LONELINESS AND THE LAW: SOLITUDE, ACTION, AND POWER IN LIVING SPEECH

Marc L. Roark, University of Tulsa
LONELINESS AND THE LAW: SOLITUDE, ACTION, AND POWER IN THE LIVING SPEECH OF JAMES BOYD WHITE

MARC L. ROARK

ABSTRACT

The law is filled with empty spaces – what is not written; what is not said but meant; what is unsayable or unprintable. This article describes the spaces that such emptiness creates in both individual lawyers and in the law. The article begins by considering the elements of the legal idea: the action, needed to move the idea into consciousness, and the power conveying the idea’s strength to the community. Proceeding from this framework, part one focuses on the loneliness that fosters legal ideas. Describing four types of loneliness: Indeterminacy, Ressentiment, Contemplation, and Exile, the article considers how these types of loneliness are revealed in the jurisprudence surrounding the African-American (Plessy v. Ferguson to Brown v. Board of Education) and the Asian American (Yick Wo and Korematsu) equality lines of cases. The article argues that the silent spaces of these opinions reveal as much as the written opinions.

Part 2 considers the action of the idea – both the movement of the idea from the consciousness to the material world, and the realization every lawyer comes to that his work is mere repetition. Focusing on the same line of cases, this part demonstrates how even the cases that suppose a positive change in the law, are repetitious in some ways of the past. The article suggests that the recognition of this repetition, is not only necessary but unavoidable for the lawyer-scholar to define himself.

Finally, Part 3 describes the power of the idea, lifting it out of the constraints of the material and into the spaces of the normative. Utilizing the description of place and space, the article captures the essence of grounding normative ideas into materiality and vice versa. The article however contains a cautionary tale in that certain ideas, when they become normative, can leave manifestations already materialized left to wither alone and with no normative identity (or an identity long passed). Utilizing the analogy of law as liturgy, the Article suggests that the silent spaces both tell us what the law is and what the law is not – revealing the true character of the material manifestation.

Visiting Assistant Professor of Law, University of Tulsa College of Law, L.L.M., Duke University (2006); J.D., Loyola School of Law (2002). I want to thank the gracious and helpful comments from my friends and colleagues both in Tulsa and elsewhere including: Alfred Brophy, Jeff Powell, Johnny Parker, Marla Mansfield, Marianne Blair, Valerie Phillips,
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ARTICLE

Who are the lawyers of tomorrow? What do they look like? What do they know? How do they think? These are often the kinds of questions that are utilized by admissions committees, law professors, the general public, and lawyers to be as they assess the future lawyer’s ability to perform as a Lawyer. While the former of the four categories dwell on scores, institutional placement and four-year degrees (what do they know),¹ the latter considers whether one looks lawyerly, sounds lawyerly and acts lawyerly.² But what of the questions of ideas and

¹ See e.g., David A. Thomas, Predicting Law School Academic Performance From LSAT Scores and Undergraduate Grade Point Averages: A comprehensive study, 35 Ariz. St. L. J. 1007, 1010 (2003) (purporting to identify predictive value comparisons for overall law school performance); Patrick R. Hugg, Comparative models for Legal Education in the United States: Improved Admissions Standards and Professional Training Centers, 30 Val. L. Rev. 51, 75 (1995) (describing the process of review in admissions criteria); for a list of articles critical of the LSAT approach, see Thomas, supra n.5.
² Speaking as an attorney and as one who regularly engages attorneys-to-be, I can say there is a disconnect we often feel with our own perception of the world much less the world’s perception of us. I like the coming to terms that Patricia Williams has: This is who I am. A soft-spoken fifty-something mush of a minority, deferential but strong, really
character? Are future lawyers courageous? Are we training them to be so? Can they define themselves? Are we equipping them with the tools that they may be better poets than prophets?  

3 Summarily, can they have their own ideas? This is the essence of the lawyer-scholar as opposed to the “professional” lawyer – lawyer scholars own their ideas.  

4 Ideas to be truly one’s own require an appreciation of the maturity of the idea. The idea itself is intertwined in the action and the power that give the idea life. Dorothy L. Sayers, the eminent British writer, took to describing what happens when the writer sets to writing.

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I am. I confess to a tendency to collapse under rightist pressure, but I try to compensate by writing brave leftist articles for The Nation under the Joan of Arc byline “Diary of a Mad Law Professor.” I teach courses in contracts, Consumer Protection, History of Civil Rights, Theories of Equality and general issues of law and Public Policy. My hair is so unruly that new students get mesmerized by it before they finally manage to wrestle themselves back down to eye contact with me. I am an anxious mother, a worrier by habit, and therefore a pretty decent lawyer. My skin is a soft custardy mustardy brown with lots of freckles and imperfections. I am punctual. I am good at math. I wish I had found someone to marry so I wouldn’t always have to go to dinner parties by myself – to say nothing of avoiding arrest for child abuse should J.B. ever become president — but I have no regrets. I like my independence. My life is good. When not consumed by my many official duties as political correct, feminazi, black, single mother, I like poetry, walking on the beach at sunset and traveling to new places.

See PATRICIA J. WILLIAMS, OPEN HOUSE: FAMILY FRIENDS, FOOD, PIANO LESSONS AND THE SEARCH FOR A ROOM OF MY OWN 6 (2004). Lawyers (and Law Professors) often wonder what we look like, what we should look like what we are becoming. The combination of confidence with anxiety fills our being.

3 Consider the distinction between the way poets think and the thought process of the prophet: While the prophet works under divine direction, so to speak, the poet views the social order as a whole, down to a very Romance of its language. The Romance is captured by the way former Attorney General (1817-1829) William Wirt describes the best ideas of success in studying law.

Laborious study, and diligent observation of the world are both indispensable. . . By the former you must make yourself master of all that is known of science and letters; by the latter you must know man, at large, and particularly the character and genius of your own countrymen. You must cultivate assiduously the habits of reading, thinking and observing. . . . Learn all that is delicate and beautiful, as well as strong, in the language. . . you must take care to unite. . . the diligent observatory of all that is passing around you; and achieve, close, and useful thinking.


4 It may be helpful to define lawyer-scholar. I mean here, the broadest sense of both words – those trained and engaged in the work of the law, critically engaging the ideas and structures around them, so that they begin to define themselves. This term is not role specific. It includes lawyers, law professors, judges, clerks, etc… Lawyer-scholar is not meant to foreclose the category by task but rather assumes all persons engaging law should perform the principle function of self-definition in the face of law.
In her book, the *Mind of the Maker*, Sayers describes the process in which a writer (and creator) assumes a single idea and introduces it to the action that the idea requires. Indeed, Sayers tells us that in the art of writing, there is a tripartite structure of writing: the idea, the activity, and the power. The idea underlies and bridges the physical revelation and is thrust forth by the power, which sets the idea in motion. In the power and activity is found the meaning of the work in the soul. Such is the same in the development of legal ideas. Duncan Kennedy describes this moment where the idea, the activity and the power are most recognizable in our culture of law a the opinion of first impression - - a “kind of clearing of freedom in the entire forest of constraint.” Though such fresh ideas ultimately are absorbed into a part of the greater cultural law, the idea started out of silence and inactivity. Only when the idea is recognized, can the activity and power give the idea a “space” to grown, plant new manifestations in the places created by the ideas, and thereby become truly one’s own. As this article describes, the activity and the power help distinguish an idea as truly’s one’s own.

James Boyd White’s book, *Living Speech: Resisting the Empire of Force* captures the nature of Sayer’s tripartite system. Indeed, White’s thesis of the book is summarized rather succinctly: “How as individual minds and persons might we come to understand the ways that the Empire of Force is always present in our thought and speech, and learn how to resist its power by refusing to respect it?” What I am interested here in White’s work, is the nature of legal writing and the

5 DOROTHY L. SAYERS, THE MIND OF THE MAKER 39 (1941). Sayers concept of the idea is one that is discovered not created. Sayers says “the activity of writing the books – is a process in space and time, it is known to the writer as also a complete and timeless whole, the beginning and end. “She goes on to say “the Idea of the book is a things in itself quite apart from its awareness or its manifestation. . . . The idea is thus timeless, without parts or passions, though it is never seen either by writer or reader except in terms of time, parts and passions.” Id.

6 Consider Charles Black’s words: “Generalities about injustices are mere evasions of the central truth about our injustice. Hamlet was not a philosophical tract on indecision; it was a play about a particular young Danish Prince Injustice in America has not been an abstraction, or a miscellany without a theme.” Charles Black, *Talismanic Names and Modern Justice*, in THE HUMANE IMAGINATION 50, at 53 (1986). Ideas gain power in context through our perceptions of the material world!


