Book Review

From Cultural Construction to Historical Deconstruction

When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community. By James Boyd White.*
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The linguists, whom one meets everywhere these days, explain that every transaction in our culture—our money and mathematics, our games and gardens, our diet and our sexual activity—is a language; . . . And languages, too, are simply invented systems of exchange, attempts to turn the word into the world, sign into value, script into currency, code into reality. Of course, everywhere . . . there are the politicians and the priests, the ayatollahs and the economists, who will try to explain that reality is what they say it is. Never trust them; trust only the novelists, those deeper bankers who spend their time trying to turn pieces of printed paper into value, but never pretend that the result is anything more than a useful fiction. Of course we need them: for what, after all, is our life but a great dance in which we are all trying to fix the best going rate of exchange, using our minds and our sex, our taste and our clothes . . . .

—Malcolm Bradbury¹

The law is a profession of words; language is its stock-in-trade. Nevertheless, lawyers have shown little sustained interest in the nature of language and its relation to thought and action. Most lawyers rely on a sim-

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1. M. BRADBURY, *RATES OF EXCHANGE* 8 (1983).

plistic "functional" understanding of language as a transparent medium for the transmission of ideas and instructions. In skilled hands, it is considered a force for clarity and certainty; in untutored ones, it is a source of confusion and disruption. Like Humpty Dumpty,² lawyers maintain that it is simply a question of which is to be master. While legal theorists have been more sophisticated, their work has tended to be philosophically and conceptually oriented.³ Jurisprudence has been content to ignore the ideological dimensions of legal language. Yet, it is through language that legal and jurisprudential discourse has operated as a mode of social control. Utilizing a threadbare notion of language, law helps make our social world and defines the role of actors within it. In this way, law becomes a "medium of consciousness for a society, its forms of consciousness externalized."⁴

The jurisprudential community has begun to treat the problems of language more critically in the past couple of years. In their constant efforts to place adjudication on a surer political and philosophical footing, mainstream theorists have plundered other scholarly disciplines. Disenchanted with economics, jurisprudence has joined the theoretical debate raging within literary circles.⁵ Like their literary counterparts, legal theorists are concerned with locating meaning in the encounter between reader and text. Proposed solutions run the full gamut from authorial intention through textual objectivity to reader choice and a bewildering series of combinations. Having involved themselves in literary life, jurists have gotten more than they bargained for. Far from facilitating the quest for the jurisprudential grail, their involvement with literary theory has highlighted the shortcomings of mainstream legal theorizing, while adding further problems for good measure. Nevertheless, many jurists remain undaunted and hope that this engagement will be productive.

In his new book, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, James Boyd

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2. See L. CARROLL, *Through the Looking Glass*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 135, 214 (1936).

3. See, e.g., W. BISHIN & C. STONE, *LAW, LANGUAGE, AND ETHICS* (1972); H.L.A. HART, *THE CONCEPT OF LAW* (1961); D. MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); J. WHITE, *THE LEGAL IMAGINATION* (1973); Smith, *Law, Language, and Philosophy*, 3 U. BRIT. COLUM. L. REV., May, 1968, at 59; Stone, *From a Language Perspective*, 90 YALE L.J. 1149 (1981). For a powerful critique from a sociological perspective, see Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445 (1980).

4. G. KRESS AND R. HODGE, *LANGUAGE AS IDEOLOGY* 13 (1979).

5. There has long been a fringe interest in the overlap between law and literary theory, e.g., Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of An Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979). In the past few years, the debate has flourished; see, e.g., *Symposium: Interpretation*, 58 S. CAL. L. REV. (1985) (forthcoming); *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982). For a summary of the central concerns in this debate, see Levinson, *On Dworkin, Kennedy, and Ely: Decoding the Legal Past*, 51 PARTISAN REV. 248 (1984).

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White makes a state-of-the-art attempt to enrich legal theory with the insights of modern literary theory. Of its kind, it is a singular and stand-out achievement. Yet, for all its polish and erudition, it paradigmatically illustrates the failings of contemporary legal and literary theory. Enslaved to the logocentric desire for objective truth and meaning, it refuses to acknowledge and address the political determinants of language, texts and scholarly discourse itself. "Criticism and interpretation . . . have a deep and complex relation with politics, the structures of power and social value that organize human life."⁶ Using White's book as its focus, this essay will explore and expose the ideological foundations and commitments of contemporary jurisprudential practice, demonstrating that the crime is not ideology, but the silence that hides it. The first half of the essay introduces the debilitating dilemma of contemporary scholarship and White's sophisticated response. The second half offers a deconstructive critique of that work and suggests the need for an alternative mode of theorizing that rests on a radically different epistemology. Linguistic truth and interpretive knowledge are as much the progeny of power as its parents.

I. BABEL AND BEYOND

The contemporary world of academic study is characterized by self-doubt and confusion. Jurisprudential discourse is fragmented and discordant. Legal thinkers no longer speak "*ex cathedra*, but with a babble of voices."⁷ Scholars are acutely self-conscious about the very nature of the scholarly enterprise. There is particular concern over the status of theorizing and the standard for its evaluation.

For so long, the natural tendency was to equate knowledge with science and to emulate scientific methods. Scholars contributed enthusiastically to the Enlightenment Project.⁸ At the turn of the seventeenth and eighteenth centuries under the influence of Descartes, Kant, and Locke, scholars sought to distinguish philosophy from theology. Relying on self-reflection, they wanted to ground truth and knowledge on an ahistorical and universal foundation, unconditionally valid for all persons at all times. Without such an objective grounding, knowledge would become prey to a radical skepticism, behind which lurks the spectre of social chaos and madness. As Kant prophesied:

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6. Mitchell, *Introduction* to *THE POLITICS OF INTERPRETATION* 1 (W. Mitchell ed. 1983).

7. L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 6 (1977).

8. See A. MACINTYRE, *AFTER VIRTUE* 35-48 (1981); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 131-64 (1979). For a general historical introduction to the thought of the period, see N. HAMPSON, *THE ENLIGHTENMENT* 186-217 (1968).

[This domain of pure understanding] is an island, enclosed by nature itself within unalterable limits. It is the land of truth—enchanted name!—surrounded by a wide and stormy ocean, the native home of illusion, where many a fog bank and many a swiftly melting iceberg give the deceptive appearance of farther shores, deluding the adventurous seafarer ever anew with empty hopes, and engaging him in enterprises which he can never abandon and yet is unable to carry to completion.⁹

In a post-Kuhnian¹⁰ world, this search for an absolute and universal truth is being abandoned. The newly received wisdom is that all theorizing contains an “arbitrary element, compounded of personal and historical accident.”¹¹ It is accepted that scholarship can be neither entirely divorced from raw data nor fully insulated from a “meta-theory.” The belief in science as a purely objective and impersonal study has been discredited.¹² Any theory partakes of an irreducible subjective and personal component; “[s]cientific knowledge, like language, is intrinsically the common property of a group or else nothing at all.”¹³ In making this concession, though, modern scholarship has not succumbed to an abject skepticism.¹⁴

The modern challenge is to embrace and ground a belief in the relativity of truth, while, at the same time, staving off a threatened helter-skelter into the nihilistic abyss. The goal is to acknowledge the plurality of values, but avoid a sophisticated solipsism. Although this new challenge has given many flagging disciplines a new lease on critical life, the search has generated more heat than light. Beneath the resurgent activity, there are clear signs of desperation. The hallmark of most academic exchange is a coveted but vacuous cleverness; glibness is passed off as profundity and novelty as originality.¹⁵ In short, contemporary scholarship scrambles to

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9. I. KANT, *CRITIQUE OF PURE REASON* 257 (N. Smith trans. 1929). The roots of this tradition, of course, can be found in Plato and, perhaps, Machiavelli. For a thorough survey of this dichotomy, see R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS* 1-50 (1983). Recently, Mark Lilla has described “foundationalism” as a pejoration “meant to criticize the belief that such inquiry will eventually undergird timeless, invariant facts and judgments.” Lilla, *On Goodman, Putnam, and Rorty: The Return to the “Given,”* 51 *PARTISAN REV.* 220, 221 (1984).

10. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

11. *Id.* at 4.

12. Kuhn’s assault has met with stiff opposition. See *CRITICISM AND THE GROWTH OF KNOWLEDGE* (I. Lakatos & A. Musgrave eds. 1970). One problem, as Kuhn himself has conceded, is that his text “can be too nearly all things to all people.” T. KUHN, *ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 293 (1977).

