code terms, the two main statutory questions would be whether the aim of the conspiracy amounted to "obstruction" and whether the defendants could be found to have the quality of intention (or guilty mind) indicated by the word "willfully."

On the first point, it is true that the defendants did not plan to interfere physically with the draft — for example by blocking the door of the receiving station with a truck — but if the recruits read and were persuaded by the defendants' publications, and refused the draft, that would certainly seem to be an interference that might well fall under the term "obstruction." Should it matter that such an obstruction would depend upon an act of will by another person, the recruit who decided to refuse? The prosecution would say surely not; one who persuades or encourages another to commit a crime is under ordinary principles of law responsible as an accessory. There is no notion in the criminal law that such a voluntary act by one party excuses another who encourages the crime. It was therefore consistent with common understandings for the Court to classify what the defendants were trying to achieve as a form of "obstruction" within the meaning of the statute.

Writing for the Court, Holmes does not explicitly define the quality of mind or intention required by the word "willfully," but he under-

²⁴ *Schenck*, 249 U.S. at 49 (citing the Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219).

standably has rather little difficulty finding the requirement met in this case: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."²⁵

Once the Justices started thinking of the case in such criminal law terms, it was natural for them simply not to regard the First Amendment as fairly present at all, on the obvious ground that the First Amendment does not protect criminal speech, which this so plainly seemed to be. Criminal ends can be obtained by verbal as well as nonverbal means, and it would be an odd reading indeed of the First Amendment that saw such conduct as protected against punishment simply because words were chosen as the instruments of crime. Perhaps refusing induction should not be a crime; but, so long as it is, it should be criminal for one person to persuade another to commit that crime, just as it would be if the crime were murder, say of a foreign dignitary or a commercial rival. This would all seem obvious.

For Holmes, then, and the rest of the Court, the case was easy enough. The criminal law seemed to say all that needed to be said, and the defendants' invocation of the First Amendment was understandably unsuccessful. On the other hand, Holmes did respond to the First Amendment argument raised by counsel and in doing so took the first steps, almost without knowing it, in the direction of an enormously influential way of thinking about the central puzzle presented by this and similar cases: Ought the First Amendment protect conduct, otherwise criminal, simply because it takes the form of speech? Why? And, whatever the rule is, should it protect some forms of speech more than others — the kind of political speech involved here, for example, but not the speech necessary to maintain a numbers racket or an extortion ring?

To begin with the last point, Holmes does not address the question explicitly, but he does seem to see this kind of speech as somehow different from speech of other kinds — he says that some of the strongest expressions came from "well-known public men" and that in peacetime circumstances the defendants might well have been within their "constitutional rights."²⁶ That he cannot fully articulate the difference is hardly surprising, since his opinion is something of a first effort to think about the kind of speech the First Amendment should be read to protect.

The more fundamental question is whether speech, or some forms of speech, should enjoy a protection under the First Amendment that

²⁵ *Id.* at 51.

²⁶ *Id.* at 51-52.

is not available to other forms of conduct. Again, Holmes is not explicit on the point. It is not entirely clear, to me at least, whether he means the "clear and present danger" test²⁷ to establish a new constitutional rule for the protection of speech or simply to explain the principle of criminal law under which this conduct is properly punishable: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."²⁸ Holmes uses this language to explain why this speech can be reached in this wartime context, when in peacetime it might be innocuous, but his point would be equally relevant whether he is thinking in constitutional or criminal law terms.

It was almost inevitable for the Justices to see *Schenck* the way they did, and not only because of their conservative and class-based hostility to the doctrines and persons of the defendants. The criminal law seemed adequate to deal with the case, particularly the pre-Code law, which drew fewer fine distinctions and rested far more confidently on net jury judgments of guilt and innocence. Any thought about the possible bearing of the First Amendment had in a sense to be conjectural, for its language had been given no effective meaning. Holmes does mention the First Amendment, though only to dismiss it; yet almost despite himself he begins to provide material for thought about it — in his talk about the wartime context, in his recognition that there is a constitutional right to carry on some sorts of as yet undesignated speech, and in his articulation of the standard of proximity and degree that the First Amendment might require the criminal law to follow.

B.

When *Abrams v. United States*²⁹ was presented for decision later the same year, on generally similar facts but under a more repressive set of statutes, it is not surprising to find the Court affirming *Schenck* in every respect, saying simply that it sufficiently discussed and negated any First Amendment claim.

The facts are familiar: the defendants, all Russians by birth, were distressed by the American invasion of Russia in 1918, from the east, which they saw as directed at the new revolutionary government there.

²⁷ *Id.* at 52.

²⁸ *Id.* Although *Schenck* is formally a conspiracy case, of which the gravamen is agreement, Holmes seems to be thinking about it as an attempt case, where the question is "how close" the conduct came to inflicting the harm the defendant intended. Or he may be asking whether the means chosen to attain the goals of the conspiracy were so ill-adapted to the purpose that they presented no danger to the public. Standard classroom examples include things like conspiring to murder a foreign dignitary through magic charms or attempting to shoot down a passenger plane with a child's bow and arrow.

