LAW AS A LANGUAGE, LAW AS AN ART: REFLECTIONS
ON JAMES BOYD WHITE’S *KEEP LAW ALIVE*

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ABSTRACT

Keep Law Alive, the latest book by law and literature scholar James Boyd White, is an important apologia for the traditional understanding and practice of law in the United States. Law, White argues, has served as a language in a sense closely parallel to what we mean by referring to English or Spanish as a language: law provides those fluent in it with the tools to describe the social world and to imagine its transformation, but without scripting what the speaker must say. White also envisions law as an art that evokes imagination, emotion and personal judgment, as well as the mind, and that is fundamentally oriented toward the realization of justice. Intellectual, social and political changes, however, threaten to displace law as a language and art with a view of law as an essentially empty rhetoric that cloaks the use of abstract and impersonal reasoning often borrowed from other disciplines. The survival of law depends on the willingness of those who speak it to continue its practice as an art that serves a humane vision of political life.

KEYWORDS

Law as Language, Law as an Art, Imagination, Form of Life, Justice

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* Professor of Law, Duke University. This essay began as notes for a conference discussion of *Keep Law Alive* that did not take place because of the pandemic. I am deeply grateful to Linda R. Meyer for inviting me to be part of the panel, and to her, Sarah Higinbotham, and Jim White, for their comments and encouragement.

I. INTRODUCTION

For almost half a century, the idea of “law and literature” as a serious field of inquiry and debate has been closely linked with James Boyd White, whose pathbreaking book *The Legal Imagination* addressed questions of legal meaning by treating seriously the embodiment of law in texts that can be read as literary works.¹ Over that period, law and literature has become a recognized and even mainstream mode of American legal scholarship, a fact which makes it easy to forget that at the time White began writing, he and other scholars were engaged in a serious intellectual struggle over how to understand law and what it means to study law critically.² White was not proposing an elegant but essentially abstract theory; his call to attend to the literary and rhetorical aspects of the law was an existential challenge to understand, teach and practice law in a particular manner. And White’s literary understanding of law entailed a warning as well: he sought to persuade his readers to question or reject approaches to legal thought that would convert it into something resembling – or pretending to resemble – a value-free science.

In his recent book *Keep Law Alive*, White once again offers a vision of law, a vision that is continuous with that he first proposed long ago, but developed and presented with a clarity that comes only with long reflection on a governing idea. And it is, once again, a vision that is also an invitation and a warning. The title *Keep Law Alive* expresses vividly the urgency White wants us to feel about the task he is summoning American readers to undertake. “This is a moment,” perhaps the last moment, “before [law] changes or goes entirely, when we can see it, and hear it,

¹ See, e.g., Eliza S. Walker, “*Terms of Heart*”: *Judicial Style in Obergefell v. Hodges*, 61 B.C. L. REV. 1935, 1954 (2020) (“The genesis of the Law and Literature movement is commonly traced to the 1973 publication of *The Legal Imagination* by James Boyd White. White advocated for the inclusion of the ‘great books’ of literature in the law curriculum, and argued that the tools of literary theory and criticism had something to bear on the study and interpretation of legal texts.”); Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 861 (2011) (identifying White as “the founding father of the ‘law and literature’ movement in American law”). By pointing out White’s central role in the emergence of law and literature as a serious field of study, I do not mean to ignore the important work of other scholars. See, e.g., Gary Minda, *Reflections*, 26 CARDOZO L. REV. 2397, 2398 (2005) (bringing together White and Richard Weisberg, whose *The Failure of the Word* appeared in 1984, as “the founding fathers” of the movement).

² See Minda, *Reflections*, *supra* note 1, at 2398 (discussing the origins of both law and literature and law and economics “in the intellectual ferment in the University of Chicago of the 1970s and 1980s”). Compare RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1st ed. 1988) (contrasting the realistic and scientific discipline of law and economics with romantic and aesthetic law and literature approaches such as White’s) with James Boyd White, *What Can A Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2015 (1989) (reviewing Posner, *Law and Literature*) (Posner “is committed to a mode of thought and expression, to a sense of language and of law—at its heart it is scientific and economic in character—that prevents him from seeing in the texts he studies the most important part of their meaning.”). It is fair to observe that Judge Posner’s views have not remained static. See POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 6 (3d ed. 2009) (asserting that later editions rejected “the negative and even defensive character” of the book’s original version).

and think about it.”³ The context in which White is writing is a time when all that American law has been, or aspired to be, may disappear forever, and his book seeks to bring to full consciousness the practices and implicit commitments of that law at its best before those practices and commitments disappear. I fully share White's alarm, and his belief that those of us who know something of the American tradition of law from the inside have a special responsibility to act. I know of no other work on law that as powerfully urges action in and for the law.

At the same time, I can imagine a skeptic, and not necessarily someone simply being captious, asking just what White, or I, can possibly mean. After all, it is hardly the case that public life in the United States lacks for arguments over law, invocations of law, threats of legal action, accusations and counter-accusations of law-breaking. Depending on the critic and the particular controversy in view, the institutions of law— courts, the profession, the police, even (occasionally) law teachers and law schools—are praised or damned with tedious regularity. But even the negative commentary generally assumes that law and the judiciary are highly significant factors in the life of the nation. Concern about the law isn't limited, furthermore, to talking heads or opinion columnists: it is widely believed that significant numbers of voters care enough about who fills federal judgeships to choose a presidential candidate on that basis. Law in some sense is alive and well. So just what is this “law” that White warns us is under threat and may disappear, that we must take steps to keep alive?

