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THE CULTURAL STUDY OF LAW. By *Paul W. Kahn.* Chicago: University of Chicago Press. 1999. Pp. ix, 169. $22.

FROM EXPECTATION TO EXPERIENCE. By *James Boyd White.* Ann Arbor: University of Michigan Press. 1999. Pp. xi, 194. $39.50.

INTRODUCTION

For legal scholars it is the best of times. We are inundated by an eclectic range of writing that pushes the envelope from analysis and synthesis to the upper reaches of theory. Mainstream topics face fierce competition from fresh ideological visions, a variety of genres, and spirited criticism of the status quo. Young professors have access to a burgeoning variety of journals to circulate their ideas and advice while the mass media covets them as public intellectuals.

There is a less sanguine mood; an increasingly vocal group of scholars complain that it is the worst of times and refer to the above paragraph as a proffer of proof. Eclecticism translates to postmodern relativism in law review drama that compares, unfavorably, male aloofness with the female nurturing instincts of "emotional logic"[1] or presents highly charged agony experiences about birthing trauma.[2] Yale publishes photography as art-commentary and ramblings on popular culture.[3] Law professors as storytellers use stream of consciousness to circulate autobiographical tales of the racism and sexism of the callous, liberal, white male hierarchy.[4] Instead of problem solving or providing counsel to judges and practitioners, law profes-

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1. *See, e.g.*, Drucilla L. Cornell, *The Dream Cure*, 10 CARDOZO ARTS & ENT. L.J. 87, 90 (1991).

2. *See, e.g.*, Marie Ashe, *Zig-Zag, Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

3. *See* Barbara Kruger, *Art-Commentary*, 97 YALE L.J. 1105 (1988); Symposium, *Popular Legal Culture*, 98 YALE L.J. 1545 (1989).

4. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

sors write for the approval of their new peers in the humanities.[5] Professors Kahn and White reside in the last category.

Ignoring the fracas and obsessed with self, professors gleefully keep churning out the unconnected fluff and more journals surface to absorb it, while critics seethe with frustration.[6] Criticism has been enriched with two new insights — and challenges. James Boyd White[7] of Michigan Law School seeks salvation in the use of the literary imagination to transform and elevate our vision of law. Paul W. Kahn[8] of Yale Law School proffers an even more dramatic solution: stop the presses — scholar heal thyself.

Legal scholars are, according to Kahn, like squirrels on a treadmill: they energetically run and run but never go anywhere. We don't know why the squirrels run, but Kahn knows what motivates legal scholars to engage the treadmill — it's the Holy Grail of reform. Why? Reform is always necessary. It presents the tempting challenge of an abyss — a bottomless pit of constant failure on a highway of flawed solutions, a road kill that attracts law professors like stink on dung (pp. 7-8).

For Kahn, reform is the inevitable product of the interaction of reason and will. Reason guides the rule of law with rational restraint, analytical deliberation, and logical critique. "[W]e consent to law because it is reasonable" (p. 10). But reason is an empty gesture without popular will, which is necessary to convince the citizenry to consent to the wisdom of reason. Most of the time this is what in fact occurs, and the two effectively "work together to create an almost impregnable redoubt for the rule of law as our deepest cultural commitment" (p. 13). There are, however, times where one of the institutions serves to rationalize deficiencies in the other. For example, the lack of popular support for a government regulation may be overcome by resort to reason, while the irrational may be tolerated by the consent of popular will (p. 13).

As Kahn points out, the commitment to use reason to build popular will/consent prompts professors to dedicate careers to producing reform scholarship. Much of the scholarly focus is devoted to recon-

5. "Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, whether or not *they* have the scholarly skills to master it." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992).

6. *See, e.g.*, Daniel A. Farber & Susanna Sherry, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997); Arthur Austin, *The Top Ten Politically Correct Law Reviews*, 1994 UTAH L. REV. 1319 (1994); Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U. L. REV. 233 (1999); Anne M. Coughlin, *Regulating the Self: Autobiographical Performer in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995).

7. L. Hart Wright Professor of Law, Michigan Law School.

8. Robert W. Winner Professor of Law and the Humanities, Yale Law School.

ciling reason and will in judicial review where courts use reason to develop principles to "obtain the consent of the popular will" (p. 14). Likewise, the use of reason to critique existing laws always turns up glitches and friction, inviting suggestions of corrective reform. Kahn sums up the source of the scholarly motivation: "The rule of law . . . is not merely rule under the existing law; it is this whole process of continuous reform" (p. 15).

Juggling reason and will and a virulent addiction to reform scholarship is not the only problem. Instead of functioning as true scholars with impartiality, law professors write as practitioners of reform. They imitate judges by writing article-briefs in the doctrinal form of judicial opinions. They seek to make law work. To Kahn, this reflects the "collapse" of a distinction between the scholar and the object of his study (p. 7). The scholar is in effect the judge manqué. All article-briefs follow the same plot: identify a defect in an opinion's reasoning, devise a rationale for reform, and write a new decision-article (p. 28). The inevitable result is a continuous process of classical doctrinalism.[9]

It is not that Kahn completely condemns reform scholarship, but he does argue that an obsessive interest and disquietude with the topic diverts inquiry into more relevant areas and satisfactory results. Judge manqué scholarship gives a misleading impression that judicial decisions convey power. In reality, judges mainly speak to the practicalities of achieving an end without ever defining that end. Even the Supreme Court cannot set an agenda for the ends of governance. *Brown v. Board of Education*,[10] arguably the most important judicial decision in history, has had modest effects on society, race, and governance (p. 132). Kahn's explanation: "They never had the power; they always lacked the will" (p. 133).

Given the existence of a multitude of complex forces that impact and shape the compass and motivation of judicial power, scholars are wasting time seeking "right" answers when they aren't there or are mute.[11] Kahn's solution: shift the scholarly focus to new sources by

9. P. 19. "[Doctrinal analysis] involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis." Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1113 (1981).

10. 347 U.S. 483 (1954).

11. If we are confident that we are better off after the judicial pronouncement, this is only because we are already committed to a court-centered world in which we evaluate power by looking to the quality of authoritative decisions. If we believe that there are right answers under law and that law has a value in and of itself, then we will argue about the legally correct answers that the Court should reach. This is what most legal scholarship is about. But if judicial decisions do not translate into effective results in the larger political order, then legal correctness may not be much of a value. Getting the law right may not tell us much about the character of the political order.

P. 135.

"looking at the legal imagination" (p. 135). Study the varied contingencies and the context of law's culture, its indeterminacies, and influences on it from the "inheritance of remnants from antiquated belief systems, brought into a loose coherence by virtue of certain master conceptions — e.g., sovereignty, revolution, equality" (p. 137).

THE CULTURAL WAR

Kahn's crusade continues the law academy's paranoid relationship with scholarship. In distancing himself from the reason-will-reform paradigm, he implicitly acknowledges a sense of doubt as to whether law is worthy of serious scholarship. The effort to elevate the scholar above the "practice of law" states the source of the paranoia: the practice of law is a vocation — something like digging ditches or plumbing — and cannot support any attention other than descriptive survey, that is, an explication of what lawyers do, why they do it, and suggestions for improvement (reform).