13. T. KUHN, *supra* note 10, at 210.

14. For a subtle attempt to distinguish skepticism from nihilism, see J. FLYNN, *HUMANISM AND IDEOLOGY* 1-29 (1973).

15. See Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199, 238 (1984).

colonize a precarious beachhead between the ground of objective truth and the ocean of radical subjectivism. The Enlightenment Project has been revised, but not rejected. Unfortunately this attempt is doomed to failure: Nihilism is the inevitable condition and outcome of the metaphysic on which contemporary scholarship relies. Modern literary and legal theory glimpses this message, but muffles its subversive implications.¹⁶

The contemporary studies of legal, literary, and political theory are united in their efforts to ground the critical act in something more than personal whim or caprice. The jurist strives to demonstrate that judging is neither wholly discretionary nor wholly mechanical and how legal materials can be combined to provide a coherent and just agenda for social justice.¹⁷ The literary theorist seeks to show that interpretation is generated through the reader's encounter with the text in which the reader completes, but does not exclusively control, meanings.¹⁸ The political theorist attempts to explain that justice is not simply the satisfaction of the immediate interests of some ephemeral consensus, but inheres in a set of normative and regulative principles that most fully allows individuals to develop and pursue their own life plans.¹⁹

This common project, offered as a philosophy of tolerance and generosity, can be usefully described as "humane pluralism." It posits that political, legal, and literary communities must be organized so as to accommodate all shades of opinion; coercion and fanaticism are anathema. Everyone must have an equal opportunity to express and realize his or her own unique potential and selfhood. Although persons are situated in a particular historical context, they can transcend it and search for the timeless truths of humanity.

This outlook is the controlling ideology of the academy. Its precepts and ambitions inform the work of the academic establishment in law, literature, and politics. The claim to have struck upon the "right answer" is considered passé.²⁰ Humane pluralism represents an enlightened egalitarianism, and any opposing philosophy that does not embrace such a pluralistic and humane stance is dismissed as sectarian and repressive.²¹ The

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16. See *infra* pp. 227-29.

17. E.g., Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

18. E.g., W. BOOTH, *CRITICAL UNDERSTANDING: THE POWERS AND LIMITS OF PLURALISM* (1979).

19. E.g., Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113 (S. Hampshire ed. 1978).

20. Dworkin initially defended the thesis that there is "a single right answer" to all disputes, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 279 (1978); Dworkin, *No Right Answer?*, in *LAW, MORALITY, AND SOCIETY* (P. Hacker & J. Raz eds. 1977). He seems, however, to have omitted this particular claim from more recent accounts of his theory, see Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982). For a critique of Dworkin's more recent writings, see Hutchinson, *Of Kings and Dirty Rascals: The Struggle for Democracy*, 9 QUEENS L.J. 273 (1984).

21. A good, general illustration of this style of scholarship is Nelson, *Standards of Criticism*, 60

avored response is to posit a certain "bounded" objectivity;²² there exists a range of plausible responses to any particular text or problem and, within that set, the choice is personal. Accordingly, "humane pluralism" is a largely formal and process-oriented philosophy that preserves the equal choice of all in determining issues of substance. That choice is constrained only as necessary to respect and allow a different choice by others. Academic debate, whether based on textual criticism, statutory construction, or political decisionmaking, centers on the nature and location of that constraint. Indeed, Bruce Ackerman argues that "the liberal tradition is best understood as precisely such an effort to define and justify broad constraints on power talk."²³

II. A WHITER SHADE OF PLURALISM

Within this contemporary tradition, James Boyd White occupies an almost unique position. As a professor of law, professor of English, and adjunct professor of classical studies at the University of Michigan, he has (unlike some of us) little trouble avoiding the familiar charge of dilettantism. He offers as sophisticated and eloquent a defense and account of mainstream theorizing as is available. His selections span the whole range of legal, literary, and political offerings, and his writing evidences a sus-

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TEX. L. REV. 447 (1982). It would be mistaken to characterize "pluralism" as a purely theoretical as opposed to historical phenomenon. See *infra* pp. 225-30. My colleague Harry Arthurs argues that pluralism may be seen as a stage in Kuhnian development in which paradigms are dissolving and reconstituting themselves. H. ARTHURS, "WITHOUT THE LAW": JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND (1984). As such, pluralism ought to be treated as an essentially descriptive label rather than a prescriptive project. As an historical phenomenon, pluralism acts as an enabling device to allow the nonorthodox to confront the common enemy of "conventional wisdom." Pluralists unite in opposition, though agreeing to disagree in substance, because each alone might be isolated and crushed by existing orthodoxy. Although this Arthurian thesis is instructive and helps to explain a more radical pluralism, it still implicitly accepts and shares the dubious foundational assumptions of "humane pluralism." See *infra* section IV.

22. Fiss, *supra* note 17, at 750.

23. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980). In his recent work, Ackerman continues his self-imposed task of making law-talk more sophisticated. See B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984). In the modern activist state, the courts must become a public forum for debating the "systematic structural tensions of social life." *Id.* at 20. The lawsuit will become an open-ended polycentric dispute. Like White, he relies on a generalized idea of procedural due process. Similarly, although introducing the conversational constraint of forbidding the justification of any particular rights "by asserting the possession of an insight into the moral universe intrinsically superior to that of their fellows," Ackerman explicitly relies on "the conditional affirmation of market freedom." *Id.* at 99-100. Indeed, his standard for social justice is the notion of market failure. See *id.* at 59, 78, 100. Quite simply, he has given philosophical respectability to a marginally reformed status quo.

Incidentally, Ackerman is scathingly critical of the work of Critical Legal Scholars, especially Duncan Kennedy and Roberto Unger. Yet he presents no genuine critique of their position. He merely engages in the name-calling for which he condemns them. *Id.* at 43-45. While it is true that such writers do not always address the inconsistencies in their Continental sources, this charge does not amount to a negation of any particular insight or critique. Intellectual xenophobia is a poor substitute for substantive criticism. *Id.* at 44-45.

tained and intimate experience with these texts. Writing with natural elegance, White manages to be insightful and inciteful. Throughout, his timely book is energized by an urgent love of literature and law and their liberating potential. His passion and sincerity are palpable. For White, the road to human and political fulfillment is down the way of literature and law. Through them, humanity can make good on itself and constitute a truly egalitarian community. His writings, a paradigm of "humane pluralism," provide a powerful illustration of the ambition and failure of the academic enterprise.

A. *The Textual Circuit*

The scholarly task and ambition is for White the same in law as in literature, to demonstrate and explicate how "character and community—and motive, value, reason, social structure, everything, in short, that makes a culture—are defined and made real in performances of language".²⁴ In a very real sense, he sees law and literature, inclusive of political tracts, as common enterprises. Each is nothing more than a species of the general activity of "claiming meaning for experience and of establishing relations with others in language."²⁵ Language constitutes a culture, and through language, a culture is reconstituted. Like Wittgenstein, White believes that "to imagine a language means to imagine a form of life."²⁶ Accordingly, the Whitian scholar engages in a search for meaning that resides not so much in the literary texts or legal materials themselves, as in the way of reading and interpreting them.

Recognizing the pivotal role of language, White insists that we can never obtain an unmediated experience of the world; "language [is] a kind of social action rather than a system of referential tags."²⁷ Language cannot be simply a labeling device precisely because attempts to reduce experience to language can never be fully realized. The world as depicted in and by both law and literature is nothing more than an imperfect approximation of reality, a simulacrum of life. But this fact does not give White cause for regret. It offers an opportunity and responsibility to remake our world and ourselves: "when language changes meaning, the world changes meaning and we are part of the world."²⁸

Building on this dynamic and protean notion of language as a cultural artifact, White proceeds to describe and practice a way of reading that

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24. J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* xi (1984) [hereinafter cited by page number only].

25. P. x.

26. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 19 (G. Anscombe trans. 1953).

27. P. 291.

28. P. 4.

gives life and meaning to legal and literary texts. Like de Man, he argues that "[c]riticism is a metaphor for the act of reading."²⁹ Meaning is not a determinable essence locked into the text by the author to be pried out by readers at some later date. Reading is a more active and participatory process. For White, meaning resides in the cooperative engagement between text and reader: "Reading works by a perpetual interchange between the person that a text asks you to become and the other things you are."³⁰ It is a dialectical process.³¹ As Terrence Hawkes has characterized it, "the writer proposes, but the reader disposes."³² The text is a highly charged source of creative energy in which the author has placed a series of live outlets. Readers plug in their own cultural experiences, complete the circuit of valorization, and produce meaning. For both author and reader, the meaning-giving enterprise is communal, interactive, and experiential; "[e]very way of reading is a way of being and acting in the world."³³ His version of reading is not an analytic technique, conceptual system, or programmatic solution, but rather a way of being a cultural actor. Consequently, meaning is reducible to neither the informational content of the text nor to its range of possible logical readings, but inheres in the cooperative experience it offers its readers.

White offers "four fundamental questions" to organize and inform the reading process: "How is the world of nature defined and presented in this language? . . . What social universe is constituted in this discourse, and how can it be understood? . . . What are the central terms of meaning and value in this discourse, and how do they function with one another to create patterns of motive and significance? . . . What forms and methods of reasoning are held out here as valid?"³⁴ By posing and seeking to answer these questions, the reader will become a vital participant in the construction and criticism of a cultural experience.