²⁹ 250 U.S. 616 (1919).

They printed and distributed leaflets, in English and Yiddish, that condemned the President and the government for this action, called upon the workers of the world to awake and put down capitalism, and urged American workers to engage in a general strike, with particular language directed to those working in munitions factories.³⁰ The new statute forbade criticism of the government, provocation of resistance to the United States, and interference with the production of war materials. In what is for our purposes its most interesting provision, the statute also made it criminal willfully to "urge, incite, or advocate any curtailment of production [of war materials] . . . with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."³¹ This language enabled the defendants to make an argument not available in *Schenck*, namely that their efforts were intended not to interfere with the war against Germany, as charged, but to stop the independent American invasion of Russia. The defendants' claim was an honest one: their real concern was for the new socialist government in Russia, not for the German regime, for which they bore no affection whatever. But the Court rejected it: "It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."³² And even if their primary purpose was to help Russia, the Court went on, they called for a general strike, especially in the munitions industry, which would obviously hinder the war effort against Germany.³³

Here I want to call upon our earlier reading of the Model Penal Code to ask how one trained under it might respond to the Court's reasoning. Under the Code's analysis the question would be what degree of culpability the statute should be read to require with respect to each of its material elements. The Court's first formulation, that men should be held accountable for the effects their acts were likely to produce, really amounts to a holding that negligence is the proper degree of culpability with respect to "curtailment." The Court simply erases the distinction between crimes requiring true purpose, as conspiracy and attempt normally do, and those based on negligence or recklessness, as in certain forms of manslaughter. This is all the more disturbing in light of the explicit intent requirement in the statute, which

³⁰ For a full statement of the facts and background, see RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* 43-81 (1987).

³¹ Act of May 16, 1918, ch. 75, 40 Stat. 553, 553. Unlike the "obstruction" statute, this statute overtly punishes a speech act and could therefore be thought to present its own First Amendment problems. But neither the Court nor Holmes saw it this way.

³² *Abrams*, 250 U.S. at 621.

³³ *Id.* at 623.

reads: "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war."³⁴

The Court's second formulation seems, without acknowledging it, to be saying something quite different, and much more justifiable: that in this case the defendants could be found to have a true intention to hinder, since it was their hope and object to achieve a state of affairs — the interference with the production of munitions — that they knew would hinder the government. The fact that they were doing this for a motive not contemplated by the statute, the protection of Russia, is irrelevant — just as it is irrelevant if the reason an escaping criminal deliberately shoots and kills a policeman is not hostility or a positive desire to kill, but simply a wish to escape, for which the killing seems to be necessary.

What these two formulations together reveal — and they have the support of much else in the criminal law of the time — is to the eyes of one educated by the Code a fundamental weakness of understanding and analysis. This is crude and undifferentiating thought, the Code lawyer would say; it not only reaches questionable results, it fails even to identify or address with clarity the fundamental issues.

C.

Holmes, in dissent, analyzes the case with much greater care. The first two counts, based on new statutory provisions which today we would plainly hold unconstitutional, charge conspiracies to publish abusive language about the form of government of the United States and to publish language intended to bring that form of government into contempt. Holmes does not suggest that these provisions are unconstitutional, but he says that there is nothing in the record to support conviction under either count.³⁵ With respect to the count charging advocacy of curtailment of the war effort, he says that the record will simply not support the finding of an intention to cripple or hinder the United States in the prosecution of the war. As a general matter he concurs in the way of thinking the Court's opinion reflects, saying:

I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will

³⁴ Act of May 16, 1918, ch. 75, 40 Stat. at 553. The Court's position on "intention," odd though it is to one trained in the Model Penal Code, is not eccentric but seems to reflect the criminal law thinking of the time. Here is Wharton, for example: "When there is a general intent to do evil . . . of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong." 1 FRANCIS WHARTON WITH JAMES M. KERR, A TREATISE ON CRIMINAL LAW 202 (11th ed. 1912). And even today the felony murder rule rests on something like this analytic basis.

³⁵ *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting).

satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not.³⁶

Like the Court, Holmes here elides the distinction between intent and negligence, as he also did programmatically in *The Common Law*.³⁷ What makes this case different for him is that it is not a common law case but a statutory one. And "this statute must be taken to use its words in a strict and accurate sense,"³⁸ not only because it is a statute, but because otherwise it would be absurd. For it would punish a patriot who argued successfully against what he thought were wasteful war expenditures, say on airplanes, which later came to be seen as essential to the prosecution of the war.³⁹ The statute should therefore require what the Model Penal Code would call a true purpose to cripple or hinder the war effort, and that cannot be established by this record.

Notice how the way of reading established by the Model Penal Code would have clarified the issues. It would have repudiated as an analytic mishmash the view of the Court that "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce,"⁴⁰ saying that of course people can be punished for negligently (or recklessly) producing a socially harmful result, but that they should be so punished only under a statute, or other rule, that articulates those degrees of culpability, certainly not under a statute that requires "intent." What is more, they should be punished much less severely than one who intends the harm, or knows that it will flow from his conduct. Once true "intent" is required, the question, as Holmes says, is whether the record will support such a finding, which may in turn depend upon the difference, perhaps assumed but not articulated by the Court, between intent and motive.⁴¹

³⁶ *Id.* at 626-27.

