

CENSORING SAMBA: AN AESTHETIC JUSTIFICATION FOR THE PROTECTION OF SPEECH

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I. INTRODUCTION

Echoing the sentiments of Justice Felix Frankfurter when he first decried relying on reflex over reason in the Court's treatment of free speech cases,¹ Stanley Fish and other scholars have argued that there is "no such thing as free speech," by which they mean that there is no *principle* of free speech.² Fish's attack, however, differs from the common complaint that the standard justifications offered in this country for a principled protection of speech do not tell us *why* speech should have a greater degree of immunity from regulation than any other form of conduct causing harm or offense, or, if these justifications do tell us why, cannot account for the extent of the current protection we now offer to speech.

* © 2008, Jack L. Sammons. All rights reserved. Griffin B. Bell Professor of Law, Mercer University School of Law. I would like to thank those attending faculty colloquiums at Stetson University School of Law and Mercer University School of Law for their fine questions and comments. Thanks are due as well to Dr. Claudia Ribeiro Pereira Nunes, Judge Fernanda Duarte, Professor David Ritchie, and my former student, Wesley Woolverton, for their assistance in translating materials and in checking my understanding of all things Brazilian. And, finally, for comments, conversation, and criticism on this and related topics, I am deeply indebted to Robert Audi, James Fox, Michael Goldberg, Mark Jones, Lanier Sammons, James Boyd White, and to my students both at Mercer and in the Stetson International Law Program at the University of Granada.

1. See *Dennis v. U.S.*, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring) (noting that the "conflict of interests" present in free speech cases "cannot be resolved by a dogmatic preference for one [interest] or the other . . . [;] [i]f adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims").

2. E.g. Stanley Fish, *The Trouble with Principle* (Harvard U. Press 1999) [hereinafter Fish, *Trouble*]; Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* 102 (Oxford U. Press 1994) [hereinafter Fish, *No Such Thing*]; Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. Colo. L. Rev. 1061 (1993) [hereinafter Fish, *Fraught with Death*]. Fish also notes the "others" referred to in the text of this Article, but he is careful to distinguish his approach from what he considers to be their progressive liberal one. Fish, *Trouble*, *supra* n. 2, at 116–117.

These are very well-known problems, and Fish is not particularly interested in them. Instead, his claim is that *any* justification offered for the protection of speech, any answer to the question “what is speech for,” will necessarily fail as a *principled* justification.³ To answer the question “what is speech for?” at all, he says, is to join “the regime of censors.”⁴ There will always be speech that subverts whatever purpose we attribute to speech and that speech we will not tolerate. Instead of a principle, then, what we have is a political determination, a choice between warring political policies, through which we give the name “free speech” to whatever speech serves the winner’s purposes.⁵

This, Fish says, is as it should be. Best it would be to confess that this is what we are doing and be clear about it rather than maintain the pretense that the various justifications offered for a principle of free speech actually establish one.⁶

To the great apparent annoyance of Fish and those who agree with him, United States judges continue to ignore their advice and, as these authors would have it, treat the idea of freedom of speech as a talisman. These judges offer protection to speech that they say—in a “rhetoric of regret” as Fish calls it⁷—they hate and, they also say, we should hate as well. They do so, according to Fish, for reasons they cannot or do not adequately explain.⁸ The

3. See Fish, *Trouble*, *supra* n. 2, at 75–92 (explaining that there is no principle of free speech but only political preferences that we then call principle).

4. *Id.* at 115 (posing the question “[w]hat is the First Amendment for?”).

5. *Id.* at 93–94, 147–149. Fish has no objections to a principled protection of speech operating as a “hoop” whose presence is a restraint on the use of force, but wants such a “principle” to be seen, as he would have it, more transparently and for what it really is, i.e., a political determination. *Id.* at 93–94. Such transparency, he believes, would permit the argument about the protection of speech to itself become more transparent. *Id.* at 94. As such this can be seen as part of a more general claim by Fish, one not so much about the law’s autonomy as its claimed separation from the political conversation, to which there are, of course, well-rehearsed responses and well-rehearsed responses to those responses. *Id.* at 149–150.

6. *Id.*

7. *Id.* at 75.

8. See *id.* at 75–92. Fish argues that judges who engage in the “rhetoric of regret” often find themselves in a catch-22. *Id.* at 90–92. For example, the court in *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916, railed against neo-Nazism as a philosophy that should be “completely unacceptable to civilized society,” yet protected the speech at issue on the grounds that refusing to do so would be akin to “ideological tyranny.” Fish, *Trouble*, *supra* n. 2, at 80–81. The irony here, according to Fish, is that the court recognizes neo-Nazism as a tyrannical philosophy, yet justifies its protection of the same as tyranny in and of itself. *Id.* at 80. “[T]he illogic of first finding a discourse terribly

judicial protection of the neo-Nazi march in Skokie, Illinois,⁹ is a prime example not only of the principled protection that Fish decries, but also, and relatedly I believe, an example of the uniqueness of the extent of the protection offered to speech in the United States in comparison with other liberal democracies.¹⁰ For most, if not all, of these other democracies, Fish's argument is really unnecessary. For other democracies, with rare exception, the protec-

dangerous and then encouraging its proliferation," Fish concludes, renders the court's reasoning "incoherent." *Id.* at 82. For a further exploration of these ideas, see *id.* at 75–114.

9. *Supra* n. 8 and accompanying text. The recent reaction to radio personality Don Imus's description of a primarily African-American female college basketball team as "nappy headed ho's" has increased public attention on the issue of justification for the protection of speech, especially on the United States' almost unique protection of hate speech (although I do not believe the phrase fits the Imus example). David Carr, *Networks Condemn Remarks by Imus*, N.Y. Times B7 (Apr. 7, 2007). Of course, Imus's speech did not involve "state action" as that term is now understood in the law of the United States, and thus there is, under current United States doctrine, no constitutional issue involved. Nevertheless, the limitation on the protection of speech to protection from "state action" itself requires a justification—there is no such formal requirement in Germany for example—and, if there is to be an adequate principle at work in all of this, that principle is one that should reflect some understanding of why, if speech is so very important, the only legal protection given to it is protection from "state action." Interestingly, the only public defense offered for Imus's comment, at least the only one I have heard, was that his language is no different from the language of rap music. Phil Mushnick, *Brainless Hypocrites Win Again*, N.Y. Post 6 (Apr. 13, 2007). But according to this defense, what Imus failed to do was distinguish his speech from more obviously aesthetic uses of the same terms. *Id.* This failure, it was said, was almost forgivable, given Imus's typical radio performances. *Id.* So, according to this argument and generally speaking, the more obviously aesthetic speech is, the more freedom it requires and deserves. There is, as I hope you will also think by the end of this Article, quite a lot to this theory, although its application to Imus's speech may be confused. If, following this argument, we thought of aesthetic speech rather than political speech (ironically perhaps for political speech because its integrity requires strong measures of restraint such as those that permit all voices to be heard) as the paradigm for protection of speech, our thinking about the protection of speech would be very different, would it not?

10. See generally Eric Barendt, *Freedom of Speech* (2d ed., Oxford U. Press 2005) (discussing the legal protection of free speech in England, the United States, Canada, Germany, and under the European Human Rights Conventions); Ronald J. Krotoszynski, Jr., *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (N.Y.U. Press 2006) (comparing the approach taken to freedom of speech in several different countries). Krotoszynski might argue that the United Kingdom's nonconstitutional, common-law derived protection of speech is also a matter of principle. *Id.* at 183–213 (discussing free speech in the United Kingdom). I would quarrel with that assessment, but the argument is not important for present purposes. And in any event, to the extent to which the approach of the United Nations is now being shaped by the incorporation of the European Convention on Human Rights into British law, that shaping is surely away from a principled approach and towards the clearly political one of the Convention. *Id.* at 183–185.

tion of speech is already and quite clearly a political determination based on previously given answers to the question “what is speech for?” that place the value of speech within a politically accepted hierarchy of social values.¹¹ Our country’s “principled” refusal to answer this question with any degree of clarity, much less finality (or, as Fish would have it, our answering it only with the vapid recitation of principle), is, then, not without consequence.¹² And given that the extent of our historical experience with the constitutional protection of speech far exceeds all other democracies, our claim of acting on principle in protecting speech surely merits the world’s attention.

II. AN EXCEPTION TO THE RULE

Fish admits, however, that there is one form of justification for the principled protection of speech immune from his conceptual assault.¹³ This form of justification says something like: “Speech should be free because it is speech.”¹⁴ It is, in other words, a self-justifying activity. Sort of, as Fish perhaps might say, the “I Am the I Am” version of a justification for a principle.¹⁵ In fact, Fish adopts a description very much like this because he dismisses this sort of justification as theological talk and a tautology that cannot do the work we expect a justification to do.¹⁶

11. For example, in Germany, free speech occupies a lower rung on a long ladder of political values including personal dignity, honor, and the right to freely develop one’s personality. Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity As a Preferred Constitutional Value in Germany*, 78 Tul. L. Rev. 1549, 1549 (2004).

12. Fish, *Trouble*, *supra* n. 2, at 115. Fish insists that his own critique is not itself politically driven; that is, that he does not have in mind preferred outcomes in particular cases. *Id.* at 150. This is one way in which he distinguishes his analysis from others who also claim that there is no principle at work here—nor does he argue for a conception of the political good that should determine these outcomes. *Id.* at 148–150; Fish, *Fraught with Death*, *supra* n. 2, at 1083–1084. Nevertheless, it seems quite likely, as I say in the text, that the unique extent of protection offered to speech in this country as compared with other countries is related to, if not solely a product of, our judiciary’s learned reliance upon principle for the protection of speech. So the argument here really does, I believe, make a difference in the outcome of particular cases.

13. Fish, *Trouble*, *supra* n. 2, at 86–87; Fish, *Fraught with Death*, *supra* n. 2, at 1085–1186.

14. Fish, *Trouble*, *supra* n. 2, at 87.

15. *Id.*

16. *Id.*

A. Self-Justifying Activities

There are, of course, activities that we commonly recognize as self-justifying or, said differently, within the category of non-inferentially (and pretheoretically) justified. The easiest and most common examples of these are play and art. We do not think about either of these activities as needing inferential justification. Even when we think about them very carefully, they do not seem to need any justification by any value other than their own performance. Or, said differently again, their justifications are found non-inferentially in the experience of the thing itself. We do damage to these two activities, we rightfully think, and to our understanding of them, when we seek inferential justifications.¹⁷

B. Expressive Speech as Aesthetically Justified

I want to argue here, against Fish's general claim, that speech is much the same. In fact, speech shares in the self-justification of one of these examples—art. Expressive speech, *all* expressive speech, always has as one of its elements a participation in the same self-justifying activity that art is.¹⁸ Expressive speech, that is, *always* has an aesthetic component to it that we can recognize and, because it does, our protection of expressive speech is always, in part, aesthetically justified as a matter of principle. What judges do when, drawing upon the materials of the law, they offer a principled protection for speech—whether

17. For example, we risk a corruption of sports when we justify it as bringing revenues to a city or as improving our physique. We also risk a corruption of art when we think of it as making a city a more attractive place for businesses to relocate or making ourselves more interesting people. I have written about this form of corruption of practices before in the context of legal ethics. See Jack L. Sammons, "Cheater!" *The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 Idaho L. Rev. 273 (2003).

18. Please note that I have described the aesthetic as one of the elements of speech. I *am* saying (unsurprisingly, perhaps, given the classical Greek origins of the thought) that *all* expressive speech has an aesthetic component; I *am not* saying that all expressive speech is then entitled to legally enforced protection. This distinction will become clear as the Article progresses, or so I hope. In order to be considered principled, the protection of speech does not need to be absolute. In this context, it only needs not to be political. Anticipating much that is to come, an aesthetically justified principle for the protection of speech, like other principles in the law (and in morality), is *prima facie* and defeasible, operating in its case as a self-justified thumb on the judicial scale. The question of how it can operate in this fashion will have to await further textual development.

they say so or not—is treat speech as, in part, the aesthetic performance that speech, *all* expressive speech, always is to varying degrees.

Showing how this aesthetic justification can do the work we expect a justification to do, including how it works in the practical judgment of our judges, is not, however, an easy matter. Yet another theoretical discourse on the meaning of the aesthetic would do little good as a starting point. Such a discussion would only lead us to a different and interminable debate, one with great risk of distorting the intended meaning given our non-inferential starting point. What we really need to get going here with an aesthetic justification is a very real example, a vicarious experience if you will, of the “aesthetic” to help us understand how it works as a justification for speech.¹⁹ And for this, thankfully, God has given us Brazil.

