

Justice as Attunement

Transforming Constitutions
in Law, Literature, Economics
and the Rest of Life

Richard Dawson

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Foreword

My first acquaintance with Richard Dawson was an invitation to examine his doctoral thesis in law. This was conducted by video-link from one side of the planet to the other: me sitting in a room in England in the early morning and Richard sitting in a room in New Zealand in the early evening. As I recall, there were surprisingly few problems of attunement, despite the distance, and that has been my experience of engaging with Dr Dawson's work ever since. As I write, I have not had the pleasure of meeting Dr Dawson the old-fashioned way, but all being well this will be the year to put that right. Through technology we have the privilege to hold the entire span of the earth in our sights, but Richard Dawson understands, and I hope I do too, that for all the dazzling sights of the digital age it is deep attunement to the small sound of a personal voice that still matters most. How to bring that understanding into teaching and scholarship is something that must be learned and acquired slowly through practice, and Richard Dawson will agree with me that there is no better catalyst to that practice of learning than the works of Professor James Boyd White.

It is a happy coincidence that Richard Dawson's book was completed in 2013, for that year marked the 40th anniversary of the publication of Professor James Boyd White's pioneering work, *The Legal Imagination*. Dr Dawson has been deeply inspired and extensively influenced by the work of Professor White, and by *The Legal Imagination* in particular, but it is equally clear that the present volume is more than a work of tribute to James Boyd White. Professor White lays it down as a serious challenge that all of us should strive in our reading and listening to maintain critical independence of thought and to attain a compassionate personal response. Richard Dawson has met that challenge. He has attuned his ear to the voices of other writers and in the process he has developed the distinctiveness of his own voice. It is our turn to read and to listen and to become attuned.

It is a platitude to say that one has read a book with pleasure, so I will not put it that way. What I will say is that this has been in many respects an easy book to read. Not only is it written in short thematic chapters that are arranged in alphabetical order to give it the enticement of an encyclopaedia, but the writing style is always lucid and engaging. It is in these and other

respects an easy read. But what pleased me most about this book are the respects in which it is difficult to read. Whereas it is not hard to read or to understand it at a surface level, what is very difficult is to read it deeply and to sound its depths and to become attuned to those deep sounds. The explanation for this challenge is straightforward: deep reading is always difficult. Deep appreciation *ought* to be difficult. The attunement of one person's mind to the mind of another should be perfectly challenging.

In *The Legal Imagination*, James Boyd White presents a panoramic portfolio of reading materials. He offers insightful perspectives on them and presents his readers with some of the puzzles that the materials produce. Richard Dawson offers his own responses to some of those puzzles (his chapter on Metaphor, for instance, is expressly a response to White), but equally impressive are the lengths to which he has gone to assemble a rich portfolio of his own. He has carefully expressed new contemplations, made new complaints and set new conundrums. I came to this book from a position of familiarity and empathy with the works of Professor James Boyd White, but Richard Dawson has deepened my appreciation of White's works and also broadened my appreciation to areas (notably economics) in which I had not previously thought to apply a Whitean approach. Richard Dawson's book does not offer a thesis so much as a *praxis*, or, to be more accurate, it seeks to prove the thesis that progress in human understanding and human judgment-making depends upon good practice. It seeks to prove this thesis through a demonstration of how to read well, listen well, hear well. He performs ways for us to attune justly.

Richard Dawson has taken risks in writing this book. Not least in his decision to present numerous short thematic chapters in alphabetical order to be read in any sequence that the reader might choose. At one point in the Prologue, he asks, 'What sort of literature is *The Legal Imagination*?' Later, in his Introduction, he answers his own question with the suggestion that *The Legal Imagination* might be placed in the genre of *Bildungsroman* (what he calls 'novels of character formation'). It might be better placed outside of any genre, and Dawson's own book might be placed with it. One of my all-time favourite books, Thomas Carlyle's *Sartor Resartus*, will keep them company in the select genus of genre-less works. Carlyle struggled for many years to find a publisher for his opus in large part because it did not fit within a known category. We should be grateful that Dr Dawson has not kept us waiting so long. In its purely formal or structural aspect Richard Dawson's alphabetized work is somewhat reminiscent of early modern digests such as John Selden's *Table Talk*. And perhaps that is the point – that we are invited to sit down together or 'lie down together' (as Milner Ball – another author featured in Dr Dawson's book – would have put it) in a mode of after-dinner conversation that is both controversial but companionable. Richard Dawson is a writer one can hear; a writer one can converse with. This is a refreshingly unpretentious book. For an author so well versed in the technicalities of both law and economics, he shows great sympathy for his readers in his effort to remove all

barriers of vernacular and academic cant. He has cut up easy mouthfuls for us to chew over. The difficulty in his digest lies in the appreciation of every flavour and every nuance. Will we savour each section before we move on to the next? My own sense is that each section is sufficiently rich on its own to supply a Masters seminar with numerous talking points and much food for thought. Indeed, in each section there are the ingredients from which a discerning reader could work up a whole new book.

'Whole' is the word. This is a book that has to be appreciated holistically as one that integrates its many parts and as a work that has integrity of form and substance. Taken as a whole it is a fine work of deep research, sensitive reading, sustained critical engagement, intellectual integrity and sophisticated, clear expression. The highest praise I can give this book is that it lives up to the promise of its beautiful title: *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics, and the Rest of Life*. Richard Dawson has challenged his readers to become better people through the process of attuning to what he and others have to say. I challenge anyone to read this book and not become a better person for it.

Gary Watt
The University of Warwick

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After submitting my thesis, which centres on the works of James Boyd White, I sent him a copy, hoping for some criticism. He provided an abundance (not only on the thesis but on an early draft of this book), for which I am immensely indebted to him. I am grateful to him for permission to use material from his work.

Jack Sammons offered helpful comments on two chapters. He also helped with the title of this book – providing me with insights on the central activity with which I am concerned.

I have benefited from comments on draft versions of the Introduction by Jeanne Gaakeer and Gary Watt.

Several fragments in this book draw from journal articles. I continue to benefit from comments by editors and referees from the following journals: *Canterbury Law Review*, *Otago Law Review*, *Waikato Law Review*, and the *Journal of Australian Political Economy*.

I have gained much from teaching several courses in Community Education at the University of Canterbury.

My debt to Martin O'Connor, my economics teacher, who first directed my attention to some disintegrative consequences of economic imperialism, is considerable.

In the early stages of writing my economics doctoral thesis, Warren Samuels invited me to contribute to a volume titled *The Founding of Institutional Economics* (1998). This helped to greatly expand my horizons in and out of economics.

In writing this book, I have found myself returning to and extending some ideas that reside in my book *The Treaty of Waitangi and the Control of Language* (2001). I remain indebted to the Institute of Policy Studies for providing a grant that enabled me to write it.

During 2002–04, several colleagues in the Waikato Management School, especially Maria Humphries, deepened my understanding of certain rhetorical dimensions of life.

In 2003 and 2004, students in POLS 311 – The Politics of Maori and Other Indigenous Peoples – at the University of Waikato taught me a great deal about communication.