8 Id.

9 Part I describes the conditions necessary for recognition – silence, not just in the auditory sense, but more relevantly in the spectrum of ideas. Part II is about the action – action in not defining and action in defining oneself differently from one’s surroundings. Part III is about the power – the planting of the ideas into space – a technical term for the normative recognition of the idea, and the manifestations and consequences of ideas in Place – a technical term for the physical manifestation of the idea.

10 JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (Princeton 2006). Amongst the many indices of a great work present here is the fluid way that White captures the sense of speech through the ages: tying Dante, Scripture, correspondence, children’s essays, poetry etc… together with legal writing by their common enterprise – a medium tied to words and meaning. White’s theme is to remove the individual from the words and phrases that have no meaning, and to assist the lawyer/individual in finding his own self through his own writing by resisting the “Empire of Force.”

11 Id. at 10.
lawyer-scholar’s ability to self-define herself so to identify the idea, the activity, and the power. Specifically I want to discuss three matters in this regard: (1) the tension between ideas that are “our own” and ideas that are not; (2) the way action in the law comes out of the idea, a regeneration as such, with a new form of action and a new catalyst that drives the idea towards meaning and makes the idea truly one’s own; and (3) the way the power operates in the places and spaces of the individual.

I. THE REGENERATIVE PATH -- THE SOUNDS OF SILENCE

There is a tension the lawyer scholar feels when approached with the problem of law. On the one hand, there is a distinct community of voices, both past and present that the scholar must hear when confronting the idea. At the same time, there is a tension of being alone, set aside, and adrift to find one’s own way. It is the tension that is between Holmes’s comments of “directors of a force” rather than the “mouthpieces of an infinity.”\textsuperscript{12} A mouthpiece of infinity might suggest the lawyer-scholar has a vast range of resources, that the law is an open book and his sources are either innumerable or yet to be defined. But it can also mean finding one’s own self-defining view amongst the ages.

That James Boyd White can conclude “that Justices of the Supreme Court, and other Judges too, are under an ever greater temptation and pressure than the rest of us to speak in dead, mechanical, or bureaucratic ways,”\textsuperscript{13} confirms the Holmesean thought that at center, Judges are bound to their community.\textsuperscript{14} In one sense, using the words, Such an irreconcilable antagonism, of course, must have a correspondent depth of seal in the human construction. It is the opposition of Past and Future, of Memory and Hope, of the Understudy and the Reason. It is the primal antagonism, the appearance in trifles of the two roles of nature.

\begin{footnotes}
\item 12 Letter from Oliver Wendell Holmes to Harold Laski (January 29, 1926) in Richard A. Posner, The Essential Holmes 235 (1996) (“It seems to me like shaking one’s fist at the sky when the sky furnishes the energy to enable one to shake his fist” referring to some court’s allowing of the U.S. to be sued in distinction to Sovereign Immunity.”). Consider Ralph Waldo Emerson’s description in his essay “The Conservative”:

\begin{quote}
Such an irreconcilable antagonism, of course, must have a correspondent depth of seal in the human construction. It is the opposition of Past and Future, of Memory and Hope, of the Understudy and the Reason. It is the primal antagonism, the appearance in trifles of the two roles of nature.
\end{quote}

\item 13 White, supra note 5, at 11
\item 14 See e.g., Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J. Dissenting) (Holmes’ opening line: “This case is decided upon an economic theory which a large part of the country does not entertain.”); Traux v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes J., Dissenting) (“There is nothing that I more depreciate than the use of the [Constitution] beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires… even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.”) Perhaps then, one way of viewing Holmes’ pragmatism is as both a step towards self-limitation and towards self-expression, defining himself while not defining the community as judged by himself. In so doing, it was perhaps necessary for the court to remain silent, rather than speak towards communal defining. See Erin Rahne Kidwell, The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review, 62 ALBANY L REV. 91, 120 (1998); see also, Thomas C. Grey, Molecular Motions: The Holmesean Judge in Theory and Practice, 37 WM & MARY L. REV. 19, 39 (1995) (“While rule skepticism may have undermined the virtue of predictability based upon adherence to precedent…. it served the other policy that dominates Holmes’ judicial
grammar, and structure of the ages can lead one to believe she is writing the meaning of the tradition. Ultimately, that community can overpower the lawyer scholar’s voice so that the realization comes that her ideas are not her own ideas, but rather are ideas that are mere repetitions of style. White continues “that they should resist these forces strenuously, seeking to attain in their own compositions the kind of life, the presence of mind and imagination, that can alone prevent the law from becoming a central actor in the Empire of Force.”\textsuperscript{15} Indeed, the legal scholar must be willing to let the community (with all of its styles) infect her mind; but she cannot stop there. Rather, she must allow her mind to sort through the tangled web of conflict, chaos, and charisma, to come to her own center of gravity in the law and her writing. She must avoid the community, for a time, so that her thoughts, are truly her own and are expressed as such. As well stated by White, the idea is only allowed to be the scholar’s own when she allows the idea to “lie in [her] own struggle to come to terms with the systems of meaning…”\textsuperscript{16}

Speaking in Judge-speak, Lawyer-Speak, or Scholar speak deceives the person doing the speaking; it’s a siren telling the person that one is doing something meaningful and timeless by conforming to what the expected style is.\textsuperscript{17} Whether its Justice Blackmon’s opinion in \textit{Virginia Pharmacy Board v. Citizens’ Consumer Counsel},\textsuperscript{18} or John Ashcroft’s description of war tribunals,\textsuperscript{19} White describes the immaturity and lack of conscious reflection that plagues so much legal writing, leading to the more dire consequences of law becoming less attached to meaning and more attached to what was said about that meaning. Action for the legal scholar is the penning of an idea to the conscious world in his own language, tone, rhythm and beat. Thus the three alternatives that one can view the legal idea are as (1) a invention of infinity; (2) an exercise in repetition; or (3) a regeneration of thought. This article is about the last of these alternatives.

Regeneration requires contemplation and solitude to thrive. In as much as it needs the community of voices during the day, it also needs the quiet of the “good morning,” and the retreat of the “good night.”\textsuperscript{20}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 40 (dante’s poem teaches “the necessity of being on guard when the siren sings.”).
\item \textsuperscript{18} Id. at 77 citing \textit{Virginia Pharmacy Board v. Citizens Consumer Counsel}, 425 U.S. 748 (1976).
\item \textsuperscript{19} Id. at 65 citing Statements by former Attorney General John Ashcroft \textit{in inter alia}, St. Louis Post Dispatch, November 18, 2001.
\item \textsuperscript{20} W.H. Auden, \textit{Law like Love}:
\begin{verbatim}
Yet, Law abiding Scholars write; Law is neither wrong nor right
Law is only crimes, Punished by places and by times;
Law is the clothes men wear, Any time anywhere;
Law is good morning and good night.
\end{verbatim}
\end{itemize}
\end{footnotesize}
But silence can be positive, negative, and merely there. One way of considering the lawyer-scholar and the types of silence is to look at the models of silence in literature that purports to be associated with the law. A second way is to consider the impact solitude has upon the law.

A. Models of Loneliness

The lawyer-scholar might recall the loneliest characters in literature that have either been so consumed by their ordinary tasks that they forget the counsel of the ages or, those that specifically refute the counsel of ages to be lonely in the face of the masses. On the one hand, there is Stevens from The Remains of the Day\(^{21}\) .... focused, steady, dependable, yet also completely without the ability to think outside of the purpose and function that he performs – truly indeterminate of his own view of the social order.\(^{22}\) His relationships are completely constrained by the task he performs: for example his relationship with his master;\(^{23}\)


\(^{22}\) See Christine Brooke-Rose, Exsul, 17 POETICS TODAY 289, 294 (Fall 1996) (describing the book as portraying Stevens' thoughts and emotions “through his pompously, distancing, alienating correct idiom!”). One might even suggest that Stevens’ views of the world correlate only to his status, which relieves him of the responsibility to form his own identity:

> But like being what it is, how can ordinary people truly be expected to have strong opinions on all manner of things – as Mr. Harry Smith fancifully claims that the villagers here do? And not only are these expectations unrealistic, I rather doubt if they are even desirable. There is after all, a real limit to how much ordinary people can learn and know, and to demand that each and every one of them contribute strong opinions to the great debates of the nation cannot, surely, be wise.

See Remains of the Day, supra note ___, at 194 (Stevens speaking).