The answer that *Keep Law Alive* provides cannot easily be summarized: law, as James Boyd White has long understood law, resists abstraction and oversimplification. But two aspects of the rich portrait he has given us particularly stand out to me, and in this essay I want to reflect on what it means to say that law is a language, and that law is an art.⁴ By talking about these descriptions of law separately I do not mean to suggest that White treats them as discrete and unrelated. Quite the opposite: *Keep Law Alive* talks about law as a language that can be used or reshaped through artistry or craftsmanship, and the art of law is a “language art” in the most literal sense, dependent on the lawyer-artist's mastery of its words and grammar, and her ability to translate human experience into the law's terms and the law's concerns into ordinary language. If we keep the two ideas apart for the moment, however, I think we will be able to see more clearly what White means by each description of law, and indeed how they relate to one another.

³ JAMES BOYD WHITE, *KEEP LAW ALIVE* 160 (2019).

⁴ These are, I believe, two of the overarching and unifying themes in the book, but my selection of them for attention in this essay is not a suggestion that other aspects of *Keep Law Alive* are of less interest or importance: his powerful restatement of his long-held conviction that the law, like other admirable and complex human activities, lives through the never-ending negotiation of its internal tensions; his penetrating observations about the destructive effects of substituting economic for legal reasoning; his powerful essay on the American language of race; and his reading of Augustine's *Confessions* and François Ost's play *Antigone Voilée* as resources for learning to live responsibly in a time when law, democracy, and human decency are all under siege.

II. LAW AS A LANGUAGE.

Keep Law Alive is written throughout in a personal tone unusual in legal scholarship, but only to be expected from White. “Living speech,” speech that matters and can be taken seriously, brings the reader into contact with the mind and thought of the writer, because the latter has put himself into his work.⁵ White’s work is always living speech, and he explains his assertion that the law is a language by drawing the reader into his personal experience.

When I was an undergraduate I studied Greek, and I found myself asking questions like the following: ... What are the forms of thought and imagination that this language invites and makes possible? What, in short, can be said and done in this language that cannot be said and done in English? When I came to law school I felt that in learning law I was also learning a new language. It was like learning Greek, except that it was a language in which to think about and debate important contemporary questions of our shared existence. ... The questions I had for it were much the same as those I had about Greek.⁶

In the past, the point of law school was often said to be learning to *think* like a lawyer, an image that might suggest a cerebral and even individualistic accomplishment. White’s experience was that law school more closely resembled the process of coming to participate in a new linguistic *community*, a community that existed to serve the “shared existence” of Americans in general but to do so through “forms of thought and imagination” that cannot easily be said or acted on in the natural languages spoken by the Republic’s people.

As a description, a phenomenology, of what goes on in law school, the image of learning the law as learning a new language seems to me, as a former law student and long-time law teacher, entirely convincing. Even after many years, I recall how difficult it was at first simply to understand what was being said in an opinion or statute, while as a teacher of first-year law students I find it very useful to understand what I am trying to help them do in terms of becoming fluent in a new tongue: I have no direct access to how they are *thinking* about law, but in almost every class I listen to students and attempt to shape how they are *talking* the law. But the value of describing law as language is not limited to the way it captures the experience of legal education.

Earlier in the book, White explained what he means by calling the law a language in a less personal manner: legal knowledge, what one knows as a lawyer, “is a species of cultural competence, like learning a language ... for what a lawyer knows at the center is how to speak and write the language of the law, in actual situations in the world—how to use legal language to create legal meaning.”⁷ The common non-lawyer belief that “the law” consists of a lengthy list of rules, and that what distinguishes the lawyer from others is that she knows the list’s contents,

⁵ See JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2008).

⁶ WHITE, *supra* note 3, at 82-83.

⁷ *Id.* at 7.

mistakenly treats the law as a closed system of directives that map onto the world in a straightforward manner. In reality, however, law is “an open system, like a language” that creates “a set of possibilities for original thought and expression” and “not only mak[es] creativity possible, but requir[es] it.”⁸ Learning a new language enables one to read hitherto inaccessible texts, to express oneself in ways not previously available, but the new language does not dictate what must be said. It expands the new speaker’s “set of possibilities” for effective learning, thought and expression, but the speaker must decide what to read and say. In the same way, law as a language makes it possible for the lawyer to address many disputes and issues in the community’s life in potentially effective ways, but it does not script for her how she deploys the law’s language.

Envisioning law as a language also enables us to see more clearly three other truths about law. First, law cannot be reduced to some other form of human discourse that can tell us what is “really” important or “really” the issue in some controversy. People with appointments on contemporary American law faculties are especially prone to think that law is a façade behind which the real subject matter lurks, waiting to be unveiled by the use of economics, say, or another social science, or some sort of policy study, or history, or a moral philosophy (whether John Locke, John Dewey, or John Rawls). Ideally, the methods and findings of the real discourse simply displace anything that is distinctively legal in the process of decision making.⁹ But languages don’t work that way: they require translation rather than substitution. “Neither economics nor sociology nor psychology nor any other field can address, let alone resolve, the distinctive legal questions about the identity and meaning of authoritative texts and about the degree of deference due the judgments of others. ... [I]n no case can the language of the external discipline substitute for that of the law; it must be translated into it.”¹⁰ Other fields of knowledge very often have critical roles to play in sound legal thought, but lawyers must translate what they have to contribute before the legal system can make effective use of the contributions. The *Iliad* can speak with power to fundamental questions about conflict, personal and social, but it must be translated by those with the ability to do so before Homer can play a role in Anglophone culture.