The scholarship paranoia can be traced to Langdell's admission of law as a vocation by his effort to create a science of law by sequencing cases to form the basis for the deductions of legal principles. "Law, considered as a science, consists of certain principles or doctrines."[12] In objectifying law he rationalized the doctrinal method of scholarship that conforms to Kahn's paradigm — decisions are parsed and synthesized to derive prescriptions to guide judges and lawyers. The objective is problem solving.

The dominance of doctrinalism was assured when the law review network evolved to showcase faculty scholarship. As an editor for the *Harvard Law Review*, John Henry Wigmore said: "We knew that their pioneer work in legal education was not yet but ought to be well appreciated by the profession. We yearned to see the fruits of their scholarship in print."[13] It opened up a unique system that ignores the discipline of peer review thereby depositing virtual control over substance and methodology in the author.

The first major threat to doctrinalism came from the legal realists who questioned the credibility of the notion that "science" defines legal analysis. Kahn detects realism's failure as a movement in its adherence to the reason-will-reform paradigm, thereby remaining "firmly within the grip of legal practice" (p. 24). Once the realist threat dissipated, doctrinalism flourished, enabling faculty to reap fi-

12. Norman Redlich, *The Common Law and the Case Method*, 8 CARNEG. FOUND. BULL. 11 (1914) (quoting Langdell).

13. John Henry Wigmore, *The Recent Cases Department*, 50 HARV. L. REV. 862, 862 (1937) (emphasis removed).

nancial rewards and status from being perceived as producing a form of scientific analysis.[14]

In his zest to save legal scholarship from self-destruction, Kahn conveniently opts to ignore the cultural war that engulfed legal scholarship in the 1980s. When law school enrollment dramatically increased in the early '80s, it signaled more than the brain drain about which Derek Bok complained.[15] It provoked the hiring of a new group of young faculty who entered the academy with a new vision. They questioned, to the point of resentment, the rigidity and authoritarianism of the system that produced them. The newcomers included feminists who had their own score to settle. Not only did both groups share a desire for change, they also had more in common with their colleagues in the humanities than with the doctrinally oriented law school faculty. They became Tenured Radicals, and as Crits (Critical Legal Studies) and Fem Crits, they became instigators of a new culture.

In the meantime, the postmodern revolution exploited its dominance of the humanities to gain control of the university community. The quest for truth succumbed to relativism while emotion trumped objectivity as the interpretation of the text became a game of transgressing and demystifying. Postmodern language never escapes from its duplicity and confusion. Led by Tenured Radicals, the once autonomous law schools joined the crusade of chaos. The values that defined the Langdellian paradigm of scientific analysis were swept away, leaving a dwindling group of liberal law professors, along with a few holdouts in the sciences, to stand guard as the last keepers of the old traditions. To make things worse, they had to fight off both Tenured Radicals and incoming students who had been conditioned to postmodernism in their undergraduate experiences.

Although he recognizes Critical Legal Studies' hostility to the liberal system, Kahn dismisses the Crits as failed reformers. They got too radical — "[s]uch radicalness makes this scholarship seem oddly naive" — and became irrelevant "because no one was listening" (p. 29), thus minimizing their objectives and impact. He is correct on the failure issue, as Duncan Kennedy candidly admitted in 1995: "CLS is

14. *See* ARTHUR AUSTIN, THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION 160-64 (1998) [hereinafter AUSTIN, THE EMPIRE STRIKES BACK]; Arthur Austin, *Law Professor Salaries: The Deobjectification of Legal Scholarship by Tenured Radicals*, 2 GREEN BAG 2D 243 (1999).

15. Harvard University President Bok claimed that the "brain drain" into law schools is "a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, the enhancement of the human spirit." Jethro K. Lieberman & Tom Goldstein, *Why Have Lawyers Proliferated?*, N.Y. TIMES, Aug. 6, 1986, at A27.

dead as a doornail."[16] Crits made a practice of drawing attention to various problems but never followed up with solutions. As Professor Gordon observed, after an exercise in shoveling rhetorical smoke, Kennedy and his friends "zoom[ed] off in their BMWs and Jaguars to continue their class struggle against hierarchy and privilege."[17] The reason they failed at reform was simple — it was never their goal. But they did what they set out to do — wage an all-out cultural revolution against the liberal rule of law.

It was the Crits who introduced postmodernism to the law academy with a tactic now commonly known as trashing. Communicated in a helter-skelter postmodern pitch, trashing is in-your-face jive and chatter used to ridicule and deconstruct liberal symbols and institutions.[18] Crits conducted a radical political campaign to break down the law academy's infrastructure of objectivity, neutrality, and rationality — and ultimately subvert the individualistic, biased rule of law. The liberal, constructed hierarchy would be replaced by egalitarian altruism.[19]

The Crit manifesto, *Roll Over Beethoven*,[20] stands as one of the first — and most passionate — expressions of postmodern legal scholarship. Peter Gabel and Duncan Kennedy, two of the original Crits, engage in a Critspeak hip-hop session of ridicule, contempt, and radical chic. Kennedy praises the interspace of artifacts, gestures, histrionics, soap opera, pop culture, and "all that kind of stuff."[21] Gabel opines: "That I think is indeterminate."[22] The masters of crittrash are, however, coherent on one point. They criticize the reform efforts of liberals and feminists, labeling them hallucinates who co-opt themselves into "adopting the very consciousness they want to transform."[23] Their target is the State — "the state as a collective hallucination."[24] They complain about the reciprocity among people, unconnectedness,

16. Hope Yen, *As HLS Mulls Its Mission, CLS Scholars Remain Quiet*, HARV. L. REC., Dec. 1, 1995, at 2.

17. James Gordon, *Law Review and the Modern Mind*, 33 ARIZ. L. REV. 265, 269 (1991).

18. "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* a germ of truth) in the internally contradictory, incoherent chaos we've exposed." Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984).

19. "Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism. (Love thy neighbor as thyself.)" Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717 (1976).

20. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

21. *Id.* at 9.

22. *Id.* at 53.

23. *Id.* at 26.

24. *Id.* at 28.

and the State as an imaginary political community composed of a "sequence of images forming a kind of dream-like narrative that mystifies and idealizes the painful reality of immediate social experience — the real experience corroded by alienation and mutual distance."[25]

Kahn also views the feminist movement as reformist and, like CLS, as "in thrall to the idea that reason and will are the double sources of the rule of law" (p. 24). There is no doubt that feminists talk a rights game, and it was the Crit's refusal to support their reform aspirations that led to a break between the groups — with the Crits the losers.[26] But that was before the postmodern vision had the opportunity to become a major factor in revising feminist rhetoric. Equality by itself is not sufficient to root out the residual effects of patriarchy and the tyranny of reason. What is needed, according to many contemporary feminists, is a postmodern worldview of reality as a mask for the unordered and holistic solutions that come from feeling and empathy.[27]

A postmodern dialect enables female legal scholars to produce shock trashing to discredit and break down the coherence of the constructed categories and classifications used by the dominant legal ideology to oppress women. Fictional social constructions, like male, female, heterosexual, homosexual, and lesbian, in actuality blur into a continuum. In her controversial postmodern declaration, Mary Joe Frug described in graphic detail the female body existing in a state of constant terror, shocked the readers with the "F" and "C" words, while praising postmodernism for encouraging "wordplay that is often dazzlingly funny, smart, and irreverent. Things aren't just what they seem";[28] that is, things aren't what they seem in a liberal, politically constructed, dominant culture.

