Book Review

Conversing About Justice

Justice as Translation: An Essay in Cultural and Legal Criticism. By James Boyd White.* *Chicago: The University of Chicago Press*, 1990. Pp. xviii, 313.** $29.95.

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I. INTRODUCTION

Like many other members of the legal academy,[1] I have long admired, and profited from, James Boyd White's work on the intersections of law and literature. Drawing from his literary commitments[2] the importance of relying on narratives rather than on abstract propositional utterances for the notions that constitute our culture and provide our norms, he was at the forefront of those who emphasized the necessity to pay attention to "the reality of the experience of other people, and [to the] importance of their stories, told in their words."[3]

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1. *See, e.g.*, Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47, 54 n.13 (1990) (encomium to White). Many other examples of White's impact on the thought (and even lives) of others could easily be given.

2. White is a professor of English language and literature and adjunct professor of classical studies at the University of Michigan, as well as the holder of a chair within the University of Michigan Law School.

3. J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 132 (1985).

Through careful listening to these stories, he suggests, we can achieve what he calls "the true political nature of the law," which is to serve as "a way of establishing community and giving meaning to experience."[4] And White's notion of community includes a strong commitment to justice, described by him as including the capacity for "[m]any-voicedness; the integration of thought and feeling; the acknowledgment of the limits of one's mind and language (and an openness to change them)."[5] These characteristics, he argues, should be present in the legal analyst, including the judge; indeed, discussing what constituted an admirable legal opinion, he subordinates the overt "message" contained within the formal propositions of an opinion to "the experience of mind it holds out as a model of legal thought: the language it makes as it places one item next to another, the community it makes with its several audiences."[6]

It is of some significance that the quotations in the paragraph above come from one of his earlier books, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, published in 1985. Reviewing it, I indicated that "[o]ne need not agree with White's analyses in order to respond with great pleasure to the 'experience of mind' that he holds out."[7] The pleasure came in part from the contact with "a man passionately concerned with basic issues of justice and human community who believes that our progress toward an almost Platonic good can be aided by a greater self-consciousness about our ways of reading and writing."[8] Like many of his other admirers, I noted that "I felt called upon to become more caring myself in my own capacities as a writer, reader, and teacher of law."[9] To put it mildly, this was not meant as small praise.

Still, my review, for all of its apparent enthusiasm, contained some reservations. In spite of his emphasis on the importance of literary models to the development of one's capacity for sensitive legal analysis, I found him strangely silent regarding the various debates raging among literary critics and contemporary philosophers about topics seemingly relevant to his enterprise. A reader would not learn of the existence (or potential relevance) of such writers as Jacques Derrida, Stanley Fish, Elaine Showalter, or Richard Rorty, to offer only four examples. Moreover, he seemed to present an overly-rosy picture of law, especially in a chapter analyzing the Socratic critique of the rhetorician-lawyer in the *Gorgias*. Although perhaps not quite so complacent as Charles Fried, who unforgettably insisted that good lawyers, at least in contemporary American society, need never worry that their goodness as lawyers would call into question their goodness as persons,[10] White seemed to discount any real force

4. *Id.* at 78.
5. *Id.* at 132.
6. *Id.* at 118.
7. Levinson, Book Review, 97 ETHICS 666, 667 (1987).
8. *Id.*
9. *Id.*
10. *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060 (1976).

to the Socratic critique of lawyers as mere technicians prepared to devote their intellectual talents to making the lesser appear the greater, the unjust, just.[11]

Unfortunately, these disquieting notes, which were not enough to outweigh my genuine esteem for *Heracles' Bow*, now seem glaring in regard to White's new book, *Justice as Translation: An Essay in Cultural and Legal Criticism.* Part of the problem is that the new book substantially repeats themes already well discussed in earlier work. There is, therefore, little sense of a real advance on what was achieved in *Heracles' Bow* or his earlier book of essays, *When Words Lose Their Meaning.*[12] It is difficult for me to believe that anyone who has read the earlier work really needs to read the new one, though those who have not might well begin (and perhaps end) with *Justice as Translation.* Unabashed admirers of the earlier work might not care about its relative lack of freshness. But even slightly constrained admirers will notice ever more the renewed presence of some of the deficiencies of these earlier works.

Most of the chapters of *Justice as Translation* were previously published, and I liked almost all of them when I initially read them. One of them is reprinted in a book that I coedited on the problems of legal interpretation.[13] Yet the joinder of what were quite fine independent essays in a single book has served to diminish their overall force, to create a whole that is ultimately less than the sum of its parts. Although I continue to share many aspects of White's vision and am happy to acknowledge the many real contributions he has made, I think it is more than time for him to confront some of the tensions that pervade his work and vitiate his analysis.[14] I will devote this review to spelling out some of these points.

II. PROPOSITIONAL UTTERANCE OR EXPERIENTIAL NARRATION?

There is a certain difficulty in writing this review, which should be acknowledged at the outset. It arises from the fact that White devotes almost the entire first section of his book to attacking what might be termed propositional argumentation, i.e., the reliance on abstract concepts to provide at least the

11. Nor did White argue, as does Stanley Fish, for example, that the Socratic distinction between knowledge and opinion so central to the critique of rhetoric is itself merely rhetorical inasmuch as rhetoric is all there is. *See generally* S. FISH, DOING WHAT COMES NATURALLY ch. 20 (1988) ("Rhetoric"). Indeed, given White's distinction between "engag[ing a reader] dialectically instead of trying to manipulate him rhetorically," J.B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTION AND RECONSTITUTION OF LANGUAGE, CHARACTER, AND COMMUNITY 220 (1984), there is every reason to believe that he would reject Fish's argument.

12. J.B. WHITE, *supra* note 11.

13. *See* White, *Judicial Criticism*, 20 GA. L. REV. 835 (1986), *reprinted in condensed form in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 393 (S. Levinson & S. Mailloux eds. 1988). The article also appears in a revised form as chapter six of *Justice as Translation.*

14. *See also* Tushnet, *Translation as Argument* (Book Review), 32 WM. & MARY L. REV. 105 (1990). Although Tushnet's review goes off in somewhat different directions from this one, I concur almost entirely with the criticisms directed at White, and I strongly recommend it to anyone interested in White's work.

entry point for one's analyses of the world.[15] The "shimmering and fluid world of language"[16] just does not allow the creation of intellectual systems that truly transcend the individuals who make use of abstract concepts. "Words, and other language forms, simply do not mean—not ever—exactly the same thing to all users of them, as the builders of intellectual systems must claim or at least hope to achieve."[17] Thus "the art of law is not that of linear reasoning to a secure conclusion." Instead it is an art that is "fundamentally literary and rhetorical in kind, of comprehension and integration: the art of creating a text—a mind and a community—which can comprise two things at once, and two things pulling in different directions."[18]

I have no real problem with such an argument, as I assume is true of almost anyone who has drunk from any post-Wittgensteinian, post-structuralist, or post-modernist well. Much of my own work is explicitly nonlinear,[19] and, for better or worse, the most quoted single sentence I have ever written is one stating that "[t]here are as many plausible readings of the United States Constitution as there are versions of *Hamlet*, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the texts."[20] I think I well appreciate the reasons that White wants to lead us away from a callow belief in abstract conceptualization or an artless linguistic formalism as helpful modes of coming to terms with the exigencies of our lives. The problem these days may be finding someone who unabashedly defends the kind of conceptualization that White attacks.[21]

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15. See especially chapter two: "The Language of 'Concepts': A Case Study," pp. 22-45.

