

LAW, LITERATURE, AND THE “CONVERSATION OF MANKIND”

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It is common in our time that we use language not merely to define, but to create our world. As Terry Eagleton states in his remarkable recent introduction to literary theory:

[M]eaning is not simply something “expressed” or “reflected” in language: it is actually *produced* by it. It is not as though we have meanings, or experiences, which we then proceed to cloak with words; we can only have the meanings and experiences in the first place because we have a language to have them in. What this suggests, moreover, is that our experience as individuals is social to its roots; for there can be no such thing as a private language, and to imagine a language is to imagine a whole form of social life.¹

So considered, the creation of meaning becomes a uniquely democratic activity. The most ordinary use of language stands exposed as a creative act. Moreover, since we all use language, we all become creators of meaning. It is not merely that we *permit* everyone to create meaning; it is that, no matter how much we might wish to, there is no foolproof way to *prevent* people from doing so.

Nevertheless, characteristically in complex societies, individuals or groups have claimed—or have been permitted to claim—a privileged role as arbiters of meaning. At various times, priests, philosophers, literary critics, and lawyers have done so, all with varying degrees of success. For the most part, the vocation of an arbiter of meaning is a reasonably attractive vocation. The pay is not always lavish, but the job tends to be fairly secure with minimal risk (save in times of great social upheaval) of actual physical harm. As they say, it is inside work and there is no heavy lifting.²

But there is a catch. Traditionally, one could only feel secure in a privileged role if one could assert a privileged access to the truth. One had to be able to show that one was equipped, by divine inspi-

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¹ T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 60 (1983) [hereinafter cited as *THEORY*].

² One social critic, in expounding the advantages of the life of a judge over the life of a coal miner, remarked that a virtue of the judging life is the absence of falling coal. See P. COOK, “*Sitting on the Bench*,” *BEYOND THE FRINGE, ORIGINAL BROADWAY CAST ALBUM* (1961).

ration or by training, to pass judgment on the meanings created or asserted by others; to identify and certify permitted meanings, to anathematize false pretensions. If one's claim to truth became problematic, one was not necessarily out of business; but one had to become increasingly aggressive, enterprising, or shrill, in its defense.

The archetypical model for the attack on privileged meaning was, of course, the Reformation, and the spasm of indeterminate bloodshed that ensued. One consequence of the Reformation was the creation of what might be called an "alternate cosmology," with its own hierarchy of meaning. The structure of this cosmology was built on "science;" but science was built on "reason," and the ultimate arbiters of reason were not the scientists but the philosophers. In a dramatic piece of linguistic sleight-of-hand, the philosophers professed themselves not only *lovers of wisdom*, but *purveyors of certainty*. As such, they claimed the role of gatekeepers, not only to their own little fiefdom, but to the whole universe of knowledge. From the seventeenth century until the twentieth century, virtually every idea that sought certification as "knowledge" in the Western world sought to justify itself in this cosmology.

All this is familiar. But there is a further chapter to this story, implications of which we are still trying to assimilate. For in our own time we are experiencing the disintegration of the cosmology of reason—not just in detail, incrementally, but *altogether*, with no competing cosmology waiting in the wings to take its place. The failure of reason as a system of certainty is not, strictly speaking, a new idea. Certainly there have always been those who believed that the pretensions of reason were an instance of *hubris*, a war against God.³ In our own century, there have been any number of specific assaults on conventional certainty—in physics,⁴ mathematics,⁵ and logic itself.⁶ But these incremental insights, however unsettling, were too arcane for any broad impact on consciousness. More interesting, for present purposes, are a number of works that serve as a kind of up-scale popularization—works that serve to extend the attack on reason from the cell of the specialist to the larger intellectual

³ While I assume I could get agreement on this as a general proposition, it is harder to get agreement on just which philosophers would take this position. My own choices would include Hume, Hegel, and Nietzsche, at least.

⁴ See, e.g., W. HEISENBERG, *PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE* (1958).

⁵ See, e.g., K. GODEL, *ON UNDECIDABLE PROPOSITIONS OF FORMAL MATHEMATICAL SYSTEMS* (S. Kleene & J. Rosser eds. 1934).

⁶ See, e.g., W. QUINE, *FROM A LOGICAL POINT OF VIEW; 9 LOGICO-PHILOSOPHICAL ESSAYS* (1953); W. QUINE, *WORD AND OBJECT* (1960).

arena. The most important single work within this genre is Thomas Kuhn's *The Structure of Scientific Revolutions*,⁷ which has most broadly influenced American academics in the last generation.⁸ Kuhn argued that science develops not so much from principles of universal reason, as from some particularized world-view that exists among some particular community of scientists. Science may develop by elaboration within the world-view; but it also "develops" by discontinuity when one world-view supplants another. Discontinuous world-views are by their nature incommensurable. Science thus stands exposed, not so much as a search for truth, but as a claim of meaning against the void. Kuhn did not stop the world from "doing" science—and it is clear he had no such intention. But after Kuhn, the world was no longer able to "do" science with the old pretensions.