In 2006, the Treaty of Waitangi Research Unit at Victoria University of Wellington published an Occasional Paper of mine, titled *Waitangi, Law, and Justice*, from which I have drawn. I continue to benefit from interchanges with the Unit's director, Richard Hill.

In a number of wide-ranging conversations, Kim Simmonds has given me much food for thought about the topic of justice.

A special thanks is due to Sarah Campbell, my wife, for her support – and for her patience when I have repeatedly got lost in a book.

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No matter how accustomed we may be to reading, the better we know how to read, the more we shall feel the spectral sadness of the written word without a voice to fill it.

José Ortega y Gasset

After the *Maori Broadcasting* case, brought to try to get Maori language on New Zealand television, two of the plaintiffs said to me after the Court of Appeal hearing: ‘Win or lose, we feel we have been heard at last’. We lost – but we should not underestimate the human desire to confront issues that matter in formal process before a disinterested tribunal.

Rt. Hon. Dame Sian Elias

The hearing is the heart of the law . . . ; but the hearing reaches its fullest significance only when it is coupled with the obligation to explain. Then the judicial opinion becomes a form with wonderful possibilities for meaning. It is a composition in which the speaker must choose a language for telling a story and justifying a result, and must do so against the reasonable claims of the losing side that he or she speak differently. . . . It is structurally multivocal, a system of translation that is open, in principle at least, in all directions. It is self-transforming. Since the opinion must make sense as a whole, the ultimate demand is one of integration. The instrument of integration is the voice – one’s sense of self, of language, and of another. If one could strike a living balance among all these tensions and be attuned to all the conflicts one addressed, one would be making art of the highest kind, uniting in a single composition the concerns of truth, of beauty, and of justice.

James Boyd White

Prologue

Attunement to Attunement
To a General Reader
When a Lawyer Writes a Complaint: Herbert A. Eastman

What is this book you have in your hand, you may ask, and why is it called *Justice as Attunement*? ‘Attunement’ is for me a way of orienting oneself to meaning. It resembles the activity implied in the common phrase ‘getting on the same page’. The word ‘getting’ is especially important, for there is a sense in which we can *never* be completely ‘on the same page’, since ‘meaning’ is in constant motion. On the flow of meaning, the lawyer Felix Cohen has said:

Perhaps, if we look closely enough, a sentence never means exactly the same thing to any two different people. For no two minds bring the same . . . background to bear on . . . a sound or a series of marks. Indeed, I doubt whether any sentence means exactly the same to me the first time I hear it that it means the tenth time or the hundredth time. Of course, for many practical purposes, we are disposed to overlook such variations of meaning.

(Cohen 1950: 240)

What I am calling ‘attunement’ is a way of paying close attention to what Cohen calls ‘variations of meaning’. One practical purpose for paying attention to them is to do justice to our selves and to others.

Attunement to Attunement

As I say in the Introduction, my use of the word ‘attunement’ in this book draws from the linguist Alton Becker. Like Cohen, Becker attends to the role of background in the process of meaning. He does so, for example, in these autobiographical remarks:

I once found myself, a small-town Midwesterner, at a rather prestigious East Coast institution. At lunch, I was repeatedly intimidated by the power and originality of the conversation, so much so that I stopped having lunch at all after a few weeks, for I felt my confidence as a teacher and a writer slipping away. . . . A friendly local native finally told me that the problem was only a deficiency of prior text, which could be

overcome if every morning I read . . . the ‘agenda,’ the *New York Times*. I did, and it worked. I now shared with them a daily prior text . . . and I heard now the pervasiveness of prior text in all they said. They were not intimidating, and I could speak, now, with confidence and originality.

(Becker 1992/1995: 285)

When we share a ‘prior text’ we will have a resource with which to participate in a ‘conversation’. An aim of this Prologue is to provide some ‘prior texts’ for helping you, the reader, engage with the text that follows it. Becker might have put it this way: my aim is to assist the reader in the activity of attunement to the word ‘attunement’.

I am reluctant to give a dictionary-style definition of ‘attunement’, for such a definition lacks the life of prior texts – in a dictionary there is no person using a word in a particular context, from which it acquires meaning worthy of the name.

To a General Reader

Part of this book’s subtitle – *in Law, Literature, Economics* – is meant to suggest interdisciplinary activity. Given the tendency toward specialization in educational institutions, it is likely that some of the book will be unfamiliar to you. Unfamiliarity can be a source of many difficulties – including ‘a deficiency of prior text’. In an essay on interdisciplinary work, the lawyer Jack Balkin notes that ‘a sense of bewilderment’ often emerges ‘when people from different disciplines meet’. He continues:

It is the sense not only of having to wade through a strange and abstruse vocabulary, but also the sense of puzzlement as to ‘why does he or she find *that* interesting?’ or ‘why was so much effort wasted on showing *that* or discussing *that*?’ To chance upon a discussion among persons of a different discipline can be like arriving at someone else’s family reunion. Each discipline has its own ongoing controversies, its own distinctive debates to rehearse, its own characteristic points to score, and its own private demons to exorcise.

(Balkin 1996: 956)

The ‘why . . . ?’, as Balkin appreciates, can have rewarding answers if time and energy are given to the question. We do not need to be economists to know that claims that ‘effort’ was ‘wasted’ will be based on assumptions that the reader might not share. One person’s waste can be another’s profit, which may be found in their ‘strange and abstruse vocabulary’, if treated justly.

While there is interdisciplinary activity in this book, it is perhaps more ‘trans-disciplinary’, for it is written to a general reader and it asks questions that are relevant to all people – ultimately questions of justice. Writing to a general reader has benefits and costs. One benefit is that it can help avoid the

problem of a strange vocabulary. One cost is that it could well increase the likelihood of ‘puzzlement’ questions.

This Prologue is mainly for a reader who might be inclined to ask ‘why does he find *that* interesting?’ when reading the Introduction, especially the part about attunement to the work of James Boyd White. (‘Why read his work?’) One aim of this Prologue is to suggest what this activity involves and why it can be worth the effort.

When a Lawyer Writes a Complaint: Herbert A. Eastman

In 1995, the *Yale Law Journal* published an extraordinary essay, ‘Speaking Truth to Power’, by Eastman, director of clinical education at Saint Louis University School of Law. The essay is extraordinary for several reasons, one of which is that Eastman gives an extended criticism of his own work as a lawyer – two decades earlier. In 1976, then recently out of law school, Eastman joined a legal aid program for southern Illinois and immediately found himself assigned to ‘Hattie’s case’. Hattie Kendrick has an important place in his essay, which opens as follows:

I once had a client named Hattie Kendrick. She was a woman and an African-American, a school teacher and a civil rights warrior, spit upon, arrested, and tossed out of restaurants and clothing stores that did not ‘cater to the colored trade.’ She marched and spoke out for integration and against oppression. Her school fired her, but not before she had taught generations of black children in Cairo, Illinois, that participation in American democracy was their right and their duty. In the 1940’s, she sued to win equal pay for black teachers, with Thurgood Marshall as her lawyer. And in the 1970’s, she was a named plaintiff in a class action asserting the voting rights of black citizens in Cairo against a city electoral system rigged to reduce the value of their votes to nothingness. All she wanted was to cast a meaningful vote in a democratic election before she died – she was in her nineties, growing blind and weak. Such a woman. Such a story. And such a voice. Listen to how she discerns the problems of her town: ‘Too long have the two races stood grinning in each other’s faces, while they carry the fires of resentment and hate in their hearts, and with their hands hid behind their backs they carry the unsheathed sword.’ Yet here is how the complaint filed in federal court identifies the named plaintiffs, including Hattie Kendrick: ‘All plaintiffs are Blacks, citizens of the United States and of the State of Illinois, and residents of Cairo, Illinois registered to vote in Municipal Elections conducted in Cairo.’