\(^{23}\) See Remains of the Day, supra note 15, at _____ (wherein Stevens only lightly chastises the memory of his former master

> "How can one possibly be held to blame in any sense because, say, the passage of time has shown that Lord Darlington’s efforts were misguided, even foolish? Throughout the years I served him, it was he and he alone who weighed up evidence and judged it best to proceed in the way he did, while I simply confined myself, quite properly, to affairs within my own professional realm. And as far as I am concerned, I carried out my duties to the best of my abilities, indeed to a standard which many may consider ‘first-rate.’ It is hardly my fault is his lordship's life and work have turned out today to look, at best, a sad
his father,\textsuperscript{24} his employee,\textsuperscript{25} even with the land,\textsuperscript{26} reflect his view constrained by the empire. Stevens is a perfect servant of the empire; as one author said, ‘Stevens’ words reveal a curious contradiction: although Stevens views the maintenance of the empire as central to the nation’s identity [an identity which Stevens possesses, as if his own, Stevens believes that such a people as he] must entrust their welfare into the hands of the ‘great gentlemen’ whom Stevens has served.\textsuperscript{27} Thus, Stevens’ loneliness is role centered – which has happened to also take over his personality. It is this aspect of his professional duty – the duty that shackles him to a lonely existence – that has been found a wonderful counter-example for legal ethics and professionalism thinkers.\textsuperscript{28} The

waste-and it is quite illogical that I should feel any regret or shame on my own account."

\textsuperscript{24} Note how Stevens’s most intimate moments with his father relate to their shared status as butlers. \textit{See id.} at 40-42 (describing his father’s butlering courtesies to a General responsible for his son’s death:

Meanwhile, the general having no idea of my father’s feelings, took full opportunity to relate anecdotes of his military accomplishments, as of course many military gentlemen are wont to do to their valets in the privacy of their rooms. Yet so well did my father hide his feelings, so professionally did he carry out his duties that on his departure, the General had actually complimented [father’s master] on the excellence of his butler and had left an unusually large tip in appreciation – which my father without hesitation asked his employer to donate to a charity. \textit{Id.} at 42. Yet this sentiment obviously clouded Steven’s (and perhaps his father’s) view of the sentiment due between a father and a son. As Stevens tells his father that because of age and illness, the older man’s duties were being limited, the reader gets the sense of such detachment that perhaps they were not even related, or that the only way they perceived themselves was as butlers. \textit{See id.} at 65. Finally, as Stevens’ father lies sick and dying Stevens comforts his master first, even as his father dies. \textit{Id.} at 104-06.

\textsuperscript{25} Stevens expresses distaste for those employees that engage in “liaisons with other staff members.” \textit{Id.} at 50-51. Though Stevens finds it rather “churlish” to appoint blame, he still views their commitment to the profession, the house, (and the empire) as should be their primary concern. That Stevens would express such discontent suggests that Stevens has bought in fully to the Empire around him, and that Darlington hall is necessary for the continued success of the moral empire. Perhaps the best irony of \textit{Remains of the Day} is that the reader is lead by the suspicion that an unresolved sexual tension exists between he and Ms. Kenton. \textit{See e.g., id.} at 244. If not for the Empire, then Stevens himself would also engage in the love he so much desires, something he realizes after the Empire is done and the relationship’s chances have long passed. \textit{Id.} at 244-45.

\textsuperscript{26} The English landscape at its finest—such as I saw this morning—possesses a quality that the landscapes of other nations, however more superficially dramatic, inevitably fail to possess. It is, I believe, a quality that will mark out the English landscape to any objective observer as the most deeply satisfying in the world, and this quality is probably best summed up by the term ‘greatness.’ … And yet what precisely is this greatness? … I would say that it is the very lack of obvious drama or spectacle that sets the beauty of our land apart. What is pertinent is the calmness of that beauty, its sense of restraint. It is as though the land knows of its own beauty, of its own greatness, and feels no need to shout it.”

\textsuperscript{27} \textit{See John P. McCombre, The End of (Anthony) Eden: Ishiguro’s The Remains of the Day and Mid Century Anglo-American Tensions, 48 TWENTIETH-CENTURY LITERATURE 77, 84 (Spring 2002).} The primary thesis of McCombre’s work is the revelations of the British Empire in Ishiguro’s work.

\textsuperscript{28} \textit{See Rob Atkinson, supra note 8, at 50.}
hallmark of that loneliness is a lack of courage to define himself
differently than his social world – the Empire of Force around him –
dictates. Ultimately, an Empire of Force needs people like Stevens to
quietly subsume the tenets proposed and therefore believe it’s an Empire
of virtue.

A second lonely character is one that chooses to be lonely
because he rejects the status of everything around him -- Raskolnikov
from Crime and Punishment. This type of loneliness is closest to the
term ressentiment, a condition of “rancorous envy by the naturally weak
towards the naturally strong.”

As a chronic condition of lingering,
unwanted dependence upon a person or
a situation somehow seen as insulting,
ressentiment finds fertile ground among
reactive types with no firm sense of
personal values. Envious of the graceful
and harmonious existence of just
individuals around him, the man of
ressentiment at his most creative uses
his gifts of pervasive observation and
complex intellect to insinuate himself to
power.

This theory of ressentiment reveals the character of the individuals more
than it contemplates the problems in the law. Consider that
Raskolnikov’s sickness is the product of self-inflicted withdrawal
because of personal aggrandizement:

In short, I maintain that all great men or
even men a little out of the common,
that is to say capable of giving some
new word, must from their very nature
be criminals—more or less, of course.
Otherwise it’s hard for them to get out
of the common rut; and to remain in the
common rut is what they can’t submit

Robert Weisberg summarizes the shared experience of the moral ends of law with the ressentiment person: "justice and ressentiment are in every sense antipathetic. Yet reactive emotion threatens to emerge in any legal environment." Raskolnikov deems personal morality to be far more valued (and disconnected from) social morality. Thus, there is little choice but for great thinkers such as he, to shun the social world, even its laws, so that the new order can be created.

In contrast to the loneliness that produces ressentiment man and indeterminate man, is that which produces contemplative man. Consider Atticus Finch in To Kill a Mockingbird as perhaps the most idealized American vision of the law’s righteousness at work. His noble ability to see past human imperfections --"to walk a while in another person’s

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31 FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (1866).
32 Weisberg, supra note 18. Citing Nietzsche, Weisberg shows how the ressentiment man creates his own sense of morality, apart from the greater community base:

The ambition of these most abject individuals is to at least mime justice, love, wisdom, superiority. And how clever such an ambition makes them! For we cannot withhold a certain admiration for the counterfeiters skill with which they imitate the coinage of virtue; “we alone” they say “are the good, the just, we alone the men of good will.” They walk among us as warnings and reprimands incarnate, as though to say that health, soundness, strength, and price are vicious things for which we shall one day pay dearly; and how eager they are, at bottom, to be the ones to make us pay! How they long to be the executioners! Among them are vindictive characters aplenty, disguised as judges who carry the word justice in their mouths, like a poiseness spittle, and go always with pursed lips, ready to spit on all who do not look discontent, or all who go cheerfully about their business.


The artistic development of the theme of isolation and loneliness is at the center of Dostoevskij’s ethical and moral speculations. Treating the various phases and aspects of this problem, he shows isolation as the logical consequence of man’s striving to gratify his ambition.

34 HARPER LEE, TO KILL A MOCKINGBIRD (1960).
35 See Stephen Lubet, Classics Revisited: Reconstructing Atticus Finch, 97 MICH. L. REV. 1339, 1339 (1999) ("No real life lawyer had done more for the self-image or public perception of the legal profession than the hero of Harper Lee’s novel, To Kill a Mockingbird."); Michael Asimow, When Lawyers were Heros, 30 U. S. FRAN. L. REV. 1131, 1138 (1986) ("To all the lawyers who decide to use their precious time and skills in ways that don’t go straight to the bottom line, Atticus Finch is the patron saint. He is a mythic character. He is everything we lawyers wish we were and hope we will become.").
skin” -- empowers him to understand his townspeople at face value – a virtue rather sparse in the community he dwells in daily. That isolation which emerges in *To Kill a Mockingbird* is depicted as self-reflection; Atticus’s solitude is filled with personal inquiry. Atticus, it may be said, learns who he is and what the law is, in times of silence and self-inspection. And in those moments of solice, Atticus is able to understand how law works in the community. It’s Atticus’s ability to be lonely, to self-define himself, and therefore engage the law with critical introspection, that makes Atticus the prominent model of legal contemplation and courage. Indeed, self-reflection is a necessary precursor to self-definition in the law.