Kuhn's challenge was particularly provocative because it was aimed at the hard sciences, which were supposedly secure domains within the realm of certainty. However, this crisis of confidence was by no means limited to the hard sciences. In "softer" disciplines, the supposed arbiters of knowledge were finding it increasingly difficult to stake out a claim of privileged access to knowledge or a privileged status for themselves as arbiters of knowledge. For example, in law, the story of increasing intellectual impoverishment (or at least embarrassment) has been told a number of times.⁹ When read together, *Literary Theory*¹⁰ and *The Functions of Criticism*,¹¹ both written by Terry Eagleton, show how a similar (albeit by no means iden-

⁷ T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); see T. KUHN, *THE COPERNICAN REVOLUTION; PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957); see also T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* (1979). The secondary literature is extensive. Important collections include *CRITICISM AND THE GROWTH OF KNOWLEDGE* (I. Lakatos & A. E. Musgrave eds. 1970) and *THE STRUCTURE OF SCIENTIFIC THEORIES* (F. Suppe 2d ed. 1977).

⁸ In Britain, the palm would undoubtedly go to L. WITTGENSTEIN'S *PHILOSOPHICAL INVESTIGATIONS* (1966). See J. HARTNACK, *WITTGENSTEIN AND MODERN PHILOSOPHY* 59 (1965).

⁹ The *locus classicus* on modern American law is G. GILMORE, *THE AGES OF AMERICAN LAW* (1977). An excellent summary of the disintegration of doctrine may be found in Gordon, *Critical Legal Studies Symposium: Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984), together with Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981). It is worth mentioning that one discipline that seems to flourish in the ashes of certainty is the writing of intellectual history. This development in legal thought is sometimes labeled, by friend and foe alike, as "nihilism." See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984) [hereinafter cited as *Player and the Cards*]; Carrington, *Of Law and the River*, *J. LEGAL EDUC.* (1984). I think that label, in the hands of whatever faction, is a product of a misunderstanding.

¹⁰ *THEORY*, *supra* note 1.

¹¹ T. EAGLETON, *THE FUNCTIONS OF CRITICISM: FROM THE SPECTATOR TO POST-STRUCTURALISM* (1984) [hereinafter cited as *FUNCTIONS*].

tical) embarrassment has overcome what broadly might be called the profession of “letters.”

Kuhn may have undermined the legitimacy of the hard sciences, and the softer “disciplines” may have weakened themselves, but it was left to Richard Rorty to carry this assault on certainty into the citadel of reason—the realm of philosophy itself. In *Philosophy and the Mirror of Nature*,¹² Rorty propounded what might be known as “Rorty’s Uncertainty Principle.” He asserted, not merely that philosophers *do not*, but rather that they *cannot*, possess certainty—at least not the kind of certainty that philosophers have claimed to possess in support of their pretension to primacy in the cosmology. Rorty’s assertion, if true, has the effect of dethroning philosophy from its place as the queen of sciences. Since this monarchy is one on which all her subjects depend, this assertion also would have the effect of displacing all other pretensions to knowledge. One’s worst suspicions of philosophy would have been proven correct.

One might conjecture that Rorty, if he understood the implications of his own proposition, would have been perplexed. Not Rorty, he is perfectly willing to abandon the quest for certainty—but not perfectly willing to abandon his tongue and his pen, one should be quick to add. Rorty makes it clear that there is still plenty of work for intellectuals to do. Only the goal has changed. Rorty would change the goal of his quest from “certainty” (an illusion) to what he calls “edification.”¹³ In effect he acknowledges that “edification” is an opaque slogan for such a momentous goal (testimony, perhaps, to the poverty of our philosophic tradition). But the concept, as he asserts it, is far from opaque. By “opaque” Rorty means:

[The] project of finding new, better, more interesting, more fruitful ways of speaking. The attempt to edify (ourselves or others) may consist in the hermeneutic activity of making connections between our own culture and some exotic culture of historical period, or between our own discipline and another discipline which seems to pursue incommensurable aims in an incommensurable vocabulary. But it may instead consist in the “poetic” activity of thinking up such new aims, new words, or new disciplines, followed by, so to speak, the inverse of her-

¹² R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) [hereinafter cited as *MIRROR*]; see also R. RORTY, *THE CONSEQUENCES OF PRAGMATISM* (1982). It is probably an open question how and to what extent Rorty is saying something new, as well as to what extent he is a high-brow popularizer of Hume, Hegel, Nietzsche, Heidegger, Wittgenstein, Dewey, *et al.* With respect to this Commentary, I do not think it makes any difference. However, at least one author, in a published paper, has tried to show the application of Rorty’s thinking to law. See *Player and the Cards*, *supra* note 9, at 1.

