

## SPEECH, SILENCE, AND ETHICAL LIVES IN THE LAW

*Robin West\**

As his many appreciative readers know, James Boyd White brought his learning to bear on the relation between ethical living and ethical speaking, and particularly as it pertains to how we live and speak in law. His prodigious writing, teaching, and speaking career, as far as I can tell, was motivated by a singular, passionate belief: that the human capacity for language can and should serve as a bridge from mind to mind and spirit to spirit, so that we might cohabit the earth not only peaceably, but with the pleasures and grace of each other's company. Language, White taught, can both facilitate friendship across the space that divides us as individuals, and create a just and lively cooperation across the oceans that divide our nations, our beliefs, and our communal codes for living. Ethical speech in law, White argued across the span of four decades, can address injustice, forge bonds of shared struggle, unearth a shared human essence across difference, ease suffering, create a human community, and articulate both our promises to each other and our hopes that we can live up to them.

In his books, his essays, his lectures, and no doubt in his day-to-day teaching, James White interpreted and taught from exemplary instances of profoundly ethical speech: Socrates' reflections on the meaning and value of citizenship the night before his beloved City-State put him to death, Huck Finn's casual embrace of friendship as he defied the institutionalized enmities of slavery, Nelson Mandela's *Oration from the Dock* on the subject of liberation as he anticipated his sentencing, Abraham Lincoln's *Second Inaugural*, on the awesome destructiveness of both a necessary war and an unjust peace in a national family, Justice O'Connor's opinion on the communal value of shared precedent to a community of diverse individuals while striking down a divisive law. These men, women, and children's oratory soared, but all lawyers, White taught us, could and should engage in ethical speech. Lawyers distinctively employ speech as they live out their professional and ethical lives, and with their speech they create civic space for others to do likewise. They should, then, speak ethically. Jim White has been the guide, as his readers and students strive to learn how; Huck Finn, Nelson Mandela, Abraham Lincoln, and Socrates are the teachers. Lawyers could do a lot worse than to follow Jim White's eloquent, learned lead through the ethical monuments in our cultural heritage. Jim White loves law and he loves literature and he loves oratory, and he loves them for the moral breakthroughs that at least on occasion this exemplary speech facilitates.

---

\* Professor of Law, Georgetown University Law Center.

I wonder, then, if it was with some sadness that toward the end of his career White turned to a study of the ways in which language, speech, and verbal formulae, in law and outside of it, sometimes serves the dehumanizing ends of power, rather than the aspirational goals and hopes of citizen heroes and admirable statesmen. We have, in our linguistic heritage, Mandela's *Oration From the Dock* and Lincoln's *Gettysburg Address* and *Second Inaugural*, and Dr. King's *I Have a Dream*, and Plato's *Crito*, and White has helped us understand them all. He could have left it at that. But we also have mountains of advertising copy that numb us to words' capacity for conveying truths about the world, and volumes of pornography that differently but just as assuredly desensitize us to the human in the machine, and, now, "torture memoranda" from the Bush Administration's Office of Legal Counsel that mock the hopes and promises of the Geneva Conventions. And, of course, we have more than a few centuries worth of censorial speech, militarist jingoism, and nationalist propaganda, much of it protected or promulgated by law and law's verbal minions. So, why did Jim White, who loves language for its ethical potential, who thinks of speech as a paradigmatically ethical moment, who loves what we might say for the way it might unite us—why did he turn, in his latest book, to a study of advertising, propaganda, pornography, and to a study of the ways in which language can dehumanize, can dumb us down, can make us inattentive to or complicit with the empire of force? This last book—*Living Speech: Resisting the Empire of Force*—is not as exhilarating a read as his earlier ones. It is our lesser speechifying selves, not our better selves, he subjects to scrutiny. So—why did he take up this topic? I don't know, but I must say that the book that resulted is hugely clarifying. I love this book just for that. Language, White teaches, can bring us to an ethical life or it can lead us away from it. We need to understand and appreciate this tool of ours. White has already taught us that. In his last book, he reminds us that we need to fear it a bit as well.

White's turn to language's potential for dehumanization was unexpected, but not really surprising, at least to me. White had listened carefully and appreciatively for a good thirty years, as his critics told him, again and again, that his jurisprudence is misguided. Law, some of us have argued, to, against, and with Jim White, *contra* his undue and generous-to-a-fault audacious hope, is the language of power, not of ethical living; law's language can alienate, as well as unite, law can and often does—whether paradigmatically or not—work through the intimidation of the sword, not the sweet persuasion of the shared Word. And so on . . . Don't you see? White always graciously responded to us—his legal positivist critics—that he actually knew all of that, no fool he, and that he has never, in fact, made the claim that either law or language could not be put to other ends. Nevertheless, he tended to say, he wanted—he chose—to study the ways in which we might sometimes give voice to our ethical aspirations in law. To do that he had to study the hope we express through law, not the duplicity. We, his critics, of course, believed him on this declaration of intent—why not? This last book, though, shows why we were right to do so. Only someone who passionately loves language for its affirmance of life could also so thoroughly under-

stand, and convey, the power of language to destroy that which is human within us. Again—this turn to law’s language in the service of force and duplicity, rather than hope and community, was unexpected, from Jim White. But was the power and clarity of the analysis that resulted surprising? No.

