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Human Dignity and the Claim of Meaning: Athenian Tragic Drama and Supreme Court Opinions

JAMES BOYD WHITE

I am going to bring together what may seem at first to be two extremely different institutions for the creation of public meaning, namely classical Athenian tragedy and the Supreme Court opinion.¹ My object is not so much to draw lines of similarity and distinction between them, as a cultural analyst might do, as to try to capture something of what I believe is centrally at work in both institutions, in fact essential to what each at its best achieves. I can frame it as a question: How is it that the best instances of each genre (for I will be talking only about the best) work to resist the ever-present impulse to trivialize human life and experience—certainly well known in our own era—and instead confer upon the individual, and his or her sufferings and struggles in the world, a kind of dignity? I think that something like this is in fact the core of the most important achievements of both institutions, and that in both cases it is simultaneously imaginative (or literary) and political in nature.

I mean not to make an especially original or controversial point, but to call upon a familiar and widespread intuition. I assume that we all sometimes have the feeling that what we are reading—or watching or hearing—trivializes human experience, reducing it to something unimportant or insignificant and stimulating a kind of cynicism or despair. But of course we also sometimes have the opposite feeling, that the expression or action to which we are exposed—the Bach cantata, the painting by Vermeer, the poem by Keats or

Dickinson—somehow dignifies or exalts the human, marking out possibilities for significance in life, in our lives, that can serve as a ground of hope in a universe full of confusion and suffering. We can't easily explain how it happens, but in the first case we come away somehow ashamed of being a human being, in the second, proud and glad to belong to such a species.

Speaking of my own experience, and I hope yours too, at least some theatrical productions, and some Supreme Court opinions

too, give me the second (and better) kind of response, and in this talk I want to explore how and why that happens. I shall not summarize my conclusions now except to say that a large part of my attention will be on the way in which both the dramas and the opinions I shall examine imagine human beings as speaking creatures—on what, that is, they make speech mean. This will lead me to suggest at the end what I mean as a major point, that it is in our capacity for claiming meaning for experience that our deepest dignity lies, and that it is in the denial of that capacity, and what it says about us, that the essence of trivialization can be found.

I shall begin with what I assume to be the less familiar form, Greek drama, and then turn to the law.

First, some background. In Athens the

performance of tragedy was a highly public and intensely competitive event which occurred in its full grandeur only once a year, at the great festival of Dionysus. Only three dramatists were permitted to compete; they were chosen several months ahead of time, and given that period in which to perfect the performance of the four-play sequences they had submitted. What we might call “rehearsal” was no small or casual matter; it cost roughly as much to train a chorus for a single set of plays as it did to keep a warship at sea for a year, and rich men were called upon by the state to bear this burden. The plays were performed at the Theater of Dionysus, next to the Acropolis; they were then judged, by officials or by the crowd, with prizes of great honor awarded for the best play, best actor, best chorus, and so forth.²

The tragic theater was a cultural form, an



Theatre Bacchus. Dionysus.

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occasion for the making of public and shared meaning, that had certain ways of working. These were naturally realized differently by different playwrights and in different plays, but running through this body of work there are three important strands that I would like to bring to your attention. As we shall later see, these three strands, perhaps surprisingly, have analogues in some of the best opinions of the Supreme Court.

Bringing the Remote Into the Circle of Attention

I shall begin with the great trilogy of Aeschylus called the *Oresteia*. The first play, the *Agamemnon*, tells the story of that hero's return to Mycenae from the Trojan War, and how he is shamefully killed—in his bath—by his wife Clytemnestra and her lover Aegistheus; the second play tells how her son Orestes, commanded by Apollo to avenge this murder of his father, kills his mother; the third brings on stage in pursuit of Orestes the Eumenides, the dreadful furies who punish the shedding of kindred blood. Orestes finds refuge in Athens, where he is tried for his act by a court and jury established for the purpose. He is acquitted, for he was acting under divine compulsion in the form of explicit orders from Apollo. The trilogy thus ends with the establishment in Athens of courts of justice; courts that will, in the future, break a chain of vengeance such as that which plagued the house of Atreus, and do so by imposing sanctions for homicide that themselves do not occasion blood guilt.

The *Agamemnon* begins with a watchman in Mycenae waiting, at dawn, for the beacon of light that will announce the victory at Troy—for Clytemnestra has arranged for fires to be lit on mountain top after mountain top, to bring this news across the sea in a single night. Next, the chorus, in a song about the events that have led up to the present, tells how Agamemnon, on his way to Troy ten years earlier, his fleet held in harbor by adverse winds, sacrificed his daughter Iphigenia

to persuade the gods to let him go—a terrible crime that Clytemnestra will later invoke as a justification for her own terrible crime. Soon after, a messenger arrives to describe the sack of Troy, in his vivid account bringing directly before the other characters within the play—and before the audience in Athens, too—these remote and perilous happenings.

I wish to draw attention here to a rather simple fact, namely, that the drama brings into the space we call the theater, and before the minds of the people of Athens, imagined events that are distant in both time and place. Thus the audience is here asked to imagine Mycenae at the time of the fall of Troy, Troy itself, the chain of mountain tops running from Troy to Mycenae, the sacrifice of Iphigenia ten years earlier, and so on.³

In an age of television, movies, newspapers, and the Internet, it may be difficult to see this for the surprising and powerful cultural phenomenon it was, for we are besieged with communications that invite us to imagine the remote and distant. But these plays took place in a different kind of world, one in which this was a real invention. In bringing on stage, and into the conscious imaginings of the people, events that were remote in time and space, the drama invited the audience to connect themselves to the distant. This was, I think, one of the central functions of the Athenian theater, and it had a perhaps surprising political and ethical significance.⁴

Think, for example, of another play by Aeschylus, *The Persians*. This tells the story of the great naval battle at Salamis, at which the Athenians destroyed the Persian invaders. Writing ten years after the battle, Aeschylus locates the action of his play surprisingly in Persia itself, where we see the royal women of Persia awaiting news of the expedition. The audience sees these events, not from the point of view of Athens, as a wonderful triumph, but from the point of view of the Persian women, for whom it is a disaster and with whose suffering one must sympathize. Of course, the audience is really Athenian, so



The Persians tells the story of the great naval battle at Salamis in 480 B.C. at which the Athenians destroyed the Persian invaders. Aeschylus, who wrote the play ten years after the battle, chose to tell the tale from the point of view of the royal women of Persia awaiting news of the ill-fated expedition.

they actually see it both ways at once—they are forced to do so—and that double vision is a central part of the meaning of the play.

