
Keep Law Alive

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GUEST CONTRIBUTION

ABSTRACT

An account of the author's recent book, *Keep Law Alive*, including: an assessment of the dangers which threaten law and the democracy it depends upon; an analysis of the ethically and intellectually praiseworthy methods and traditions law once enjoyed, using as examples the Model Penal Code, a pair of judicial opinions by Justice Holmes, and an essay on affirmative action; the elaboration of a way of thinking about law not as rules or policy or theory but as an inherently unstable but crucially important structure of thought and expression; and finally some attention to the question, how we might resist the corruption of law and, failing that, and using Augustine as an example, how we might live with its loss.

KEYWORDS

law, democracy, justice, tension

In this paper I want to talk about a book I recently brought out, entitled *Keep Law Alive*. As its title suggests, it rests on the view that in my country the law is in danger of dying, or at least becoming something very unhealthy. I hope that not much of what I say about the condition of our law would be true of yours.

¹ This essay includes a previously published passage: James Boyd White, "Why I Wrote This Book". Law, Culture and the Humanities. December 2020. doi: HYPERLINK "<https://doi.org/10.1177/1743872120973182>"10.1177/1743872120973182 Reprinted by permission of SAGE Publications.

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I First I want to talk about the experiences that led me to suspect and fear that our law is in danger.

Although I have been a law professor for most of my professional life, I went to law school with the idea of being a practicing lawyer, and after graduation I practiced law in a small firm in Boston. I greatly liked and respected what I saw of American law in both contexts. I could see that law itself really mattered, and that it was especially important to do it well rather than badly, both in teaching and in practice. I thought the fidelities and understandings of a good lawyer were good for the world. Not that law was perfect, but that our work was in part a way of making both the law and the world better.

A.

I left practice not because I did not like it, or to become a scholar, but in order to teach law, itself in my view a form of practice. Teaching law was an activity—full of interest, richness, difficulty, and importance—that I thought could justify a life.

But as the years went on I gradually began to worry more and more about the health of law, both in law schools and in the world. To give you a sense of what I mean I will describe some of the impressions I gradually formed, with heavy emphasis on word “impression.” I cannot prove any of this; I am simply reporting the progress of my own sense of what law was becoming, the sense that led to this book.

One of the feathers in the wind was my perception that some law professors felt themselves somehow superior to practicing lawyers—that their work was more interesting and more important. This seemed to me wrong on the merits—a failure to understand what the practice of law can at its best involve—and deeply inappropriate for people whose main job was to teach other people to become lawyers.

A bigger feather in the wind was what happened to the judicial opinion in the world and in law school. For me as a student, almost the whole enterprise of law school could have been summed up as learning to read and to judge judicial opinions—not in terms of their outcome but as ethical and intellectual performances. What we were taught to admire in the best opinions was

not that they “came out” as one wished, but their way of creating and doing law. Reading them offered a real education, not just about an institution, but about thought and language and honesty and justice—and about reading and writing too—for all these were at stake in what the opinions did.

In those days the work being done by the Supreme Court in particular seemed to warrant and reward this kind of critical attention. For example, I greatly admired the opinions of John Harlan though I disagreed strenuously with many of his conclusions.

But over time I got a sense that law school classes were devoted much less to what makes a good opinion—or a good brief, or judge, or lawyer—than to questions of policy or theory, questions really of outcome.

As a consequence, instead of reprinting important parts of the judicial opinions, casebooks seemed to reprint smaller and smaller segments of them, often reducing the case to its bare facts, to be discussed as a kind of abstract example in the development of theory or policy. The kind of conversation and learning that focused on the judicial opinion and what it revealed about the legal process in which our students were to live, was on this basis no longer fully possible. For me much of the air had been let out of the law school classroom.