A similar and helpful analogy to these descriptions is contained in the concepts of exile. Exile carries a double meaning: first as the “present sense of living elsewhere” and second “in its etymological sense of ‘springing forth.’”36 We might say that the loneliness exuded in “indeterminate man” and ressentiment man” represent only the former – a disconnection between the spaces of the mind and the places surrounding them. At the same time, contemplative man exudes both forms of exile – at one and the same time, he is both withdrawn and springing forth to become his own person in the law. Naturally, such loneliness ultimately impacts the law.

B. Solitude upon the law.

Loneliness not only impacts the lawyer-scholar’s view but ultimately shapes law. Consider the three types of silence we have approached above. Silence that is indeterminate leads to law that carries no real basis in the values of the social order. Similarly law that arises from ressentiment norms is reactionary and rarely survives longer than the reaction is valued by society. On the other hand, law that is contemplative offers the paradigmatic benefit of being grounded in the historical and normative basis that is the law’s foundations, while not being swallowed by them at the same time.

Consider Jeb Rubenfeld’s theory of the Paradigm case37 and the enigma that is *Brown v. Board of Education*. Within our common law tradition of respecting precedents there is a force that advises Judges and law makers against paradigm shifts in the law. This was not, as we know, the force that steered the Brown decision. Instead, according to Rubenfeld, *Brown* followed an enduring interpretive structure prevalent in all of Constitutional law: that cases involving non-application restrictions (i.e., involving something the Constitution does not forbid) are not reflective of social commitments, but are temporary place holders for social construction.38 In contrast, the paradigm case, such as Brown, emerges from beneath the immediate social construction and reclaims a part of historical understanding previously absent in the law; it regenerates the norms and values present in the Constitutional order.

36 See Exsul, *supra* note ____, at 289.
37 JEB RUBENFELD, REVOLUTION BY JUDICIARY (2005).
38 Rubenfeld, *supra* note ____, at 17.
Consider now the loneliness that we have discussed before – all within the African American and Asian-American Civil Rights liturgy. One is the silence that simply watches the Empire of Force move at will throughout the social order so as to not disturb the social order (the indeterminacy effect). This type of silence is inaction, when the idea has already suggested that action should be taken. Consider the precedent set by *Plessy v. Ferguson* and shifting of the idea in *Brown v. Board of Education*. At core in those decisions is the recognition that a disruption of the “Empire of Force” comes at great social cost: “In determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order…” In stating the problem as one of social order and not Constitutional mandate, the Court curried the analysis through law towards a neutral posture at rest with winds of majoritarian demand. In *Plessy*, Justice Brown writing for the majority stated the proposition this way:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each others’ merits and a voluntary consent of individuals. As was said by the court of appeals of New York….

“This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate… Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can

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39 One might view the African American Civil Rights Cases – *Plessy v. Ferguson* through *Brown v. Board of Education* – and the Asian American civil rights cases – *Yick wo and Korematsu* – as forming a liturgy. Liturgy is a customary community act in the form of worship usually ground within a specific religious tradition. The focus here on “liturgy” is the reminder that “knowledge of the law” and “knowledge of ourselves” is interdependent and that interdependence is what “ethics” is about. *See Stanley Hauerwas, In Good Company: The Church as Polis* 156 (1995). Liturgy as a religious act is teemed with several contrasting events: stages of action paired with silence; stages of anticipation with disappointment and then hope. In each of these meaningful moments the revelation and character of the natural ends of worship is revealed – leading one to better understand not only the being but the liturgy itself. Consider the Court’s action as such. As we move inward and outward from disappointment to satisfaction, we seem to understand better at each stage the way the Court understands the Constitution. Through our disappointment in the Court’s treatment of African Americans and Asian Americans the Court reaffirms our own sense of the world. Through our celebration of the Court’s redemption of the same individuals, we celebrate the end view.

White’s analogy towards the Quaker Friends meetings is a wonderful parallel to this idea of law and liturgy. “Speech taking place against silence” – action transposed against inaction – to reveal the character of not only the community but the inherent truths they are seeking. *See White, supra, note __*, at 13.


only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.\footnote{Plessy, 163 U.S. at 551.}

The \textit{Plessy} court’s silence before a social problem is one that avoids conflict and seeks to preserve peace. In contrast, the \textit{Brown} court in setting forth the remedies for the \textit{Brown} class plaintiffs noted the social disturbance the \textit{Brown} decision caused.\footnote{Brown, 349 U.S. at 299.} Nevertheless, the Court stated:

> At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.\footnote{Brown \textit{v. Board of Education of Topeka}, 349 U.S. at 300 (1955).}

And as if the \textit{Brown} idea was not already attentive to the importance of action, the Court noted that its decision should be carried out “with all deliberate speed to the parties in the case,”\footnote{\textit{Id.} at 301.} a phrase that gained new meaning by the Court’s deliberate application (an aspect we will consider in parts 2 and 3 herein).

For now, let’s consider how \textit{Plessy} went silent before the idea and how \textit{Brown}’s silence led to action. \textit{Plessy} narrowed the question from one of law to one of social choice. Justice Brown even suggests that the failure of equality may be the fault of African Americans and not the social or legal framework.\footnote{\textit{Plessy}, 163 U.S. at 551.} In so doing, the Court was not inclined to recognize a right \textit{different} from that which the Empire of Force already assumed to be correct. One of the arguments that \textit{Plessy} made before the court was that the status of race was a “property right” that African Americans were being deprived of before the law.\footnote{\textit{Id.} at 549.} \textit{Plessy}’s argument:
“that in any mixed community, the reputation belonging to the dominant race is “property,” ultimately is rejected by the Court as a product of social distinctions, not Constitutional status.\footnote{Id.} The court’s rejection of this Property argument becomes, however prophetic towards the ultimate decision in \textit{Brown} and subsequent legislation as a result of \textit{Brown}. Indeed, in \textit{Brown}'s companion case \textit{Bolling v. Sharpe}, the Court aligns social equality with the traditional adherents of freedom in the Fifth Amendment: “Although the Court has not assumed to define liberty with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”\footnote{Bolling v. Sharpe, 347 U.S. 497 (1954).} One might even consider that the Civil Rights Act of 1964 is an acknowledgement by Congress that fundamental social status at the very least affects property rights, if not is a recognition that equality is a property right, and in either case is actionable under the Fifth and Fourteenth Amendments.\footnote{Civil Rights Act of 1964.}

The second dangerous loneliness, the social ressentiment, is best depicted in the aggressive legislation at issue in \textit{Yick Wo}\footnote{Yick Wo v. Hopkins, 118 U.S. 356 (1886).} and the military orders of \textit{Korematsu}.\footnote{Toyosaburo Korematsu v. U.S., 323 U.S. 214 (1944).} Recall that the definition of Ressentiment was the condition of rancorous envy by the naturally weak towards the naturally strong. Yet when ressentiment moves from personality to law, it gains a retributive formula that reorients the social malaise towards a new concept of justice\footnote{Recall the background to both the \textit{Yick Wo} and the \textit{Korematsu} matters. In \textit{Yick Wo}, the ordinance at issue stems from a long line of exclusion laws directed directly at Chinese-immigrant workers. In one scholar’s words, “Chinese-american entrepenuers in the American West experienced great early success.. but the downturn in the Western American economy in the 1870’s, combined with anti-chinese agitation from white competitors drove the Chinese out of these businesses.” See Thomas Wuil Joo, \textit{New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence}, 29 U.S.F. L. REV. 353, 358-59 (1995). Thus, “all of the fears and prejudices associated with African Americans were easily transferred to the Chinese, a racially distinct class with comprised mainly of menial laborers. Id. citing ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 260 (1971).} – a lens by which the Empire of Force qualifies previously held truths:

\begin{thebibliography}{99}
\bibitem{Id.} Id.
\bibitem{Civil Rights Act of 1964.} Civil Rights Act of 1964.
\end{thebibliography
Ressentiment, unlike hatred, which can be resolved in a single decision or gesture, is a full-blown intellectual malaise, inclined to take institutional and formal, rather than personal, spontaneous, revenge. It emerges only subtly and gradually from an unresolved sense of insult. The “insult” — real, imagined, or provoked by the desire to possess an inaccessible object or trait — grates on the intellect as much as on the emotions. The rage which should theoretically be directed [elsewhere — even towards himself], he venomously misapplies to innocent third parties. If unchecked by a major effort of will, this process continues to pollute the victims relationships until his values are overturned utterly.

Consider then, how the legal enforcement of the San Francisco ordinance in *Yick Wo* embodies this framework. The ordinances, which restricted certain types of laundry houses were deemed unconstitutional based on the hostile way such ordinances were enforced towards the Chinese-class. 54 As the Court notes in opinion:

> No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation in which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except for hostility to

54 *Yick Wo*, 323 U.S. at 374.