At the climax of *The Persians*, a messenger reports the story of the battle itself, to which he was an eyewitness—telling how the Persians were tricked into rowing around the island of Salamis all night, then penned into a narrow bay from which they could not escape. These events in fact took place just a few miles away from Athens—the audience can see the mountains of Salamis from their seats—which means that in this play, occurring in Athens but set in Persia, Athens itself is brought on stage, simultaneously into the imagined world of Persia and the real world of Athens itself. The play thus makes Athens look at itself as it appears to others.

In setting the play up this way, Aeschylus is I think talking to his citizens about their own world, simultaneously stimulating pride in their great victory and disciplining that

pride by the recognition of the terrible loss it brought to others. He is also telling the Athenians that they should guard against the heady overconfidence that might otherwise naturally arise in them from the victory. In a real sense this play is thus a teaching play, teaching the public something crucial about its moral situation, as the *Oresteia* taught it something about its central institutions—in both cases, by bringing to awareness what is distant in time and space, and morally distant too.

It is not just that the theater carries distant events before the consciousness of the people. It brings into the light of day facts—or forces or ideas or impulses—that are normally repressed or hidden: the reality of the experience of the Persian women, for example, or of the murdered Iphigenia, or the psychic and moral forces represented by the Furies in the *Eumenides*—monstrous deities who normally live out of sight, underground, so hideous in the performance, says one account, that

women miscarried at the sight of them. Perhaps the most famous example of this habit of bringing on to the stage what in a deep sense is felt to belong off it is the *Oedipus Tyrannos* of Sophocles, where, as Freud helped us see, some of the most profound and disturbing of human psychological forces are brought directly into the consciousness of the audience, as it contemplates Oedipus' violation of the central taboos against incest and parricide.

A particularly striking instance of this impulse lies in the theater's treatment of women. In the world of Athens, women had a legal and social position mainly as the possessions of men, whether fathers or husbands; even in procreation they were imagined to contribute nothing to the child except a kind of oven in which the male seed could grow; and they themselves had no property and no civil rights. Yet by all three dramatists they are represented on stage as psychological and moral actors who are in every sense (except power) the equal of men. It may be indeed that such figures as Antigone and her sister Ismene, Phaedra, Medea, and Alcestis are the most deeply and fully realized women in Western literature until Shakespeare, perhaps even Jane Austen. It is hard to know how fully to explain this phenomenon, but I think it is another expression of the general impulse to put on stage what is real but unseen—a part of life that is normally excluded from the vision of the male citizens who made up most of the audience.⁵

In all of these ways the drama works as a way of expanding and intensifying our sense of what it means to be human, making it possible to pay attention to what we had not fully seen before. This kind of drama is not merely a kind of entertainment, but a major public and political event, one of the purposes of which, at the hands of the three great geniuses whose work we have, is educative and transformative.

I want now to turn from Athenian tragic drama to the form we call the judicial opinion,

especially the opinion of the Supreme Court of the United States. There are, of course, obvious differences between these forms of speech and life, but I think there are also significant parallels. What we call the Supreme Court is in an important sense not this building, nor the nine men and women who sit on the Court, nor even all those who have done so in the past, but an entity that exists primarily in cultural and imaginative and political space. It is a public arena, bounded by its own structures and rules, one function of which is to bring certain stories and the problems they present into public attention, not for the sake of entertainment but in some sense for education or enlightenment. Likewise, it has its own sense of time, in which the remote is brought into the present. The time and space it creates and within which it works are in a sense of its own making; it is the Court itself that gives significance and reality to these dimensions of its existence; and it does so in the form which its great Chief Justice Marshall did much to invent, the opinion of the Court.⁶

Like the ancient theater of Athens, the Court is thus an institution for the making of shared and public meaning. What is more, it shares the more particular feature I have just described, for it too regularly brings into the circle of public attention events and people and places that are normally overlooked or excluded or just not seen. This is in fact one of its central functions.

As a way of exploring how this works in a particular instance, I now turn to *Cohen v. California*, a famous First Amendment case to which I shall refer throughout this article.⁷ Its facts reflect the era of the Vietnam War, including protests against it. The defendant, Paul Robert Cohen, wore a jacket bearing the words "Fuck the Draft" while walking down a corridor of the Los Angeles municipal courthouse. He was then arrested and convicted of violating a California penal statute that made it an offense to "maliciously and willfully disturb the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." The de-



One of the central functions of the Supreme Court, like Athenian tragedy, is to bring to attention events and people that are normally overlooked or excluded. In this article, the author compares *Cohen v. California* (1971), a Supreme Court decision involving a Vietnam War draft protester, to Greek drama.

fendant engaged in no other conduct alleged to disturb the peace. The state court imposed a penalty of thirty days in jail. The Supreme Court, in an opinion by Justice Harlan, reversed the conviction.

The judicial process here brings into a zone of public awareness material that is normally unseen, most obviously and dramatically, and perhaps a bit embarrassingly, in the use of the word “fuck”—a word which, although known, I assume, to almost all English speakers, is normally used only on certain kinds of occasions, with certain kinds of audience, and is definitely excluded from most formal discourse, certainly the discourse of the Supreme Court of the United States. Justice Harlan marks the distance between this term and the language of the Supreme Court—and the decorous conversation he seeks to establish with his readers—by the way he recites the facts of the case, not in his own words but those of the California court: “On April 26, 1968, the defendant was ob-

served in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible.”⁸ He thus quotes the language but distances himself from it.

This is not the only way in which the repressed or unknown is brought by the opinion in *Cohen* to a place where it can be seen and thought about and responded to in a new and deeper way. Mr. Cohen’s story was from almost all other perspectives a trivial one, a minor skirmish in the national war about the war. He was not, so far as I know, otherwise an important person in the world, but just a young man opposed to the draft. This was a case of no political or public significance until the Court made it so, saying that despite the apparent triviality of the event the issues presented here—presented, that is, by the lawyers, and seen and articulated by the Court in this very opinion—“are of no small constitutional significance.”⁹

This process—giving significance to the apparently insignificant—is a major part of what the Court regularly does. Think, for example, of a case like *Powell v. Texas*,¹⁰ where an alcoholic pauper was thrown into jail overnight to sober up, to all the actors as minor and routine an event as occurs in police work; the Supreme Court made this the object of learned, and contrasting, reflections on the conditions upon which the state may punish conduct as criminal, especially conduct arising from disease, in a set of opinions that might have remade criminal law in this country.¹¹ In this case—as in every criminal procedure case, in nearly every First Amendment case, and throughout the law, really—the unimportant is made important. This has its own political meaning, for it says that there is no case too small, no person too insignificant, to be worthy of potential attention. Here and elsewhere the Court makes big law by attending to small events. No one is excluded on principle.