¹³ See generally *MIRROR*, *supra* note 12, at 357-72, 376-89.

meneutics: the attempt to reinterpret our familiar surroundings in the unfamiliar terms of our new inventions.¹⁴

More briefly, Rorty calls on philosophers to rejoin what he calls "The Conversation of Mankind."¹⁵ One can readily imagine that this sort of guff would not be well received by philosophers, and it was not. Professor Alasdair MacIntyre, who of all people would appear most likely to understand Rorty, dismissed Rorty with the gruff retort that he did not intend to spend his time consorting with "literary critics."¹⁶ Yet that is exactly what Rorty proposed. And here is an elegant irony: for Rorty, in purporting to demote philosophy from its throne, blandly undertook to promote the "lesser" disciplines to (whatever remained of) the throne. Properly understood, this ploy could have surprised no one more than it surprised the literary critics, who had learned to suffer more or less gracefully the assertion that their discipline was somehow a lesser mode of intellectual life. Cinderella was off to the ball.¹⁷

Law scholarship is a notoriously parasitic growth on the developing scholarship in other fields. Hence, it is no surprise that the new fashion for "conversation" has begun to spill into the law reviews. A particularly instructive example is the debate between Professors Fiss and Brest over the place of "interpretation" in legal literature.¹⁸ Brest is one of the more insistent proponents of the new notions of understanding. Fiss has called Brest's form of scholarship "nihilism"¹⁹ and Brest, not surprisingly, has rejected the

¹⁴ *Id.* at 360.

¹⁵ *Id.* at 389; cf. M. OAKESHOTT, *THE VOICE OF POETRY IN THE CONVERSATION OF MANKIND*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 197-247 (1981).

¹⁶ MacIntyre said, "If I am doomed to spending the rest of my life talking with literary critics and sociologists and historians and physicists, I am going to have to listen to a great deal of philosophy, much of it inept." MacIntyre, *Alasdair MacIntyre on the Claims of Philosophy*, 2 *LONDON REV. BOOKS* 5, 15-16 (1980), quoted disapprovingly in Skinner, *The End of Philosophy?*, *N.Y. REV. BOOKS* 46, 48 (March 19, 1981). MacIntyre's *After Virtue*, published the same year, seems to fit squarely within Rorty's view of the universe—and indeed bears an acknowledgement to Rorty. A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* viii (2d ed. 1984).

¹⁷ Provided she finished her homework. Rorty makes it clear that his conversationalist needs some conversational proficiency, and thus one suspects that the curriculum, post-Rorty, might look pretty much like it did before. The point is important, because a too glib summary of Rorty makes him sound like much more of a Yahoo than he is. See *MIRROR*, *supra* note 12, at 357-94.

¹⁸ See Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982) [hereinafter cited as *Objectivity*]; Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982) [hereinafter cited as *Interpretation*]. Brest provoked Fiss with Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063 (1981). See also Levinson, *Law as Language: Reading Law and Reading Literature*, 60 *TEX. L. REV.* 415 (1982). On the drift of "interpretative" scholarship into many fields, see Bell, *The Turn to Interpretations: An Introduction*, 51 *PARTISAN REV.* 215 (1984).

¹⁹ *Objectivity*, *supra* note 18, *passim*.

characterization.²⁰ But on closer scrutiny, it appears that in this debate, as in so many bitter debates, the antagonists are united by more than what divides them: *both* Fiss and Brest are talking about a “process” in language that would have sounded strange ten years ago.

It is in this context that one might read Professor James Boyd White’s *When Words Lose Their Meaning*.²¹ White is a lawyer and a law professor; but he is no newcomer to the “Conversation of Mankind.” Well before the topic became fashionable, he had built his professional career on the conviction that literature ought to be taken very seriously. In an extraordinary, early work, a course book for use in law schools, White presented a variety of “exercises” calculated to engage law students in his way of thinking.²² *When Words Lose Their Meaning* follows that earlier book. Here, White tries to teach by example: he offers his own readings of a number of texts. His purpose is not merely to say something about the text, but also to say something about the reader: to show how a reader might use a text as an occasion for self-education. It is stretching a point only a little to call it a sort of “teacher’s manual” for his earlier book, showing how people make claims of meaning in the world.

To understand White, it is helpful to try to understand his place among the “schools” of modern literary criticism. White himself (correctly, I think) identifies his work with “the tradition inelegantly known as ‘reader response’ criticism.”²³ He mentions, in particular, the work of Wolfgang Iser.²⁴ Eagleton, in *Literary Theory*, gives a convenient summary of Iser’s position that serves adequately to introduce White:

The most effective literary work . . . is one which forces the reader into a new critical awareness of his or her customary

²⁰ See *Interpretation*, *supra* note 18. Although Brest does not specifically reject the label, he rejects the content of the attack. A more recent essay purports to embrace the name of nihilism in a kind of confession and avoidance. See, e.g., *Player and the Cards*, *supra* note 9. I think the label, in the hands of whatever faction, is a misunderstanding.