The most energetic opposition to the culture of reason comes from the "voice" movement. As females and people of color, writers in this tradition voice the unique and distinct perceptions and experiences of outsiders coping with liberal majoritarian law. Voice people challenge doctrinalism with a new paradigm; they use narratives, parodies, and parables to produce authentic and exclusive accounts of alienation and victimhood.[29]

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25. *Id.* at 35.

26. *See* Robin West, *Deconstructing the CLS-Fem Split*, 2 WIS. WOMEN'S L.J. 85 (1986); AUSTIN, THE EMPIRE STRIKES BACK, *supra* note 14, at 92-93.

27. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Symposium, *Women in Legal Education–Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. 1 (1988).

28. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1047 (1992).

29. The dominant view is summed up by a critic of authenticity: "[The] voice of color is identified and synonymous with marginalized groups in our society whose marginal outsider status enables them to relate important stories — stories that cannot be sincerely told by their privileged majoritarian peers." Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2038 (1991).

Voice comes to the table with formidable leverage. It is marketed as a Kuhnian paradigm change, a new genre of scholarship vetting race and gender.[30] The race and gender orientation tends to mute negative responses. Moreover, the biographical context of narrative stories makes them virtually immune to critical evaluation.[31] Negative criticism merely validates the authenticity of the author's description of victimization. "How can you respond critically? Tell a different story of your own?"[32] Finally, by converting truth into whatever the author decrees, storytelling introduces into legal scholarship a postmodern self that defies consensus.[33]

While the voice medium delivers a message, it is not *the* message. *The* message of Critical Race Theory scholarship is that the liberal, white, male rule of law and the system it maintains are corrupt. This system is an institution predicated on white supremacy, immune to reform, and destined for catastrophe. Derrick Bell uses the voice thesis in a parable about an economically besieged United States accepting an offer from aliens to exchange Blacks for gold and critical chemicals.[34] In another Bell allegory, it takes an explosion killing all Black faculty and administration at Harvard to force an affirmative action hiring policy.[35] Even when the white system makes a concession, it will invariably turn out to be a trick to camouflage some new form of oppression. While Patricia Williams tells stories about persevering in a racist society,[36] Richard Delgado's narratives blame Western men-

30. *See* Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479, 492-96 (1995).

31. Indeed, some advocates of storytelling come close to suggesting that silence is the only permissible response to stories. Whites who sympathetically attempt to analyze or even recount stories told by people of color are said to be guilty of misappropriating the storyteller's pain. For example, when a white woman at a CLS summer camp referred to a story told by a Native Canadian woman as an example to defend the use of personal experiences, the original storyteller protested: 'Did that woman intend to appropriate my pain for her own use, stealing my very existence, as so many other White, well-meaning, middle and upper class feminists have done?'

Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 851, n.233 (1993) (citations omitted).

32. David Sexton, *Radio Review: Should We Be Blind or Not, Prof?*, LONDON TELEGRAPH, Mar. 2, 1997, at 31.

33. *See* STEVEN CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY 10 (1989).

34. "And just as the forced importation of those African ancestors had made the nation's wealth and productivity possible, so their forced exodus saved the country from the need to pay the price of its greed-based excess." Derrick Bell, *After We're Gone: Prudent Speculation on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 400 (1990).

35. *See* Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989).

36. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

tality for unleashing "a ruthless, restless culture"[37] that enslaves people of color.

To Kahn, reform means superficial tinkering — revising process and procedure, courts expanding or contracting rights as professors gleefully and self-righteously churn out critique scholarship. While the Crits cravenly demurred from the revolution, the Tenured Radicals of feminism and the voice people participated in rights advocacy, but only as a support tactic for their main objective — a paradigm change from the liberal culture of reason and rationality to the indeterminacy of the postmodern culture. Like Kahn, they seek a new culture. Unlike Kahn, they are in the process of achieving their goal.

KAHN AS A POSTMODERNIST

Kahn's evasion of the postmodern paradigm change challenge is explained when he outlines his cultural study of law. His creation of what I call the Ideal Legal Scholar avoids contamination from the practice of law by engaging in a Socratic dialogue that enables him to temporarily suspend belief in law practice. By transcending "every context" of the practice of law, the scholar is free "to examine the conditions of belief that make possible our ordinary activities and norms" (p. 33), enabling him to discover postmodern insights: imagination prevails over reason, law is always contingent,[38] avoid making normative judgments, and seek out self so "[w]e can know more about ourselves" (p. 40).

As the central nervous system of certainty, truth is anathema to postmodernism.[39] In assuming that truth interferes with the work of the Ideal Scholar in his cultural inquiry, Kahn implicitly endorses postmodernism. To the Ideal Scholar, truth is inevitably qualified and contested, existing as an attitude or the product of imagination. "Like every constructed world, the critical world exists only as long as we imagine it" (p. 40).

A rejection of truth and certainty does not inhibit Kahn from giving the Ideal Scholar a detailed macromap for the cultural survey. The map calls for the use of what Kahn calls "genealogy" and "architec-

37. *See* Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1370 (1992) (book review).

38. "Understanding the constructed character of the rule of law allows us to see its contingent character and to understand that law's claim upon us is not a product of law's truth but of our own imagination — our imagining its meanings and our failure to imagine alternatives." P. 39.

39. What is striking is precisely the degree of consensus in postmodernist discourse that there is no longer any possibility of consensus, the authoritative announcements of the disappearance of final authority and the promotion and recirculation of a total and comprehensive narrative of a cultural condition in which totality is no longer thinkable.

CONNOR, *supra* note 33, at 10.

ture" to uncover a "legal aesthetic" (pp. 40-41). Genealogy traces the remnants — implications — of cultural transitions, to etch out a narrative of beliefs. Architecture relies on analogy to show that in law the past always exists in the present. "The point of legal interpretation is always to recover, i.e., to make present, something that appears already to exist" (p. 52). Unlike science, in which progress destroys the past, in law nothing is ever displaced. "All law remains available at every moment" (p. 54).

By giving the past continuity, Kahn compels the Ideal Scholar to consider the consequences of relevant transitions, especially those associated with religion and revolution. Pass a law, lock someone in jail, or write a brief, and it resonates with the authority of Moses descending from the Mount with God's law. Law "is simultaneously a product and a continuing representation of the divine origins of the community" (p. 47). Revolution breaks out, law ends, but "[w]ithout revolution, law does not begin" (p. 69), as each validates the other.

Pondering the indeterminacy of religion and conjecturing over the remnants of political transitions provide the perfect pursuit for the postmodern scholar. Law as imagination and fiction have a Derridaian bite that resonates in the gamesmanship ploys of the faculty lounge. But Kahn leaves postmodern abstractions to micromanage and in the process puts his Ideal Scholar in an awkward bind.

According to Kahn, every institution can make representation claims, often leading to multiple or competing claims. For example, both judge and jury can claim to represent the popular sovereign, forcing what Kahn calls a "contest" with enormous implications. If the jury is speaking for the people as representative of the popular sovereign, jury nullification would "appear permissible because it is understood as a direct action by the people" (p. 80). But if it is the court that can claim sovereign representation, nullification would constitute an inappropriate usurpation of power. "The judge can claim to know the law and, through law, to know the sovereign people better than any accidental collection of persons on a jury" (p. 80).