Because law can be seen as a language, second, becoming a good lawyer is not a matter of mastering an expansive set of facts about rules as the non-lawyer may imagine—as if one could become fluent in a natural language by memorizing a dictionary and a list of grammatical rules. We know someone truly knows a language when through practice she has become skillful in its use, able to understand nuance and complexity, and in turn to communicate with clarity and

⁸ *Id.* at 101.

⁹ Fortunately, judges and others who must actually make legal decisions seldom fall into this trap, with the partial exception of those judges who embrace originalism as constitutional dogma as opposed to one of several legitimate tools in constitutional analysis. And even originalist judges generally write opinions and reach decisions that fit within a more traditional common-law style of constitutional law. *See, e.g., Maryland v. Shatzer*, 559 U.S. 98 (2010) (Scalia, J., for the Court) (a fourteen-day break in custody terminates the presumption that a waiver of *Miranda* rights was not voluntary if it occurs after the suspect invokes the right to counsel).

¹⁰ WHITE, *supra* note 3, at 118 & n. 12.

beauty. Becoming fluent in the law demands a parallel process of practice at using the words and concepts of the law to answer what White calls “the distinctive legal questions.” And we know someone is a good lawyer when she can address, and give persuasive answers to, complicated questions about the meaning of the law’s authoritative texts and relationships among its institutions and speakers. Some law professors who believe in the law-as-façade mistake barely conceal a kind of contempt for colleagues whose expertise lies in the language of the law, but even the less arrogant are committed, by virtue of their understanding of law, to a view of legal education and legal research that relegates distinctively legal knowledge to a secondary role. Seeing law as a language makes the errors in this view obvious.

Understanding law as a language, third, enables us to see that what is problematic or wrong about a flawed legal doctrine or decision is often rooted in the limitations of the linguistic tools lawyers employ. A natural language enables its speakers to see and think and express ideas not available to non-speakers, but by the same token it sets limits to their capacities of thought and imagination. And any language can be used in obfuscating or degrading ways. White illustrates these facts in a powerful chapter on “What’s Wrong with Our Talk about Race?” The answer he gives in the end to this question is that “our”—the American, not just the legal—“language of race works like a language of war ... since its origins were as a language of war, a language that would justify the war of whites against blacks—their seizure, sale, and total subjugation, by torture and murder if necessary.”¹¹ Americans cannot speak well about issues involving race because the very language we use, even if we intend to reject racism altogether, has been shaped by the moral horror of chattel slavery. The American language of law has not escaped this profound warping: most of our legal discussion of race employs terms and concepts so abstract that they obscure the unique place in American life played by the enslavement of African Americans and its aftermath of white Americans’ racism toward black Americans.¹² The result is that legal decisions tend to transform questions about “the power of the state to address our gravest and deepest social evil” into calculations about the relative costs and benefits of programs that existing constitutional doctrine does not even allow Americans to discuss in terms of that evil.¹³

The vision of law as a language in *Keep Law Alive* offers a deeply traditional, and to me entirely persuasive, alternative to the strong tendencies in contemporary American public and professional life to treat law as reducible to a closed system of pre-determined answers, or that view law as the packaging to be removed from

¹¹ *Id.* at 76.

¹² “I believe that for most white Americans ‘race’ really refers to the line between white and black.” *Id.* at 54. White’s argument that the problem of racism directed toward African Americans is paradigmatic, and in certain important respects unique, fully acknowledges that “the other [American] forms of racial abuse and hatred are unique, too, [since] each group has its own characteristic experiences of abuse and contempt and injury.” *Id.* at 57. This is no mere throwaway line: throughout, White successfully attempts to explain the personal as well as intellectual bases for his viewpoint in a fashion that recognizes the possibility of disagreement. The language of the chapter on race is a wonderful example of “living speech.”

¹³ *Id.* at 62. The Supreme Court’s rejection of “societal discrimination” (itself an abstract label for a concrete social reality) as a legitimating basis for addressing racism goes back to the controlling opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

the extra-legal substance that counts, or that dismiss attention to distinctively legal questions as a political smokescreen or, at best, an intellectually uninteresting distraction that the cognoscenti should ignore. Keeping law alive will require Americans to regain or reassert a robust confidence in law as a distinctive and meaningful language that cannot be replaced without profound injury to the American community's ability to pursue its highest, humane ideals.

III. LAW AS AN ART.

Keep Law Alive tells us that the young Jim White found himself, first as a student of Greek and later as a student of law, asking various questions about the language he was learning. One that the book specifically mentions concerned the ways in which this new language would broaden the range of ideas and actions open to him: "What are the forms of thought and imagination that this language invites and makes possible?" The answer the Jim White of today gives us is that learning the language of law invites and enables the student of law to practice an art, and this vision of law as an art is central to *Keep Law Alive*.¹⁴ But just what does it mean to see law as an art rather than, say, a science or a form of mathematical or economic calculus?