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54 *Yick Wo*, 323 U.S. at 374.
the race and nationality to which the petitioners belong…

This reading of the law in ressentiment form lead the court to reject laws, like in *Yick Wo*, that, though facially neutral, are clearly aimed towards certain classes of individuals. Such moments reflect times when the court refuses to engage the Empire, and instead averts its gaze towards the greater social narrative reflected in the Constitution.

But then there are times the court merely condones ressentiment, and allows for laws that appear designed for retribution. This combination of ressentiment and indeterminacy reflects a court unwilling to resist the empire and thereby empowers the laws that are so egregious towards our Constitutional values. Consider the orders and outcome from *Korematsu*. In *Korematsu*, the court addressed military order No. ______, which required the relocation of Japanese, German, and Italian Americans located on the West Coast. It is important to understand the nature of the Black opinion (majority) in *Korematsu* – what Justice Black does and how the majority avoided the real issue of individual rights.

The majority emphasize the need to defer to the powers of the Congress and the Executive over the individual. In doing so, though, the Court skillfully uses the art of double negation and deferment. Notably, the Court’s central holding is phrased as such: “In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.” Notice where the silence and indeterminacy lies in this statement. The unspoken words by the Court are “we approve of the executive exclusion of persons based on race and ancestry.” Thus, by being indeterminate, the court allowed the Empire of Force to not only cower to the fears of the empire, but also to intellectually remain true to its normative values of equality under the Constitution.

Perhaps then, it is not quite so odd to talk about the virtues of loneliness in the law – we merely need to qualify whether that loneliness is one that helps understand social mores or is a reaction to social mores. Indeed, the classical virtue of loneliness was once seen as being imperative towards the reflection and understanding of the law. As Ralph Waldo Emerson quoted in his speech celebrating the emancipation of the West Indian slave: “Whilst I have meditated in my solitary walks

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55 One might argue that *Lawrence v. Texas*, refuses to respect the ressentiment laws aimed at Homosexual conduct. See e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* struck down a _____ year old sodomy statute, that was only rarely enforced, and seemed to be currently used only to harass homosexuals. See Rubenfeld, *supra* note ____, at 184 (“*Lawrence v. Texas* should be celebrated by all who stand against the endless campaign to vilify and torment homosexuals). One way the *Lawrence* stands as an opinion of contemplation, is its reasoning resting in the norms of the Constitutional structure. By defining liberty, according to the “autonomy of self” instead of through the language of equality, *Lawrence* begins to separate from the traditional structures of the Constitution and towards an individualistic ethic. See Rubenfeld, *supra* note ____, at 186.

56 *Id.* at 217.

57 *Id.*

58 *Id.*

59 *Id.*
on the magnanimity of the English Bench and Senate, reaching out the benefit of the law to the most helpless citizen in her world-wide realm [the West Indian slave], I have found myself oppressed by other thoughts.60 Contemplation affords the scholar with an eye both inward and outward to view the law from – it forces the scholar to take stock of the ways law impacts “the most helpless citizen.” As Charles Black contemplated: “a concern for the practice of law,” what we will call the action to the idea, requires first, a perspective from “the inside.”61 As he says further, “visible legitimacy on the intellectual level,” informs the good of what is the law.62 When we reflect as Emerson and Black, we cannot help but view the law as it contradicts our shared values. If allowed by solitude -- not indeterminacy or ressentiment -- to intellectual honesty, we begin thinking in greater narratives – towards the good, the individual, and the idea.63

White summarizes this point:

In such ways the meaning of any expression worth real attention comes in part from silences, external and internal, silences that reflect both what is not said and what is not sayable at all. We cannot really imagine it, except as surrounded by silence; and if it invites and rewards the kind of attention I describe, it will seem to come not from the familiar part of the mind that is full of tags of remembered speech and gesture, rote pieces of speech that we assemble without thinking, but from some deep place within the self – silent, below the words, a place where language can be the subject of conscious attention and where it can be remade.

60 See CHRISTOPHER NEWFIELD, THE EMERSON EFFECT: INDIVIDUALISM AND SUBMISSION IN AMERICA 17-18 (1996). The freedom narrative, as used herein, refers to the ability of transcendentalists to break from the traditional democratic deference towards a theme of self-authorization, individualism, and self-sustained morality in the law. Id.


62 Id. at 20.

63 What this article suggests, is a deeper contemplation such as a poet might undertake. Indeed, such contemplation and works are accused of suffering from “falsity, irrationality, and seductiveness.” See Kenju Yoshino, The City and the Poet, 114 YALE L. J. 1835, 1838 (2005). Such falsity, irrationality, and seductiveness, though, provide the law a steady counter-balance to its institutional truth, rationality, and puritanical means. Indeed, the poetic way is defined as false only in the face of accepted truth. Certainly, at one time, a Black man’s equality could have been described as being a falsity, irrational, and merely seductive idea before the law. And then, came the poetic thinkers whose ability to self-define helped shape the law. Indeed, the thought that a phrase such as “all deliberate speed” could temper a radical change in social relations as propelled by the law is something so irrational and seductive that only a poet could perceive. See Jim Chen, Poetic Justice, 29 CARDOZO LAW REVIEW ____ (2006).
An essential feature of this kind of speech or writing is that its use of language is not automatic, but shaped or chosen. The speaker or writer tries to be aware of his language and its limits, and invites his audience to be so too; this requires of both of them an inner as well as outer silence. And this silence is not simply empty space or time, an absence of words; it is a state or condition that must be attained by work and art and discipline, and it must be used and used well. It is a crucial part of what we mean by the engagement of the whole mind. 64

In as much as White’s discourse reflects ideas in general, two primary implications of silence are necessary. First, the scholar must allow herself to quiet the voices all around her (and the text) to engage the text and power of that which she is trying to comprehend; to allow oneself to put aside the commentaries that purport to answer the meaning behind the text and herself hear the words that are spoken and those that are not. Dealing with each on their own terms affords the scholar a cognitive distance to find his own voice in the text. White describes this process in the context of reading Dante’s Inferno:

The reader of this poem is thus not simply put in a position in which he must exercise independence of judgment, finally on his own; the reader is compelled at the same time to establish a responsible relationship with an intellectual and juristic structure that is represented as having real authority. He is not pushed off, that is, to make his own way in a world of radical existential uncertainty, but, far more maturely, and significantly he is presented with the inescapable problem of reading, understanding, learning from, disagreeing with, and reimagining the reigning modes of thought of the time – of Dante’s time – as they are represented in the theological world of the poem. It is not right answers that Dante offers us in the end, but a special kind of silence, the silence that follows posed but unanswered questions. 65

64 White, supra note 5, at 15.
65 White, supra note 5, at 22.
That responsible relationship that White infers is an ability to hear one’s own questions coming from the text, despite the answers that White’s “Empire of Force” might suggest.

Next, the lawyer-scholar must find a way to express the legal idea in the terms of silence. Indeed, Jim Chen describes how Justice Holmes assumed the poetic phrase “All Deliberate Speed” and formulated a legal idea. That idea was acquired by Justice Frankfurter, who lent it to Justice Warren. In each case, the phrase though takes a new meaning as the idea is defined by the holder. The answer of how Holmes’s “All Deliberate Speed” was transformed from a quickened heat to a slow, ameliorative process is one that silence best answers. The perception of the racial dynamics and the social change both convict and confirm Warren’s new reading of the phrase; like in Dante (and Job), as White suggests, reading through silence sometimes offers the best answer – no answer to the problems speech presents.66

II. THE ROLE OF THE IMAGINATION, REGENERATION, AND THE LAW.

When lawyer-scholar’s engage loneliness, ideas begin to flood the mind. The three types of lonely-thinkers described in part one, each find different manifestations of ideas. For the indeterminate man, the ideas are mere excursions into the thoughts and norms of those around him; he has failed to define his own self within the law and therefore his own ideas become dominated by the ones he deems “master” or great. Simply said, he has no imagination.

Imagination itself however does not make the lawyer-scholar contemplative. Indeed, the failure to bound one’s imagination by the historical and institutional experience renders the thinker’s mind untrustworthy. That is not to say that the thinker is bound to always respect those institutions; rather, he must recognize them, understand them, and even at times honor them before his ideas generate autonomy from them. This in essence is the problem with ressentiment man. His ideas have become so reactionary – his imagination so unbounded – that he can hardly be defined separate from the institutions he reacts to. Instead he is inevitably linked to those institutions.