²¹ J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984) [hereinafter cited as *WORDS*].

²² See J. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973) [hereinafter cited as *IMAGINATION*]. I have read that book a number of times, having used it as a course book on three separate occasions in two law schools. I think the name is grotesquely inadequate, but I have never been able to come up with an improvement. I think this may be a testimony to the originality of White’s project.

²³ *WORDS*, *supra* note 21, at 288. White mentions a number of other influences as well, but I think it is no travesty to limit attention, for present purposes, to his “reception theory.”

²⁴ *Id.* at 289. White mentions W. ISER, *THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM PAUL BUNYAN TO BECKETT* (1978); see also W. ISER, *THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE* (1979).

codes and expectations. The work interrogates and transforms the implicit beliefs we bring to it, "disconfirms" our routine habits of perception and so forces us to acknowledge them for the first time for what they are. Rather than merely reinforce our given perceptions, the valuable work of literature violates or transgresses these normative ways of seeing, and so teaches us new codes for understanding The whole point of reading . . . is that it brings us into deeper self-consciousness, catalyzes a more critical view of our own identities. It is as though what we have been "reading", in working our way through a book, is ourselves.²⁵

In elaborating this process, White focuses directly on the *reciprocal* nature of language: the writer (or speaker) receives language, and he creates it; he changes language, and is changed by it. To read, with this perspective, is at once to observe and to participate in this process. In White's book, one watches the writer making language; and one watches oneself making language as one watches the writer. Specifically, White invites his readers to approach a text through four questions. First, "How is the world of nature defined and presented in this language?" Second, "What social universe is constituted in this discourse, and how can it be understood?" Third, "What are the central terms of meaning and value in this discourse, and how do they function with one another to create patterns of motive and significance?" Finally, "What forms and methods of reasoning are held out here as valid?"²⁶ The questions are all subordinate, however, to a larger goal: the task of learning to appreciate reading as an act of self-education.

White's approach seems to me most accessible in his analysis of Thucydides' *History of the Peloponnesian War*.²⁷ Thucydides' Greece, as any reader of his history will quickly see, is a world of argument. The inhabitants are always speaking out to justify themselves, or to remonstrate with others. But as White so clearly demonstrates, the very existence of this argumentative society depends on a shared culture. The richness of the Greek's rhetorical repertoire bespeaks a heritage that is dense, supple, and richly textured. Correspondingly, we see the decline of Greece in the decline of this shared culture. As Thucydides himself asserts, "[i]rrational boldness was considered as manly loyalty to one's partisans; prudent delay as specious cowardice, moderation as a disguise for unmanliness, and a

²⁵ THEORY, *supra* note 1, at 79.

²⁶ WORDS, *supra* note 21, at 10-12.

²⁷ *Id.* at 59-92.

well-rounded intelligence as a disqualification for action.”²⁸ Or as suggested by White’s title, a world in which words have lost their meaning.

In a world such as our own, debauched by the excesses of meaning, one might suppose that the condition of Greece in decline is rather more the rule than the exception. But White, in his discussion of Samuel Johnson’s *Rambler* essays, shows that this need not be so.²⁹ What Johnson undertakes is a specific exercise in the *task of definition*. He takes common terms of moral discourse—terms that we too often see as vacuous or impoverished—and seeks to recharge them, giving them a vigor and texture that enriches not only the language, but our moral life.

White is perhaps most interesting when he applies his approach to Jonathan Swift’s *Tale of a Tub*.³⁰ This is so because *Tale of a Tub* is a satire, and as a satire, it challenges the reader in a special way. The text begins, as White says:

not by immersing the reader in a working rhetorical universe, as our other texts did, but, as befits a satire, by locating him in a crazed and impossible world in which he has to make his own way. Nothing seems to work right. The effect is to force upon the reader the task of working his own way out of the place the text defines for him, of making his own position against its perpetually deconstructive force. The text thus compels the reader who engages with it to become, in a new way, active and self-conscious in reconstituting his language.³¹

Several other studies support the same theme, with varying degrees of success. A study of Jane Austen’s *Emma* gives White an opportunity to exhibit what must be, for him, an ideal example of the process of education at work: Emma moves from naive certainty through blunt experience to a new subtlety, all with the guidance of a loving friend.³² In Edmund Burke’s *Reflections on the Revolution in France*, one encounters a writer with nearly unique skill at seeking to create and justify a community.³³ Indeed, I think White is unduly apologetic about Burke’s unabashed enthusiasm for hierarchy. Part of Burke’s power, over a modern reader, is his ability to support an idea that runs against the grain. In a study of the *Iliad*, White shows

²⁸ *Id.* at 81 (quoting THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, BOOK 3, 82, 4).

