

Against the Wind

James Boyd White and the Struggle to Keep Law Alive

Keep Law Alive

James Boyd White (Carolina Academic Press 2019), 184 pages

Todd M. Stafford, rev'r*

James Boyd White is a believer. A true believer. In the rule of law. And his most recent book, *Keep Law Alive*, is a call to the ramparts to defend and preserve the rule of law against the forces—various strains of creeping authoritarian corruption of our search for truth, democracy, and justice—that today threaten its very existence. In the United States, White holds, law and democracy are peculiarly combined, and this makes us who we are.¹ Thus, “when our law and democracy are threatened, everything we are and care about is threatened too.”² For White, the rule of law is essentially a process, a continuous conversation, of which we’re all a part, about what we are as a society. The book is an invitation to self-consciously engage in the law’s conversation and, in so doing, to appreciate what the law is and what its institutions and actors do. But there’s a tension in this book. White has been committed to his vision for over fifty years of law teaching, and this book walks a line between warning and elegy. There’s an atmosphere of, if not panic, then urgency, the kind of urgency that sets in when one suspects that his dream may be dead or dying. But he hopes against hope. White is a towering figure in the legal academy, and, for those approaching his work anew, this is a good place to start. The book is a short, engaging read that pulls the reader with its compelling urgency. In it the reader will be treated to White’s romantic vision of a grand constitutive conversation that is our American experiment, and the

* Professor of Legal Writing, Faculty Director of the LL.M. Program, University of Colorado School of Law.

¹ JAMES BOYD WHITE, *KEEP LAW ALIVE* xviii–xix (2019).

² *Id.* at xix.

reader might be tempted to join in. But, in these times, one must remain sober, and White's essential optimism might feel misplaced.

Holding an M.A. in English as well as a J.D., White has spent his career "trying to connect the western literary and humanistic tradition with the teaching and study of law,"³ and he's been a staple in the law and literature field since its inception. White published his seminal text *The Legal Imagination* in 1973. That work, which White said did not fit within any existing category, defined a new subject, which he described as "an advanced course in reading and writing, a study of what lawyers and judges do with words."⁴ It's a sprawling text of nearly a thousand pages, populated with a cornucopia of excerpts from literary works, poetry, and other stuff, woven together with White's provocative commentary, questions, and suggested writing assignments. The work was reissued in 2018 with the subtitle "Studies in the Nature of Legal Thought and Expression," which only vaguely suggests the content of this provocative stew of jurisprudence, literature, history, rhetoric, and composition theory. I teach a course by the same title and inspired by White's project, and the book indeed "works" to stimulate students on a marvelous exploration of legal thinking and the role of imagination in the lawyer's life. In a testament to its richness, no two iterations of the course are ever the same. With that work as his foundation, White has written prolifically, with many books, book chapters, and articles in print. Indeed, part of each chapter in *Keep Law Alive* was previously published elsewhere, so the book is an excellent overview of and entrée to his work.

As such, the book is vintage James Boyd White: thoughtful and thought-provoking, drawing on a wide range of literary, philosophical, and legal sources and examples. Its sweep in its engaging 160 pages is breathtaking. For White, and this is a fixed star in all his work, law is not merely a system of rules or institutions, but "an activity of mind and language, a way of claiming meaning for experience and making that meaning real."⁵ Law is a "living" thing, "an activity of the mind and imagination—a form of life—that has the value of justice at its heart."⁶ He insists, "One thing that makes our law rare and precious is the way in which human minds and hearts can be engaged in its activities and processes."⁷ It is a language into which we must translate people's problems. And it is, in White's view, always, an *art*—a conversation that is constitutive of our society. And by

3 James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES IN LAW 381 (2011).

4 JAMES BOYD WHITE, *THE LEGAL IMAGINATION* xxxi (1973).

5 WHITE, *supra* note 1, at 85.

6 *Id.* at xvi.

7 *Id.* at 3.