In addition to providing a structure for the reading process, White also introduces the crucial interpretive construct of an "ideal reader,"³⁵ main-

29. P. DE MAN, *BLINDNESS AND INSIGHT* 107 (2d ed. 1971).

30. P. 17.

31. P. 270.

32. Hawkes, *Taking It As Read*, 69 *YALE REV.* 560, 561 (1980).

33. P. 21.

34. Pp. 10-12.

35. See W. ISER, *THE ACT OF READING* (1978); W. ISER, *THE IMPLIED READER* (1974); see also De Maria, *The Ideal Reader: A Critical Fiction*, 93 *PROC. MOD. LANGUAGE ASS'N* 463 (1978) (exploring emphasis on readers in contemporary literary criticism). Karl Popper espoused a flatly contradictory view:

One of the main reasons for the mistaken subjective approach to knowledge is the feeling that a book is nothing without a reader: only if it is understood does it really become a book . . .

This view is mistaken . . . [A] book remains a book—a certain type of product—even if it is never read . . .

Moreover, a book, or even a library, need not even have been written by anybody: a series of books of logarithms, for example, may be produced and printed by a computer. . . . Yet each

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taining that a text establishes the characteristics of its own model reader and invites the reader to take on that identity. In so doing, texts force readers to consider who they are and whether they wish to become someone else. For White, the act of reading is a profound exercise in self-education and improvement. As such, "it is a lesson in humility."³⁶

As a pluralist, White concedes that the "ideal reader" of a text will vary from actual reader to reader. Yet he maintains that this pluralism does not presage an irresistible slide into the black hole of nihilism:

The uncertain reciprocity I describe is often felt to be intolerable, for it seems to entail an essential and universal relativism, extending even to our own character and consciousness. When the resources of a certain kind of thinking run out, a common response is to give up in despair; the disconcerting discovery that the conceptual and logical apparatus of quasi-scientific rationality will not do for the understanding of life or literature or law leads to the announcement that we live in an incoherent and elemental flux in which no reasoning, no meaning, is possible. But to say that there is no meaning or knowledge of one kind is not to deny the possibility of other kinds, and in our actual lives we show that we know how to read and speak, to live with language, texts, and each other, and to do so with considerable confidence. But to do this we must accept the conditions on which we live. When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.³⁷

Accordingly, White insists that meaning is not simply a function of an anarchic subjectivism. While there may not be identity, there will be a "family resemblance" between different readers' "ideal reader." The text remains crucial, "for the meaning is in the original statement and nowhere else."³⁸

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of these figures contains what I call "objective knowledge" . . . true or false, useful or useless; and whether anybody ever reads it and really grasps its contents is almost *accidental* . . . . [T]here would always be plenty of misunderstandings and misinterpretations; and it is not the actual and somewhat accidental avoidance of such misunderstandings which turns black spots on white paper into a book. . . . Rather, it is something more abstract . . . its dispositional character of being understood or interpreted, or misunderstood or misinterpreted, which makes a thing a book. And this potentiality or disposition may exist without ever being actualized or realized.

K. POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* 115-16 (1972) (emphasis added).

36. P. 266.

37. Pp. 277-78.

38. P. 272.

B. *Toward Cultural Construction*

White's book, however, is not simply about the theory of reading. The proof of the theory is in the reading: He devotes his main energies to using his interpretive technique. With enviable range and erudition, he offers a guided tour through some of the great texts of Western civilization. In a series of instructive and resonant readings, he introduces us to the epic world of Homer's *Iliad*, the grand statecraft of Thucydides' *History*, the civilized dialectics of Plato's *Gorgias*, the exuberant irony of Swift's *A Tale of A Tub*, the didactic eloquence of Johnson's *Rambler Essays*, the gentle humanity of Austen's *Emma*, the fiery rhetoric of Burke's *Reflections*, the high-minded fervour of the Declaration of Independence, and the authoritative reasonableness of Chief Justice Marshall in *McCulloch v. Maryland*.³⁹ He probes the culture of each text and teases out the "ideal reader" the text asks us to become. For example, Johnson teaches a language of morality, whereas Austen suggests a language of friendship.

In each of his readings, White concentrates on different aspects of the transformative qualities of texts. The final chapter, "The Possibilities of American Law," displays the full force and workings of the Whittian reading experience. For White, the differences between reading legal and literary texts are "largely in emphasis and in the degree of explicitness."⁴⁰ White acknowledges that, whereas the dialectic of cultural reconstruction between the ideal reader that a particular text asks us to become and who we already are is necessarily tentative, the reading of a legal text is less conditional: "[I]n its own terms the legal text is authoritative . . . [and law] makes a real social world in a way that a work of literature does not."⁴¹ The difference, however, is consequential rather than quintessential; the structure and character of the reading experience is the same. Like literature, law is another cultural method for individual and collective self-improvement. With refreshing honesty, White portrays adjudication as "no longer the meticulous comparison of precedent against precedent but the large-minded, energetic, and perpetual reconstitution of language and the world."⁴² Nevertheless, judges are not unfettered ideologues. They must draw upon and use a given set of conversational materials; "[t]he law is a set of social and intellectual practices that have their own reality, force, and significance."⁴³

Chief Justice Marshall's seminal opinion in *McCulloch* is offered as the

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39. 17 U.S. (4 Wheat.) 316 (1819).

40. P. 271.

41. Pp. 270-71.

42. P. 359.

43. P. 273.

perfect illustration of White's theory of reading in action: It allows us to enter into a dialectical relation with Marshall himself and also to experience Marshall's own encounter with and reading of the Constitution.⁴⁴ For White, the Constitution, unlike the Declaration of Independence, is not a clarion call to action but "a charter for collective life."⁴⁵ Deliberately vague and general, it is not a self-executing document, but requires a committed nation to breathe just life into it. However, he does claim that it changed "the rhetorical conditions of life."⁴⁶ It was for great "constitutional conversationalists," like John Marshall, to lend substance and direction to that rhetorical community.

White seeks to draw out of Marshall's text its "ideal" reader. He highlights the rhetorical strategies used to convince the reader not only that the result was right, even though it seemed at odds with the words and background of the Constitution, but also that the Court had the ultimate authority to determine constitutional meaning. Although he employs several argumentative ploys, White concedes that it comes down to the reader's assent and willingness to go along with Marshall: "[T]o make an authoritative culture of argument . . . all rests on the reader's confidence in [pure and disinterested] judicial reasoning."⁴⁷ Constitutional interpretation becomes an art that transcends the plain words or commands issuing from some abstract authority. For White, each new case is an invitation to remake the past for the future by redefining the present life and language of the community:

Like Burke's British Constitution, the Constitution that Marshall expounds must have an internal as well as an external existence, a

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44. The achievement of John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is the subject of mixed views. Some consider his contribution as being the establishment of the Supreme Court as a "bulwark of an identifiable rule of law as distinct from the accommodations of politics," G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 7 (1981). In a similar vein, Nelson sees him as entrenching a widely shared consensus of values against fleeting majoritarian preferences, see Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 900-01 (1978); Nelson, *Emulating the Marshall Court: The Applicability of the Rule of Law to Contemporary Constitutional Adjudication* (Book Review), 131 U. PA. L. REV. 489 (1982). A more skeptical assessment is that Marshall engaged in different interpretive strategies, from the textual to the visionary, and illustrated the manipulative and political character of adjudication, see P. BREST & S. LEVINSON, *THE PROCESSES OF CONSTITUTIONAL DECISION-MAKING* 35-36, 114 (2d ed. 1983). Moreover, in performing this role, he has been considered to have insulated individualistic values, especially the sanctity of property, from legislative encroachment; see Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340, 352-60 (1982). Both of these latter views subvert White's view of the Supreme Court as a forum for the open construction of cultural life. I suggest that judicial review is much more than a style of decision-making: It represents a substantive scheme of political values and significantly constrains the cultural results produced.

45. P. 240.

46. P. 245.

47. P. 251.

whole life in the reader's own mind and capacities. Thus the reader becomes for a moment the framer, the expositor, and the critic of the Constitution; he is to look back to its origins and forward to its construction in the unknown future.⁴⁸

Marshall's opinion introduced a mode of discourse for cultural development, and for White, the history of American law has been the seizing of this opportunity to engage in cultural life. Although he does not relate that history, he has no doubt that the triumph of American law has been its insistence on equality. Justice is not simply about rules, but is realized in the quality of relations between citizens and state.⁴⁹ The courts have provided a public forum in which the terms of that relation can be debated and declared.⁵⁰ In the pluralist tradition, White remains agnostic as to the actual decisions reached; he is content with the entrenchment of the rhetorical condition for cultural regeneration. White's account is not only a prescription for better organizing legal life, but also a description and defense of the actual practice of American law. By locating judicial texts within a larger literary tradition, White reinforces the legitimacy of legal discourse within American life and its primacy as a forum for cultural growth.⁵¹ "The most important [ethical and intellectual] achievement of judicial writing [is] . . . the manifestation in performance of a serious, responsible, and open mind, faithful to the sources of authority external to the self even while contributing to their transformation."⁵² The experience of constitutional discourse vindicates and validates his own theory of reading and language. Accordingly, White would presumably deem it right and proper that John Marshall, Felix Frankfurter, and Warren Burger should stand alongside of Homer, Jonathan Swift, and Edmund Burke as cultural giants of the first rank.