19. For this Article to have its desired effect, you must vicariously experience a certain (and very rich) moment within a particular aesthetic culture as a way of defining the aesthetic. But for this experience to work, you need to hear the music on which the moment, and this Article, depends for much of its rhetorical effect. Given the limitations of the medium, however, I can only beg you to do this by going online. The three songs central to this Article are as follows: Chico Buarque, *Apesar de Você*, in *Chico Buarque* (Universal/Polygram Recs. 1978) (CD); Chico Buarque & Milton Nascimento, *Cálice*, in *Chico Buarque* (Universal/Polygram Recs. 1978) (CD) (written with Gilberto Gil); Chico Buarque, *Vai Passar*, in *Favourites: 60 Years On* (Wrasse Recs. 2003) (CD). Performances of two of these songs are available online: *Apesar de Você* is available at <http://www.youtube.com/watch?v=R7xRtSUunEY&feature=related> (posted Oct. 10, 2007), and *Vai Passar* is available at <http://www.youtube.com/watch?v=NI3uiF5Gc4k&feature=related> (posted Sept. 23, 2007). The third and most important, *Cálice*, is unfortunately not available as a video in its entirety because it was censored, and therefore gives you no real sense of the recorded song. Nevertheless, you can view it at <http://www.youtube.com/watch?v=QQdj6Yr6rHg> (posted July 15, 2007). You can also download the full recorded version of *Cálice* on iTunes for ninety-nine cents at <http://phobos.apple.com/WebObjects/MZStore.woa/wa/viewAlbum?playlistId=3735719&s=143441&i=3735681>. Ideally, you should watch and listen to these songs when each first appears in the text that follows. To encourage you to do so I have repeated these web addresses in footnotes as each song appears in the text.

There are many reasons for approaching a definition of the aesthetic this odd way in this context. I hope that most of these reasons will become apparent as this Article progresses. Not to make too much of this, I hope, but there does need to be a nod here to Wittgenstein in this attempt to define the aesthetic by an example of its operation as and within a culture (of its own creation), as well as ones to Erasmus and his “folly,” and Foucault and his “madness,” among others, for their explorations of the puzzle of understanding a concept from within it. *E.g.* Desiderius Erasmus, *In Praise of Folly* (Cosimo Classics 2007) (originally printed 1511); Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Vintage 1988); Ludwig Wittgenstein, *Philosophical Investigations* (3d ed., Prentice Hall 1999).

III. THE TWO POLITIES OF BRAZIL

The people of Brazil live in two polities: the polity of samba²⁰ and the polity of common sense.²¹ Every Brazilian has at least these two identities. To talk of samba in Brazil is always to talk of *brasilidade*, or “Brazilianness,” for samba is Brazil.²² Samba is not all that Brazil is. Brazil is also common sense. But samba is Brazil, and Brazil is sometimes samba. Samba is

20. We must be very careful with the word “samba,” here for non-Brazilians do not use this word as Brazilians do. In Brazil, anything, *anything at all*, can be said to be more or less “samba,” and sometimes the same thing will be more “samba” at times and less so at others. “Samba” is, as non-Brazilians would think, a rhythm (and a dance), but it is so in the way that we might say the rhythm (or dance) of an activity, an event, a person, a life, a life story, or, with the classical Greeks, the *rhuthmòs*, or “flow,” of the things we do and the things around us. This broad use of the term is well captured in an early Chico Buarque song, *Tem Mais Samba [There’s More Samba]*, in *Os Primeiros Anos* (Som Livre 2006) (CD). *Tem Mais Samba* is a song described as “the generative nucleus and thematic synthesis of [Buarque’s] repertory.” Charles A. Perrone, *Masters of Contemporary Brazilian Song: Mpb 1965–1985*, 8 (U. Tex. Press 1989). Some representative lyrics from the song read as follows: “There’s more samba in meeting than in waiting/There’s more samba in evil than in wounds/There’s more samba in anchors than in sailing/There’s more samba in forgiveness than farewell.” *Id.*

21. My description of the other polity as “common sense” comes from several sources including, most importantly, the inspiration provided by Jacques Rancière in *The Politics of Aesthetics: The Distribution of the Sensible* (Continuum 2004). My use of the term, however, is quite different from Rancière’s use of “the sensible,” by which he refers to what is capable of being apprehended by the senses. He analyzes politics in terms of the distribution of this capability. *Id.* at 12, 23–24. I have used the term “common sense,” typically a very positive thing in our lives, in an effort to be clear that the polity of common sense is a necessary polity. Because the polity of samba, as opposed to the one of common sense, is harder for us to see and to understand, and because it is in the polity of samba that I ground the justification I offer for the protection of speech, I have overemphasized its positive attributes in a comparison with the polity of common sense. I do not want you to think, however, that there is always something wrong with “common sense” or that these polities are necessarily antagonistic, although, at times, as in the example in the text, they can become so. Neither polity in fact means much, which is to say neither has much reality, without the other. And, while it is typically the polity of common sense that gets confused about this, problems arise when either polity pretends that this is not the case.

22. Noel Rosa, an early samba composer, established the most important early expression of the link between samba and national identity in Brazil. Bryan McCann, *Hello Brazil: Popular Music in the Making of Modern Brazil* 53–54 (Duke U. Press 2004). And, in Rosa’s arguments with other *sambistas* (“masters of samba”), it became clear that Brazilian music was “the decisive forum for debate over national identity.” *Id.* at 5. The argument that samba represents the entirety of Brazilian music is traceable at least to 1939 and to the novelist Lins do Rego. *Id.* at 63–64. How samba became the national identity of Brazil is well told in Hermano Vianna, *The Mystery of Samba: Popular Music & National Identity in Brazil* (John Charles Chasteen ed. & trans., U.N.C. Press 1999). It is a story, Vianna says, of “cultural mediators” who found ways of bridging differences within the culture of Brazil, all in the name of samba. *Id.* at 20–21, 29–31, 88.

[a]n anonymous power—almost subterranean, so to speak, like the actions of the water table in the formation of the riverbank—[that] configures the cultural fabric of [Brazilian] nationality, with its common legends and traditions, flying from South to North and from North to South on the shimmering wings of popular song.²³

A. The Polity of Samba

The polity of samba in which all Brazilians live is unique. Its religion—it doesn't so much have one as it *is* one—is impossible: a Catholic syncretism so complex that none of the religions within it can be easily distinguished, for none fully excludes the other.²⁴ The eschatology of this unique religion is utopian but nontotalizing, offering an ideology-free future that neither political theory nor political action could ever hope to capture. This is not a hope for future joy, but the joy of a present hope. Samba can enact this impossible and unimaginable future and, in doing so, verify it in the present.

The central virtue of this unique religion is a particular form of waiting that Brazilians call *saudade*. *Saudade* is a longing for that which has never been or ever will be.²⁵ It is hope's active form in the polity of samba, and it yearns only for its own continuance.²⁶ It is a recognition, as one *sambista* said, of the "immi-

23. Vianna, *supra* n. 22, at 32 (citing Afonso Arinos, *A Unidade de Patricia* 887, in *Obra Completa* (Conselho Federal de Cultura 1969)).

24. Claus Schreiner, *Música Brasileira: A History of Popular Music and the People of Brazil* 78–84 (Mark Weinstein trans., Marion Boyars Press 1993). The borders between Catholic and syncretic religions have always been fluid in sambas, starting with the initial combinations of Amerindian and Gregorian chants. *Id.* at 9, 31.

25. A very common use of the term *saudade*, sometimes translated as "nostalgia," is to describe missing someone. This use, however, is a way of emphasizing the absence of the one missed by comparing it, metaphorically, with a true *saudade*, or so it seems to me. It is *saudade* that makes so very difficult distinctions in samba between various religions, for the institutional forms of these religions tend to name that which is yearned for and then use that which is named rather than trusting in it.

26. The song generally thought to be the first *bossa nova* ("new sound"), and written by the grand maestro of samba Tom Jobim (or as he is called in Brazil, Antonio Brasileiro), was entitled *Chega de Saudade* [*Enough of Saudade*, or in some translations, *No More Blues*], in *Fotografia—Os Anos Dourados de Tom Jobim* (Universal 2006) (CD). It is a song filled with *saudade*. The point is that *saudade* finds its end in its own performance. If you want to think about this in terms of "the blues," you will not be too far off. However, to understand what Jobim, those who preceded him, and those who followed him in samba mean to Brazil, you must listen to Chico Buarque's *Paratodos* [*For All*], in *Para Todos*

nence of a revelation which does not occur”²⁷ Living together forever in this imminence lies at the very center of the polity of samba and holds it together.

Samba, like any polity, has its own unique history.²⁸ This history is a telling of the history of Brazil that follows the logic of story rather than of fact and time.²⁹ In samba’s history, for example, Carnival, the pre-Lenten revelry so associated with Brazilian identity, predates Brazil’s own discovery, while Cabral, the errant navigator who initiated Portuguese exploration, first arrives a few months after Carnival.³⁰

Samba’s history of Brazil is, however, a real history, not an invention. It is a history of Brazil’s ongoing creation in samba. There is in this history, and in all that samba is, a unifying of Brazil, a unifying of its traditions, its regions, its religions, its classes, its cultures, its genders, and, born in the freeing of the slaves as samba was, its races.³¹ For samba has discovered, over

(RCA Intl. 1994) (CD). There is no other good, honest, or true way to understand it. You can do this, right now, by going to <http://www.youtube.com/watch?v=BF03rcdA8Y4>.

27. “Music . . . [tries] to tell us something, or [has] said something we should have missed, or [is] about to say something; this imminence of a revelation which does not occur is, perhaps, the aesthetic phenomenon.” Denis Donoghue, *Speaking of Beauty* 70–71 (Yale U. Press 2003) (citing Jorge Luis Borges, *The Wall and Its Books*, in *Labyrinths: Selected Stories & Other Writings* 223 (Donald A. Yates & James E. Irby eds., Penguin 1970)). There is a Chico Buarque song about this “something” entitled *O Que Será* [*What Can It Be?*], in *Quatro Em Um* (MUSICRAMA/Koch 2001) (CD). You can also hear this song at <http://www.youtube.com/watch?v=VfybMjbadKY> (posted Mar. 24, 2006). There are two versions of this song. One is about the ineffable in our experiences of the world, while the other is about the ineffable in ourselves.

28. Samba also has its own national anthem—Ari Barroso’s *Aquarela do Brasil* [*Watercolor of Brazil*]. McCann, *supra* n. 22, at 70–78. (This is the song known simply as *Brazil* in most countries outside of Brazil.) Alternatively, and in true samba fashion since one song celebrates samba’s presence and the other condemns its absence, samba’s anthem, *Querelas do Brasil* [*Indictments of Brazil*] by Mauricio Tapajos and Aldir Blanc, is both a combination of *Aquarela do Brasil* and a parody of it. *Id.* at 239.

29. See e.g. Alma Guillermoprieto, *Samba* 140–142 (1st ed., Vintage Bks 1991) (describing samba’s version of the role of Princess Isabel and of Zumbi in the abolition of slavery in Samba); Additionally, *Quem foi Inventou o Brasil* [*Who Invented Brazil?*], a musical question posed in the song *Historia do Brasil* by Lamartine Babo, provides an answer that “toys with history and those who believe in it.” Schreiner, *supra* n. 24, at 1.

30. *Id.*

31. E.g. Christopher Dunn, *Brutality Garden: Tropicalia and the Emergence of a Brazilian Counterculture* 23 (U.N.C. Press 2001) (asserting that “Brazilian popular music is the most complete, most totally national, most powerful creation of our race so far”); McCann, *supra* n. 22, at 15 (stating that turning to popular music became the foundation of a unified national culture); Schreiner, *supra* n. 24, at 14, 19 (noting that the African culture shaped the beginnings of urban samba); Vianna, *supra* n. 22, at 14–15 (stating that

time, that all these divisions can be rendered harmonious in samba.³² In fact, any divisions imagined within the polity of samba, divisions between high and low culture for one telling example³³ or between the religious and the secular for another,³⁴ are all imagined externally to samba.³⁵

This polity carries with it, as all polities do, its own ethic and its own descriptions of the world from which this ethic arises and to which it must be reapplied. It defines its own virtues within its own admired characters, and these characters provide its own Aristotelian ideals. The culture of the polity of samba is self-reflecting. Its music is meta-music (music, that is, that is both samba and about samba), and its governance is remarkably participatory, offering a form of popular citizenship available to all at any time for any communal purpose.³⁶ Sometimes those marginalized in other polities, especially the young, relish even more the influence and freedom they have as citizens of samba³⁷ and, because they do, identify themselves more closely with it.

The enormous freedom found within samba, however, is also a severe limitation upon it. For all things, including those things

samba served as a unifying element among the diverse groups in the Brazilian society).

32. See Vianna, *supra* n. 22, at 15 (explaining that music has the power to overcome class and racial divisions). Samba finds among differences a common measure that “does not reduce differences to mere instances of a common essence or genus. In other words a likeness that only maintains itself through the differences, and not despite nor in addition to them.” John Milbank, *Theology and Social Theory: Beyond Secular Reason* 289 (2d. ed., Blackwell 1993). Milbank, however, is not talking about the aesthetic as I am. The best example of this I know, and the best way to make sense of the claim, is found in the Brazilian expression that God created different races for us because it was sexy.