To some degree, the assertion that law is an art works to show what law is *not* according to White: "I have been resisting an image of laws as rules and policy, but behind those things there is a deeper vision to resist: of law as abstract, mechanical, impersonal, essentially bureaucratic in nature, narrowing rather than broadening the human capacity for experience, understanding, and empathy."¹⁵ Such a vision of law as "anti-art" strives to eliminate the role of personal evaluation and traditional legal argument in reaching legal conclusions in favor of an allegedly objective set of tools borrowed from some other discipline, often economics (or in constitutional law, history), that can turn legal analysis into a science delivering incontestable "results" rather than judgments that are necessarily open to discussion and challenge. By arguing that law is an art, White is asserting that law cannot be the exercise in algorithmic decision making, or value-neutral policy analysis, or plain-or-original-meaning textualism that so many law professors (and unfortunately some judges) apparently long for.¹⁶ The image of law as an art identifies law as fundamentally incompatible with any of these fashionable attempts to deny the role of the individual and of his or her judgment in legal argument and decision.

More often, however, White talks about what follows from recognizing law as an art in affirmative terms, and specifically identifies the ways in which the knowledge and practice of law broadens human capacity and human understanding,

¹⁴ The centrality of this image of law is clear from the fact that three of the six chapter titles refer to it.

¹⁵ *Id.* at 103.

¹⁶ In his seminal essay on "Law as an Art," the great constitutional lawyer Charles L. Black, Jr., long ago warned against "the present trend, in some academic circles at least, to discard altogether the traditional techniques of law, and simply to drive toward what is conceived as the right result [and] pass[] over the almost infinitely rich resources of traditional law ... in favor of comparatively thin and incomplete systems of thought." BLACK, *THE HUMANE IMAGINATION* 31-32 (1986).

individually and interpersonally. Except when the term is bandied about as an empty compliment, to call a human activity an *art* is to imply that its practitioners are personally involved in the creation or performance of the art, and that the art calls on its recipients to participate meaningfully in what the artist has fashioned.

My own sense is that what law calls for in those who practice it, or teach it, or live with it in other ways, is at heart an art, an art of language and composition. The law in this living sense is ... an activity of the mind and imagination—a form of life—that has the value of justice at its heart.

[The] kind of knowledge [law] requires and makes possible ... is knowledge not just of rules or concepts, but of an art that is essentially literary and compositional in nature.¹⁷

I will return to White's observation about justice later. For now, let us focus on three other features of law as an art to which these passages point.

First, law is an art of language. That might seem obvious or banal—after all, no one denies that the law uses words—but it is clear here and elsewhere that White is not offering us a truism. Law, he tells us, is an art of language that involves at its heart *composition*, the creation of new texts (whether written or oral), and not just the deciphering of an authoritative oracle.¹⁸ Law as an art is therefore “essentially literary,” and what good lawyers are engaged in is more like writing (or reading) a poem than solving an equation. For that reason, the appropriate mode of evaluation for legal texts such as judicial opinions is “by judging [the writers’] work as performances of an art” rather than by our “political agreement or disagreement with the outcome.”¹⁹ And if law is a *literary* art, then its performances—at least when they are skillful—will be constituted, of necessity, by the interplay of tradition and creativity. A lawyer who tried to ignore “the inheritance of thought and experience expressed in what we call the materials of law— prior cases and statutes, existing understandings and expectations” would not be engaged in law at all.²⁰ But a lawyer who thinks that those materials supply all the answers to all possible questions is deluding himself, or in the grip of one of the “abstract, mechanical, impersonal” accounts of law that attempt to reduce law to rules or extra-legal policies.

That law is an art entails, second, that it is far broader than the austere ratiocination some anti-art visions of law praise. Both the legal speaker and the lawyers who answer or evaluate her work must call on not only the logical and technical skills of the mind, but the creative and intuitive faculties of the imagination.

¹⁷ *Id.* at xiv, 3.

¹⁸ Of course law involves the interpretation of authoritative legal texts, which are sometimes Delphic in meaning, as well as the translation into legal terms of non-lawyers’ ordinary English as well as the findings of other disciplines. But even these ostensibly hermeneutical rather than creative tasks are “an activity, that requires its own complex art.” *Id.* at 118, n. 12.

¹⁹ *Id.* at 102, n. 17. On the parallels between the work of lawyers and judges and that of poets, see *id.* at 100-01 & n. 15, and 102 n. 18.

²⁰ *Id.* at 3.