I think the popularity of law and economics fed this tendency, not because there is anything wrong in bringing to the law what economics has to teach about economic questions that arise in law—that is of course fine, and the same would be true about sociology, or psychology, or philosophy. The problem was that economics, in some hands at least, seemed to me not so much to want to enrich law as to replace it. The idea seemed to be that legal questions could best be decided by economic methods.

This naturally led to a turning away from what seemed to me most important in the activity of law: our sense of the value and authority of the texts and traditions we had inherited and the whole legal culture they defined. You cannot really do law in the language of economics, any more than you can do economics in the language of the law.

As for the practice of law, I have heard mysterious things, some of them grim. A few years ago I was told by a couple of graduates working in different big firms that in their offices no one really read cases as we had tried to teach them to do in law school, that is, as seriously addressing real and difficult problems in a context in which much could be said on either side, and hence as offering something of an education not only about the questions at issue

but how to do law well. The associates mainly skimmed them for good language, I was told, while the partners were charging so much an hour that they could not justify the expense of reading them with care.

Maybe these people were kidding me, or just defective people, but I don't think so (Powell 2013). One reason is that my own experience of reading Supreme Court cases was more and more disappointing. I increasingly had the sense that as I read an opinion I was not hearing from the Justice as an independent mind seriously engaged with the issues the case presented. Maybe this was because the clerk wrote most of the opinion, and the Justice signed off on it, maybe it was because the culture of the Supreme Court came to permit a Justice simply to rehearse a set of arguments for a desired result, as a brief might do, without ever making the case and the opinion truly his or her own.

Whatever the reason, I felt that too many opinions were empty.² What this meant for legal education and practice too was that we simply could not give to judicial opinions the kind of attention and respect that used to be so rewarding—attention which is necessary to their real authority.

In my view this was a failure of law. For a comparison you might look at a volume of the Supreme Court Reports from say in the late fifties or early sixties, when I was in law school. I think you would find the difference shocking: of course there were political and theoretical tensions among the Justices then, and other imperfections of various kinds, but I always had the feeling that I was being spoken to by the Justice in his own voice and in an authentic way. These were opinions one could respond to and work with.

The trend I am tracing has had consequences concerning nominations to the bench, where almost everyone, both left and right, seems now to agree that the important thing is how the candidate will vote, not how he or she will engage in the process of deciding how to vote. This reduces law to politics in a way that destroys its essence.³

I was also struck by the danger to democracy, and hence to law, presented by the sky-rocketing disparity in income and wealth that we were experiencing even twenty years ago. The problem is that the very rich are not just rich; their wealth gives them immense power—economic and political power—that has no basis in democratic institutions or practices. This power

² Justice Souter in particular seemed to maintain the tradition.

³ See *Bush v. Gore* (2000).

has no meaningful regulation, but rests simply on money. Much the same could be said about rich corporations and banks, which have become increasingly unregulated. By contrast, the law once offered a rich and ultimately democratic language, and set of practices, which defined a genuine kind of authority that it is losing or has lost.

Finally, I thought our legal and constitutional system was deeply threatened when I learned that our government not only lied systematically about the justification for its war against Iraq, but secretly tortured persons they had captured. Torture seemed to me hideous, inconsistent with law in the most basic sense. Efforts were made to justify it by a corrupt form of the kind of “cost benefit analysis” that economics, in some hands at least, encouraged. In this case it led to a crime against humanity.

My experience in the last three years of life in my country is of a threat to law and democracy that is even more drastic and explicit. I won’t rehearse the corruptions I have in mind—you can read about them daily—but I do think our fundamental commitments to the Constitution, to democracy, to truth, and to the law are now under serious threat. Once more for me a powerful issue is torture, this time not in the case of captives thought to have information, but in the case of children and their parents separated at the border, both groups suffering torture of the soul at the hands of our government.

We are facing the possibility of a world of “law” in which there is no serious claim to justice.

B.

Keep Law Alive is my response to the situation I describe. In it I try to do three different things: to demonstrate what seems to me essential and good about the law we once had; to urge people of the law, and citizens more generally, to try to keep that tradition alive if they possibly can; and to address the question, What should we do if we fail?