33. See McCann, *supra* n. 22, at 93–94 (stating that a number of different cultural groups, including composers and folklorists, gradually accepted samba’s relationship with the Brazilian national identity). It is the poet Vinícius de Moraes who is, perhaps, most responsible for defining samba against any division between high and low culture. See Perrone, *supra* n. 20, at xxiii–xxv (describing de Moraes’s devotion to establishing and promoting the movement of samba).

34. Guillermprieto, *supra* n. 29, at 8; Schreiner, *supra* n. 24, at 14–15, 78–84.

35. McCann, *supra* n. 22, at 94. Samba has always struggled with the potential of enacting itself in other spheres and has often oscillated between optimism (samba *exaltacão*) and pessimism (critical samba). *Id.* at 93–95. These two forms of samba, however, can exist side by side without contradiction, for samba in both is the same. *Id.* at 94–95. What differs is the extent to which other spheres (or “polities” as I refer to them here) know that they are also samba. *Id.* at 94–95. For a good example of the pessimistic view, see the compositions of Geraldo Pereria in the rebirth of critical samba in the 1940s and 1950s, *id.* at 78–80.

36. *Id.* at 11–12.

37. *Id.* at 13.

required to make samba a polity at all, that do not permit this free range of individual imagination cannot be samba.³⁸ Because of this limitation, samba is a polity that is never at rest, never secure, constantly recreating itself and, in the process, creating and recreating Brazil—because samba is Brazil and Brazil is sometimes samba.

The citizens of this polity, the people of Brazil, are shaped, defined, and created by looking at the world imaginatively. And the police of this aesthetic polity, this aesthetic realm, distribute its aesthetic coin by commendation.

B. The Polity of Common Sense

The polity of common sense is the polity in which most needs are met, work is done, money changes hands, and the state is found. It, too, has a unique Brazilian character and a unique Brazilian history, but this unique character is much harder to see. The patterns in which we recognize differences among different polities of common sense are few and becoming fewer. The unification that creates this polity of common sense is not at all like the unification in samba. It is not harmonious; it is discordant. It is the unity of a truce among warring divisions; the unity of seemingly natural-born enemies who have agreed, for their own reasons, to play the same game at least for a while. The divisions overcome in samba not only remain in the polity of common sense; they are subtly encouraged. The state, the one with the monopoly on the legitimate use of force³⁹ needed to keep this truce and the game it permits going, is not all there is to this polity, but it is, often enough and on its own terms, most of it.

The religions of this polity are many and are mutually exclusive. Common sense, however, moves each to pray for the continuation of this game forever for the form of security it can provide to all.⁴⁰ These prayers are within a shared eschatology of hope for a future permanent security that can be presently imag-

38. See Paul Guyer, *Values of Beauty: Historical Essays in Aesthetics* 178, 241 (Cambridge U. Press 2005) (discussing the need for freedom of the imagination for the aesthetic response).

39. Max Weber, *From Max Weber: Essays in Sociology* 77–78 (H.H. Gerth & C. Wright Mills, eds. & trans., Oxford U. Press 1946).

40. This idea is an ancient one, but for a recent interesting version of it, see William T. Cavanaugh, *Theopolitical Imagination* (T & T Clark 2002).

ined. The people of this polity, who are the people of Brazil, are shaped, defined, and created by looking at the world sensibly. And the police of this polity, this realm, distribute its coin of common sense by rationality, manipulation, and command.

C. The Political

Politically, the polity of common sense has a lot to say. The polity of samba, on the other hand, has only one message—one note. *This message is that nothing (people, relationships, service, science, mathematics, technology, law, religion, politics, government, the state, the market, common sense, or even samba itself) can be good, honest, or true without samba.* The one form this one message always takes is as a description of the world in such a way as to reveal this one truth about it. This description can be either a celebration of samba's presence in the world or a castigation of its absence.⁴¹ Those are the only choices. In this, and in Immanuel Kant's (who tried hard to make room for just a little samba) terms, samba has "purposiveness without purpose."⁴² Anything else that samba is reputed to have said politically is a translation of this one message by others and these translations can, themselves, be more or less samba.

Regardless of how its message might be understood by others, samba, once again, really only *describes*. Often, in fact almost always, it describes only the trivial, for the trivial is far more important to samba than the political, or better said, the trivial is its political. (The leveling of all observation—the king and the cat are both equally interesting—is, in fact, a very samba thing to do and a thing done frequently in it.) In these descriptions, however, samba routinely does that which common sense finds so very hard

41. *Supra* n. 35 and accompanying text (acknowledging that "[s]amba serves both as [an] uncritical celebration of the nation and [a] profound inquiry into its failures").

42. Immanuel Kant, *Critique of Judgment* § 10 (J.H. Bernard trans., Hafner Press 1951). For a wonderful discussion of Kant's aesthetics that makes this point persuasively, see Guyer, *supra* note 38, at 177–179, 239–241. As Theodor Adorno would have it, this purposelessness "gives the lie to the totality of purposefulness in the world of domination." Donoghue, *supra* n. 27, at 70 (citing Theodor W. Adorno, *Aesthetic Theory* 79, 84 (Robert Hullot-Kentor trans., U. Minn. Press 1997)). Really, however, samba's insistent reminder of itself to others gives "lie" to any claim of totality, that is, any claim that does not include samba.

to do: *it speaks beyond itself*.⁴³ Speaking beyond itself, in fact, is a very large part of what makes samba samba.

The inherent vagueness of samba's way of speaking its one message—a product of the parabolic and metaphoric form its speaking takes, its utter dependence upon an audience's participation in the message making, its equally utter dependence upon the translation of others for its own meaning, and so forth—is an *indirection* that is a central virtue in samba. What is *not* samba is directness and clarity.⁴⁴ For the polity of samba sees in these characteristics closure of thought and, in closure, a necessary denial of samba.⁴⁵ Because it keeps saying the same thing over and over again, however, and is never very clear about it, samba's one message usually goes unnoticed in the polity of common sense. So, typically, samba just goes about its business of being samba and common sense being common sense, and each draws upon the

43. Combining what I say in the Article's one message with the characteristic of samba, which it speaks beyond itself, means that samba is always saying that everything also speaks beyond itself. The theological version is as follows: "This is to say that all there is *only* is because it is more than it is." John Milbank, Catherine Pickstock & Graham Ward, *Radical Orthodoxy: A New Theology* 4 (Milbank et al. eds., Routledge 1999).

44. Consider the description of one "samba's samba," or master of samba masters, as follows:

His circumlocutory, under-the-breath way of speaking left much unstated and much in doubt, and this was his preference: if things are left vague they can always be re-defined later more advantageously. Nothing went more deeply against his grain than a definite commitment that locked a situation into rigidity, deprived it of flow.

Guillermoprieto, *supra* n. 29, at 149. Or, much more broadly considered,

[t]o the people of the United States . . . "white is white, black is black, and mulata, there's no such thing. Gay is gay, macho is macho, woman is woman, and money is money. That's how rights are bargained for, granted, won[,]and lost up there. Down here, indefiniton is the rule, and we dance with a grace that I myself can't explain."

Vianna, *supra* n. 22, at 108 (citing Caetano Veloso's poem *Americanos*). Veloso's poem *Americanos* was later recorded as a song. Caetano Veloso, *Americanos*, in *Circuladô Vivo* (Polygram Intl. 1993) (CD). Finally, and leaving Brazil for the moment,

[t]hat is why rational ideas do not appear in works of artistic genius in their own form, but in the guise of *aesthetic* ideas, that is, unifying themes or images which suggest an idea of reason on the one hand and an inexhaustible and pleasing harmony of sensible forms and images on the other without being reducible to either by any rule.

Guyer, *supra* n. 38, at 239 (citing Kant, *Critique of the Power of Judgment* § 49 (Guyer ed., Eric Matthews trans., Cambridge U. Press 2001)).

45. For a discussion of how this principle applies to the aesthetic, see Murray Edelman, *From Art to Politics: How Artistic Creations Shape Political Conceptions* 42–45 (U. Chi. Press 1995) (explaining how a principled denial of directness and clarity applies to aesthetics).

other at various times for various purposes although this, too, is seldom noticed.

To think that samba is Dionysius to the state's Apollo, and the chorus to the constitutive tragedies of common sense, would be as wrong as it is tempting. For samba, while it can be described like this, is always more. Apollo, samba insists, is dancing too. Sometimes the state that thrives in the polity of common sense tries treating samba as one of its competing constituencies rather than the separate and harmonious polity that samba is.⁴⁶ And, when it does, it often confuses samba with samba's constantly changing institutional forms. This confusion is always a threat of corruption of samba's character, and when samba's character is threatened, so is its one message. So, whenever something like this confusion occurs, whenever samba appears to be coopted as a one among the many of common sense rather than as itself a many, it finds a devious way of continuing to be just samba.⁴⁷

D. Political Confrontations between the Polities

Sometimes the relationship between the two polities can become, shall we say, rather dicey. Typically this happens whenever the polity of common sense feels threatened. At this point, the state that thrives within the polity of common sense thrives more than ever and begins to insist that the state is all there is to common sense and common sense is all there is to the state.⁴⁸ The

46. See e.g. McCann, *supra* n. 22, at 90–94 (describing the attempted management of popular culture under Brazilian President Vargas's *Estado Novo*).

47. During *Estado Novo*, the Brazilian Department of Propaganda and Cultural Diffusion concentrated its censorship effort on abolishing the character of the *malandro* in samba. McCann, *supra* n. 22, at 65. In 1940, not one explicit *malandro* samba was recorded. *Id.* What were recorded instead were sambas featuring “regenerate” *malandros* that were ridiculous and contained verbal and musical clues as a counterpoint to the lyrics of regeneration, *id.* at 66, 94, such that those lyrics could be heard and understood by the audience as ironic.

48. The response the aesthetic gives to governmental action is always a reminder of those things that are always beyond governmental action. This is so not only because, as the aesthetic says, the government's citizens are not just its citizens, but also because the polity that the aesthetic is is a polity of imagination and constant change. What the government yearns for in these times of instability is “a fixed, closed universe” such as the following:

Pharaoh, the passive king in the block universe, in the land without revolution or change or history of promise or hope, is the model king for a world that never

coin of common sense, the state says, is and must be the security it can provide, for what could make more common sense than that?⁴⁹ To provide this coin, however, the polity of common sense must be in control. Samba then, acting only as it always has, becomes a threatening reminder to the state that it is not in control because the identity of the people within the state is not just in the polity of common sense. The more violent the state becomes in the name of its form of security, the more it feels threatened by this constant reminder.

In times of confrontation between the polities, it is not samba, however, that changes its speech from the descriptive to the political. It is the state that does this to samba. From samba's perspective, the state has just made its one message more salient on the state's own terms than it was before. Nothing about the state's message has really changed. When the state does so, it gives to samba a form of authority over the state that samba does not really have. So when samba speaks politically, it is always just describing the state, and this description has whatever power

changes from generation to generation. That same fixed, closed universe is what every king yearns for—even Solomon in all his splendor.

Walter Brueggemann, *The Prophetic Imagination* 41 (Fortress Press 1978). It is most typically the state that, explicitly or implicitly, makes the absolute claim upon us that produces the aesthetic response. Sometimes, however, others within the polity of common sense—scientific rationality for one example—will do so as well in the form, as Joseph Vining describes it, of claiming to be “total theories,” and, in doing so, deny samba. Joseph Vining, *The Song Sparrow and the Child: Claims of Science and Humanity* 12–17 (U. Notre Dame Press 2004). Samba is always already there as a response to such claims, and it reminds us that speech is not speech when the language we use does not point beyond itself—when it is not, that is, samba. It is, however, only the state that can truly make this claim with a form of authority (power, force, violence, manipulation, group loyalty, group love, fear, et cetera) that challenges the very existence of samba as a separate polity. And, therefore, it is primarily “state action” against which samba requires protection. Sometimes these claims by the state are very subtle. To believe that the first duty of a government is to protect its citizens is to question why we should protect speech that threatens either those citizens or the government that protects them and, with the common sense of this conceptual abstraction, we are well on our way to a total governmental system denying samba.