²⁹ *Id.* at 138-62.

³⁰ *Id.* at 114-37.

³¹ *Id.* at 115.

³² *Id.* at 163-91.

³³ *Id.* at 192-230.

us a poet who is able to transcend the language of his characters, and make it into a language of moral criticism.³⁴ I think White is quite correct here; the only difficulty is that the *Iliad* has been written about so much that it is tough to say anything really new.³⁵

White moves from these purely literary texts to a study of some "legal" examples, seeking to show that the law is also an exercise in the construction and reconstruction of meaning.³⁶ White's analysis holds very well for legal texts. But I think this portion of the book is disappointing. Part of the problem is tactical. White chooses to build his "legal" argument around three examples: the Declaration of Independence; the Constitution; and *McCulloch v. Maryland*.³⁷ I think these were unfortunate choices. The trouble with these texts is that they are so well known in academic discourse that they scarcely belong to "law" any more. A careless reader may fail to grasp that White believes he can justify his approach for *any* kind of "law" source, not just for major "public" utterances. White could have made his point more effectively if he had chosen texts from a less obviously "public" realm—criminal law, for example,³⁸ or the law of inheritance.³⁹

But there is another more substantive difficulty, which is present throughout the book, and particularly so in White's discussion of law. The trouble is that White says far too little about the relation of discourse and naked power. The point is that discourse is not *only* a matter of words. It is (or may also be) a method of control, a device for exercising power. This, of course, may be true of *any* language—there is no sharp line between the "literary" and the "political" on this issue—but, the problem becomes sharply defined when one talks about the language of the law. We want our judges to give reasons for their actions, and we want them to be good reasons. We stand prepared to comment on, to criticize, just as we would comment on or criticize any other claim of meaning. Conceivably, the arbiter, if he gives bad reasons (or no reasons) often enough, will find himself out on the street. Just as plausibly, bad reason may be

³⁴ *Id.* at 24-58.

³⁵ White also offers a study of Plato's *Gorgias*. *Id.* at 93-113. The relevance of *Gorgias* to White's thesis is obvious, perhaps. Unfortunately, the possibilities for discussion are so great that in White's treatment the topic almost gets out of hand. For more on White's treatment of Socrates, see *infra* text accompanying note 42.

³⁶ *Id.* at 231-74.

³⁷ 17 U.S. (4 Wheat.) 316 (1819).

³⁸ See the remarkable notes to J. WHITE & J. SCARBORO, CONSTITUTIONAL CRIMINAL PROCEDURE (1977); cf. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165.

³⁹ See, e.g., J. White, *Comparative Anthology on Death* in IMAGINATION, *supra* note 22, at 83-167 (emphasis on pages 89-100).

able to oust good by force of arms. Power may change language, but language may change power. The relationship is, to put it mildly, complex.

I think that White knows this. Particularly in his studies of Thucydides and Homer he offers a number of important insights on the relationship between language and power. And in his introductory chapter, he remarks that "[t]he world of language mediates between the languageless within and the languageless without."⁴⁰ I think he would have strengthened his case if he had explored the point more in his chapter on law. Failing to do so, he leaves himself vulnerable to enemies who want to turn his flank.⁴¹

Be that as it may, I hope I have made clear that I think White understands, about as well as anyone now writing, the possibilities of education. Under the circumstances, it is no small irony that White scarcely writes at all about the one arena he seems best equipped to critique—the law school classroom. I suppose this was intentional. White's points are, of course, general, and in any event, it is hard to think of anything more dreary than yet another discussion of what goes on in law school. But it does seem to me worthwhile to offer just one more passage from White's book—a discussion of the technique of "dialectic." Dialectic proceeds, as White says:

not by making lengthy statements or exhibitions but by questioning and answering, one to one. Its object is to engage each person at the deepest level, and for this it requires utter frankness of speech on each side, a kind of shamelessness in saying what one really thinks. One's concern is not with what people generally think, or anything of the kind, but only with what one thinks oneself and what the other thinks. This is not a competition to see who can reduce the other to his will; it is a process of mutual discovery and mutual refutation The object of it all is truth, and its method is friendship, the full recognition of the value of self and other in a universe of two.⁴²

⁴⁰ WORDS, *supra* note 21, at 21.

⁴¹ Thus, one reviewer has said that "White would presumably deem it right and proper that John Marshall, Felix Frankfurter, and Warren Burger should stand alongside of Homer, Jonathan Swift, and Edmund Burke as cultural giants of the first rank." Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 220 (1984). It may be that no amount of clarification could protect against this sort of misreading, but more discussion of the relationship between language and power might at least have complicated the task.