At this point the Ideal Scholar faces a dilemma. Bound by Kahn's ukase to avoid the trenches of reform, the Scholar's work is at an end. He has identified the intersection between the institutions and the competing representation claims but can do no more than note their contingent existence; he cannot, as a postmodernist, make a judgment on a "correct" claim of representation, but instead, he "explores the multiple possibilities of representational claims" (p. 78). Here is the dilemma. Stopping at this point is a counterintuitive inhibition for serious scholars: it cuts against the moral obligation, inherent in the scholarly ethic, to carry inquiry to a conclusion — whatever the consequences. Ironically, Kahn illustrates the dilemma by being unable to refrain from making a judgment: while jury nullification is generally "flawed justice," it may be appropriate in certain situations, such as

charges of euthanasia (p. 81). Kahn's relativistic cultural analysis collapses.

The explanation for Kahn's vigorous stand for cultural scholarship comes in four "methodological rules" whose intent is to render practical scholarship either superfluous or officious. The rules come in two strands: first, every meaning in law is contingent. Even the source of power, the judge, exists as a contingency — either as a suppressed self in which he conveys a rule of law image, or, in the alternative, suppressing the law image to become a political figure (*e.g.* Chief Justice Earl Warren) (p. 101). In law, progress is a myth, and there are no successes or failures, resulting in persistent competition among meanings. Reform under these conditions is thus a meaningless ephemeron. "In the absence of a hierarchy of norms, no program of reform can silence alternatives" (p. 104).

Secondly, law is not "a failed form of something other than itself" (p. 92), and it is not something in transition. "[L]aw is a set of meanings by which we live — and that is all that it is" (p. 102). Practical scholars like Richard Posner can effect a type of change that never impacts on the rule of law — which existed before and will exist after Posner's reform. Moreover, debates among practical scholars result in "balancing" and political compromises internal to the rule of law. The failure or success of the reform does not affect the nation's faith in law's rule, "which dates from the founding" (p. 105).

Kahn says that he does not seek the demise of reform scholarship — instead he suggests the use of some restraint to tone down the rhetoric and expectations. Nor should the Ideal Scholar subvert the practical work of traditional scholarship (p. 137). These protestations cannot smokescreen his contempt for the practical scholar's waste of energy on unproductive goals. Arguing about the interplay of reason and will and how the authoritative sovereign should govern detours the practical scholar to spurious claims on the authority and power of the judiciary, wasting resources best devoted to "the character of the study of law" (p. 135). Kahn cautions that, while courts can tell us which side of the road to drive on, they do not have the authority to affect the vital factors of governance. "Courts can draw our attention to the aberrational, i.e., to remnants of social practices that we have otherwise abandoned, but they cannot make us other than we are" (p. 130). Dedication to reform analysis hides the reality that courts have marginal effect on societal outcomes.

Kahn's message is that writing about what should be done and arguing over which Justice's opinion is "correct" may be a self-serving path to academic status but is a waste of time for discovering the implications of legal culture. He wants the Ideal Scholar to follow the cultural inquiry to the source of "real power" that "inheres in our expectations and beliefs, in the institutional structures that we take for granted, and in countless, mundane daily choices" (p. 132). The objec-

tive: redefine and reorient the character of the study of law by examining the legal imagination, a concept that covers the full range of experiences such as the impact of sexuality and the implication of the body. "The cultural study of law investigates a way of life in all its diversity, not just those objects and practices positively labeled 'law' " (p. 125).

Kahn leaves no doubt that it is a religious meaning that inspires the imagination of the Ideal Scholar. Even violence can be understood by reference to religion. To connect law and violence, one must understand that sacrifice is an act of violence that transforms ideas into reality. Kahn cites Abraham's sacrifice of his only son Isaac in exchange for a nation under law (p. 95). Where there is no divine response, sacrifice is meaningless violence. Kahn's cultural inquiry demonstrates that violence can best be understood as a meaningful factor in the legal imagination — not as an act of failure or a mistake implying "that somehow we have a world that we did not intend to have" (p. 97).

LAW AND LITERATURE

"To understand the rule of law we must examine that which we imagine to be other than law" (Kahn, p. 120).

"A cultural approach sees that all of law's texts, including those of the legal scholar, are works of fiction" (Kahn, p. 139).

Kahn is preaching a version of postmodernism to a sympathetic audience of feminists, critical race people, and Tenured Radicals. He can also count on support from elements of the law and literature group. While Kahn correctly characterizes law and banana efforts[40] (for example, law *and* psychology, sociology, economics, etc.) as "securely within the practice of law, regardless of their letterhead" (p. 26), the literature movement has diverse letterheads, along with an eclectic range of uses and effects, including Professor White's use of literature to postmodernize law. Using "good" literature to teach writing skills obviously comes under a law practice characterization called remedial education. We get a blurred letterhead from an examination of William Faulkner's *Intruder in the Dust*,[41] which discloses multiple meanings on the intersection of race, violence, maturation, and law.[42] There is no blurring of meaning or intention, however, when Robin

40. "Virtually all the leading law schools offer what detractors call 'law and banana courses' like 'Ethology of Law' at Yale, 'Rhetoric, Law, and Culture' at Michigan, 'Anthropology of Law' at Columbia and 'Law and Economics' almost everywhere." Charles Rothfeld, *What Do Law Schools Teach? Almost Anything*, N. Y. TIMES, Dec. 23, 1988, at B8.

41. WILLIAM FAULKNER, INTRUDER IN THE DUST (1948).

42. *See "The Law and Southern Literature" Symposium*, 4 MISS. C. L. REV. 165 (1984).

West uses a Franz Kafka short story, *A Hunger Artist*,[43] to trash Richard Posner's world of economic individualism. By selling admission to people to witness him starving to death, the Hunger Artist is the "ultimate Posnerian entrepreneur,"[44] dedicated to the corrupting individualism of a capitalist market economy. West interprets the story to depict a Posnerian system that "leaves all preferences satiated at every moment of autonomous choice"[45] and refuses to intervene in social and economic dislocations.

Posner disputes the accuracy of West's interpretation of Kafka,[46] thereby missing the point. It is not a matter of interpretative translation; West incorporates Kahn's notion of "other than law" and culture as "fiction" to derive a description of the oppressive effects of an economic system driven to solve every problem — from adoption to violence — by resort to free market exchange. West's pretension thus demonstrates the affinity between Kahn's culture of imagination and the use of literature to explicate. While literature has always interacted with law, it has generally been as background presence. Years ago, for example, it was common practice to provide incoming students with a list of "recommended" literary icons that would present insights into the profession. In the postmodern era, law and literature has become a featured attraction.[47] Teaching Virginia Wolfe, Dick Gregory, and Marcel Proust gave Tenured Radicals an opportunity to demonstrate disdain for objectivity, try new critical theories, and offend the Kingsfields of the Academy. More literature courses were added to respond to demands for exposure to feminist work. Whatever the motivating currents, the movement bears the imprint of James Boyd White, who got things going in *The Legal Imagination* (1973)[48] and now sums up in *From Expectation to Experience.*

Professor White has been conducting a cultural inquiry of his own, anticipating Kahn's scorn for "practical law" by vehemently rejecting the use of literature for vocational purposes. White's Ideal Reader

43. FRANZ KAFKA, *A Hunger Artist*, *in* SELECTED STORIES OF FRANZ KAFKA 188 (Willa Muir & Edwin Muir eds., Random House 1952).

44. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 393 (1985).

45. *Id.* at 394.

46. Posner's response: "It [*A Hunger Artist*] may be about many things. But only superficially is it about hunger, poverty, the pitfalls of entrepreneurship, and the fickleness of consumers." RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 180-81 (1988).

47. In a 1993-94 survey of 199 law schools, 84 reported offering law and literature courses. Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 666 (1995).

48. JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 311-14 (1973) [hereinafter WHITE, LEGAL IMAGINATION].

does not read literature to fact monger, to gain clues to character, or to learn methods of critical interpretation. Likewise, White rejects literature as constituting a road map to rhetorical flourishes and stratagems for getting an edge in litigation. Instead, the Ideal Reader engages the text "to transform one's sense of language, of the mind, and of the world" (p. 56). The objective is to exploit the power of reading in a performance that enables us to recognize experiences beyond self.

> What the habitual reading of literature offers, then, is not a set of propositions or a method leading to a set of results, but the experience of directing one's attention to a plane or dimension of reality that is normally difficult or impossible to focus upon, namely the ethical and linguistic plane, where we remake in our texts both our languages and ourselves. To the literary mind language is not simply transparent, a way of talking about objects or concepts in the world, but is itself a part of the world; language is not simply an instrument that "I" use in communicating ideas to "you" but a way in which I am, or make myself, in relation to you. [p. 71]

Kahn wants to rehabilitate the legal scholar through imagination of self and other in conceiving the rule of law; White wants to rehabilitate the law student through exposure to the literary imagination, ultimately transforming the student into an Ideal Reader with the instincts of an Ideal Scholar. He begins by having students examine nonlegal texts to identify voices and discourse that legal expressions omit. The next step is to learn — and appreciate — how nonlegal authors transform language. Then comes a critical internal dialogue; a student is ordered to conjure up an experience such as the death of a friend, the character of another person, regulation of conduct, and "think" about it, first as a lawyer, and then "in some other way available to her, as she might do in the rest of life" (p. 74). In the ensuing dialogue, a comparison emerges in which the law discourse comes across as artificial, lifeless, and packed with objectified, analytical rigidity.

White initially assumed that the comparison would compel the student to begin to doubt his choice of law as a career and, as a counter, to develop a creative alternative to the law voice. That is not what happened — instead students relied on the voice they had successfully used in undergraduate school, a voice as vacuous as lawspeak. The result is frustration: "[T]he student finds himself using two voices, both of which are unsatisfactory to him" (p. 75).

The remedy for this face-off is literary imagination. Using the energy from literature, students learn to speak in a new voice that enables them to produce more inspired law work as well as discoursing in a personal voice of their own. They become Ideal Readers. The power of nonlegal voices informs the student, "establishing possibilities to admire, or in some cases deplore, that may help us investigate how this life can be led well" (p. 78).

White describes a postmodern version of basic training: take young, naïve recruits, pound into their pliable psyches how futile their pitiable existence as civilians was, then inculcate them with the combat techniques of a more fulfilling life. Like my old top sergeant who opened up every day by looking me up and down before advising me that "if that's ed-a-cation, I don't want none of it" (he was the best professor I've ever had), White seeks to convince law students that lawspeak is unworthy, stunted, and that they are in need of redemption through literature. *Darkness at Noon*[49] comes to law school.

In a typical drill session from *The Legal Imagination*, White orders the student recruits to read an excerpt from *The Education of Henry Adams*,[50] reminds them of Joseph Conrad's quitting the sea to become a writer — "Why on earth did he do so . . . ?," asks a series of questions, orders them to "express the real you," "[t]hink now of your relations with others," "[c]onsider what you do when a friend suffers,"[51] and on and on. The message is clear: develop a voice of empathy and compassion or remain condemned to lawspeak.

Even in the congenial milieu of a writer's workshop or the specialization of an English major, the conversion White seeks is problematic. Acquiring the temperament or self that he envisions involves a personal journey, demanding serious maturation and considerable sacrifice. As an undergraduate I took over thirty hours of lit courses and never encountered the type of highly programmed badgering that White throws at his students. I experienced passion rather then programming. If I accessed a new voice, it did not come from classroom badgering but from the opportunity to hear William Faulkner discuss the creative process.[52] He was "a tricky man, not above playing, however courteously, with his audience,"[53] but he was open to the creative process. There is another problem: White eschews the use of literature to teach style yet promotes a drill program force-feeding students with demands for copious drafts, conveying the message that style is in fact the objective — why else engage in the ennui of drafting exercises?

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49. ARTHUR KOESTLER, DARKNESS AT NOON (Daphne Hardy trans., MacMillan Co. 1941) (1940).

50. HENRY ADAMS, THE EDUCATION OF HENRY ADAMS: AN AUTOBIOGRAPHY (Houghton Mifflin Sentry ed., 8th prtg. 1961) (1918).

51. WHITE, LEGAL IMAGINATION, *supra* note 48, at 311-14.

52. *See* FAULKNER IN THE UNIVERSITY: CLASS CONFERENCES AT THE UNIVERSITY OF VIRGINIA (Frederick L. Gwynn & Joseph L. Blotner eds., 1959).

53. *See* Douglas Day, *Introduction* to FAULKNER IN THE UNIVERSITY xi (Frederick L. Gwynn & Joseph L. Blotner eds., 1959).

POSNER V. WHITE: PARADISE LOST — OR GAINED?

The harshest criticism of White's work comes from Judge Richard Posner, who first raised the issue of relevance in a law review article[54] followed by a book.[55] He rejects the assumption that literature can furnish unique insights into law or that lawyers, as lawyers, can contribute to the understanding of literature. Literature may reference law, but law is not the central story. "There are better places to learn about law than novels . . . ."[56] Moreover, White's literary musing reflects nonlegal interest and training, not legal skills. Posner debunks what he calls the "great false hope": that literature can inform lawyers about interpretative knowledge, which can help in extracting meaning from text. To Posner, the great false hope masks a post-structuralist ploy that would equate legal interpretation with a system of literary interpretation that replaces the author's authority over meaning with the authority of reader-critics. "[T]he readers have now overthrown the bosses and installed themselves in power."[57] Without the direction of the author's intention, reader-critics have total control over meaning, leading to a system where there can be as many "correct" interpretations as reader-critics. Posner's distinction is that literary people can get away with poetic license but not judges who have the responsibility to impose their will on the public. Posner concludes: "the functions of legislation and literature are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed for the one have no useful application to the other."[58]

If literary imagination becomes the springboard for legal interpretation, it is Paradise Lost for Posner and his liberal colleagues. His 1986 article described an interpretative attitude that defined the then dominant liberal tradition.[59] If he had put his ear to the railroad tracks, he would have heard ominous vibrations. Postmodernism was beginning to filter into the law academy, filling a leadership void left by disconnected and aloof liberals who were blind to, or intimidated by, the aggressive tactics of Tenured Radicals. The Radicals constitute a group of people who, as the Yale Law School dean said, care more about the humanities than law.[60] By the early 1990s the post-

54. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986).