(765–6)

The complaint in *Kendrick*, for which a younger Eastman was responsible, gets much critical attention in the essay. The older Eastman has a complaint

to make about the younger Eastman's complaint, which failed to do justice to his client.

We can read Eastman's essay as an attempt by him to work out a way of talking about the activity of being a lawyer, one who takes justice seriously. There is a sense in which he seeks to do justice to himself. This act begins by him attending to his own experience. Early on, he writes:

This Article springs from the recurring disappointment and frustration I have felt after consultation with clients in cases presenting outrages that, in a phrase loved by my mother, cried out to heaven. . . . My frustration and disappointment began when I reviewed the pleadings I drafted for them. I could barely see over the chasm separating what those clients told me about their lives and what I wrote to the court as factual allegations in the complaint – sterile recitations of dates and events that lost so much in the translation. What is lost in a description that identifies a woman like Hattie only as a registered voter? . . . We lose the identity of the person harmed, the story of her life. But even more is lost. This was a class action aimed at remedying a systemic problem harming thousands, over generations. . . .

The complaint omits the frustration of the democratic process and the powerful metaphors that claim an exception to the rules restricting the court's involvement. The complaint leaves intact the walls between the clients and the court, the clients and the lawyer. In a strange way, it even effaces the lawyer by denying her the dynamic and creative role of responding to the tragedy witnessed.

I wondered how we, as lawyers, could plead the horror of wrong done on a mass scale. In reviewing the pleadings in other famous civil rights class actions, I found similar things. This Article explores why we fail and wonders whether we can do better.

(766–77)

We might wonder if the editors of the *Yale Law Journal* expressed any concern about Eastman's use of the first person, the personal 'I'. Were there prejudices against the personal tone and the autobiographical elements in his article? We might also wonder if, then and now, any legal writing textbooks (a lawyer's 'prior texts') deal with 'cases presenting outrages that . . . cried out to heaven'. Do any such textbooks offer guidance on how to tell a 'story' and how to listen to one? Do any direct attention to 'powerful metaphors' that are not often recognized as such? Do any offer resources for dealing with that which might be 'lost . . . in the translation'? If the translator is a betrayer, as the old saying goes, we might do well to wonder if the image of lawyering as 'translation' opens up a productive line of inquiry for those who desire to be 'dynamic and creative'. Might the image help turn the legal hearing into a meaning-full hearing, in which there is some close listening?

What are the possibilities for doing ‘better’ when drafting a complaint? Eastman calls for ‘thicker pleadings’ (808). He explains what he means by that phrase in several ways, one of which is through a ‘more literary revision’ of the *Kendrick* complaint that he filed. About his new complaint, he writes:

[T]he lawyer intertwines legal and nonlegal language. . . . By integrating the nonlegal language in a legal pleading, it calls upon the persuasive authority of both. . . . By pleading in the language of journalists and clients—and by quoting clients and others in the pleading—the complaint attempts to make the most powerful use of ambiguity. While the pleading begins and ends with language more recognizable and acceptable to a traditional audience—and retains the customary numbered paragraphs—the client stories dominate the pleading. In particular, Hattie’s story is kept central, to draw upon the compelling attractiveness of her story. The story is allowed to develop, inviting and not coercing. (834)

The pleading offers the language of voices rather than of concepts. . . . The lawyer’s voice is included, as well. . . . In the hopes of practicing as a jazz civil rights lawyer and trying on a different paradigm for racial discrimination, the pleading tries to speak in terms of an entire community harmed by racism, rather than of a black people oppressed by a white people. In this sense, I emulate Hattie, who referred to white people as ‘brother’ even as she talked about subjugation. To further explore this paradigm, the complaint refers to European-Americans and African-Americans. This may help us to think in terms of a common immigrant history and also remind us of the diversity of persons with roots in those continents. (834–5)

We might wonder if any legal writing textbooks encourage their readers to think about what lawyers can learn from their clients. Contrary to what many legal writing textbooks say and suggest, ‘ambiguity’ has some important virtues, including the possibility of being ‘inviting and not coercing’. And ‘voice’ matters. What value is a hearing without authentic ‘voices’? We might wonder what could become of the law if ‘the lawyer’s voice’ became normal in legal materials. Might a linguistic move away from ‘concepts’ to ‘voices’ be necessary for meaningful talk about justice? Might the legal hearing thus acquire new significance?

A Becker reader might be inclined to ask this question: what texts did Eastman read before critically engaging with his *Kendrick* complaint? (How did Eastman manage to distance himself from his younger self? What questions did he ask? What method did he adopt?) Throughout his essay, he refers to the work of James Boyd White, including his writing course book *The Legal Imagination*. A foundational question in White’s book is this: ‘What does it mean to learn to think and speak like a lawyer?’ ‘The readings and the

writing assignments', White says, 'can be said to elaborate and complicate that question.' He continues:

In the course of the book the student is asked to write as a lawyer, judge and legislator, and to reflect as a mind and a person on what he has done, to speak in his own voice about his experience of writing and thinking. He is asked to see what the lawyer does as a literary activity, as an enterprise of the imagination, with respect to which both success and failure – if he can define them – are possibilities for him. He must judge for himself what these possibilities are. The demand is upon his imagination, his ability to make sense out of what he does by looking beyond it.
(White 1973: xix–xx)

White's imagined reader might find intimidating his invitation 'to see what the lawyer does as a literary activity'. We, however, have benefited from reading one of his actual readers. In having done so, to draw from Becker, we have avoided part of the 'problem' of 'a deficiency of prior text'.

White stresses that 'the law' is not an entity, as much talk about 'it' suggests, but a 'performance' culture. Listen to his 'thesis': 'that the activities which make up the professional life of the lawyer and judge constitute an enterprise of the imagination, an enterprise whose central performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language' (758). His reader might wonder how to justly respond to that thesis. How is she or he to 'hear' him?

White gives much life to his thesis in the 'writing assignments'. Consider this one:

Drafting a Complaint

Part One

Give an account of a death in some language other than legal language. Your account should not take the form of 'the statement of facts' in a legal brief or judicial opinion, but should be a living statement of its own.

Part Two

- A. Draft a complaint, civil or criminal, based upon that event.
- B. Explain and evaluate what you have done as a writer of a complaint.
- C. Explain what sort of rhetorical resource the complaint affords.
What interest or value has this sort of writing? What dangers?

Here are some questions that may help you work this assignment out.

1. What sort of literature is the complaint? On what understanding is it to be read? Look at your complaint and ask what it has left out, what else might be said about these events. . . .