III. THE CRITICAL WAGER

Most people would consider it banal to remark that texts are written somewhere by someone at some time and read somewhere by someone at some time. To offer this as an exciting and new foundation for critical inquiry is to run the real risk of being dismissed as trite. Yet mainstream

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48. P. 263.

49. White has developed this theme in earlier writings. See White, *The Fourth Amendment as a Way of Talking About People*, 1974 SUP. CT. REV. 165.

50. Cf. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981) (challenging myth of "canonical original intention"); Dworkin, "Natural" Law Revisited, *supra* note 20, at 187 (discussing role of adjudication in governing our collective lives).

51. Cf. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 98 (1982) (discussing dialectical relationship between Biblical metaphors and American morality).

52. Pp. 269-70.

legal and literary theorizing has managed to flourish through a studious avoidance of this insight, contriving to maintain that the production and reception of texts occur in a social vacuum, drained of political and economic matter.⁵³ Contemporary theorizing has all but ignored the ideological dimension of language even though all interpretation assumes an entire structure of values. The hard shell of language has a soft ideological underbelly: Everyone makes a critical wager and accepts a package of foundational beliefs and assumptions about reality and nature.⁵⁴ Politics is inscribed within language. Authors, readers, and critics exist within a complex web of private and institutional relations and values.⁵⁵

While often paraded as scholarship's highest ambition and achievement, the constant refusal to historicize represents the tragedy and not the triumph of modern scholarship. To seek to understand a text apart from its political history is not only suspicious, but impossible. It is White's dubious distinction to be a marvelous exemplar of this ahistorical tendency and its ideological significance. After sketching the history of "literature" and the modernist assumptions of literary criticism, this essay will locate White's theory of reading within contemporary struggles in legal and literary theory, extracting and criticizing its ideological content.

The identification of "literature" as a distinct category of texts is relatively recent.⁵⁶ Prior to the eighteenth century, poetry and politics were integrated. Reading and writing was an exercise engaged in by small and familiar groups.⁵⁷ The actual function of texts depended on the particular socio-economic structure and relations between writer and reader; "poetry of the late seventeenth and eighteenth centuries traffics in power."⁵⁸ The premodern appreciation of language was as action and not signification.⁵⁹ A text was not considered an occasion for interpretation, but an event of

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53. Like scientists, contemporary scholars concede that they have not yet succeeded in making a perfect vacuum. Consequently, the metaphor in the text refers to an interpretive space with most, but not all, of the substantive matter removed. Some quantum physicists maintain that a vacuum represents the most churning space of violent physics: "That nothingness contains all of being." H. PAGELS, *THE COSMIC CODE* 279 (1982).

54. See W. GAIRDNER, *THE CRITICAL WAGER: ESSAYS ON CRITICISM AND THE ARCHITECTURE OF IDEOLOGY* 3 (1982).

55. See *THE POLITICS OF INTERPRETATION* (W. Mitchell ed. 1983). This omission is not confined to mainstream theorists, but has been charged against more radical critics, see Said, *Reflections on Recent American "Left" Literary Criticism*, 8 *BOUNDARY* 2, at 11, 21 (1979).

56. See T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 1-53 (1983).

57. Indeed, one critic has argued that "almost all English Renaissance literature is a literature of patronage." Marotti, *John Donne and the Rewards of Patronage*, in *PATRONAGE IN THE RENAISSANCE* 207 (G. Lytle & S. Orgel eds. 1981). See also D. JAVITCH, *POETRY AND COURTLINESS IN RENAISSANCE ENGLAND* (1978) (examining close relationship between court and poetry in Elizabethan England).

58. Tompkins, *The Reader in History: The Changing Shape of Literary Response*, in *READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM* 201, 203 (J. Tompkins ed. 1980).

59. For an excellent essay on this topic, see *id.*

engagement, calling for reaction and not reflection. For instance, within the Greek bardic tradition, speech was considered a potent force that functioned like magic and drugs.⁶⁰ Similarly, Swift's and Johnson's texts were political and promotional texts, intended to shape civic life.⁶¹

At the end of the eighteenth century, literature began to carve out a territory of its own whose constituency was "not the republic but the republic of letters."⁶² With the advent of commercial printing and the relative demise of the patronage system, the literary community burgeoned; writers spoke to a larger, more impersonal and anonymous audience of readers. However, as literature liberated itself from direct political control, literary criticism took on a very different role: Texts became objects of scientific and scholarly analysis rather than political events in their own right.⁶³ Some declared that great literature was distinguished by its universality and timelessness;⁶⁴ criticism was intended to promote "the free play of mind on all subjects . . . , steadily refusing to lend itself to any ulterior, political, practical considerations."⁶⁵ Modern literary criticism, even in its Whittian sophistication, still operates within this pseudo-scientific tradition: The text is an object to be interpreted, and criticism remains a search for meaning.⁶⁶ The central concern and measure of criticism is "interpretative validity." Although frustrated at every turn, critics cannot disabuse themselves of Ruskin's logocentric belief that "[n]othing can atone for the want of truth."⁶⁷

Based on the seminal work of I.A. Richards,⁶⁸ New Criticism completed the separation of literature from politics and locked meaning in an objective textual prison. Its ambition was to establish the text itself "as an object of specifically critical judgment."⁶⁹ Nevertheless, although democratic and popularist in theory, the practice of New Criticism was elitist.

60. See ANCIENT LITERARY CRITICISM: THE PRINCIPAL TEXTS IN NEW TRANSLATIONS 6-8 (D. Russell & M. Winterbottom eds. 1972).

61. E.g., Orwell, *Politics vs. Literature: An Examination of Gulliver's Travels*, POLEMIC, Sept.-Oct. 1946, at 5-21 (discussing political meaning and implications of Swift's famous text).

62. Crane, *English Neoclassical Criticism*, in CRITICS AND CRITICISM, ANCIENT AND MODERN 376 (R.S. Crane ed. 1952).

63. See R. WILLIAMS, MARXISM AND LITERATURE 45-54 (1977).

64. E.g., Shelley, *A Defence of Poetry*, in THE GREAT CRITICS: AN ANTHOLOGY OF LITERARY CRITICISM 502 (J. Smith & E. Parks eds. 1951); Wordsworth, *Observations Prefixed to the Second Edition of Lyrical Ballads*, in THE GREAT CRITICS, *supra*, at 563.

65. Arnold, *The Function of Criticism at the Present Time*, in ESSAYS, LITERARY AND CRITICAL 12 (1906).

66. See Culler, *Issues in Contemporary American Critical Debate*, in AMERICAN CRITICISM IN THE POST-STRUCTURALIST AGE (I. Konigsberg ed. 1981).

67. 3 J. RUSKIN, THE WORKS OF JOHN RUSKIN 137 (E. Cook & A. Wedderburn eds. 1903).

68. I. RICHARDS, PRACTICAL CRITICISM (1929); I. RICHARDS, PRINCIPLES OF LITERARY CRITICISM (1924).

69. Wimsatt & Beardsley, *The Affective Fallacy*, in THE VERBAL ICON 22, 22 (W. Wimsatt, Jr. ed. 1954).

Decried as "a mystery-religion without a gospel,"⁷⁰ it led to censorship and demagoguery. White and similar critics have struggled to release meaning from its confinement in the textual prison-houses of New Criticism to run free in the open fields of pluralistic reading.⁷¹ Those fields, however, are not boundless or uncontroled. White offers his own silent running commentary.

White and other critics still rely on a prior and independent text which guides readers as they solve the riddles and fill the gaps of the text; "questions [of meaning] . . . have objective answers."⁷² In effect, White manages to get his readers and keep his text too. He remains firmly within the modern tradition of text-centered, rhetorical and ahistorical criticism. The radical nature of the shift in location of meaning from text to reader is more apparent than real; it is only significant within the narrow, logocentric and modernist ambitions of "interpretative validity." The status and determinants of the text remain problematic.

Although he characterizes writing as a pivotal mode of social action, White fails to consider the historical situation of particular acts of writing and reading. He ignores the socio-economic determinants of the texts he interprets. Indeed, with revealing honesty, he states that "[ideology] has figured largely in battles with which we have nothing to do."⁷³ Moreover, White overlooks the historical specificity of his own interpretive strategies. Rather than remain true to his declared view of language as social action, he reads into his major "transhistorical" texts the basic tenets of humane pluralism.⁷⁴ In this way, by seeming to discover such values embedded in the texts, he naturalizes and universalizes his own preferred set of beliefs as the eternal truths and ideals of cultural life. Like the conjuror, White "finds in things nothing but what he himself has imported into them."⁷⁵ In so doing, their ideological content will be extracted and criticized. In short, White's own text confirms Althusser's claim that the practice of reading depends upon a theory of reading which itself has an ideological base.⁷⁶

White recognizes that meaning is not simply found or discovered, but is

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70. N. FRYE, *ANATOMY OF CRITICISM* 14 (1957).