16. P. 35.

17. *Id.*

18. P. 224.

19. *See* S. LEVINSON, CONSTITUTIONAL FAITH 5-6 (1988): "My concern is not so much to make a linear argument aimed at moving the reader toward some purportedly ineluctable conclusions . . . as to attempt what I hope will become a common exploration of what is at stake in taking the Constitution seriously as a presence in one's life . . . ."

20. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982). For a representative attack, see R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 262-63 (1988).

21. Richard Posner, the implicit focus of White's attack on economic conceptualism, certainly does not. *See, e.g.*, R. POSNER, *supra* note 20, at 308-09, in which he praises Potter Stewart's famous comment about pornography—"I know it when I see it"—by reference to its "candor (in acknowledging the limits of legal reasoning) and bluntness [in] refreshing contrast to the characteristic evasions of the modern judicial opinion" and "avoidance of the concrete." "There are obvious dangers if judges lose sight of the consequences of their decisions and fool themselves into thinking that they inhabit a purely conceptual realm." *See also* Posner, *Us v. Them* (Book Review), NEW REPUBLIC, Oct. 15, 1990, at 47, 48 (reviewing M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990)):

> What is familiar seems natural and what is natural seems immutable, so we must keep up our guard against complacency. We can do this only by becoming self-critical, by multiplying our skepticisms, our perspectives, our empathies.
>
> All this is true, and important, and still resisted so strenuously as to be worth reiteration. Its neglect continues to cause needless cruelties and injustices. Moreover, it is a lesson particularly worth emphasizing to lawyers . . . because legal reasoning is a bastion of dichotomous classifications that over-simplify social reality and confuse local, transient, sometimes uninformed public opinion with durable, even metaphysical, reality.

This theme pervades Posner's new book, THE PROBLEMS OF JURISPRUDENCE (1990). *See* Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*,

All of this being said, it is also true, as drinkers from the same wells must acknowledge, that one can scarcely speak at all without using highly conceptual language. One point, I presume, of the anthropological approaches counseling the importance of "thick description,"[22] is that what appear to be the slightest ephemera of everyday life—a wink, for example—[23]can lead us into the highly ramified concepts that constitute a culture. Thus many of us interested (or obsessed) by problems of interpretation insist, against our more "commonsensical" colleagues, that even the most apparently mundane observations about everyday life are embedded within highly complex—and debatable—theories, the elucidation of which certainly can require high conceptual language. It is surely on point that Professor Geoffrey Miller, in the course of a generally favorable review of White's 1984 book, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, notes that White presents "a theory of language and of human interaction . . . . [that] has its stock of words used in unfamiliar or technical senses" and that "[k]ey concepts in Professor White's picture of language are 'language,' 'text,' 'community,' and 'character.'"[24] It may simply be, to adopt a term recently presented by my colleague Jack Balkin in these pages, that abstract conceptualism and narrative contextualism are joined together in a "nested opposition," coexisting in endless, albeit uneasy, tension.[25]

Still, to treat *Justice as Translation* as the incarnation of propositional, conceptual utterances, which I then endorse or criticize as is my wont, might be quite profoundly to miss the point of White's own enterprise. After all, for White, legal texts are usefully analyzed as if they were literary texts, and "[l]iterary texts," he tells us, are "not propositional, but experiential and performative."[26] Even more to the point, they are "language-bound and language-centered; not reducible to other terms—especially not to logical outline or analysis—but expressing their meanings through their form."[27] Most striking of all, perhaps, is his assertion that such texts are "not bound by the rule of noncontradiction but eager to embrace competing or opposing strains of thought; not purely intellectual, but affective and constitutive, and in this sense integrative, both of the composer and of the audience, indeed, in a sense, of the culture."[28] There is more than an echo of Walt Whitman— "Do I contradict myself?/ Very well then I contradict myself,/ (I am large, I contain multi-

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91 COLUM. L. REV. (forthcoming June 1991).

22. *See* C. GEERTZ, THE INTERPRETATION OF CULTURES ch. 1 (1973) (*"Thick Description: Toward an Interpretive Theory of Culture"*).

23. *Id.* at 6-7.

24. Miller, *A Rhetoric of Law* (Book Review), 52 U. CHI. L. REV. 247, 248-49 (1985).

25. Balkin, *Nested Oppositions* (Book Review), 99 YALE L.J. 1669, 1669 (1990) (reviewing J. ELLIS, AGAINST DECONSTRUCTION (1989)).

26. P. 42.

27. *Id.*

28. *Id.*

tudes.)"[29]—and of Emerson—"A foolish consistency is the hobgoblin of little minds. . . . With consistency a great soul has simply nothing to do."[30] I do not necessarily mean to be critical in suggesting such affinities—Emerson and Whitman are central figures of the American pantheon, after all—[31] but their own multivocality certainly presents difficulty for any analyst trying to get a clear fix on any given argument found in their works.

Indeed, the most interesting (and longest) part of his tripartite "essay"[32] is a set of chapters—organized around the title "The Judicial Opinion as a Form of Life"—presenting a number of judicial opinions not in terms of the doctrinal rigor with which they approach the issues at hand, but rather in regard to their conversational quality. For White, "the legal text, like every text, is a stage in a conversation,"[33] and he defines as "the true responsibilities of judging, . . . establishing a suitable character for oneself and an appropriate relation both with the prior texts that define one's role and with other people: the responsibility of creating a character and a set of relations that will make possible a conversation 'in which democracy begins.'"[34] The primary criterion of evaluation for White is the judicial character implied by the structure, form, and tone of an opinion, particularly its openness to a genuinely democratic discourse. The "excellence" of judging "is definable in terms of character and relations, in the kind of conversation it establishes, not in the 'result' or 'rule' or 'reason' abstracted from the text in which they are given meaning."[35] Indeed, White defines the "justice" that is the titular focus of his book as "a matter not so much of consequences as of characters and relations: who we are to each other in our talk and in our lives."[36]

The judicial opinion does not differ in any categorical sense from other forms of legal writing, including his own book. Thus we read in the introduction that *Justice as Translation* "is itself meant to enact at least the beginnings of such a movement" toward "the direction of completeness and inclusion, or what in the first chapter I shall call 'integration.'"[37] In any event, for White, model texts "are not coercive of their reader, but invitational; they offer an experience, not a message, and an experience that will not merely add to one's

29. W. WHITMAN, *Song of Myself*, in COMPLETE POETRY AND COLLECTED PROSE 246 (Library of America ed. 1982).

30. R.W. EMERSON, *Self-Reliance*, in THE SELECTED WRITINGS OF RALPH WALDO EMERSON 152 (B. Atkinson ed. 1950).

31. See, e.g., S. SHIFFRIN, THE FIRST AMENDMENT AND ROMANCE 159-62 (1990), for a celebration of the relevance of these two thinkers to American constitutional analysis.

32. Not only does the word "essay" appear in the subtitle of the book, but White also refers to the book as such at p. xiv.

33. P. 101.

34. P. 216. White adopts the notion that "democracy begins in conversation" from John Dewey. *See* p. 91 (quoting DIALOGUE ON JOHN DEWEY 58 (C. Lamont ed. 1959)).