When a dramatist invokes what is physically or morally distant, we naturally ask what he will make of it: what meaning will he claim for the story of Iphigenia or the looting of Troy or the events at the Persian court? The answer will always lie in particularities of writing and performance. In the same way, when Mr. Cohen's story is brought into the theater of the courtroom, we ask what it will be made to mean by the lawyers and by the Court, and this, too, is of necessity a highly particular matter, tied intimately to the facts of the case. For, as every lawyer knows, we do not and cannot know ahead of time the cluster of arguments on both sides by which the law will work in a particular case, which the Court must in turn resolve, and which it will use and transform in its own opinion.

This particularity requires a kind of attention, makes possible a kind of invention, different from the kind of talk usual in political or theoretical debate. What is happening in the *Cohen* case, from one perspective, is just another event in the long struggle over the

meaning of the Vietnam War. But the law cannot think in such terms; it must fashion itself to meet the particularities of the case as these emerge in thought and argument. And when the bright light of attention is focused on what we have not seen, or not seen clearly, it almost always reveals a complexity and richness of significance that we had missed, thus putting in question, among other things, our own prior habits of mind and imagination. In the *Cohen* case, the large issue—that of the draft and the war itself—is, of course, on everybody's mind. What the law does here is take a tiny fragment of that larger story, this simple act of protest, and examine it not in the terms of the national political debate—prowar or antiwar—but as a constitutional problem, to be analyzed, argued, and decided in the terms established by this branch of the law. This means, as we shall soon see, that an essential part of the opinion will be a delineation of these terms, an account of the universe of meaning established by the First Amendment and the cases decided under it.

Like the drama, then, the opinion not only brings before us what is remote in time and space but in doing so creates a world of imagination, simultaneously drawn from the world we otherwise know and an alternative to it. The idea in both cases is not to offer the audience an escape into fantasy, but to create an imagined reality that can run against the "real world," both to test it and to be tested by it. In both forms, particularity is essential to the art; and in both forms, the created order is at once final and tentative: final because it reaches a conclusion, comes to an end; tentative because the rest of life continues, creating an ever-changing context that will challenge or confirm the imagined order in new and different ways.

Movement to Discovery by Dramatic Opposition

Perhaps a more familiar feature of Greek tragedy is that it lives and works dramatically,

by the interaction between different characters speaking out of their respective situations in different voices. This too was a real invention, for the first forms of drama were purely choral performances; at first one actor was added to the chorus, then another, then, finally, by Sophocles, the third.¹²

The opposition of character to character is so much the soul of what we think of as drama, then and now, that it is hard to appreciate the force and originality of the invention. Think, for example, of the opposition between Creon and Antigone over the relative authority of the city's decrees and those of the timeless and unwritten laws that the young woman invokes; or of the confrontation between Orestes and the Furies at his trial for the murder of Clytemnestra; or, in the play that bears her name, of the intense struggle between Medea and Jason. Or, to shift nearer our own world, think of Shakespeare's *Hamlet*, which can be seen as a set of antagonistic conversations between Hamlet and others—Gertrude and Claudius and Polonius and Laertes and Horatio—each defining somewhat differently the meaning of the past they share and of contemplated future action too. The question the play presents is, what kind of sense can be made of a world defined by such contrasting possibilities of speech and meaning?

It is equally obvious that, with us at least, the law works in a similar way: by the opposition of character against character, plaintiff against defendant, each representing a different vision of the world—and of the law—and seeking to establish its own as the dominant one. The central legal institution we call the hearing works by a disciplined opposition that is intended to lead, and sometimes does, to deeper understanding, indeed, to the revelation of central questions theretofore obscured by our ignorance, or by our habits of thought and imagination.¹³ It is not simply that play and trial work by opposition, but that the opposition leads the participants and the audience to new discoveries, about what has happened and what it means, about what ought to

happen, about who these people are and ought to be.

As the play often takes as its subject a familiar story from mythology or history, which is told in such a way as to reveal new possibilities of meaning, so the hearing often begins with a set of preconceived ideas—in the parties, judge, and lawyers alike—about the facts and their significance, about the law and its bearing upon them; these are tested and complicated in argument and sometimes completely transformed. When the play and the hearing work well, they are both processes that carry us by the force of opposition from a position defined by our pre-existing expectations into quite different and often surprising terrain. This happens in *Cohen* itself: this is a case to the facts of which lots of people, including judges and lawyers, would have highly predictable responses, pro or con, and one of the functions of the opinion is to complicate these responses, perhaps beyond recognition, by the discipline of the body of thought and law developed under the First Amendment.

I shall not belabor this point of comparison, which seems plain enough as it stands, but wish to make a particular point about the way the law works in this respect. It is true that in *Cohen*, as usual in American law, the lawyers for the two sides create a drama of opposition that the Court will in turn address. But notice that Cohen himself is not a participant in this conversation. His original speech—the slogan on his jacket—is reported by others, but he himself has no opportunity to say what it should be said to mean in the language of the law. That is the task in the first instance of the lawyers, then of the courts. Unlike Orestes or Oedipus, Cohen is a real flesh-and-blood person, with his own ways of talking, his own vision of the meaning and perhaps the necessity of what he did, and none of this is present in the legal argument, especially on appeal.

The law thus provides a second language, into which the languages and experiences of

ordinary life must be translated. The people of the law will locate and define what happened in the real world in these terms, placing what Cohen himself actually said and did in a larger context, which will in turn do much to shape the kind of meaning that can now be claimed for Cohen's words. The law is in this way a cultural process, working on the raw material of life—the injury to the body or the psyche, the failed business, the broken marriage, the vulgar words in the courthouse—to convert it into something else, something of its own: the occasion for the assertion of a certain sort of meaning. It is a kind of translation.

One of the striking features of the opinion in *Cohen*, and one of its great merits, is that it acknowledges this fact about itself: the difference between ordinary language and legal language is not erased or elided, as it usually is, but made inescapably prominent. In addition to the usual dramatic opposition between the lawyers, there is thus another overt tension, between two registers of discourse and between the people who speak in these different ways: between Mr. Cohen, wearing his jacket with its blunt-spoken legend into the municipal courthouse, and Justice Harlan, speaking as he does in elaborate and sophisticated legal terms about that event. On one side, we have the crude and simple phrase, a gesture of contempt and defiance that seems to express the view that nothing else need be said, to claim that this is a wholly adequate response to the issue of policy it addresses, indeed the only proper response. On the other side, we have a mind of great fastidiousness and care, defining, by the way it works through the issues, a set of crucial cultural and social values: the values of learning, of balance and comprehensiveness of mind, of human intelligence, of depth of understanding. Nothing could seemingly be further from the mind exemplified in this elegant, complex, civilized composition than the kind of crude speech it protects.¹⁴ And by creating in his own voice a tone that respects ordinary canons of decency in expression, then incor-

porating this vulgarism within it, Justice Harlan performs, at the level of the text, just what he says the First Amendment requires of society in places like the courthouse: the toleration of what we normally exclude or suppress.