³⁷ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 49-51, 108-09 (Dover Publ'ns 1991) (1881).

³⁸ *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

³⁹ *Id.*

⁴⁰ *Abrams*, 250 U.S. at 621.

⁴¹ Holmes's response to the argument that the defendants' ultimate "motive" is irrelevant if they actually intended to curtail production is to say:

It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

Id. at 627 (Holmes, J., dissenting). This language leaves open the argument that the defendants' "proximate motive" was in fact to curtail production and that this would constitute "intent" as Holmes defines it. Holmes may nonetheless be justified in his position here, on the grounds that

This, then, is what happens here: without fully seeing the challenge to his own established views about the objective basis for criminal as well as civil liability, Holmes seizes upon the standard of intention in the statute to move him, and us, in the direction ultimately taken by the Code. In doing so he exemplifies the kind of legal knowledge that consists of an art of language and imagination, the capacity to transform his own inherited materials of thought and to do so in a disciplined and persuasive way. And more than that: by what seems like an accident, his insistence on one criminal law rule over another — requiring real proximity, and a true intention to bring about the harm in question — has the effect of protecting a certain kind of speech, speech that expresses general ideas or values, or advocates or criticizes policies. Out of this shift in criminal law doctrine emerges the beginning of First Amendment thought on the Court. Holmes here makes something out of almost nothing, and what he makes is of enormous interest and importance.

It is significant that Holmes's intention requirement is based upon the language of the statute, not the Constitution. As a constitutional matter he explicitly reaffirms the "clear and present danger" language of *Schenck*:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that *produces or is intended to produce* a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.⁴²

Holmes here makes plain that Congress could, if it wanted to, punish speech that actually "produces" harm by a standard less protective than intention or purpose — for example under a statute that prohibited the reckless curtailment of war production. But Congress must make such a choice explicitly, and here it has made the opposite choice, to require "intent."

Holmes's proposed constitutional rule would thus require intention only in uncompleted crimes, such as attempt or conspiracy, not in completed crimes, which the legislature is free to punish under a lower standard. If you look at this case with the eyes of the criminal lawyer, then, Holmes is arguing that the First Amendment requires a small shift in a rule (requiring purpose not negligence or recklessness) governing a small piece of the universe of criminal statutes (attempt and conspiracy), and then only when speech, or speech of a certain kind, is involved. From the point of view of the First Amendment lawyer, however, this minor shift in the degree of culpability in this small class

the jury was not properly charged and it is therefore irrelevant that there is evidence from which they could find for the government on what Holmes calls "proximate motive."

⁴² *Id.* (emphasis added).

of cases constitutes practically the entire universe of First Amendment law at the time. What happens next, though I think it could not easily have been predicted, is that the insistence by Holmes and Brandeis upon the "clear and present danger" test in a range of political cases ultimately makes the central issues of attempt and conspiracy law — proximity and intention — the central issues of First Amendment analysis as well.

It need not have happened this way. Holmes might have started off his dissent in *Abrams*, for example, by assessing the social value of the kind of speech the defendants engaged in there. If one were to think of freedom of speech as an individual right, it would be natural to begin with the speech itself, first judging its quality and character and then declaring that it is, or is not, protected. But Holmes begins the other way around, not with the speech but with the harm, saying that the defendants should not be subject to punishment because they do not come close enough to inflicting a harm against which the state has a right to protect itself. This same reasoning could apply to other conduct that was also too remote from harm, regardless of its social value, such as purchasing a weapon with which one intended to commit a crime or ordering plans for a building one intended to bomb. Would Holmes draw distinctions among different kinds of conduct and speech that are all equally remote from harm and, if so, how and why? Does it matter if the conduct consists only of words, or words of a certain sort? These are questions that this part of Holmes's opinion implicitly raises but does not answer.

D.

At this point, Holmes shifts voice and direction, looking now at the case as a whole: "In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them."⁴³ No longer a technical analysis of the statutory language or of the charges of the respective counts, Holmes now displays a grasp of the whole; and he conceives of the defendants not simply as having a case against them fail for want of proof, but as having a "right," a right to publish. The First Amendment here makes its first real appearance, protecting "the creed that they avow — a creed that I believe to be the creed of ignorance and immaturity . . . but which . . . no one has a right even to consider in dealing with the charges before the Court."⁴⁴ Again we have the word "right," here negated in the

⁴³ *Id.* at 629.

⁴⁴ *Id.* at 629–30.

Court, affirmed in the defendants, now the right to a "creed" — a creed that everyone knows, as Holmes *almost* says, was the true object of condemnation in this case, and others like it. We are taking our first steps into a different world.