71. Duly acknowledged by White, the central link in this struggle is the work of Wayne Booth, see W. BOOTH, *supra* note 18. Interestingly, Booth writes wistfully that "[w]e thus seem to have no Supreme Court in our [literary] republic to determine standards of justice," *id.* at 224. As has become the practice, the dustcover of White's book contains pre-publication comments by "leading" critics in the field. One is by Booth, who describes the book as "marvelous" and "a wonder." This comes as no surprise considering that Booth is a colleague of White's and one of the main theoretical inspirations—if not *the* main theoretical inspiration—for the book.

72. P. 6.

73. P. 21.

74. Pp. 18, 24, 91.

75. F. NIETZSCHE, *THE WILL TO POWER* 327 (W. Kaufmann & R. Hollingdale trans. 1967).

76. L. ALTHUSSER, *FOR MARX* 36-39 (B. Brewster trans. 1969).

negotiated and dictated through continuing action. Yet, if meaning is being scripted in the theatre of social action, he does not consider what interests, purposes or resources different actors bring to the performance. Although White is silent about the *how* and *why* of language, there exists, "at the edge of [his] text, the language of ideology, momentarily hidden, but eloquent by its very absence."⁷⁷ White's treatment of Homer's *Iliad*⁷⁸ illustrates his neglect of the crucial relation between discourse and power. The structure of heroic language and its development in a historically specific set of social relations—in particular, Homer's depiction of women—demonstrate how "[t]he reflexive elaboration of frames of meaning is characteristically imbalanced in relation to the possession of power. . . ."⁷⁹

Homer writes that women are treated as prizes; they bestow honor on the possessor and his household.⁸⁰ White identifies this treatment of women as an integral feature of the heroic form, a mode of discourse which he takes as fixed and does not go behind.⁸¹ What does Homer's treatment of women tell us about Greek society? First, as part of a bardic tradition, his text was not written for posterity, but was intended to act as an operative force in the struggle to negotiate meaning in contemporary life. Being constantly retold and performed, it would have had an effect on prevailing relations between men and women. The categories of "woman" in contemporary Greek life would be appropriately defined and developed. On White's own terms, as the text remakes the culture, the Homeric characterization of "woman," presenting the subjugation of women as natural and inevitable, would have consequences for the elaboration of that category in Greek society. As a resource presumably controlled by men, the genre of epic poetry becomes social action of the first order.

In asking questions about social action from his standpoint "outside history," White is caught in a bind. He is committed to accepting the text at face value. When one cannot resort to the grubby facts of social history, one must ignore or deny any distortion between political life and its textual representation. For instance, many women may have contested the image of women as honorific prizes. Yet Homer asks us to adopt or continue that finished categorization of women. To treat the text as a crystallized moment in the unending process of meaning-negotiation, as White does, is misleading. The text must take its identity from and be evaluated

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77. P. MACHEREY, *A THEORY OF LITERARY PRODUCTION* 60 (G. Wall trans. 1978).

78. Pp. 24–58.

79. A. GIDDENS, *NEW RULES OF SOCIOLOGICAL METHOD* 113 (1976) (original italicized).

80. HOMER, *THE ILIAD* 26, 170 (E. Rieu trans. 1969). On the role of Greek women generally, see A. CAMERON & A. KUERT, *IMAGES OF WOMEN IN ANTIQUITY* (1983); J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 19–54 (1981).

81. Pp. 24–58.

against the actual dynamics of that process. The ideological function of the text might be downplayed, but it ought not to be overlooked.

White's failure to address the ideology of the text prevents him from taking seriously his own assessment of language as social action. The significance of the impact of his omission is compounded by the fact that, throughout the book, he alerts us to the manipulative potential of language. Yet, he perversely chooses to neglect the hierarchical relations of power within which textual activity takes place. Plato's *Gorgias*, however, shows that victory is a matter of power and not of persuasion; Socrates wins over Gorgias by having him agree to his rules of the game.⁸² Also, White's description of Johnson's *Rambler* essays is complacent and naive: "He defines a term by showing how it can be combined with others and, in doing so, not only clarifies established meanings (for all the words) but makes possible the new expression of *substantive truths*."⁸³

Although White confers interpretative validity on the reader's response, he does not commit himself to a vogueish nihilism in which "[l]iterary interpretation becomes a game of tennis played without a net and on a court with no backlines."⁸⁴ While recognizing that texts harbor a multiplicity of meanings, White maintains that some meanings are better than others and that his theory of reading can illuminate those meanings. As his book progresses, he becomes less tolerant. He begins to talk of "proper"⁸⁵ and "true" readings⁸⁶ and to criticize others whose readings are "a perversion"⁸⁷ or "quite wrong."⁸⁸ At the end of the book, White completes his task of showing that "the textual community can be understood in ethical and political terms across the whole range of texts we shall read and the genres they exemplify."⁸⁹ Like I.A. Richards,⁹⁰ White believes that texts have a civilizing mission and inculcate the external values of "beauty and truth and justice."⁹¹ It is in fleshing out those ideals that White reveals and reads into the texts his own preferences and projects. He supplies a barely disguised running commentary for the location of "true" meaning in the pluralistic fields.

There are two central themes to the Whitian experience of reading: the idea of human equality and the willingness to be persuaded in political

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82. Pp. 102-08.

83. P. 154 (emphasis added) (footnote omitted).

84. Brooks, *The New Criticism*, 87 SEWANEE REV. 603, 604 (1979).

85. Pp. 23, 115.

86. P. 137.

87. P. 191.

88. P. 307.

89. P. 18.

90. See I. RICHARDS, *SCIENCE AND POETRY* (1926).

91. P. 275.

discourse.⁹² Finding these themes in different periods of history, diverse types of society, and distinct genres of writing, White concludes that these values are inherently human and represent the best in human nature. White finds the highest expression of the ideals of "equality" and "persuadability" in the practice of constitutional argument in the liberal democracy of the United States:

[T]he heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for recognizing others, for acknowledging ignorance, and for achieving cultural change.

. . . . The central idea of justice, on this view, is a matter not of rules, distributions or correctives but a matter of relations. . . . The essential idea of equality before the law is an equality of speakers, not an equality of distribution or results . . . .⁹³

White's early statement that "this book, despite appearances, is really about law from beginning to end"⁹⁴ is no small reassurance or idle threat. His whole book is a sophisticated attempt to justify and apologize for the present chaotic practice of adjudication. He revels in the polyglotism of judicial and juristic discourse and sees in its performance the embodiment of civilized and just discourse. His book is a paean to pluralism; Babelism becomes the triumph, not the tragedy, of social action.⁹⁵ Bolstered by the wisdom and authority of the world's great texts, White glorifies the institution of judicial review. Even in Homer's *Iliad*⁹⁶ or Thucydides' *History*,⁹⁷ he spots an implied support and justification of the "rule of law" based on equality and persuadability.

Examining White's book itself as an historical text to be interpreted reveals much about White's own pluralism. In his treatment of the *Iliad*, what White does not think is important tells us a great deal about White's own politico-historical context and project. The sounds of silence are unmistakable. In stressing the celebration of human equality in the Homeric

92. Pp. 18, 39, 53, 78, 161, 228.

93. Pp. 273, 283.

94. P. xi.

95. *Contra* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 569 (1980) (Rehnquist, J., dissenting) ("it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn . . .").

96. P. 50.

97. P. 89.

world, White is only talking about warriors and, at that, only the chief warriors. Equality is respected within a confined community; women, slaves, and rank-and-file soldiers are already defined out of the community.⁹⁸ Equality, based on official status, becomes largely artificial. On closer inspection, White's "human equality" is nothing more than formal equality in a society characterized by massive substantive inequality. This definition of equality, of course, parallels the situation in White's and our contemporary society: All citizens are equal before the law, notwithstanding that the material conditions of their lives give rise to severe and pervasive substantive and structural inequality.⁹⁹ White has projected the modern ideology of "humane pluralism" back on to the ancient *Iliad*. He has translated Anatole France's ironic saw into a political creed: "[T]he majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal . . . bread."¹⁰⁰

IV. OF PHILOSOPHY AND POWER

White's pluralism is typical of the predicament and practice of contemporary scholarship. Although eschewing any reliance on or search for absolute truth, it remains haunted by Pilate's question, "What is truth?" White cannot escape or discard the logocentric urge for objective and original meaning. He shares the epistemological assumptions of the Enlightenment Project.¹⁰¹ For him, man is the source of history and meaning; truth and knowledge are produced by the individual mind operating on independent experience. Within this scenario, the social structure and dynamics of power are of little significance. Indeed, White subscribes to the Baconian view that "all power is a species of persuasion."¹⁰² The major thrust of this essay has been to contradict that view and to suggest how power is as much the producer of knowledge and history as its product. In recent years, there has been a radical and eclectic assault throughout the Humanities upon the foundations of Western metaphysics. Although operating on many different fronts, the attack is loosely unified in its shared objective of explicating the intimate relation between philosophy and history. After introducing the main force of that general critique, the remain-

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98. In Greek, for example, *philos* denoted a limited stock of persons and things which were of special value to their owners and on which their existence depended. Significantly, there was no word for or distinction between persons and things in this category. For a general discussion of the value-structures of Greek society, see A. ADKINS, *MORAL VALUES AND POLITICAL BEHAVIOUR IN ANCIENT GREECE* (1972).