35. P. 217.

36. *Id.*

37. P. xii.

stock of information but change one's way of seeing and being and talking."[38] It would be truly beside the point to indicate that I received relatively little new information or conceptual clarification from the book; that, after all, was not the major reason it was written or what White primarily aimed to impart. Ultimately, then, I am invited as a reviewer to report on the experience engendered through reading *Justice as Translation.* As I already suggested, I found the experience more vexing than enjoyable. What Richard Posner writes about *Heracles' Bow*—that White's effort to explain what constitutes "law as a humanity . . . is pitched at so high a level of generality that I have trouble holding onto the thread of his discourse"[39]—is, I am afraid, all too applicable to *Justice as Translation.*

III. JUSTICE AS *TRANSLATION?*

The elusiveness of White's argument is well captured in the title itself, *Justice as Translation.* It has become a cliche of contemporary literary theory that all texts are read "intertextually," i.e., by reference to other texts,[40] and it is almost impossible for a contemporary American academic reader to avoid reading White's title within the context of (and perhaps as an implicit attack on) John Rawls' famous notion of "justice as fairness."[41] Indeed, one can easily read the book as a critique of all rationalist abstraction; I presume that no contemporary philosopher better fits this mold than Rawls with his famous metaphor of the "veil of ignorance"[42] that serves as the basis for generating quite abstract and relatively acontextual concepts of justice.

An animus against Rawlsian philosophy (and, indeed, against all analytic philosophy) may be the subtext of *Justice as Translation,* but it is not made a manifest part of White's argument. The discussion of the relationship between the concept of justice and the concept of translation is limited to the final, twelve-page chapter, which raises far more questions than it answers. "Translation," for White, is "the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people."[43] Indeed, he has earlier written that "[w]hat we know of poetry, that it is *not paraphrasable or subject to translation,* is true as well of *all* our our texts,

38. P. 42.

39. R. POSNER, *supra* note 20, at 314.

40. *See* THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS 112 (C. Baldrick ed. 1990): "[I]ntertextuality, a term coined by Julia Kristeva to designate various relationships that a given text may have with other texts .... In the literary theories of structuralism and post-structuralism, texts are seen to refer to other texts (or to themselves as texts) rather than to external reality"; *see also* V. LEITCH, DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION 161-63 (1983) ("Intertextuality [is] a text's dependence on and infiltration by prior codes, concepts, conventions, unconscious practices, and texts ....").

41. Rawls, *Justice as Fairness,* 57 PHIL. REV. 164 (1958).

42. J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

43. P. 257.

formal and informal."[44] These strictures against paraphrasability presumably apply to *Justice as Translation* itself. If one takes seriously this rather inflated language, then there is almost literally no point to a review, which depends on the possibility of paraphrase.

White insists that "[t]here is . . . no 'translation,' only transformation achieved in a process by which one seeks to attune oneself to another's text and language, to appropriate them yet to respect their difference and autonomy as well . . . ."[45] Translation, to the extent that we can speak of its occurring at all, is "not about transportable 'content,' but about the relations—between texts, between languages, between people—that we establish in our own compositions; about the attitudes towards other people, other languages, that we embody in our expressions."[46] One cannot, therefore, do anything so banal as test one profferred translation against another by, for example, using a dictionary or seeking the "expert" advice of a native speaker of the language from which the text is being translated. Not only is there "no single appropriate response to the text of another," there is not "even a finite appropriate set of responses; what is called for is a kind of imaginative self-assertion in relation to another."[47] To be sure, one can judge a profferred translation, but only "by its coherence, by the kinds of fidelity it establishes with the original, and by the ethical and cultural meaning it performs as a gesture of its own."[48]

Lest one read this as a counsel of despair regarding the possibility of successful communication, White goes on to assure us that translations occur and, indeed, do wondrous things. In particular, we are presented with a model of "[g]ood translation"[49] that "proceeds not by the motives of dominance or acquisition, but by respect."[50] Translation becomes a term standing for "a set of practices by which we learn to live with difference, with the fluidity of culture and with the instability of the self. It is not simply an operation of mind on material, but a way of being oneself in relation to another being."[51] Indeed, "the activity I call 'translation' . . . becomes a set of practices that can serve as an ethical and political model for the law and, beyond it, as a standard of justice."[52] Thus White "hold[s] out the good translator as a model for us, as defining a set of intellectual and ethical possibilities from which we can learn, both as people and as lawyers."[53]

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44. P. 33 (emphasis added).
45. P. 254.
46. *Id.*
47. P. 256.
48. *Id.*
49. P. 257.
50. *Id.*
51. *Id.*
52. P. 258.
53. P. 259.

The image of translation placed before us "asserts an essential and radical equality among us,"[54] given the lack of a "superlanguage"[55] that might serve genuinely to resolve differences in our perceptions. Thus "what is necessarily called for is a kind of negotiation between us, I from my position—embedded in my language and culture—you from yours."[56] White concedes that "[w]e can and do make judgments, but we need to learn that they are limited and tentative; they can represent what we think, and can be in this sense quite firm, but they should also reflect the recognition that all this would look quite different from some other point of view."[57]

At this point readers might well believe that they are being directed toward a form of relativism,[58] or at least being prepared for a serious discussion of what is entailed by recognition of the particularity of our own perspectives on the world. But there is no such discussion; instead, there is a certain verbal fog. Thus, we are told, quite sensibly, that "respect for the other" does not "oblige[] us to erase ourselves, or our culture."[59] Just as we should respect "the traditions of the other . . . despite their oddness to us, and *sometimes despite their inhumanities*, so too our own tradition is entitled to respect as well."[60] This injunction captures all too well the fuzziness—some might say conceptual incoherence—that runs through the book. What the complex concept of "entitlement" might mean in this context is left undiscussed. Is anything beyond sheer existence necessary to "entitle" a tradition, whether our own or others, to respect? The emphasized phrase suggests both that the presence in a tradition of "inhumanitites" (whatever they may be and however they might be recognized) is not enough per se to justify withdrawal of respect. White evades any such difficulties by informing us that "[o]ur task is to be distinctively ourselves in a world of others: to create a frame that includes both self and other, neither dominant, in a [sic] image of fundamental equality."[61] Translation, in White's sense, "does not assert that no judgments can be reached, but is itself a way of judging, and of doing so out of a sense of our position in a shifting world."[62]

The reader will no doubt have detected a certain impatience with all of this, though not, I hasten to say, because I necessarily disagree with White. Generally speaking, I do not, and it is not clear that anyone could, at least at the level of generality at which the argument is presented. Something more is called for,

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54. P. 264.
55. *Id.*
56. *Id.*
57. *Id.*
58. Which I do not use as a scare word. *See, e.g.*, B.H. SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (1988). *But see* West, *Relativism, Objectivity, and Law* (Book Review), 99 YALE L.J. 1473 (1990) (criticizing Smith's relativism in *Contingencies of Value*).
59. P. 264.
60. *Id.* (emphasis added).
61. *Id.*
62. *Id.*

including—dare I say it—explicit conceptual analysis (even as we are usefully reminded of the limits of such analysis). There are all sorts of problems contained within White's formulations, all sorts of stumbling blocks that make it difficult to grasp with any degree of certainty what he means to be suggesting. The linkage between "justice" and "translation" is suggestive, to be sure, but ultimately in the way that *any* link between two concepts can jog the mind and provoke interesting thoughts.[63] It is unlikely, though, that anyone seriously interested in the now 2500-year history of contemplation about the meaning of justice will find in *Justice as Translation* the sword that will help to cut any of the Gordian knots associated with the term. The notion of "justice as translation" seems to boil down to a restatement of perhaps the oldest notion of justice—to give each person his or her due. It leaves entirely in place the central dilemma posed by that primal notion, which is how we decide what is "due," how much of the particularity of desire must indeed be honored, and how much of it may be ignored, or even ruthlessly suppressed, in order to achieve justice.