Then comes his famous paragraph on the purposes of the First Amendment, beginning with what may seem an odd concession: that if you are confident in your premises and your power, you will naturally "express your wishes in law and sweep away all opposition."⁴⁵ In this sense, "[p]ersecution for the expression of opinions" is "perfectly logical."⁴⁶ Holmes articulates here an image of government as a kind of tyranny, based upon the premise that the winner takes all. Victory, if total, brings total power. This instinct is his starting point. But he expresses this vision only to repudiate it on the basis of experience, to distinguish it from our way of imagining both our government and our society:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.⁴⁷

While much can be said in favor of, and against, the view Holmes here expresses of the First Amendment, his main achievement is to express any view at all. No other Justice had done so.⁴⁸ Whatever the

⁴⁵ *Id.* at 630.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ As is well known, Judge Learned Hand, in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), had struggled with the question, and took the view that speech that fell short of "counsel[ing] or advis[ing] others to violate the law" should be protected. *Id.* at 540. In this opinion he defines the key terms thus: "To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it." *Id.* at 540.

Instead of asking the jury a question of "proximity," as Holmes did in *Schenck*, Hand sees the central issue as the character or quality of the speech, or what we might call the nature of the speech act. During the interval between *Schenck* and *Abrams*, he urged these views on Holmes in correspondence, but Holmes saw very little difference between the two formulations. See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 473 n.87 (1989); POLENBERG, *supra* note 30, at 218-19. Zechariah Chafee published an article, *Freedom of Speech in War Time*, *supra* note 1, in which he argued that Holmes's clear and present

First Amendment was then thought to be, the Court had established no way of thinking that would make it relevant to a criminal conspiracy plainly within the zone of congressional power, as this one was. In the terms I suggested earlier, Holmes finds a way to give meaning to the text by imagining the world in which it occurs, including himself and others within it, in a coherent way; it is this act of imagination that is the center of this famous paragraph. He no longer sees this case as like one in which the state punishes persuasion to murder. What is at stake here, rather, is what he calls a "creed," consisting of "ideas" and "thoughts." He thus separates out from the world of standard criminal law cases what he sees to be the material of a First Amendment case. For without quite realizing it, he found in *Schenck* a point of criminal law analysis with which to begin thinking about the First Amendment. His clear and present danger test is in its origins simply a statement of an intention and proximity requirement for attempt and conspiracy liability. But he and others will now and later give it enormous resonance in speech cases. Having made the beginning he did in *Schenck*, he moves in this paragraph to a statement that will begin to explain and justify his instincts.

What he says here can be criticized, of course. The exchange of ideas, or their competition, is not really a market, in which people are paying more or less for what they value;⁴⁹ what he has in mind is closer to what may be his deepest image of human life, the process of evolution by the survival of the fittest. But survival is a test of power, not of truth, and we all know that false, despicable, and dangerous ideologies or ideas can thrive for a long time. Particularly in the field of ethics and justice, there is no reason to think that we always move

danger test could be construed as meaning something very close to Hand's formulation and that this would provide the beginning of a rational principle upon which First Amendment jurisprudence could be founded. The standard view is that Holmes was influenced by Chafee, with whom he conversed, as well as by Hand, and that this explains the sea change between the two cases. Novick is doubtful, not sure that there is such a sea change: Holmes reaffirms *Schenck* in explicit terms in *Abrams*, and rests his opinion in *Abrams* on a ground not available in *Schenck*, namely the statutory provision requiring an intention to curtail production. See NOVICK, *supra*, at 473 n.87. My own interest here is less in explaining why the shift in Holmes's position occurred than in trying to understand what he made his language mean.

⁴⁹ And to say that speech is like a market is not to say that it should be unregulated, for our tradition is that the government has broad powers to regulate actual markets of a commercial kind, powers broader by far than it has to interfere with what we think of as individual rights specifically guaranteed by the Constitution. And there are real questions about the freedom and efficiency of our own "market in ideas," if one uses such language, for it can be seen to be dominated by some voices and to exclude others. But Holmes was not really arguing for the systematic extension of market thought into this field; rather he was trying to find a way to express, through a metaphor, the importance of freedom of speech to society as a whole, building perhaps on Chafee's insistence — well chosen, if his idea was indeed to influence Holmes — that there is a "social interest" in freedom of speech, as well as an "individual" one, a social interest that Chafee, like Holmes here, characterizes in terms of "truth." See Chafee, *supra* note 1, at 956-59.

progressively towards a better world. And Holmes's view that significant speech consists of "ideas" or "thoughts" is highly limiting, for it tends to find the value of speech in its reified products, when one might think that its value is in fact processual, subtle, and far too protean to be reduced to something called "ideas." It is in fact one of the great merits of this very paragraph that it cannot be boiled down to a single idea, or concept, which can be simply carried away by the reader; it is itself too complex, too tension-filled, too alive, to permit such treatment.

But these are small points: the great thing is that Holmes found a way to imagine the world in such a way as to give the First Amendment meaning and scope, which no other Justice had yet done, and a way of imagining that is not ideological or mechanical in character. His universe is populated with people who are striving to understand and speak, disagreeing to the point of war, claiming power, asserting truth, and he says that this activity, in which he is himself engaged, in this very paragraph and throughout his work as a Justice, is one that must be in its nature local and provisional. Just when we are most sure we are right, we must recognize that we may be wrong; and not only about matters of truth, as he puts it, but about matters of justice as well.

