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BOOK REVIEW

TRANSLATION AS ARGUMENT

JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM, By James Boyd White.* Chicago: The University of Chicago Press 1990. Pp. 313. $29.95

MARK V. TUSHNET**

James Boyd White has pulled off a major accomplishment: he made me want to write a defense of Richard Posner in the most occluded and bureaucratic prose possible.[1] My desire results in part from some obvious defects in White's arguments, particularly with respect to what he defines as "economics" and "philosophy," and in more substantial part from the manner in which White presents his arguments. I should say at the outset, so that what follows may be discounted appropriately, that I respond to White's manner of presentation as most people respond to fingernails raking across a blackboard.[2] In *Justice as Translation*,[3] I found one extremely striking essay, "Translation, Interpretation, and Law," a few provocative close readings of some cases and legal texts, and a lot of fog. In this Review, I hope to work toward an explanation of how, in light of my reaction—which I believe to

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1. I resist the former temptation, but see *infra* text accompanying notes 82-109, and conclude reluctantly that I lack the talent to succumb to the latter. I put it that way to emphasize that, once one sees the use of bureaucratic prose as a choice which stylists can select, one's inability to make that choice becomes a defect in one's literary talent. From this point of view, which may be a postmodernist one and therefore uncongenial to White, literary talent includes the ability to switch freely from one style to another. *See, e.g.*, A. HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT (1988). In contrast, White believes that using the bureaucratic style shows a character defect, at least when an author does not deliberately choose that style over others. Whether he believes that anyone can make such a choice is unclear.

2. I must note at the outset that, based on White's influence, many people regard him as an inspiring teacher, and that my reaction perhaps should be discounted as resulting from my general cussedness.

3. J. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990).

be justified—to these essays, White could have become a major figure in the law and literature subdiscipline.[4] I do so by attempting, to adapt one of White's phrases, to construct the reader White imagines for his work.[5]

White's essays articulate two related themes. The first, emerging most clearly from some of his readings of Supreme Court opinions, is that all too often the Court speaks in an authoritarian voice. White argues, for example, that Justice Felix Frankfurter's defense of the proposition that police procedures "shock the conscience"[6] ultimately rests on the authoritarian claim that judges like Frankfurter are people whose characters are such that the citizenry ought to defer to their judgments.[7] Similarly, Chief Justice Taft's opinion in *Olmstead v. United States*[8] "appeals to our desires for simplicity, for authority of a certain kind, and for a boss who will tell us what things mean and how they are."[9]

The second theme is that society ought to develop a capacity to see law as translation; that is, as an effort to articulate a way of being open to alternative meanings while recognizing that what judges and lawyers create inevitably operates in a domain "in between" the claims of authority, precedent, social policy, and the like: "There is no single appropriate response to the text of another, nor even a finite appropriate set of responses; what is called for is a kind of imaginative self-assertion in relation to another."[10] The good translator has "an excellence of mind and character . . . to which we can aspire: an attempt to be oneself in relation to an always imperfectly known and imperfectly knowable other who is entitled to a respect equal to our own."[11]

Presented in this manner, the choice seems clear. Authoritarian voices are bad; imaginative self-assertion respectful of the voices of others is good. Yet, this sort of opposition has a certain "new age"-ish mushiness that provokes some cranky observations. First,

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4. The obvious counter to the thrust of this Review is that my reaction to the book can most charitably be called idiosyncratic, and that the explanation for White's prominence is, contrary to my view, that his work is actually extremely good (and that, in legal academia, people who write extremely good works become prominent). The only answer possible to such a counter is the Review itself.

5. "Who . . . is the Ideal Reader defined by the Constitution or by this statute or contract?" J. WHITE, *supra* note 3, at 101.

6. Rochin v. California, 342 U.S. 165, 172 (1952).

7. *See* J. WHITE, *supra* note 3, at 107-09.

8. 277 U.S. 438 (1928).

9. J. WHITE, *supra* note 3, at 148.

10. *Id.* at 256.

11. *Id.* at 258.

White trades on implicit[12] images of African-Americans and women as excluded outsiders whose voices need to be heard.[13] His formulations, though, seem to ask "us" to be open to everyone. Frankly, that strikes me as ridiculous. "We" may not have learned much about right and wrong over the course of history, but we know enough to realize that we do not have to be open to the voices of racists.[14] The idea that we should be open to previously excluded voices, in contrast, relies on a substantive theory of justice regarding the impropriety of past exclusion of certain voices. White's approach lacks substantive content.[15]

Second, read closely, White himself is not completely open to alternative voices. He systematically downplays the claims made on behalf of "law-and-order,"[16] and, when he proffers the voice of a police officer, he treats the officer with an attitude somewhere in between indifference and contempt.[17] This occurs in White's discussion of *United States v. Robinson*,[18] which upheld the authority of a police officer to engage in a full body search incident to an arrest, even though a full search was unnecessary to discover evidence of the crime for which the arrest occurred, or to ensure that the person arrested was not carrying anything that he or she might use to harm the arresting officer.[19] White introduces his discussion of the case by quoting the testimony of the arresting officer: "I just searched him. I didn't think about what I was looking for. I just searched him."[20] Later, White says that this sort of statement shows that, in the officer's view,

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12. To the extent that White places slavery at the center of his discussion, his imagery is explicit. *See infra* text accompanying notes 39-71.

