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### The Law's Mystery

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# THE LAW’S MYSTERY

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## ABSTRACT

*What is the continuing significance of Cohen v. California, the 1971 U.S. Supreme Court decision holding that “Fuck the Draft” is a message protected by the First Amendment? Using Cohen as an exemplar, this article offers a new theory about how to understand the law and judicial opinions.*

*The theory begins in a recognition of the “law” as resting upon mystery and uncertainty, a mystery that is also the source of the law’s enchantment. It is this enchantment that we depend upon for the law to be authoritative rather than authoritarian and reducible to the political and thus to power. In simple terms, the mystery of the law—its being beyond us in this way—constitutes its legitimate authority over us. The law that discloses itself to us does so through the openings that language provides. For our culture, judicial opinions are its primary way of doing this.*

*Having introduced the theory, the article applies it, exploring whether it is possible to bring to the surface the tracings of a “great” judicial performance, using “great” in the sense of revealing an opening through which the law discloses itself. This section describes a reading of Cohen that aims to discover whether through the performance of the opinion, its author has uncovered something that is “of the essence” of our community.*

*The article finally raises questions about what it would mean to legal education and law practice if judicial opinions were evaluated without destroying the law’s mystery. What would it mean if we thought of judges as preservers of this mystery? What would it mean if readers of opinions started thinking in terms of their own experience of the opinion rather than as critics of it? And what would it mean if lawyers saw their task as related to “truth”?*

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## I. INTRODUCTION

What you are about to read is not what it appears to be: the work of two people who together offer a theory about a way of understanding the law and opinions and then together put this theory into practice in the analysis of a well-known opinion, *Cohen v. California*.<sup>1</sup>

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<sup>1</sup> *Cohen v. California*, 403 U.S. 15 (1971). Thomas G. Krattenmaker, a law clerk to Justice John Marshall Harlan during the 1970 Term, has claimed that he wrote the opinion in *Cohen*. See

It is not this because the authors did not come together in this sense on either part, the theory or the practice. The theory is almost entirely the work of one; the practice almost entirely the work of the other. Neither author is necessarily committed to what the other says. In this way, and perhaps in others, the article may be more complex than it first appears. It is an experiment really, one in which one author, Jack Sammons, offers something to the other, Linda Berger, to see what she makes of it, and, in this, to teach him what he has said and what value it might have. The one, Linda, was and is skeptical of Jack's approach to law, skeptical especially of his use of something called the "truth" (whether this be in the form of *aletheia*, i.e., a phenomenological uncovering of something, or not) and, later, skeptical of any project that attempts to think the ineffable as his seems to do. Jack, for his part, worries whether what he has offered makes the sort of sense that could be useful to those who live their lives in the law as Linda does. He does not worry that he has not said enough—he knows he has not—but worries if he could ever say enough to capture some part of his fleeting pleasant moments of apparent coherence in an otherwise chaotic mind, those moments that prompted his writing something like this. Is there something revealed in those moments? Is there something to be revealed in them?

Neither of us has had our different concerns adequately addressed or (of course) our questions answered by this experiment. What has happened instead is that we have learned to let these be, but then there is something terribly important in that, no?

#### A. MYSTERY

Jack would like to start with a brief reminder of what Steven Smith has called the law's ontological gap<sup>2</sup> which can be expressed simply (in terms borrowed from Joe Vining) by saying that everything we might be tempted to think of as law is only evidence of it and not the thing itself.<sup>3</sup> Vining and Smith find this odd way of our thinking of law reflected in our ordinary speech.<sup>4</sup> It is there, for example, in dissenting opinions when the dissent says that the majority got the "law" wrong. In such speech, we treat law as something immaterial and yet fully external to us as we treat few other things. The odd things we do treat this way in ordinary speech are quite telling: "it was meant to be," we say, or "the muse speaks," or "what fate holds in store for us," or "the character took on a life of her own," or "he found inspiration" (when it retains the sense of something

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Thomas G. Krattenmaker, *Looking Back at Cohen v. California: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 651, 652 (2012) ("With two [minor] alterations, Justice Harlan filed the opinion as drafted."). Whatever the contributions of "authors" outside the opinion to the text of the opinion, they are irrelevant to the theory and practice described here, which focuses on what is revealed through the opinion.

<sup>2</sup> See STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

<sup>3</sup> JOSEPH VINING, *FROM NEWTON'S SLEEP* 26 (1994).

<sup>4</sup> SMITH, *LAW'S QUANDARY*, *supra* note 2, and VINING, *FROM NEWTON'S SLEEP*, *supra* note 3.

being breathed in to us), or “there’s something in the air,” just to mention a few.

This immaterial and yet external “law” somehow discloses itself to us, we might say, since nothing we can say about it (and, therefore, none of our ways of thinking about it) is sufficient to let us know what it is. This is surely mysterious and, because a law that is beyond our conceptions of it is also beyond our control to some extent, it is unsettling in its uncertainty.

This characteristic of “law” as resting upon mystery and uncertainty is, however, also the source of the law’s enchantment for us, however little we may now acknowledge it. It is this enchantment that we depend upon for law to be authoritative over us, as we hope it will be, rather than authoritarian and reducible to the political and thus to power.<sup>5</sup> In simple terms, the mystery of the law—its being beyond us in this way—is its legitimate authority over us. The task this imposes upon us, the one I undertake here, is to explore a way of thinking such “law” without destroying it by concealing from ourselves its mystery or avoiding its uncertainty.

To conceal and to avoid these things is certainly very tempting. Our anxieties about law produce in us a very strongly felt need to be its master, to place it conceptually within our control (even if only through self-imposed limits on possible conceptions of it), and to render it subject to our own will. We don’t want mystery and uncertainty in other words. We want to think that we are in control, so typically we enframe law conceptually to make it appear that we are.

Let me pause here for a very brief aside on phenomenology and on how phenomenology would have us consider cultural realities, like law, of the world into which, as some phenomenologists would put it, we are thrown.<sup>6</sup> For phenomenology the question of whether or not this law is “*really* there,” which is the question I bet that is occurring to you right now, is odd since what prompts a question like this is a phenomenon that *really* appeared. And, for phenomenology, there are no “mere” appearances and nothing is “just” an appearance. Instead, and quoting a well-known text, “phenomenology allows us to recognize and to restore the world that seemed to have been lost when we were locked into our own internal world by philosophical confusion. Things, like . . . [the] law . . . that had been declared to be merely psychological [projections] are now found to be ontological.”<sup>7</sup>

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<sup>5</sup> There are similarities here to Jim White’s concerns in JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006).

<sup>6</sup> For “thrownness,” see especially MARTIN HEIDEGGER, *BEING AND TIME* Division 1, Chapter 5 (Macquarrie and Robinson trans., Harper & Row 1962)

<sup>7</sup> ROBERT SOKOLOWSKI, *INTRODUCTION TO PHENOMENOLOGY* 15 (1999).

B. LAW AS ART AS TRUTH

This law, which discloses itself to us, does so through the openings that language provides.<sup>8</sup> For our culture, judicial opinions are its primary way of doing this. Yet judicial opinions can do this only when judges resist the temptations towards control and avoidance I have described and are sufficiently humble before the law that they are willing to become inconsequential to opinions they have written in order to permit the law to speak.