2. To the layman the complaint may seem a conclusory, dead instrument of no interest except as another example of the dishonest and nonsensical ways that lawyers speak. . . . Does it make sense, is it honest, to another audience, on some special understanding?
 - a. Examine your own complaint and ask how you have characterized the events you describe – with what specificity, what bias. . . .
 - b. . . .
 - c. By what process did you compose your complaint? What were the questions you faced? What inconsistent pressures did you try to accommodate . . . ?
3. . . .
4. In the portion of your paper in which you explain what it is you have done when you have drafted a complaint, you will necessarily characterize a part of a lawyer's life. In what terms do you do so? What inferences about the lawyer's life could be drawn from your account of what you did? Consider in particular the metaphors you use, and ask whether they do justice to your experience: 'start the machinery of the law,' . . . and so on. Try to find a way to express as fully as you can what drafting the complaint involved for you.
5. The temptation is to look at this in mechanical terms: the writer is a selector, like a cranberry-grader . . . perhaps. But your writing has a real audience and real purposes. To whom are you writing, and what are you trying to achieve with this document? Does it help to conceive of the complaint as a threat, say, or a challenge, or a bid, or a wish?

(182–4)

We can be confident that Eastman had not read that assignment when he drafted the original *Kendrick* complaint. His *Yale Law Journal* essay, however, can be read as a response to most of it. In his essay, he says and suggests much about 'what' he had 'done' when he wrote the complaint in the *Kendrick* case. In explaining and evaluating his new complaint, he shows us that a complaint has important possibilities as a 'rhetorical resource' for doing 'justice', and that an important task for the lawyer is to pursue these possibilities as best as she or he can. In juxtaposing his two complaints, Eastman directs attention to the 'dangers' of a 'dead' complaint. An Eastman reader will know that a complaint does nothing less than frame the whole case, providing an image of who the parties are to one another, a way of thinking about the story they share, and what questions the lawyers and the judge need to address. What could be more important than that?

White's question about 'the questions you faced' might prompt us to attend to his questions and to ask some in response. Who is this James Boyd

White? What sort of literature is *The Legal Imagination*? On what understanding is it to be read? What experience lies behind it? To whom is he writing, and what is he trying to achieve with his questions? Does it help to conceive of his questions as a threat, say, or a challenge, or a bid, or a wish? Are they all of those at once, in the direction of doing justice?

In taking 'performance' seriously, we might do well to ask not what the present book is 'about' but what it *does*. It engages in the activity of close listening, to a writer who has said and suggested much about the possibilities of the hearing. I think that if we can attune ourselves to White, we will equip ourselves for doing justice both in and out of the law.

Introduction

Attunement to and from James Boyd White: Hearing the Hearing
'My Reader'

An Alphabetical Lexicon

A Guide for Confusion: Composition and Literary Criticism at
Amherst College

Quotations: Political Listening

Pronouns

In Jane Austen's *Mansfield Park*, Henry Crawford reads aloud part of Shakespeare's play *King Henry VIII*. When he has finished, Edmund Bertram remarks to him: 'you read as if you knew it well.' This exchange follows:

'... I do not think I have had a volume of Shakespeare in my hand since I was fifteen. I once saw Henry the Eighth acted, or I have heard of it from somebody who did, I am not certain which. But Shakespeare one gets acquainted with without knowing how. It is part of an Englishman's constitution. His thoughts and beauties are so spread abroad that one touches them everywhere; . . . '

'No doubt one is familiar with Shakespeare in a degree,' said Edmund, 'from one's earliest years. His celebrated passages . . . are in half the books we open, and we all talk Shakespeare, use his similes, and describe with his descriptions.'

(Austen 1814/2003: 312–13)

Like *Mansfield Park*, this book connects 'constitution' and language-'use'. I define an activity that all of us engage in all the time, often without being aware of it. In brief, the activity is: constituting ourselves and others when we use our language, which we transform in our use of it. I will define this activity largely by directing attention to examples and by my own performance in these pages, for I am myself engaged in it. Attending to this activity opens up an inquiry into the kinds of selves and relations that we do and could constitute. This inquiry lends itself to talking about justice as being concerned with constituting appropriate selves and relations.

Attunement to and from James Boyd White: Hearing the Hearing

The language that I use for talking about constitutions and justice draws heavily from the work of James Boyd White. In 2008, White retired from the University of Michigan, where for over two decades he had the titles of Hart Wright Professor of Law, Professor of English, and Adjunct Professor

2 Introduction

of Classical Studies. Not one to doff and don disciplinary hats, White offers an integrated way of imagining social life. To draw from the subtitle of his book *When Words Lose Their Meaning*, he is centrally interested in ‘constitutions and reconstitutions of language’ (White 1984). His interest touches various levels, including the person and society, as suggested here:

Language is learned only by stages and only for use and by using it; and as one learns it, one naturally but imperceptibly undergoes changes: changes in attitude and perception and sentiment by which one becomes ‘acculturated,’ or ‘cultured,’ or perhaps ‘cultivated.’ But to learn a language is also to change it, for one constantly makes new gestures and sentences of one’s own, new patterns or combinations of meaning. Language is part of a system of invention, an organized way of making new meaning in new circumstances. Some of these inventions are shared with others and become common property; others remain personal, part of the process by which the individual within a culture is differentiated from others who are similarly situated.

The language marks the mind, and one will normally see that one’s language is contingent, not necessary, only if one experiences a basic cultural dislocation: the sense that words have lost their meaning.

(White 1984: 8 and 277)

In learning to speak, a child incorporates a language that structures her or his experience. From a young age, language can seem to be a part of nature, not a cultural artefact, until ‘one experiences a basic cultural dislocation’. Such an experience may change one’s sense of the nature of experience, for one may now sense it from a distance that was not previously available.

When words do ‘lose their meaning’, we can respond by telling a story about that very experience. The title of White’s book draws from a passage in Thucydides’ *History of the Peloponnesian War*, which tells a story about the destruction of the Hellenic world. After introducing details, he connects the *History* and his own book:

An alteration in language of the kind I mean is . . . a change in the world and the self, in manners and conduct and sentiment. . . . One response to the world is to make a text about it, a reorganization of its resources of meaning tentatively achieved in a relation, newly constituted, between reader and writer. This is a way of acting in the world and on the world by using the language of the world. Thucydides’ *History* is a response of this kind; so are the other texts we shall examine, and so, indeed, is this book itself. Other activities are also texts in this sense, including the conversations that take place among us, at home or at the office or on the street, whenever we talk about what matters to us. We struggle to make

our words work as we wish, to redefine them to meet our needs, and in doing this we remake, in ways however small, our language and our world. The reconstitution of culture in a relation shared between speaker and audience is in fact a universal human activity, engaged in by every speaker in every culture, literate or illiterate, and the texts we shall read in this book can be taken as extraordinarily powerful . . . examples of this activity. (White 1984: 4)

White's own efforts at 'the reconstitution of culture' in *When Words Lose Their Meaning*, which defines a 'universal human activity' whilst reading a diverse collection of writers – Homer, Thucydides, Plato, Jonathan Swift, Samuel Johnson, Edmund Burke, Jane Austen, Chief Justice John Marshall – offers an experience of 'a basic cultural dislocation'. Whilst reading his text, writers who might at first seem to have little in common (say, Austen and Marshall) may come to be perceived as deeply similar, for they give 'extraordinarily powerful . . . examples' of the 'reconstitution of culture'.