Contemplative man in contrast, does not react nor just absorb. He rather, as a studious observer of the forces around him makes deliberate use of his imagination to find his own mind in the law. Contemplative man, makes decisions similar to the way Judge Hutchenson described his decision making process in cases that were “difficult or involved [or that turn] on a hairsbreadth of law or of fact:

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive

66 Id. at 24.
flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for judicial feet, sheds its light along the way.67

While some might hear Judge Spark’s description of the hunch as an uncontrolled guessing game, that was certainly not the imagination ploy that Judge Hutchinson infers. Rather, it is the searching of law and institutions, and when no clear answer is clear, finding the answer in one’s own self-defined view of the law.

The question then arises how does the lawyer-scholar segregate the ideas that have become self-defined, those that are due to no self-sustaining presence in the law; and those that are bound by no view of institutions. Sub-part A of this section considers the strains of the imagination upon all three models of loneliness. Sub-part B then considers how the civil-rights liturgy, described in Part I reacts to the different forms of imagination.

A. **Regenerating the Idea: Discovering that all my best is dressing old words new.**

In times of quiet, the lawyer-scholar is able to contemplate the past, consider the present, and imagine the future. The contradictions between legal values and social norms is less apparent before solitude allows the scholar to engage his own mind. Yet, the revelation also bears upon the legal mind, that his contemplation is not new. It is, as Shakespeare confessed in his sonnets, a condition of repetition reborn into the scholars mind, for:

> What’s in the brain that ink may character  
> Which hath not figured to thee my true spirit?  
> What’s new to speak, what new to register,  
> That may express my love or thy dear merit?  
> Nothing, sweet boy; but yet, like prayers divine,  
> I must each day say o’er the very same,  
> Counting no old thing old, thou mine, I thine,  
> Even as when first I hallow’d thy fair name  
> So that eternal love in love’s fresh case  
> Weighs not the dust and injury of the age,
Nor gives to necessary wrinkles place,
But makes antiquity for aye his page,
Finding the first conceit of love there bred
Where time and outward form would show it dead. 68

And then finding the words to express your disappointment at a lack of ingenuity:

Why is my verse so barren of new pride,
So far from variation or quick change?
Why with the time do I not glance aside
To new-found methods, and to compounds strange?
Why write I still all one, ever the same,
And keep invention in a noted weed,
That every word doth almost tell my name,
Showing their birth, and where they did proceed?
O! know sweet love I always write of you,
And you and love are still my argument;
So all my best is dressing old words new,
Spending again what is already spent:
For as the sun is daily new and old,
So is my love still telling what is told.69

Shakespeare’s Sonnets exemplify the disappointment lawyer-scholars come to at the realization that their ideas are not their own.

A lawyer scholar’s search for “innovation” in the law is a constant refrain of repetition combined with unique perspective, which can lead the scholar to the conclusion that his ideas are not his own. In some ways, innovation can be seen as one of two alternatives proffered by Stephen Winter: “it is either manipulation of the law to accomplish an extralegal, social or political goal;” or it is an orderly and systematic expression of imagination bounded by social and legal contexts.70

Indeed, assuming the latter of Winter’s categorization as the loneliness this essay seeks to provoke, a certain delineation must be made – that is those whose imaginations have no constraint in the law and those who have no imagination.

Of those whose ideas are bounded by neither social nor legal contexts, they run the risk of making their scholarship relevant to them only. In seeking their own ways, and their own approval, the “spirit of their writing and conversation is lonely; they shun general society; they incline to shut themselves in their chamber in the house, to live in the country rather than in the town, and to find their tasks and amusements in solitude.”71 Indeed, the scholar that chooses to venture alone, simply to

68 William Shakespeare, Sonnets, CVIII.
69 William Shakespeare, Sonnets, CXXVI.
be alone runs the risk of exiling herself (in the abandonment sense) and forfeiting all common sense for the sake of being unique. As Emerson said “Whoso goes to walk alone, accuses the whole world.”72 One relevant example is the criticism that the Critical Legal Studies Movement in the legal Academy had too much imagination.73 Imagination, however, was not the problem with the crits. Rather their problem was the consistent pessimism in viewing the law and the world – a view that ultimately became prophetic of their own existence.74 Such pessimism inhibited the crit’s ability to communicate their imagination so that those outside their knowledge could understand and contemplate. In doing so, the Crit’s primarily failed to understand themselves, which rendered them to be by themselves. Perhaps that is one reason that Crit theory has never really been expressed in judicial opinion, though the ground was fertile for its application.

Such is not the loneliness this essay suggests. Rather, the solitude is one of quiet contemplation in the face of social communication. It is, the scholar’s ability to turn away from the voices of the day, and to the quiet of the morning and evening that gives him room to think, expound, contemplate, and move his thoughts from the community of voices to a self-defined voice among the many such as Justice Harlan’s dissent in *Plessy v. Ferguson*:

> In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the

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72 Id.


74 See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 421 (1995) (“but the Critical Legal Studies Movement failed to capitalize on the sense of disenchantment our of which it was born...[they] have prove to be better debunkers than reformers.”). This patter of debunking or the “pessimistic view of the law” translated into a “desire to deride.” Id. In a sense, the very first quotation that Duxbury utilizes to introduce his section on the Crits, though not about the crits, captures their essence:

Let us face it, they do not write well, and their stylistic failings spring from these very features - careless neologism, a slap dash indifference to precision and rigor in exposition, and eager willingness to say more, and to say it again rather than refining what one had already said, and so forth – which have been noticeable in the sociological world from which they sprang long before their own particular twist was ever heard of.

Id. at 422 citing Ernest Gellner, *Ethnomethodology: The Re-enchantment Industry or the Californian Way of Subjectivity*, in his SPECTACLES AND PREDICAMENTS: ESSAYS IN SOCIAL THEORY 46 (1979).
law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States.75

The solace and silence that Harlan allows himself is not only towards the socially acceptable place of African Americans in the late nineteenth century, but also to the procedural and jurisprudential urges of the day. The second group that emerges are those that are bound by no imagination. They are like the Priest and the Judge in Auden’s poem, Law like love:

Law say the Priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.

Law says the Judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I’ve told you before
Law is as you Know I suppose,
Law is but let me explain it once more
Law is the LAW.76

Both the Priest and the Judge are eerily similar: their interpretations of law are static. They derive meaning from Place (steeple and courthouse); from source (priestly book and judges look); and from disposition. Both the priest and judge hold the keys to understanding “Law” and those understandings are immutable by the individual.

This second group falls into White’s description of the Empire of Force:

The Empire of Force is at work not only in those who are engaged in the actual practices of war but in others as well.

Behind the men and women at the front

75 Plessy, 163 U.S. at 555.
76 See Auden, supra note ___, at ___. Here again, the reflection on Auden directs us to the comparison between imagining the world where law is a set parameter and where law is a loose simile. As one commentator has noted “Law like Love is based on Auden’s distinction between human and natural law… Awareness of this distinction prompts the lovers to avoid the bland assertions used by other members of society (Law is), and to state only a ‘timid similarity’ (Law like…). See Fuller supra note ___, at 173. Notably, “Man cannot step outside necessity to discover rules about his condition.” Id.
are other people, all of us, committing ourselves to this activity and necessarily engaging in our own ways of constructing those on the other side as things or animals or monsters, not people. Beyond even that, the Empire exists in other forms, in ordinary life and politics, throughout our lives in fact, whenever we find ourselves denying each others’ full humanity in the way we speak and think…. For the force of the Empire is psychological, emotional and ideological….

And then White captures the true essence of his Empire:

> What looks like external and physical force thus always depends upon — is really a manifestation of — forces at work within the mind and the imagination. These forces are as real, and in their own way can be ultimately as destructive, as physical power. This means that the Empire of Force has presence and power in the minds of each of its agents and servants and supporters — in each of us who does not oppose it, who does not understand it and know how not to respect it. This is in fact where it really lives, in the mind; without that life it would have no force at all.

Indeed, the manifestations of the Empire of Force come not from our own ideas, made separate and individual; rather they are a product of past social behavior — behavior that has been approved by history and over time, but which ultimately we must reject as spawns of the Empire.

### B. Imagination and the Law

Before Plessy’s “separate but equal” decision, the Empire of Force set the imagination for the Court. As we discussed in Part I, the Empire of Force reinforced that imagination in Plessy. And After Plessy, the Empire of Force continued to reinforce the notion that racial equality could be enforced under a “separate but equal basis.” Not until Brown v. Board of Education, does the Court’s imagination spread beyond Plessy, though even then, the Court demonstrates that in some means its imagination is still constrained.