To explore this disclosing of law I will be thinking here of opinions, as James Boyd White and others have taught me to do,<sup>9</sup> as creative acts, that is, as the works of art they are. And, as with other works of art in which we say it is Art and not the artist that is the origin of a great work,<sup>10</sup> we will need to think here of the Law and not of judges as the origin of great opinions. Great opinions are great, then, to the extent that the Law speaks through them, and for no other reason.

Thinking of opinions as works of art, however, is not to think of them aesthetically.<sup>11</sup> But why not think of law aesthetically? Aesthetic thinking about art (and, in our comparison, about opinions) distances art from our world, making art inconsequential to our lives and the special province of a social elite with time, money, and education enough to create a false sense of its importance. In this, the experience of art becomes peripheral to our ordinary lives as if on holiday. These are the conditions in which Art dies.<sup>12</sup> This is exactly the opposite of what is sought here for law. Rather than thinking of opinions aesthetically, to think of opinions as art is to think of them as truth-revealing in the way we often say that a great work of art reveals a truth—however fleeting, however contingent, however cultural, however partial, the moment of truth might be.

The truth revealed in opinions, as in art, is not truth as a correspondence to something or coherence with something. For then the question of truth would just be moved to that to which we say a truth corresponds or

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<sup>8</sup> For discussions of the disclosure made possible through the openings that language provides, see MARTIN HEIDEGGER, *Language*, in POETRY, LANGUAGE, THOUGHT (Hofstadter trans., 1971) and MARTIN HEIDEGGER, *ON THE WAY TO LANGUAGE* (Peter D. Hertz trans., Harper and Row, 1971).

<sup>9</sup> See, e.g., JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); JAMES BOYD WHITE, *HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

<sup>10</sup> See MARTIN HEIDEGGER, *Origin of the Work of Art*, in POETRY, LANGUAGE, THOUGHT, *supra* note 8, especially at 56; see also Jack L. Sammons, *The Origin of the Opinion as a Work of Art* (unpublished manuscript on file with author).

<sup>11</sup> You may think that the risk of considering law as an aesthetic is small, but perhaps not. Perhaps most professors who take law seriously, that is, who do not seek to control it conceptually, are tempted towards the aesthetic. And perhaps law schools are where law goes to die.

<sup>12</sup> See HEIDEGGER, *Origin of the Work of Art*, in POETRY, LANGUAGE, THOUGHT, *supra* note 8, at 39, 77.

in which it coheres.<sup>13</sup> In other words, any attempt to constitute the world as an object of knowledge—which is what we do when we look for that to which truth corresponds—is derivative of a more primary access to it.

Instead, the truth revealed in opinions is truth as the disclosure (uncovering, deconcealing, unclosedness, *aletheia*, etc.) of an aspect of a world that was concealed from us—using that word “world” as we might say the world of law, the world of baseball, or the world of the waterfront—something, that is, that is already there in a vast network of holistic connections reaching out towards a broad horizon in which to understand a thing truly requires some understanding “of an indefinite number of other things.”<sup>14</sup>

As an example of what this means, I offer to you Christo's and Jeanne Claude's *The Gates* in Central Park.<sup>15</sup> I think it is clear that *The Gates* is an interpretation of Central Park and as such it both reveals and conceals something truthful about the world of the Park. In doing this, *The Gates*, in its uncovering, is bringing to presence aspects of the Park that are always already there, but seldom attended to. It does this in a way—as art—that grounds the world of the Park in uncertainty or, a step further for our culture, the ineffable, or, a step still further, what we could call and sometimes do call the holy, and thus also conceals the park from us.

Through *The Gates*, the Park is now uncovered as a living presence in our ordinary lives that was always there, but unnoticed, and in such a way that its awesomeness (to use a word that has been ruined for us) is made manifest. If you watched the documentaries about *The Gates*,<sup>16</sup> this is exactly the way that ordinary New Yorkers who knew the Park well—and were hardened by their culture to things like the holy—described the experience.<sup>17</sup> *The Gates* enacts the experience upon which it depends, calls us to something we already knew but did not know that we knew, and gives life to values in a world in which there is no a priori meaning.

But then, Olmstead's Central Park does quite the same, doesn't it? (The perfect title of the piece, *The Gates*, comes from Olmstead who called the openings in the continuous stone that surrounds the park, the gates, that is, the openings through which the Park was connected to the world and the world to the Park.)<sup>18</sup> The Park uncovers the world of parks; makes us notice, for example, that we are people who need parks—very badly apparently—when we are true to ourselves, and this world too extends out to the horizon of the world into which we are thrown. Olmstead's Park

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<sup>13</sup> For Heidegger's initial discussion of this, see HEIDEGGER, BEING AND TIME, *supra* note 6, at 256-73.

<sup>14</sup> JAMES C. EDWARDS, THE PLAIN SENSE OF THINGS: THE FATE OF RELIGION IN AN AGE OF NORMAL NIHILISM 154 (1997)

<sup>15</sup> For the history of this art project and pictures of *The Gates*, see CHRISTO AND JEANNE-CLAUDE, THE GATES: CENTRAL PARK, NEW YORK CITY 1979-2005 (2005).

<sup>16</sup> *The Gates*, HBO Documentaries (Antonio Ferrera & Albert Maysles directors, 2005).

<sup>17</sup> *Id.*

<sup>18</sup> CHRISTO AND JEANNE-CLAUDE, THE GATES, *supra* note 15, at 4.

does this in a way that grounds the Park not in some concept, some willing or some control on his part or ours, but in that which is mysterious, ineffable, and holy in our lives. In a very real sense, he brings "park" to a certain life as Christo brought Central Park to a certain life.

Those who viewed *The Gates* have their role in this art as well for they are the "preservers" of the truth of this now disclosed living park. It is they who through their choices in viewing *The Gates*—this view, not that one; this path, not that one; this weather, not that; this day, not that; this connection to my world, and not that, and so on—make possible the living parks of Olmstead and Christo for it is they who have understood *The Gates* to be an important aspect of their world. It is they who have kept it from being an aesthetic object (in which, once again, "Art" can only die) which is to say, kept this work of art from being peripheral to their ordinary lives rather than a central element of those lives and, in some crucial sense, defining. It is these "preservers"<sup>19</sup> who permit me to use the present tense in describing *The Gates*. And there is no great art, as there are no great opinions, without such preservers.

C. SUCH ART DISCOVERS A CULTURE, DISCOVERS A PEOPLE, AND IS TRUTHFUL ABOUT OURSELVES, PERHAPS IN THE ONLY WAY WE CAN BE.

Just as in *The Gates*, what is uncovered for us in Law, that is, what the disclosure of Law is truthful about, seems to be something about our identity. It is, for example, a disclosing of those things about which we care as it was in the example of *The Gates*. Like *The Gates*, the Law's disclosures, in Jim Edwards' description of great art "exhibit not only its own specific conditions of presencing but also—and quite perspicuously—the general and universal conditions under which any human thing comes to presence."<sup>20</sup> So, to say all this as simply as I can, and, I hope, to render it something that will now be obvious to you if it wasn't before: the Law is a truthful uncovering of our given identity—to ask by whom it is given is to miss the point<sup>21</sup>—within the legal world and, in it, we discover that our identity, too, is grounded in mystery and uncertainty. Because it is our own identity that is uncovered for us in Law, it is authoritative over us.