There is a paradox deep in Holmes's opinion. As I suggested above, one could approach this case by thinking about the value of the speech in question — its importance to the speaker and to the world — but Holmes treats the issue primarily as one of proximity to a cognizable harm. Although he sets forth a statement of the aims of the First Amendment and of the value of speech, in operation his opinion works like an old-fashioned due process analysis, which focuses more upon injury to a claimed state interest than on a delineation of "rights." This approach is consistent with the skeptical strain in this opinion and in Holmes's thought more generally, for it expresses a sense that one cannot know, cannot judge, the ultimate value of any particular act of speech. We are always situated in our interests, in our culture, and the whole point of the First Amendment, to one part of Holmes's mind, is to establish a process that will lead to changes we cannot foresee and would not, in the present cast of our minds, approve, and thus to changes in our own ways of thinking and perceiving. The paradox is that this skepticism produces a principle that is far more tolerant of speech in general, and tolerant of far more kinds of speech, than would an explicit analysis of what one might think of as specifically First Amendment interests and concerns — focusing for example on the value of a particular expression or type of expression — for Holmes's principle does not draw lines of relative value among speech acts.

One doubts whether Holmes means this skepticism as strongly as he seems to say, for at other points in the opinion he is, to say the least,

unafraid to make and articulate judgments of value. Indeed, his tolerance of the speech in this case depends partly upon his sense that it is really of no consequence — if the defendants were not “puny anonymities,”⁵⁰ as he calls them, but represented a serious threat, his skeptical tolerance might well disappear, as he implicitly acknowledges. But the thread of thought he establishes here is still with us.⁵¹ And the habit of mind Holmes manifests — of thinking in terms of the proximity of harm to already recognized interests — is also at work today, for good or ill, in what we call “hate speech” and “pornography” cases, where we find it very hard to find the social evil the government has a right to prevent in the speech itself, as opposed to the “interests” that we claim, or deny, that the speech threatens or injures. If we had begun differently we might think differently now.⁵²

I referred at the beginning to the view that knowledge of Jewish law could not be reduced to the knowledge of rules, or even to understanding what conduct the rules required, but consisted as well in knowledge of who you are, in relation both to the larger community and to the God of Israel whose gift these laws are. In constitutional discourse there is no God, of course, but there is something as it were analogous, for we endow the Framers with a largeness of vision and depth of wisdom that enable us to think of the Constitution in the idealized way we do, and ought to do. We cannot read the Constitution except as a text that has an author, and hence as having a kind of meaning that cannot be reduced to rule, or policy, or system — a meaning that depends upon a sense of character and identity, in the community and in oneself; upon what I have called a way of imagining the world, and oneself and others within it, that will make possible coherent speech and significant action. This is what Holmes achieves: a sense of the nation as having a character, a character like the one he gives himself in his prose — confident of its views, ready to act upon them, but at that very moment aware that it may be mistaken, that a voice it is inclined to sweep away may be telling the truth.

⁵⁰ *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

⁵¹ And is still subject to doubt: would *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the case that established the most protective form of the “clear and present danger” test, really apply to speech that had no political or social substance at all but was rather part of a garden-variety conspiracy to commit murder or extortion? Even if it were cast in the form of “ideas”: “the only good cop is a dead cop,” or “nothing is more important than the honor of the family”?

⁵² Or think of *Abrams* itself, in which Holmes’s judgment seems to rest in large part on the “absurdity” of a reading of the statute that would punish the patriot who argued, wrongly it turns out, against the production of a certain kind of armament. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting). But this imagined result is not the only possibility: one less skeptical than Holmes might be willing to draw a line between the kind of speech imagined there and the kind of speech engaged in by the defendants in *Abrams*, both in terms of form — one calling for a strike, the other arguing the merits of a position — and in terms of intention or motive, one disregarding (at best) the nation’s interest in the war, the other seeking to advance it.

Holmes is here teaching us that, at its deepest, legal knowledge is imaginative in character. And not just imaginative, performative, for Holmes's own opinion, in dissent, is an enactment of the theory he articulates: it is an effort by him to put into competition with others an "idea" necessarily provisional, in the hope that its truth will ultimately be accepted by others — as indeed happens, for this paragraph becomes perhaps our most important single statement of the nature and purposes of the First Amendment. As I suggest above, this passage cannot actually be reduced to a single proposition or image; far too complex for that, it is what I would call "writing" rather than an "idea," a way of capturing essential tensions in a momentary order. Yet it is offered in competition with other writings, as an example to be read and understood and learned from, one that may affect our own thinking and writing too. And if we are persuaded by this performance, we affirm not only his position but the very process he describes and in which he, and we, participate.