99. For a thorough and accessible documentation of this inequality, see J. COHEN & J. ROGERS, *ON DEMOCRACY* 20-87 (1983).

100. A. FRANCE, *THE RED LILY* 91 (W. Stephens trans. 1927).

101. See *supra* pp. 211-13.

102. P. 280.

der of this essay will concentrate on one particular mode of critical thought, namely "historical deconstruction," and adumbrate its implications for legal theory. The danger of such a crude sketch is that it inevitably tends to trivialize this potent intellectual turn of events.

A. *The Contingency of Knowledge*

The dichotomies of tradition/reason and faith/science are misleading and distorting. By excluding history from intellect, philosophy is impoverished and degenerates into an "attempt to pick at a wet knot with boxing gloves."¹⁰³ Ahistorical reason inevitably leads to nothingness; no justificatory argument can withstand its own critical assault. Although protesting its abandonment of the objectivistic search, pluralism remains firmly within the same modernist tradition. It occupies the same epistemological site as the discredited objectivism. Indeed, originating as a second-best solution, it implicitly accepts the dichotomous design of the Enlightenment Project. The pluralist parasite thrives and can exist only in a symbiotic relation with its objectivist host. Yet nihilism is troublesome only if there is a belief in the worth of the Enlightenment Project: The nihilistic abyss is a construct of that project. If the Enlightenment Project is abandoned, the association of nihilism with moral despair will also be rejected.¹⁰⁴ Of course, pluralism does not pretend to be an anything-goes philosophy. To hold back the tide of imagined nihilism, pluralists, as White's work evidences, smuggle in personal preference as universal insight. History can be hidden, but never excluded.

Directed towards its evasion and transcendence, philosophy is grounded in historical circumstance. Theories are produced in specific socio-historical situations and help to generate a particular version of history. As Alasdair MacIntyre states, "[t]he teaching of method is nothing other than the teaching of a certain kind of history."¹⁰⁵ Human reason and discourse are the prized possessions of a social heritage. Rationality and language cannot divest themselves of history and reach an ahistorical or metalinguistic truth. Human identity is located within tradition and language; they are not ours to dispose of.¹⁰⁶ As such, philosophy can never be

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103. P. DE VRIES, *THE TUNNEL OF LOVE* 136 (1954).

104. See J. GOUDSBLOM, *NIHILISM AND CULTURE* 87-143 (1980). For an optimistic interpretation of nihilism and its jurisprudential possibilities, see Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984).

105. This quotation is from page 61 of the original typescript of an article, *Epistemological Crises, Dramatic Narrative and the Philosophy of Science*, published in abbreviated form in 60 *MONIST* 453 (1977), and quoted in R. BERNSTEIN, *supra* note 9, at 57.

106. See C. GEERTZ, *THE INTERPRETATION OF CULTURES* 52 (1973); H. PUTNAM, *REASON, TRUTH, AND HISTORY* (1981).

more than a stylized literary genre¹⁰⁷ and, like all literary genres, is beholden to its historical milieu. Philosophical discourse has no privileged status above other discursive practices. Metaphysicians begin and end with their own cherished values. By a circuitous process of reasoning, they manage to confer universal validity on their own preferred values and interests; "metaphysics . . . is a living lie . . . . Having thought from Z to A, [they] pose[ ] as thinking from A to Z."¹⁰⁸

The critical upshot of this insight is that modes of thinking are themselves revealed as contingent. The great systems of philosophy and styles of theorizing about the human condition are not fixed and immutable. The "Enlightenment Project" is a phase. It originated and was allowed to mature at a particular time and served particular interests. The historical introduction and institutionalization of the search for the ahistorical foundations of knowledge and truth operated to freeze existing patterns of social relations. It legitimated an established distribution of power by conferring on it a spurious, but respected, ontological status. Most importantly, this epistemological strategy has constrained and controlled our appreciation of the historical imperative itself; it sought to persuade us to turn a deaf ear to the subversive message of historical contingency. So effective has it been that it makes the imagining of a different way of thinking literally *unthinkable*. The difficulty of learning is as naught compared to the Sisyphean task of unlearning.

B. Toward Historical Deconstruction

The demand for an abandonment and denial of the Enlightenment Project is represented in legal and literary theory by "Deconstruction." An elusive and enigmatic tendency,¹⁰⁹ it glories in and relies on its own slip-

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107. See Rorty, *Nineteenth-Century Idealism and Twentieth-Century Textualism*, 64 *MONIST* 155, 157 (1981).

108. K. BURKE, *THE PHILOSOPHY OF LITERARY FORM* 383 (3d ed. 1973). This point is made in deconstructive style by Wlad Godzich:

Philosophical thought arises historically, but, from the moment of its emergence, it seeks to define itself as a form of cognition which would be based on a first principle understood as the foundation of all forms of being and thought. Philosophical thought is thus in a quandary from its inception: It must grant the status of philosophical question to the very circumstances which gave rise to it while formulating the mode of philosophical questioning as independent of any contingent considerations.

Godzich, *The Domestication of Derrida*, in *THE YALE CRITICS: DECONSTRUCTION IN AMERICA* 36 (J. Arac, W. Godzich & W. Martin eds. 1983).

109. The task of presenting an even cursory account of Deconstruction is fraught with difficulties. Indeed, I confess my trepidation at claiming to describe such a theoretical tendency. The words of Winston Churchill spring to mind:

I had a feeling once about Mathematics, that I saw it all—Depth beyond depth was revealed to me—the Byss and the Abyss. I saw, as one might see the transit of Venus—or even the Lord Mayor's Show, a quantity passing through infinity and changing its sign from plus to minus. I saw exactly how it happened and why the tergiversation was inevitable. . . . But it

periness for its intellectual cogency and potency. From the outset, it must be understood that Deconstruction is not a philosophy, but a philosophical strategy for displacing traditional philosophy; a deconstructionist "is a bad son demolishing beyond hope of repair the machine of Western metaphysics."¹¹⁰ Deconstruction seeks to demonstrate that words and texts lead down a blind alley of thought. It eschews any concept of embodied meaning. Operating from *within* the traditional paradigm, it unravels and lays bare the contradictory and warring forces that lurk behind and subvert the common sense meaning of words and texts. As with White's text, what is present necessarily depends on what is absent. The text is both the source of knowledge and its disguise.

Reveling in paradox, Deconstruction denies that any particular mode of linguistic signification can achieve interpretive hegemony; interpretation is an endless exercise in unbounded free play. Ruthlessly employing this scandalizing leitmotif, Deconstruction traces the labyrinthine circle of meaning. As Barbara Johnson puts it:

[The deconstructive critique] reads backwards from what seems natural, obvious, self-evident, or universal, in order to show that these things have their history, their reasons for being the way they are, their effects on what follows from them, and that the starting point is not a (natural) given but a (cultural) construct, usually blind to itself.¹¹¹

Moreover, Deconstruction does not exempt itself from its own critical maneuvering; it is alive to the possibilities of its own deconstruction. This, of course, serves to reinforce its own critical strength. How is it possible to interpret a philosophical strategy that itself denies the conventional intelligibility of interpretation?¹¹²

Unfortunately, American literary scholarship has grossly misapplied this radical critique and blunted its critical edge. In their obsession with "interpretive validity," critics have enlisted Deconstruction in the battle of interpreting particular texts. For instance, J. Hillis Miller writes that "[t]he ultimate justification for [Deconstruction] . . . is that it works. It reveals hitherto unidentified meanings and ways of having meaning in

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was after dinner and I let it go!

W. CHURCHILL, *MY EARLY LIFE: A ROVING COMMISSION* 41 (1930).

In offering this tentative introduction to Deconstruction, I have benefited from J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1983); C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982); D. Kennedy, *International Legal Structures* (July 1982) (unpublished manuscript). For the most accessible summary of the objectives and style of Deconstruction by its leading exponent, see J. DERRIDA, *POSITIONS* (A. Bass trans. 1981).