You may be wondering now, I also hope, what else it could be or how else our identity might be known other than it somehow being dis-

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<sup>19</sup> For a discussion of the role of "preservers" in art, see HEIDEGGER, *Origin of a Work of Art*, in POETRY, LANGUAGE, THOUGHT, *supra* note 8, at 64-67.

<sup>20</sup> EDWARDS, *THE PLAIN SENSE OF THINGS*, *supra* note 14, at 212.

<sup>21</sup> We are seeking not to ask questions in our usual fashion but to examine the place from which such questions come. Our not knowing the origin of the gift is what is important here and what is revealing. The gift is always already there and our task is not to control it through conceptualization, whose truth we then argue, but to experience the gift. From whom, from where, does the inevitability in art come? Who provides the Ninth Symphony? The only possible answer to that is no thing. And so we can, if you want to, say that nothing gifts.



closed to us through openings of language including the openings of language that the law is—for we certainly could not do this through our own analytic conceptions of who we are, nor could we capture who we are in any circular reflections upon our own identity. In great opinions we come to know who we are through the contingent resolution of the anxieties about our identity that each good case creates for us and part of what is disclosed to us in this resolution is who we are in our relationship to the very language we use, the very language in which all openings occur. The power of a great opinion is not just that “it lets us see, but [through language] it lets us see the seeing.”<sup>22</sup>

#### D. INEVITABILITY

With this background, I would now like to turn to one way of thinking Law without destroying it. In doing so, and trying to be a good phenomenologist about this, I want to draw upon something many of you, if not all, have already experienced. In offering this way of thinking law, I am not trying to make the law less mysterious or even clearer, but instead to further uncover its mystery. I do this, however, by trying to invoke your experience of mystery in other settings.

The idea here is to look within judicial opinions for what we will call “inevitability.” “Inevitability” is used here as it is in art criticism as a term of art.<sup>23</sup> Thus I will be asking you to suspend the usual ways in which you may think of the term: as something somehow destined to happen or invariable or obvious or predictable. Instead, I ask that you think of the “inevitable” as those odd and surprising moments in which something strikes us as something we already knew but did not know, until that moment, that we knew it. This “inevitable” is not something predictable, but something that suddenly and often surprisingly appears as that which must be, although you did not know this before its appearance. Inevitability then, in art and in opinions, appears only in the performance and can be known in no other way.

I don’t want to make this seem strange and unusual. It is a very ordinary and common perception. There are moments when you are listening to a popular song, for example, when a turn of a phrase, musical or lyrical; or a shift of keys; or an interesting riff or unlikely arrangement is sensed as if it were always supposed to be as it is even though you could not have known this prior to hearing it. When I first read William Carlos Williams’ *The Red Wheel Barrow* <sup>24</sup> for example, I came to know, although I could

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<sup>22</sup> EDWARDS, THE PLAIN SENSE OF THINGS, *supra* note 14, at 212.

<sup>23</sup> See, e.g., John Tasker Howard, *Inevitability as a Criterion of Art*, THE MUSICAL QUARTERLY, Vol. 9, No. 3 (Jul. 1923) 303-13.

<sup>24</sup> THE COLLECTED POEMS OF WILLIAM CARLOS WILLIAMS VOL. 1 1909-1939, 224 (Litz & MacGowen eds., 1991):

so much depends  
upon  
a red wheel

not have known it before, that “white chickens” needed to be there. They were a necessity, which is another way of describing the same thing we mean by inevitability, and, as Rowan Williams puts it: “[T]he artist looks for the ‘necessity’ in the thing being made, but this ‘necessity’ can only be shown when the actual artistic form lets you know that the necessity is not imposed by the hand of the artistic will but uncovered as underlying the real contingency of world that has been truthfully imagined . . . .”<sup>25</sup>

To show you further what I mean, let me turn first to the surprising example of Beethoven—surprising because we think of Beethoven as the prototype of the Romantic genius imposing his vision upon the world when he was quite the opposite. We can start with the lectures of Leonard Bernstein—who was not a particularly analytical critic of music and for our purposes this is much to his credit—on the symphonies.<sup>26</sup>

Throughout the lectures, and always after describing in glorious detail Beethoven’s struggles with the music, Bernstein tells us that what renders Beethoven’s music great is its inevitability which, he says, is the product of Beethoven’s ability to discover what the next note has to be.<sup>27</sup> In this, Beethoven could produce music that, despite its sometimes revolutionary form, seems to us to have been previously written, “in Heaven” as Bernstein put it,<sup>28</sup> for there is in the music an unexpected coherency, a sense that, as he also put it, “something is right in the world.”<sup>29</sup>

We hear the same regarding great poetry from Harold Bloom. Writing about Whitman’s “Song of Myself,” he says: “There is nothing *free* about this verse: in measure and phrase, it has that quality of the inevitable that is central to great poetry. Inevitable in this context takes its primary meaning, phrasing that cannot be avoided, that *must* be.”<sup>30</sup> This, for Bloom, is the mark of all great poetry: “the uncanny power of unavoidable . . . phrasing.”<sup>31</sup>

But we need not, and Bernstein and Bloom do not, confine this inevitability to small moments in art. To show you its larger use, one on the

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barrow

glazed with rain  
water

beside the white  
chickens.

<sup>25</sup> ROWAN WILLIAMS, *GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE* 147-48 (2005).

<sup>26</sup> See LEONARD BERNSTEIN, *THE JOY OF MUSIC* (1959); LEONARD BERNSTEIN, *THE INFINITE VARIETY OF MUSIC* (1966).

<sup>27</sup> BERNSTEIN, *THE JOY OF MUSIC*, *supra* note 26, at 105; see also BERNSTEIN, *THE INFINITE VARIETY OF MUSIC*, *supra* note 26, at 198.

<sup>28</sup> BERNSTEIN, *THE JOY OF MUSIC*, *supra* note 26, at 29.

<sup>29</sup> *Id.* at 105.

<sup>30</sup> HAROLD BLOOM, *THE ART OF READING POETRY* 36 (2004).

<sup>31</sup> *Id.* at 39.

scale of *The Gates*, I will use as my example the interesting case of what is called the “joy melody” in Beethoven’s *Ode to Joy* in the Fourth Movement of the Ninth Symphony.<sup>32</sup>

The “joy melody” was the product of an enormous struggle over very many years for Beethoven. At the end of the struggle he wrote in the margin notes: “Ah! Here it is! It’s been found . . . .”<sup>33</sup> The oddness of feeling that you have found something that could not have existed before you found it is a composer’s sense of the inevitable. Despite clear documentary evidence to the contrary, the “joy melody” is frequently described by commentators as a drinking song that Beethoven must have heard somewhere.<sup>34</sup> And why would they think this? Because it seems that way: “The melody moves in stepwise motion, up and down the scale and not skipping keys the vast majority of the time; the whole range is within an octave and most of it stays within a fifth; and the rhythm is straightforward too, mostly it just moves with the pulse. All of this makes it easy to sing and the amazing thing is that it is doesn’t sound trite.”<sup>35</sup> Such is the character of Western folk songs, of course, the music of the people that defines a culture. The joy melody is thought to be a folk song because listeners hear in it something they think they already know; they “remember” the melody even when they have no memory of it. In other words, listeners find in the melody the same inevitability that Beethoven found. Beethoven, then, has not created the people’s voice in the song. He has reminded them of it.