⁴² WORDS, *supra* note 21, at 109-10. White at this point is contrasting dialectic with rhetoric. He argues that the goal of rhetoric is to reduce the other to one's will, and that "this means that rhetoric naturally treats others as means to an end, while dialectic treats them as ends in themselves." *Id.* at 109. This analysis of rhetoric is oversimplified; we

The passage is from White's discussion of Plato's *Gorgias*. The dialectic in question is, of course, the Socratic dialogue. I leave it to the legal reader to consider whether White's description bears any relation to anything that has ever gone on in a law school classroom.

White's undertaking thus clearly fits Rorty's program very nicely—as an effort at “edification” to enrich “the Conversation of Mankind.” Informed by this example, it is intriguing to turn back to the two books by Eagleton, and to consider the problem of literary theory from a broader perspective. Eagleton's works have a number of obvious virtues including concision, clarity, and an enviable gift for summary. He navigates adroitly through the shoals of forbidding doctrine—structuralism, deconstruction, and others. His thumbnail summary of psychoanalysis is a little gem of *haute vulgarisation*.⁴³ His history of English literary theory would be an admirable quick crammer for any bright undergraduate in the field.⁴⁴

For present purposes, Eagleton is most interesting when he sketches the disintegration of English literary discourse from the eighteenth century until the present. He shows how criticism emerged as an aspect of a “public sphere” of discourse in the aftermath of the English Revolution—an effort by an emergent middle class to consolidate its position and declare its identity.⁴⁵ He shows how criticism has found itself progressively more embarrassed by the erosion of a “public” which the critical discourse presumes.⁴⁶ In this process, he gives pivotal significance to Samuel Johnson, who also served as an example for White.⁴⁷ White offered an appreciation for Johnson's skill at enriching our discourse about morality. Eagleton situates Johnson as one who fought a kind of rear-guard action, in a sense the last truly “public” man—on the cusp, as it were, between the wholehearted dialogue of the Augustan era, and the increasingly privatization and specialization that has overcome criticism since then.⁴⁸

may seek to use persuasion on our friends, as well as our enemies. *See generally* text accompanying note 54. Indeed, White seems to employ a great deal of persuasion in *Words*, and I doubt that he thinks he is using his readers as means to an end. But none of this denies the fruitfulness of his description of dialectic.

⁴³ *THEORY*, *supra* note 1, at 151-61.

⁴⁴ *See id.* at 17-53; *see also* *FUNCTIONS*, *supra* note 11.

⁴⁵ *See* *FUNCTIONS*, *supra* note 11, at 9-13, 18-19, 24-25, 30-34.

⁴⁶ *Id.* at 12-53.

⁴⁷ *Id.* at 12-13, 31-35. *See* *WORDS*, *supra* note 21, at 138-62; *see also* the discussion in the text accompanying note 29 *supra*.

⁴⁸ “In the trek from the cultural politics of Addison to the ‘words on the page,’ the philosophical moment of Samuel Johnson—a mind still laying ‘amateur’ claim to evaluate all social experience, but now isolated and abstracted in contrast to the busily empirical Addison—is a significant milestone.” *FUNCTIONS*, *supra* note 11, at 34 (emphasis in original).

Eagleton, however, is not interested in raw narrative alone. He structures his account around a well-developed view of the place of “literature” in society. Or, more particularly, the absence of place; for Eagleton’s central proposition is that “literature *does not exist*,” at least not “in the sense that insects do.”⁴⁹ Eagleton suggests that this may seem “a far-fetched assertion.”⁵⁰ In fact, however, I think it is neither quite as far-fetched, nor quite as correct, as he purports it to be.

Eagleton’s argument for the non-existence of literature breaks down, on closer scrutiny, into two more specific points. First, is that *any* writing (or speech) constitutes a claim of meaning, and that all may be analyzed the same way.⁵¹ This point may once have been controversial, but today, it seems to me that it is hardly debatable at all. I think it is clear that, as White says, the process of cultural construction “is in fact a universal human activity, engaged in by every speaker in every culture, literate or illiterate”⁵²

Second, Eagleton is concerned about the notion of literature as a canon of privileged texts. Eagleton is perfectly well aware that there *is* such a canon, and that it passes under the *name* of literature. But he argues that what passes under the name of literature is no more than power. Or in his own words, “the value-judgments by which (literature) is constituted . . . refer in the end not simply to private taste, but to the assumptions by which certain social groups exercise and maintain power over others.”⁵³

Here, I think Eagleton tumbles headlong into the thicket that White so largely ignored. White neglected the place of power in discourse, a critical but correctable error, I believe. Eagleton talks about power incorrectly, because he oversimplifies the notion of power. He creates a false dichotomy between the world of “power” and the favored world of everything else, whether it be “language,” or “meaning,” or “discourse.” In fact, the relationship between these ideas is far more complex than Eagleton’s presentation would suggest.