110. Miller, *The Critic As Host*, in *DECONSTRUCTION AND CRITICISM* 251 (1979).

111. Johnson, *Introduction* to J. DERRIDA, *DISSEMINATION* xv (B. Johnson trans. 1981).

112. See J. DERRIDA, *OF GRAMMATOLOGY* 24 (G. Spivak trans. 1976).

major literary texts."¹¹³ Domesticated and neutralized, it has been reduced to a tamed dogma of textual nihilism. In its American mutant form, "unbounded free play" is premised on an unconstrained individual-at-large who designates meaning at will, an eternal signifier. It has been put to work within the very metaphysical process that it is intended to disrupt. In its text-centered, abstract, and ahistorical focus, Deconstruction shares much with the discredited New Criticism. However, this failure to take history seriously does not deliver a fatal blow to Deconstruction. Drawing on the work of Michel Foucault, it is possible to nurture an "Historical Deconstruction" and, thereby, "politicize . . . the polyphony of the signified."¹¹⁴ Infused with the radical energy of historical contingency and power, Deconstruction can re-emerge stronger and better able to carry through its critical agenda.

Deconstruction, which introduced the idea of epistemological indeterminacy, has failed or refused to grasp its political significance. Indeterminacy does not require the conclusion that all texts are meaningless. On the contrary, it puts language up for grabs or, to be more precise, makes it "open to interested appropriation."¹¹⁵ The real deconstructive task is to note the determinate meaning actually given to texts, to identify the historical determinants of the meaning-giving exercise, and to uncover the relations of power that produce and benefit from this textual knowledge.

At the core of this inquiry is the crucial historical relation of power and knowledge. They are mutually generative and inseparable. Power is anonymous and ubiquitous, neither always bad nor always good. A complex web of forces that continually disaggregate and coalesce,¹¹⁶ it is a pervasive and dynamic feature of all relations: "We all struggle against each other. And there is always something in us which struggles against something else in us."¹¹⁷

Through the control of linguistic practices, power preserves and perpetuates itself. It constructs reality in its own image by silencing and excluding the powerless. The hidden agendas of power are secreted within the interstices of "scientific" codes of knowledge and are most seductive

113. Miller, *supra* note 110, at 252.

114. Belsey, *Literature, History, Politics*, 9 *LIT. & HIST.* 17, 20 (1983).

115. F. LENTRICCHIA, *CRITICISM AND SOCIAL CHANGE* 81 (1983).

116. Foucault has written:

No one, strictly speaking, has an official right to power; and yet it is always exerted in a particular direction, with some people on one side and some on the other. It is often difficult to say who holds power in a precise sense, but it is easy to see who lacks power.

M. FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE* 213 (D. Bouchard trans. 1977). Not surprisingly, Foucault has been assailed for his "political quietism," see Said, *Travelling Theory*, 1 *RARITAN*, Winter 1982, at 41, 64. In part, Foucault abandons a class analysis in favor of a broader examination of power. See M. FOUCAULT, *POWER/KNOWLEDGE* (C. Gordon trans. 1980).

117. Dews, *The Nouvelle Philosophie and Foucault*, 8 *ECON. & SOC'Y* 141, 164 (1979) (quoting Foucault, *Entrevue: le Jeu de Michel Foucault*, 10 *ORNICAR?* (1977)).

when in discursive disguise. There can be no starker example of this process than the pivotal role of language in perpetuating patriarchy; the subordination of women is inscribed within language.¹¹⁸ Quite simply, knowledge is a taking of sides, the making of a "critical wager."¹¹⁹

While power cannot be exercised or be effective without knowledge, the production of knowledge impinges on and engenders power. There is no universal pattern to this relation. But Historical Deconstruction offers an analytic grid for exploring the shifting and manifold relations of power and knowledge in their immediate historical context. Of course, this means accepting that the claim "to reveal . . . truth" is a "ridiculous pretension."¹²⁰ For many, this will signal the end of any hope for salvation and will mark the final lurch into the abyss. Yet it is far from clear what exactly we would lose if we gave up on an eternal, transcendent notion of truth. Conversely, even if we could possess such truth, it is unclear what we would do with it: Truth is surely less important than the life it makes possible.

Clearly, therefore, Historical Deconstruction is not to be acted on in the logocentric struggle, but is "an active antithesis of everything that [traditional] criticism ought to be."¹²¹ It is a systemic and pervasive attack on the foundational plausibility and efficacy of the Enlightenment Project. Individuals are not free or autonomous. As both objects and subjects of knowledge, they are trapped in the cultural discourse of reality; "[t]he individual is no doubt the fictitious atom of an 'ideological' representation of society; but he is also a reality fabricated by [a] specific technology of power . . . ."¹²²

C. *The Quest for the Hermeneutic Grail*

The ambition to explain the legitimate role and responsibilities of the judiciary within a constitutional democracy has long been the motivation behind most American jurisprudential scholarship. In recent years, the study of legal interpretation has preoccupied jurists. Constitutional schol-

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118. For an excellent critique of the patriarchal perspective that underlies philosophy, see MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982). See also SEXIST LANGUAGE: A MODERN PHILOSOPHICAL ANALYSIS (M. Vetterling-Braggin ed. 1981); Elshtain, *Feminist Discourse and Its Discontents: Language, Power and Meaning*, 7 SIGNS 603 (1982).

119. W. GAIRDNER, *supra* note 54, at 3.

120. M. FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE, *supra* note 116, at 39.

121. C. NORRIS, *supra* note 109, at xii.

122. M. FOUCAULT, DISCIPLINE AND PUNISH 194 (A. Sheridan trans. 1977). The task of "deconstructing a universalist subjectivism" is taken up by Tom Heller. See Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 192 (1984). Heller's rather dense but erudite article is intended only as a beginning to this task.

ars have become absorbed in (and obsessed with¹²³) the quest for the hermeneutic grail—namely, the search for an appropriate set of methodological principles for valid interpretation which allows jurists to connect “linguistic intuitions with ethical intuitions.”¹²⁴ The plethora of ingenious solutions testifies not only to the fecundity of the juristic imagination, but also to the bankruptcy of traditional legal thought. Whereas, at one extreme, there is the insistence on historical and textual objectivity,¹²⁵ at the other extreme is the belief in the extra-constitutional authority of a prophetic interpreter.¹²⁶ There are, of course, many intermediate positions.¹²⁷ Yet, for all their apparent diversity, theorists continue in their search for scientifically and politically valid methods of interpretation.

Sadly, Deconstruction has been enlisted in the logocentric struggle for constitutional meaning. Relying on a pseudo-deconstructive line of criticism, Sanford Levinson defends an interpretive mode of legal nihilism. For him, legal language is infinitely manipulable; “[t]here are as many plausible readings of the United States Constitution as there are versions of *Hamlet*. . . .”¹²⁸ The meaning-giving exercise is reduced to another occasion for the expression of personal prejudice. He maintains that “legal discourse is simply judges and other adjudicators doing what their political and ethical views command,”¹²⁹ and confers on John Marshall the dubious distinction of being “the great Nietzschean judge of our tradition.”¹³⁰ For Levinson, constitutional interpretation is the unbounded free play of the judicial mind.

In adopting this nihilistic stance, Levinson is playing the same epistemological game as White and other traditionalists.¹³¹ He shares the same

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123. The hallmark of American constitutional scholarship is its obsessive quality. Scholars seek to establish the distinctiveness of legal discourse, the centrality of adjudication, and the pivotal importance of the Constitution in American politics and history. This limited focus obscures and overlooks the broader function of law in society. See Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. (1985) (forthcoming).

124. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 293 (1981).

125. See R. BERGER, *DEATH PENALTIES* (1982); R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

126. See M. PERRY, *supra* note 51, at 91–145.

127. See Fish, *Fish v. Fiss*, 36 STAN. L. REV. (1984) (forthcoming); Fiss, *Conventionalism*, 58 S. CAL. L. REV. (1984) (forthcoming); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). For a review of the literature, see P. BOBBITT, *CONSTITUTIONAL FATE* (1982); Thomson, *Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes*, 13 MELB. U.L. REV. 597 (1982).

128. Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982).

129. Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466, 1471 (1983) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982)).

130. Levinson, *supra* note 128, at 389.

131. This “nihilistic” strain seems dominant in the work of two of the leading Critical Legal Scholars. Although his earlier work suggests a recognition of an identifiable body of legal precepts, Duncan Kennedy’s more recent, polemical work seems to challenge the existence of any settled rules, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976);

foundational faith in individuals as the source of meaning beyond the constraints of their historical and linguistic situation. His is a profoundly ahistorical and asocial analysis. He seems to offer a contentless doctrinal analysis in the same way that a nihilistic cartographer might draw a map of a desert without any topographical features. Over time, the sand will swirl around and the dunes will shift in site and size, but it is nonsensical to claim that the desert has no shape or contours at any particular time.¹³² In short, Levinson has missed the radical point of Deconstruction and, like his literary counterparts,¹³³ translated it into one more interpretive technique.