13. J. WHITE, *supra* note 3, at 113-40.

14. Institutional reasons may exist for protecting the rights of racists to say what they believe, but the metaphor of openness on which White relies suggests that we should always be in a position to accept what others say, or at least to reject what they say after respectful consideration.

15. In addition, though it may be inevitable in jurisprudence, White's approach plainly favors those who are more, rather than less, articulate.

16. In discussing Olmstead v. United States, 277 U.S. 438 (1928), White makes "[o]ne final point" that "in this case it is the law-and-order man who is authoritarian in his voice and style, and the defender of individual rights who speaks as an individual himself and to us as individuals." J. WHITE, *supra* note 3, at 157. After sketching an alternative opinion, White concludes that "it would be hard to [come out on the law-and-order side] very persuasively." *Id.* at 158.

17. J. WHITE, *supra* note 3, at 187-88.

18. 414 U.S. 218 (1973).

19. *Id.*

20. J. WHITE, *supra* note 3, at 187 (quoting *Robinson*, 414 U.S. at 251 (Marshall, J., dissenting)).

> the citizen whose rights are invaded is not entitled to insist that the invasion be limited by a stated justification. Instead of being regarded as a person, whose interests clash with those of the police, the suspect is here told that in some important way he belongs to the police and not to himself.[21]

This viewpoint, to White, does not offer "a language in which the opposing sides could both talk, expressing their claims and defining their disagreement."[22]

From this passage, I suggest that White is, to put it mildly, not sensitive to what the arresting officer actually was saying. I suspect that "I just searched him" means something like this:[23]

> I go out there every day and run into a lot of people who are doing their best to live decent lives in a society which is so indifferent to their troubles that it allows them to live in conditions subjecting them to serious risks of death and physical injury. I have to do the best I can to help those people by protecting them against the depredations of evildoers, of whom there are also many. But, doing my job also puts me in serious danger, not all the time but often and unpredictably enough that I can never be confident that any discussion I have with anyone, particularly a discussion with someone I have arrested, will not erupt into violence at any moment. That puts me in a "mind set" that is quite hard to live with; normal people just do not go around assuming that violence is liable to occur around them at every moment. To be able to live my life off the job in a decent way, I have to develop some psychological mechanisms that let me "bracket" the job, so that I can put it, and the ever-present threat of violence, aside when I go home.
>
> That is not easy to do, but one mechanism that works reasonably well is to develop routines, so that I do not have to think about what I am doing at every moment. One routine is to search everyone I arrest, not because I would actually make a considered judgment in every case that I am at risk of violence but because, unless I develop that routine, I will not be able to turn the job off at night when I go home. The courtroom and the streets are so far apart that it would be demeaning for me to try to lay all this out when some lawyer asks me a silly question, so I answer by saying, "I just searched

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21. *Id.* at 195.
22. *Id.* at 196.
23. As should be clear, I am improvising in this passage and omit the profanities that surely would be part of the officer's response.

> him. I didn't think about what I was looking for." Then, to compound the insult, some law professor criticizes me for treating Robinson as if I owned him! That professor ought to talk to the good people on the streets and see what they think about my trying to get drug dealers out of their lives before he tells me that nonsense. Or, he should not send me out on the streets to try to help the good people lead decent lives without backing me up in some other way.

At some level, I believe, or hope, that White would find that sort of statement, or a more realistic one along similar lines, an honest and acceptable presentation of the law-and-order position. What is striking, however, is that nowhere in his book does White even try to engage in a dialogue with people of the sort I have imagined here. This absence suggests that White's openness is only partial, and that his partiality has some, dare I call it political, content. The first aspect of White's imagined reader, thus, is a political one: someone who is basically sympathetic to the reforms of constitutional criminal procedure instituted by the Warren Court and basically not terribly sensitive to the real problems of maintaining order in a disorderly society.

A third cranky observation about White's language supports this suggestion. Early in the book, White offers an analysis of "academic and professional discourse,"[24] asking his readers to imagine themselves as professors in their offices. How, he asks, do they approach the literature of the field? He writes,

> If you are at all like me you do so not with eager anticipation but with a feeling of guilty dread and with an expectation of frustration. For we live in a world of specialized texts and discourses, marked by a kind of thinness, a want of life and force and meaning.[25]

He continues, "there is something about our conception of professionalism—it may have to do with the use of a false image of science as a model of thought and discourse—that leads us to speak and write in ways that are false to the character of our own intellectual lives."[26] For White,

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24. J. WHITE, *supra* note 3, at 8.
25. *Id.*
26. *Id.* at 11. For a discussion of White's difficulties with science, see *infra* text accompanying notes 111-21.

> in literature and in law alike there is often a perceptible want of love for the subject matter . . . . The driving emotion often seems not to be love but a desire to dissect, to dominate, to conquer, both the past and one's contemporary peers. The erotics of this kind of criticism is not reciprocal or mutually recognizing, but competitive and dominating.[27]

This and similar passages in White's work offer much to think about. Most obviously, who is this "we" he is talking about? To whom is the "want of love for the subject matter" perceptible (an interestingly passive construction)? White describes a deeply alienated professional academic lawyer. That description may reflect his professional experience, but—I cannot avoid personal testimony here—it is not my professional experience. For me, reading law and the many legal commentaries currently produced is truly exciting, and I have learned, grown, and been erotically engaged in the sense White appears to intend, even by work as fundamentally bad as White's.[28]

White describes professional legal writing as if it were limited to narrow, purely doctrinal analyses of the sort that occupied almost the entire discipline in the 1950's. But the world of legal academics is not like that any more, if it ever was. White treats himself "as a local informant about my own language,"[29] which is fair enough, but if the rest of "us" are to take his cultural criticism seriously, he should give us more assurance of his good sense of the culture he purports to be criticizing.