55. POSNER, *supra* note 46.

56. Posner, *supra* note 54, at 1356.

57. TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 85 (1983).

58. Posner, *supra* note 54, at 1374.

59. *See generally id.*

60. Former Dean Wellington was credited with the complaint that "law professors today are more concerned with intellectual currents among their colleagues in the arts and sciences

modern influence had infiltrated the American Association of Law Schools, which decreed "nontraditional" (read postmodern) scholarship acceptable for promotion and tenure.[61] But give Posner credit for ferreting out what White and the postmodernist were after — the use of the literary imagination to distill objectivity and the Posnerian economic model from law.

Two years after Posner's book came out, White pounced like an offended Norman Mailer going after Gore Vidal. He started by candidly acknowledging, "I agree with virtually nothing that is said . . . ."[62] He accused Posner of a hidden agenda; what is offered as an examination of literature is in reality a Langdellian legal brief stacked with coercive arguments and propositions that fail to "engage" (one of White's favorite words) the texts he seeks to explain.[63] Compiling facts and identifying issues, Posner treats texts as if they were legal precedent. He gets the ultimate put-down — he is an anti-intellectual who speaks in an academic-lawyer-economist voice that "prevents him from seeing in the texts he studies the most important part of their meaning."[64] Posner is not an Ideal Reader.

White's main criticism is that Posner suffers from an inability to "engage" — or connect — to text and that that is a deficiency that compels him to force the judgment that literature has nothing to say about extracting meaning from authoritative legal texts.[65] Otherwise he could divine the message that uncovering original intention is neither linear nor a function of marginal cost but comes from the use of the literary imagination — it is, in other words, an art.[66] From expectation to experience, White invokes the translator's analogy: every textual translation adds something that was not in the original or omits something that was. To demonstrate how the translation process works, White has students translate "All men are created equal" into a

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and less concerned about law practice and the output of the bench." John C. Metaxas, *Two Justices, Self-Congratulation Mark Harvard Anniversary Bash*, NAT'L L.J., Sept. 22, 1986, at 4. He subsequently wrote that they "do not venture outside the ivy-covered walls, scorn the practicing lawyer and his work . . . and look for rewards only from within the universities." Harry Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987).

61. In making promotion and tenure decisions faculty are to avoid "prejudice against any particular methodology or perspective used in teaching or scholarship." *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 505 (1992).

62. James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2014 (1989) (reviewing POSNER, *supra* note 46).

63. *See id.* at 2028.

64. *Id.* at 2015.

65. *See id.* at 2015 (noting that "Posner does not treat literature as literature . . ."); *id.* at 2033 ("Posner tends to look right through the language of the texts he reads . . . ."); *see also id.* at 2021-22.

66. *See id.* at 2023.

foreign language of their choice. "The results are astonishing: in some languages, such as Korean or Chinese, my students report that the sentence they produce is simply incoherent or unintelligible" (p. 85).

The analogy is that the lawyer-artist, in reading the authoritative text to extract a meaning for application in a new context, will necessarily add and omit.[67] The ascertainment of a static and immutable original meaning is, under the translator's analogy, impossible and a dangerous assumption. This does not mean, as Posner argues, that the lawyer-artist is empowered with the unbridled discretion to pick meaning out of the air with Derridaian insouciance. The lawyer-artist is always restrained by an obligation of fidelity to the original text. "The lawyer is thus a kind of translator, a writer who necessarily remakes an original text but always under the obligation to do it justice."[68]

Postmodernism endorses language lacunae: obscurantism to mask substantive confusion or vacuity.[69] Posner complained that he had difficulty following White's exhortative abstract discourse.[70] Unquestionably White has an affinity for language lacunae — in part attributable to the material in which he trades. He is essentially an English professor who crusades in the law academy and understandably lapses into rhetorical enrichment deemed fashionable in an English department. Then too, like Kahn, he is a postmodernist, and that's how they talk. The problem for outsiders is cutting through the rhetorical stratagems to ascertain if there is a hidden agenda.

White's translator analogy requires some serious cutting. He uses the analogy to demonstrate that intentionalism is a sham because original intent defies identification. While translation produces "a kind of relativism" (p. 84), White claims that it never dissolves into deconstruction. The "good lawyer" and the "good judge," who produce the ideal interpretation for a given context, can bypass the abyss of deconstruction (p. 85), where there is no fixed meaning of a text,

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67. *See id.* at 2021.

68. *Id.* at 2022 (footnote omitted).

69. Critic Raymond Tallis says: "clarity is the enemy of writers whose stylistic mannerisms serve to cover over difficult theoretical problems by making [it] hard to pin down just what they are saying." Raymond Tallis, *A Cure for Theorrhea*, 3 CRITICAL REV. 7, 29 (1989) (book review). John Ellis identifies another consequence of obscurantist terrorism — it deflects criticism "so that familiar positions may not seem so familiar and otherwise obviously relevant scholarship may not seem so obviously relevant." JOHN M. ELLIS, AGAINST DECONSTRUCTION 142 (1989).

70. *See* Posner, *supra* note 54, at 1392 ("[White's] writings on law and literature contain much on literature, but little on law beyond exhortation to lawyers and judges to be more sensitive, candid, empathetic, imaginative, and humane. The exhortation is timely and eloquent; but what exactly White envisages for law as a humanity I do not know. His most recent effort to explain what he means is pitched at so high a level of abstraction that I have lost the thread of his discourse.").

except in the experience of the reader "and that experience is immediately compromised the moment you say something about it."[71]

In a search for the ideal interpretation, how does the "good judge" overcome the relativism of the translator's analogy? Easy: he engages in "a perpetual negotiation between the self and the world, including other people" (p. 87), learns what they say or do, looks to other languages, values, and cultures, while comparing the judge's own language with others. It is like reading an Alan Greenspan transcript; you know he is making a point, but you're not sure what it is. Like Greenspan usually does, White reveals the point at the end: "There are no right answers here, but a conversation all the terms of which are tentative or uncertain" (p. 87). Here is the hidden agenda: the "good judge" and the "good lawyer" are, in fact, contrary to White's assertions, engaging in deconstruction. Like Paul de Man, the "good judge" knows that language never escapes "from the duplicity, the confusion, the untruth that we take for granted in the everyday use of language."[72]

Professor Kahn tells us, "The power of irony extends everywhere" (p. 76), presumably even touching White, Paul de Man, and deconstruction. White rejects deconstruction for going too far by denying the possibility of *any* meaning.[73] He exaggerates the range of deconstruction; meaning exists but only for an instant, it is constantly defined and refined, never finalized, and always subject to the trace of previous and subsequent words.[74] For the literary critic there is a more compelling reason for staying away from deconstruction — it is déclassé. Once the chic literary — and law[75] — fashion, it self-destructed from the excesses of Jacques Derrida,[76] the debacle of the Fish Bowl at Duke,[77] and the Paul de Man scandal.[78]

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71. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 65 (1980).

72. PAUL DE MAN, *Criticism and Crisis*, *in* BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM 3, 9 (1971).

73. *See* White, *supra* note 62, at 2017 n.8.