IV. Law as Conversation, Law as Violence

Probably the central question of most political theory—including theorizing about the role of law—asks about the existence of principles that compel a particular choice when deciding who among contending adversaries ought to be preferred (and thus who ought to be forced to acquiesce to the social vision of an adversary). Though White, as noted above, certainly appears to acknowledge the reality of moral and social pluralism, the reality tends to be dissolved in a haze of solidaristic aspiration. Much too often the reader is presented with bland reassurance that "[t]he art of law is the art of integration"[64] or that "what the law insists upon is that we are a discoursing community, committed to talking with each other about our differences of perception, feeling, and value, our differences of language and experience."[65]

To put it mildly, this is not the only possible description of "what the law insists upon." As Geoffrey Miller has noted, one of the similarities between otherwise antagonistic proponents of law and economics and critical legal studies is their shared perception of "the distinctive nature of law as the application of state coercion."[66] Almost totally absent from *Justice as Translation* is the sensibility associated for many of us with the late Robert Cover,

63. Recall Charles Fried's description of the "lawyer as friend," Fried, *supra* note 10, and recall as well Arthur Leff and Edward Dauer's withering demolition of that connection. Dauer & Leff, *The Lawyer as Friend* (Correspondence), 86 YALE L.J. 573 (1976) (replying to Fried).

64. P. 214.

65. P. 80.

66. Miller, *supra* note 24, at 257. This shared perception may be explained, at least in part, by a common ancestor in Oliver Wendell Holmes, who emphasized that "law, being a practical thing, must be found itself on actual forces." *See* O.W. HOLMES, THE COMMON LAW 36 (M. Howe ed. 1963).

whose eloquent insight into the violence that underlies much (I don't think Cover was so pessimistic as to believe all) law stands, if not as a reproach, then certainly as a challenge to White's work.[67] In stunning contrast to White's image of the judge as grand integrator is Cover's as the killer, sometimes quite literal, as in the case of capital punishment, sometimes "merely" metaphorical, as when a judge, "[c]onfronting the luxuriant growth of a hundred legal traditions . . . assert[s] that this one is law and destroy[s] or tr[ies] to destroy the rest."[68] And do not many (most, all?) of us acknowledge that such violence and coercion sometimes may well be justified, that some visions of social possibility should be destroyed, even by force of arms? Consider the ruthless suppression of the striving for Southern independence and perpetuation of a society organized around chattel slavery of Blacks[69] manifested between 1861-1865, or indeed, the contemporary events in the Persian Gulf that cost tens of thousands of Iraqi lives in the name of vindication of international law.

To be sure, White recognizes that "[t]he law works by an act of coercion," but this acknowledgment is immediately undercut by his seeming confidence that law works (or at least should work) to "create[] something new, a place and mode of discourse, a set of relations, that form a central part of our civilization."[70] He continues, "[A]t its best [such coercion] can work as a way of respecting the human beings on both sides of a controversy by giving each something to say that is appropriate to their legitimate needs and to the character of the relation that exists between them."[71]

Only an absolute churl would fail to find this vision of law, "at its best," attractive. But dare one say that it appears almost pollyannaish when placed against the reality not only of secession, chattel slavery, and civil war, but even against the more mundane problems of our contemporary life, including, say, abortion? As Amy Gutmann has pointed out in a recent review of Laurence Tribe's aptly named *Abortion: The Clash of Absolutes*, there may simply be no way to "integrate" the dazzlingly different perspectives of the "pro-choice" and "pro-life" adversaries in the abortion debate.[72] Political prudence may counsel "a fair moral compromise" by which proponents of abortion accept more limitation on a woman's fundamental right of reproductive choice than their philosophical commitments believe warranted, in return for a willingness

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67. *See generally* Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Foreword*]; Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Rules*, 20 GA. L. REV. 815 (1986).

68. Cover, *Foreword*, *supra* note 67, at 53.

69. It would be truly anachronistic to refer to those held in bondage as African-Americans, given the dependence of slavery on the inability to imagine those held as joined in genuine community with those holding them.

70. P. 202.

71. *Id.*

72. *See* Gutmann, *No Common Ground*, NEW REPUBLIC, Oct. 22, 1990, at 43 (reviewing L. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990)).

by those for whom abortion is murder to accept some infliction of death on morally innocent fetus-human beings in violation of their tenets.[73] But, of course, it is just such a vision of "fair moral compromise" that underlay the opinion of Justice Story in *Prigg v. Pennsylvania*[74] that White castigates for its tortuous justification of Congress's power to pass the egregious fugitive slave law and its abject disregard for the specific fate of Margaret Morgan, the fugitive slave whose capture in violation of Pennsylvania's "liberty law" triggered the suit.[75]

By juxtaposing slavery and abortion, I most certainly do not mean to suggest either that compromise on abortion is warranted[76] or that Justice Story was correct in preferring compromise to the disunion that he justifiably saw over the horizon. William Lloyd Garrison might well have been correct in burning the Constitution and crying for disunion from slaveholders. What I do mean to suggest is that more is required of someone who would contribute to our contemporary enlightenment than retreat to the bland platitudes pervading *Justice as Translation.* This reader, at least, was moved to rebellion upon reading yet once more about "our common life," and the importance of creating a community, based on democratic discourse, that recognizes "that the essential conditions of human life that it takes as its premises are shared by all of us."[77] When all is said and done, White writes within a comic tradition,[78] in which the seeming dilemmas of social life dissolve into happy endings in which enemies join hands in recognition of their commonality.

This invites us to concentrate on the sentimental reunions, in the early twentieth century, of veterans of the Union and Confederate armies and to ignore the quite different, and savage, reality attached to the Battle of Antietam, the siege of Vicksburg, and Sherman's march to the sea. The constitutive understandings of American life, including its constitutional dimension, have been written in blood as much as forged in conversation. At least some of the open space allowing conversations to take place owes its creation to the willingness to inflict the most horrible violence on persons who would not otherwise give way. But any such recognition seems absent from this book.

It is not violence per se that requires recognition so much as the point that not all differences can be overcome through mechanisms of "integration," whether institutional-political or conversational. Radical differences of perception will remain, and they must be frankly grappled with. It is such grappling that I find ultimately missing in *Justice as Translation.* Perhaps this is ex-

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73. *Id.* at 45.

74. 41 U.S. (16 Pet.) 539 (1842).

75. Pp. 114-23.

76. *See* Dellinger, *Should We Compromise On Abortion?*, AM. PROSPECT, Summer 1990, at 30 (answering "no").

77. P. 157.

78. *See* West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory,* 60 N.Y.U. L. REV. 145 (1985) (correlating jurisprudential traditions with Northrop Frye's narrative myth-structures).

plained, at least in part, by the choice of legal problems that White focuses on, which are slavery and, especially, certain rights of criminal defendants. There is no mention, however, of such issues as abortion, pornography, or the rights of fundamentalist Christians to maintain their own cultures as free as possible from the influence of a surrounding secular humanist culture. To be blunt, there is something evasive, if not outrightly sentimental, about devoting one's energies to attacking chattel slavery[79] or even presenting, to what will inevitably be a dominantly liberal readership, views of criminal procedure that will present no real challenge to preexisting ideological dispositions.[80] One would like to see White confront at least one of the problems that are tearing our contemporary legal culture apart.