In this way, while protecting the speech Justice Harlan distances himself from it, defining himself and the Court as different from, indeed, opposed to, the values—the sense of self and other, the idea of public thinking and speaking—expressed by it. It is this distance that enables him credibly to say at one point that the tolerance of “cacophony” required by the First Amendment may be a sign of strength, not weakness, in the society that is capable of it. This is a message that he does not merely articulate but performs or enacts throughout the whole opinion, for he simultaneously protects Cohen's speech and exemplifies ways of thinking and talking that are at the other end of the spectrum. Do not imagine from this opinion that you might be well advised to use language like that on Mr. Cohen's jacket in addressing the Supreme Court, or that to display such a jacket in a courtroom might be immune from sanction.

It is important to notice in this First Amendment case that the kind of speech that the opinion exemplifies and values in its own performance is not really “free speech,” but the opposite of that, highly regulated and constrained: by the principle of judicial authority, which requires serious attention to earlier cases and to the tensions between them; by a conception of excellence in legal thought, which shapes the kind of attention Justice Harlan gives to those cases; and by canons of civilized and rational discourse, including grammar and syntax, which govern the forms of expression. It is, in fact, this very quality of Harlan's opinion that makes its protection of Cohen's slogan so significant and important: it is protecting something very different from itself, and in doing so it defines the kind of toleration the First Amendment has at its center. Yet when it does so it recognizes, almost



The author argues that Justice John Marshall Harlan's opinion in *Cohen* simultaneously protected the draft protester's speech and exemplified ways of thinking and talking that were at the other end of the spectrum in terms of eloquence and decorum.

of necessity, that this other utterance has a force and value which may be missing from the opinion itself; indeed, it almost necessarily suggests that there may be times when the right response to a political situation is not more reason, not more civilization, but the kind of verbal gesture one cannot quite imagine Justice Harlan, as he defines himself here, ever making.

For there are points in this opinion at which one might be less inclined to call Harlan's manner of speech "elegant" or "sophisticated" than "stuffy" or "stilted"—as, for example, when he says that we should remember that human speech "conveys not only ideas capable of relatively precise, detached

explication, but otherwise inexpressible emotions as well," and goes on to add that the Constitution should not be assumed to have little or no regard for this "emotive" function which "may often be the more important element of the overall message sought to be communicated."¹⁵ When I hear this, I at least have the feeling that I am in the presence of highly overformal speech, the workings of a mind that is at the moment constricted by its own commitments to a certain kind of thought. But this very fact has its dramatic and literary function, for it enacts for us what it might mean to insist, as California wants to do, that Cohen should be compelled to translate his utterance into more formal and generally ac-

ceptable speech—this would make him sound like me, Harlan is in effect saying, and it would bleed what he says of all its life and vigor.

We can see now that the other impulse I mentioned, the bringing on stage of that which is unrecognized or alien or perhaps taboo, is at work through the entire opinion. Harlan brings on this phrase, this moment, not only to protect it, but to establish a dramatic tension with it, a tension that validates it as well as tolerates it. One is reminded of Shakespeare's capacity to see the world from every point of view, in this sense to humanize every monster. Even Caliban, the subhuman creature who tries to rape Miranda and destroy Prospero, is given his moments of sympathy, and more than sympathy—of unique and beautiful expression.

Claiming Meaning for Experience

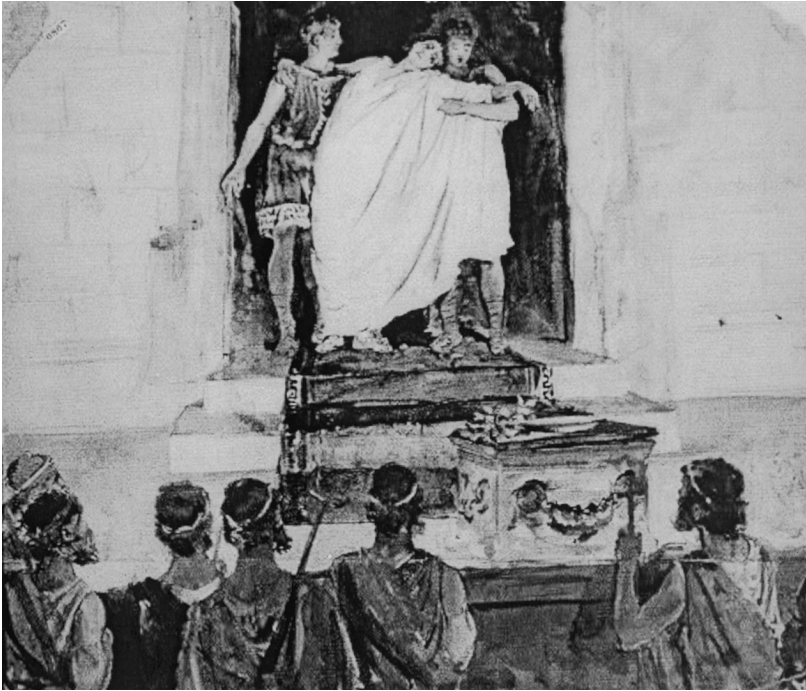
In addition to its way of imagining the distant and remote, and its way of working by dramatic opposition, Greek tragedy has a third feature, harder to define than the others but no less important, not only for Athens but in its consequences for the literary and dramatic imagination ever since. What I have in mind is a certain sort of speech in which a speaker looks back over his experience as a whole—and thus our experience too—seeking to find a meaning in it, to claim a meaning for it, and such a meaning as will enable him or her to shape his or her future speech and conduct in a coherent and valuable way.

Not all dramatic speech has this quality. Much of it consists of simple response to events, in the form of lamentation or the expression of joy or worry; some of it consists of denunciation, or manipulation, or planning, or the giving of orders—think of Creon speaking to Antigone—or the pursuit of clarification, as in *Oedipus*. All of these gestures can, of course, be ways of giving meaning to experience, but they have not quite the quality I seek to define, which includes a kind of summing

up, a self-consciousness, an effort to imagine the whole world and oneself and others within it, to see one's story as a whole and among other stories. It is the full performance of a gesture that is begun over and over in human experience, both in our own lives and on the stage, but rarely taken to completion.