In trying to define the kind of law we are losing I focus not on such fundamental institutional elements as a democratically elected legislature; or a system of checks and balances; or the principles that no one should be detained without judicial review, that the law should be administered by an independent judiciary, or that legal process should be public—though all of these things are now under serious threat.

Rather I am concerned with the activity of law itself: the complex intellectual, ethical, and imaginative activity at the heart of legal thought and practice, without which the principles I summarize above would have little life or meaning. So I shall ask first: what is it like, and what does it mean, to do law in the sense in which I once learned it? Why is it valuable?

II.

I shall begin, as my book does, with a brief account of the Model Penal Code, a model statute prepared in the early fifties with great intellectual and moral energy by the American Law Institute, a professional organization devoted to the improvement of law.

A.

It is fair to say that at the time the ALI began to work on the Code, criminal law in my country was disorganized and incoherent, without a uniting theory or set of principles, really without an intelligible language. The ALI wanted to create a code that was based upon sensible assumptions and ethical principles, and would thus be both coherent and just.

I think they also wanted to show how it was possible for a group of lawyers working on their own time to produce a proposal for major reform of a crucial branch of the law which would be widely accepted. The Code was in this way a monument to the kind of careful, rational, ethical, public-spirited thinking that once characterized the profession at its best.

The basic idea that drove the Code was that people ought to be punished only when they were at fault, and only to the degree they were at fault. Fault was in turn defined largely in terms of mental states, so that, for example, a person who burned down a barn should be punished much more severely if they did it on purpose than if they did it out of carelessness.

In such a case prior law would also have drawn distinctions based on the state of mind of the defendant, but they tended to be haphazard, unreasoned, and unclear. Words like “willful” or “wrongful” were often used to define a state of mind, and of course they did not much help. Often a statute designated no state of mind at all.

In response to this situation The Model Penal Code established a hierarchy of mental states among which a legislature should choose for each of the elements of a criminal offense. These mental states were: *purpose*; *knowledge*; *recklessness*; and *negligence*. Of course each of these terms needed and received more elaborate definition, but for our purposes today I think it is enough just to list them as I have.

These degrees of culpability, coupled with a scale reflecting the seriousness of the injury inflicted or threatened, established a scale of appropriate punishments, meant to be just.

B.

Let me give you an example of the way in which the Code changed things, using a pre-Code case.

A Vermont statute against adultery made it a crime among other things to “for a woman to sleep with another woman’s husband.” A woman was charged with sleeping with a man whom she erroneously, but in good faith, believed to have had a valid divorce (*State v. Woods* 1935).

The statute said nothing about the state of mind required for a crucial element of the offense: did the prosecutor have to show that she *knew* the divorce was invalid? Or would *recklessness*—that is conscious disregard of an excessive risk—be enough? Or *negligence*? Or was she to be punished for the mistake no matter how reasonable it was? Under the principles of the Code, the legislature would have made the choice of state of mind explicit.

In the actual case, the Court did not address this question at all, but focused instead on a highly abstract and not obviously relevant matter, namely the metaphysical character of the mistake, asking whether it was a “mistake of fact” or a “mistake of law.” In the former case the mistake would be an excuse, they said, in the latter not at all, under a general rule of common law that “mistake of law” is no defense to a “general intent” crime. The court concluded that her mistake was indeed one of “law,” and that she could be convicted even if she was completely reasonable in her honest belief in the validity of the divorce.

In this context the words “law” and “fact” are virtually empty terms of conclusion with no clue to how they should be thought about. If the defendant was in no way at fault with respect to the status of her partner’s earlier marriage, how is it just that she should be convicted of a crime?