On the one occasion when he does address a topic of crucial contemporary significance, affirmative action, the weaknesses of his approach are all too evident. Attempting to defend affirmative action—and to suggest a way of speaking about it that will be community-constitutive rather than a source of further discord—he writes that the white person disfavored by an affirmative action program should realize "that he too is a member of a community that is seeking to rid itself of the residual and terrible evils of slavery."[81] He should therefore view any burdens imposed by affirmative action "like the soldier's burden which is in some sense a privilege to bear, even when imposed upon a draftee, then or now."[82] One should accept an "imagined identity not with the white slave owner, but with the white liberator."[83]

Even Richard Posner, no devotee of affirmative action, finds White to have offered "a brilliant metaphorical formulation of the case for affirmative action."[84] But it is surely question-begging as well: thus Posner suggests that "union soldiers were fighting not to free the slaves but to preserve the union, and the current disadvantages under which black people labor and which affirmative action seeks to alleviate are neither comparable to, nor demonstrably a residuum of, the evils of slavery."[85] Nor does the metaphor work to explain the justice of affirmative action in regard to, *inter alia*, women, Asian-Ameri-

79. As Mark Tushnet writes, "[T]here is something rather demeaning about making a big deal about the proposition that slavery was a bad thing." Tushnet, *supra* note 14, at 113. Indeed, *Justice as Translation* is dedicated to "the memory of Margaret Morgan," the victim of the injustice that became *Prigg v. Pennsylvania*. *See* p. 114. Although the book is dedicated to Morgan, she is absent from the index (as I learned when trying to locate quickly her moving story). Thus, the book ultimately sends decidedly mixed messages about the genuine stature of Margaret Morgan as someone to whom, in Arthur Miller's unforgettable words, "attention must be paid." Obviously, it may be unfair to blame White, rather than his indexer, for the omission.

80. On this Tushnet altogether accurately comments that "White's imagined reader" is "someone who is basically sympathetic to the reforms of constitutional criminal procedure instituted by the Warren Court and basically not terribly sensitive to the problems of maintaining order in a disorderly society." Tushnet, *supra* note 14, at 109.

81. P. 221.

82. *Id.*

83. *Id.*

84. R. POSNER, *supra* note 20, at 295.

85. *Id.*

cans, or Hispanic-Americans. Nor, to be blunt, does it speak to the fact that most liberal law professors rarely "enlist" in the fight against racial injustice by, for example, choosing to forego our own well-paid, tenured positions and accepting the anxiety and stress visited upon those who bear the primary burdens of affirmative action programs.[86]

The central point, though, is that anyone genuinely grappling with the great issue of achieving justice within the context of America's racial dilemmas wants more than the short discussion White gives the reader; one would like to see more of a confrontation with the extensive literature about the various moralities and immoralities of affirmative action. And given White's ostensible commitment to paying close attention to the stories of others, one wants some greater acknowledgment of the perspectives of the white (and some might suggest Black[87]) "losers" in affirmative action programs, perspectives that would allow us to understand (and perhaps even "respect") the rage that they often direct at facile supporters of such programs. His metaphor, however brilliant, smells of the scholar's lamp or, perhaps more accurately, the scholar's armchair out of which this book seems to have been written. Nor is this the only example where White seems to evade his own advice to listen carefully to one's own opponents. As Mark Tushnet notes, White "systematically downplays the claims made on behalf of 'law-and-order.'"[88] When discussing the law of search and seizure, and the possible perspective of a police officer in regard to this body of law, White's imagined voice of the police officer is treated "with an attitude somewhere in between indifference and contempt."[89] Tushnet, certainly not identified with what White appears to dismiss as an "authoritarian"[90] desire for law and order, goes on to imagine a serious and, indeed, quite moving phenomenological self-description of the police officer's perspective.[91] Would that White had done likewise.

V. Form, Content, and the Assessment of Judicial Opinions

One difference between this book and White's earlier writings is that this one concentrates on law, particularly as manifested in judicial opinions, in contrast to the emphasis in much of the earlier books on more traditionally

86. At this point, the metaphor of "conscription" might take on a decidedly different meaning from the one intended by White, for the history of American conscription is riddled with the kinds of exceptions that have too often justified gibes such as "a rich man's war, but a poor man's [and, in our more progressive age, women's] fight." One should never forget, for example, that the Civil War itself, the first to be fought in substantial measure by conscripted soldiers, allowed one to buy out of the duty to serve by the payment of $300. In any event, the patterns of "conscription" that one finds in regard to affirmative action rarely meet any strong notion of equally shared burdens and too often foist on vulnerable whites the duty to make up for the discriminatory acts of elite whites who continue to enjoy their privileged positions in society.

87. *See* Carter, *The Best Black, and Other Tales*, RECONSTRUCTION, No.1, 1990, at 6.

88. Tushnet, *supra* note 14, at 107.

89. *Id.*

90. P. 157.

91. Tushnet, *supra* note 14, at 108-09.

"literary" materials. But there is a clear connection between his evaluation of literature and these judicial opinions. White clearly shares the classic humanist's faith in the ability of fine literature to help form fine character. Much could be said, of course, about the assumption that the quality of literature (or law) that one reads will importantly shape the reader's life in significant ways. I personally tend to doubt that reading "fine" literature or listening to great music has much to do with making one a decent person; there are just too many cultured scoundrels—not to mention "uncultured" persons of great moral integrity—in both our past and recent histories. But my skepticism about White's argument goes beyond such empirical data.

"You cannot write a great novel in support of anti-semitism, says Sartre, and I think," White adds, that "you cannot write a great opinion that denies that sense of the ultimate value of the individual person that is necessarily enacted in any sincerely other-recognizing expression."[92] In order to be an interesting sentence, this must mean more than that one defines greatness in a novel as avoiding anti-Semitism or greatness in an opinion as vindicating the ultimate importance of the individual. The sentence then becomes mere tautology. Rather, White must be asserting that there is an integral connection between the moral vision of a work and its formal qualities. One simply cannot use the various techniques that mark one as a "great writer" in order to compose a writing that conveys the specific message of anti-Semitism or anti-individualism.

For White, as already suggested, the form of the opinion should embody the commitment to conversation and to a multiplicity of perspectives as elaborated above. It is not enough to state one's commitment to such things; the opinion must actually demonstrate their possibility. As White writes, "[W]hat distinguishes the work of a good judge is not the vote [or even the doctrinal 'message' conveyed by the opinion] but the achievement of mind, essentially literary in character, by which the results are given meaning in the context of the rest of law, the rest of life."[93] He clearly shares what he describes as "*our* faith as lawyers"[94] that the discipline required to write a series of opinions "is itself deeply educative," training "the mind and sensibility of the individual judge—and of the collectivity of judges, of the lawyers and the public" in such a way that "over time the decisions in the cruder sense, the votes, as well as the opinions, will be more sound, more intelligent, and more just."[95] The "excellence" of judging "is definable . . . in the kind of conversation it establishes, not in the 'result' or 'rule' or 'reason' abstracted from the text in which

92. P. 158.

93. P. 92.

94. *Id.* (emphasis added). It is banal, but necessary, to ask precisely to whom the "our" refers: is it White's ideal reader, his conception of his likely reader, or any American lawyer who might pick up his book? And should the laity be expected to share such faith as lawyers may possess in the virtue of their enterprise?