49. Although the implementation of national “security” and “protection” often comes at the cost of human life and individual rights, the state can make the need for such measures seem so rooted in common sense that they essentially become an “offer you can't refuse” for the citizenry. See Cavanaugh, *supra* n. 40, at 75 (citing Charles Tilly, *War Making and State Making as Organized Crime*, in *Bringing the State Back In* 170–171 (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., Cambridge U. Press 1985)) (describing the relationship between the state's promulgation of “threats” to security, its promotion of defense, and the costs imposed on the population).

the state gives to it out of fear. For samba has no power of its own, nor does it offer access to power by itself. Its only power, like the Christian paradox it so closely resembles, is in its powerlessness, that is, in its denial of the importance of power in samba.⁵⁰

IV. ONE NOTABLE AND "SYMBOLICALLY DENSE"⁵¹ CONFRONTATION

There have been numerous confrontations between the politics of samba and common sense in Brazil. One time, however, was a time of particularly intense symbolic density,⁵² and because

50. For the Christian version of this paradox, I need to refer you to the entire corpus of work of Stanley Hauerwas. See e.g. Stanley Hauerwas, *Against the Nations: War and Survival in a Liberal Society* (Winston Press 1985) (criticizing and providing a different approach to Christian ethics); Stanley Hauerwas, Richard Bondi & David B. Burrell, *Truthfulness and Tragedy: Further Investigations into Christian Ethics* (U. Notre Dame Press 1977) (compiling numerous essays regarding Christian moral intelligibility). Anyone familiar with Hauerwas's work will know how indebted I am to him in this section of the Article. It is risky business to compare the aesthetic with religion, any religion, but especially with Christianity. The two, however, tend to blend in my own thinking, especially in regards to music, and I have made no real effort in this Article to keep them neatly apart even if such is possible, which I do not think is the case. There are almost as many Christian theologians who would warn us about confusing the two as there are those, starting with Augustine, who find they cannot describe their thoughts about religion without using analogies (or more) to the aesthetic, especially music. For example, Karl Barth, perhaps the most important theologian of our time, thought the eschatology of Christianity could be best understood through the music of Mozart. John Updike, *Foreword*, in Karl Barth, *Wolfgang Amadeus Mozart* 8 (Clarence K. Pott trans., William B. Eerdmans Publ. Co. 1986); see generally Hans Küng, *Mozart: Traces of Transcendence*, (John Bowden trans., William B. Eerdmans Publ. Co. 1991) (discussing several possible understandings of Mozart's music). My strong sympathies are with the latter group except for their unfortunate tendency to treat harmonies, especially Western ones, as if they were essential to all music rather than being a rather late and often limiting development, and their equally unfortunate, also limiting, obsession with high culture—an obsession that renders suspect their claims about the aesthetic. (This is also to say that theologians who do not listen to Brazilian music or go to baseball games, or their cultural equivalents, have missed too much of God's handiwork to have much of value to say about it.) Most of those theologians who warn us about the aesthetic, I think, confuse the institutions of the aesthetic with the aesthetic itself and tend to accept divisions within the aesthetic that are externally imposed upon it. And then there are those theologians, like Hans Urs von Balthasar, who argue that theology itself has lost its samba. See Hans Urs von Balthasar, *The Glory of the Lord* vol. I: *Seeing the Form* 18–20 (Joseph Fessio & John Riches eds., Erasmo Leiva-Merikakis trans., Ignatius Press 1982) (arguing that Christian theology suffers from a lack of "the beautiful"); see also Donoghue, *supra* n. 27, at 52–56 (discussing Balthasar's view on theological aesthetics).

51. The term comes from Dunn, *supra* note 31, at 2.

52. See *infra* nn. 53–55 (discussing general turbulence in Brazil).

it was, this confrontation best reveals the meaning of samba and with it an understanding of the aesthetic.

The following things happened in Brazil in the sixties: an economic boom;⁵³ an economic fall;⁵⁴ and a communistic threat to those who were struggling to keep the property the boom had provided.⁵⁵ This was a time of rich against poor, right against left, children against parents, regions at war, and weapons in the jungle. The truce among the warring divisions of common sense was threatened and the game was at risk. The polity of common sense responded to insecurity as it always does and soon thereafter, in 1964, there was a military and procapitalist coup.⁵⁶ (This was not an unpopular coup—not at all—security is always a very popular thing.⁵⁷) And, early on, this coup was fully supported by the Catholic Church. The “[i]nitial public demonstrations [were] in support of the military [and they] suggested a reaffirmation of facile patriotism, traditional Catholicism, patriarchal family values, and vigorous anticommunism,”⁵⁸ all strongly held common sense values. These values were nicely captured in the most popular bumper sticker of the times—“Brasil: Ame-o ou Deixe-o!” (Brazil: Love it or Leave it!).⁵⁹

But, while popular, it was not without its dissenters, and, for a few years “[t]he [new] regime tolerated [a small] protest culture as long as [its protests were] produced for a limited audience of middle- and upper-class progressives.”⁶⁰ But soon, as the state became more violent, even this was too threatening, and on December 13, 1968, the state instituted Act AI-5, which strictly censored all media, closed the federal Congress and the state and municipal assemblies, suspended political rights of individuals, nullified elected and appointed mandates, dismissed government employees, and suspended the right of habeas corpus in all cases

53. See Dunn, *supra* n. 31, at 163 (discussing Brazil’s economic growth and the problems that this “economic miracle” caused for Brazilian society).

54. *Id.* at 43–44 (discussing the threat of government at the time and the resultant effect on those in power).

55. *Supra* n. 54.

56. *Id.* at 43.

57. *Id.*

58. *Id.*

59. *Id.* at 163.

60. *Id.* at 44.

involving national security as, apparently, all cases did.⁶¹ With this act began five years known as *anos de chumbo*, the “years of lead,” or *o sufocoo*, the “suffocation.”⁶²

A. Samba Speaks!

You really cannot dance to such a leaden rhythm and sing in suffocation, premised as these were on a description of Brazil that denies that it is samba, so samba’s one message started being heard. Its primary voice, this time, was Chico Buarque, appropriately the son of one of Brazil’s most famous historians.⁶³ Among all the young followers of the creators of Bossa Nova, Antonio Carlos Jobim and João Gilberto, it was Chico, singing in a traditional Luso-Brazilian musical form that provided the broad mass appeal, who most had the courage, compassion, and good eye—the qualities of Michael Walzer’s “connected critic”⁶⁴—needed to remind Brazil of its identity in samba. He was called a “protest” singer, but to that he rightfully objected: “Certain circles use this term,” he said, “in order to force me into an outsider’s role.”⁶⁵

Why was Chico the voice of samba and not others? There certainly were others: Caetano Veloso, Gilberto Gil, Tom Zé, Gal Costa, José Carlos Capinam, Torquato Neto, Nara Leão, and the entire countercultural Tropicalia Movement.⁶⁶ But these others

61. *Id.* at 148.

62. *Id.* at 149.

63. Perrone, *supra* n. 20, at 2. For an excellent introduction to Chico’s music, including some English lyrics and very thoughtful analysis, see *id.* at 2–44. Unfortunately, the three best sources for research on Chico Buarque have not been translated, but are as follows: *Chico Buarque do Brasil* (Rinaldo Fernandez ed., Garamond-Biblioteca Nacional 2004); *Chico Buarque: Letra e Música* (Humberto Weneck ed., 3d ed., Brochura 2004); Adélia Bezerra de Meneses, *Desenho Mágico—Poesia e Política em Chico Buarque* (3d ed., Brochura 2002). The Author thanks Mr. Wesley Woolverton for his assistance in reading these Portuguese sources. On the role his father played in samba, see McCann, *supra* note 22, at 7–11 and Vianna, *supra* note 22, at 1–9.

64. See Michael Walzer, *The Company of Critics* xi–x (1st ed., Basic Books 1988) (explaining the concept of the “connected critic,” a critic who speaks from within a tradition, rather than standing outside of it); Michael Walzer, *Interpretation and Social Criticism* 35–66 (Harvard U. Press 1987) (describing the role and effect of social criticism in society).

65. Schreiner, *supra* n. 24, at 161.

66. Gerard Béhague, *Brazilian Musical Values of the 1960s and 1970s: Popular Urban Music from Bossa Nova to Tropicalia*, 14 *J. Pop. Culture* 437, 448 (Dec. 1980). For example, *Sugarcane Fields Forever*, one of Caetano Veloso’s best-known songs of the period, offers a strong moral vision of Brazil, but it is one that for its true effect depended upon an audience of the young who would catch the reference and would then feel themselves as

made of themselves outsiders or willingly accepted the outsider's role. For most Brazilians, it was Chico who was more clearly within the story line of samba: the story of Noel Rosa, of Wilson Batista (with whom Rosa battled, and won, on the issue of what "authentic" means within samba), of the *modinhas* of Eduardo das Neves "The Black Diamond," and yes, of Carmen Miranda, and so forth.⁶⁷ The state, however much it might protest them, is always less concerned with the threat of outsiders. They are a much easier matter for the state. Chico, on the other hand as the state came slowly to understand, could define Brazil. The others offered only the radical dissent of their more romantic contentions.

Now there were also those, often more favored by the youthful elite, who tried to use samba's one message as a direct call to arms and in a direct confrontation with the military authority that now was common sense. There were those as well who saw the use of any tradition, including samba's traditional musical forms, as itself authoritarian. But these were not sambistas. Doing politics as samba is always done on the state's own terms, not samba's. It is, in other words, playing the state's game with the state's equipment. And that is what happened to these singers. They became weapons in the jungle and were made weak by trying to be powerful. There's not much samba in trying to be or, for that matter, in being powerful. Samba as romantic rebellion can be exiled; samba as political force can be executed; samba itself is not so easily controlled for samba is Brazil. And Chico spoke for samba.

After the state censorship of his play, *Roda Viva*,⁶⁸ and the persistent persecution that followed, and not yet knowing his own role, Chico entered a self-imposed exile to the samba desert of

much a part of the world as of Brazil. Dunn, *supra* n. 31, at 169. Like all liberal claims, the song offers its morals at the price of stripping the moral agent of his or her particular identities. Such was not going to be persuasive for those whose totalitarian inclinations were prompted by a fear of change, a fear of loss.

67. Béhague, *supra* n. 66, at 447; Dunn, *supra* n. 31, at 192. It was Noel Rosa, known as "The Philosopher of Samba," who was Chico's clearest predecessor and whose "wit, wisdom, [and] contemplative character" prepared the audience of samba to accept Chico's intellectual abilities. Perrone, *supra* n. 20, at xviii; Schreiner, *supra* n. 24, at 159. The history of samba can get quite complex, so for an excellent telling of what might be called its intellectual history, see McCann, *supra* note 22, at ch. 2. For a version focusing more on musical form, see Schreiner, *supra* note 24, at ch. 4 (discussing samba's origination and life with the developments of new artists).

68. For a discussion of this event, see Dunn, *supra* note 31, at 81–83.

European culture in 1969 for protection and self-reflection.⁶⁹ In 1970, with samba in disarray, he returned to Brazil and announced his role as the voice of samba in a song he had written in exile, *Apesar de Você (In Spite of You)*.⁷⁰ Newspapers at the time featured pictures of well-armed troops gathered in the streets, of the multicolored marchers the troops were gathered to control—and those marchers, typically, would be singing *Apesar*. What follows are the most essential lyrics in translation:

. . . My people today are
Cautious with their words
And, looking at the ground, see
You who invented this state
And invented it to invent
All this darkness
You who invented sin
Forgot to invent
Forgiveness. . . .

. . . In spite of you
Tomorrow has to be
Another day.
I ask you
Where will you hide
In the enormous euphoria?
How will you stop it
When the cock insists
On crowing?

. . . In spite of you
Tomorrow has to be
Another day⁷¹

69. Perrone, *supra* n. 20, at 3.

70. Buarque, *Apesar de Você*, *supra* n. 19. Please listen to this online at <http://www.youtube.com/watch?v=F56JFFEh0v8> (posted Aug. 22, 2006).

71. *Id.* The lyrics to *Apesar de Você* were translated to English by the Author, with the assistance of Dr. Claudia Ribeiro Pereira Nunes and Mr. Wesley Woolverton. See also Sabrina Lastman, *Revaluation of Samba in Chico Buarque's Critic Song*, 1 *Lang. & Literature* 82, 89–91 (Vol. 1, No. 1, 2006) (offering a slightly different translation of *Apesar de Você*). The phrase “forgot to invent forgiveness” is central to the meaning, I believe. The state, by itself, cannot be a community of forgiveness. It cannot step outside of itself to see itself in the way that forgiveness requires. Its attempts to do so, and to speak beyond itself as samba does, are only pretense serving the state’s purposes. For forgiveness then, the

Chico got this song by the censors, at least initially, by describing it as a song about a very authoritarian girlfriend.⁷² The song is a clear announcement that the battle the state is now fighting is not with communism; it is with samba, and that this state, the one that would do battle with samba, is the state's own invention. But it is not Brazil. The threat the song offers against this invented state is the threat of samba's different eschatology.⁷³ It is the threat of a "euphoria"; and in typical samba fashion, this euphoria, this impossible future, is enacted and made present in the song itself. "How will you muffle our chorus singing right in front of you?"—the song asks as the unmuffled chorus then sings right in front of everyone.⁷⁴

In its musical form, especially in its percussive instrumentation, the song is close to traditional samba.⁷⁵ It would be readily identifiable by Brazilians as the music of all Brazil. It is the music of the marchers *and* of those whose cars bore the bumper sticker "Brasil: Ame-o ou Deixe-o"⁷⁶ and not something from which the owners of those cars could readily distance themselves.

state would require recognition of another polity. If the Brazilian state tried to "invent forgiveness" it would have had to recognize its own limitations in a manner that would have challenged the very claims it was then making.