Under the ALI approach, had it been available, there would have been no abstract and pointless talk about mistake of law and fact. Instead the legislature, after debate, would have decided the state of mind question in light of the purposes of the criminal law and the requirements of justice as they saw it, and expressed their judgment in the statute. The ALI method would thus have exposed for legislative thought and argument the important questions raised by this case but not addressed by this court. In doing so it would be making real the question of justice itself.

The ALI thought that the whole of criminal law could be constructed in this way, punishing wrongful acts according to the degree of culpability suited to each element of the offence —negligence, recklessness, knowledge, purpose—coupled with the seriousness of the harm. This was an effort to define justice in this field and to elaborate that definition with great care and openness.

Of course the ALI did not invent the Code out of whole cloth, but drew upon what seemed the best judicial insights and prior efforts at codification alike. They could do this because their education taught them how to read opinions, how to judge them on their merits, and how to learn from them.

The ALI had no law-making power. Its mode of reasoning and analysis would be adopted by others only if and when it was found persuasive. In fact its mode was immensely persuasive: I have been told that after the publication of the Code virtually every state reformed its criminal law, almost all of them using the Code as a model.

To me the kind of work that the lawyers of the ALI learned and engaged in was an elegant and noble effort to bring reason into a confused branch of the law and to do so with the objective of achieving justice.⁴



I want now to give you a brief example of another kind of excellence, judicial excellence, this time at the hand of Justice Holmes, in a pair of cases now 100 years old.

⁴ Of course it had its limits and difficulties, which I discuss in the book, but omit here.

A.

The first case is *Schenck v. United States* (1919), which involved a statute that made it a federal offense “willfully to obstruct the [military] recruiting and enlistment service of the United State,” or to conspire to do so.

The defendants had sent circulars to men called for the draft in World War I. These circulars denounced the draft, as a violation of the constitutional prohibition of involuntary servitude, and the war itself, as a project designed to enrich the capitalist rich.

Did this conduct violate the statute prohibiting willful obstruction of the recruiting and enlistment service?

Today we would leap to see this as a free speech case under the first amendment of our Constitution, but there was virtually no first amendment law at this time. Holmes, writing for the Court, upheld the conviction, saying simply:

“Of course the document would not have been sent unless it was intended to have some effect, and we do not see what effect it could be expected to have upon a person subject to the draft except to obstruct the carrying of it out.”

Thus there was a conspiracy to effect a “willful obstruction” as required by the statute.

As people trained by the Model Penal Code, we would regard this as unsatisfactory, for Holmes is really saying that though the defendants were merely negligent with respect to the foreseeable obstruction of the draft, they could be punished under a statute that in its own terms reached only those who obstructed “willfully.” Holmes does not engage in any analysis of the kind the Model Penal Code would require on this question. But that is how criminal law was done in those days.

Was this really a free speech case? Not in Holmes’s view, because he thought the first amendment should not be construed to protect criminals who are engaged in conduct on other grounds criminal simply because the instrument of criminality is verbal.

But he was troubled at least a little by the free speech argument made by counsel. He noticed that some of the speakers were “well known public men,” and opined that in peacetime they might have been within their rights, apparently for the reason that in such circumstances it would naturally be much less likely as a practical matter that their circulars would interfere with

the draft and enlistment of soldiers. His formulation of this position—later to have a deeply different significance—was this:

“The question in every case is whether the words used are used in such circumstances, and are of such a nature, as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

In *Schenck* Holmes believed the clear and present danger test was met.

B.

In a similar case decided later that same year, *Abrams v. United States* (1919), Holmes dissented. This case involved a conviction under a more repressive set of statutes, making it a crime in relevant part:

*“willfully to urge, incite, or advocate any curtailment of the production of war materials . . . with **intent by such curtailment** to cripple or hinder the United States in the prosecution of the war.”*

The defendants were fans of the new government of Russia and had distributed leaflets opposing, not our involvement in World War I but our recent invasion of Russia from the Pacific. Their leaflets condemned this action, called upon workers of the world to put down capitalism, and urged American workers to engage in a general strike, particularly with respect to munitions factories.