Let me give two brief instances. In *Oedipus at Colonus*, the blind and aged man finds at last a home in the sanctuary of Colonus on the edge of Attica. The townspeople in the chorus are afraid of him and wish to drive him off; Creon, his brother-in-law, comes from Thebes to seize and bring him back to that city, to ensure that he will be buried there and thus confer on Thebes the benefits which an oracle has promised to the place that receives his body. Oedipus himself is filled with a sense of cost and loss, of his own status as an object of fear and taboo, but he also displays a remarkable serenity, an integrity of mind; and towards the end, in an argument with Creon, he surprisingly asserts his essential innocence. He looks back over his entire life and claims new meaning for it. He was, he says, the object of a divine decree from birth that he should do these unspeakable things—how, then, can it have been his fault? He did not know who it was he killed, or who it was he was marrying; and when he did kill he acted in self-defense. He has—and he knows it—violated the deepest of taboos and is by this fact eternally marked; but he also sees that in another and deeper sense he is innocent as well. The action of the play confirms this sense of his own deep innocence, in two ways: first, in Theseus' expulsion of Creon and acceptance of Oedipus into the territory of Athens; then, in Oedipus' own apotheosis, his conversion by divine power on his death into a kind of quasi-deity himself.

Or consider the *Ajax* of Sophocles. The story here takes place during the Trojan War, just after the death of Achilles. The armor of Achilles is given by the leaders, Agamemnon and Menelaus, not to Ajax, who is sure he de-



"Oh, Miserable am I" laments a blind Oedipus in this 1880 illustration. Like heroes of Greek tragedy, Supreme Court Justices struggle to claim that they can describe, explain, and justify their decisions in an appropriate way.

serves this mark of honor, but to Odysseus, in what Ajax regards as an act of fraud. Filled with fury and a sense of injury, Ajax sets forth at night to kill Odysseus and the two leaders, the only response this man of war and honor can possibly imagine. Athena sees him do this, and deludes him into thinking that a herd of sheep and goats are the enemies he seeks; he slaughters them, delighted at his revenge; but then he gradually returns to sanity, surrounded by the corpses of these animals, a laughingstock to the whole world, utterly humiliated. The course for him is plain, and he faces it clearly and with characteristic courage: "It's a contemptible thing to want to live forever . . . Let a man nobly live or nobly die."¹⁶ The meaning of his situation is that he should die and be done with it.

Tecmessa, the woman with whom he lives and by whom he has had his only son, pleads with him not to end his life, for the moment he dies she and their son will become

slaves of others, which will be horrible for themselves and a humiliation both to Ajax' parents, who are still alive, and to his own memory. Ajax at first rejects her claim, but he is in fact affected by what she says, and when he returns to the stage after a choral ode lamenting his decision, he speaks in a wholly different way, not from inside his misery of the moment but from outside, at an enormous distance, philosophical or religious in kind.

Strangely the long and countless
drift of time
Brings all things forth from dark-
ness into light,
Then covers them once more. Noth-
ing so marvelous
That man can say it surely will not
be—
Strong oath and iron intent come
crashing down.
My mood, which just before was
strong and rigid,

No dipped sword more so, now has
lost its edge—
My speech is womanish for this
woman's sake;
And pity touches me for my wife
and child...

So, he says, he will go to the shore of the sea
and purify himself, hiding his sword in the
sand.

From now on this will be my rule:
Give way
To Heaven and bow before the sons
of Atreus.
They are our rulers, they must be
obeyed.
I must give way, as all dread
strengths give way,
In turn and deference. Winter's
hard-packed snow
Cedes to the fruitful summer; stub-
born night
At last removes, for day's white
steeds to shine.
The dread blast of the gale slackens
and gives
Peace to the sounding sea; and
Sleep, strong jailer,
In time yields up his captive. Shall
not I
Learn place and wisdom?

This is an extraordinary speech. It represents an enormous shift of mind and feeling, from a self-centered despair to an acceptance of his lot, which is in turn based at least in part on a recognition of the claims and experience of others. Ajax can now see Tecmessa, not merely as a possession, but as a person with whose experience he can sympathize. His virtue has so far been to be without pity; now he can pity. What is more, he now sees his present defeat not as a single, unique, and humiliating event, but as part of the larger order and process of the world, in which all dread and powerful things give way in the end: winter, and night, and storms, and sleep, and wakeful-

ness. We live amidst cycling emergences and withdrawals, dominances and submissions, of which this event is only one. His humiliation is thus stripped of social and moral significance and made a fact, a fact of nature, like death itself.

This speech is, therefore, an answer to a central question the play presents, which is how one can possibly live in a world in which life is so utterly subject to chance, even malicious destruction. The answer is ultimately a matter of voice and character, of imagination and speech. Ajax lives in a world of uncertainty and destruction; but he can see that and say it, and in doing this can see himself, not as a unique heroic ego, but as part of a set of processes larger than he; and all this enables him to accept his life, and its conditions.¹⁷

There is enacted in this speech an impulse that is perhaps first made part of the Western inheritance here in the tragic drama of Greece: the impulse to stop, to sum up life as a whole and to try to make sense of it, to claim a meaning for it; to try to imagine the world and oneself within it in such a way as to make meaningful action possible—whether that action is the kind of suicide upon which Ajax first resolves, and later, perhaps still under the destructive spell of Athena, commits, or whether it is the kind of life in connection with others that he, in this speech, for a moment, imagines.

What is more, this kind of speech is, I think, essential to the deepest contribution of tragic drama, which is, as Hegel said, to give dignity to human life by recognizing and enacting the possibility that the human mind—the self or soul—can maintain its integrity even, or especially, at the moment of its dissolution.¹⁸ It is such an act of character and imagination that enables Oedipus to overcome and transform what he has done; that enables Prometheus, chained to the rock, to maintain a moral and psychological superiority to the Zeus who tortures him; and that enables Ajax, for a moment at least, to accept

and live with the humiliation thrust upon him by fate and the gods. It is in the human capacity for speech of a certain kind that human dignity most deeply resides: speech that invokes what is distant and remote and brings it before the mind, where it can provide material and a point of view from which the culture, and the self, can be criticized; speech that moves, as the play and trial both do, by opposition and contrast into new perception and understanding; and speech, like that of Ajax or Oedipus, that seeks to sum up experience and claim a meaning for it.

To return once more to *Cohen*, I want now to suggest that in writing his opinion for the Court, as, in a sense, in any judicial opinion of any real quality, Justice Harlan is expressing very much the same impulse, in a different context, that we saw at work in Ajax and Oedipus: the desire to sum things up, to tell again the story of the past, to imagine the world and its people, all in ways that will make possible coherent speech, intelligible and appropriate action. For part of the duty of the Court is to say how this case should be talked about in the language the Court has made—in this instance, the language made in cases decided under the First Amendment. To do this, it must attend to the entire authoritative past created by the Court and do so with the duty of resolving so far as it can the tensions it discovers within it, with the aim of asserting, for the moment, that justice has been done. It must use this language to make a claim both to coherent speech and to appropriate action.