I am reasonably confident that White is offering rather cogent criticisms of a segment of the culture of the legal academy of the 1950's, but I wonder why I should care much about that today.[30] Also, when he gets as close to cases as he comes in this discussion, White seems wildly off the mark. The first part of the book includes essays on what White offers as contemporary

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27. J. WHITE, *supra* note 3, at 99.

28. In writing this sentence at this point in the Review, as in writing the Review as a whole, I am aware that White already has in place his defense to criticism—that it is "not reciprocal or mutually recognizing, but competitive and dominating." *Id.* In the manner of passive-aggressive behavior, is not that defense itself "not reciprocal or mutually recognizing" in that it discredits from the outset claims, such as mine, that White's book is fundamentally bad? *Id.*

29. *Id.* at 26.

30. I have to say that, after reading White's description of the alienated intellectuals that constitute the culture he criticizes, I could not shake the image of male law professors who believe that they must wear a tie when they teach—not that wearing a tie while teaching is wrong, only that it ought to be a choice rather than a cultural imperative.

> him. I didn't think about what I was looking for." Then, to compound the insult, some law professor criticizes me for treating Robinson as if I owned him! That professor ought to talk to the good people on the streets and see what they think about my trying to get drug dealers out of their lives before he tells me that nonsense. Or, he should not send me out on the streets to try to help the good people lead decent lives without backing me up in some other way.

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24. J. WHITE, *supra* note 3, at 8.
25. *Id.*
26. *Id.* at 11. For a discussion of White's difficulties with science, see *infra* text accompanying notes 111-21.

the most part do I cite particular writers on particular points" because White's "concern is with structure and tendency rather than detail."[33] But, for a reader of texts, I think the distinction between structure/tendency and detail is meaningless.[34] I suspect the problem is that, somewhere deep down, White knows that his reflections on law-and-economics and philosophy would not survive a close reading of actual texts, at least if, as a cultural critic must allow, the selection of texts were subjected to some test of representativeness. It may not be that for every Richard Posner or Ronald Dworkin there is an Amartya Sen or a Stanley Cavell, but enough of the latter exist to make White's cultural criticism quite unpersuasive.

(In the prior sentence, I considered including a footnote saying that White acknowledges the existence of Sen[35] and Cavell[36] in passing, while suggesting that "real" economists and philosophers were people like Posner and Dworkin—though he does not use their names in his text. Doing that, though, would have reproduced the privileging of text over footnotes which is the point this paragraph identifies.)[37]

If White is not truly open to a fairly large number of voices, how can he present himself as the apostle of openness? His criticism of authoritarianism offers a third aspect of the reader he imagines: a tender-minded liberal who finds himself or herself uncomfortable with the inroads that law-and-economics has made in the legal academy. White makes an interesting, and on one level quite outrageous, rhetorical maneuver which bolsters that suspicion. The second section of the book deals with judicial opinions and consists, after an introductory chapter, of readings of opinions.[38] The first reading deals with two opinions discussing the constitutional aspects of slavery.[39] This reading allows White to show that he really is on the right side, that he thinks slavery was a *bad thing*. Although this is not hot news, it immediately

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33. J. WHITE, *supra* note 3, at 51.

34. I am confident that White could have made many of his points more effectively, though without being able to attribute the defects he found to economics, through readings of the opinions and articles of Judges Posner and Easterbrook, the former of whom routinely generates opinions that read like entries in a contest for parodies of the style of Ernest Hemingway.

35. *See* J. WHITE, *supra* note 3, at 78 (parenthetical reference to Sen).

36. *See id.* at 272-73 n.6 (approving citation to Cavell).

37. I leave it to the reader to consider the significance of the parentheses around this paragraph.

38. J. WHITE, *supra* note 3, at 113-40.

39. *Id.* at 127.

places the reader on White's side, allowing White to claim thereafter to continue a collaboration instituted in the common judgment about slavery.

But, after all, there is something rather demeaning about making a big deal about the proposition that slavery was a bad thing. I found this particularly annoying in White's discussion of *Dred Scott v. Sandford*,[40] wherein he offers an interpretation of Chief Justice Taney's opinion that almost necessarily evokes in a modern reader questions that arise in connection with the abortion issue and then (willfully, it seems to me) fails to address those issues. In contemporary political discourse, *Dred Scott* functions as an analogue to the abortion decisions. Critics of those decisions sometimes argue that, just as the Court in *Dred Scott* held that African-Americans could not be citizens within the meaning of the Constitution, so the Court in *Roe v. Wade*[41] held that fetuses were not people in the constitutional sense.[42] One passage in White's discussion of *Dred Scott* speaks to this argument, though not in a way that casts credit on White. The passage takes off from the observation that Taney had no "warrant . . . in constitutional terms"[43] to talk about race at all: "For nowhere in the Constitution is race mentioned, nor does it list other categories of human beings, some who can become citizens, others who cannot . . . ."[44] White notes that Taney's language responded to the defendant's plea that African-Americans could not become citizens:

> But the normal practice when a party makes a claim cast in extra-legal terms is either to disregard it or to recast it, as far as possible, in legal terms. (Suppose, for example, that the defendant had argued that a short person or a blind person could not become a citizen. Would the Supreme Court have accepted that as its question?)[45]

The answer White wants to his rhetorical parenthetical question is "No." I cannot see, however, how White can resist the implications of the following reformulation: "Nowhere in the Constitution are fetuses mentioned. Suppose a lawyer argued that a

40. 60 U.S. (19 How.) 393 (1857).
41. 410 U.S. 113 (1973).
42. *Id.* at 158.
43. J. WHITE, *supra* note 3, at 127.
44. *Id.*
45. *Id.*

fetus was a person. Should the Supreme Court accept that as its question?"[46] I cannot avoid feeling that White fails to address this question because, although opposing slavery is easy, taking a position on abortion is more difficult for some.