This extraordinary first example we have of a major composer using a vocal part in a symphony—as odd as placing drapes in a park—opens a world to us as did *The Gates*. We know it did from its preservers—those, for example, who selected it as the Anthem of Europe—for whom it is important and defining in their lives in a way that very little music is.

But what of the mystery, what of the uncertainty, of this? For this we leave the world uncovered in the joy melody and return to the earth upon which it rests. At bar #331 something odd happens in the Fourth Movement, the tone changes, and the melody of joy becomes a Turkish march in which we cannot help but be reminded of the turbulent struggle in which, and only in which, joy can be fully joy for us.<sup>36</sup> As arising out of struggle,

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<sup>32</sup> For this I have relied primarily on HARVEY SACHS, *THE NINTH: BEETHOVEN AND THE WORLD IN 1824* (2010) and ESTEBAN BUCH, *BEETHOVEN’S NINTH: A POLITICAL HISTORY* (2003).

<sup>33</sup> BUCH, *BEETHOVEN’S NINTH: A POLITICAL HISTORY*, *supra* note 32, at 103.

<sup>34</sup> *Id.* at 101-02.

<sup>35</sup> E-mail correspondence with my son Dr. Lanier L. Sammons, a composer, (Mar. 7, 2011) (on file with author).

<sup>36</sup> Žižek has described this shift in a similar way for very different—one might say opposing—purposes. See SLAVOJ ŽIŽEK, *IN DEFENSE OF LOST CAUSES* 271 (2009). Recently Charles Rosen has described the Turkish march as depicting the struggle for freedom (which, he says, the Ninth is about). The variation, which follows the march, he says, is a musical representation of the starry heavens implying a spiritual view of freedom. Charles Rosen, *Freedom and Art*, *THE NEW YORK REVIEW OF BOOKS* 28 (May 10, 2012). Harvey Sachs, with credentials much superior to either Žižek or Rosen on such matters, describes the Turkish march as a “lighthearted introduction in 6/8 time and with the indication ‘Allegro assai vivace,’ fast and

joy now becomes something quite strange to us—a strangeness the movement attests to through the many subsequent mutations of the setting of the melody—and something we cannot fully account for as we thought we could before. It is something mysterious, uncertain, and even frightening in its Dionysian elements. In mythic terms, it displays the presence of absent gods. Such joy calls us to membership in a community that is beyond our communities, a seemingly transcendent community in this sense that could not possibly exist other than as an act of our imagination, and yet one we care about so deeply, *and one that is so real*, that this very caring offers meaning to those other communities in which we live.

Rather than undermining what has been uncovered for us in the melody, the truth of what joy is for us now shines forth in a tragic and yet transcendent affirming. In this truth, however we may now interpret it and interpretations abound, we are uncovered and our identity is displayed to us. We can say even now, one hundred and eighty-five years after its first performance, that we remain the people of the Ninth for better or for worse. We can honestly say, as people often do, that if we did not have Beethoven and the Ninth Symphony we would have to invent them or, in other words, they were inevitable.

Are there judicial opinions that work this way for us? There may be and that is the question before us here.

It is, however, not music, but poetry which is the crucial art form for us—as poetry was for the later Heidegger (for by now I may as well give credit to him within the text).<sup>37</sup> For it is in poetry that language, and, therefore law, most clearly becomes the opening through which truth is disclosed. And, of course, the ancient connections between the poet and the judge do not need rehearsing here.

The search here then is for judges who have been poets.<sup>38</sup> Those who possess Keats's “negative capabilities” that permit law to speak;<sup>39</sup> who

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very lively,” and hears in it a simple “village band approaching from the distance, playing a syncopated, fragmented version of the ‘Joy’ theme.” SACHS, *THE NINTH: BEETHOVEN AND THE WORLD IN 1824*, *supra* note 32, at 157. All of this is to suggest that the Fourth Movement uncovers a truth about us (and hides others) that has many aspects. It is a truth to be experienced in the listening.

<sup>37</sup> See HEIDEGGER, *The Origin of the Work of Art*, in *POETRY, LANGUAGE, THOUGHT*, *supra* note 8, at 70-72; see also HEIDEGGER, *What Are Poets For?* in *POETRY, LANGUAGE THOUGHT*, *supra* note 8, at 89.

<sup>38</sup> Although the case examined here, see *infra* notes 43 to 108, is a United States Supreme Court opinion, looking for cases that work the way described in the text, and for judges who are then poets, is not limited to such opinions. In fact, there may be reasons why it is more difficult to find inevitability, as it is described in the text, in Supreme Court opinions. The point of doing so, however, remains the same.

<sup>39</sup> *Letter from John Keats to George and Tom Keats* (Dec. 21, 1817), Selections from Keats' Letters, Poetry Foundation Org at <http://poetryfoundation.org/learning/essay/23783-6?page=2> (last visited Feb. 12, 2012). Keats used this expression in a letter to his brothers, George and Tom, on December 21, 1817. *Id.* See also NATHAN A. SCOTT, JR., *NEGATIVE CAPABILITY: STUDIES IN THE NEW LITERATURE AND THE RELIGIOUS SITUATION* xi (1969).

“consent to be stupid”;<sup>40</sup> and who have these capabilities not as an act of will, but as a product of living the questions that arise in the particularities of the cases presented to them. Or, and making Shelley quite literal, of judges who as poets really are the “unacknowledged legislators of the world,”<sup>41</sup> not so much by providing good decisions as by creating the conditions for them. These are judges who seek “to change the world,” but only “to change it into itself.”<sup>42</sup>

The law in the opinions of such poetic judges is, as I have been saying all along, not a law grounded in power, but in mystery. Such a law is very much a matter of a judge and a reader being overcome by a certain mood, a certain pathos prompted by the case itself—yet another of those immaterial fully external things that we find in our ordinary speech—and in this mood both judge and reader become poetically attuned to Law. And so, in this way of thinking law, we are to look for this inevitability in opinions as a way of thinking law without destroying it. Let me remind you, however, that this is an experiment. We, Linda and I, are very different people with very different lifetimes of thought about the law. One of us, me, seeks in the law traces of the gods who have fled, the ones known more now by their absence than their presence. The other, Linda, sees in this a potential threat to tolerance, diversity, and, perhaps most importantly, the humanistic values she finds in thinking of the world as rhetorical. It is her turn now to see what she can make of what I have said.

## II. UNCOVERING AN INEVITABLE

In this section, Linda will explore whether it is possible to bring to the surface the tracings of a “great” judicial performance, using “great” in the sense suggested above. That is, she will describe her reading of a judicial opinion as an experiment to discover whether through the performance of the opinion, its author has uncovered something that is “of the essence” of our community.

The exploration will be loosely organized around these questions:

- a. Through the performance of the opinion, does the author become inconsequential, fading from the foreground as a truth (or an essential something) is revealed?
- b. Unlike the author, is the particular truth that is revealed consequential?

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<sup>40</sup> SCOTT, *NEGATIVE CAPABILITY*, *supra* note 39, at 67.

<sup>41</sup> PERCY B. SHELLEY, *A DEFENCE OF POETRY AND OTHER ESSAYS* 61 (2010).

<sup>42</sup> This is Rowan Williams’ description of the artist. WILLIAMS, *GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE*, *supra* note 15, at 18.

c. And finally, is the truth surprising but recognized almost immediately, close to a memory and seemingly unavoidable in retrospect?