The defendants’ purpose was not to interfere with the prosecution of the war with Germany, though what they did might have had that effect. They wanted to protect the new Russian government, not Germany. But the majority opinion said, in essence, that the defendants should be taken to have intended whatever would naturally flow from their conduct. In doing so, they made the same mistake Holmes did in *Schenck*, namely they treated what was really negligence as a form of purpose.

This time Holmes dissented. He put the situation this way:

*“I do not doubt . . . that the United States constitutionally may punish speech that produces **or is intended to produce** a clear and imminent danger that*

it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”

That is: in his view the government could punish the men if their leaflets either *had* the effect of interference with the war effort or *were intended* to do so—but not if they neither intended nor achieved such a result, and that is how he read the facts here.

Almost by accident, Holmes was beginning to give constitutional status to the “*clear and present danger*” language he used in *Schenck*, where he proposed it not as a constitutional rule but as a rule for the reading of criminal statutes. By his careful attention to the language of the statutes, and his trust in an instinct he could not quite articulate in *Schenck*, he was able to bring the first amendment into life. He used criminal law reasoning to give birth to first amendment law.

This is an extraordinary moment in the workings of the law. Holmes’s “clear and present danger” test became the basis for the development of first amendment law in the years and decades to follow. His work of thoughtful imagination is with us still, giving us resources in language and thought with which we can address the most important questions not only about freedom of speech, but about constitutional adjudication more generally.

IV

My third example of the way the law used to work is taken not from a legislature or court but from my own work as a law professor engaged in the criticism of law.

A.

My subject is the way the Supreme Court speaks about race, especially in the context of challenges to what is called “affirmative action” on the part of government agencies, including of course universities. Here I criticize the current way of thinking and talking and propose something else.

The reason I want to speak as a critic of the law from within the institution, both in this book and to you today, is that I mean it as an invitation.

For I expect that many of my readers and hearers, especially but not only lawyers, will find themselves resisting some things I say, disagreeing, perhaps strongly, with my assumptions, my methods, or my conclusions, and I want to draw attention to that response and explain its value.

I expect disagreement not because I think my piece is deeply flawed, but because this is what happens—or what should happen--when lawyers read each other's work: they test it by argument. They just do. This kind of argument is an essential part of the way law functions—in court, in class, in a law office, in judicial conferences—and I want the reader, especially the nonlawyer, and you too, to have the experience of engaging in just this form of critical thought.

As you test what I say against your own experience, your own knowledge, your own ideas, you will find yourself engaging in legal argument of an important kind. You will in fact be doing a version of the kind of law I think we are in danger of losing, and that is the point.

B.

I cannot rehearse the whole argument here, but my basic idea is that the Court has elaborated a way of thinking about discrimination by race as though there were no relevant differences among the races. Their general rule is that state legislation using *any* racial classification is constitutionally invalid unless it is supported by “a compelling state interest,” which cannot be effectively protected any other way.⁵

Given the Court's natural desire to be and to appear neutral, this approach makes a kind of sense; but I think it is wrong. In my view the hideous reality of our racial human slavery, which for centuries reduced human beings to the status of animals without any rights whatever—including the right to a family, the right to religious sacraments, the right to read, the right to sexual integrity, the right to choose how they spent their time and labor—is worse than anything that other ethnic groups have suffered, and the effects of this barbarism are still deep in our culture and society.

I think the Court should reflect this fact in its treatment of affirmative action cases.

⁵ See, e.g., *Loving v. Virginia*, 388.U.S. 1 (1967).

C.

So far this is an argument from social history and current sociology, but it can be reinforced by an argument of another kind, legal and constitutional in character.