77 White, supra note 5, at 5.

78 Id.
Following the Civil War, the move towards integrating the African American race fully into the social make-up of the Constitutional republic began to take shape. Over the five years following the Civil War, three Constitutional Amendments, and one several legislative acts attempted to transform the American Constitution from one that primarily imposed “a system of negatives” to one that “imposed duties on the national government to act positively, as an instrument, to realize purposes that had inspired the creation of the nation.”

Namely, in 1865, the thirteenth amendment was ratified ending slavery in the United States; in 1868, the Fourteenth Amendment’s extension of due process was ratified; and in 1870, the Fifteenth Amendment’s prohibition of laws abridging or denying the right to vote based on race, color or previous condition of servitude was ratified. In 1866, Congress passed the Civil Rights Act of 1866 which, amongst other things, entitled all persons, to the full and equal enjoyment of inns, land sales, admissions to theatres and public amusement venues, “regardless of race, color or any previous condition of servitude.”

In 1883, six cases came before the Supreme Court by individuals challenging prosecutions under the 1866 law for failure to admit African American persons into various venues. The decision, as framed by Justice Bradley, “is the Constitutionality of the law, for if the law [was] unconstitutional, none of the prosecutions can stand.” In determining the question, Justice Bradley considered each of the three Constitutional Amendments individually. As to the Fourteenth Amendment, Bradley found that no Congressional authority could be found since the Amendment was one of prohibition aimed at the States – “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...” Indeed, Justice Bradley states the issue succinctly:

until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority.

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80 Id.
81 Id. at 145.
82 Id. at 144.
83 See The Civil Rights Cases, 109 U.S. 3 (1883).
84 Id. at 9.
85 Id.
86 Id.
Thus, according to Justice Bradley, the Fourteenth Amendment could never be read as doing anything more than serving as a shield against discriminatory conduct; it could be no sword for Congress to utilize.

Similarly, Justice Bradley did not find the Congressional authority in the Thirteenth Amendment either. While the thirteenth Amendment was a Constitutional sword that eradicated slavery, 87 the narrow question that the majority settled upon was whether the exclusion from venues by virtue of race or color was an incident of slavery. The majority concluded it was not. In concluding that such exclusion was not, Bradley writing for the majority notes this interesting connection:

The long existence of African slavery in this country gave us very distinct notions of what it was and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master’s will, disability to hold property, to make contracts, to have a standing in Court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. 88

The Court noted that these incidents were ultimately eradicated by a combination of the thirteenth and fourteenth amendment; but any power of Congress to act is not found in the Amendments’ “corrective character.” 89

But perhaps most shaping the Court’s decision in the Civil Rights Cases is the emergence of political choice as the fire brand of change. Implicitly the court recognizes that decisions such as were made are of a political character:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be

87 See id. (Bradley, J.) ("conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents...").
88 Id.
89 Id.
protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment, (which merely abolishes slavery,) but by force of the fourteenth and fifteenth amendments.  

Justice Bradley’s call for the African American to now cease as a “special favorite” and instead to find his place in the political process (the reference towards the Fifteenth Amendment) is interesting in the least, given that the law in question was a direct result of the political process.

Justice Harlan seems to recognize that the Civil War Amendments together with the legislation derived, not from a single act of emancipation, but as a whole were designed to initiate the black man, wholly into society. Harlan begins with a strong assertion: “the substance and the spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism.” That verbal criticism rejected a holistic view of the amendments; that the thirteenth, fourteenth, and fifteenth amendments were “adopted in the interest of liberty and for the purpose of securing through national legislation…rights inhering in a state of freedom and belonging to American citizenship.” For Harlan, the Civil War Amendments and their reference to a “badges of slavery and servitude” could not be interpreted away from either the prior history of slavery in America nor the prior legislation by Congress that made such history possible.

90 Id.
91 Id. at ___ (Harlan, J. Dissenting). Harlan quotes previous Supreme Court decision Oldfield v. Marriott, 51 U.S. 146, 156 (1850): “It is not the words of the law, but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.”
92 Id.
Therefore, as Harlan suggests, the same powers which Congress used to enforce the fugitive slave acts in the early nineteenth century, should also stand under the thirteenth and fourteenth amendments to provide Federal enforcement here.

What is more, the Supreme Court seems to recognize that the powers of the Fourteenth Amendment certainly encompass distinctions based on status. In *Yick Wo*, the Court decides the case as falling within the “broad and benign provisions of the Fourteenth Amendment.” Yet, such conclusions were found to be more aberrational than reflective of the equalizing power of the Fourteenth Amendment. In the words of one scholar, despite the fact that the *Yick Wo* opinion seemed to put some “teeth into the equal protection mandate [of the Fourteenth Amendment]… these early hopes were dashed just ten years later when the court upheld so-called separate but equal racially segregated train accommodations in *Plessy v. Ferguson*.

*Plessy v. Ferguson* ultimately is decided in the shadow of this debate. The question of whether a state could designate “separate but equal” provisions is certainly a question of tolerable prohibition – but as the Court in *Plessy* decided, such a law was not prohibited by the Fourteenth Amendment. The Court never broadened its opinion, (in *Plessy* or after) that such acts did not violate the Thirteenth amendment. The imagination of the Court, in deciding the Civil Rights cases, is virtually indeterminate – bound to the prior social view of the Constitution as an instrument primarily designed to not interfere with the social relationships. The Court’s finding that the Fourteenth Amendment did not create a requirement that African Americans be placed on the

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93 *Yick Wo*, 118 U.S. at 373.

94 Consider the *Plessy* Court’s own reference to *Yick Wo* as a response to Plaintiff’s assertion that allowing “separate but equal” on the basis of race will allow for other extensions of the doctrine. *It was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places without regard to the competency of the persons applying or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race.* *Plessy*, 163 U.S. at 550. The Court’s response to Plaintiff is both unempathetic and unconvincing. Though the Court may hold *Yick Wo* as evidence that the Court is not influenced by the greater social narrative, the overwhelming experience of African Americans suggests otherwise, a point that *Korematsu* makes clear nearly fifty years later. See Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 99 U. Ill. L. Rev. 1209, 1218 (1999) (pointing to *Korematsu*’s paradoxical invocation of “rigid” scrutiny as a basis for detaining Japanese Americans during World War II).

95 Julie A. Nice, *supra* note ____ at 1217-18.
same social plane as whites is eerily similar to Justice Bradley’s opinion sixteen years earlier that the Fourteenth Amendment did not equip Congress with the power to enforce equality. Not only was Congress without power to prevent the continued class segregation, the Constitution supposedly did not even try to address the question. The Court rather reverted to its previous system of negatives, instead of looking at the purpose – the normative narrative the Amendments were intended for.

2. After Plessy – Separate is Still Equal

*Plessy* does not stray from the sense of dominant community expectations. Rather, those expectations influence the Court’s decision to avoid its legal imagination. But *Plessy*’s constraint is tied to more than the social expectations surrounding segregation; its also tied to the legal expectations of what the Fourteenth Amendment could do and what it could not. Bound in thought with Justice Bradley in *The Civil Rights Cases*, the court reinforces the idea that the Constitution demanded nothing in the order of social re-engineering during the years following the civil war.

Consider that one way of explaining the Court’s treatment of race-based rights cases after *Plessy v. Ferguson* to *Brown v. Board of Education*, was to read the issues of the case in a way to leave intact as much as possible the prohibition view of the fourteenth amendment. The Court’s expansion and then retraction, and ultimate dismantling of the standard of “separate but equal,” is a primary demonstration of the Court’s recognition that its old ideas continue to pervade new issues. For example, the court in *Guinn v. U.S.* considered whether an Oklahoma Amendment to the state constitution that allowed a literacy test that excluded certain African American citizens from voting violated the Fifteenth Amendment’s grant of suffrage.\(^96\) This question was posed by the Court, not as a question of African American suffrage – the issue that spawned the dispute, but was described as suffrage *qua* suffrage. Thus by avoiding the real issue at stake the Court reiterated the idea that the classes could have separate rights – as long as they were equal.

Similarly, the Court in *Buchanan v. Warley*, addresses the issue of whether a white person could be prohibited from selling a house to an African American in the face of city zoning segregationist requirements. The Court posed the question, not for what it was – legislation that sought to deprive African Americans from certain real estate markets – but rather for what was least corrosive of the *Plessy* Doctrine – whether the law stripped the seller of a property right by restricting the persons to whom he could sell to.\(^97\)

In another example, the Court appears to chip away at the *Plessy v. Ferguson* holding, by implicitly stating that its holding is still valid. Indeed in *Missouri v. Gaines*, the Court considered whether the State of Missouri’s failure to provide equivalent graduate education violated the

\(^{96}\) 238 U.S. 347, 349 (1915).