72. Kirsten Weinoldt, *Chico Lives*, *Brazzil Mag.* ¶¶ 12–13 (Mar. 1999), <http://www.brazzil.com/cvrmr99.htm>.

73. The eschatology upon which the state rests its claims is found in an ontology of violence that samba, of course, denies. In another song, *Bom Conselho* [*Good Advice*], released not long before *Apesar de Você*, Chico also set samba clearly at odds with common sense. Chico Buarque & Caetano Veloso, *Bom Conselho*, in *Caetano e Chico: Ao Vivo na Bahia* (Polygram Brazil 1972) (CD). The "good advice" of the song is a series of reversals of common sense bromides or admonitions, such as "play with my fire" or "leap before you look." *Id.* Since "common sense" no longer recognized samba, it could no longer be honest, good or true and, therefore, the meaning of its bromides had to be disturbed sufficiently to free perceptions for samba to be seen.

74. Buarque, *Apesar de Você*, *supra* n. 19. Compare this, if you will, with the protest song *We Shall Overcome*, which sounds in comparison like a dirge, full of direful resolve, and nothing like something you would sing if you really believed your own words. In *Apesar de Você*, those who invented the state are overcome in the singing itself. *Id.* Although the operative word of *We Shall Overcome* is "shall," its feeling is not forward looking at all. Instead, it draws upon a sadness, a soulfulness, a yearning for a missing past, a *duende* perhaps, to deliver its message to common sense. It is more *fado* than samba. The differences here, however—differences between two cultures by which we could come to know much more about what the aesthetic means—are quite complex and would take us too far afield.

75. See Schreiner, *supra* n. 24, at 69–71 (analyzing the history and development of drums that serve as an integral part of samba).

76. *Supra* n. 59 and accompanying text.

For they, as they well knew, lived as well within the polity of samba and it too was the Brazil they loved. Nothing, of course, could have been more threatening to the state than this reminder that its own citizens were also (and always) beyond its control.

B. . . . And Samba Is Censored

After the release of *Apesar de Voce*, the state quickly closed down the plants that manufactured the record, confiscated all the remaining records, and required that all songs would have to be submitted to the *Serviço de Censura Federal* (“Federal Censorship Service”) for approval prior to their manufacture.⁷⁷ From this point on only one of every three songs Chico submitted would make it through the censors, and once, he submitted twenty papers only to get two approved.⁷⁸ But no matter; you cannot really censor samba, for samba is a form of speech that can, as all speech can, recreate its message in other forms, and this is what Chico did. It was a very samba thing to do, of course. One of those characters that samba celebrates in its own ethics is the *malandro*, or trickster, who, like samba, rejects all force and lives only by his wit.⁷⁹ This is the character Chico assumed in his battle with censors. His songs became puzzles for the public to see if they could discover how he had successfully and cleverly disguised, yet again, samba’s one message. The role the state had imposed on him, then, increased his association with samba in the public eye. For malandros in samba are “not merely colorful characters, they are the performers and guardians of the essence of popular culture in its purest form.”⁸⁰ The malandro is a character who can also “mediate between [the] *cidade* (city) [and the] *morro* (country)”⁸¹ and, because he can, he is the preeminent mythical

77. Dunn, *supra* n. 31, at 161–162.

78. *Id.* at 162.

79. The wisdom of the *malandro* is joyous, mocking, and, unlike Nietzsche’s version of the same idea, nonviolent. The *malandro* does not see the rule of force as the alternative to the rule of reason but, instead, sees reason as providing its own (playful) limitation and, therefore, when understood as samba, always also pointing beyond itself. The role of the intellectual *malandro*, which Chico filled, had won samba acceptability through Noel Rosa’s polemic battle with Wilson Batista in the 1930s over the meaning of the “authentic” in samba. McCann, *supra* n. 22, at 52–58.

80. *Id.* at 53.

81. *Id.* at 54 (emphasis added).

mouthpiece of all Brazil. Rather than reducing Chico's authority, the state had unwittingly and dramatically increased it.

V. CÁLICE⁸²

It was from this position of an authority bestowed upon him by the state, that this malandro most clearly expressed samba's one message for these times in a song he wrote with Gilberto Gil and performed with Milton Nascimento: *Cálice*.⁸³ *Cálice* is a song about the unique samba of speech.⁸⁴

The song starts with a liturgical chorus that asks us to listen to what follows liturgically. What we hear next would be, for most of its intended audience (and remembering that Brazil has the largest Catholic population in the world and is the home of hundreds of syncretic religions that include elements of Catholicism), the central text of the New Testament. These are the words from the Gospels of Matthew, Mark, and Luke, at the beginning of Christ's prayer at Gethsemane before his arrest: "Father, . . . take this cup [*cálice* in Portuguese] from me."⁸⁵ Surely every Catholic, and probably every Brazilian, would know what followed in the Biblical text: "Yet not my will, but yours be done."⁸⁶ This is the moment in which Christ, dreading his crucifixion and the silencing of his political announcement of the Kingdom, nevertheless willingly accepts his own death as an act of faith and, in that acceptance, creates the Kingdom He had announced.⁸⁷ It is an act of

82. Parts of the following describing typical audience reactions in Brazil are common knowledge according to my discussions with my Brazilian colleagues.

83. Buarque & Nascimento, *Cálice*, *supra* n. 19. You can watch the video at <http://www.youtube.com/watch?v=QQdj6Yr6rHg> (posted July 15, 2007).

84. As you will see in the text that follows, *Cálice* offers a very complex and, I believe, primarily theological argument about the harms done when speech is suppressed. I want to insist, however, that these arguments are reducible to samba's one message which, in this case, is that speech is not true, honest, or good without samba. The exegesis of *Cálice* I offer in the text is an example of how this one message takes on meanings that come from outside the polity of samba. It shows, then, how speech works at the intersection of the polities.

85. Luke 22:42 (New Intl.); Mark 14:36 (New Intl.) (translated as "*Abba*, Father, Take this cup from me"); Matthew 26:39 (New Intl.) (translated as "My Father, . . . may this cup be taken from me.").

86. Luke 22:42 (New Intl.); Mark 14:36 (New Intl.) (translated as "Yet not what I will, but what you will"); Matthew 26:39 (New Intl.) (translated as "Yet not as I will, but as you will.").

87. Buarque & Nascimento, *Cálice*, *supra* n. 19.

nonviolent resistance, then, and a trusting in a different form of security that makes sense only in the polity His trusting created.

The word *cálice*, however, is also the Portuguese word used for the chalice of the Mass. For many in the audience this is also how they would hear this word. It is a hearing reinforced by the setting of the prayer; for any good Catholic would remember that the disciples, most especially Peter, who would create the Church in which “chalice” becomes a symbol of the salvation bought by Christ’s faithful act, were sleeping when they were asked to be on guard. Three times Christ left them to pray the same prayer and three times they failed him. This understanding of the word *cálice*, as well as the shift from the prior understanding (for the cup that Christ is accepting is the cup of His own blood), would be further reinforced by what follows after the thrice repeated opening words of the chorus: “This cup of wine red with blood.”⁸⁸

A purely liturgical interpretation of the song, however, is immediately shaken by the verses that follow. When we hear “wine and blood,” our liturgical expectation is that “bread and body” will follow, and instead, in the verses we are given the speech—the melody, the rhythm, and the cadences are those of resignation—of a man who is disintegrating before us because he has been silenced. Each of the elements that made him human—his voice, his heart, and his mind—are sealed one by one through the verses,⁸⁹ and he ends:

It is so difficult, Father, to open the door
The words caught in my throat
This Homeric spree upon the earth
What good will good will do

88. *Id.*

89. For this reading of the verses, I am indebted to Bezerra de Meneses, *supra* n. 63, at 91–98. In one of the verses, Chico has the unidentified man (no gender is given, but I cannot honestly refer to the speaker as a “speaker” or as a “voice” or as a “person” without doing damage to the song, so I use “man” here in the sense of “everyman”) describe himself as “[s]enseless yet still watchful for the lake monster to emerge in the grandstand at any moment.” *Id.* at 93; Buarque & Nascimento, *Cálice*, *supra* n. 19. When asked about this, Chico said that for his generation, the silencing was thought of as temporary, as an anomaly, but for those raised in it, he feared, it was a monster that was always there and, because it was, they became self-censors, destroying their own humanity. For such is the effect of living in fear.

Though my heart is sealed, there are still
The heads of the drunks downtown⁹⁰

In a delusional and robotic state, smelling diesel fumes, incapable of distinguishing his own existence from others, and wishing for any self if only “to invent his own sins” or “die from his own poison,” he despairs:

Perhaps the world is not so small
Nor life a consummated fact
I want to invent my own sins
I want to die from my own poison
I want to lose once and for all your head
My head to lose your judgment
I want to sniff diesel fumes
Get drunk until someone forgets me.⁹¹

Why *this* desperation? As the song progresses, we learn the answer. Throughout the song, and in the original Portuguese, the “side sounds” of speech, the “c” and “s” sounds, are often used and mixed together.⁹² Two-thirds of the way through the song, where we would expect to hear again a liturgical chorus, we hear instead a pseudo-military one. At this point, if not before, we can now hear the third meaning of the word, *cálice*. *Cálice* in Brazilian Portuguese is also a homonym for the two words *cale se*, in which

90. *Id.* The lyrics to *Cálice* were translated to English by the Author, with the assistance of Dr. Claudia Ribeiro Pereira Nunes and Mr. Wesley Woolverton.

91. *Id.* Notice that in the lyrics the man becomes interchangeable with anyone else: “I want to lose once and for all your head; my head to lose your judgment.” *Id.* This is the self the state wishes to impose upon us, the song implies; the state wishes, that is, to force us to invent selves that are indistinguishable.

92. *Id.* The three ways of pronouncing the letter “c” in Brazilian Portuguese are as follows: a “hard c” like the “k” in “king”; a “soft c” like the “s” in “sing”; and a “soft c” preceding the vowels a, o, or u, which is written as “ç.” The Berlitz Schools of Languages, Robert Strumpfen-Darrie & Charles F. Berlitz, *The Berlitz Self-Teacher: Portuguese* vii (Grosset & Dunlap 1953). These side sounds are sometimes called the “wind” of speech or the “whistle” of the human voice, and are part of its musicality like the squeak of fingers on guitar strings. Richard Arthur Surtees Paget & John Rae, *Human Speech: Some Observations, Experiments and Conclusions as to the Nature Origin, Purpose and Possible Improvement of Human Speech* 97 (Routledge 1999) (stating that “[c]onsidered as a musical instrument, the human voice is really a little orchestra of wind instruments . . . we hear [‘whistle notes’] as a breathed or whispered vowel.”). And, thus, using the letters that produce these side sounds to produce the change in meaning reinforces the song’s message about the aesthetic nature of speech.

the “c” now become an “s.” In English, *cale se* means “shut up!” As the song goes on from the military interlude, this particular meaning of the word becomes clearer and clearer until we can hear only the words *cale se* or “shut up” as they are shouted against the imagined speakers of the chorus, the speaker of the verses, and the song itself.

Through the logic of its imagery, the song has moved the listener’s association from Christ and “cup,” to the Church in failure and “chalice,” and then to the mob and “shut up.” If you wanted to join the chorus at the beginning—in the second chorus the two singers sing together—you are turned against yourself by the end of the song when the two singers are together again in shouting *cale se*. And you too, have silenced and, therefore, condemned the man of the verses, a man who is also you, to his fate.

The message here is subtle but unmistakable. It is a startling and critical reminder to Brazilians of who they are, of a fullness of their identity not formed in or by the state, of a way of resisting a loss of this identity that is not violent, of a security the state cannot provide, of a polity beyond it, of a duty to speak as a gift to the world in which we are “the speaking part,”⁹³ and, in all this, of samba.⁹⁴ Samba’s one message about speech, that it—and, therefore, we—cannot be honest, true, or good without samba, is delivered in a samba that, by speaking indirectly and beyond itself, does that which the state sought to deny. In forgetting that this, too, is who you are, says the song, you are responsible for your own silencing. You can blame yourself for the desperate need to recreate a robotic self out of what has been left to you by the state. You are resigned to the disintegration of your own authentic humanity for you have no samba.