74. *See* Arthur Austin, *A ~~Primer~~ on ~~Deconstruction~~'s "Rhapsody of Word-Plays"*, 71 N.C. L. REV. 201, 205-6 (1992).

75. A state supreme court judge advertised for clerks who could apply "deconstructionist textual theory to workers' compensation statutes and Article 9 of the U.C.C." David Margolick, *At the Bar*, N.Y. TIMES, July 5, 1991, at A12.

76. "[F]or readers with a lifetime to spare, there is also a 100-page essay by Jacques Derrida, dealing with a subject yet to be determined." WILLIAM E. CAIN, THE CRISIS IN CRITICISM: THEORY, LITERATURE, AND REFORM IN ENGLISH STUDIES 167 (1984).

77. Stanley Fish transformed a mediocre English department into a national fashion plate by hiring stars in postmodern fields like deconstruction. It became the cutting-edge of literary criticism. After intense political infighting, it self-destructed. *See* David Yaffe, *The Department that Fell to Earth*, LINGUA FRANCA, Feb. 1999, at 24.

78. Three years after his death, de Man was exposed as a Nazi collaborationist and propagandist, having published more than 170 anti-Semitic articles. *See* AUSTIN, *supra* note 14, at 106-09.

The irony is that the rumors of its demise put up a smokescreen for deconstruction's current revival under postmodernism. The aphrodisiac high from telling Homer and Shakespeare what they meant proved too much as postmodernists searched for new ways to retain control of the text. And what better strategy than to use literature as a vehicle to showcase legal texts as vulnerable to the interpretative inclinations of the Ideal Reader? It reminds me of the time I heard William Faulkner tell a graduate English student — an Ideal Reader — who was badgering him about the character implications of Flem Snopes that, if that's what the student got out of Flem, that was O.K. with him.[79] Faulkner was not about to get into an argument over what he — the author — meant to say about one of *his* creations.

Both Kahn and White vehemently urge the absence of correct interpretation — truth is invariably contingent, incorporating traces of the past and future. "The idea," White says, "is to undermine the assumption that words 'have' meanings, and suggest instead that they have potential for meanings of many kinds."[80] White's translation analogy automatically generates static — meanings omitted or added — that renders interpretation problematic. The designation of a "good lawyer" and a "good judge" with commitments to "justice" is an open-ended invitation for context-dictated value judgement, and is subject to Posner's wrath for cutting "himself loose from moorings that are part of the fundamental design of American government."[81]

EDWARDS VS. WHITE

First came the postmodernistic scholarship — then came the critical reaction. The most dramatic criticism came from Judge Harry T. Edwards of the D.C. Court of Appeals and former Michigan law professor who got the academy's attention by charging that professors at elite schools were imitating the arts and sciences with rogue scholarship.[82] He labeled them ivy tower dilettantes who, as " 'impractical' scholars,"[83] produce abstract theory unconnected to law. With a dedication to indeterminacy, Critical Legal Studies falls in the impractical category, while law and economics, with flights in abstraction, exem-

79. This was part of a conversation that I overheard in an English class at the University of Virginia in 1958. I like to think that Faulkner would have agreed with me that there is a lot of Flem in Bill Clinton. *See* Arthur Austin, *From Flem Snopes to Bill Clinton Somehow We've Been Here Before*, WASH. TIMES, Sept. 7, 1998, Fair Comment, at 30.

80. P. 79. White sounds like Stanley Fish: "The objectivity of the text is an illusion and moreover, a dangerous illusion, because it is so physically convincing." FISH, *supra* note 71, at 43.

81. *See* Posner, *supra* note 54, at 1370.

82. *See* Edwards, *supra* note 5.

83. *Id.* at 35.

plifies the irrelevance of theory. As for law and literature, Edwards tosses it aside as making no practical contribution — it "simply describes certain texts."[84]

With indignant flair, the Judge took the debate to a different venue; while Posner focused his criticisms on literature, Edwards indicted the spread of the postmodern culture into legal education — and even into practice. It was a venue that gave White an opportunity to reprint an article presenting a richer and more encompassing justification for his literary imagination (pp. 43-51).

According to White, scholarship is more complicated than Edwards's misleading dichotomy between the practical and the theoretical. White contends that everything starts with the law school mission, which should not teach task assigning, present "right" or "wrong" choices, or burden students with the acquisition of skills. The objective is expansion: learning one's mode of thought, engaging in self-criticism, and making choices "under conditions of radical uncertainty" (p. 47). It is a matter of translating from other fields, testing the language of one field against that of another. The mission is to teach "responsibility for the operations of one's own mind" (p. 47).

White thus "engages" Edwards by converting his complaint against scholar dilettantes into a cultural issue and responds by invoking the vision of the literary imagination. When Edwards complains about the lack of ethical training in the law academy,[85] White blames it on a tunnel-vision devotion to teaching the practical skills of mechanical jurisprudence (p. 45). The solution is cultural; ethics comes from the holistic inspiration of the transformative effects of the literary imagination, which induces respect for others and for what lawyers and judges do. Law school should teach "responsibility for the operations of one's own mind, and for the judgments one reaches; responsibility to the law itself" (p. 47).

The inclusive range of a holistic education is not unlimited and unconditional. While White would tolerate the participation of the social sciences, they embrace "tendencies of a different kind" (p. 51), that threaten the academy. Because of the seriousness of the threat — which we can assume comes principally from Posner and the law and economics gang — he advocates a more vigorous defense against the "tendencies of a different kind" than is presently being displayed. "It is possible that the defense will fail, and law as we know it will disappear, which I would regard as a tragedy beyond contemplation" (p. 51).

White thus uses the literary imagination to cast law and economics as a threat to convert legal education into a monster of objectivity, in-

84. *Id.* at 49.

85. *See id.* at 38, 66-74.

dividualism, and efficiency. Posner and his Chicago coterie are conspiring to bring a *Hunger Artist* ethos to *One L.*[86] Like Robin West, White sees a Kafka metamorphosis in every classroom, morphing students into Ivan Boeskys.[87] There is a threat, but it comes from the balkanization of legal education into a law *versus* banana squabble between the traditionalists and younger Tenured Radicals. Here is more of Kahn's ubiquitous irony: as proponents of banana disciplines, White and Posner are bound together in a common cause of survival.

It was Posner as professor who broke the door down for the acceptance of bananas. While there had been modest cross-fertilization with the social sciences, the appearance of law and economics sparked a revolution. An article in the *Wall Street Journal* reported it as "the most important thing in legal education since the birth of Harvard Law School."[88] As a progeny of the Chicago School of Economics, and with the sponsorship of the University of Chicago Law School, the movement overcame strong opposition to become a curricular fixture. The long-range consequence is that Posner and his zealous followers made all bananas respectable, prompting the *New York Times* to ask: *What do Law Schools Teach? Almost Anything.*[89]

Edwards does not advocate the total exclusion of theory; rather he concedes that, in moderation, exposure to nonlaw fields could provide valuable insights. To him, the threat comes from volume; the weight of the banana invasion has converted the curriculum into a graduate school of social science and humanities.[90] In a 1998 essay Peter H. Schuck of Yale Law School agreed with Edwards on the split between practice and education but discounted its effects. "It poses no serious problems . . . and it can be reduced but never bridged completely, which in my view is fortunate for both sides."[91] For support, he cites a study purporting to show no significant change in the quality and quantity of doctrinal scholarship from 1960 to 1985.[92]

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86. SCOTT TUROW, ONE L (1977) (providing a diary of the author's first year at Harvard Law School).