Indeed, for all the traditional talk about thinking like a lawyer, law being a learned profession, and so on, "at its deepest, legal knowledge is imaginative in character."²¹ What lawyers *know* is not so much facts of any kind (including the facts of what one can find in the statute books or case reports) but how to identify and construct "patterns of thought and imagination" that connect the legal and historical past to the facts of today or tomorrow that demand the lawyer's attention.²² "[T]he life of the law is full of opportunities and occasions ... for imagination, for invention, for creation in language, or what I call 'writing.'"²³

Keep Law Alive's chapter on "Reading (and Writing) a Judicial Opinion" provides an extended example of how seeing law as an art that engages the imagination as well as the intellect can deepen our understanding of the relationship between law and the society it serves and to some degree constitutes. The chapter focuses on Justice Oliver Wendell Holmes's celebrated opinions in the 1919 *Schenck* and *Abrams* decisions, opinions that are universally recognized as the inauguration of serious Supreme Court thought about the first amendment's protection of freedom of speech. Much of the writing on those much-written-about opinions has taken one of two tacks. Holmes's switch from rejecting the first amendment claim in *Schenck* in the spring to accepting it in his *Abrams* dissent in the fall has always been intriguing, and scholars have often tried to work out just what in Holmes's thinking changed and why. Others have been more concerned with the conceptual content of Holmes's enigmatic but powerful discussion of free speech's importance in *Abrams*. White, instead, invites us to see how Holmes the artist of law was "almost without knowing it [beginning in the spring in *Schenck*] to provide material for thought about" the first amendment, materials that he then used in the fall in *Abrams* to construct "a way to give meaning to the text by imagining the world in which it occurs, including himself and others within it, in a new and coherent way."²⁴

What is of critical importance and lasting significance about the *Abrams* dissent is not its doctrinal content, which in any event is more hinted at than developed, but the shift in perspective that Holmes achieved and then provided his readers. Rather than leaving the free speech clause an almost empty or formal rule, "Holmes found a way to imagine the world in such a way as to give the first amendment meaning and scope ... a way of imagining that is not ideological or mechanical in character." The Constitution broadly protects speech, even speech "that we loathe and believe to be fraught with death,"²⁵ because doing so makes sense in the world that Holmes has (in one way) called into being, but also (in another way) constructed out of the materials and tools the American legal tradition provided him.

For his imagined universe is populated with people who are striving to understand and speak, disagreeing to the point of war, claiming power, asserting truth, and he says that this activity, in which he himself is engaged, in this very paragraph and throughout his work as a Justice, is one that must be in its nature local and

²¹ *Id.* at 40.

²² *Id.* at 6.

²³ *Id.* at 42.

²⁴ *Id.* at 28, 36.

²⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

provisional. Just when we are most sure we are right, we must recognize that we may be wrong; and not only about matters of truth, as he puts it, but about matters of justice as well.²⁶

Almost at the end of *Keep Law Alive*, White returns to Holmes, and expands on how he understands the role of imagination in Holmes's 1919 first amendment opinions.

This is a crucial moment in the development of law, as it would be in the making of any composition ... from history to philosophy to music or painting; the moment, that is, when a person who is engaged deeply and sincerely, and with an open mind, in a practice of thought and imagination finds unconscious resources within the self that produce a new direction, a change in the way the enterprise is imagined. Holmes does that, not by a kind of leap, but by building on his tradition, which he keeps alive as he remakes it.²⁷

Law at its best, law practiced as an art as Holmes wrote his opinions in *Schenck* and *Abrams*, is like other arts both a profoundly individual activity and one that always takes place within a tradition and a history that define the art and its limits, but always does so provisionally, open to moments, performances, that transform the art and the artists.

In light of White's insistence that law as an art engages more than just the calculating mind, the third aspect of his vision of law is unsurprising. Law as an art is a "form of life,"²⁸ and to practice law in that manner is to make a deeply personal commitment. One of the most striking aspects of *Keep Law Alive* is the unguarded and self-revealing way in which White writes about law and his relationship to law.

What I hope comes through more than anything else is the love that I have for the law that I am trying to make real for my reader. It has been a blessing to be able spend my life doing it.

²⁶ This passage, and the quotation from White before the phrase from *Abrams*, are from *Keep Law Alive*, at 38.

²⁷ *Id.* at 157-58. Commentators on the Holmes opinions regularly miss the foundations in legal tradition on which Holmes was building. The error is easy to make if one is thinking about freedom of speech in overly conceptual terms – the first amendment had played almost no role in Supreme Court decision making before *Schenck*, and a scholar looking for judicial discussion couched in those terms will likely conclude that the *Abrams* dissent was a bolt out of the blue, or a reaction to a district court opinion by Learned Hand or to academic commentary. See *id.* at 36, n. 27 (briefly discussing these issues). By thinking about law as an art, and thus expecting that Holmes's opinions will rely both on tradition and on his creative imagination, White is able to explain the process by which Holmes transformed features of the criminal law of attempt and conspiracy into the foundations for a constitutional law of free speech.

²⁸ I don't understand White to be putting great weight on the semi-technical sense "form of life" often bears in post-Wittgenstein philosophy, but instead primarily to mean by it something like "moral, emotional, and spiritual mode of living a human life." But Wittgenstein's usage and what I think White has chiefly in view are not incompatible.