Holmes's performance is not strategic or instrumental, but authentic, expressing not only "ideas" that can in a sense be shared and passed around and argued about, but the deepest nerve of his own mind and imagination, in a voice that is distinctively his own. His articulation of the deep tensions that mark his mind — between skepticism and faith, brute power and idealization, tolerance and judgment, dominance and truth — is not in fact a weakness of his opinion, any more than the tensions at work in the Model Penal Code are weaknesses, but a gift to us, and part of the gift is that the tensions cannot be resolved. He means what he says, and we know it; and his writing has the force it does in large measure by virtue of that fact. At the end he tells us: "I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."⁵³ He not only talks about the beliefs of others, and their fighting faiths, he has beliefs of his own. He shows us how it is possible to mean what you say in the language of the law.

III. BRANDEIS'S OPINION IN *WHITNEY*

I wish now to turn very briefly to another famous passage in the history of the First Amendment, Justice Brandeis's concurrence in *Whitney v. California*.⁵⁴ In this case Brandeis invokes the clear and present danger test⁵⁵ — including the intent requirement for uncom-

⁵³ *Id.* at 631.

⁵⁴ 274 U.S. 357 (1927).

⁵⁵ Brandeis says that a necessity that would justify a restriction of speech "does not exist unless [the] speech would produce, or is intended to produce, a clear and imminent danger of

pleted crimes — to cast doubt on the defendant's conviction under a statute that punished knowing membership in an organization advocating crime and violence as means of political change.⁵⁶

In affirming the conviction, the majority said that great weight should be given to the judgment of the legislature that criminal syndicalism presented "such danger to the public peace and security of the State, that these acts should be penalized in the exercise of its police power,"⁵⁷ declaring that the statute should be struck down only if it is "arbitrary or unreasonable."⁵⁸ In other words, the Court saw the First Amendment as having no force at all in the case, which was in its view a straight criminal law case, to be tested under the Due Process Clause for its rationality only.

Justice Brandeis wrote an opinion, for himself and Justice Holmes, which concurred in the result on the grounds that there was testimony in the record that tended to establish a more responsible role for Whitney than mere membership in the organization would indicate, but dissented as to the meaning and relevance of the First Amendment. While Brandeis agrees that the Court should normally defer to legislative judgments, he says "the enactment of the statute cannot alone establish the facts which are essential to its validity."⁵⁹ Here those facts are the elements of the clear and present danger test, the very function of which is to define a zone where the ordinary processes of majority rule are not permitted to work. In a famous paragraph he explains why our Constitution has made this commitment:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They be-

some substantive evil which the State constitutionally may seek to prevent." *Id.* at 373 (Brandeis, J., concurring) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

⁵⁶ The California Criminal Syndicalism Act made it criminal "knowingly [to become] a member of any organization . . . organized or assembled to advocate, teach or aid and abet criminal syndicalism," which was defined as doctrine advocating that "the commission of crime, sabotage . . . , or unlawful acts of force and violence" were appropriate "means of accomplishing" changes in industrial ownership or political "change." *Whitney*, 274 U.S. at 359-60 (quoting the California Criminal Syndicalism Act). The theory of the statute seems to have been that membership in an organization, with knowledge of its aims, is in traditional terms a species of aiding and abetting. Or perhaps that it is a kind of conspiracy, not on the rationale that conspiracy is a kind of inchoate crime, like attempt, to be punished by reason of the "proximity" to harm created by the agreement itself, but on the traditional alternative rationale, that the existence of an organization with criminal purposes is an evil independent of crimes it is on the verge of committing, as a fertile ground for as yet undesignated, perhaps unthought of, crimes. *See generally Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

⁵⁷ *Whitney*, 274 U.S. at 371.

⁵⁸ *Id.*

⁵⁹ *Id.* at 374 (Brandeis, J., concurring).

lieved that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁶⁰

Brandeis here invokes the Framers nearly as demigods, confidently asserting what they thought and meant by the First Amendment itself. From one point of view this is a kind of fantasy, for we all know that the Framers were not superhuman beings, that they were not united but divided in their attitudes, and that in any event the society out of which they functioned was unjust, and so on. From another point of view, however, this act of imagination or something like it really is essential to the task of lawmaking that is the Court's responsibility. For the words of the text alone do not mean much, nor do they carry much force even if understood; the kind of knowledge we need includes a way of imagining the author of the text, and ourselves, in such a way as to make possible an intelligent reading of the text itself, and this is an act of creation. To understand the law we must understand the character of the lawmakers, and of our relation with them, and we must have a grasp of the story that unites our people over time. This includes, for the modern American lawyer, as well as for one who consults the rabbi, knowledge of past injustices, places where we have gone deeply wrong and perhaps paid a price for it, and knowledge of silences as well; and it is in a sense a silence that Brandeis is addressing here, as Holmes did in *Abrams* — a failure on the part of the Court to pay serious attention to the crucial language of the First Amendment.

Brandeis's two long sentences are structured as a string of clauses connected by semicolons, a style that gives a sense of connectedness and sequence among different thoughts, or different aspects of the

⁶⁰ *Id.* at 375-76 (citations omitted).

same thought. Not as in a logical outline, in which one first asserts premises then deduces conclusions, nor in the usual inductive structure, in which one first presents factual details then asserts a conclusion that flows from them. Rather, Brandeis is showing what it is like to think, as a whole mind, all at once, the way we really do think. What he says is not reducible to a tag — say “the education for democracy” rationale of the First Amendment — nor is it translatable into a series of propositions set forth as a theory. The words work here the way they do in ordinary speech and literature alike, not by the stipulated definitions necessary for a certain kind of rationality, but in a process of continual and reciprocal redefinition. Speech, and safety, and fear, and hatred, and reason, and discussion, and government, all these terms interact to create a whole language, a way of talking and thinking.