This is true at a very basic level. One might speculate that the raw distinction between “arms” and “words” ought to be clear enough. But on closer scrutiny, it is not at all clear. Suppose that you wish to assert an idea; for example, you are racially superior to me (or, I am *not* racially superior to you). You may choose to use

⁴⁹ THEORY, *supra* note 1, at 16 (emphasis added).

⁵⁰ *Id.*

⁵¹ *See id.* at 17-22, 196-217.

⁵² WORDS, *supra* note 21, at 4.

⁵³ THEORY, *supra* note 1, at 16.

your weapons to enforce my assent to your idea. I may purport to assent to avoid your weapons. But that is only one possibility. There are many others. Your weapons may frighten me into *actual*, as distinguished from merely feigned, assent. Or, your weapons may crystallize my resistance, even at the risk of my own safety. There are many other possibilities. Eagleton passes over them without notice. Similarly, he passes over any discussion of the appropriateness of these exercises of raw power. He does not mention, for example, whether one may use power at all for his own protection, or, what is more complicated, for "his own good."

Setting aside the matter of raw power and moving to the realm of words, the issue becomes more complex. As Eagleton appears to recognize, *every* use of words is an appeal for assent. In seeking to establish a claim of meaning, one may urge, wheedle, beguile, exhort, entreat, or exercise any of a thousand other rhetorical strategies. Some of these may be adopted as acts of friendship or as part of a "constructive" discourse to help to "bring out the best in one." But one's motives may also be sinister. The devil, himself, can quote scripture; he may even be able to *write* scripture, for aught that appears. *I* may not be able to tell the difference in a particular case; what is worse, *you* may not be able to tell the difference, either. You may be doing the devil's work with the best of intentions. As if that were not complicated enough, you may even be doing good in spite of yourself. There is an almost infinite range of possibilities here, and I do not for a moment purport to be writing a definitive treatise on discourse. My point is that Eagleton creates a false dichotomy that conceals the problem. As I tried to indicate earlier, on the issue of "words" versus "arms," I think White also could have done better. However, I think White writes superbly on the matter of the subtle, slippery nature of words alone.

In his chronicle (as distinct from his theory) I think that Eagleton often does good, perhaps, in spite of himself. His text is full of passages that serve to show how claims for meaning are made and broken. For example, in tracing the decline of the eighteenth century "public sphere," he exhibits the corresponding rise, in the early nineteenth century, of a whole realm of "opposition" discourse—Cobbett, Paine, feminism and the dissenting churches—which Eagleton himself characterizes as a "counter-public sphere."⁵⁴ Exactly what is going on here in the development of this "counter-public sphere?" Let us take Cobbett as an example. It seems clear that Cobbett, by writing and publishing, is seeking an

⁵⁴ FUNCTIONS, *supra* note 11, at 35-36.

audience and demanding attention—attention, that is at the expense of other, competing, presumably “weaker” claims on my energy and time. In short, he seeks to claim for himself a place in a privileged discourse or, as it might be called, a place in the literary canon. On my shelf I have a paperback edition of Cobbett’s *Rural Rides*, published in 1973.⁵⁵ From this I would infer that Cobbett has achieved and currently retains a place in the canon. I cannot say for certain whether he deserves it or not; among other things, I simply have not assessed all the possible competitors. My choices of “what to read” are energized by a muddy concoction of advice and accident. As I read Cobbett, it may be that I am responding to an act of friendship; it may be that I am being sent “a-whoring after false gods;” or it may be that I am knuckling under to blunt power.

Moving forward to the twentieth century, Eagleton gives an admirable brief sketch of the careers of his own spiritual progenitors, F.R. Leavis and Raymond Williams.⁵⁶ In the practice of their craft, Leavis sought, and Williams still seeks, to understand, explain, endorse, anathematize, and define values. They operate with reference to a basically specific universe of texts. On occasion, they may seek to promote a hitherto obscure text into the universe, or to give a text formerly within the universe a dishonorable discharge. In other words, they seek to create and modify a canon. Moreover, Leavis and Williams claim attention for particular works. They also successfully claim attention *for themselves*, as against competing *interpreters* of the canon, and surely have exercised a pervasive influence over British intellectual life in the period since World War II. Again, there is no *intrinsic* way to determine whether they did it by fair means or foul.

Finally, we may turn to Eagleton himself. Eagleton seems to endorse Cobbett’s place in the canon. He seems to certify Williams, and possibly also Leavis, as interpreters of the canon. Furthermore, at the end of *Literary Theory*, Eagleton offers a number of topics which are, in his view, worthy topics for further inquiry: first, “imperialism;” second, “the Women’s Movement;” third, “the ‘culture industry;’” and fourth, “working-class writing.”⁵⁷ Eagleton is thus making four separate claims. He is making a claim about who deserves to remain in the canon; about who is a proper interpreter of

⁵⁵ W. COBBETT, *RURAL RIDES* (1973) (reprint of 1912 ed.).