87. Boesky was a Wall Street takeover expert caught and sentenced for using inside information who reportedly said: "Greed is healthy. You can be greedy and still feel good about yourself." *See An Insider Goes Inside*, WASH. POST, Dec. 21, 1987, at A22.

88. Charles Barrett, *A Movement Called "Law and Economics" Sways Legal Circles*, WALL ST. J., Aug. 4, 1986, at 1 (quoting Bruce A. Ackerman).

89. Rothfeld, *supra* note 40.

90. *See* Edwards, *supra* note 5, at 35-41, 47-57.

91. Peter H. Schuck, *The Profession and the Professors*, AM. LAWYER, July/August. 1998, at 85, 86.

92. *See id.* Schuck does not identify the study. I suspect it was Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK L. REV. 353 (1996), that surveyed articles from 1960 to 1985. For a study demonstrating "that modern legal scholarship is losing touch with the practice of law," see Michael D. McClintock, *The De-*

It is not that his data is flawed — it is simply dated and therefore irrelevant. An economist would call it a case of "creative destruction": it was not until the mid- to late 1980s that the postmodern movement tripped in with sufficient influence to "creatively" usurp control of the legal education market from the liberals. *Roll Over Beethoven*,[93] the Crit manifesto, was published in 1984, and storytelling, the Critical Race trademark, got a jump start in 1989 from a *Michigan Law Review* symposium,[94] while the *Harvard Law Review* published Frug's postmodern manifesto in 1992.[95] Law school catalogues began to resemble an undergraduate course menu inspired and taught by an expanding collection of nonlaw doctorate faculty who came on board during the mid-eighties. Schuck notes that Yale has about 15 nonlaw Ph.Ds.[96] My school has dual appointments in history, medicine, economics, and political science.

What happens when postmodern scholarship gets to the Promotion and Tenure Committee is a topic of some bewilderment. Rather than delaying nontraditional writing until they get tenure with obligatory doctrinal work, young faculty now want to get an early start on a postmodern career. There is a catch — how does the Committee proceed? What do they use for evaluative criteria? If they thought critical evaluation of doctrinal work was problematic, wait till they deal with narratives and other postmodern genres.[97] Instead of trying to determine whether the article adds to the knowledge of the field, the evaluator can look for its transformative effects on the audience. The question is not whether the work solves a problem, but rather: Does it resonate? It is not the comprehensibility of the analysis and research but whether the author manifests a commitment to an oppressed group. The burden is on the evaluator "to discern the unifying threads of a nonlinear argument."[98] Confronted with this formidable challenge, the prudent committee will opt to rely on "those they recognize as experts in the genre for the[] assessment."[99]

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clining Use of Legal Scholarship by Courts: An Empirical Study, 51 OKLA. L. REV. 659, 688 (1998).

93. Gabel & Kennedy, *supra* note 20.

94. Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

95. Frug, *supra* note 28.

96. *See* Schuck, *supra* note 91, at 86.

97. For a discussion of scholarship evaluation see Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

98. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1042 (1991).

99. Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 709 (1992) (footnote omitted).

The process could lead to some mean-spirited academic infighting when the full faculty gathers to make hiring and promotion decisions. The law core people — the liberals — can be expected to protect their turf from further erosion in a replay of Edwards versus White. To practical scholars, like Edwards, the inability to evaluate banana scholarship justifies rationing that participation in the academy.[100] Things could get worse when it is banana *versus* banana in a struggle for preference. The only criteria for comparison are in the subjective judgments of the respective proponents, opening up the prospect of *ad hominem* attacks or arguments over the comparable merits of teaching equilibrium theory, *Billy Budd*, or C. Wright Mills.

"CONSCIOUSNESS III IS DEEPLY SUSPICIOUS OF LOGIC, RATIONALITY, ANALYSIS, AND OF PRINCIPLES."[101]

I first encountered postmodernism in 1970 in *The Greening of America*. Charles Reich, a young law professor, wrote it during encounters with students in the dining halls at Yale. In the style we now know as postmodern pomobabble,[102] Reich exhorted the '70s youth to reject the liberal establishment, something he called the Corporate State, which he held responsible for the evils of technology, rationality, meritocracy, and the hierarchical authority of education, creating the "worst of all possible worlds."[103] The salvation was Consciousness III: a "way of life .... It is the energy of enthusiasm, of happiness, of hope."[104]

Like Reich, Kahn and White are after the same Corporate State culprits. The law hierarchy uses the coercive authority of rationality to oppress the self by denying the presence of plurality, fragmentation, and indeterminacy. For Kahn, Consciousness III is the cultural inquiry which puts space between the Ideal Scholar and the logic of law. "The real stakes in scholarship are not over the reform of law, but the character of the scholar" (p. 137).

When asked by an Ideal Reader to rate the living novelists, William Faulkner startled everyone by putting Tom Wolfe first — followed by himself, Dos Passos, Hemingway, and Steinbeck. Why Wolfe? He explained that the ranking was based on "the splendor of our failure .... he failed the best because he had tried the hardest, he

100. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2218 (1993).

101. CHARLES A. REICH, THE GREENING OF AMERICA 256 (1970).

102. *See* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

103. REICH, *supra* note 101, at 110.

104. *Id.* at 234.

had taken the longest gambles, taken the longest shots."[105] And so it is with Professor Kahn; his lofty aspirations are beyond anyone but Paul Kahn.

On a practical level there are formidable barriers to Kahn's project. Reform scholarship is what law academics do; it is their calling and their substance. We like writing about law; there is something for everyone — advocacy, thought pieces, problem solving, trashing for the mean spirited, and so on. Even shirkers like the reform model; when pressured by deans for a publication, they know they can easily turn off the heat with a quickie. There is, however, a more serious predicament: Just what is a cultural inquiry? Where does reform scholarship stop and the Ideal Scholar take over? "Genealogy," "architecture," and "methodological rules" work for Kahn but are too rarefied for general consumption. It may be that Kahn is the first — and last — Ideal Scholar.

White includes law and economics as a coconspirator in the Corporate State, while exercising considerable hostility towards Posner, whom he accuses of treating language as "scientific and economic in character,"[106] resulting in "lapses of taste and judgment"[107] in reading texts. White's *From Expectation to Experience* is the literary imagination tracking Reich's Consciousness III's praise of nonlinear thought, the "spontaneous" and "disconnected,"[108] as the Ideal Reader looks for contingency and engagement in literature.

As part of the postmodern movement, law and literature and White have bright futures. White knows how to push the right buttons and has an obvious affinity for building an interest in textual exploration. Competing in a declining buyer's market, law schools seek to differentiate their school from the competition. Offering nontraditional bananas has become the favorite product differentiation tactic, assuring a fertile life for White and his literary imagination.

105. FAULKNER IN THE UNIVERSITY, *supra* note 52, at 206.

106. White, *supra* note 62, at 2015.

107. *Id.* at 2027 n.40.

108. REICH, *supra* note 101, at 257.