This understanding of speech is an ancient one and usually expressed in religious form as it is in *Cálice*. For that is the form we use when we want to reaffirm the ineffability of our own identity, the transcendence, the “real presence,” of our being that

93. Nicholas Lash, *Holiness, Speech, and Silence: Reflections on the Question of God* 57 (Ashgate Publ. 2004). This is, Lash says, our “response-ability.” *Id.*

94. “Thus the experience of art does not just allow us to escape from the pain of reality, like a drug, but occasions a joyful affirmation of our identity with reality that cannot readily be obtained anywhere else.” Guyer, *supra* n. 38, at 287 (commenting upon the view of Arthur Schopenhauer, *The World as Will and Representation* vol. I (E.F.J. Payne trans., Falcon Wing’s Press 1958)).

makes us fully human. It is an understanding that sees in speech, as the Greeks saw in music, the possibility of our meeting place with the divine. It is wrong, in the final (and Augustinian) analysis, Chico says, for the state to use speech for its purposes because our speech does not belong just to us.

If you listen to this song, you will notice that its brutal message, and even the squalid dehumanizing of the person in the verses, is done with extraordinary beauty, for such is samba.⁹⁵ Samba's one message here is in a form that many in Brazil, perhaps the majority, would have hated, although it may be hard for us to understand why this is so from our current perspective. (From the perspective of our recent past—remembering that the United States supported the military revolution in Brazil—such hatred would not be hard to understand.) Imagine, however, a message to liberals opposed to the war in Iraq that you are responsible for that war. Your own liberalism has denied you any form of security other than what the state can provide through its monopoly on force, and it is you who has made common sense of this monopoly. Or, if you prefer, imagine Catholics being told that your denial of contingency in misapplications of what you call natural law lead, however unwillingly, to the communal judgments that encourage abortions, offer support for the death penalty, for the loss of compassion, and for all that you hate. And imagine these messages being delivered with extraordinary beauty and appeal and hummed in the streets of our cities. Imagine then, a samba, a *Cálice*, for our time.

VI. THE AESTHETICS OF SPEECH

All of this, I should hasten to remind you, has been but a necessary prelude for exploring an aesthetic justification of our protection of speech. Stanley Fish, you will remember, objected to the courts' protecting speech as a matter of principle. The justifications offered, he said, are all reducible in application to a choice between warring political policies that are not principled at all. This, we noted, is not true if speech is aesthetically justified and,

95. This is to say that anything can be "the object of a beautiful *representation* in art," and not that any object can be beautiful. Guyer, *supra* n. 38, at 88 n. 26 (emphasis in original).

to this point, we have been exploring what the “aesthetic” is. In Brazil, we found an example of the aesthetic in the polity of samba. The aesthetic then is a particular way of life or, better said, a particular way of imagining life, or, returning to the word’s original Greek sense, a perspective on life that is always there along with the other ways in which we may live, imagine, and perceive our lives.

Speech, expressive speech, as we heard in *Cálice*, is constitutive of our humanity.⁹⁶ But this claim is nothing more than the one message of samba, or, if you are with me now, the aesthetic, that nothing can be good, honest, or true without it. *Expressive speech, then, and with it authentic humanity, is always grounded, in part, in the ongoing possibilities of the aesthetic.*⁹⁷ What you

96. It is perhaps good at this point to remember that the root word for “you” in Portuguese (and in Italian) is the same as the root word for “voice.” *Portuguese–English, English–Portuguese Dictionary* 404, 421 (Hippocrene Bks., Inc. 1987); Piero Rebora, Francis M. Guercio & Arthur L. Hayward, *Cassell’s Italian Dictionary* 1064, 1079 (MacMillan Publ. Co., Inc. 1977). It is, therefore, very difficult for Brazilians (or Italians) not to think that your voice is you.

97. I hope it is clear that this is not a grounding of a justification for the protection of speech in human dignity, in individuality, and certainly not in the instrumental good of autonomy. None of these, I believe, can adequately account for the unique value of speech in comparison with other conduct and, thus, cannot serve adequately as justifications for its protection. They are all consequential in the way that I am trying to avoid with a self-justifying activity as our justification. Nor is it a grounding in self-fulfillment except to the extent that by this term we mean a claim about what is authentically human, i.e., what we are when we are at our most truthful. I am aware that in the text I have claimed that the aesthetic includes the transcendent, which is to say that I have offered a theological understanding of it. The move I make is this: expressive speech, grounded as it is in the ongoing possibilities of the aesthetic, relates us to that part of ourselves which is not ours. Any attempt to describe that which is “not ours” in this sense requires that we use language that points beyond us as the aesthetic does, and, when we try to identify this pointing we find, if we are careful about it, theology to be there. I am, therefore, still trying only to offer a way of understanding what we mean by the aesthetic. It is just that, on this understanding of it, I know of no language other than the theological to use. So, with George Steiner, I too believe that “human speech declares its origins in transcendent dialogue.” George Steiner, *Grammars of Creation* 34 (Yale U. Press 2001). Or, with Lash, that speech’s fundamental form is prayer. Lash, *supra* n. 93, at 64. It is not by coincidence that both Steiner and Lash start the analyses that lead them to these conclusions with music: “I believe,” says Steiner, “the matter of music to be central to that of the meanings of man . . .” George Steiner, *Real Presences* 6 (U. Chi. Press 1989). Or, as Lash put it: “The world makes music before we do, and the music that we make is, as it were, an articulation of the music of the world, a giving *voice* to things. In the music that we make, the truth of things (if we make music well) sings, and celebrates, and weeps.” Lash, *supra* n. 93, at 58. And this is where I have started in the text. It is then music that permits us to see most clearly the aesthetic element of speech and it is this element that permits us to see the transcendence upon which true speech depends.

have when speech is censored can no longer be speech because it is speech that does not come from its truthful source. Silencing speech, then, disorders our lives because our lives are samba; our lives, whatever else we might say they are, are also aesthetic. It is not all our lives are, but, whatever they also are, our lives are always and already aesthetic.

Because we tend to think of most speech as only in the polity of common sense, our Brazilian example is also there to help us to see speech's aesthetic nature by displaying political speech, the paradigm of protected speech in the polity of common sense, in its most aesthetic form as music. To see speech as only within the polity of common sense, as only content, as only offering propositions, facts and opinions, or "ideas" in a market place, for example, is as wrong as it is corrupting. The divisions between ordinary speech and music are never certain (each polity can make its own claims about this) nor are the divisions between ordinary speech and any poesis. I hope that by now this description of speech rings true to you, but, if not, think of the common origin of speech and music in rhythm⁹⁸ and rhythm's origin in the pulmonic mechanisms by which we speak.⁹⁹ Or, if you are more experientially inclined, listen to any speech,¹⁰⁰ especially the excited speech of youth (in which the desire to express one's self to others is strongest and clearest), and hear in its performance the rhythmic pattern, the word choice, the intentional use of ambiguity and of metaphor, the use of intonation, of emphasis, of inflection, of music word coloring in reverse, of alliteration, of rhyme, of percussion (especially for emphasis), of meter, of the extending or shortening of the length of each sound for effect, of melisma, of

98. E.g. Steven Mithen, *The Singing Neanderthals: The Origin of Music, Language, Mind and Body* 23–25 (Harvard U. Press 2006); Ann Wennerstrom, *The Music of Everyday Speech: Prosody and Discourse Analysis* 46–60 (Oxford U. Press 2001) (arguing that rhythm serves as the foundation for creating the hierarchy of stress patterns in our voices, and that these stress patterns allow us to add an emotional component to the communication of information).

99. *The Oxford Companion to the English Language* 869 (Thomas McArthur ed., Oxford U. Press 1992) (citing David Abercrombie, *Elements of General Phonetics* 36 (Aldine Publ. Co. 1967)) (stating that rhythm originates in the lungs as air pulsations).

100. For an attempt to integrate speech, music, and sound as an aid to listening to speech as music, see Theo Van Leeuwen, *Speech, Music, Sound* (St. Martin's Press 1999). It is, as our former Poet Laureate Robert Pinsky puts it, "almost as if we sing to one another all day." Robert Pinsky, *The Sounds of Poetry: A Brief Guide* 3 (Farrar, Straus & Giroux 1998).

cadence, and of coda, and think, then, of any laughter or any crying accompanying the speech as, often enough, in the role of the Brazilian *cuica*, the unusual melodic percussive instrument, probably African in origin, that produces those strange squeaking sounds you will often hear in Brazilian sambas. These components of ordinary speech are not themselves its aesthetic. They are, instead, evidence of its aesthetic nature; the ever-present possibilities of the aesthetic there in all speech.¹⁰¹

It is now time to make explicit what has been implicit thus far and remarked only in a footnote or two. Speech is always at the boundary between the polity of samba and the polity of common sense or, again if you are with me, the aesthetic and the instrumental. *Being always at the boundary is what is unique about expressive speech in comparison with other human activities and why it is so constitutive of our humanity.* In expressive speech, we are at our most human because we are closer to this boundary between the polities in which we live our lives than with any of the other activities that constitute those lives.¹⁰²

101. Among poets, for whom this is all rather standard fare, Federico García Lorca offers a very good example of the use of ordinary speech, especially within his “Gypsy Songs,” purely for its aesthetics, and his life—one in which his one poetic message was translated by the state as political and for which he was assassinated (the well-chosen term used in Granada to describe his murder)—offers another good example of a symbolically dense confrontation between the polities. See Arturo Barea, *Lorca: The Poet and His People* (Ilsa Barea trans., Harcourt Brace & Co. 1973) (concentrating on Lorca’s poetic life); Ian Gibson, *Federico García Lorca: A Life* (1st Am. ed., Pantheon 1989) (summarizing the life of Lorca from his childhood to his death).

102. I do not mean that speech is unique because it has an aesthetic potential. All activities have an aesthetic potential, for such is the nature of samba. I mean that speech’s position as an activity in regards to its aesthetic nature is unique among all activities. It is this uniqueness that allows us to single out speech for special protection and yet still explain the extraordinary coverage of this protection. Of course, speech is not only at the boundary between these polities, as I have described it, but is also at the boundary between body, language, and thought, at the boundary between subject and “the Other,” and so forth. See Mladen Dolar, *A Voice and Nothing More* 72–74, 102–103 (MIT Press 2006) (explaining that while language and the body share the voice as a common element, “the voice is part neither of language nor of the body”). It is being at the boundary that makes it unique. “So again we find the ambiguous ontology—or, rather, topology—of the status of the voice as ‘between the two,’ placed precisely at the curious intersection [of ‘the subject’ and ‘the Other’].” *Id.* at 102. I know I have not said enough here to convince anyone of the claim made in the text and that this claim is central to an aesthetic justification’s coherence. To say enough, however, would require another article. Here, the best I can do is to try to adequately introduce the idea and, I hope, give it enough traction to go forward. In that other article, part of the claim will be that “[i]n [any] speaking and in writing something mad occurs: the true conversation is a pure play of words.” Roberto Calasso, *Literature and the Gods* 178 (Tim Parks trans., Alfred A. Knopf 2001) (citing Novalis, *Monolog*,

There is nothing new in this realization. We can see generalizations from it, variations on it, or reactions against it, if we want, in Plato's concerns with poesis,¹⁰³ Kant's matching of human freedom to nature in aesthetics,¹⁰⁴ Arthur Schopenhauer's reflection of true will in music,¹⁰⁵ Friedrich Nietzsche's justification of our lives in the aesthetic,¹⁰⁶ Martin Heidegger's poetic dwelling on earth as mortals,¹⁰⁷ and in the thought of every philosopher who has ever discovered in his or her writing a dance to a silent samba, or, for Christians, in the parables of Christ that make little sense without their samba. Our protection of speech, then, is an act of *hospitality* towards our very real selves. It need not be anything else or serve us in some other fashion.

VII. JUSTICE HOLMES FAINTLY HEARS, AND JUDGE
HAND STARTS TO DANCE, THE SAMBA

Remember with me now that Fish's complaint is not abstract. It is not theory. It is not even philosophical. It is about something that judges are doing now. So we are not considering something esoteric or exotic here. If United States judges protecting speech are acting on principle in the way Fish finds objectionable, and if, as I have suggested, this has something to do with a recognition of speech's aesthetic nature, then we should be able to examine the sources of this principled protection and find hints of samba there.¹⁰⁸ To do this, we will need to start, as everyone does, with Justice Oliver Wendell Holmes and Judge Learned Hand.

in *Schriften* vol. 2, 672–673 (Suhrkamp 2005)).

103. *E.g.* Plato, *The Republic* Book III, X (Allan Bloom ed. & trans., Basic Bks. 1968).

104. *E.g.* Kant, *supra* n. 42.

105. *E.g.* Arthur Schopenhauer, *The World as Will and Representation* vol. 1, § 52 (E.F.J. Payne trans., Dover Publications, Inc. 1969).

106. *E.g.* Friedrich Nietzsche, *The Birth of Tragedy from the Spirit of Music* (Francis Golffing trans., Doubleday & Co., Inc. 1956).