Our nation as a whole consciously took the official position that slavery was a hideous moral deformity in two crucial ways: One was the civil war itself, which as Lincoln said was in an essential way about slavery.⁶ This war was won by the opponents of slavery. The second way the country as a whole spoke to slavery was in a set of amendments to the Constitution that were clearly meant to protect former slaves and to advance their efforts to overcome the centuries of abuse: guaranteeing citizenship and the right to vote and prohibiting state action that denied due process or equal protection. The injustices suffered by no other group have been the subject either of a civil war or of such constitutional amendments. In other words, the experience of black people is not only different in historical and present fact, it has been the object of unique constitutional action.

As a result, I think that instead of treating state action that is meant to overcome the effects of racial slavery with a reluctant and anxious scepticism, as the Court now does, the Court, and the rest of us too, ought to embrace it gladly. When a State assumes responsibility for this dreadful part of our past and present, and tries to heal or correct its continuing effects, we should happily and gratefully support what they do, so long as their efforts meet a test of reasonableness.

D.

I mean this with my whole heart.

But, as I say, to make this argument is to invite response. In the book I make the argument as well as I can, much more fully than I can do today, and I hope that it will be responded to in the same spirit. This kind of debate is itself law in action just as legislation and judicial decisions are. Your responses are as much a part of law as my assertions. They can be a way of keeping law alive.

⁶ In his Second Inaugural Address.

V.

I want now to elaborate an idea implicit in the three examples I have given, namely, that the law is at heart not just a system of rules, as we often think of it; nor is it simply a set of institutional arrangements that can be adequately described in a language of social science; nor is it just the expression of policy choices; rather it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. These tensions do much to define the art of language at the heart of the law.

Law is a form of life that must work with the rules and other materials of the law, but it is not reducible to them. Likewise, it has the value of justice at its heart, but it is not reducible to abstract or philosophical talk about justice. It is a process of its own, built upon internal tensions, by which the old is made new, over and over again.

These tensions are not resolvable once and for all, but must be addressed freshly, over and over, by lawyers and judges who are responsible for what they do. They define much of the task of lawyer and judge.

I will briefly describe three of these tensions, to give you an idea of what I mean.

A.

The first is the inherent tension between law and justice I just mentioned. There is an obvious and strong tension between them, kept alive by the fact neither is allowed dominion over the other. They stay in tension, for it is an unstated convention of our law that the lawyer on each side of case must maintain that the result they are arguing for is both required by the law and fundamentally just. An argument that the law requires a certain outcome even though it is admittedly unjust, or an argument that because the law is unjust it should simply be disregarded, would both be profoundly incomplete in our legal culture. No lawyer would want to be in the position of making such a case.

The deep tension between these indispensable claims means that the lawyer or judge must labor, sometimes mightily, to harmonize them. In the process it gives lawyer and judge alike the opportunity to create something new and alive—not merely the logical working out of rules or premises, but

a deeper engagement with the texts of the past and the facts of the present, in a constant and unending search for valid and just meaning.

This tension must be addressed afresh, in almost every case. It is one aspect of the lawyer's great task, which is to bring the ideal and the real into a single field of vision.

B.

Another structural tension is that between legal language and ordinary language. Your client comes to you as one who tells his story in ordinary language, and who wants certain things, defined in that language, to happen. To be able to represent your client you need to understand their language as well as you can. But you also know you will have to translate what they are telling you into a language that will not make much sense to them. Like other translations this can never be done perfectly. The incongruity between these two languages is a challenge throughout the process of representation. It calls for an art of mind and language that can bring these two languages together. It has to be practiced again every day, always imperfectly.

C.

A third tension exists within the lawyer: between the unreasonable fear that she is a mere mouthpiece who will say anything to win and the unreasonable hope that she is a pure and active moral agent pursuing only the truth. This anxiety is a part of legal work, and has to be faced on the merits. Is what you are doing morally wrong? Can it be justified? This is not avoidable by a conscientious and responsible person. It is an important question, to which no formulaic answer will do. You have to create your own solution.

D.