How does Justice Harlan, speaking for the Court in the *Cohen* case, attempt to do these things? Here is a brief outline of what might be called the argumentative structure of his opinion.

He begins a bit like a modernist painter sculpting out negative space by telling what, in his words, this case “does *not* present” (emphasis in original). First, he says this is a case in which the state seeks to punish, not conduct

that is associated with speech, but speech itself.¹⁹ Likewise, it does not involve a statute directed at the special need for decorous speech and conduct in the courthouse or its precincts, but one of general applicability. This means that no special deference is due any judgment of the legislature as to the proper control of speech in the halls of a courthouse, for no such judgment has been made.²⁰ And, despite the sexual vulgarity of the central term employed, this is not an obscenity case, for the expression is in no way erotic.²¹ Furthermore, the phrase in question does not qualify as the sort of expression the Court has termed “fighting words,” unprotected by the First Amendment, for it was not a direct personal insult. Nor is a prohibition of this phrase justified by the fact that it was forced upon “unwilling or unsuspecting viewers,” as a “captive audience”; to justify suppression on such grounds, the government must show that “substantial privacy interests are being invaded in an essentially intolerable manner,” which is not the case here.²²

Harlan thus runs through nearly the entire body of potentially relevant First Amendment law, only to put it aside on the grounds that it does not bear on the case before him. That is, he simultaneously admits the surface relevance of the arguments he states and denies their real force in this case. He is here addressing and resolving the sort of argumentative opposition between lawyers I referred to earlier, and it is important to say—although it would take too long for me to show that it is so—that none of the points he dismisses is without some merit, none of his own positions beyond argument. He recognizes what can be said the other way, but is, at the same time, exercising a power—the power of a language-shaper—to determine its scope and basis and reach.

All this is, for him, a kind of brush-clearing that opens up what he regards as the real issue in the case, which is whether California may “excise, as ‘offensive conduct,’ one par-

ticular scurrilous epithet from the public discourse.” It cannot do so, he first says, on the theory advanced by the court below, namely that it is “inherently likely to cause a violent reaction,” for that is simply not the case.²³ However, there is a second theory supporting the conviction, which in his view commands more respect and attention: namely, that the states may suppress this “unseemly expletive” in an effort to “maintain what they regard as a suitable level of discourse within the body politic.”²⁴

He begins his examination of this question at a highly general level, reimagining as it were the first premises of the legal universe. First, he says, we must make this judgment with an understanding of the purpose of the constitutional right of free expression: “It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us, in the hope that such freedom will ultimately produce a more capable citizenry and more perfect polity, and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our system rests.”²⁵ This is a lovely and economical statement, drawn from a more extended one, the famous dissent of Justice Brandeis in *Whitney v. California*,²⁶ to which Harlan makes reference. The result of this freedom, Harlan goes on to say, “may often appear to be verbal tumult, discord, and even offensive utterance.”²⁷ But these are side effects of what a broader debate enables us to achieve, and “that the air may at times seem to be filled with verbal cacophony is, in this sense, not a sign of weakness, but of strength.”²⁸

Then, in turning to the particulars of this case, Harlan makes two central points. First he says that the result contended for by the prosecution would confer “inherently boundless” powers on the state. For if this word can be excised from public speech, where is the power to stop? What he means is that there is

simply no principled way to distinguish between this particular term and others. This view rests on an important understanding of the nature of language, namely, that words cannot be sorted like peas or bolts, according to size or weight. They have a life that is more mysterious and multidimensional, more context-dependent, than such a view would allow.

Second—and central to the ultimate meaning of the case—Harlan says that to force a translation of Cohen’s utterance into more socially presentable speech would strip it of much of its significance. For human speech, he says in a passage I quoted earlier, “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well”; and we cannot believe that the Constitution has “little or no regard” for this “emotive function, which practically speaking, may often be the more important element of the overall message sought to be communicated.”²⁹ And even if this is not true, he thinks that it would be too facile to assume that one “can forbid particular words without also running a substantial risk of suppressing ideas in the process.”³⁰

Note the tension here. First Harlan says that speech does more than express “ideas,” and that what he calls its emotional content is crucial to its value; then he returns to the topic of “ideas,” saying that we cannot be confident that the suppression of vulgarity would not involve the suppression of “ideas,” as though ideas are the important things after all. He thus reaffirms the distinction between ideas and feelings he has just criticized; but the earlier criticism—insisting on the value of emotive expression—continues to work, thus transforming his point from its rather crude statement about “ideas” to a crucial recognition that our language about language is itself inherently limited and constricting. What unites his two perceptions, despite the tensions between them, is his sense that we cannot be confident that we can know how the

meaning of language works, certainly not so confident that we can inflict surgery on an utterance without running the risk of destroying its life.

This is the most important part of the meaning of the Court's opinion: a sensitivity to the fact that meaning and form are inseparable. It is a familiar truth of literary criticism that the meaning of a poem or a play or a novel, or any other work of art, lies not in any restatement of it into other terms—in any message or idea—but in its performance, in the life and experience it creates for its audience or viewer. In adopting and performing this position in the law, Harlan takes an enormously significant step away from the view that the First Amendment should be held to protect only speech that contributes to the marketplace of "ideas," and especially of political ideas. Of course Cohen's own speech is deeply political; but the way the Court imagines and resolves his case makes the amendment reach much further, to the protection of art and perhaps—as one might wish to do in the case of Greek drama—to a dissolution of the simple distinction between political and nonpolitical, as the opinion dissolves the distinction between ideas and feelings.

There is thus this additional connection between the opinion in *Cohen v. California* and the Greek dramas with which we began, that *Cohen* provides a language and an authority for the protection of these plays and others like them. It is not only itself a drama; it is a way of thinking about drama.

In comparing the form of classic Greek tragedy and that of the Supreme Court opinion, my hope has been to begin to establish a somewhat clearer sense of the ways in which they work as institutions for the making of collective meaning. One idea is that increased understanding of these matters might lead to deeper criticism, and perhaps even to better performance of the judicial opinion. The three points of comparison made here, for example, can be seen to generate questions that can be

brought to the reading and criticism of any judicial opinion.

1) To what extent does this opinion bring into the circle of public awareness persons or events or other material that are normally repressed, ignored, or overlooked? Does it do this with the kind of particularity that will bring to the surface something new and problematic, and thus become the occasion for growth and change, both in our perceptions of the world and in the law?

2) Does it work in an explicit way by dramatic opposition and development (as opposed, for example, to the deductive application of theory)? In particular, how far does the Court recognize that its own language of description, argument, and conclusion has, as it were, a shadow version opposed to it, represented by the losing side? For the Court does its job, not just by reasoning to a result, but by recognizing the force and reality of other views, other ways of imagining and speaking. And does the Court find a way to create significant dramatic tensions within its own opinion, as Harlan does with respect to what I have called the two registers of discourse reflected here?