107. *E.g.* Martin Heidegger, "... *Poetically Man Dwells . . .*", in *Poetry, Language, Thought* 211–227 (Albert Hofstadter trans., Harper & Row 1971). This is a collection, done with Heidegger's approval, of his writings on aesthetics.

108. There is a phenomenon, noted as well by Fish, that I would like to document here, but space and time do not permit. When United States judges offer an explanation for why they are protecting some speech they say they hate and that we should as well, they often say that if they do not protect this hateful speech, then Shakespeare (or Milton, or Joyce, or—more convincingly in this context—Rushdie) are at risk. As Fish notes, however, this is a rather strange trope (it is difficult to describe it as an argument), for surely the judge is not saying that he or she cannot distinguish the speech in question in the case from

Justice Holmes, I am sure, you know well. It is Justice Holmes from whom we get, eventually, the principle to which Fish objects. It is also from Justice Holmes, however, that we get the understanding of this principle that prompts Fish's objection. For it is Justice Holmes, the pragmatist, who insists that there is an inferential answer to the question "What is free speech for?" that will provide a justification for the principle, and, in doing so, it is Justice Holmes who produces the warring twins of political policy that are its only possible answer.¹⁰⁹ In this way, then, we can see Fish's critique as a completion of Justice Holmes's own thinking. Justice Holmes, from the grave, might be relieved by this, but then again he might not.

It is fair to say, I think, that Justice Holmes's own thinking about freedom of speech never fully matured. He shifted from an initial liberty-based justification for the protection of speech to a democratic-based justification because liberty-based justifications could not adequately distinguish speech from other liberties, primarily and especially troubling for Justice Holmes, economic ones.¹¹⁰ And he was never satisfied with any of his articulations of a democratic-based justification. Justice Holmes often said that he did not believe his own theory of free speech, "which did not

Shakespeare and the distinction would not just be a matter of taste nor would it necessarily be a distinction that the law is not capable of taking into consideration. Fish, *Trouble*, *supra* n. 2, at 87–88. So the judges who use this trope must mean something else by it or, if Fish is right, this trope is just evidence of the knee-jerk and thoughtless reaction called "principle." I am sure you can see where I am going with this. The judges who use this trope really do seem to be aware of the aesthetic component there in the hateful speech, as it is there in all speech, and it is that, and little else, that prompts what appears to be a very personal judicial reluctance to suppression of speech. This is, once again, not to say that this recognition of the aesthetic component of speech means that all speech is entitled to legally enforced protection. More on this later in the text. It is to say that perhaps these judges, in the way in which they describe their reluctance, are on to something.

109. See generally e.g. G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford U. Press 1993) (analyzing Justice Holmes's free speech jurisprudence). Writes White, "legal doctrine was thus ultimately based on 'the very considerations which the courts most rarely mention . . . considerations of what is expedient for the community concerned.'" *Id.* at 139 (quoting Justice Oliver Wendell Holmes). Additionally, "every important principle that was developed in the common law, [Justice Holmes] believed, 'is in fact and at bottom the result of more or less definitely understood view of public policy.'" *Id.* Later in life, according to White, Justice Holmes abandoned his positivistic judicial philosophy *only* in regards to speech issues. *Id.* at 448.

110. See *id.* at 440–443 (contrasting Justice Holmes's liberty-based justification of free speech in a series of cases dealing with teaching foreign languages in public schools with Justice Holmes's general reluctance to expand economic freedoms).

mean he believed in something opposed to it,” but “little as [he] believe[d] in it as theory [he] hope[d] [he] would die for it.”¹¹¹ There was clearly something here that Justice Holmes did not fully understand. His own treatment of speech, in fact, is often seen as an anomaly in an otherwise more consistent jurisprudence.¹¹² In writing about speech, he moved from sources that were not typical for him and went off on more obvious rhetorical sprees as if this issue required freedom from the constraints that he normally imposed on his own speech.

Justice Holmes’s starting point, of course, was not in freedom at all, but in the view that speech was just as subject to the restrictions of the sovereign as any other conduct. From that starting point, what Justice Holmes had to find was some purpose of the sovereign well served by giving greater freedom to speech than to any other conduct that could be balanced against the consequences to the state from harmful or threatening speech. There is, behind this conception of the question, an image of the state as all there is. In it even the “market place of ideas” is not to be protected for any purpose that is not also a purpose of the state. The state then—which in Justice Holmes’s conception is also claiming to be all there is in the one polity of common sense—is to be restrained in its regulation of speech. Such restraint, however, can only be for the state’s own purposes as those are interpreted by it on and in its own terms. In our terms, common sense is to be restrained, but by what? By common sense, of course, because there is nothing else.

A state, however, that is limited only by its own purposes is ultimately not limited at all, and this, in essence, is what Fish is telling us—and why, he says, claims of principle in these matters are reducible to the political.¹¹³ It is little wonder then that Justice Holmes’s own approach, viewed over time, showed little consistency between each attempted articulation of a justification. Each one, for Justice Holmes, became inadequate to the task and, at the end of his career, he was left only with a vague but certain

111. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 203 n. 279 (2004) (citing Ltr. from Justice Oliver Wendell Holmes to Harold Laski (Oct. 26, 1919)).

112. For a discussion of whether this is an anomaly or if, instead, the difference reveals a deeper understanding of Justice Holmes, one in which he is primarily a judicial rhetorician little concerned with consistency, see White, *supra* note 109, at 412–454.

113. Fish, *Trouble*, *supra* n. 2, at 93–94, 147–149.

intuition that something important was going on, something well worth defending. Something, he said, that would have required him to explore the “unconscious’ dimensions of policy formulation.”¹¹⁴

For Judge Hand, the question was not the same at all. Judge Hand, you will remember from reading *Masses Publishing Co. v. Patten*,¹¹⁵ is surprisingly uninterested in examining the consequences of harmful speech.¹¹⁶ Instead, Judge Hand believed that speech is to be judged as to its form. Direct speech that threatens harm is not to be protected; indirect speech that threatens harm is.¹¹⁷ Now, and this I think is central here, there is no necessary correlation between the directness of speech and either its potential for harm or the harmful intent with which it is spoken. Indirect speech—speech, that is, that depends upon the audience’s acceptance of some unstated inference—can be just as threatening and just as maliciously offered as direct speech. Why, then, would Judge Hand, practical man that he was and strongly opposed to the speech he permitted in *Masses* as he also was,¹¹⁸ think that the form of the speech not only mattered, but could be *all* that mattered in determining the extent to which it was to be protected? Of course, as others have often noted, the role of the judge in Judge Hand’s test of directness is a linguistic task more appropriate for the limited role of the judiciary that was Judge Hand’s lifelong cause. It is also one that judges are better trained to do. This observation, however, is not sufficient to answer the question, because there are a variety of approaches of which the same could be said and each of these approaches would offer a different degree of protection for speech. Why would Judge Hand offer such extraordinary protection, only to have that protection turn on the form of the speech? And why offer this extraordinary protection *only* to speech? For Judge Hand’s principled protection

114. White, *supra* n. 109, at 153.

115. 244 F. 535 (S.D.N.Y. 1917), *rev.* 246 F. 24 (2d Cir. 1917).

116. *See id.* at 539 (concluding that the “virulent attack” set forth by the speech at issue, and the possible harmful effects of that speech, are “beside the question of whether such an attack is a willfully false statement”).

117. *Id.* at 540.

118. Gerald Gunther, *Learned Hand: The Man and The Judge* 154 (Alfred A. Knopf 1994) [hereinafter Gunther, *Learned Hand*]. For a more detailed analysis of *Masses* by Professor Gunther, see Gerald Gunther, *Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719 (1975).

of speech is as an anomaly in his jurisprudence of deference to legislative action.¹¹⁹ And finally, why, if protection is to turn on the form of the speech, was indirection his sole criterion of form?

In Judge Hand's analysis, we need not ask "What is speech for?" There is instead something unquestioned that is already of value in speech. This is not something to be discovered or invented, as it was for Justice Holmes, but something to be expressed. And this something was, in some fashion perhaps not clear to him, related to form and form to indirection. In order for this to be true, however, and in order to understand Judge Hand, I think it is necessary to see that for him the polity in which the state resides cannot be all there is.¹²⁰ Judge Hand's conception of speech places it, including threatening political speech, within a conversation somewhere outside of any conversation of the state although not only outside of that conversation. In Judge Hand, then, there is a subtle recognition of the different polities of speech. It is a recognition that, if pursued, would lead beyond Holmes' impasse. What Judge Hand seems to be implying in *Masses* is that the justification for protecting speech is to be found somewhere outside of what we have called the polity of common sense.¹²¹

119. Gunther, *Learned Hand*, *supra* n. 118, at 658. As Judge Hand said in a letter, "I had rather lose any right but that of the right to talk, 'the most important,' as well as 'probably the most dangerous, of all rights.'" *Id.* at 281.

120. There is more to the difference here between Justice Holmes and Judge Hand than this, of course. One very broad way of describing the difference, in later terms, is that while Justice Holmes understood that discourses of truth are "incommensurable language games," it was Judge Hand who saw that this insight "does not ineluctably impose upon us the conclusion that the ultimate, over-arching game is the play of force, fate[,] and chance." Milbank, *supra* n. 32, at 279. For Justice Holmes, "we" are a world of competing interests above which we can never arise and what is crucial in such a world is to play the game well. For Judge Hand, despite his well known skepticism, there is the potential of ideals, of vision, of an aesthetic view of life, and of aesthetic persuasion. There is, that is, a people in all their humanity and not just all their brutalities. And the effect of this is that Justice Holmes's "we" is not Judge Hand's "we" at all. And Judge Hand's "we" does not always gesture towards the state.

121. "[F]or [Judge] Hand, freedom of speech was not merely an implication of the supposed absence of known truth. It was part of a positive way of life that he embraced." Michael E. Smith, *Let Us Now Praise Famous Men: Learned Hand, The Man and the Judge by Gerald Gunther*, 82 Cal. L. Rev. 1643, 1651 (1994). Judge Hand's expansive thoughts about speech in *Masses* were surely made easier for him by the aesthetic, indeed poetic, form of some of the challenged materials and by his personal familiarity and, in fact, association with the artistic community that produced it. See Gunther, *Learned Hand*, *supra* n. 118, at 152–155 (describing Judge Hand's acquaintance with Max Eastman, publisher of *The Masses* magazine). Additionally, the fact that Judge Hand's earliest judicial considera-

You are now ahead of me, for if we try to describe this other polity in Judge Hand's own terms, we begin to describe the polity of the aesthetic, the polity of samba. Judge Hand is treating speech as a self-justifying artifact, placed at an aesthetic distance, identified not by its content but by its form of which its content is a part, with the indirection that art both encourages and requires, whose only message to us that we need consider is a reminder of itself. The more indirect the speech is—think here of metaphoric or parabolic—the more it points to its aesthetic nature and its location in the polity of samba. The more direct it is—think here of commands—the more it points to its location in the polity of common sense. For Judge Hand too, then, speech is something that is forever at the boundary of these two polities.

VIII. CAN JUDGES DANCE AND STILL BE JUDGES?

What are we to make of this aesthetic justification for a principled protection of speech? How would it work? Can it possibly do those things that a justification for a principled protection of speech must do? We are back then to Fish's concerns with any self-justification for the protection of speech—that is, that it cannot possibly do the work we would expect of a justification. Fish tells us that we would not argue that the principled protection this form of justification offers is absolute,¹²² and he is surely right, and, if not absolute, he might say, the exceptions we must recognize will continue to be based on a choice between the warring twins of policies that are constitutive of any judicial conversation within the polity of common sense, and will always reveal the politics behind the offered principle. An aesthetic justification cannot do the work we must expect of a justification, Fish might say, for the form of this justification denies to it a role in this balancing. What Judge Hand did, he might add, was not to avoid this balancing, but to do it prior to and outside of his opinion. This, then, as Fish might also say, is a deception, which is what principle tempts us towards, and we should avoid it. It is not samba

tion of speech issues was in the context of an obscenity challenge to a novel contributed to the ease with which Judge Hand was able to articulate his thoughts in *Masses*. See *id.* at 149–150 (noting Judge Hand's disagreement with the then-applicable obscenity law despite his obligation as a judge to comply with it).

122. Fish, *No Such Thing*, *supra* n. 2, at 103.

that is at work in the law. It cannot be. It is all common sense. And in this, I think, Fish is simply wrong.

What lies behind Fish's concern with a self-justifying principle for the protection of speech is a claim that the law cannot accommodate different modalities of thought. The law in this conception of the law is all balancing, and although sometimes it is all apples and oranges, both are at least within the category of fruit and can be measured and weighed. Other modalities of thought that do not lend themselves to this form of thinking cannot be law. The modality of thought that the law is, Fish might say, demands that all justifications offered for the protection of speech be inferential. Or, in other words and in his terms, you have no choice but to ask "What is speech for?" if you are to enter the legal conversation at all. Something like the aesthetic for which we can offer no inferential justification, but typically, only further description (to borrow Wittgenstein's famous description of moral argument), is not suitable for legal argument.¹²³ Because it is not, it cannot serve as a justification.