The cheapness of White's moral stance against slavery is particularly demeaning because the chapter's subtext is a polemic against the jurisprudence of original intent associated with former Attorney General Edwin Meese.[47] By demonstrating that the jurisprudence of original intent led the Court to come out on the side of slavery in these cases, White implies that the jurisprudence of original intent is fundamentally misconceived.[48] The argument misfires, however, because White invites his readers to take the texts of cases decided in 1842 and 1857 as contemporary texts. Accordingly, he criticizes Justice Joseph Story's opinion in *Prigg v. Pennsylvania*[49]:

> [Story's] way of reading legal texts is inconsistent with the fundamental idea of law on at least two counts: first, *as we think of it,* law is a way of creating a world that accommodates opposing interests and claims, a world in which distinct voices can be heard. . . .
>
> Second, Story's method eliminates the aspirational or idealizing element that is essential to *what we think of as law* . . . .[50]

Maybe I am too much of a historian, but someone writing about a jurisprudence of original intention ought to be sensitive to the possibility that people in the past did not think of law as we do and that openness to distinct voices means attempting to reproduce the mental universe in which they operated to find the meaning of things that seem so odd to us today.

I can elaborate by examining White's criticism of Story in somewhat more detail. *Prigg* was a case in which the state prosecuted a slave-catcher for kidnapping a woman who had

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46. In this example, it does not seem significant that antichoice lawyers argue that fetuses are persons whereas proslavery lawyers argued that African-Americans *could not be* citizens. (Prochoice lawyers argue that fetuses are not persons, and antislavery lawyers argued that African-Americans were, or could be, citizens.)

47. The chapter title is "'Original Intention' in the Slave Cases." Meese is not cited anywhere in the chapter or its footnotes, but it is inconceivable that White's readers would not understand the target of the criticism.

48. J. WHITE, *supra* note 3, at 134-36.

49. 41 U.S. (16 Pet.) 539 (1842).

50. J. WHITE, *supra* note 3, at 121 (emphasis added).

escaped from slavery in Maryland.[51] The slave-catcher failed to comply with the procedures for establishing ownership specified in Pennsylvania law.[52] The Supreme Court held that the Pennsylvania statute was unconstitutional.[53] White begins by examining the language of the fugitive slave clause[54] and concludes that one can fairly construe the clause as authorizing Congress to enact a statute defining procedures for identifying fugitive slaves, as Congress had done in the Fugitive Slave Act of 1793.[55] Yet, White also concludes that the Act did not preempt state legislation consistent with its aim of properly identifying fugitive slaves and their owners. Because the Pennsylvania statute harmonized with the federal Act, the state could insist that slave-catchers comply with it.[56]

White contrasts this analysis, which "a modern constitutional lawyer might generate,"[57] with the argument that Story actually makes. For White, Story "short-circuit[s]" this sort of analysis by adopting a historical view of the origins of the fugitive slave clause.[58] As Story reads the history, the fugitive slave clause was an essential element of the compromise that brought the Constitution into being: "Story pierces the text for the intention that he says underlies it and declares that this intention is its meaning. For him language is not the source of meaning, nor does it give it shape; meaning lies in the wish or aim or motive of the author."[59] As a result, Story adopts "an impossible diction," which transforms the Constitution's term "discharge" so as to "erase[ ] the distinctions between 'interrupt,' 'limit,' 'delay,' 'postpone,' and 'discharge.' "[60] The source of this view, according to White, is Story's interpretive method of "look[ing] through . . . language for the intention that lies behind it."[61]

A number of things are wrong with this argument. First, and least important, White's criticism of Story's interpretation of the term "discharge" seems to ignore the proposition that "it is a

51. 41 U.S. (16 Pet.) at 543.
52. *Id.* at 608.
53. *Id.* at 625-26.
54. J. WHITE, *supra* note 3, at 115.
55. *Id.* at 117.
56. *Id.*
57. *Id.*
58. *Id.* at 117-22.
59. *Id.* at 118.
60. *Id.* at 119.
61. *Id.* at 120.

constitution we are expounding."[62] People engaged in ordinary discourse might occasionally want to distinguish among "discharge," "interrupt," "delay," and the like. As John Marshall understood, however, the language of the Constitution was a language of condensation which used general terms to express authority to deal with subjects that, in a more refined form of discourse, people might treat separately.[63] Story might well have thought that the fugitive slave clause was exactly of this nature.