This book is driven by love of something that seems now to be under threat. I do not want to lose it.²⁹

Legal writing often aspires to an impersonal and even Olympian tone,³⁰ but *Keep Law Alive* consistently adopts the opposite approach. No reader can miss White's passionate concern for a practice and tradition that has shaped his individual experience and identity—or White's desire to communicate his passion and commitment.³¹ (Note White's reference to "my reader." The book, furthermore, frequently addresses his reader directly, as an individual whom White seeks to inspire as well as inform.) Nor does White distance himself as a person from what he writes about controversial or disturbing topics, most strikingly in his chapter on "What's Wrong with Our Talk about Race?" "To put it bluntly, I think that we whites are as a general matter much more racist in our attitudes towards blacks than towards any other group, and that this shows up in our behavior and in the social structures we fashion and support."³²

To speak about loving the law is to invite condescension from those uncomfortable with or dismissive of emotive and self-involving language; to write candidly, as a white American, about white American racism is to risk condemnation from more than one perspective. That Jim White does not hesitate to do so, but in fact repeatedly invites the reader to respond to the person he is showing himself to be,³³ might seem either naïve or courageous.³⁴ But I think White would respond he could not truly write *Keep Law Alive* in any other way. Because his assertion that law is an art is not just as a vague compliment but a serious and substantive description of law as he understands law, White was obliged to make his own involvement—moral and emotional as well as strictly intellectual—clear. There is simply no other honest way to speak about law as an art.

At this point, we should turn to the facet of law as an art that I deferred earlier, White's claim that the art of law that is "an activity of the mind and imagination—a

²⁹ *Id.* at xix, 160 (from, respectively, the Foreword and the Afterword).

³⁰ I do not mean to imply that this is always a bad thing. Part of the persuasiveness of a brief, for example, sometimes lies in the way an impersonal tone lends weight to substantive arguments. The adoption of a style that distances the writer from his or her words, furthermore, is logical if one views law as what I've called "anti-art," as the opposite of what White is commending. But of course neither White nor I think that view is correct.

³¹ *See id.* at xiv ("I am speaking about law as I learned it and practiced it and taught it."). There are many similar acknowledgements throughout *Keep Law Alive*.

³² *Id.* at 56-57.

³³ Each chapter ends with a series of questions and suggestions for reflection that are written as direct addresses from White to the individual reader. At the end of the chapter on the American language of race, the questions include "What is your judgment about what I do? If the heart of law lies in a set of responsibilities and practices, how does what I say here define them? ... What character and identity do you see in me, as the writer of this chapter." *Id.* at 78-79.

³⁴ My friend and doctoral supervisor, the theologian Stanley Hauerwas, is fond of saying that to speak of a tenured professor displaying courage in something he writes is an oxymoron. I take his point, but at the least it takes a certain degree of fortitude for someone to associate his personal identity with viewpoints that will predictably excite ridicule or invective. Not the least of the many admirable qualities *Keep Law Alive* embodies is White's willingness to take that risk.

form of life—that has the value of justice at its heart.”³⁵ This claim is central to White’s understanding of law as an art, as he makes clear: “the main goal of law is ... justice ... Justice in fact is part of the definition of law;” the legal tradition is “a continuing and collective effort to imagine justice into reality;” every judicial decision “performs an answer to the question: ‘What are our institutions of justice? How well—how justly—do they work?’”³⁶ The obvious problem, as White fully recognizes, is that American society is shot through with disagreement over fundamental issues of justice that we have no apparent means of resolving. “There is no arbiter, no one who can tell us that this is truly just, that truly unjust. We are debating competing conceptions of social justice.”³⁷ How then can American *law* have justice as its goal or end, when it is unimaginable that the American political *community* will ever agree on which legal outcomes are just?

I do not think White ever fully answers this last question, although as I explain below I think this is a strength, not a weakness or oversight in his book. But first let us see what partial answers *Keep Law Alive* provides. There are, first, two explanations of the statement “the end of American law is justice” that I think White clearly rejects. He is not offering or assuming a view of “justice” that would limit the concept to a thin notion of purely procedural regularity or fairness.³⁸ Still less is White the moral relativist that Justice Holmes is sometimes accused of being. Americans disagree over issues of justice “as a social fact,” but that doesn’t mean there are no right answers to such questions. For White, ethical judgments are debatable claims about moral reality rather than incorrigible assertions of private preference; as he puts it in discussing Holmes’s *Abrams* dissent, “we may be *wrong*; and not only about matters of truth, as [Holmes] puts it, but about matters of justice as well.”³⁹

And here, I think, we begin to see part of what it means to say that justice is at the heart of law. One of the questions the young Jim White asked himself as he was learning the language of law is “what will it mean for me to give myself the mind and character of a lawyer, of one who speaks this language?”⁴⁰ There is no mystery about the assumption here that language shapes character; to give a painful example, as White shows in his powerful chapter on the American language of race, the ways in which white Americans speak about black Americans, and about race

³⁵ *Id.* at xiv. The image of justice as the heart of law recurs in the same words at 81.

³⁶ *Id.* at 5-6, 43, 83.

³⁷ *Id.* at 104.

³⁸ That White’s understanding of justice sees it as reaching substantive issues rather than merely procedural due process is unmistakable throughout *Keep Law Alive*. Two particularly clear illustrations are White’s discussion of racial justice which ends with the admission that “[t]here is no easy way to imagine ourselves out of the world of deep and violent injustice we have created,” *id.* at 77, and his analysis of the internal tensions (between substance and procedure, the particular and the general, law and justice, past and present) a judge must confront and work with in coming to a just and lawful decision, *id.* at 92-97.

³⁹ *Id.* at 103, 38 (emphasis added). To borrow a bit of jargon from the philosophers, I think Holmes was a nonfoundationalist but not a relativist in ethics; the impression that he was the latter comes in large measure, I think, from Holmes’s tendency at times to state his views in deliberately provocative language. But the correct reading of Holmes as *moraliste* (or, perhaps, *moraliste manqué*!) is a question for another essay.