One contemporary writer who seems to have grasped and acted on the insights of Historical Deconstruction is Roberto Unger.¹³⁴ His doctrinal analysis is part of a more ambitious project of political theory.¹³⁵ As a critique of present juristic and judicial practice, he claims that there is a "permanent disequilibrium of doctrine."¹³⁶ Principles and counter-principles pervade the legal materials with no metaprinciples to reconcile them. However, Unger does not argue that doctrine lacks intelligible meaning or shape at any particular historical moment. To do so would negate common sense experience and invalidate the thesis that law and legal theorizing help hold in place and naturalize the hierarchical structures of social domination.¹³⁷ His claim is that the doctrinal patterns can

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Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40 (D. Kairys ed. 1982). Mark Tushnet seems to hold to a similarly nihilistic position, see Tushnet, *Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

132. For an example of a scholar who seeks to defend the radical indeterminacy of the law and provide a critique of its present position, see Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

133. See *supra* pp. 230-31.

134. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). In recent articles, two authors use deconstructive techniques to undermine traditional doctrinal work. Frug relies on Derrida's notion of "dangerous supplement" to deconstruct contemporary scholarly attempts to justify bureaucratic organization. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1288-91 (1984). Spann makes a less explicit and less technical use of deconstructive argument to explicate the occurrence of "analytical spin." Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 516-44 (1984). For an attempt to apply a deconstructive analysis to English law, see Hutchinson, *The Rise and Ruse of Administrative Law and Scholarship*, 47 MOD. L. REV. (1984) (forthcoming).

135. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976). For an extended presentation of these arguments and a general critique of Unger's work, see Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984). It is extremely difficult to speak confidently about Unger's relation to any particular intellectual tendency. While his work bears the imprint of French post-structuralist thought, his habit of minimal footnoting makes such observations tentative. On this point, I tend to agree with Milner S. Ball; the lack of reference to the work of any other person is "a circumstance as ungenerous to fellow laborers . . . as it is to [those] who struggle to find bearings in the rare atmosphere [of Unger's work]." Ball, Book Review, 51 GEO. WASH. L. REV. 309, 323 (1983) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982)).

136. Unger, *supra* note 134, at 574.

137. E.g., *id.* at 602-16 (analysis of equal protection doctrine).

never be objectively justified, and thus they amount to nothing more than contingent choice. Insofar as legal materials rely on some normative "background theory" of rights¹³⁸ or wealth maximization,¹³⁹ that theory itself rests upon a matrix of basic antinomies. In short, doctrine contains and can never dispossess itself of the resources for its own revision. It can be constantly and consistently reorganized in its own contradictory self-image. Determinacy is contrived, superficial, and ephemeral; legal principles are historic plots on the doctrinal graph which charts the ideological resolution of social disputes. Unger's solution is to suggest a practice of "enlarged doctrine" in which the courts would become an institutional forum for the open ideological debate over the future organization of social life.¹⁴⁰

In its legal form, Historical Deconstruction does not claim to provide a more reliable interpretation of particular cases or offer a useful body of interpretive rules. It is concerned with the phenomenological and historical task of exploring the nature and possibilities of interpretation itself. It is a systemic analysis that attempts to understand the mediation of past meaning through present understanding; "the general structure of understanding acquires its concrete form in historical understanding."¹⁴¹ Interpretive knowledge is produced within and sustains an historical structure of power. Neither text nor interpreter exclusively controls the meaning-giving act; structural determinism or naive humanism is not a viable option. The need to solve the puzzling interaction between human agency and historical conditions remains the urgent task of social and legal analysts.

V. THE NEVER-ENDING END

Whatever may be the shortcomings of individual Critical Scholars' offerings, their importance as a group ought not to be neglected. They have made the relations between history, power, and thought a major item on the agenda of contemporary jurisprudential debate. Their study of the study of law insists that no study, including their own, can ever be apolitical or ahistorical. Posner's assessment of such scholars as "play[ing] by different rules" and as "unassimilable and irritating foreign substances in

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138. E.g., Dworkin, "Natural" Law Revisited, *supra* note 20.

139. E.g., R. POSNER, THE ECONOMICS OF JUSTICE (1981).

140. R. UNGER, LAW IN MODERN SOCIETY, *supra* note 135, at 576-601. Any resemblance to White's, p. 263, or Ackerman's, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 310-12 (1980), accounts of the Supreme Court as a forum for cultural reconstruction is purely coincidental. Unger does, however, share a naive reliance on the revolutionary power of adjudication. See Hutchinson, *supra* note 123.

141. H. GADAMER, TRUTH AND METHOD 234 (G. Barden & J. Cumming eds. 1975).

the body of the law school"¹⁴² is perfectly accurate. This is a compliment, not a criticism.

The implications for legal language are devastating. Any language is a social entity, and its efficacy depends on shared values. As the values of the legal community begin to crumble and diversify, the coherence of legal language will come under greater stress, and its political underpinnings will be exposed. It will be increasingly revealed that linguistic concepts are not terms through which to describe and view an independent reality, but that they constitute that reality.¹⁴³

Language is the silent police of the mind. Moreover, we have only language to rely on to escape language. Bob Gordon reminds us of this chilling prospect: "[I]f the real enemy is us—all of us, the structures we carry around in our heads, the limits on our imagination—where can we even begin?"¹⁴⁴ A wider appreciation of this fact would be one place. By speaking a language, we accept its values and commitments. It is a symbol and tool of power which thrives on ignorance and dependence and perpetuates certain ways of thinking. This is especially true of lawyers' use of language.¹⁴⁵

At a more mundane, but nonetheless important level, the institutional and formal restraints placed on legal language subtly control its substantive content. Most manuals on legal writing stress the need for the "cold" virtues of precision, conciseness, simplicity, logic, and detachment.¹⁴⁶ One author goes so far as to say that "[abstract words] are vague . . . [and] offer an easy way out for the lazy and the fuzzy-minded."¹⁴⁷ Such strictures militate against the articulation of certain types of thinking and criticism. By forcing critics to speak in the traditional idiom, they defuse

142. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1127, 1128 (1981).

143. See W. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 180 (1974). One of the most colorful examples of this is offered by Foucault in a passage from Borges who quotes from a Chinese encyclopaedia that "animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies." As Foucault observes, "the wonderment of this taxonomy" is not only "the exotic charm of another system of thought," but "the limitation of our own, the stark impossibility of thinking *that*." M. FOUCAULT, *THE ORDER OF THINGS* xv (1970).

144. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281, 291 (D. Kairys ed. 1982). It is perhaps extreme to go as far as Martin Heidegger and claim we are nothing more than a conversation; see M. HEIDEGGER, *EXISTENCE AND BEING* 277 (W. Brock ed. 1949); cf. L. FULLER, *THE MORALITY OF LAW* 185-86 (1964) (man's survival predicated on power of communication).

145. See Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984). In a pithy note, Stark argues that "lawyers write badly because doing so promotes their economic interests." *Id.* at 1389. For him, legal language strangles communication and "limits what lawyers can see." *Id.* at 1390.

146. E.g., E. BISKIND, *LEGAL WRITING SIMPLIFIED* (1971); N. BRAND & J. WHITE, *LEGAL WRITING* (1976).

147. H. WEIHOFEN, *LEGAL WRITING STYLE* 21 (2d ed. 1980).

and deradicalize their critical message. Indeed, law reviews have a similar effect. The organization, presentation, and editorial practices of the law reviews tend to impose a stylistic and disabling straitjacket on legal writing and, therefore, thought.¹⁴⁸ So, with the indulgence of this Journal's kind editors, now for something completely different: A *Sting* in the tail. . . .¹⁴⁹

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148. For the classic put-down of law reviews, see Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962): "There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground." *Id.* at 279. I have little doubt that Rodell would have considered this essay further proof that law reviews are "citadels of pseudo-scholarship, those squanderers of numberless square miles of timberland." *Id.* at 286. I trust he would not have considered it a "rodomontade of legalisms." *Id.* at 289.

149. Sting, *De Do Do Do, De Da Da Da*, recorded on THE POLICE, ZENYATTA MANDATTA. Courtesy and copyright. 1980 Virgin Music (Publishers) Ltd. Published in the U.S.A. and Canada by Virgin Music Inc. All rights reserved.

Don't think me un-kind
Poets priests and poli-ticians

have words are hard to find
words to thank for their po-ti-

tions They're on-ly checks
Words that scream

I've left un-signed
for your sub-mis-sion

From the banks of cha-os in my mund-
and no one's jam-ming their trans-mis-sion

And when their el-o-quence es-capes,
'Cause when their el-o-quence es-capes,

me their log-ic ties
you their log-ic ties

me up and rapes me
you up and rapes you

De

Do Do Do, De Da Da Da, that's all I want to say

to you De Do Do Do, De Da Do Da their

in-no-cence will pull me through, De Do Do Do, De

Da Da Da, that's all I want to say to you De

Do Do Do, De Da Da Da, {They're mean-ing less and all
They're mean-ing less and all

To Coda

that's true
that's true