Second, White simply ignores the fact that, in the conceptual universe in which Story operated, the modern distinction between a constitutional provision that authorizes Congress to adopt a statute that preempts state authority and a preemptive statute was not at all well-established. In *Gibbons v. Ogden*,[64] Marshall found "great force" in the argument that the grant of power to Congress to regulate interstate commerce in itself and without further legislation displaced all state authority to act similarly.[65] Determining whether a constitutional provision had this automatic preemptive effect required an examination of the nature of the power at issue. An examination of the intentions of those who placed the power in the Constitution is one way to determine the nature of that power; such an approach is hardly inconsistent with our notion of law. If Congress's power to adopt laws regulating the recapture of fugitive slaves, which White concedes one could infer reasonably from the text,[66] was of a nature making it exclusive of state power, the fact that Pennsylvania's statute was consistent in its purposes with, and did not obstruct the implementation of, the federal Fugitive Slave Act of 1793 was simply irrelevant: the Constitution's grant of power to Congress to adopt the Fugitive Slave Act necessarily deprived states of the power to enact laws regulating the same subject.

Third, and perhaps most important, White is correct in saying that Story's language fails to acknowledge that the Constitution as a whole was a compromise between the South and the North. Yet, to say that the fugitive slave clause was a concession to the South whereas the representation formula was a concession to the North seems entirely consistent with that fact.[67] The fact

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62. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
63. *Id.*
64. 22 U.S. (9 Wheat.) 1 (1824).
65. *Id.* at 209-10.
66. J. WHITE, *supra* note 3, at 120-21.
67. Under the representation clause, the slave population of the South received only

that the document as a whole is a compromise does not mean that every provision of the document must itself embody the compromise. In this sense, the Constitution as a whole "accommodates opposing interests," even if the fugitive slave clause does not.[68]

In short, Story's interpretation of the fugitive slave clause is a plausible one. What about White's claim that "Story's method eliminates the aspirational or idealizing element" of law?[69] Here too White's effort to criticize an essentially historical method of analysis by ignoring history leads him astray. Earlier in the book, White identifies a "principle of the separation of powers"[70] that requires lawyers to do more than assess the results of cases: "The question for the lawyer is *always* more than what the best result or rule would be, for it includes as well the question: Who should have the power to decide what the best result or rule is . . . ?"[71] A similar separation of powers issue underlies the problem in the slavery cases. Conceding that the enterprise that the Constitution put in place has an idealizing element, lawyers like Story may well have believed that the idealizing element consisted of the survival of the United States as an ongoing enterprise that achieves the best results over the course of time, even if quite bad results might be in place at any particular moment. Story's emphasis on the concessions to the South is consistent with this view of the Constitution as a whole. As Story saw it, and he seems to have been correct, those concessions were essential to the establishment of the United States, which once in operation could place the people of the Nation on a course leading to the eventual elimination of slavery. Without the concessions, slavery would have been entrenched permanently in the South with no prospect of elimination by the Nation in which the South participated. The idealizing element was the Constitution as a whole, rather than any particular part of it. If Story believed that the Nation could not survive without acceptance of his interpretation of the fugitive slave clause, and if he believed that the survival of the Nation provided the best prospect for

three-fifths weight in determining the number of seats to which Southern states were entitled in the House of Representatives. The three-fifths clause reduced the representation the South would have had if slaves had been counted fully. *See* U.S. CONST. art. 1, § 2, cl. 3.

68. J. WHITE, *supra* note 3, at 118-19.

69. *Id.* at 121.

70. *Id.* at 96.

71. *Id.*

the elimination of slavery, then his interpretation of the fugitive slave clause indeed embodied the aspirational element of the law.[72]

By beginning his analysis of judicial opinions with an extended discussion of slavery and then following with criticisms of law-and-order criminal procedure opinions, White takes the easy way out. Both areas pose more difficult questions than White poses for his readers, even in the aspirational and idealizing mode. Once again, White's openness to other voices is more partial than he acknowledges. The ease with which White makes judgments about difficult questions is characteristic too of both his attempt to appropriate a certain kind of philosophy for his views and of his criticisms of economics in law.

As I have suggested, White has a rather old-fashioned view of philosophy, as these things go. For him, philosophy consists of efforts to develop a "propositional and conceptual language" that will have the "authority . . . of naturalness."[73] This language is "inherently aggressive: the idea is to stake out certain intellectual terrain with the force of one's logic, or by the demonstration of certain facts, against an audience assumed to be hostile, who will be persuaded only if compelled."[74] In contrast, the "literary method . . . proceeds . . . on the assumption that our categories and terms are perpetually losing and acquiring meaning, that they mean differently [sic] to different people and in different texts. It is not a territorial claim but an invitation to reflection."[75]

What is puzzling, though, is that White claims Ludwig Wittgenstein for the "literary method," taking "as the text to which

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72. The second part of the chapter on slavery contains an analysis of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), in which White's criticisms are more cogent. He notes that Chief Justice Taney's opinion introduces the question of race with a "stunning shock," given that the Constitution nowhere uses racial terms. J. WHITE, *supra* note 3, at 126-27. Only a jurisprudence of original intent could move from the language of the Constitution to the language of race. White offers an acute analysis of how Taney's reliance on race supported the unnecessary conclusion that the Constitution used "citizen" in a unitary way, so that if African-Americans were citizens for purposes of the diversity clause—the issue in *Dred Scott*—they were necessarily citizens for purposes of the privileges and immunities clause. *Id.* at 126-29. This conclusion, which followed from Taney's unitary definition, was politically unacceptable to the South in 1857. D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 68 (1978).

73. J. WHITE, *supra* note 3, at 22.

74. *Id.* at 41.