It is a language we can learn, but not by simply repeating the phrases, just as we cannot simply point to the passage with a word or two, or think of it as a theory in the form of a set of propositions. We must make it our own, and in doing so we shall change it. For this passage is written in Brandeis’s own voice, alive, speaking the truth as he sees it; not in clichés, or in forms simply lifted from the past, or from others, but as a writer does these things, transforming the materials he has inherited; and it invites us to do these things too. Like the passage from Holmes’s opinion, this one enacts or performs its meaning; it represents to us, in the way it captures the movements of the mind of the writer, what it means to engage in the kind of thought and speech he describes and in the processes of self-government through discussion that he celebrates. This passage cannot be translated into other terms, and its meaning lies in large part in that fact — in what an attempted translation would leave out or distort. It calls upon us to make our own version of what he does; in this is its deepest definition of what speech is, or can be, and why it is protected.⁶¹

Brandeis’s voice not only has the merit of authenticity, it is instructive; in a sense it defines a standard of civilization, an ethical and political standard, that is so secure that it can be unafraid of argument, dissent, or even passionate and determined hostility. In this way it reduces the speech and the threat of the Communist Labor Party, and Whitney herself, to something manageable — in a way even something good, for these speakers present a challenge to our first principles that we should be willing to accept. Like Holmes, Brandeis is able to assert with supreme confidence what he believes and at the same time to

⁶¹ For a fine article on the significance of the way Brandeis composes this opinion, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988).

recognize that to another person, even to himself in another context, this would all look different.

Holmes and Brandeis are often thought of as a pair, especially in the First Amendment field, where they insisted together upon the clear and present danger test in the face of the Court's opposition. But the differences between them are remarkable, perhaps all the more remarkable since the rule they propound is virtually the same. One way to put it is this. Holmes articulates a faith — against his skepticism — in the workings of a process or system he knows he cannot understand: the process, analogous to the survival of the fittest, by which some "ideas" come in time to prevail, and thus to acquire the status of truth. He sees that his own commitments may be undermined and destroyed by this process, yet he can also imagine this as a good thing. For Brandeis, the process the First Amendment aims to protect is far more comprehensible, imaginative, and susceptible to representation in his prose: it is the activity of sustained, reasoned, careful, whole-minded argument by people of good will on crucial questions of the day. He imagines an idealized argumentative process, which he not only describes but enacts in his prose; in an important sense he is *showing* what the First Amendment is meant to protect. Built into his own performance is a scale of value, with speech like his, and that which he describes, at or near the top; other forms of speech — crude, vulgar, violent, stupid, ill-informed, bigoted, nasty — at or near the bottom. As I mentioned earlier, there is here a paradox: Holmes's lack of interest in the question of the quality of speech, in what can be really good in speech and writing, leads naturally to a more widely protective rule than does Brandeis's deep interest in intellectual, rhetorical, and political excellence. One can more easily imagine Brandeis, that is, or someone following his line of thought, condemning speech that has no evident value than one can imagine Holmes doing so, since for Holmes the issue really is the proximity to harm, not the quality of the speech.

Yet it would be unfair to Brandeis to suggest that he would protect only speech like his own. This very case shows otherwise. Another way to read this opinion is as giving him — and us — a certain kind of character, one that is secure in its education, its intellectual capacities, its depth and breadth of mind, and therefore, to use a word that Vincent Blasi has shown to be central to this opinion,⁶² has no "fear" of speech that does not meet its standards. Brandeis is using his mind to make him and us strong, unafraid, able to face and live with what we despise — what we are right to despise; and part of the strength of what he achieves lies in the confidence with which he asserts not

⁶² See *id.* at 679.

merely a faith in a process, but deep commitments to a certain mode of life and thought.

A person writing about the First Amendment needs above all a way of imagining what it means that human beings have language, and can think and speak; what it means, or can mean, to be a speaking person, including in the law. This is what Brandeis and Holmes both seek in different ways to define, and what they ask us in our turn to define as well. They make an effort to show us the kind of speech to which we can aspire, the speech made possible by our freedom. Neither of these opinions written in favor of freedom of speech takes the position that all speech is equally valuable or good; they are not nonjudgmental; quite the contrary, they set forth a ground in their own performance for the criticism of speech, including not only the speech at issue in the particular case, but the speech of other Justices, of lawyers, of all of us in fact who engage in the legal and political processes of reasoned debate. The "legal knowledge" they represent to us is thus a capacity of mind and language; they seek to teach it to us; in the nature of things this cannot be done in a mechanical or ideological or propositional way, as a teaching of material; instead, they in their different ways offer a demonstration of human possibility for meaningful speech — for speech that is meant — in the law.