3) Does the Court find a way to sum up the law and claim a meaning for it, and, if so, with what kind and degree of coherence? In a First Amendment case, for example, we can ask whether the Court has a workable view of the aims and principles of that text, which in turn requires a view of the nature of human speech, and of language itself; whether it has a way of imagining the Constitution as a whole, and the roles of the various actors within it—legislatures, juries, other courts, it-

self; whether it offers, in short, a way of imagining this case and the law and the larger society that will enable it to reach a result which it can claim to be just, not only in some technical way, but truly just. And in all three dimensions of meaning we shall be interested not only in the Court's explicit statements or arguments, but, as I have tried to suggest with respect to Harlan's opinion in *Cohen v. California*, in the meaning of the performance enacted in the opinion itself.

* * * * *

I think that the desire for meaning of the kind that is reflected in the speeches of Oedipus and Ajax is the deepest impulse from which literature comes, and that it lies at the heart of our hopes when we approach a judicial opinion, especially a Supreme Court opinion. But the impulse is even more general than that, for we ourselves participate in it in our own lives and imaginations. Every human being shares the desire to find a way of describing and claiming meaning for his or her experience—at the most general level, a way of imagining the world, and herself (or himself) and others within it, that will make possible coherent speech and valuable action, even in the face of the deep uncertainties and injustices life necessarily presents.³¹ The process is never complete, for the future lines of the story we are telling are necessarily unknown to us; but we know that when they come they will certainly, like the murder of Agamemnon or the madness of Ajax, give new meaning to what is past. As we do this, we work against two deep fears: that the story we shall then be able to tell will have a meaning that is intolerable to us—or no meaning at all.

To discover shape and coherence and significance in a work of art—or law—presents us with an acute form of this problem, for it simultaneously stimulates the desire for meaning of the kind I mean and reminds us that our

experience, our story—like that of Agamemnon—is necessarily incomplete. In this way it is the function of art, and law too, to challenge life at its imaginative center.

To test out the depth and pervasiveness of the human desire to discover a way to claim meaning for one's experience, imagine for the moment that we could not claim meaning for our experience; that all our speech was reducible—as, indeed, certain strains of thought in our own world would reduce it—to something called information. Under these conditions, instead of what we call meaningful speech, we would send signals that communicated particular desires or aversions, expressed a willingness or a refusal to engage in a course of conduct, and so on. We could make offers, pay bills, get the car fixed, go to the hairdresser, buy a suit, order a dinner, arrange for sexual gratification, watch or play baseball, but we could not say what any of these things means to us. We could not justify our decisions, or explain our preferences, we could only act on them; we could not engage in the kind of conversation by which we discover who we are, what we desire, or should desire, what kind of life we live and want to live. Life could go on as a series of exchanges, and expression as a set of signals that make the exchanges possible. But such an existence would in the most important sense not be human, for it would omit the most deeply human form of speech, which is the effort to define our experience and claim a meaning for it. Description, explanation, justification: these are for us essential activities of mind and language.

As we have seen, the form we call the opinion of the Supreme Court—like the drama—is a cultural institution that works to teach the public: in part by bringing into the zone of collective attention that which is distant or remote, unseen and particular; in part by the way it works through dramatic opposition, with character poised against character, voice against voice; in part by the way it seeks to give meaning to the events thus examined,

locating them in a larger context and a larger story, running back in time and including, potentially, all the elements of its institutional memory. It does this in a language fashioned for the purpose, in which the Court—like Ajax or Oedipus—claims, or struggles to claim, that it can describe, explain, and justify its decision in an appropriate way, one that will make possible coherent speech and meaningful action in the future. And like the drama it has the potential, at least—in my view, realized in cases like *Cohen* and many others, though not all—to enhance our sense of the dignity of human life and experience, in resistance to those forces, in this and every age, that would trivialize these things.

In the judicial opinion and the drama alike, we are thus exposed to imaginations that, at their best, confront the deep uncertainties of the world, of language and the mind, but nonetheless create orders, in language, that run against those uncertainties. But in each—the speech of Ajax, the play that bears his name, the opinion in *Cohen*—the order is tentative, temporary, soon to be replaced by others, or redefined as the context that gives it meaning changes. In this way, both forms call upon us, as readers, to engage in our own versions of this fundamental activity of imagination and language: Become a maker of order yourself, they tell us, become one who claims meaning for our shared experience, or the possibility will be lost.

ENDNOTES

¹This paper was originally delivered as a lecture to the Supreme Court Historical Society, 13 December 2000.

²For a brief account, see the articles on *choregia* and Greek tragedy in *The Oxford Classical Dictionary*, 3rd ed., S. Hornblower and A. Spawforth, 1538–1542 (1996).

³The way this works practically is that the audience is first asked to imagine that the space before it, the theater, is of a different time and place, in this case Mycenae; then, by speech and song, events in places and times re-

mote from that one are also brought before the mind of the audience.

⁴Of course, there were other forms that did something like this, especially the *Odyssey*, one of the foundational texts of this culture, which invited the audience to imagine both the world of Odysseus and then, through his speeches about his travels, a world beyond that. But the drama does this in a much more immediate way, inviting the audience to believe that what they are seeing and hearing in real time, on this spring morning, are the events of long ago or far away. The *Odyssey* told of remote events; the drama acts them out.

⁵For an account of the ways in which such characters can nonetheless be seen to serve the needs of a male-dominated culture, see Helene Foley, *Female Acts in Greek Tragedy* (2001). On the place of women in the theater, see *Literature in the Greek and Roman Worlds*, O. Taplin, ed., 127–132 (2000).

⁶That it is through the judicial opinion that the Court does these things is too obvious, I think, for argument. Imagine, for a moment, that it had been forbidden to write opinions, that its judgments had to stand on their own, undefined and uninterpreted. This would destroy the possibility of law as we know it. Of course, a case matters in part because of its outcome, especially to the parties; but to the rest of us this outcome matters largely because of what it is made to mean, in the first instance by the Court that decides it, then by later Courts and commentators. The case does not have a meaning automatically, that is, but is given meaning through the opinion that describes, explains, and justifies the outcome. As a teacher once said to a writing class, “The facts do not speak for themselves. You have to speak for them.” So too it is with the results reached by the Supreme Court. It is the opinion that gives significance. For elaboration of this point, see “What’s an Opinion For?” in my *From Expectation to Experience: Essays on Law and Legal Education*, chapter 4 (2000).