This reading of an opinion as a judicial performance—in this case, Justice John Marshall Harlan's opinion for the court in *Cohen v. California*<sup>43</sup>—is (it goes without saying) incomplete, contemporary, and influenced by prior readings.<sup>44</sup>

Commentators are divided on why *Cohen v. California* is significant, but they agree that it is significant.<sup>45</sup> *Cohen's* author, the second Justice Harlan, earned a reputation for practicing judicial restraint to an extent that was unusual on the Warren court; he found himself writing in dissent more often than not.<sup>46</sup> Before *Cohen*, in lawsuits raising seemingly related questions, Justice Harlan had voted to authorize the states to regulate obscenity in order to protect society from the effects of degrading speech.<sup>47</sup> And in 1968, in *United States v. O'Brien*, ruling against the First Amendment claim, Justice Harlan voted to uphold O'Brien's conviction partly on the basis that he “manifestly could have conveyed his message in many ways other than by burning his draft card.”<sup>48</sup>

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<sup>43</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>44</sup> See, e.g., JAMES BOYD WHITE, *Is the Judge Really a Poet? in THE LEGAL IMAGINATION*, supra note 9; Marianne Constable, *Reflections on Law as a Profession of Words*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant G. Garth & Austin Sarat, eds., 1998); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396 (2002); LINDA ROSS MEYER, *Before Reason: Being-in-the-World-with-Others*, in THE JUSTICE OF MERCY 26 (2010).

<sup>45</sup> The opinion in *Cohen* “is commonly considered the leading statement on the validity of prohibitions designed to protect people from involuntary exposure to offensive speech.” Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 283. Farber argued instead that rather than establishing “captive audience” principles, the opinion delineated another very important principle: “The government is not entitled to assume the role of moral guardian and to set the standards of acceptable discourse.” *Id.* at 303. William W. Van Alstyne, *The Enduring Example of John Marshall Harlan: “Virtue as Practice” in the Supreme Court*, 36 N.Y.L. SCH. L. REV. 109, 119 (1991), believed that Justice Harlan recognized that the case was about the political issue of the time and that its ruling was about political freedom: “By any fair measure, *Cohen* was not simply a small matter about a vulgar antic. It was, rather, a case about political freedom.” *Id.* at 120.

At the time, the case was not included in the Harvard Law Review's survey of the most important cases of its term. Farber *supra*, at 283 n.2.

<sup>46</sup> See, e.g., Van Alstyne, *supra* note 45, at 119; Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 320 (characterizing Harlan as a firm believer in judicial restraint whose decisions were controlled by a framework of consistent legal principles: “The principles of judicial decision making provided a heuristic structure, a framework within which the judge must search for answers and ultimately decide.”).

<sup>47</sup> See Farber, *supra* note 45, at 284 n. 11.

<sup>48</sup> *U.S. v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring).

Based on these glimpses, it is not surprising to learn that Justice Harlan first viewed *Cohen v. California* as a “pee wee” case.<sup>49</sup> According to the account in *The Brethren* (reported by the authors to have been drawn from the recollections of Supreme Court clerks), Justice Black had argued for summary reversal of Paul Cohen’s conviction. Cohen had been convicted of disturbing the peace and sentenced to jail for wearing a jacket bearing an offensive, but most likely political, message. Although Justice Harlan had disagreed with Justice Black’s initial conclusion, he reluctantly agreed to hear arguments.<sup>50</sup> (Ironically, Justice Black eventually joined the dissenters in the 5-4 vote that reversed Cohen’s conviction.)

Unlike several other justices, Justice Harlan did not seem disturbed by the use of the word “fuck” on Cohen’s jacket—his opinion apparently was the first by the Supreme Court to contain the word.<sup>51</sup> Quoting the California Court of Appeal, Justice Harlan’s opinion begins its recitation of the facts by stating: “On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse . . . wearing a jacket bearing the words ‘Fuck the Draft.’”<sup>52</sup> In contrast, Justice Burger was said to have tried to persuade Cohen’s attorney, Melville Nimmer, not to say the word at oral argument, by suggesting to him at the outset that “you may proceed . . . it will not be necessary for you to dwell on the facts.”<sup>53</sup> Again according to *The Brethren*, Nimmer thought avoiding the word would show that it was unacceptable, and so he kept his statement of the facts brief but concrete: “What this young man did was to walk through a courthouse corridor . . . wearing a jacket on which were inscribed the words ‘Fuck the Draft.’”<sup>54</sup>

Also in contrast to the dissenters (Justice Blackmun called the wearing of the jacket “an absurd and immature antic”)<sup>55</sup>, Justice Harlan became convinced that the wearing of the jacket symbolized something of consequence. According to *The Brethren*, many of the young, male law clerks who worked at the court in 1970-71 sympathized with Cohen’s message at a time of active anti-war protests. At his meeting with his clerks three days after the oral arguments, one of them apparently pointed out that based on Justice Harlan’s earlier opinions, this “speech” was protected. Going through a list of the recognized exceptions to protected speech, the clerk demonstrated that none of them fitted Cohen’s situation.<sup>56</sup>

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<sup>49</sup> BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 152 (2005).

<sup>50</sup> *Id.*

<sup>51</sup> Farber, *supra* note 45, at 290 n. 47. A Westlaw search turned up eight subsequent uses of the word in Supreme Court opinions (search conducted in the All U.S. Supreme Court Cases database May 27, 2012).

<sup>52</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971) (quoting the California Court of Appeal, *People v. Cohen*, 1 Cal. App. 3d 94, 97-98 (1969)).

<sup>53</sup> WOODWARD & ARMSTRONG, *supra* note 49, at 153.

<sup>54</sup> *Id.*

<sup>55</sup> 403 U.S. at 27 (Blackmun, J., dissenting).

<sup>56</sup> WOODWARD & ARMSTRONG, *supra* note 49, at 154-55.

The 19-year-old Cohen had “testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.”<sup>57</sup> Still, it apparently was an unknown artist, not Cohen, who drew a peace symbol and wrote the phrases “Stop War” and “Fuck the Draft” on a jacket Cohen owned.<sup>58</sup>

On April 26, 1968, while wearing the jacket, Cohen went to the Los Angeles County courthouse to testify in an unrelated matter. When he entered the courtroom, Cohen took off his jacket and stood with it folded over his arm. A policeman who had seen the jacket sent the judge a note suggesting that Cohen be held in contempt of court. The judge declined. When Cohen left the courtroom, the police officer arrested him for disturbing the peace.<sup>59</sup>

The California statute under which Cohen was charged provided that any person “who maliciously and willfully disturbs the peace . . . of any neighborhood or person . . . by . . . offensive conduct” or who uses “vulgar, profane, or indecent language within the presence or hearing of women or children” in a “loud and boisterous manner” was guilty of a misdemeanor.<sup>60</sup> Wearing the jacket could not be construed as “loud and boisterous,” so Cohen was prosecuted on the basis that he had engaged in offensive conduct. Cohen was found guilty in Municipal Court and sentenced to thirty days in jail. The appellate division reversed, but the California Court of Appeal affirmed the conviction, and the California Supreme Court declined to review it.<sup>61</sup>

A. *THROUGH THE PERFORMANCE OF THE OPINION, DOES THE AUTHOR BECOME INCONSEQUENTIAL, FADING FROM THE FOREGROUND AS A TRUTH (OR AN ESSENTIAL SOMETHING) IS REVEALED?*

As he begins the opinion, Justice Harlan moves immediately, though obliquely, to reveal, suggesting that first impressions may be replaced by second thoughts. Here is his “before I begin” invocation, framing the problem, generating anticipation, and building credibility<sup>62</sup>:

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.<sup>63</sup>

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<sup>57</sup> 1 Cal. App. 3d at 97-98.