75. *Id.* at 41-42. I note the possibility that lawyers enjoy being the objects of aggression, thus making the conceptual technique that White describes a rhetorical trope sensitive to the demands of the audience.

[the book] is addressed" Wittgenstein's famous statement, "To imagine a language means to imagine a form of life."[76] Today, the lesson philosophers learn from Wittgenstein is the futility of attempting to provide greater clarity for a language than that language already provides. They are not, in short, conceptualists of the sort White describes. At the same time, however, White wants to recruit Wittgenstein for a reformist project that would invite the community of lawyers, legal scholars, and readers of his book to open themselves to "a variety of languages and voices."[77] For White, in law "every speaker is particularly located, both rhetorically and socially."[78] Wittgenstein understood that principle as well, but believed that he could not proceed from there to any reformist conclusion, that the goal of philosophy was to leave everything just as it was.

With that understanding of Wittgenstein, the phrase "[t]o imagine a language means to imagine a form of life" takes on a somewhat different meaning.[79] There appear to be two possibilities.[80] First, the language of the law that White finds so uncomfortable *is* the form of life that is the law. White may not like that form of life, but he cannot criticize the language that constitutes that form of life, that constitutes the law, for failing to respect the "aspirational or idealizing element[s]" that are essential to "what we think of as law."[81] To the extent that the language that constitutes the law lacks those elements, it is not a form of life that is aspirational and idealizing. On this view, as much as he tries to present himself as an insider to law, White actually speaks about it from the outside. Alternatively, White

76. *Id.* at ix.

77. *Id.* at xiv. White notes that he has tried "to speak mainly to the general reader," *id.* at xviii, though I would not bet the store against White's royalties.

78. *Id.* at 96.

79. Perhaps my objection to White's attempt to appropriate Wittgenstein for his project is overly sensitive, though I find White's efforts to do so instructive. He seems to be saying to his readers, "You know that Wittgenstein is a major figure in the culture of the twentieth century; the fact, as I present it, that my views are in some ways attuned to his gives me the kind of credibility that invites you to take me seriously." This approach is akin to relying on a moral stance of opposition to slavery to put the readers on White's side; it avoids all the hard questions. *See supra* text accompanying notes 38-46.

80. I would get into deeper water than is appropriate in this Review if I sketched how some philosophers believe they can indeed get from Wittgenstein's premises to reformist conclusions. I note only that the task is a difficult one and that White's attempt to appropriate Wittgenstein for his own purposes completely fails to acknowledge the difficulties.

81. J. WHITE, *supra* note 3, at 121.

may truly be an insider. Then, however, his language of aspiration is already part of the law, just as the language of concepts is part of the law. If so, there is nothing to reform; the form of life that is the law is already open to "a variety of languages and voices," such as Posner's, Dworkin's, White's, and mine.[82]

More serious are the defects in White's criticisms of "the language and culture of economics," the title of his third chapter.[83] Perhaps because he does not confront real texts written by real people, White constructs a series of straw men[84] to criticize. Undoubtedly, some people do hold the views that White criticizes, but those views are not economics as a reified entity, as White supposes; they are, instead, a particularly ideologically charged version of economics. Exploring White's criticisms of economics leads me to offer yet another element of the idealized reader White imagines for his book.

After some deliberation, I concluded that the only way to lay out White's position is to provide a catalogue of the silly things he says about economics. Following this catalogue, I address briefly some of his more specific criticisms. First, White says that economists formally define the "self-interest" with which they are concerned as a technical term encompassing everything that each person values.[85] When economists use that term in a culture "so heavily dominated by the motive of self-interest in the usual sense, that of selfishness or self-centeredness," however, they slide inevitably into "validat[ing] both selfishness and the desire to acquire and consume."[86] Certainly, if people are not careful about using technical terms—particularly if they have a political commitment to selfishness in the ordinary sense—they are likely to elide the differences between their technical definitions and ordinary usage. I would like some evidence, though, of the inevitability that White claims exists, particularly because, as White knows,[87] every time someone says this sort of thing to a careful economist, the economist gives the right answer, that the terms are indeed technical ones.

Second, according to White, economics reduces "all the great questions of life . . . to acquisition, competition, and calculation."[88]

82. I am not unaware that no women or members of minority racial groups are on this list.

83. J. WHITE, *supra* note 3, at 46.

84. I use the gendered version deliberately.

85. J. WHITE, *supra* note 3, at 55.

86. *Id.*

87. *See id.* at 53-54.

88. *Id.* at 59.

Third, White objects to the quasi-mathematical character of economics which, to him, leads to consideration of only "binary or dichotomous phenomena,"[89] rather than "the fact that in our actual lives all human beings are engaged in a never-completed process of growth and change."[90] Economics, according to White, divides the lifetime into two periods: an early one of immaturity and a later one during which fully competent people make choices.[91] Is it churlish to point out that Franco Modigliani won a Nobel Memorial Prize in economics for his work on the choices that people make over their lifetimes? Further, if I found White's description of the intellectual world of "us" academic lawyers foreign, what will economists think of this silliness:

> On the economic view, . . . the individual is reduced to a single unit, supposed to know its own values and how best to pursue them. This means, among other things, that education—for the rest of us the process by which character and value are formed—is reduced to the acquisition of information. True education of the mind and self is in such terms completely unimaginable; so too is the conception of the polity as a means of collective education.[92]

Against these images of economics, White sets "the law." For him, "law assumes an equality of actors and speakers, not of dollars."[93] An economist might point out, however, that having enough dollars to hire a lawyer does not hurt someone in the forums of the law.