When a person assumes that her language is adequate as a means of expression, she may readily fail to hear another person's language, and fail to do him justice, in and out of the culture that we call the law. White has much to say on the connection between language and justice. Here is one fragment:

The law . . . provides a place that is at once part of the larger culture and apart from it, a place in which we can think about a problematic story by retelling it in various ways and can ask in a new and self-conscious way what it is to mean. Law works by a process of argument that places one version of events against another and creates a tension between them . . . ; in doing so it makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible. The rhetorical structure of the law makes a place for each party and defines a relation between them by establishing the ways they may talk; in doing this it suggests a conception of justice as equality, for a person may find himself in any of these roles. The method of criticism most appropriate to the law as such is concerned less with the wisdom of a particular policy choice or the rightness of a particular rule or result than with the character that a court, legislature, or other legal speaker gives himself and his institution, the place it defines for others, and the relation it establishes between them. The law is less a branch of the social sciences than of the humanities in that it seeks not to be a closed system but an open one. It learns from the past and seeks new terms for the expression of motives, new forms for the establishment of relations; it is a method of learning and teaching; and its central concern is with the kind of relations that we establish with our inherited culture and with each other when we speak its language.

To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the 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 the 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.

(White 1984: 273)

On many occasions, I have found myself returning to that passage. My rereading has involved connecting various words, including: character, community, conscious, criticism, culture, equality, justice, language, method, rhetorical, story, voices. Making these connections has been a challenging and rewarding experience. The challenging part has included trying to modify certain habitual modes of thought and expression, struggling with my choice of language. The rewarding part has included coming to a new appreciation for the hearing and for what acts of justice might involve – White’s work offers to enrich the life of the ancient principle of justice, *audi alteram partem*, ‘hear the other side’. I suggest that doing justice, in and out of the law, involves a struggle with one’s choice of language. One goal of this book is to do justice to White’s image of ‘the heart of law’; it is part of my process of trying to ‘hear’ what he says about the hearing. This book will be a success for me if the reader returns to reread the above passage and has a similarly challenging and rewarding experience.

White’s book on ‘learning to read George Herbert’ has served as a model for this book as it concerns the activity of reading White himself. The need for a ‘learning to read’ book for a long-dead poet might need no explanation. It seems obvious, for example, why we need a guide for reading Herbert (or Shakespeare), for his language is considerably unlike ours. White makes the point, however, that there is a sense in which each person’s language is quite unlike any other person’s language:

My aim in this book has been to record the process by which I have begun to learn to read the poetry of Herbert, with the object both of helping others read their way into this difficult literature and, more generally, of suggesting a way of thinking about what it can mean to learn to read the work of another. For me . . . it is helpful to think of this kind of reading as learning the language of another, by which I mean not only that we come to appreciate more fully the special significance the writer gives to certain terms over the course of his work—‘heart,’ ‘stone,’ ‘sunne’—but also that we become familiar with his voices, transitions,

and gestures. . . . As we learn to read one gesture in light of another, one poem in light of another, we should acquire an increasing sense of attunement to the whole performance and feel our expectations engaged, surprised, and disappointed in increasingly coherent and familiar ways.
(White 1994b: 231)

Learning to read Herbert is an extreme version of what we commonly do in our own social circles. If we can learn to 'learn to read' Herbert well, we can become better equipped to learn the language of another person well. A language 'attunement', I suggest, is at the heart of doing justice. No dictionary-style definition of 'attunement' will do, for the word acquires its vital meanings in the way it is used. This book's form, discussed below, is the product of an attempt to do better.

White's use of the word 'attunement' draws from the linguist Alton Becker, who used the word in the context of 'confronting a distant text' and 'the need for correcting . . . interpretation' (Becker 1988/1995: 387). 'Attunement' refers to the process of 'self-correction', which is 'the heart of any skill, from the very subtle adjustments of a violinist's fingers, attuning ear and muscle, to the fine coordination of the steering wheel, eye, and gas pedal that constrain the everyday contests of driving' (369). In reading a text, the 'correcting' can never be perfect. Whilst 'correcting', the strange may become familiar and the familiar strange. Through this process, we may hope to better understand the other, and ourselves.

Whilst a major part of this book can be read as an attunement *to* White, its heart is not about him but the 'universal human activity' of transforming constitutions of language. White is a model for a certain version of this activity, of doing justice with language. Attuning *to* him can serve as a resource *from* which to re-imagine the topic of justice, beginning with a basic sense of justice as a process of language attunement.

'My Reader'

White's work defies simplistic placement within conventional classifications. Whilst White has largely written to a general reader – who might be imagined as one of 'The People' – he has been read by specialists from a variety of disciplines, including anthropology, economics, law, literary criticism, philosophy, political science, and theology. I made the acquaintance of White's work when studying economics. Later, as an economist, I kept reading White mainly because he provided materials with which to challenge mechanistic thought at the core of a supposedly culture-free economics. After several years of doing such challenging, I went to law school. By my reading of his course book *The Legal Imagination*, I discovered that crossing could be a broadening and deepening of my work in economics, rather than an ending. Thinking critically about 'thinking like a lawyer' could serve as a resource for

more thought about ‘thinking like an economist’. White’s work lends itself to enriching talk about disciplinary ‘boundaries’. He suggests as much in *Acts of Hope* – a book that engages with, among other texts, Plato’s *Crito*, William Shakespeare’s *Richard II*, Emily Dickinson’s poetry, Nelson Mandela’s Speech from the Dock, and the US Supreme Court’s judgment in *Planned Parenthood v. Casey*:

While I hope this book can be read with interest by those who are expert in the various fields it touches, . . . it is not mainly addressed to a community of specialists. . . . In this book, as in much of my other work, I am trying to work out a set of questions that will connect texts, and their readers, across the lines of professionalism. . . . I mean to resist the view that texts such as these are the property of one group or another, or that it is necessary to speak the language of the specialist in order to speak well about them. In fact, I do not think of myself as writing out of a profession, but out of my own experience of these texts, to which I have turned for the life they offer. I would do this, if I could, no matter what my job was, for their importance to me as a person and mind. Likewise I write to my reader not as a Dickinson specialist, or a classicist, or a lawyer, but as the person who is these things and many other things as well, and I do this in part with the object of claiming these texts as an inheritance that is common to us all.

(White 1994a: 270–1)

With the category ‘profession’ unfitting for placing White, we might consider rehabilitating ‘amateur’ (from the Latin *amator*, ‘lover’). The literary critic Wayne Booth assessed White to be ‘a kind of amateur, not in the sense of “amateurish” but in the traditional sense of genuine lover seeking no reward but the love itself’ (Booth 1996: 380–1). We might wonder what ‘set of questions’ Booth asked when trying to place White. What questions could help a White reader do him justice? Asking questions of justice might lead his reader to claim his texts as ‘an inheritance that is common to us all’. In doing so, she or he may well feel certain pressures to become an ‘amateur’, who writes to a fellow amateur.