95. *Id.*

they are given meaning."[96] To some extent, this seems to be a reiteration of the importance of a particular notion of judicial craft that allows us to recognize as "great" an opinion that we strongly disagree with, though I take it we could never reject it on the basis of its being unjust, since by definition an opinion could not be great and unjust at the same time.

It is easiest to challenge such notions in regard to literature. Consider, as a rather obvious example, *The Merchant of Venice*. (I assume that Sartre's comment applies to plays as much as to novels.) Though one might cavil whether it is accurately described as "support of anti-semitism," it seems clear to me at least that it can be read as such.[97] Perhaps this diminishes its stature and makes it a less great play than it might have been, but does it make it not a great play at all? Similar questions could obviously be asked of some of the poetry of T. S. Eliot or the novels of Celine, more clearly anti-Semitic but presumably less canonically "great" than Shakespeare's play. In any event, White's comment seems empirically problematic (how would one test its validity?). More to the point, it seems as well to suggest that art is defined in terms of its relationship to an already known and accepted political or moral theory. But surely one function of art is to lead us to what Nietzsche termed transvaluation, to turn our established views upside down through the techniques available to the artist of genius.

As we turn from novels and plays to judicial artifacts, can we still wonder if there are really no "great" opinions, in terms of capturing the "art" of the lawyer-judge, that are nonetheless pernicious in terms of the moral vision they articulate? Once again, it would seem that only someone committed to a comic vision of law could believe this to be the case. But consider Richard Posner's comment about Justice Holmes's notorious opinion in *Buck v. Bell*:[98] Posner does not hesitate to describe Holmes' opinion as "poorly reasoned, brutal, and even vicious," but that does not prevent him from describing it as "a first-class piece of rhetoric—thus demonstrating, like Antony's speech, that there is no inherent moral or truth value in rhetoric."[99] White would presumably have

96. P. 217.

97. I offer as evidence my reactions to the superb production of the play mounted last year in New York City that starred Dustin Hoffman and Geraldine James. These reactions are based, among other things, on the ultimately "comic" (as opposed to "tragic") resolution of the drama that includes the forced conversion of Shylock to Christianity, the demand for which is portrayed as a sign of Portia's "mercy" inasmuch as she could have, given her lawyerly skills, called for his death as just retribution for his attempt to gain the "pound of flesh" from the noble Antonio. There is certainly precedent in the critical literature about Shakespeare for reading Shylock within the "codes . . . of anti-Semitism." *See, e.g.*, G. TAYLOR, REINVENTING SHAKESPEARE: A CULTURAL HISTORY FROM THE RESTORATION TO THE PRESENT 233 (1989).

Given my earlier quoted comment about multiple interpretations of *Hamlet*, literally the last thing I want to do is argue that *The Merchant of Venice* is "necessarily" anti-Semitic or that thoroughly able interpreters cannot skillfully turn it into an attack on anti-Semitism. The central question is simply whether the formal "greatness" of the play, assuming we think it great at all, depends on resolving the question of its stance as to the iniquity of anti-Semitism.

98. 274 U.S. 200, 205-07 (1927) (Holmes, J.) (upholding mandatory sterilization for "feeble-minded" institutionalized persons, saying, "Three generations of imbeciles are enough").

99. R. POSNER, *supra* note 20, at 289.

little trouble disagreeing with Posner insofar as he would define "first-class" judicial rhetoric quite differently, in terms of its inviting a kind of conversation so totally lacking in either *Buck v. Bell* or Antony's magnificent exercise in audience manipulation.

This, however, only returns us to the question of the extent to which White's jurisprudence elides certain crucial questions by adopting as part of its definition the performance of specific functions, whether they be "integration" or, as in the quotation above, "that sense of the ultimate value of the individual person that is necessarily enacted in any sincerely other-recognizing expression."[100] As Stanley Fish has pointed out, White wants ultimately to define law (and for that matter literature) as "simulacra of" his own self-conception: "open, tolerant, generous, all encompassing, committed to no particular program or point of view because they are large enough to accommodate all."[101]

Though White's assessments of judicial opinions might be problematic, his test cannot be said to be vacuous. He delivers some interesting criticisms of judges whom one might expect White to have applauded, given his presumably liberal substantive politics. Thus, although it is no surprise that White castigates William Howard Taft's wooden reading of the Fourth Amendment in *Olmstead v. United States*,[102] one notes that he criticizes as well Justice Black's "authoritarian claim" that he has found in the Bill of Rights "a certain and clear body of law by which 'due process of law' could be defined."[103]

From White's perspective, "authoritarian" opinions are presumably always defective regardless of the context in which they are delivered. But this assumption raises important political questions of its own. Kenneth Karst, concluding his generally admiring review of *Justice as Translation*, notes that Chief Justice Warren's opinion in *Brown v. Board of Education*[104] is probably more "authoritarian" than White would like, but is not, according to Karst, any the less great for that. Many of the decisions that followed *Brown* are aptly described by Karst as "grunts" rather than conversations, "curt orders that offered no explanation beyond citations to *Brown I*."[105] Indeed, Karst seems to suggest that there are times when the most appropriate tone for a judge to adopt is precisely that of, in White's words, the priest "declar[ing] the meaning of the

100. *See supra* text accompanying note 92.

101. Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495, 505 (1982).

102. 277 U.S. 438 (1928).

103. P. 148. Elsewhere, however, White cites Justice Black as possessing the "authenticity of mind" that he most admires. P. 224.

104. 347 U.S. 483 (1954). Interestingly, this case is not discussed by White.

105. Karst, *The Interpreters* (Book Review), 88 MICH. L. REV. 1655, 1660 (1990) (reviewing J.B. WHITE, JUSTICE AS TRANSLATION (1990)). He cites as examples State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (state-regulated athletic contests); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

sacred language"[106] to a public that is expected to submit, and the declaration by *Brown* and its progeny of a new vision of racial justice, however flawed it may have been, might well have been just such an occasion.[107]

Or consider *Cooper v. Aaron*,[108] where the Court asserted its highly controversial—indeed, dubious—claim to be the "ultimate interpreter" of the Constitution. The proclamation of authority (backed up ultimately by federal bayonets) occurred in the context of the most serious challenge to federal authority since the Civil War, Governor Orval Faubus's refusal to accept the desegregation of the Central High School in Little Rock, Arkansas. "Whatever style a Justice may choose," Karst reminds us, "at bottom law is command, even when it is commanding tolerance of political outsiders or inclusion of religious outsiders. To the Governor of Arkansas who sought to keep black children out of Little Rock's Central High School, the Supreme Court properly spoke in the stern tones of Authority."[109] Would White have had the Court "converse" with Faubus about either the potential merits of a segregated society or the potential legitimacy of a State's refusing to accept *Brown* as the law of the land? I do not mean these as entirely rhetorical questions. A serious person might prefer a less "authoritarian" opinion than *Cooper*,[110] even while recognizing that an opinion acknowledging the possible legitimacy of multiple perspectives about desegregation might well have given aid and comfort to white racists and further hindered what sentiment existed for acquiescence to desegregation. But surely one can applaud, upon attentiveness to context, the vigor of the Court's language in *Cooper* and the refusal to dignify as conversation-worthy Governor Faubus's racism.