ENDINGS

I mean by these readings of the Model Penal Code and Supreme Court opinions to suggest something about the nature of legal knowledge, namely that at its heart it is a kind of writer's knowledge: the knowledge of legal language and the art of using it, criticizing it, transforming it, all with the aim of working out a way of imagining the world, and oneself and others within it, that will enable us to speak coherently about what we call justice. For justice requires us to find open and respectful ways of imagining ourselves and each other. Our law is of course not religious law, but like religious law it calls for more than a learning of rules, or rote obedience, or technical skill — it calls for thought and speech of a whole-minded kind. And an important part of what the rabbi said about Jewish law is true of our secular law as well: you must know who you are in reading it and in writing it, and what it calls upon you to do and to be. Holmes and Brandeis here show that they — like all lawyers and judges — are called upon by our law to be writers in the law.

It is not only the Constitution that requires this response in us: any statute does the same, as we saw with the Model Penal Code, as does any case. All law calls upon us to act, not merely to repeat or invoke, but to make something new. Of course we work with old materials — as this very Essay retells old and familiar stories — but it is our task

as lawyers to make something with a quality of freshness and immediacy, directed to the present moment.

The obvious question I leave unanswered — except by the invocation of examples I hold out for approval — is how this task can be well performed and how it can be well taught. It is plain that we cannot expect to proceed by either issuing or following directions — rules for inventing topics, for composing introductions or conclusions, or for shaping our style to meet our audience, or any of those things. The art of writing cannot be reduced to a program that can be taught and applied, certainly not to a set of tricks or techniques. It must be learned as other arts are learned: by practice, by critical examination — by more practice and more reflection; by reading the works of others and discussing them, then returning to our own work; by attending to the nature of the languages we are given to use, their strengths and limits, enablements and constraints; by thinking of the ways in which we define ourselves and others, as minds, as institutional and social actors, as members of a community and culture.

Practicing lawyers must constantly school themselves in the art of legal expression that I see at the center of legal knowledge. But those of us who are teachers in law school have a role as well, for we can help our students develop the insights and abilities necessary for this life. And we can do more than that, for in our writing we may be able to make conscious and explicit at least some of the questions and problems that one who practices this art will have to face, not as I say with the idea of working out a set of rules for excellence in legal thought or anything like that, but in the belief that in this, as in many fields, increased awareness of what one is doing will lead to increased understanding, clearer choice, better judgment. The main issues I have in mind are, naturally enough, those to which I have given my own attention over the years: the nature of legal language, particularly as defining what might be called a rhetorical culture, a world that works by argument; the arts of mind and language by which that language, and especially the claims to authority inherent in legal discourse, can be controlled; the process of reading the texts of others and recasting them into other terms — often called “interpretation,” though in my view better thought of as a kind of translation — which is a crucial part of the work of lawyer and judge alike; the force and power of narrative in the law, especially as it works in tension with more abstract and logical forms of thought; the ways in which human beings are, and can be, represented in legal discourse; and so on. Questions of this sort imagine the lawyer as engaged in activities that are at once analytic, cultural, linguistic, artistic, and ethical in character: the work of a whole mind.

My aim in this Essay has accordingly not been to work out a method either for the performance or for the teaching of the art I point to, but simply to render more particular, and perhaps more insistent,

an intuition that I think most lawyers also have, that the life of the law is full of opportunities and occasions, never perfectly realized, for imagination, for invention, for creation in language, or for what I call "writing." I will only add that I think this fact should be closer to the center of our attention as teachers and scholars, in law schools and law firms alike, than perhaps it has been. What the writers examined here achieve is not merely a literary excellence, after all, but a legal excellence, and we all need to think about what that is, or can be.

And how hard it is, too. Just imagine that you were called upon to write those paragraphs in *Abrams* and *Whitney*, or the key provisions of the Model Penal Code: how confident are you that you could do anything like what is achieved there? Yet each of us in the law is called upon to exercise just that art, in other cases and situations.

Several times in this Essay I have spoken of the imagination, and for me that is the root and nerve of my subject. As I have recently maintained in *The Edge of Meaning*,⁶³ I think that the deepest specifically human need is the need to claim meaning for experience, and that our ability to do this is dependent upon our capacity to imagine the world, and ourselves and others within it, in a sufficiently coherent way to make such claims possible.⁶⁴ This is not something that can be done easily, or done once and for always. We necessarily meet impediments, in our nature, our culture, our language, in the limits and corruptions of our own minds; and the art of making meaning is an art of coming to terms with these conditions of our lives, in the law and out of it. Holmes and Brandeis and the Model Penal Code show us how to do something, but it is up to us to do it afresh, for ourselves and our contemporaries, in our own language and in our own situation. Like them, we — as teachers and writers both — should be prepared to make new versions of our inheritance, good for our time and for our minds, recognizing that what we say too will need to be revised in turn, as we join those who have come before and will come after, each of us using as writers the materials of law to try to make sense of our experience in a continuing and collective effort to imagine justice into reality.

⁶³ JAMES BOYD WHITE, *THE EDGE OF MEANING* (2001).

⁶⁴ See, e.g., *id.* at xi-xii.