There are other tensions that give life and structure to the law, which I discuss in the book but will omit here. But I can name a few of them briefly, leaving it for you to flesh them out in your own imaginations.

Between the letter and spirit of the law;
between substance and procedure;
between fact and law;
between the present and the past (and the future); between reason and intuition;

between language itself and what cannot be expressed; and there are many more.

We should not find these tensions daunting, however, because each of them, and all of them together, call upon us to use our minds and imaginations, and our sense of justice too, in new and fruitful ways.

Such tensions are structural, built into the process, resolvable only on the occasion at hand, and then always imperfectly. They demand from those who experience them, whether judges or lawyers, the exercise of an art—an art of language and mind and character.

They mean that the law cannot be reduced to rules or policy or bureaucracy, or to the exercise of power, though all those things are at work. These tensions are not as some might say, simply “noise in the system,” but the life of the law itself. They make it clear that in doing law we must be centers of energy, of invention, and of life.

This means that law is not, as it is sometimes imagined, a monolithic machine working away in an impersonal fashion. Rather it is a rather fragile piece of our culture, requiring those who live with it to remake it constantly, over and over. Its existence should never be assumed or taken for granted. It is something we create and maintain when we act in its name. When we do it well, when we engage in law at its best, as I have tried to describe it, we do something of first importance. But the law does not act by itself; it needs us to keep it alive.

VI

Before it closes, my book shifts gears in a rather radical way. It speaks no longer about the legal tradition I have been describing or the dangers to which it is subject or my hopes for its rejuvenation.

Instead it addresses another question, different in kind: What if we fail to keep law alive? Suppose we do lose law as I have been defining it, and with it the Constitution, and democracy? Suppose we have already lost it? This

may seem speculative to some of you, but I think this is a serious and real possibility in my country. What then?

This is what we should be thinking about. But how?

Here I turned to Augustine of Hippo, whose autobiographical *Confessions* I had been reading. I thought of him because he was a man of great worldly success, who lived in times even worse than our own, yet somehow even under these conditions managed to maintain his psychic and intellectual integrity.⁷

His world did not have even the idea of democracy or political equality, and not much of an idea of the rule of law. There was no Constitution. Slavery—not racial like ours, not always inherited, but still slavery--was accepted as an institution by almost everyone. North Africa, where he lived, was bitterly torn with religious violence. When he was in his fifties Rome was sacked by the Visigoths, after hundreds of years of self-government, which must have felt like the end not only of government but of culture. The whole world was crashing down. Augustine was living largely in a failed world, as we too may also find ourselves doing.

A.

In his famous autobiography, *The Confessions*, he told the story of roughly the first forty years of his life, which was in many respects like that of the successful lawyer of our own day. He was trained in rhetoric, which he both practiced and taught with great success, first in Carthage, then in Rome, then in Milan, which was in those days the seat of the empire. He became one of the Emperor's rhetoricians. A marriage was arranged for him with the daughter of rich and powerful family. His future was likely to include a provincial governorship. He was ambitious and his ambitions were largely satisfied.

But in Milan, as he tells it, he had experiences of a different kind, mainly internal, that led him to convert to Christianity. He then abandoned the philosophic way of understanding the world. The whole structure of life that he had built just breaks down. All his achievements seemed to disappear.

⁷ The treatment of Augustine is based upon my "Augustine's *Confessions* as Read by a Modern Law Teacher" (White 2014).

From this point he wanted to retreat into religious life with his friends, and returned to Africa with that in mind. But things worked out differently for him. He was dragooned by a congregation into being their priest, then soon made a bishop, and he was to spend the rest of his life facing these responsibilities.

B.

The story he tells in the *Confessions* is not the usual autobiographical story of success on success, but a story of a kind of benign humiliation, the destruction of his own pretenses and claims, often against his will and without his knowledge, until he is at the end as it were stripped naked and vulnerable and ignorant; but in that condition he is able to live in a new and deeper way.