I wish that White had chosen to assess *Brown* or *Cooper*. Even more to the point, I wish he had challenged more directly the likely biases of his most sympathetic readers, whom I suspect are largely left-liberal. Although he has interesting things to say about judicial writings ranging from Justice Story's opinion in *Prigg v. Pennsylvania*[111] to the opinions in *United States v. Robinson*,[112] the last of a sequence of search-and-seizure cases that White examines, I doubt that they will lead many readers to engage at sufficient depth with the real questions posed by this aspect of White's enterprise.

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106. P. 148.

107. *See* Karst, *supra* note 105, at 1660.

108. 358 U.S. 1 (1958).

109. Karst, *supra* note 105, at 1660 (footnote omitted).

110. I certainly have no hesitation in rejecting *Cooper's* "papalist" claims to "ultimate authority" in offering constitutional interpretations. *See* S. LEVINSON, *supra* note 19, at 9-53.

111. 41 U.S. (16 Pet.) 539 (1842).

112. 414 U.S. 218 (1973). White also offers a very brief discussion of United Steelworkers v. Weber, 443 U.S. 193 (1979), pp. 218-21.

VI. CONVERSATION OR MONOLOGUE?

What most led to my negative response to the experience of reading *Justice as Translation* was, however, not so much the various conceptual problems left unresolved by the book—what book, after all, could survive any rigorous application of that test?[113]—as White's failure to indicate any real engagement with the many other writers who are grappling with similar concepts and attempting to deal with problems they raise. If White were portraying himself as an unabashed egoist, that would be one thing. But he presents himself as a man committed above all to conversation and the creation of supportive, multi-voiced communities. We have just seen that he applies such values to the analysis of judicial opinions and criticizes even result-attractive opinions, such as Justice Black's, that suggest the authoritarian priest rather than the committed[114] conversationalist. And recall the presentation of *Justice as Translation* as a model enactment of his commitments. All of these factors, far more than simple disagreement with some of the specific arguments, are what ultimately explain my deep disappointment upon reading the book.

An important clue to what is is most distressing about *Justice as Translation* is provided by looking at its index, where the reader will notice numerous omissions of persons who have contributed to the discussion of which *Justice as Translation* is a part. Most noticeable, surely, is the absence of any reference to Nietzsche, whose thoughts on "perspectivism"[115] might be thought highly relevant to someone with White's ostensible views. Nietzsche, of course, is scarcely a bland figure committed to White's reassuring notions of equality and democratic conversation. He is also dead, so it would be hard to engage in genuine conversation with him. This is certainly not the case with Richard Rorty, and one would like to know what White thinks of Rorty's far more attractive and explicitly liberal presentation (detractors would probably say domestication) of perspectivism.[116] But Rorty also makes no appearance, so we do not know. It is also worth mentioning in this context Bruce Ackerman's *Social Justice and the Liberal State*, almost certainly the most systematic effort, at least within the legal academy, to ground social justice in the imperatives of conversational dialogue,[117] but similarly unmentioned.

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113. My own book, *Constitutional Faith*, *supra* note 19, certainly could not.

114. And protestant: thus White contrasts the "authoritarian claim" of privileged "authority to declare the meaning of the sacred language" to the "fact" of "the individual's responsibility to engage as an autonomous and present person" in the interpretation of the sacred texts. P. 148.

115. *See, e.g.*, A. NEHAMAS, NIETZSCHE, LIFE AS LITERATURE 158 (1985).

116. *See, e.g.*, R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989).

117. B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980). There is, of course, an extensive literature outside the legal academy on the relationship between notions of conversation and the derivation of norms of social justice. For a helpful introduction, see Benhabib, *Liberal Dialogue Versus a Critical Theory of Discursive Legitimation*, in LIBERALISM AND THE MORAL LIFE 143-56 (N. Rosenblum ed. 1989) (discussing especially the work of Ackerman and Jürgen Habermas).

Among the most fruitful explorers of conversation and the implications of differing perspectives, of course, have been feminists, but no feminist author appears in the pages of this book. The most notable omission in this regard is probably Martha Minow's 1987 *Foreword* to the *Harvard Law Review*,[118] which eloquently sets out the importance of adopting the validity of multiple perspectives, though her work is only one such example.[119] But White's reader would get nary a clue about the existence of this literature.[120] It is as if feminists have written nothing.

The same can be said of those analysts of race who have emphasized the importance of developing multiple perspectives. One thinks immediately of Derrick Bell, Alan Freeman, Mari Matsuda, Richard Delgado, and Patricia Williams.[121] One need not enter the debate provoked by Randall Kennedy's important article about the merits of some of the so-called "critical race theory" scholarship[122] in order to recognize its obvious affinities with aspects of White's own project and its relevance to anyone who views a central task of law as developing a greater receptivity to the presence of "different voices" in our legal conversations.[123] Nor is any notice taken of Robert Burt's work over what is now more than a decade, which insists with great eloquence on the importance not only of sensitivity to the perspective of the other, but also, with equal passion, on the duty to embrace the other and forge new bonds of family or community.[124] There is a similar ignoring of the work that has come out of the critical legal studies movement that has often insisted on just such "fluidity" of language that leads to "indeterminacy" of outcomes and thus

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118. Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); *see also* M. MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990). It is not at all a coincidence that one of Minow's substantive interests is bilingualism and bilingual education, certainly one of the most dramatic symbols of the reality of "different voices." *See id.* at 19-23, 26-29, 31-40.

119. For work published before 1988, presumably the last year before White sent the manuscript to the University of Chicago Press for publication, see, in addition to Minow's *Foreword*, *supra* note 118, Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985) (Isabel Marcus and Paul J. Spiegelman, moderators; Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, and Carrie Menkel-Meadow, conversants).

120. There is an index entry for Robin West, but the reader is led only to a footnote citing her debate with Richard Posner about Franz Kafka and law and economics. *See* p. 275 n.11 (citing West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985), and West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986)).

121. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Freeman, *Legitimizing Racial Discriminaton Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

122. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1988).

123. *See, e.g.*, Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

124. *See generally* R. BURT, TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT REALTIONS (1979).

makes orthodox legal analysis, with its quest for determinate solutions, impossible.[125] There are many ways in which White's position seems quite similar to those identified with these various branches of contemporary legal discourse—is he a "crit" who has not yet come out of the closet?—but it is hard to tell, insofar as he relentlessly refuses to acknowledge that there is in fact a vigorous, indeed often acrimonious, conversation that is taking place all around him about the very issues that he is ostensibly most interested in.

Finally, there seem some obvious analogues between White's arguments and some of those associated with the "neo-republicanism" of Frank Michelman,[126] who presents a conversational model of judging, even if some argue that it seems to limit, when all is said and done, the conversational community to the judges.[127] Michelman does appear in the index, but only as the author of a 1978 article on law and economics, White's *bête noire*. That is not all of Michelman's work that should be of profound interest to White.

Just as importantly, there is nothing resembling serious confrontation with the thoughtful critics of perspectivism and of feminism, critical legal studies, postmodernism, and other such styles of the contemporary intellectual scene that embrace one or another variety of antifoundationalism. Such critics, for example, are curious about the basis for identifying the "inhumanities" that they, like White, are prepared to recognize, including chattel slavery. If ungrounded, do such identifications simply stand as referents to the existence of interpretive communities that regard these practices, which may, after all, be quite common and supported by quite sophisticated theoretical defenses, as "bad things"?