At the conclusion of the chapter, White offers a number of more specific criticisms of economics, again in the straw man mode. First, he states that "economics is blind to the differences in wealth among different actors in the real world."[94] White acknowledges that many economists believe that these differences raise questions of distribution as to which they have "no special wisdom,"[95] but argues that economists should ask questions about distribution as "independent mind[s]" and their answers should appear in their work.[96] In addition, according to

89. *Id.* at 64-65.
90. *Id.* at 65.
91. *Id.* at 64-65.
92. *Id.* at 65.
93. *Id.* at 79.
94. *Id.* at 82.
95. *Id.*
96. *Id.*

White, economists do address questions of distribution by assuming that the marginal utility of money is constant.[97] The latter point is certainly overstated. At least some economists are willing to entertain the assumption that the marginal utility of money declines with wealth, and after making that assumption, they have offered analyses of policies that say something about how governments might alter the distribution of wealth without impairing the incentives with which they, and we, are also concerned. White's first point, that economists ought to think about distribution as independent minds, is surely correct, but his further point, that if they bracket concern about distribution they "impliedly assert" the "fairness" of the existing system,[98] is simply false. Numerous economists have taken positions equivalent to: "Well, here's how things look when you work out the implications of the paradigm of acquisition and trading; isn't that really disgusting?"

Second, White says that "[the market] systematically undervalues" resources that "have a long or indefinite life" because "for this kind of economics all value is ultimately exchange value and hence, in our world, money value . . . and because the exchange method generates the conception of income over time as the definition of wealth."[99] As a result, "this kind of economics can have no way to measure any 'resource' that has a permanent value."[100] If this premise means anything, and I am not sure that it does, it means that economists sometimes fail to set the discount rates for certain resources at a low enough value—even, for permanent resources, whatever they are, at zero.[101] But, Philistine that I am, I confess to some puzzlement at the notion of a permanent resource. White has in mind "social and cultural resources,"[102] but these must be of a special sort. Literary works, for example, may have permanent value, but setting an appropriate discount rate for the physical material that embodies them is not particularly problematic; the degeneration of paper does not mean the loss of *Middlemarch*.[103] Physical artifacts, such as

97. *Id.* at 82-83.
98. *Id.* at 82.
99. *Id.*
100. *Id.* at 83.
101. A discount rate of zero means that at every point in the future the resource is worth exactly what it is worth at present; a discount rate of one, in contrast, means that as soon as the present period is over, the resource loses its value completely.
102. J. WHITE, *supra* note 3, at 84.
103. G. ELIOT, MIDDLEMARCH (1871-72).

the Venus de Milo or the Parthenon, seem better suited to White's idea, yet I wonder about the "permanence" of their value. For whether the governments of Greece over the next century ought to devote so many resources to the preservation of the Parthenon against physical deterioration as to ensure the continued impoverishment of a large segment of the population of Greece seems a question worth discussion, rather than one whose answer is as obvious as White suggests.[104]

Third, White says that "economics has the greatest difficulty in reflecting the reality of human community and the value of communal institutions."[105] Here too he concedes that he is criticizing "the tendency of the popularized version of this kind of economics," which "in its more sophisticated forms . . . seeks to describe and explain cooperation . . . in its familiar terms, those of individual actors pursuing individual interests."[106] As to sophisticated versions, however, White simply asserts that economists cannot sustain a way of talking that treats altruism "as a species of selfishness."[107] This assertion is not an argument.

Fourth, White states that "the language of self and self-interest not only fails to reflect the reality of community and shared interests, it draws attention away from those aspects of life as well, and devalues them."[108] His most forceful point is that adopting "the economic view would in fact threaten the very existence of community, for on these premises no one would conceivably die or risk her life for her community: at the point of danger, one's self-interest in survival would outweigh all other self interests."[109] White's view, in my opinion, is as wrong as one can get. There is nothing noneconomic about the proposition that someone who failed to sacrifice her life for her community would thereafter be filled with such self-loathing that her lifetime utility would be lower than would have been the case had she sacrificed her life. As I suggested in the opening sentence of this Review, I am not comfortable talking about such things in this way, but no careful economist, and such people do exist, would say that his or her

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104. An answer, of course, is that the resources necessary to preserve the Parthenon are not that great, or that the collateral benefits of preserving the Parthenon will generate, in the long run, enough additional resources to overcome poverty in Greece. My only point is that the answer White assumes is correct is not obviously correct.

105. J. WHITE, *supra* note 3, at 84.

106. *Id.* at 84-85.

107. *Id.* at 85.

108. *Id.*

109. *Id.*

commitments to economics inevitably lead to the conclusions that White states economics must yield.

Finally, White offers this statement:

> [T]o speak of all "tastes" as if they were equivalent is to invite oneself and others to think that they are, and to confirm the premise[ ] . . . that no distinction can be drawn between the beautiful and ugly, the wise and foolish, and so on. It is to confirm a vulgar view of democracy that makes the preference or will supreme . . . .[110]

At this point, recalling why Bentham said that pushpin was as good as poetry is appropriate. The move was indeed democratic, but not vulgarly democratic. Economics emerged as a theory of democracy to challenge aristocratic elites who claimed that what they valued was more significant than what the peasantry valued. White objects to economics because it fails to acknowledge sufficiently the values that traditional aristocracies promoted. Another aspect of the idealized reader White imagines as his audience is thus the reader's superiority to the vulgar masses who do not place enough value on "social and cultural resources" such as poems and White's book.