<sup>58</sup> Farber, *supra* note 45, at 286.

<sup>59</sup> *Id.*

<sup>60</sup> Cal. Penal Code § 415.

<sup>61</sup> 403 U.S. at 17-18. See Farber, *supra* note 45, at 286-88 for an expanded discussion of the review process in California.

<sup>62</sup> See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113-14 (2002).

<sup>63</sup> *Cohen v. California*, 403 U.S. 15, 15 (1971).



Justice Harlan appears to be proposing that the audience should join him in the unveiling: “I agree with you (and the dissenters) that this case seems very small and insignificant. But you and I will soon find out just how large is its constitutional significance.” In this early instance in which Justice Harlan appears to foreshadow the outcome, his statement is abstractly and modestly phrased, promising only that the issue will be revealed to be of no small constitutional significance.

Justice Harlan next recounts the facts—quoting in large part from the opinion of the California Court of Appeal and declining the opportunity to tell the story in his own words.<sup>64</sup> After a matter-of-fact account of the facts and the appellate review process, he concludes by stating: “We now reverse.”<sup>65</sup>

Switching to a more assertive tone, he summarily clears the way of any issue of jurisdiction: Because Cohen had consistently claimed that the statute as applied to him infringed his rights to freedom of expression, “[t]he question of our jurisdiction need not detain us long.”<sup>66</sup>

To “lay hands on the precise issue,” Justice Harlan moves next to cut away and clear out the underbrush: it is useful to talk first about matters “which this record does not present.”<sup>67</sup> In this first movement of the opinion, Justice Harlan proceeds by subtraction—excising from consideration what the case does not involve, including very quickly, exactly what the state of California said it did involve. The California Court of Appeal had held that Cohen’s wearing of the jacket was offensive conduct, which it defined as “behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace.” The California appellate court further held that the State had proved offensive conduct because it was “certainly reasonably foreseeable that [Cohen’s] conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.”<sup>68</sup>

In reply, Justice Harlan states conclusively that Cohen’s violation was not “conduct”: instead, “[t]he conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public.” His only conduct was “the fact of communication.” Because wearing the jacket conveys a message, Justice Harlan writes, the conviction “rests squarely upon his exercise of the freedom of speech” and “can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom.”<sup>69</sup>

Assuming that Cohen’s wearing of the jacket is intended to convey a message, Justice Harlan establishes that “the State certainly lacks power to

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<sup>64</sup> *Id.* at 16-17.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> *Id.* at 17-18.

<sup>67</sup> *Id.* at 18.

<sup>68</sup> *People v. Cohen*, 1 Cal. App. 3d 94, 99-100 (1969).

<sup>69</sup> *Cohen v. California*, 403 U.S. 15, 19 (1971).

punish Cohen for the underlying content of the message the inscription conveyed.”<sup>70</sup> Justice Harlan then moves to the remaining obstacles.

First, the California statute is not a time, place, and manner restriction: the statute applies everywhere in the state, and it contains no language indicating its purpose is maintaining the decorum of the courthouse. Further, when Cohen entered a courtroom, the judge wasn’t upset enough to hold him in contempt although a police officer suggested that he do so.<sup>71</sup>

Second, Cohen’s message does not qualify as incitement: “the evident position on the inutility or immorality of the draft” Cohen’s jacket reflected does not fall within the proscription of incitement because there is no showing of an intent to incite disobedience to or disruption of the draft.<sup>72</sup>

And the message is not obscenity because it’s not erotic though it may be vulgar and the phrase has a sexual derivation.<sup>73</sup> And it’s not fighting words (although “fuck you” might be if directed to a specific person).<sup>74</sup> And it’s not an intentional provocation of a given group likely to have a hostile reaction because “there is . . . no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.”<sup>75</sup> And it’s not enough that the message was thrust upon unwilling or unsuspecting viewers: they could look the other way, no one seemed to object, and the statute doesn’t really seem concerned about the captive audience.<sup>76</sup>

Metaphorically and narratively, Justice Harlan has cut away the underbrush, then glimpsed and startled the real issue out into the clearing. As a result,

the issue flushed by this case stands out in bold relief. It is whether California can excise, as ‘offensive conduct,’ one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.<sup>77</sup>

Justice Harlan dismisses the “theory of the court below”: the California court’s reasoning is “plainly untenable.” He has already established that there is “no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen.”<sup>78</sup>

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<sup>70</sup> *Id.* at 18.

<sup>71</sup> *Id.* at 19 and n. 3.

<sup>72</sup> *Id.* at 18.

<sup>73</sup> *Id.* at 20.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 21-22.

<sup>77</sup> *Id.* at 22-23.

<sup>78</sup> *Id.* at 23.

So the question must be whether California can act as the police officer in Cohen's courthouse was in fact moved to act, as a guardian of public morality, arresting Cohen because the officer was offended by Cohen's jacket. Justice Harlan expresses somewhat more hesitancy about the second rationale: "it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic."<sup>79</sup> But Justice Harlan assures the audience that accompanying him farther on the path, through continuing "examination and reflection," will reveal the shortcomings of finding that California may punish the use of a word.

Assuming that having the author recede from the foreground would be a good thing for a great opinion in the sense we are talking about, how does Justice Harlan recede as he "flushes" into the clear, where it "stands out in bold relief," the essence of the case?<sup>80</sup>

First, Justice Harlan structures and writes the opinion as if it recounts a path through the working out of a problem rather than as a recitation of a foregone conclusion. Although this case may first seem silly, together we will find it is not. As we move along, some questions need not detain us. Others need to be addressed, but only long enough to be removed. We move together along the path, clearing the path of what is not at issue. Like those who hunt birds, we will through this process stumble upon and "flush out" the issue.

In the first movement, Justice Harlan neither shapes the fact statement to make the outcome appear foreordained nor announces the reasons for the holding early on. He predicts only that we will find this case to be of no small significance, and he tells us that the court will reverse Cohen's conviction. In this way, Justice Harlan involves the reader in the activity of the opinion, in the process of movement.

As he moves with the reader through the categories that are not in play, Justice Harlan makes brief assertions and expands on few arguments, providing a capsule summary of First Amendment law. When he does expand on an argument—the captive audience one—he makes claims in complex, interwoven phrases, and in less than certain terms:

Given the subtlety and complexity of the factors involved, if Cohen's speech was otherwise entitled to constitutional protection, we do not think the fact that some unwilling listeners in a public building may have been briefly exposed to it can serve to justify this breach of the peace con-

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<sup>79</sup> *Id.*

<sup>80</sup> James Boyd White writes that there is "a difference between an opinion that reaches a decision and one that is aimed there." WHITE, *THE LEGAL IMAGINATION*, *supra* note 9 at 238. If the opinion is to express the process of decision making, the judge should keep the reader in suspense and expose the reader "one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judge." *Id.*

viction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but instead, indiscriminately sweeps within its prohibitions all offensive conduct that disturbs any neighborhood or person.<sup>81</sup>

Matching the movement through the thinking out of the opinion, and in much the same way that a bird would be flushed from its hiding place by its hunter, Justice Harlan appears to recede into the background, step into the foreground, and then recede again. In the first movement, when he describes the facts and procedural history, Justice Harlan's sentences are often passively structured, a move that removes and distances the author. In the early going, the characters and actions chosen are remarkable for their lack of flesh and blood:

This case may seem . . . too inconsequential . . .

but the issue it presents is of no small constitutional significance.<sup>82</sup>

Cohen was convicted . . . .