What was *more* surprising, at least to me, than his focus on law’s and language’s potential for destruction, in his latest book, is the attention he bestows in that book on *silence*. Drawing on his experience as a practicing Quaker, and fully mindful of the paradox inherent in the attempt, Jim White tries to articulate in this book—I think for the first time—his respect for silence. Silence, White writes, carries the recognition of humanity that must in turn precede the communicative moment at the heart of ethical speech. I for one was not prepared for this newfound attention to silence, not in the slightest. Here’s the exasperated version of this question: Why does this man who so loves language, speech, oratory and the world’s great literature *now* tell us that what he *really* loves are those painful drawn-out silences in Quaker meeting houses? How can this man who taught us, for decades, to appreciate the connections between just living and just speech, who for so long taught that the ethical impulse is to be found in the linguistic act, turn four-square and embrace silence? How did he come to love silence? Why does he think we all should?

I truly don’t know, but I do have a theory. At a conference almost fifteen years ago, at St. John’s Law School, Jim White shared a memory with a few of us, in an unpublished side conversation. In his mind’s eye, he told us then, there he stood, several years back, as a young man, in front of a large plexiglas window in the nursery of a big-city hospital, looking for his newborn baby among dozens of others, neatly laid out in rows and rows of bassinets. As he recollected the moment, he had a common, near-universal perhaps, but by no means trite, reaction to those rows and rows of babies: how similar they all are! My *god*, they all look alike. They sound alike too. They *are* alike. Many of them don’t even have *names* yet, none bear marks of tribes or nations. None have distinguishing accents that bond them to their community of origin and delineate and separate them from others. They are so much alike. Yet, these many black and a few white babies are destined for such disparate futures, some tragically so.

Let me elaborate just a bit on this thought, reported fifteen years after the fact, some ten years ago, by this scholar of language, great literature, and law. Some of these look-alike babies that so impressed themselves on the young Jim White would eventually endure parenting that was not, as developmental psychologists sometimes put it, “good enough.” As we know, not-good-enough parenting risks sociopathology at worst, social and emotional isolation at best. Many more of those just-alike babies, even with perfectly good, or good-enough, parenting, would eventually endure social institutions that are not “good enough” or anywhere near: not-good-enough institutions that virtually guarantee lives of need, struggle, and frustration for some, criminality and considerable desperation for others. Some, a very few of those babies, and, not coincidentally disproportionately white, in that

City Hospital, would eventually enjoy excellent parenting and really terrific social, educational, and institutional supports. They would go on to lead good and successful lives. Yet, all of these differently hued babies were just so alike. There's no earthly excuse for those divergent paths, the better of them pre-determined by privilege and the lesser of them so pre-determined by this country's history of racism, slavery, xenophobia, antipathy, fear, and hate. Or so thought James Boyd White, young academic, linguaphile, new father.

The memory Jim White shared with us that day evokes a common enough image, from our shared national memories of mid-century life, in the decades before large City hospitals started putting the newborns in their mothers' maternity rooms. The new father, in a black-and-white Life Magazine sort of photo, barred from the delivery and recovery rooms, stands scanning rows of identical babies, asking anyone who will listen, "which one's mine?" Someone, somewhere, perhaps the nurse in starched white, perhaps the reader or viewer, takes that vaguely ridiculous scene in, and sort of wants to respond—"hey, they all are, pal." So likewise, there stood Jim White, scanning rows of infants, with a part of him asking "where's mine," but a part of him thinking, "they all are." In his own personal moment of Quaker-like silence in the hospital nursery, White tells us, he stood silently looking for his own newborn child, while feeling protective, human, responsible for, and connected to them all. As we all know, but are too inclined to forget, a year or more of infancy precedes all those years of communicative *linguistic* speech from mother or father to infant. Think of that: a full year of human interaction without language. If that year is *ethically spent* between the parent, infant, and larger society, so might be the speech, and much of the life, that follows. Likewise, we might say, that act of ethical silence in front of the nursery plexiglas, preceded Jim White's own equalitarian, communitarian, and deeply ethical speech. I like to think that he never forgot the lesson of that moment of silence, and in his latest book, he's paid his respects to its hope and promise.

Silence acquaints us with that of God in each of us, so say the Quakers, but also, silence brings us to what we share, universally, with all the black, brown, and various shades of off-white infants in the nursery—so says Jim White. Conversational language—the "to do" lists, the high school book reports, the dinner table conversation—all of that can indeed bring us back, brick by brick, so to speak, to that silent moment of awe, appreciation, protection, and responsibility for the world's children. When those bonds are strong, sometimes, we then proceed, collectively, to use our powers of ethical speech to construct agreements, and contracts, and promises, and compacts, and treaties, with nations and states and municipalities and communities and strangers that are far flung from our own. Most important, though, with our powers of ethical speech, with those words we call law, sometimes we build the "just-enough" social institutions that might facilitate the "good-enough" parenting that enable all of our co-citizens' truly good lives, not just the good lives of the children we raise in our homes. With ethical speech and the moral law we might make from it, we on occasion

stay true to the promise that James Boyd White whispered silently, wordlessly, and from his heart, to all the world's children, when he stood at that 1960s styled nursery window in the hospital that day, excitedly searching out his own.