An Alphabetical Lexicon

Authors create texts not out of a vacuum but out of prior texts. The meaning of a text to a reader is influenced by the texts that she or he brings to it. Writing and reading is at one level a process of moving between texts. In his book on Herbert, White has this to say about the process:

We naturally read any poem, and any poet, in light of what we have already read, the other poems that have formed our expectations, trained our attention, and in this way shaped our responses and our tastes.

To bring to Herbert a sense of poetry derived from Pope, say, would produce a very different experience of his texts from one based on Shelley or Browning. In my own case, the poet who most shaped my sense of what poetry was, and could do, was Robert Frost, and in reading Herbert I found illuminating parallels, especially in the fact that both seemed to build so much of their poetry out of voices. Frost's art and teaching are thus at work in my own reading. . . . In saying that Herbert's poetry of voices is in an important way like Frost's I of course reverse the proper sequence, for any influence went the other way. But to one educated at Amherst College, as I was, it did not quite feel like that, for at Amherst Frost was the model of what a poet could be, and much of his excellence was seen to lie in his capacity to manage his voices.

(White 1994b: 15–16)

That passage offers what we might call cultural background: processes that 'formed our expectations' and 'trained our attention, and in this way shaped our responses and our tastes'. Writing conventions that put pressure on us to eliminate autobiography will pressure us to direct our 'attention' away from one's cultural background. These conventions can thus be an obstacle to our attunement to the reality of 'experience'-structuring cultures. White invites his reader to consider resisting these conventions. Let me take up White's invitation for the purpose of reading him, in light of others.

My experience of reading White has resembled my experience of reading the economist John R. Commons, who has a place in this book. (Commons revered the name 'political economy' for his discipline, a name worthy of rehabilitation, for reasons suggested in various pages below.) In the early 1900s, Commons helped draft a Wisconsin public utilities law and a law establishing an Industrial Commission. He came to appreciate that drafting is not a simple mechanical process but a complex art, one that involves anticipating various sorts of cases that may arise. After completing his task, he sought to develop an economics that centred on the legal hearing. In doing so, he brought the neglected topic of justice before the economist, a move that has large consequences for economics, for the ordinary meanings of various key words change. He connects each of these words and gives them new meanings. In doing so, he places great demands upon his reader. One Commons critic says this about the dynamics of reading him:

To truly understand . . . any component of Commons' thought, one must first grasp . . . his 'whole' [framework]. . . . [T]hat challenge is in many ways similar to the undertaking of an anthropologist who is set down in the midst of a primitive social group and instructed to discover the meaning of activities and objects as understood by the members of this alien culture themselves. Only slowly, as the participant-observer gradually becomes familiar with the activities of the new culture and the contextual nuances of the language in which its members express their

thoughts, do accurate meanings, and thereby genuine understanding emerge. In like fashion, one simply cannot grasp what Commons is driving at on an initial reading.

(Ramstad 1986: 1095–6)

Commons returns repeatedly to some basic questions, but each time he comes at them from a different standpoint. This is the process by which he reinterprets familiar institutions – such as ‘the market’ and ‘the law’ – in such a way that they take on a new meaning. The familiar can productively become strange.

When writing about Commons’ work in my economics doctoral thesis, I was at a loss as to how I should present it, for it was wide-ranging and I could not assume that my reader was familiar with it. I began by experimenting with an alphabetical lexicon. Each chapter was devoted to one of his key words, offering a mini-exploration, learning a little of Commons’ world, before beginning again from another standpoint. I shelved the experiment with the lexicon for various reasons. I now regret this, for I have come to believe that it is the best way to read such an extensive work that centres on dynamics of cultural transformation. Any attempt to present these dynamics in a linear form would fail to do justice to the complexities of such transformation.

My change of mind happened when writing my law doctoral thesis on White’s work. When I struggled to communicate with lawyers about it, the lexicon came to mind. Both Commons and White deal with an expansive whole, an evolving culture, and both require multiple rereadings if they are to be *really* read. Both have been profoundly misunderstood, no doubt partly due to the power of habits of thought in the culture that they criticize. The form of an alphabetical lexicon offers a collection of bases from which to engage with some of these habits.

In this book, I intend my use of the lexicon to understand the ways in which White has responded to the task of transforming constitutions. I do this partly because I think highly of his performances, but mainly to utilize him as an example of what we will have to do ourselves if we are to transform constitutions well. Thus, whilst ‘attention’ may be a key word for White, it may not be for my reader, who might choose different key words, and choose to work with them differently. One aim of this book is to stimulate awareness of such choices and to make them intelligible.

Many of the chapters in this book directly connect with others – a cross-reference is marked with an asterisk. There is no single road for reading them. Select a road that interests you. Change if the going is awkward.

Whilst this book makes a significant place for White’s broad and deep explorations, I hope that its form can serve as a model for engaging with other similar explorations. It could be used, for example, with respect to anthropologists such as Mary Douglas and Clifford Geertz, cultural/literary critics

such as Mikhail Bakhtin and Edward Said, educationalists such as John Dewey and Paulo Freire, linguists such as George Lakoff and Deborah Tannen, philosophers such as Hans-Georg Gadamer and Ludwig Wittgenstein, or theologians such as Walter Brueggemann and David Tracy.

A Guide for Confusion: Composition and Literary Criticism at Amherst College

The activity of attunement to White's way of imagining the world will involve connecting to his English education at Amherst College. We began doing so in the previous section and we will do a little more here before continuing to do so in several of the chapters below. Our interest here is the experience of confusion.

When White went to Amherst as a freshman, he encountered Theodore Baird, who directed English 1–2, a course in composition. At about the time White took the course, the *Harvard Educational Review* published a study of it. Here is a fragment:

By midyear . . . an Amherst freshman finds it easy to believe the legend that one day Professor Baird pointed to a window in the classroom and asked the students to say exactly what they saw. When the whole class insisted that what they saw was a twelve-pane window, Baird went up to it, opened it, stepped through it onto the lawn outside, and told the class to follow. After leading the class around the building . . . and back into the classroom, Baird asked for a definition of the doorway they had just used. . . . The new definitions were more careful. Such legendary exercises . . . undoubtedly contribute to the success of the course. But primarily the Amherst undergraduate recognizes that English 1–2 forces him by a variety of novel means . . . to think for himself in a radical and honest way.

(Broderick 1958: 46–7)

Baird sought to make the familiar unfamiliar. Partly by playing with 'definitions', he sought to help the student 'become conscious of words for their own sakes and of their importance' (Baird 1931: 9). Composing 'new definitions' can be a way of composing a new world.

Baird's students were given numerous assignments. These were 'sequential': 'they led from one place to another' (Gibson 1985: 139). The movement commonly involved returning to an earlier assignment and critically engaging with it. The student might get quite confused, as Baird suggested in this assignment:

Reconsider the last five assignments dealing with the standards of correctness and the meaning of these standards in terms of people and society.