He was given 30 days' imprisonment.<sup>83</sup>

The facts upon which his conviction rests are detailed . . . .<sup>84</sup>

Previewing the argument, Justice Harlan becomes almost curt in his assertions and dismissals:

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used . . . .<sup>85</sup>

[W]e deal here with a conviction resting solely upon 'speech' . . . .<sup>86</sup>

[T]he State certainly lacks power to punish Cohen for the underlying content of the message . . . .<sup>87</sup>

Appellant's conviction . . . rests squarely upon his exercise of the 'freedom of speech' protected . . . by the Constitution.<sup>88</sup>

In the ensuing discussion of what is not at stake, Justice Harlan chooses words and phrases that advance small or negative claims:

It is useful first to canvass various matters which this record does not present.<sup>89</sup>

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<sup>81</sup> 403 U.S. at 22.

<sup>82</sup> *Id.* at 15.

<sup>83</sup> *Id.* at 16.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 19.

We think it important to note that several issues typically associated with such problems are not presented here.<sup>90</sup>

[A]s it comes to us, this case cannot be said to fall within those relatively few categories . . . .<sup>91</sup>

But when “the issue flushed by this case stands out in bold relief,” Justice Harlan brusquely addresses the state’s arguments:

The rationale of the California court is plainly untenable.<sup>92</sup>

[T]he principle contended for by the State seems inherently boundless.<sup>93</sup>

Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.<sup>94</sup>

[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas . . . .<sup>95</sup>

As he approaches the holding, Justice Harlan’s language is again negatively and almost hesitantly phrased, as if the author is not making a positive pronouncement, but rather is barely in control:

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because this is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.<sup>96</sup>

*B. IS THE PARTICULAR TRUTH THAT IS REVEALED  
CONSEQUENTIAL?*

Set aside for a moment what Justice Harlan told us the issue was—“whether California can excise . . . one particular scurrilous epithet from the public discourse”—and look instead at what is uncovered during his journey through the second movement.

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<sup>89</sup> *Id.* at 18.

<sup>90</sup> *Id.* at 19.

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.* at 23.

<sup>93</sup> *Id.* at 25.

<sup>94</sup> *Id.* at 25.

<sup>95</sup> *Id.* at 26.

<sup>96</sup> *Id.* at 26. Contrast this restrained language with Justice Blackmun’s hostile declaration in dissent:

Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech. . . . Further, the case appears to be well within the sphere of *Chaplinsky* [the “fighting words” case]. . . . As a consequence, this Court’s agonizing over First Amendment values seem[s] misplaced and unnecessary.  
*Id.* at 27 (Blackmun, J., dissenting).

After flushing out the issue and dismissing the rationale of the California court, Justice Harlan sketches in the constitutional backdrop for the decision:

[First,] we cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions [that we have already found do not apply here].

[Second, the] constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. 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 into the hands of each of us, in the hope that use of 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 political system rests.<sup>97</sup>

Though the issue Justice Harlan posed calls for a straightforward and negative answer—no, California cannot do that, the Constitution restrains California—what he reveals in this movement, like the sentence at its core, is more expansive and harder to contain. Against the constitutional backdrop he sketches, freedom of expression is powerful, but the rationale for protecting it is almost indescribable in the ordinary sense of legal argument. Why should governmental restraints be removed from the arena of public discussion? In phrases that almost slide on top of one another, Justice Harlan says the decision about what can be said has been placed *into the hands* of each of us, *in the hope* that freedom will make citizens and governments better and *in the belief* that individual dignity and choice are foundational.

Although the immediate result of such freedom of expression may seem like chaos, Justice Harlan finds value that may have been hidden:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.<sup>98</sup>

In the community Justice Harlan reveals, verbal cacophony is a strength, not a weakness. Again, the reasoning is not so much explained, as taken for granted: “we cannot lose sight of the fact that . . . fundamental societal values are truly implicated.”

In this setting, Justice Harlan highlights the emotional content of the speech, as important as the message it communicates, a benefit that he says

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<sup>97</sup> *Id.* at 24-25.

<sup>98</sup> *Id.* at 24-25.

is well illustrated by the episode involved here, that much linguistic expression serves a dual communication function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>99</sup>

In sum, what Justice Harlan has uncovered is consequential, but it cannot be reduced to paraphrase “nor is it translatable into a series of propositions set forth as a theory.”<sup>100</sup>

C. IS THE TRUTH SURPRISING BUT RECOGNIZED ALMOST IMMEDIATELY, CLOSE TO A MEMORY AND SEEMINGLY UNAVOIDABLE IN RETROSPECT?

The expansive interpretation expressed in Justice Harlan’s opinion in *Cohen* may seem surprising because the case could have been decided much more narrowly by a judge devoted to judicial restraint—all Justice Harlan had to hold was that Cohen’s wearing of the jacket was not offensive conduct inherently likely to lead to violence and so the California statute could not constitutionally be applied to him. The decision might also be seen as surprising in a comparative sense: other liberal democracies have decided that they must regulate some offensive speech for the sake of other societal values. And it could be viewed as surprising simply because Justice Harlan had so recently acquiesced in punishing the burning of a draft card, an action like Cohen’s that seemed to convey a message like Cohen’s.<sup>101</sup>

But none of these perspectives is “surprising” in the sense in which we ask this question. The truth that is uncovered is not the holding, or the

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<sup>99</sup> *Id.* at 25-26.

Justice Brandeis had foreshadowed this principle as well:

The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting in discussion of Fourth and Fifth Amendment rights).

In addition to these general principles, Justice Harlan also provides what he calls some “more particularized considerations”: that the State cannot make principled distinctions between offensive words and that the State cannot forbid words without running a risk of suppressing ideas. *Id.* at 25-26.

<sup>100</sup> WHITE, LEGAL KNOWLEDGE, *supra* note 44, at 1427.

<sup>101</sup> Van Alstyne, *supra* note 45, at 119, notes that the result “belies the expectation one might otherwise have were one’s impression based only on the frequency of Harlan’s dissents . . . [that is,] that he must have taken a narrow measure of constitutional review.”

message, of the opinion, but instead is the essential something about us as a community that the opinion reveals to have already been true. This truth is surprising not because it does not coincide with our expectations but because it does, at least in retrospect. Remember that in an opinion of the kind we hope to find, the judge “consents to be stupid,” performing as if the truth will be revealed in the activity or the movements of the opinion and not because of the author’s control over it.

In this sense, then, is *Cohen*’s truth surprising? All of the first part of Justice Harlan’s opinion in *Cohen* is about what is not at stake. So we are surprised at the end, but we remember, that the opinion promised to reveal something of consequence.