⁴⁰ *Id.* at 83.

more generally, distort our perceptions, our emotions, and our moral characters. The same is true about misogynistic and xenophobic habits of speech. But not all languages are morally objectionable or problematic,⁴¹ and White believes that law as a language and an art can shape the mind and character in deeply positive ways.

Consider what a skilled litigator must do in building the case for her client. She will argue that the outcome in her client's favor is "required by the law," and seek to substantiate that claim by offering the strongest possible technical arguments from the relevant statutes and precedents. She will also argue that a decision for her client is "fundamentally just. An argument that ... admitted that the result was unjust, would be profoundly incomplete."⁴² But she cannot advance her moral claim by talking about "justice" or "fairness" abstractly; the claim must take account of the institutional context in which legal decisions are made. "We [lawyers] recognize that power and authority are already distributed among many actors, present and past, each of whom has his or her own zone of authority. If made within their jurisdiction, their judgments are entitled to some degree of respect even if we disagree with them—the precise degree of respect being an important question of law and justice."⁴³ And she will craft her claims about law and justice on the assumption that the judge will take them seriously, and evaluate their cogency fairly and intelligently rather than treat them as window-dressing for a political or ideological position: "we talk to the judge not as the bundle of prejudices and beliefs and commitments and character traits that form part of his or her character, but as an ideal judge, one who is always seeking to do justice under the law."⁴⁴

Of course, "[o]ften enough lawyers or judges are thoughtless, crude, unimaginative, inarticulate, and dull."⁴⁵ White is portraying an aspirational ideal, but it is an ideal that can shape, when all goes as it should, the words and actions of the imperfect lawyers and judges who actually make up the legal system. Precisely because she wants to be effective in a practical sense, an able litigator must display respect and even a kind of humility, not only toward the judge in the case, but as well toward the judges, legislators, and others whose decisions and actions make up the legal materials relevant to the case.⁴⁶ In doing so, she is acting to that extent as a just person herself—"Justice requires us to find open and respectful ways of imagining ourselves and each other"⁴⁷—and contributing to the culture of respect

⁴¹ About the language of race, White writes of "the simultaneous moral impossibility of racial thought and its unavoidability" at this point in American history. *Id.* at 77. In fact, he argues, one of the ways in which American talk about race goes awry is through abstraction and generalization. Americans will come to the honest reckoning with racial injustice that is necessary if we are finally to address it only by speaking more directly. See generally *id.* at 61-62.

⁴² *Id.* at 95-96.

⁴³ *Id.* at 104.

⁴⁴ *Id.* at 96, n. 6.

⁴⁵ *Id.* at 101. White goes on immediately to add that "such things are sometimes true of us all. But not always, in every way."

⁴⁶ On this, see as well White's insightful discussion of the ways in which opposing counsel are "obviously opposed to each other [while they] are also in fact cooperating" when they play their parts properly. *Id.* at 89-90.

⁴⁷ *Id.* at 41-42.

for all that is central to equal justice under law.⁴⁸ And she must assume that it is meaningful to talk about “justice” in a context where there is no preordained agreement about debatable moral issues, and that the ultimate decision will reflect “open-mindedness and intellectual honesty—the core of judicial ethics.”⁴⁹ The art of law thus demands that its participants (including judges) embody virtues of good faith and respect for others, and employ the language of justice in explaining their arguments and decisions.⁵⁰

The answer to the young Jim White’s question about what learning to speak the law would do to him as a person is that law’s language commits one to speaking about, and therefore thinking about, justice. Law’s art, furthermore, is “a way of being a grown-up: learning to live in a world in which people think differently from each other and to respect the judgments of those with whom we disagree.”⁵¹ While no lawyer grows completely into the just person the law presupposes, and some do not try at all, the practice of law and the pursuit of justice overlap. And in that overlap we see a justification, in part, for White’s claim that justice lies at the heart of law. But only in part. A “real aspiration to achieve justice”⁵² is a highly admirable personality trait, but justice is more broadly the central characteristic of a decent and humane society: “nothing is more important to a healthy community than justice.”⁵³ But one has only to think about the long history of legal discrimination against African Americans to wonder if White is right to say that the goal of American law as an art is justice.

To this concern, I think White does not, and indeed by his own understanding of law and justice *cannot* give a complete answer. In some context other than law, it is possible to talk about justice *simpliciter*, as if we were “writing on a clean slate.”⁵⁴ Of course no person can in fact discuss justice wholly free of his or her cultural, historical, philosophical and religious context, but White’s image makes the point vividly that a moral philosopher, say, or indeed anyone thinking about his or her personal views on justice, is under no *a priori* obligation to take the views of others into account. In contrast, the lawyer is *always* under such an obligation, if she is practicing the art of law. As we saw above, White stresses the fact that “[b]oth lawyer and judge constantly turn to other texts, composed by other persons, who have made judgments which they are bound to respect.”⁵⁵ This dramatically shifts the basis on which one can speak about justice or identify what is just and unjust.

“[I]n the world of theory,” the world in which we can speak about justice in itself or in the abstract, “the rightness of [a particular] result depends upon its congruence with the theory,” and if our particular theory permits, we may

⁴⁸ See *id.* at 157 (lawyers’ respect for “the authority of legal institutions, and public and private actors within them [is] a form of respect that can do much to ensure that we also respect the dignity of those to whom law speaks”); *id.* at 130 (“one thing we mean by justice is a fundamental equality before the law”).