“constitutive” he means that “it creates a world of power and meaning, through which conflicts can be adjudicated, the habits of thought and feeling we call ‘norms’ can be established, the government itself created and regulated.”⁸

What makes White’s work distinctive, though, is his signature effort to practically engage the reader. As the reader reads, White asks them to “pay attention to the questions you find yourself asking and the objections you are raising, for these are essential to the kind of engagement in legal thought I hope you experience.”⁹ And he asks the reader to consider “what does it mean that these issues are addressed in this way in our world? What kind of world does it make?”¹⁰ In another signature aspect of White’s style, he writes in two voices, which he describes as: (1) “the legal expositor and critic in the body of the chapters,” where he mainly speaks of the reader in the third person, and (2) “the voice in the passages between chapters,” where he asks questions of and invites responses from the reader, whom he there mainly addresses in the second person, as “you.”¹¹ In other words, reading White is to *practice* the art in which he invests so much faith.

Keep Law Alive is a rich tapestry arranged in six chapters. The first two treat foundational aspects of “thinking like a lawyer”: statutes and judicial opinions. White’s effort here is not descriptive, but rather, as he usually does, he engages the reader in discourse, involving the reader in the art of reading and writing these things. Chapter 3 asks “What’s Wrong with Our Talk about Race?” In that chapter, White conducts a “tentative exploration” of his intuition that there is a deep inadequacy with the way the law has imagined “race,” particularly in the context of “affirmative action,” and that that inadequacy lies in the “extreme generality and abstractedness” of the law’s equal protection analysis.¹² Chapter 4 addresses law as language, discoursing on the many inherent tensions that define the art of law, such as that between legal and ordinary language, between competing but plausible readings of the law, between substance and procedure, between past and present, and between law and justice, and suggesting various consequences of these tensions. Chapter 5 takes a rather dark turn, identifying certain threats to the rule of law, namely,

8 *Id.* at 6.

9 *Id.* at 4.

10 *Id.*

11 *Id.* at xv.

12 The original version of Chapter 4 was published in the *Michigan Law Review*, and it shows its age a bit, with references to “blacks” and “whites” that are jarring to the contemporary ear. But its exploration remains intriguing and unfortunately relevant to our continuing national struggle with history, race, and inclusiveness.

the increasing disparity between rich and poor, what he calls “the disappearance of law,” dehumanization, and the tension between democracy and empire. Closing the book is Chapter 6, which takes a literary turn, considering, among other texts, Augustine’s *Confessions*, and musing on our responsibility in the face of evil. Throughout, and again in his signature fashion, he poses probing questions to bring the reader into the conversation. The book could be read cover to cover, or any chapter could profitably be studied on its own.

For White, no case is too small to sound a chord in the fugue of justice. Power works through conversation, through open argument and persuasion. To get the sweep of his vision, consider this: “Every case performs an answer to the question: What are our institutions of justice? How well—how justly—do they work? How should they work? And nothing is more important to a healthy community than justice.”¹³ In a legal hearing, “in principle at least,” everyone gets the opportunity “to present the case in the best way possible, and to answer what was said on the other side.”¹⁴ And that conversation is important not only to the parties to a particular case but “to the world,” as “it always matters very much to the world how such cases are debated and resolved.”¹⁵ White acknowledges that this describes law in abstract terms and at its best—it often falls short. But, as I said, he’s a true believer, and that belief is palpable in all his work.

I’m a believer too, but of a more tempered and suspicious sort. Of the sort that, under the influence of Nietzsche, Marx, Foucault, and others, is suspicious, because behind law lies power, and that power favors society’s elite—such that, whatever the benefits of the rule of law, and there are many, it keeps the haves having, and the have nots having not, and it always will. To me, that’s depressing. So, while I’m with White in fearing, lamenting the rule of law’s perhaps imminent demise, I have a darker view as to its workings in society, and even as to whether it’s ever really very robustly existed at all. In the end, I’m of the spirit of Winston Churchill’s assessment of democracy as “the worst form of government, except for all those other forms that have been tried from time to time”¹⁶ Give me the rule of law over whatever chaos might come next.