White's use of the term "quasi-mathematical," mentioned earlier,[111] suggests yet another dimension to White's discomfort with economics. White the humanist is simply uncomfortable with science. He does not like "attempts to apply to human life the language and methods of physical science"[112] and is unhappy with "the purportedly higher status of science" as compared to literary criticism.[113] His attitude reflects not only the language of territoriality, that scientific methods have encroached inappropriately upon the humanist's terrain, but also the language of the aristocratic humanist, who stands above the scientists' vulgar interference with the physical world.

In approaching my conclusion, I want to reflect on some aspects of the complex confrontation of science and the humanities. First, remember that "Euclid alone has looked on Beauty bare."[114] Second, while I was in college I took a course called, as best I can recall, "Analysis of Functions of a Real Variable." The object

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110. *Id.*
111. *See supra* note 89 and accompanying text.
112. J. WHITE, *supra* note 3, at 78.
113. *Id.* at 98.
114. Edna St. Vincent Millay (1920).

of the course was to construct the system of mathematics from arithmetic to calculus and beyond from an extremely small number of assumptions. Although I lacked the ability to work out the details and did not do well in the course, I had enough intuitive appreciation for the project to find it incredibly beautiful.[115] Third, Rudy Rucker, a writer of science fiction, has a story entitled "A New Golden Age."[116] In the story, mathematicians build a machine that translates mathematics into music in an effort to obtain greater funding for their research. They listen to the tapes of their elegant proofs and find them wonderful. To appease an influential politician, they also make a tape of a book by a mathematical crank, who claims to have trisected an angle and squared a circle. Then, they play the tapes for the politicians. The politicians find the mathematicians' tapes "dreary," but they love the tape of the crank's book: "So many symbols," one says.[117]

White is a "so many symbols" person.[118] I find it difficult to imagine him responding as I do to Barnett Newman's awesome "Stations of the Cross."[119] His style reminds readers of nineteenth-century novels; indeed, he comes close to "Reader, I married him"[120] at various points in his book. In short, White is not all that open to science or, by implication, the modern world. This lack of openness causes some difficulties for his effort to perceive a form of life by imagining a language, especially when that language is not in conformity with so much of the form of life in which most of us are situated.

Furthermore, White's lack of openness causes difficulties for what White offers as his primary program. His aim is to encourage "intellectual integration," which we have seen to be an

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115. A reasonably accessible introduction to the first steps in the construction is D. KNUTH, SURREAL NUMBERS (1974) (described by its author as a mathematical novelette).

116. In MATHENAUTS: TALES OF MATHEMATICAL WONDER 54 (R. Rucker ed. 1987).

117. The allusion is to a musical anecdote about a potential patron of Mozart who commented critically about Mozart's work, "Too many notes." The point of the anecdote, and of Rucker's variant on it, is that the quantity of notes is not a relevant basis for either criticism or praise.

118. Consider the rhythm of this brief, representative excerpt: "I am speaking, then, not of necessities but of tendencies, of the forces a particular mode of speaking seems to generate, the directions it moves us, or what might be called its cultural implications, or the pressures with which our art must come to terms." J. WHITE, *supra* note 3, at 27.

119. This work is a series of 14 (or 15, depending on whether one counts a second version of the "First Station") paintings inadequately described as presenting the viewer with one, two, or three vertical stripes on very large canvases; the edges of the stripes vary in their sharpness. For a more complete description and depiction, see T. HESS, BARNETT NEWMAN (1971).

120. C. BRONTË, JANE EYRE ch. 38 (1847).

openness to diverse voices, "put[ting] together in a complex whole . . . aspects of our culture, or of the world, that seem to us disparate or unconnected."[121] Integration to White is "a putting together of two things to make out of them a third, a new whole, with a meaning of its own."[122] White leaves one voice out of this new whole, however: the voice of science and mathematics, the voice of the economist.

White's discomfort with science identifies the final aspect of his imagined reader: the nineteenth-century romantic humanist. Being a romantic or a humanist is not wrong, although the sensibilities of such a person can occasionally slip a little. Thus, in discussing economics, White writes,

> It is a truism for economists that "we" are much "richer" than we were 30 years ago. But is that so obviously true if one takes into account the value of safe streets, healthy food, clean air and water, unspoiled scenery, a supportive community, or a sensible pace of life?[123]

Such nostalgia for an imagined past of harmony is characteristically romantic. I refrain from making a global judgment, but, in 1960, no ban on atmospheric testing of nuclear weapons existed and strontium-90 was in our milk; the pace of life for people like White may have been more sensible, but the absence of public financing for the ailments of old age meant that poverty among the elderly was scandalously high; some people lived in supportive communities, but African-Americans who ventured onto the highways in the South and elsewhere found it difficult to find clean places to eat or sleep.

In sum, true intellectual integration means being open to a range of voices that White's romantic humanist would prefer to ignore: that of the honest police officer attempting to do a difficult job, that of the scientist attempting to improve the quality of life and deepen the understanding of nature, even that of the economist trying to figure out the best way for society to accomplish its various goals in a world with limited resources and justified but conflicting claims on those resources.

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121. J. WHITE, *supra* note 3, at 3.

122. *Id.* at 4.

123. *Id.* at 71-72. Notice that White uses scare quotes around "we" when he thinks it valuable.