We can see why this is wrong if we compare our intuition of the aesthetic with moral intuition. Moral intuition can be noninferentially justified and grounded only in our experiences and our reflections upon those experiences. (This is to say that moral intuitions do not need to be self-evident, to depend upon a priori knowledge, or to be infeasible.¹²⁴) Within moral intuitionism,

123. Aesthetic valuing is undoubtedly the paradigm case of Wittgenstein's admonition to us to look rather than think. For this valuing is "more like seeing than deciding and choosing." Patrick Sherry, *Spirit and Beauty: An Introduction to Theological Aesthetics* 29 (2d. ed., SCM 2002) (citing John McDowell, *Aesthetic Value, Objectivity, and the Fabric of the World*, in *Pleasure, Preference and Value* 1–16 (Eva Schaper ed., 1983)).

124. Professor Audi's account of intuitionism provided much of the inspiration for what appears in this section of the text. Robert Audi, *The Good in the Right: A Theory of Intuition and Intrinsic Value* (Princeton U. Press 2004). I want to be clear, however, that my use of moral intuitionism, in a comparison with judicial consideration of the aesthetic, is not intended to be nor is it a reflection of Audi's remarkable and remarkably nuanced account. I have left the way in which judges consider the aesthetic far too mysterious for Audi's taste—there is much work to be done here—and would rely not so much upon the thinking of individual judges for further explication, but on the ways in which the common law can capture, use, and evaluate the aesthetic as a self-justifying principle. Audi also argues that "any . . . proposition that can be known non-inferentially can also be known inferentially . . . on the basis of a carefully constructed argument for it." *Id.* at 52. And that doesn't sound like samba to me. Let it suffice to say here, and inspired by Audi's account, that being grounded in experience does not mean that the noninferential and pretheoretical aesthetic principle justifying the protection of speech is necessarily self-evident, nor does it mean that the grounds of judgment involving the use of the principle cannot be

promise-keeping and truth-telling, for examples, are not matters to be reconsidered in each application by balancing inferential values against other values, but are to be treated, as a principled protection of speech would be, as *prima facie*, defeasible, and self-justified thumbs on the scale. And so they are in our ordinary thinking and so is speech treated in judicial decisionmaking.¹²⁵ For the law has within its common law processes of precedence,

formulated through articulation of one's basis for judgment—nor does such articulation then mean that the grounds really work as justification in an inferential way. *Id.* at 36–54. As Audi says, “[t]here is a sense in which, although an intuition (or an intuitive judgment) is not grounded in a proof or argument, it *can* be a conclusion formed through rational inquiry or searching reflection.” *Id.* at 45. I don't know about “rational inquiry” (except in the broadest sense of that term), but at the end of this Article I suggest that “searching reflection” upon the aesthetic element of speech and our relationship to it is exactly what is needed in our thinking about our legal protection of speech, especially in our pedagogical thinking about how to teach the subject, and that this reflection should be upon those examples that most clearly demonstrate for us speech's unique position at the boundary between the politics of samba and common sense. Audi also notes that there are cases in which globally grounded, that is, “based on an understanding of the proposition seen in the context of the overall grounds for it.” *Id.* at 46. These intuitions can be “grounded in part on a conception of a single concrete illustrative case.” *Id.* The story of Chico is offered here as such. There are, of course, many others that could be offered.

125. This is also to say that our intuition about the aesthetic nature of all speech takes the form of principle because this is the only form it can take in the intersection between the two politics. There is a temptation here to think of the aesthetic as incapable of making moral judgments on its own and as ignoring the harms that speech can do. On this view, the aesthetic is then to be morally corrected by other politics. It is not essential for my argument here, but I believe this view to be very wrong. The aesthetic takes seriously the harms of speech—not treating them abstractly as something to be balanced against something else—but responds to those harms very differently. It has its own way, then, of confronting evil without becoming it. (It is a way not far from that found within the legal conversation and the practice of law.) It sees in evil a human condition requiring aesthetic confrontation, not to destroy it for such is impossible and the attempting of which can only produce further evil, but to put within evil its own aesthetic claim. To see the devil himself in aesthetic terms is to deny to him his power over you and to return to power that transcendence that lies behind the aesthetic. The loss of the judgment of evil or of disgust, so prevalent in liberalism's stoic reaction against what it would describe as moral prudishness, is a corruption of this aesthetic response, a confusion, if you will, of the relationship of samba to common sense. It is, truly, a symptom of a loss of the aesthetic. It, like the attempt of the man in *Cálice*, is a desperate attempt to invent our own sins and die from our own poisons. So it is not an aesthetic stance, but its opposite. Perhaps I have gotten carried away here, but perhaps not. In either case, when a judge considers speech that we should hate as within the aesthetic, to some degree or another, the judge sees in that speech its own potential to speak beyond itself, its own presence with us in the polity of samba, and sees us, then, as connected to the speaker in a surprising way. It is this brief moment of imaginative awareness that produces the pause we call principle. This connection does not mean that we are not to condemn the speech, not to seek to prevent it, not to make it pay for the harm it does; it does mean that we now know better what “it” is, who it is who said it, and what we are to be in our relationship to that person. Notice that the legal conversation can often work in a similar way.

analogy, and the like, as well as its restraints of procedure and presumptions, the ability to capture and to express a practical wisdom of judges that is not restricted to any one modality of thought and to test and apply this wisdom casuistically. The wisdom expressed is not an invention or a discovery, but an interpretation and an expression over time of who we are at our best.¹²⁶ However inartfully or inarticulately the law may sometimes do this, it is the law's majesty that it does do it. For the law, dare I say it, really is samba too, and, what is even more amazing, the law seems to know that it is.¹²⁷

What this means, however, is that the protection we offer to speech, like the protection we offer to promises or to truth-telling, is intuitively grounded in our experiences of speech and not just any experience of speech, but experiences that display to us speech's aesthetic nature and its location at the boundary between the politics of samba and of common sense.¹²⁸ For this we are, then, dependent upon . . . well . . . Chico! So let us get back to his story.

IX. SAMBA'S RETURN TO ABNORMAL

Cálice, during the years of lead, was first performed in 1973.¹²⁹ The lyrics had been published the day before in a newspaper and, thus alerted, the censors were ready. The stage was filled with microphones and, as the first line of the song started, the microphone Chico was using was turned off. As he was then chased from microphone to microphone, singing only the word *cálice*, each microphone was turned off in succession.¹³⁰ Remem-

126. For a discussion of this and related themes, see Gerald Postema, *Bentham and The Common Law Tradition* (Oxford U. Press 1989).

127. The idea that our judges consider the aesthetic, in any fashion, surely seems strange to us but it is, of course, ancient. "The Most Beautiful is The Most Just" was, after all, the inscription on the walls of the Temple of Delphi and it was quite common for Athenians to think of the government as limited by the aesthetic. *History of Beauty* 53 (Umberto Eco ed., Alistair McEwen trans., Rizzoli 2004). For a very interesting look at the aesthetic dimension of the laws that shares some of the perspective of this Article, see Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (U. Cal. Press 2000).

128. This need to ground our intuitions about speech in this way is the reason this Article takes the form it does.

129. Perrone, *supra* n. 20, at 34.

130. *Id.*

bering that the word *cálice* at the beginning of the song is Christ's, what the state revealed itself to be doing by its own actions at the performance was censoring the central Christian message and, by doing so, changing the word from *cálice* to *cale se*. So, the state enacted for him the message of the song they were trying to suppress, and, at the end, the silence that followed the attempted performance, just like the silence that follows the song, carried with it the song's message in a form beyond the state's control—the perfect *malandro* trick.

We jump ahead now out of the years of lead to the end of Act A-5 in 1978 and the democratization of Brazil in 1983, when *Cálice* is finally released. Just prior to the first democratic voting, Chico released a samba of celebration, *Vai Passar*¹³¹ (“It Is on Its Way”). In instrumentation, rhythm, and arrangement, this song is the most traditional of the sambas we have considered. It is the music of a samba parade. To make this clear, the lead vocal in it drops off as other voices join in until at the end it sounds as if all Brazil is singing. This is the music of Carnival. It tells the history of all Brazil as samba and places the years of lead, when the “fatherland was asleep” and the “[mother] distracted,” within samba's story. These lyrics summarized its message:

It's on its way
 A samba's coming down the street
 All the cobblestones / Of the old city
 Tonight will / Be shivering
 Remembering
 That immortal sambas passed by here
 That here they bled about our feet
 That our ancestors danced here.

There was a time . . .
 Our fatherland was asleep
 A distracted mother
 Didn't see she was diminished . . .¹³²

131. Chico Buarque, *Vai Passar*, in *60 Years On* (Wrasse 2003) (CD).

132. *Id.* For this English translation, see Perrone, *supra* n. 20, at 42.

So, Chico says, now is the time to rejoice. But, he adds at the end, do not get confused. In the last line of the song he tells us what it is that is “on its way”:

The banner of the State Hospital is on its way
Oh, what a good life, la la dee do . . .
The banner of the State Hospital
It’s on its way.¹³³

“State hospital” is the polite way in Brazil of referring to an insane asylum. This, he says, is the banner, under which you are really rejoicing and parading. For a samba celebration is not and cannot be about politics and democracy. Samba is not democracy, but democracy can be more or less samba. Samba certainly does not care what the majority of people happen to think and it certainly knows better than to confuse popularity with its own truth, and if with its truth, beauty, and if with beauty, samba. So for samba, the song says, it is now time to go back to doing what samba always does within its own polity. To make this even clearer, a picture was released about the same time as the song showing Chico parading by himself under a banner of the “State Hospital,” what common sense would call insanity, to make samba’s one message clear again.¹³⁴

X. CONCLUSION

Where are we then, having arrived at the end of an Article intended to display that the odd reluctance our judges have regarding the silencing of speech—a reluctance we and they call principle—is but a reflection of their and our intuitive appreciation of the fullness of our humanity, a fullness in which we are, whatever else we may be, always aesthetic beings speaking the world around us? There are, as should be the case, multiple ways of go-

133. *Id.* at 43.

134. *Id.* As Charles Perrone said:

[The refrain “what a good life”] might seem a naive assertion that all is well with the new situation. But this refrain is ironic since it is associated with the passing of the banner of a school from the State Hospital (i.e., mental institution). Buarque maintains critical distance in his review of recent events. Carnival is called a “fleeting” event, and the celebration of newfound freedom is represented by a performance of the mentally unstable.

Id.

ing on here, much work to be done, several aspects of the justification that require further elaboration—some that already need much more defending, research on opinions to be conducted especially on the analytical and predictive value of this offered justification, and even an empirical test or two to run to show that this is, after all, just a matter of common sense. I would like, however, to end on a more pedagogical note.

In our conversations about free speech with students—whether these be law students, lawyers, or the public—we typically ask our audiences to observe the following parade of horrors: hate speech, incendiary speech, false and misleading advertising manipulating a gullible and mostly poor population, pornography, obscenity, and so forth. Typically, the most offered as a counter to this parade is another one: we trot out the standard justifications for protecting speech. The point of this second parade, however, is most typically to show how each one of these offered justifications is inadequate and, then, after a dismissive “perhaps, it’s all these things together”—a statement of hubris masquerading as one of humility—to move on to the other parade, the one of horrors. The effect of this is understandable. It is hard at the end of such a conversation to rejoice in what appears to be an unexplained and forced toleration of things we justifiably hate. Even the most libertarian of us come away from the experience depressed by it. We are, I fear, coming to perceive speech as indistinguishable from any other activity and losing any understanding of speech as uniquely of value, as uniquely who we are. According to a recent poll, the majority of high school students think that the media, including newspapers, magazines, television, and even the music industry, should be subjected to censorship.¹³⁵ If I am at all right about why we protect speech, however, what we are doing in our conversations about speech is more than just an assault on its protection. We can see this in the work of Stanley Fish with which this Article began. Fish’s claims against principle are, at rock bottom, assaults on the potential of the law to be anything more than instrumental and, if that, political. It is an understanding of law resting upon an ontology of antagonistic differences and, ultimately, on a fear of the violence they would produce. Our aes-

135. Assoc. Press, *First Amendment No Big Deal, Students Say* (Jan. 31, 2005) (available at <http://www.msnbc.msn.com/id/6888837>).

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thetic sense of speech, or of anything else for that matter, dies when it is not nurtured. Why not, then, try to nurture it and do so as a matter of understanding the law's potential to be more than this, more than instrumental, more than force, more than a controlled violence? Why not, that is, include in our teaching about speech a little samba every once in a while? One advantage to you—professor, lawyer, law student—is that you, then, can legitimately and with great justification, dance.