Why have I devoted so much space to bibliography mongering, rather than merely focused on problems within White's own thought? Am I doing anything more than engaging in the highly dubious practice of a reviewer wishing out loud that the author had written a different book? Or do the omissions mentioned go to the heart of the book that he *did* write? The answers, perhaps paradoxically, lie in White's commitment to the centrality of conversation, a theme that pervades the book. Recall White's assertion "that the legal text, like every text, is a stage in a conversation and ask of it: Is this conversation one in which 'democracy begins?'"[128] I find this commitment to conversation, and to democracy, extremely attractive. However, I view this book as being far more about the abstract *desirability* of engaging in conversation than an *exemplification* of a good conversation "in which 'democracy begins.'" What is given the reader is not a model of how one converses, but rather an extended,

125. *See, e.g.*, Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

126. *See* Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

127. *See* Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 28-37 (1989).

128. P. 101.

quite repetitive, monologue. Insofar as one purpose of the book is to provide a model of how to *enact* a conversation, it fails.

It is not that White's enterprise is not a significant one or that the task he set himself could not be done. Consider, for example, *The Company We Keep: An Ethics of Fiction*,[129] a book published in 1988, that has quite similar aims to those set out by White. Its author is Wayne C. Booth, who, not at all coincidentally, is a former colleague of White at the University of Chicago and a continuing friend.[130] Booth is trying to revive a distinctly unfashionable enterprise—the analysis (and assessment) of works of literature in terms of their "entire range of effects on the 'character' or 'person' or self.'"[131] He takes very seriously the metaphor of authors, and the books they write, as "friends," and, like Socrates,[132] he is well aware of the shaping effects that friends have on one another.

Writing of William Butler Yeats, for example, Booth notes that "[h]e wins my friendship, as my real friends [i.e., flesh-and-blood friends, including, one presumes, James Boyd White] do, by offering a distinctive, engaging way of being together, one of many possible ways of addressing a world of conflicting values."[133] Discussing what he calls "the ethics of narration," Booth says that the reader must always ask if "the pattern of life" offered her by an author is "one that friends might well pursue together? Or is this the offer of a sadist to a presumed masochist? Of a seducer or rapist to a victim? Of the exploiter to the exploited?"[134] Thus, of the works (and their authors) he admires most—*King Lear*, *The Cherry Orchard*, and *War and Peace*, to name only three—Booth says that their authors are "friends" whose friendship is manifested not only in contributing to his pleasure and "not only in the promise they fulfill of proving useful to me, but finally in the irresistible invitation they extend to live during these moments a richer and fuller life than I could manage on my own."[135]

A truly commendable work of literature "lead[s] me first to practice ways of living that are more profound, more sensitive, more intense, and in a curious way more fully generous than I am likely to meet anywhere else in the world."[136] And Booth's capacity for such friendship is profoundly egalitarian, for the fine work of literature "show[s] what life can be, not just to a coterie,

129. W. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988).

130. *See id.* at xi; p. xvii.

131. W. BOOTH, *supra* note 129, at 8.

132. *See* PLATO, GORGIAS 121 (T. Irwin trans. Penguin ed. 1979). This has been a recurrent theme of White's as well. Thus, in his earlier book, *When Words Lose Their Meaning*, White asks of a text that he is scrutinizing—in that specific instance Burke's *Reflections on the Revolution in France*—"How then can its relation with us be one of friendship?" J.B. WHITE, *supra* note 11, at 221. White's "ideal" world is one "of conversational and refutational friendship, a world of equal speakers with other," *id.* at 282; for both White and Booth, texts can be our friends just as much as concrete individuals.

133. W. BOOTH, *supra* note 129, at 216.

134. *Id.* at 222.

135. *Id.* at 223.

136. *Id.*

a saved and saving remnant looking down on the fools, slobs, and knaves, but to *anyone* who is willing to work to earn the title of equal and true friend."[137] The parallels between Booth's and White's enterprises should be obvious, as should be the importance of the questions Booth (and White) raises about the impact of literature (or judicial opinions) on their readers.

What makes Booth's book far more satisfying than White's, though, is precisely the enactment by the former of what it means to participate fully in a conversational community. Here, too, the dedication is telling: "For Paul Moses 1929-1966." Moses was an African-American colleague of Booth's who raised the possibility that *Huck Finn* might be deeply racist.[138] Booth, to put it mildly, was disinclined to accept the point, or the associated argument that it constituted "bad education" to subject students to it. Far more important than the abstract words of the dedication is the fact that this 500-page book is a series of reflections on the themes suggested by Moses; in a moving final chapter, Booth indicates how he has been led to see the possible validity of the points raised by Moses some quarter century ago. *The Company We Keep* is one of the most profound *acts* of friendship I have ever encountered. And, along the way, Booth pays careful attention to those writing about the issues he addresses, ranging from ethical relativism to feminism. (As to the latter, Booth notes how feminist critics have led him to reevaluate his earlier enthusiasm for Rabelais.) I warmly recommend the book to any reader seeking not only a fine presentation of the argument that it matters what models of literature (or of law) are placed before the young (and not so young), but also, and perhaps more importantly, an example of what it means, at its best, to manifest one's membership in, and friendship for, a community of equals.

Nor is Booth unique in exemplifying how actually to perform White's suggested enterprise. It is a deep irony, given White's attack on the language and culture instilled by economistic reasoning,[139] that Richard Posner conveys a far more vivid sense of the engaged conversationalist than does James Boyd White. Although my own views and political values are far closer to White's than to Posner's, I have the constant sense when reading Posner's recent work of a man aware of the multiplicity of voices engaging in legal arguments and making good-faith efforts to grapple with what they are saying. Indeed, what makes Posner one of the most interesting presences in contemporary intellectual life is precisely the sense that there is development in his thought, that it is truly worthwhile to engage with him. That is precisely what is absent in the recent work of White.

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137. *Id.*

138. *Id.* at 3-5.

139. See not only chapter two of *Justice as Translation*, but also White's very illuminating review of Posner's *Law and Literature*, White, *What Can a Lawyer Learn from Literature?* (Book Review), 102 HARV. L. REV. 2014 (1988).

Perhaps admirers of White's previous work will turn to *Justice as Translation* in the same spirit that admirers of certain genre novelists await forthcoming novels, secure in the confidence that their authors will present a reworking of themes that they have already made their own. What is true about even the best of such novelists—say Anne Tyler, from whose books I have received great pleasure over the years—is that there may be no great need to read all of her novels. Few of her readers will expect her next novel to differ all that much from what has come before. If one missed her last novel, it is no big deal, for others will undoubtedly come along, mining the same ore.

James Boyd White has given us some real gold in his earlier work, but I am afraid that he increasingly seems to be repolishing the same nuggets, and they no longer seems to be so fresh and interesting as they once were. But if that were my only objection, the tone of this review would have been far different, for no one can be expected always to produce masterpieces. What is far more important, and what does account for its tone, is the sense of betrayal experienced at least by this reader of White's eloquently stated commitment to conversation inasmuch as he almost resolutely ignores what is being said all around him about his own central issues. A monologue is not a conversation, and it is not a model for democracy, either.