

Law, Art, Politics, and Justice

Law, Culture and the Humanities

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By Robert Post, Yale Law School

James Boyd White, a treasure in the world of legal scholarship, has written *Keep Law Alive* out of “love” for the “gift” of law, which he fears we are in danger of losing (160). For White, law “is not just a set of rules or institutions” (xiv); law is “a way of claiming meaning for experience” (5). At the “heart” of “legal knowledge,” White affirms, “is a kind of writer’s knowledge: the knowledge of legal language and the art of using it, criticizing it, transforming it, all with the aim of working out a way of imagining the world” (41).

I am deeply in agreement with White’s profoundly humanistic vision of law. It seems to me exactly right. Yet I myself am also tempted to impart a slightly different emphasis to White’s insights.

At the outset of his book, White recounts with approval the advice of a rabbi, who explains that to understand Jewish law, one must comprehend the entire “story” of the Jewish people and of their relationship with God (4). This of course chimes with the fabled beginning of Robert Cover’s 1983 *Harvard Law Review* article, “*Nomos and Narrative*,” in which Cover writes that “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning” (4). Yet for Cover, the meaning of law is not merely a question of language or literary art. It is equally a question of “commitment”: “[A] legal interpretation cannot be valid if no one is prepared to live by it” (44–45).

Throughout *Keeping Law Alive*, White de-emphasizes this relationship of law to action, of narrative to behavior. White places at the center of his exposition “art – whether music or painting or architecture or poetry or drama” (102). It is certainly true that art creates the same kind of complex meanings as law. Yet it is also true that art only rarely endows its meanings with the kind of prescriptive force that essentially defines law.

Law ultimately emerges not from the individual genius of an author in her study, but from the theatre of history, which plays only a minor role in White’s book. History is where we collectively transform the lived experience of our lives. Statesmen, politicians, and historical actors fashion new imaginative structures that endow our actions with fresh possibilities and significance. Law emerges from such historical and political conflict, naked and shining, like Venus from the sea. We cannot fully appreciate the miracle of jurisgenesis until we see that law is as much about the collective construction of *forms of life*, as it is about the individual creation of texts.

Because legal actors seek to create meanings that guide action, they must advance visions of a past and future community capable of commanding conviction and allegiance. Like statesmen, legal actors make bids on the future, which society may or may not accept. Some proposals are successful; others are not. *Brown* was for a time successful; *Roe* inspired sustained resistance. As Alexander Bickel has wisely noted in *The Supreme Court and the Idea of Progress*, “[t]he Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and – the short of it is – it labors under the obligation to succeed” (239). If law is an art, it is the art of shaping society’s commitments.

In *Keeping Law Alive*, White often observes that “the main goal of law is . . . justice” (5-6). Given the universal need for rationalization, it may tautologically be true that every community regards the realization of its own values as just, and insofar as law aims at the realization of such values it aims at justice. But White does not seem to situate the value of justice historically and sociologically in this way. He speaks as though “justice” were a value always associated with an immanent critique of existing arrangements. This theme is especially prominent in his discussion of affirmative action.

In modern, plural societies, however, law must seek legitimation within a demos that possesses many competing visions of future arrangements. It is likely that the pathways of the law will be regarded as just by some, but as unjust by others. “Justice” does not serve as an external criterion, neutral in this struggle. The rhetoric of justice is instead a weapon used by participants in the cultural battles that are endemic to plural states. Because law must hold the state together despite these persistent conflicts, White movingly and convincingly shows that the craft of law requires “a capacity to face and manage its internal contradictions and tensions” (19), so that law becomes “a way of establishing and confirming agreement” in the very process of channeling disagreement (7).

If we take this insight seriously, it may perhaps offer a glimpse of hope. White is apprehensive that “now we face the challenge of living without [law]” (160), because our judges “speak in no one’s voice, without seriousness, without a sense of responsibility for what is done or said” (115). White fears that technique and administration, even raw power itself, have displaced the human search for meaning that law must embody. He is worried that we have lost the urge for justice.

But there is another possibility. For the past many decades, law in the United States may have become the servant of social groups whose ideals many find ignorant, heartless, and immoral. That does not make law any less an instrument of community self-assertion and identity. It is just that the specific identity treasured by White has been pushed aside, first in the arena of politics and then in that of law. The reconstructive vision of race in America that White (and I) find so attractive, and that formed the heart of *Brown v. Board of Education* in 1954 was repudiated in law because of backlash in the arena of politics. This is not an instance of law losing its normative moorings; it is rather an example of how the Republican political ascendancy has turned law to values quite different from what White (or I) would embrace. This implies that our constitutional law may still be pursuing justice, albeit an alien justice.

I am inclined to view recent developments of the law through this lens. White is correct to see law as an instrument of normative aspiration, and in that limited sense, of “justice.” But on this account when law expresses aspirations we find repugnant, it will

also pursue forms of “justice” that are galling. This does not portend the death of law. Instead it confirms White’s view that law is an essentially normative enterprise. Law’s norms are tested in the cauldron of history.

Given that law must prescriptively negotiate the complexities of plurality, the deep craft of law, as White so brilliantly shows, is to hold out sufficient hope to losers to remain in the game of politics, so that they can seek to turn law once again to their own values. The true loss of law happens only when we become so discouraged that we cease our efforts to reform it. Then law indeed becomes merely imperium. Then the interdependence of law and democracy, which White rightly suggests defines America, will indeed decay.