\(^{97}\) *Buchanan v. Warley*, 245 U.S. 60 (1917).
Fourteenth Amendment. The Court, noting that the right pursued is a personal right, stated:

It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

In doing so, the Court avoids the Plessy v. Ferguson question, while at the same time using the Plessy reasoning as its basis for decision. As it turns out, Separate was not equal, nor could it have been in this case. Therefore, in a discreet tweak of language, the court ignored the Plessy Problem and at the same time reiterated its presence in the law.

c. Brown v. Board of Education – New Imagination, Old Problems

And even when the Court finally decided in Brown v. Board of Education to dismantle the Plessy construction, it can be argued that the ghosts of Plessy’s fruits found their way into the construct the Court used to phrase its expectation of relief. Consider that the Warren approach of “deliberate speed” (translated meaningful, slower, processed speed) was a rational means of confronting the empire of racial segregation laws. Complaints about what Brown II does not contain (silence in the face of speech) seems to ignore the broader problem in the Empire – one of the idea of equality. That is, in one sense, Plessy v. Ferguson was exactly correct -- the law could order that Blacks and Whites be treated on equal ground, a super-Plessy v. Ferguson decision that could have spelled out how equality would be shaped; but law could never change the minds of individuals who had been immersed in racism and rhetoric of inequality for their entire lives. The only hope for defeating the Empire of Force -- the thing that could bring the legal idea to action was time – the time to be silent before the idea, time to contemplate its nature, time to reflect on how to oppose the Empire of Force diligently, intellectually, and consistently; and frankly, time for old ideas and generations to expire. The Brown phrasing then carries the double exilic meaning: on the one hand, Brown springs forth and represents the start of a new period of meaning; and at the same time, Brown is an exile, abandoned recognition that the law can only go so far.

This is exactly the loneliness that White envisions as a “discreet quiet” – the purposeful silencing of voices that renders one a responsible member of the polity both by expressing the idea in his own self-defining way and gaining the sympathy to hear others in the same way.

To imagine people as speaking is to imagine them in some deep sense as equals, for it’s to recognize that each

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99 Id. at 351.
person has her own place in the world, her own mind, and her own experience, her own right to express the meanings she finds in existence, from her own perspective. It is to create a polity based on communication across difference, committing us to the acknowledgement of the reality of the experience of others.

In one sense, White’s framework suggests that the lawyer-scholar be distinct enough from her community so that she can gain her voice in the law; in another sense, White recognizes that the lawyer-scholar never completely removes himself from the past imperfections of ideas that we do not completely embrace. By recognizing that our ideas (both of our mind and in the law) are both products of ingenuity and repetition, we free ourselves to be self-defining and stand the best opportunity for finding our own voice in the law.

III. UNCOVERING THE POWER OF MEANING

Ultimately, White’s work on self-definition describes an innate desire amongst humans to seek meaning, and not shallow baseless answers. White says that the search for meaning by imagining the world is “perhaps the most fundamental of all [desires]” and necessarily includes the ability of the scholar to perceive herself in that world, rather than just around it. This I believe law minded people have great difficulty doing. Our ability to imagine the world, requires not only a picture from the Ivory Tower, the bench, or the Law Firm skyscraper, but must include those perspectives necessarily excluded from our ordinary perception. As White points out, the virtue of Dante for the legal mind, is the ability to picture the “whole universe.”

One way of configuring this approach is the necessity to picture ourselves, not in the places of the material, but in the spaces of the imagination. A place/space orientation describes the differences between being bound by the physically present and choosing to allow our imaginations to release those bonds. A very similar mode of description is used in religious cultures in determining whether the gathering for worship in a particular place binds their imagination to only those images before them, or whether it represents a space wide open and free for the imagination to take them anywhere. The question has been asked in this more direct way: why do immigrant-ex-patriots tend to

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101 Id. at 42.
102 White, supra note 5, at 101.
103 Id.
105
become more religiously fervent in their non-native home than they were in their home-country. One answer lies between the distinctions of place and space. While they may gather in a familiar place for worship, the space is purely of their homeland.

Now imagine law as this type of liturgy that I mentioned earlier. On the one hand, law seeks out silent spaces and those spaces tend to juxtapose against its noises. Often the noises we hear remind us of former spaces in which we lived. When the law is spoken for, it defines a place, a certainty by which it incorporates the unspoken silence into the material world. That silence – the space of the law – might be said to be the underlying norms of what the law aspires to be. For example, consider that the silence left by *Brown* might be the loss of important structures of Black Culture that arose as a result of *Plessy*’s separate but equal language. One such ill of desegregation is the remnant of Historically Black Colleges and Universities, that remain under-funded and for the most part out of the consciousness of the American political voice.\(^\text{106}\) One might suggest that these Universities are left in the places of *Plessy* – a stark reminder that equality has not been achieved – while the social structure tries to reconcile the spaces of *Brown*.\(^\text{107}\) Thus, in the resurrecting of ideas into space, we must be careful that we do not leave vestiges of the old stuck in places that no longer correlate to their spaces, and therefore challenge us morally regarding the idea shift in the first place.

That our ideas create normative space that may leave institutions in place is not a call to simply respect the Empire of Force, nor is it a call to abandon these institutions. Instead its an admission, and an admonition to those of us who find ourselves in service to the institutions of the Empire – like the law. It’s a call to be creative in reconciling the ideas that defy the Empire and understanding how that defiance impacts the community at large. One such creative response in found in Al Brophy’s Reparations Pro and Con:

> The costs of a meaningful program of reparations – and racial justice – will be colossal, though so will the benefits. Much of our work now requires dealing not with overt racism (though some of it still remains) but with the relics of centuries of state-sponsored racism. This is not the easy moral case of rooting out overt racism. It will not be accomplished by a single act of Congress or executive order. It is now a battle against apathy. It is important


\(^\text{107}\) Another example of this deals with those historic African American communities, which once thrived as a center for both arts and commerce, but now seem to wither away. For a challenging treatment of the effects of racial resentment, and the subsequent response, see ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921 (2002).
that we care for the 30% of black children who live in poverty and make sure that there are opportunities for advancement. Reparations, if carefully crafted, thus hold out the hope of accomplishing two important, elusive goals: correcting an injustice and building something more positive for the future.  

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I want to conclude this article by assimilating the legal idea and White’s living Speech to a new metaphor that incorporates place, space and loneliness: the idea of nightswimming by R.E.M. Nightswimming, both the song and the action, is about a compulsive act that has power. It embraces the individual’s coming into contact with an idea that is outside the social norm, reconciling his own insecurities about the idea, and channeling the power into its most visible form.

White ends the introduction to *Living Speech* with the following statement:

This book is not centrally about war, then, or the brutality of the empire in its most florid and fully realized forms, but about the origins and sources of that kind of empire in our own thought and speech. Its real subject [White’s book] is writing and speaking, regarded as an activity of ethical and political significance. All of human life revolves around this activity. To do it well we must understand the languages, the habits of thought and expression, that surround us, that have their life within us; we must think critically about these forces and resources of meaning, which means thinking critically about our own uses of them; and we must learn the art by which we can begin to control these languages, turning them to our purposes, rather than becoming their agents and slaves – which means learning to have confident purposes of our own in the first place. In all of this we need to ask what kinds of relations we establish with others, those we talk to and those we

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talk about. This is what it would mean to “understand the Empire of Force and know how not to respect it.”\textsuperscript{110}

This article also is not primarily about social status and equality. Rather its primary focus is on combating the Empire of Force so that our Imaginations may flourish. Ultimately, this article is about the freedom to go Nightswimming.

Ultimately, the idea of nightswimming is a breach of an Empire of Force that constrains human behavior. For the person to partake, it takes the holder of the idea to make it his own before any action or power can proceed. The action proceeds by the power – the exhilaration of entering waters one does not know, and leaving one completely vulnerable to the things both in and out of the water. It is indeed, many things: naughty, discreet, private. In that moment, though, when the idea takes shape and grasps the holder, it becomes new and fresh again. To be appreciated, it requires the silence of voices and self-assertion of the individual within himself to deny the empire. Like nightswimming, ideas and living speech, deserve a quiet night.\textsuperscript{111}

\textsuperscript{110} White, supra note \_, at 12.

\textsuperscript{111} In a sense, it’s like nightswimming. Both, “deserve a quiet night.” R.E.M., Automatic for the People (Warner Bros. 1992). Nightswimming, both the song and the action, is about a compulsive act that has power. It embraces the individual’s coming into contact with an idea that is outside the social norm, reconciling his own insecurities about the idea, and channeling the power into its most visible form.