⁴⁹ *Id.* at 117.

⁵⁰ See at 95 (“in our system the lawyer and judge alike must ask not only ‘What does the law require?’ but ‘What does justice require?’”).

⁵¹ *Id.* at 90.

⁵² *Id.* at 23.

⁵³ *Id.* at 83.

⁵⁴ *Id.* at 104.

⁵⁵ *Id.* at 121.

be able to give a complete account of what is just and unjust.⁵⁶ But “the world constructed by the law is one that distributes the power to decide such questions [of institutional authority and substantive justice] differentially to various public and private agents,” and it is not possible, even in principle, to resolve in advance the tensions and potential conflicts within those legitimate sources of legal authority that will bear on the specific questions law may have to address. A moral theory can be authoritarian and absolute since it rests on “the commitments of those who are persuaded by it,” and one of those commitments may involve rejecting other theories or viewpoints as simply wrong and unreasonable. In contrast, “what the law teaches us is that we live in a world in which different people can have different, decent, and reasonable views [and] that we need a way to respect these views and judge among them fairly, that is, openly and honestly.”⁵⁷ Because the law’s goal is justice within that world, any specification of what justice requires must recognize that it is provisional and open to further consideration and debate.

IV. “CAN THESE BONES LIVE?”

Keep Law Alive is not an optimistic book. As I noted at the beginning of this essay, Jim White speaks of the present time as a moment when it is still possible to “see ... and hear ... and think about” American law, “perhaps more clearly than we could before the threat [to law as language and art] occurred.” But in the final sentence in the Afterword, White describes his “aim in this book” as giving “to the law, and to the culture of which it is a part, a voice that might be heard in a different world.”⁵⁸ Much of his book seems to accept that this different world, a world without law in White’s sense, already has the upper hand in American public life, including the life of American legal institutions.⁵⁹

White gives ample reasons for pessimism about law’s fate,⁶⁰ but I think *Keep Law Alive* is also a deeply hopeful book.⁶¹ Because law is a language, it will live as long as there is a community that speaks it. Because the art of law is a form of life, not simply a set of governmental practices, we can “keep a version of law alive as a way of approaching life itself, even if in its institutional forms it withers

⁵⁶ *Id.*

⁵⁷ *Id.* at 121-22.

⁵⁸ *Id.* at 160.

⁵⁹ For me, the most poignant expression of this suspicion or fear that law has already died is White’s comment about the law professoriate’s “almost total silence about law teaching. When I went into law teaching it was with great doubt about whether I would ever write anything, but with great confidence that the teaching of law was itself an activity—an art with a meaning—that could occupy a mind and justify a life. I wonder if anyone thinks that today.” *Id.* at 118. White also expresses his sense that contemporary Supreme Court opinions often seem to rest on a “kind of formulaic jurisprudence [that] does not expose the true reasons and thinking of the Court” and so cannot “be read with the kind of care and attention we are used to giving texts in the law.” *Id.* at 116. *See also id.* at 116 n. 9 (“the kind of criticism of judicial opinions, positive and negative, that I and many others have engaged in over the years is no longer possible”).

⁶⁰ See especially chapter x, “LAW, ECONOMICS, AND TORTURE.”

⁶¹ Hope and optimism are not synonyms.

away.”⁶² This does not mean that Americans who know and love the law can simply retreat into private conventicles of the like-minded: “The law is interwoven in the world in an inescapable way.”⁶³ But the difficulty, in this moment, in seeing how Americans are to maintain or restore the law’s vital role in public life is the same difficulty in principle that law has confronted, and successfully overcome, at other junctures in the past. As Holmes did in his day, in order to give meaning and life to the first amendment, so we too in our day, must “imagin[e] the world in which [law] occurs ... in a new and coherent way” in order to keep law alive and meaningful.⁶⁴ That will be no easy task, but there is reason to hope that it is within the “capacity of the imagination and the heart” that law evokes and nourishes.⁶⁵ Like the ancient prophet, we may not yet see how dry bones are to live again, but as he also recognized, we can look for the vision.⁶⁶

⁶² *Id.* at 153.

⁶³ *Id.* at 152. White continues (emphasis added): “If we *simply* continue to practice and teach as we have been taught we may find ourselves increasingly disconnected from the larger culture, irrelevant to other people, and unable to do the very thing we want to do, to keep law alive.” A few sentences earlier, White wrote that the “effort to keep law alive” demands that we “continue to practice and teach” law “in the traditional way.” His point about the danger of disconnection is that we must seek as well new ways to engage law with the world.

⁶⁴ *Id.* at 36.

⁶⁵ *Id.* at 153.

⁶⁶ See *Ezekiel* 37:1-4 (King James Version): “The hand of the LORD was upon me, and carried me out in the spirit of the LORD, and set me down in the midst of the valley which was full of bones, and caused me to pass by them round about: and, behold, there were very many in the open valley; and, lo, they were very dry. And he said unto me, Son of man, can these bones live? And I answered, O Lord GOD, thou knowest. Again he said unto me, Prophesy upon these bones, and say unto them, O ye dry bones, hear the word of the LORD.”