To be fair, White recognizes that our system is far from perfect and that it often fails to do justice. Indeed, in Chapter 5, titled “Law,

13 WHITE, *supra* note 1, at 83.

14 *Id.*

15 *Id.*

16 Winston Churchill, House of Commons (Nov. 11, 1947), <https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill#:~:text=Many%20forms%20of,time%20to%20time>.

Economics, and Torture,” he hits some deeply critical, even radical, and ominous notes. However, that chapter was originally produced for a conference that asked speakers to address “[what] most needs to be said about law and democracy under the conditions in which we find ourselves,”¹⁷ and its tone is decidedly darker than the rest of the book. But the mood of his work, even in this, for him, rather pessimistic book, is one of reverence for the law’s conversation. And there’s something that bothers me here. There’s a bit too much reverence. A bit of the *Mr. Smith Goes to Washington* feel. Whatever he fears we’re losing now, he seems sure we had it, as if times were better in an earlier age.

For my money, I’m not sure we ever had such a golden age. White always speaks of law as constitutive. But constitutive of what? It seems that, through history, this dialogue or conversation has actually been constitutive of some pretty ugly things: slavery, genocide, the Japanese internment, and mass incarceration, to name a few. Of course, one could argue that our ongoing legal conversation, although never perfect, has also been constitutive of unfolding progress, justice, and so forth. And that we must always strive to do better. And White often sounds in these tones. Indeed, White acknowledges that “our law is capable of great evil,” and when things go wrong, he admonishes the lawyer to “reimagine if necessary both the world and the law.”¹⁸ But is this good enough? And does it portend continuing progress? Might it not as likely be constitutive of our path toward stolen elections and, perhaps, dictatorship? For undoubtedly, these will be accomplished “legally,” by statutes enacted and legal remedies exhausted (courts will affirm results of crooked or doctored elections, with many citizens having been “legally” disenfranchised, and so forth). Indeed, I suspect that there will have been enough of a “legal” smokescreen to anesthetize much of the public. In other words, the conversation might as easily weave a dark future. Ultimately, White’s faith seems grounded in people conversing in good faith. But that’s precisely the problem. Without conceding that there ever was a golden era of good faith in abundance, it is today in decidedly short supply. The constitutive conversation, at least insofar as its progress toward White’s ideals is concerned, would appear to be on ice.

Yet, and here I’m with White, any likely alternative, at least at present, is surely far worse—the authoritarian, strong-man adoring, fact-ignoring, dare I say it, “fascism,” of the populist Right. At bottom, though, I just don’t feel as warm and fuzzy about our rule of law as White does. He

17 WHITE, *supra* note 1, at 108.

18 *Id.* at 10.

seems an unreconstructed romantic, an incurable, if somewhat tempered, optimist. And I just can't go along with him.

I think that what's missing in White's work is the contribution of critical and social theory. There's no hint of Marx or post-modernism. That's not necessarily a fault, but it is a lack, and it would seem to put his perspective in question. He doesn't seem to see that reason, too, has a tendency toward the totalitarian. And that any ideology, even rule of law and liberalism, tends to crowd out all opposition, to take up all of the air in the room—think Bush 41's so-called "New World Order," and his son's crusade against the "Axis of Evil." Ideology, any ideology, just can't be satisfied until everyone's on board, whether they want to be or not.

White is a marvelous interlocutor, and his book is well worth studying. His call to "keep law alive" is urgent because the current social and political climate threatens to destroy this conversation to which he's committed his life and on behalf of which this might be his parting appeal. Ultimately, and in keeping with the character of any genuine conversation, White invites disagreement, "so long as our argument with each other takes a thoughtful, open-minded, and good faith form, of the kind we can see in law at its best."¹⁹ Would that his appeal hits home. For it's not too much to say that whether the body politic somehow comes to converse in that spirit will determine the fate of the rule of law and of our democracy.

¹⁹ *Id.* at 135.