The process of moving from one assignment to the next may be confusing, but this usually happens when you try to place yourself historically by describing the thought and feeling and behavior of other people in the past or in the present. You are not the first person to find conflicting standards existing . . . side by side. If you find survivals of the past around you this is to be expected. You are not the first to live with confusion. Express as well as you can your sense of conflicting standards in their largest sense. Do this not only in terms of English usage but also in terms of the life you see around you Finally, express what it means to 'live with confusion.'

(quoted in Gibson 1985: 144)

A student will do well to 'express what it means to "live with confusion"' not with a tidy theory but by exemplifying it in her or his own writing. If a student imagines that talking in a confused way is a failing, she could be confused without being aware of it – a real failing.

Baird's assignment could serve as a resource in legal education. As lawyers know, the process of moving from one case to the next may be confusing. In Frost's phrase about poets, a lawyer perhaps could aspire to 'a momentary stay against confusion' (1939/1951: 18). This book is written out of this aspiration.

Quotations: Political Listening

There is extensive quotation in this book, for it is vital to attend to a whole way of thought and expression. One cannot, for example, say of White that X or Y is his position on an issue, for he often seeks to transform the language with which we talk about positions. This process needs to be fully represented in order to be understood. To avoid complexity, however, I have omitted footnotes in the original passages.

The use of lengthy quotations will sometimes help with the activity of attunement to different voices. In the process, we may hope to enhance our capacities for listening, an activity that has been given inadequate treatment in various disciplines. In the context of political thought, Susan Bickford has suggested that various forces have contributed to the depreciation of listening. One of them is the image of listening as a merely passive reception that does not require any real virtues. She resists that image:

Listening . . . involves an active willingness to construct certain relations of attention [W]e cannot hear but *as* ourselves, against the background of who we are. But without moving ourselves to the background, we cannot hear another at all.

[P]olitical listening cannot be grounded in passivity or an absence of self, for politics itself requires precisely the opposite. . . . It is the

interaction of our efforts that results in a decision, a joint action; if I somehow absent myself when you speak, in order to ‘hear’ you, and you do the same for me, in what sense are we really together as peers? Politics requires self-involvement with others in action, where we do not ‘draw back’ but actively engage with one another with direction(s) and purpose(s).

There must of course be an equality in terms of the role one plays. All must engage in shifting back and forth between perspectives, speaking and listening in turn.

(Bickford 1996: 24, 146, and 147)

‘Political listening’ connects to the ‘equality’ principle of ‘hear the other side’. How are we to listen to any side? Do we shift back and forth between perspectives?

This book is intended as a contribution to thought and expression on political listening. The contribution is at the level of performance rather than ‘theory’ (from the Greek *theatron*, ‘a place for seeing’). The unusually lengthy quotations make a place for a certain rhetorical equality in the book and for the reader to judge acts of listening.

Pronouns

White’s *The Legal Imagination* is ‘a course in writing’ (1973: xxi). At the outset, he seeks to ‘create the sense that we are all colleagues here’ (xxii). How are we to read his use of the pronoun ‘we’ in the context of his efforts to constitute a textual community? A helpful place to begin a response is this fragment from his book on Herbert:

In talking about the experiences these poems offer their reader, I frequently use the first-person plural: ‘we see,’ ‘we learn,’ ‘surprises us,’ and so forth. This is an old-fashioned locution that some people dislike because they feel that it asserts a kind of cultural or attitudinal unity that they wish, often rightly, to deny. I know of no better way to talk, however, and hope it can be understood by my reader that I am not claiming that all of us somehow respond in exactly the same way—this book is in fact built on the opposite principle—but that this is my way of talking about how a poem works. I use the first-person plural to express a hope, not to dictate a result, and I want my own reader constantly to ask whether a particular use of ‘we’ or ‘us’ does speak for her or him. My aspiration is not that you will agree with everything I say, but that you will find this performance of what Herbert means to be useful in shaping your own understanding of his poetry.

(White 1994b: xvii)

That passage has frequently come to mind whilst writing this book. When it did, I used it to guide my own writing, for it seems sound to me. Let *us* not get bogged down here with a discussion on various departures from the 'old-fashioned locution'. I have come to appreciate White's aspiration, to which I give new life in this book.

Like White, I have much to say and suggest about the relationship between the writer and the reader. There are no easy choices when it comes to using singular personal pronouns. Using 'her or him' can be cumbersome. When I am talking about White or another male writer, I will refer to his reader as 'she'. When talking about a female writer, I will refer to her reader as 'he'.

Activity

'Questions of a Certain Sort': Michael Oakeshott

'Now I Know How to Go On': Ludwig Wittgenstein

In the 1960s and 1970s, people from in and out of the law were wondering whether the apartheid regime was in a basic sense lawless. What lines of questioning* might have started a valuable line of inquiry for them? Here is one possible question: How might we imagine the law? In *The Morality of Law*, Lon Fuller suggests that that question is vitally important:

It is truly astounding to what an extent there runs through modern thinking in legal philosophy the assumption that the law is like a piece of inert matter—it is there or not there. It is only such an assumption that could lead legal scholars to assume, for example, that the 'laws' enacted by the Nazis in their closing years, considered as laws and in abstraction from their evil aims, were just as much laws as those of England and Switzerland.

(Fuller 1964/1969: 123)

For Fuller, the law is not an object (such as a set of rules) but rather is, as he puts it elsewhere, 'a purposive human activity' (1966/1999: 11). Attending to the law as an 'activity' can open up questions of justice*, questions that are beyond the pale for some people, occasionally speaking in the name of The Law.

A central aim of this book, to recall, is to define an 'activity' in which all of us engage: constituting ourselves and others when we use our language*, which we transform in our use of it. Like law, we will do well to imagine language not as an object but as an activity. What's in an activity?

'Questions of a Certain Sort': Michael Oakeshott

Like Fuller, the philosopher Oakeshott resisted imagining human phenomena as inert matter. He resisted, that is to say, dehumanizing acts of reification.¹ In *Rationalism in Politics*, Oakeshott offers a collection of essays that are 'concerned with doing, understanding and explaining; with different modes of these activities and with their relations to one another' (1962: Preface).

One essay, 'The Activity of Being an Historian', begins with these general remarks on the nature of activities:

Activities emerge naïvely, like games that children invent for themselves. Each appears, first, not in response to a premeditated achievement, but as a direction of attention pursued without premonition of what it will lead to. How should our artless ancestor have known what (as it has turned out) it is to be an astronomer, an accountant, or an historian? And yet it is he who, in play, set our feet on the paths that have led to these narrowly specified activities. For, a direction of attention, as it is pursued, may hollow out a character for itself and become specified in a 'practice'; and a participant in the activity comes to be recognized not by the results he achieves but by his disposition to observe the manners of the 'practice'. Moreover, when an activity has acquired a certain firmness of character, it may present itself as a puzzle, and thus provoke reflection; for, there may come a point at which we not only wish to acquire and exercise the skill which constitutes the activity, but may wish also to discern the logic of the relation of this activity (as it has come to be specified) to others and to ascertain its place on the map of human activity.