⁷403 U.S. 15 (1971). One of the peculiarities of a First Amendment opinion is that it is speech about speech, which means that the Court is always exemplifying its own version of the activity it is protecting (or not protecting). This in turn holds out the possibility of a tension, productive or unproductive, between the speech of the citizen in question and that of the Court. For the Court may talk *about* speech one way, yet imply—or seem to imply—a very different sense of it, of its possibilities and dangers, in its own performance. That will in fact be true here.

⁸*Id.* at 16.

⁹*Id.* at 15. Notice, too, as I said earlier, that the imagined world in which this story is placed reaches far in space and time alike. In space, it reaches out to Los Angeles and the county jail, to bring what happens there into the circle of public attention that the Supreme Court defines.

And it reaches back in time, too, as we shall soon see, when the Court tries to explain its decision, as it must, in the terms and understandings established by earlier decisions. Everything the Court has ever done is of potential relevance; that inheritance must be examined, thought about, and reorganized into a system of thought that will give appropriate and tolerable meaning to the events before it.

¹⁰392 U.S. 514 (1968).

¹¹I say “might have” because, in the event, the Court backed away from the possibilities opened up in *Powell*. Nonetheless, that case had real force in focusing thought on the problem of criminal responsibility, and doing so in a highly constructive way.

¹²See Aristotle, *Poetics*, IV:10–17

¹³See Robert P. Burns, *A Theory of the Trial* (1999); Milner Ball, “The Play’s the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater,” 28 *Stanford Law Review* 81 (1975).

¹⁴I have spoken as though Cohen’s gesture were simply a crude vulgarity, and the question were whether or not to tolerate it. This is, in a sense, of course true, but there are also respects in which his utterance was in its own way highly mannered. In a footnote, Justice Harlan explains that Cohen went into a courtroom where a trial was proceeding and, before he did so, took off his jacket and folded it up so that the slogan was not visible. Whatever his feelings may have been, from an objective point of view this was an act of respect for the courtroom and the judicial process. A policeman present suggested that the court hold him in contempt, but the judge sensibly refused. 403 U.S. 15, 19 n. 3 (1971).

¹⁵*Id.* at 26.

¹⁶All quotations from *Ajax* are from the translation by John Moore, in *Sophocles, v. II*, David Grene, ed. (1957).

¹⁷This is, at least, what it looks like when the speech is given, but shortly afterwards Ajax retires to the sea coast not to bury his sword, but to fall upon it, as a suicide. Is the speech quoted above, then, all deception, meant perhaps to placate for the moment Tecmessa and the chorus of sailors from Salamis, his countrymen? So some take it, but that would be odd in a person as utterly direct and forthright as Ajax is throughout. Yet how is one, then, to explain the suicide? One possibility, and in my view a strong one, is that the suicide is the continuing work of Athena. (Soon a messenger will report the words of Calchas, the seer, that if Ajax can be kept safe within his tent for this one day, Athena will harass him no more [lines 758–759].) On this view, the speech is sincerely meant when given; its intention is undone by the force of Athena’s curse. But this would reduce Ajax’s suicide by making it in a sense involuntary. And who could imagine him actually submitting to Menelaus and Agamemnon?

A third reading is suggested by Bernard Knox, namely that the first part of the speech, quoted above, is actually a soliloquy in which Ajax truly articulates his vision of the world; but this is not a vision that he accepts, quite the reverse of that. The language about reverencing the Atreidae, for example, shows how impossible acquiescence would be. The speech in this way confirms his resolve to leave this impossible life. See Bernard Knox, *Word and Action: Essays on the Ancient Theater* 134–141 (1979). For other views, see C. M. Bowra, *Sophoclean Tragedy* 39–46 (1944) and R. P. Winnington-Ingram, *Sophocles: An Interpretation*, 46–55 (1980).

These are all plausible interpretations, none of them without difficulty, presenting choices for the director and actor. For my present purposes it is not necessary to try to resolve the tensions among them, for they all involve the speaker summarizing a way of imagining the whole world and himself within it, whether this is done directly, or with an intention to deceive, or as a way of discovering how impossible for him the truth he is discovering actually is. But I will say, for what it is worth, that the idea that this speech is straight deception, though shared by many, seems to me simply wrong.

¹⁸For an elaboration, see Michelle Gellrich, *Tragedy and Theory: The Problem of Conflict since Aristotle* (1988).

¹⁹This is not a self-evidently obvious proposition, for one might easily think the Constitution could draw a line between speech say on a street corner, or in a newspaper, and speech that takes the forms of slogans emblazoned on a jacket and displayed in a courthouse. But that is actually part of Harlan’s point, for in those cases the state would be punishing the *manner* of speech, not its content or substance, which, if defined as a communication that opposes participation in the Vietnam War or the military draft, is immune from suppression. The question, then, is whether this is an appropriate time, place, or manner regulation.

²⁰What is more, there is no notice in this statute that the courthouse is a special place, governed by special rules. “No fair reading of the phrase, ‘offensive conduct,’ can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.” 403 U.S. at 19.

²¹He puts this point as a question of fact: “It cannot be plausibly maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.” *Id.* at 20.

²²The phrase on Cohen’s jacket is not comparable to “the raucous emissions of sound trucks” outside one’s residence, for “those in the Los Angeles courthouse could avoid further bombardment of their sensibilities by sim-

ply averting their eyes.” *Id.* at 21. Harlan concludes that this is no basis for suppression, especially where there is no evidence that “persons powerless to avoid appellant’s conduct did in fact object to it” (*id.* at 22) and where the legislature has not focused attention on the issues presented by the captive auditor, but “indiscriminately sweeps within its prohibitions all ‘offensive conduct’ that ‘disturbs any neighborhood or person’ ” (*id.*). Here Harlan does find a way to give force to objections that might have been made to the statute on its face, but he does so not in an abstract way but in the context defined by the particulars of this case. The statute may thus be valid in other cases, but not as applied to this conduct in this case—at least not without a showing of a legislative judgment made on the issues presented here.

²³*Id.* at 22–23. He makes this point—in the first instance, at least—as a question of fact, and finds the government’s case wanting. “We have been shown no evidence that

substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities” by such “execrations.” There may be some people “with such lawless and violent proclivities,” but that does not constitute a sufficient basis for the regulation of speech. To hold that it did would amount to the “self-defeating proposition” that to avoid censorship by a “hypothetical coterie of the violent and lawless” the state may impose that censorship itself. 403 U.S. at 23.

²⁴*Id.*

²⁵*Id.* at 24.

²⁶274 U.S. 357, 372 (1927).

²⁷*Id.* at 24–25.

²⁸*Id.* at 25.

²⁹*Id.* at 26.

³⁰*Id.*

³¹For a fuller explication of this theme, see my recent book, **The Edge of Meaning** (2001).