⁵⁶ On Leavis, see *FUNCTIONS*, *supra* note 11, at 70-78, 80-82; on Williams, see *id.* at 108-15.

⁵⁷ *THEORY*, *supra* note 1, at 214-16. On feminism, see also *FUNCTIONS*, *supra* note 11, at 115-23.

the canon; about who deserves to come into the canon; and about himself, as a claimant, who is entitled to make all of these claims.

How shall I go about judging claims like Eagleton's? I assume I have tipped my hand here. I do not know of any way to do so *other than* through a certain kind of discourse; the discourse, that is, that White seeks to describe and, in my judgment, also exemplifies. Eagleton has sought to express himself on the merits of this kind of discourse. He does not discuss White directly, but he does discuss Wolfgang Iser and "reception theory," and as I suggested above, I think that on this issue they can stand together as a fair surrogate for White.⁵⁸ Eagleton does a good job in summarizing Iser and "reception theory," but he does not merely describe the theory. He goes on to say that the "reception theory" "is based on a liberal humanist ideology: a belief that in reading we should be flexible and open-minded, prepared to put our beliefs into question and allow them to be transformed The only good reader would *already* have to be a liberal: the act of reading produces a kind of human subject which it also presupposes."⁵⁹

He continues: "[t]o read literature 'effectively' [*i.e.*, on the criteria of "reception theory"] you must exercise certain critical capacities, capacities which are always problematically defined; but it is precisely these capacities which 'literature' will be unable to call into question, because its very existence depends on them."⁶⁰

Eagleton thinks this analysis destroys "reception theory," not to mention liberal humanism! It does nothing of the sort. Rather, he has thrust himself into a dilemma which he does not even seem to identify, much less answer, by resting his case on this sort of approach. Specifically, Eagleton's argument assumes that it is a sufficient answer to any theory to show that the theory is "problematically defined." This may be true, but only if Eagleton's own analysis rests on a theory that is *not* problematically defined. To clarify the above, if Eagleton's claim is to be sufficient, it is not enough that he embrace a theory with another or different *kind* of problematic definition, because his premise is that *any* problematic definition is fatal. This is not just a matter of "fairness" or "sportsmanship." It is a *logical* requirement in terms of any logic that Eagleton, White, or I would understand.⁶¹

⁵⁸ See text accompanying notes 24-26.

⁵⁹ THEORY, *supra* note 1, at 79.

⁶⁰ *Id.* at 80.

⁶¹ By making an appeal to "logic," I am not making an appeal to certainty. I am making an appeal to the best reason that I know of in a contingent universe. I am assuming that on this point, Eagleton and I share a common world-view. If I am wrong, he is of course free to engage me on the point.

It seems we have come full circle. We began by recalling how science and philosophy fell from the heights of certainty into the bog of literary criticism. Now we find a literary “critic” (or “theorist”) whose argument depends on a claim of certainty that the philosophers and scientists are called upon to abandon. Eagleton, of course, cannot justify any such claim for certainty. In fact, he does not even try, or at least not very hard. To his credit, he makes few or no claims for his own discourse as being somehow exempt from the conventions that apply to discourse in general. Instead he *submits* to these conventions. Unless he is just preaching to the converted, which he does not seem to be doing, his text *requires* that his reader be able to accept “a new critical awareness of his or her customary codes and expectations.”⁶² It requires a “belief that in reading we should be flexible and open-minded, prepared to put our beliefs into question and allow them to be transformed.”⁶³ In short, Eagleton requires a reader prepared for the “Conversation of Mankind.”

Eagleton is, of course, quite right, when he says that these capacities “are always problematically defined.”⁶⁴ My point is that the “problematic” nature of these capacities does not alone relieve him of the need to call upon them in his own work. I do not exactly know why he does not call upon them in his own work and assume that he has his reasons.

I do not mean to trivialize evil here. Simone Weil, in her great essay on the *Iliad*, remarks that “nearly all of the *Iliad* takes place far from hot baths.”⁶⁵ Indeed, she adds that, “nearly all of human life has always passed far from hot baths.”⁶⁶ Critics and professors live their lives fairly close to hot baths and it takes a good deal more than sweet reason to keep them there. But if there is any edification at all, the “Conversation of Mankind” is the only way I know to get at it. I believe Eagleton is a worthy contributor to that conversation, but I think White knows a good deal more about how that conversation takes place.

⁶² THEORY, *supra* note 1, at 79.

⁶³ *Id.*

⁶⁴ *Id.* at 80.

⁶⁵ S. WEIL, *The Iliad, Poem of Might*, in THE SIMONE WEIL READER 153, 155 (G. Panichas ed. 1977).

⁶⁶ *Id.*