Very late in the opinion Justice Harlan unveils the backdrop of the First Amendment against which the issue stands out: the First Amendment puts into the hands of each of us the decision as to what views shall be expressed, in the hope that using such freedom will make us better and in the belief that no other approach would comport with our faith in individual dignity and choice.<sup>102</sup> Rather than an extensive discussion of history and precedent, this backdrop is supported only by a glancing “see” citation to the concurrence by Justice Brandeis in *Whitney v. California*.<sup>103</sup> As the backbone of his holding, Justice Harlan thus relies only on what he calls the fundamental societal values that are implicated “in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege.”<sup>104</sup>

This revelation is surprising in the sense we intend here because we recognize, when we see it, that we knew it all along. We already knew it because of what Justice Brandeis wrote decades earlier in the case that Justice Harlan cites but does not quote:

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 believed 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.<sup>105</sup>

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<sup>102</sup> *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 25.

<sup>105</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The Brandeis concurrence continues:

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



Justice Harlan relies as well on the belief that “an ‘undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,’ ” citing *Tinker v. Des Moines Independent Community School District*.<sup>106</sup> In *Tinker*, another Vietnam-era case in which students protested the war by wearing black armbands, Justice Harlan had dissented from the decision upholding students’ free speech rights because of the need for school officials to have the authority to maintain discipline. But he also had imagined a case in which the workable Constitutional rule might be otherwise. That is, he “would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.”<sup>107</sup>

Although he was unable to find such a motive in *Tinker*, the decision in *Cohen* implies that he discerned such a motivation there, a desire to prohibit the expression of an unpopular point of view in the police officer’s arrest of Cohen. Once it is described in this way, as an “undifferentiated fear or apprehension of disturbance,”<sup>108</sup> we recall that if free expression is so powerful, the fuzzy-edged, free-floating kind of fear Justice Harlan describes cannot be enough to overcome it.

And finally, having been reminded, we cannot dispute that the statement “fuck the draft” expresses an idea and, as its essence, an emotion. And because that is so, we recall that few alternative modes of expression would allow the speaker “to ventilate their dissident views”<sup>109</sup> in the same way.

When Justice Harlan clears away the underbrush, he poses the issue flushed by the case as whether California can excise as offensive conduct

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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.

*Id.* at 375.

In discussing this concurrence, White comments on the structure of the sentences 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 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.

White, *Legal Knowledge*, *supra* note 44, at 1426-27. According to White, Brandeis not only imagines, but enacts, an “idealized argumentative process,” that is, “the activity of sustained, reasoned, careful, whole-minded argument by people of good will on crucial questions of the day.” *Id.* at 1428-29.

<sup>106</sup> *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

<sup>107</sup> *Id.* at 526 (Harlan, J., dissenting).

<sup>108</sup> *Id.* at 508.

<sup>109</sup> *Cohen*, 403 U.S. at 23.

one particular word from the public discourse. This phrasing of the issue matches the image of the California police officer who arrested Cohen because Cohen's anti-war jacket offended him.

Yet, the essential something that is revealed through the opinion conjures a different image. For us, at this time, in this place (and perhaps because I'm reading *Cohen* again after the Arab Spring), the surprising, enduring, and remembered image is not one of state suppression, but instead is the powerful cacophony created by people choosing, based on hope and belief, to express ideas and emotions.

This result will resonate, if at all, with those who find something analogous to what Justice Harlan has done in *Cohen* in this description of the prehistoric cave artists of Chauvet:

The artist knew these animals absolutely and intimately, his hands could visualize them in the dark. What the rock told him was that the animals—like everything else which existed—were inside the rock, and that he, with his red pigment on his finger, could persuade them to come to the rock's surface, to its membrane surface, to brush against it and stain it with their smells.<sup>110</sup>

### III. WAYS OF GOING ON

What has happened then? Is there inevitability in the Harlan opinion and, if there is, is this a way of evaluating an opinion without destroying the law's mystery. And what of this mystery? Is that too to be found in the opinion? Linda has graciously asked me, Jack, to conclude briefly along these lines, lines that we hope might open up our work together for interested others to continue.

It would be common perhaps to think of what Justice Harlan was doing in *Cohen* as balancing; perhaps that is how he thought of it. And yet, it seems to me, after reading Linda's thoughts about the opinion and considering her reactions to it, that we could not possibly make sense of the opinion with a word like "balancing," (with its suggestion that this is something we somehow know how to do when issues get tough). It seems to me, instead, that he acts more upon what might be described as an intuition, one arising from his experience as all intuitions do, but still a rather obscure and quite different mode of thinking made available to him through the presentation of the case. What he then tries to do, I think, is communicate to us his experience of this, an experience of "the law" as I would describe it, through this case in a manner (a way of writing, that is) that permits us to share at least part of the experience for ourselves, including our sharing in the part of the experience remained mysterious to him. The silly little incident presented to him in the case was, for him and the Court, no longer within our ordinary social or political worlds. It was instead there within what I cannot help but describe as a truer *polis* than those are, one

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<sup>110</sup> JOHN BERGER, *HERE IS WHERE WE MEET: A STORY OF CROSSING PATHS* 135 (2005). Thank you to Michael Berger for bringing this insight to my attention.

in which even such small person-to-person matters necessarily open for us questions of our identity as a people.

It seemed to me, as I was first reading Linda's wonderful rhetorical analysis, that almost everything she said was at least consistent with this idea. Perhaps then the opinion is consequential in this way, working for us in a fashion similar to *The Gates* example perhaps, to open us to a horizon of our own existence. It may seem that the community which the opinion calls up is only imagined, but perhaps that is because we do not often view our world in this fuller—more fully in being as Heidegger would say—way.

Following along with this thought, and turning to Linda's third section, it did not seem to me that the opinion truly rests upon either human liberty or human dignity in the sense of relying upon these as principles, nor do I think Linda intends this. Harlan could argue from premises with the best of them when he wanted to, but I did not read him as doing that here. Instead, it seems to me, his opinion fully rests upon that which Linda described as her lasting image of the opinion: "the powerful cacophony created by people choosing, based on hope and belief, to express ideas and emotions." He gets these "people" from Brandeis, I think, in Brandeis' *Whitney* concurrence, the one Harlan quotes. Brandeis, as James Boyd White teaches us, attempts to capture the complexities of our identity as a people through a string of ideas about valuing speech held together by semi-colons.<sup>111</sup> It seems to me that these semi-colons work in that opinion like Emily Dickinson's dashes: they tell us that what is said is to be read against what cannot be said. They are, in other words, oblique references—the only kind available to judges—to the law's mystery.

Where then does this leave us? Somewhere between the two of us—Linda's humanism and my, well, poetic truths—there is a way, I think, of evaluating the quality—yes, the quality—of opinions without destroying the law's mystery. What would it mean—since this article is likely to be read by law professors and perhaps, we hope, a few law students, for there to be a form of legal education that starts in an appreciation of this mystery? What would it mean—if others read it—if we thought of judges as preservers of this mystery? What would it mean if readers of opinion started thinking in terms of their own experience of the opinion rather than as critics of it? And what would it mean—finally and most importantly—if lawyers saw their task as related to the word that upsets all of us, the two of us included, "truth"?

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<sup>111</sup> White, *Legal Knowledge*, *supra* note 44, at 1426-27.