(137)

Oakeshott here pays 'attention'* to the significance of 'a direction of attention'. In reflecting on the nature of 'activities' and on the activity of 'reflection', Oakeshott is engaged in the activity that we call philosophizing. What 'place' does this activity have 'on the map of human activity'? What is the relation between being a philosopher and, say, a lawyer? Is there a place for the philosopher within the lawyer? Might making a place for the two people in one person help prevent us from delusively imagining 'a certain firmness of character' as a solid entity? We might wonder if that question emerged in South Africa during the Truth and Reconciliation Commission's Legal Community Hearings.

How might we put together a 'map of human activity'? Passing over in silence the activity of being a cartographer, Oakeshott suggests that we attend to our questions:

Now, if we consider the concrete activity of an historian, a cook, a scientist, a politician or any man in the ordinary conduct of life, we may observe that each is engaged upon answering questions of a certain sort, and that his characteristic is that he knows (or thinks he knows) the way to go about finding the answer to that sort of question. But the questions which he knows to belong to his sort of activity are not known to be such in advance of the activity of trying to answer them: in pursuing these questions, and not others, he is not obeying a rule or following a principle which comes from outside the activity, he is pursuing an activity which,

in general, he knows how to pursue. It is the activity itself which defines the questions as well as the manner in which they are answered.

(97)

How are we to engage in the activity of reading* that passage? (Are there different kinds of reading that are associated with different lines of questioning*?) What questions do we want to ask? How might we categorize questions? How might we resolve our differences with people who live by different categories and who define differently what is 'outside' an activity? What activity will we be doing when we try to resolve our differences?

As I said in the Introduction to this book, White is not one to doff and don disciplinary hats. There is a sense in which he seeks to transcend conventional disciplinary boundaries. For anyone who imagines that such boundaries are fixed and 'natural' as opposed to fluid cultural artefacts, White's work offers the experience* of 'a basic cultural dislocation: the sense that words have lost their meaning' (1984: 277). The title of White's *When Words Lose Their Meaning* draws from Thucydides' *History of the Peloponnesian War*, in which there is an account of a social disintegration that is associated with a linguistic deterioration. For White, the account can help us attend to the ways in which 'language*', 'character*', and 'culture*' intertwine:

I will both proceed from and seek to validate the premise implicit in the title of the book, that language is not stable but changing and that it is perpetually remade by its speakers, who are themselves remade, both as individuals and communities, in what they say. The basic question asked of each text is how it performs as a response to this situation. We shall thus be interested less in what differentiates the genres represented here—poetry and philosophy and history and moral essays and fiction and politics and law—than in what unites them, in the tree of which they are several branches. For they are all species of the more general activity that is our true subject: the double activity of claiming meaning for experience and of establishing relations with others in language. Each of the texts we shall read proceeds by working upon a world it defines and leading its reader to a position within it. To put it in a single word, I would say that our subject is rhetoric, if by that is meant the study of the ways in which 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.

(White 1984: xi)

If, like many people in our culture, White's reader would define 'rhetoric'* in part by opposing it to that which is 'real', she may well be deeply puzzled by his suggestion that it could be the name of a 'subject', or 'general activity', that can serve to 'unite' a 'world'. (A doubter within her might ask

this question: Is White's rhetorical flourish about 'rhetoric', especially the metaphor* of the tree, deliberately deceptive?) If we can notice and appreciate the significance of a certain 'basic question', we may notice and appreciate the significance of a 'general activity'. (A possible source of misunderstanding on the part of a number of White's critics may reside in the fact that he is concerned with a question that seems to be beyond their horizons.) For White, 'rhetoric' is a word of integration*; it unites 'motive, value, reason, social structure, everything, in short, that makes a culture'. By resisting the common opposition between rhetoric and reality, White opens up lines of questioning that the opposition closes. After reading* White, we might be disposed to ask, for example: What kind of world does White seek to make real in his 'performances of language'? We might then ask: How might we judge our own performance* when responding to that question?

'Now I Know How to Go On': Ludwig Wittgenstein

In his *Philosophical Investigations*, Wittgenstein resists the common image of language* as a tool that serves to identify objects in the world. In doing so, he attends to different ways in which we can 'use' language:

But how many kinds of sentence are there? Say assertion, question, and command? – There are *countless* different kinds of use of what we call 'symbols,' 'words,' 'sentences.' And this multiplicity is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten. . . . Here the term 'language-game' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.

(Wittgenstein 1953: §23)

When we learn a language, we learn to participate in an 'activity' – a somewhat elusive 'a form of life'. If we act as if language is merely a collection of labels, we will be insensitive to the 'life' left out. This insensitivity can be a source of in-justice*.

Speaking about the 'understanding'* of mathematical formulae, Wittgenstein advises that we 'try not to think of understanding as a "mental process" at all.' Instead, 'ask yourself: in what sort of case, in what kind of circumstances, do we say, "Now I know how to go on"' (§154). He is concerned not with our 'understanding' in the sense of repeating some 'idea' but with being able to 'go on' in an 'activity'.

Wittgenstein's image of understanding has a place in White's *The Legal Imagination* – in a section expressing dissatisfaction with certain acts of

metaphor* in talk about the mind. After a passage from Plato's *Republic*, White offers these remarks and questions:

One of the subjects of this passage is education, the process by which one goes from a state of darkness and ignorance to one of understanding and light, and of course Plato speaks of that metaphorically too: the critical event is a 'turning of the soul in the right direction,' or a 'conversion.' And our own language of education is also metaphorical: 'educate' comes from a Latin word meaning to 'lead out', for example. . . . Wittgenstein does propose a different version: sometimes, at least, it makes sense to explain understanding by saying that one who understands a proposition 'knows how to go on' from that point, that he knows what to say or do next. . . . Which of these ways of describing knowledge . . . would be more helpful to you if you tried to express what you have learned in law school?

(White 1973: 694)

At various times, many law students seem to say, 'I don't know my way about', to use Wittgenstein's words for presenting the 'form' of a 'philosophical problem' (§123). They are lost in an unfamiliar city. Soon, however, they may find their way about like a native. This sense is readily applicable to 'what you have learned in law school': eventually one is able to competently handle the 'case arising'.

Wittgenstein's imagery also has a place in *When Words Lose Their Meaning*. Attending to 'attention*', White talks about his approach to reading*:

In this book I have sought to draw the reader's attention, and my own, to certain aspects of our common life and to hold it there. My object has been to make more fully accessible to thought the ways in which we constitute ourselves and our relations with other people when we use, and in using recreate, the language that makes us what we are. . . . The way of reading exemplified here is not an analytic technique that objectifies what it studies . . . ; rather, it is a way of responding to and thinking about the expressions of another mind. . . . It has been my purpose to record not merely a method or a set of terms but an activity of mind expressed in what I call a language. Such a language can be learned only by immersion in its processes. One understands it not when one can translate its terms into other equivalences but when one can do it oneself—when, in Wittgenstein's phrase, one knows how to go on—as I hope the reader has begun to do with the language at work in this text. The key words of analysis and criticism that I have been using accordingly acquire their meaning not from explicit definition but from the reader's experience of their use. While the book is not scientific in the usual sense, there is thus a sense in which it is nonetheless empirical, for

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