How did this happen? That is the subject of his wonderful book as a whole. I discuss it at some length in my own book but today I want to draw attention only to two of his ideas, ideas that seem to me true for us as well as for him. I believe they helped him face what he had to face, and maybe they can do the same for us.

These ideas appear late in his book, after the narrative of his life. The first of them focuses on his understanding of memory, the central human capacity that he has himself been exercising. Thus far in his book he has been telling us what he remembers about his life; now he makes a memory itself a subject of thought.

As he presents it, we start out with the inexplicable and incomprehensible gift of life. Thereafter we use memory constantly, not only when we write the story of our lives as he has been doing, but in leading our lives from day to day. Memory is the embedded experience upon which we rely for everything, from the use of language to the formation of desires to the management of social relations. But, as he makes us see in our own forgetfulness of what has told us, that memory is profoundly unreliable.

What we remember, after all, is not sense data, but sense data processed by thought and imagination. Augustine is thus imagining a way of locating ourselves in a process of which we know neither the beginning nor the end; a process that is in its essential nature interior, and in a deep way unverifiable. The “narrative” he has just told—and the same would be true of any

narrative of one's life, including an internal one—is really the memory of memories, not a story of facts.

C.

In a later section he continues this line of thought by reflecting on the mystery of time. His main idea is that all that is past is no longer real, all that is future is not yet real; all we have is the present, which is itself not stable but a tiny, infinitesimal razor edge of awareness, disappearing as fast as it emerges. By the time you get the end even of a single word, its beginning is in the past.

The razor edge can be extended slightly by memory and imagination, but it is where we live, in a constantly disappearing present.

With these ideas Augustine is bringing himself to face both the essential mystery of his own existence and the essential quality of that existence. Nothing can be simply held on to and apprehended. We have to learn to let go of what we have known, and to face what we have not known.

Thus it is that in these closing portions of his book we find Augustine, who once knew so much, saying again and again, I do not know, I cannot know, this is beyond me. (He even learned that his own reading of Scripture, however learned, intelligent, and sincere was not the only valid interpretation.) On the other hand, he is showing that he has resources within himself for facing what he might well have thought could not be faced.

He sets forth here what I think are central conditions of human life, for him then and for us now, and in our future—even if our law does die.

For us, as for Augustine, the moment passes: are we alive in it, alive to it? Can we speak out of the center of ourselves, somehow aware of what we do not know, cannot be? The *Confessions* is written to bring us to the point where such questions are real for us. Can we achieve the kind of psychic and ethical integrity he attained?

Augustine found a way to work out of his awareness that all learning, all expectations, were provisional only. He knew the world could change and that he could change. He not only worked on these terms, but worked brilliantly, far better than he would have done had he remained the expert rhetorician he started out to be. The very ephemeral quality of things made it possible for him to be present as mind and imagination in a new and much more

complete way to what he was doing. The freshness and newness of life this entailed gave him immense power, in part because it seems to have erased his earlier susceptibility to embarrassment and his need to impress others.

This may seem paradoxical, but I think it is true of Augustine and can be true of us. We too can be centers of life and creativity, alone and with others, even when law is gone. We can rely on our own minds, our own characters, our own capacities, if we think about them rightly. We can be unafraid.

Of course Augustine's own experience rested in large part on his religious conversion. Obviously not everyone wants to go that way, but I think it is possible for us to hope to have an educative transformation of another sort, as a lawyer or as a person, leading to something like what Augustine comes to attain.

That is: an awareness of the evanescence of all things; of the unreliability of memory and intellect; of the essential emptiness of most goals of ambition or competition; of the springs of life and strength within oneself, upon which one may rely; of the hope of speaking always to another as that person is, in that situation at that moment, out of the center of oneself and one's mind; of the openness of our texts and practices of authority to multiple readings and uses; and ultimately of the power each of us might hope to have in speaking in ways that are true and alive—for only through such speech is justice possible.

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