

# ‘No Foundations’?

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## 1. Live structures

The relaunch issue of *No Foundations: An Interdisciplinary Journal of Law and Justice* (2012) fittingly opened with an article by James Boyd White, one of the founders of law and humanities scholarship, entitled ‘Justice in Tension. An Expression of Law and the Legal Mind.’<sup>1</sup> If ‘one is to talk about justice in the law’, says White, ‘it must be in light of’ the reality that ‘law is not a set of rules at all, but a form of life’ (White 2012, 1). Here, we find the claim that for law to be a home for, or hospitable to, justice (and, for example, not simply a *means* by which justice is or is not obtained or produced), for justice to be *in* the law, we must see law differently than we usually see it. On the way to making this familiar claim (see e.g., White 1990), White turns to the metaphor of law as a building—evoked by the idea of (no) foundations—in a brief but thought-provoking way. He writes:

What I shall say, in a phrase, is that law is not at heart an abstract system or scheme of rules, as we often think of it; nor is it a set of institutional arrangements that can be adequately described in a language of social science; rather, it is an *inherently unstable structure* of thought and expression, *built upon* a distinct set of dynamic and dialogic tensions. It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again. If one is to talk about justice in the law, it must be in the light of this reality. (White 2012, 1, my emphases.)

Law as an inherently unstable structure built upon tensions. Even if the ‘structure’ White writes of may not be analogous to a bricks and mortar building, this phrase

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<sup>1</sup> White’s article was part of the relaunch special issue, ‘Law’s Justice: A Law and Humanities Perspective.’

calls to mind such a building and draws its telling power from that metaphoric resonance. Of course, we certainly do not find here an embrace of rock-solid foundations—think for example of Peter as the rock on which Christ's church is to be built (see e.g., Matthew 16:18; Matthew 7:24). But nor do we find an outright repudiation or dismissal of foundations. Rather, White appears to play with the usual building metaphor and to subvert it by making it resonate differently. Does law's inherent instability mean it is always on the brink of collapse? That cannot make for a good structure, can it? But if law is inherently unstable, are different or better foundations an option? Will law ever benefit from foundations that assure the soundness of its structure?

White's apparent subversion of the metaphor is tied to his adoption of a viewpoint 'internal' to one who is 'doing' law (White 2012, 5). Other so-called disciplines<sup>2</sup>—read: the social sciences—may wish to solidify law, objectify it, even turn it into rules.<sup>3</sup> But to do law is to experience the inherent instability, even the 'liveliness,' of its structure. According to White, law is both, and at once, a living structure and a structure for living. As he says, the dynamic and dialogic tensions he describes<sup>4</sup> are 'the life of the law itself'<sup>5</sup> and not 'as some might say, "noise in the system"' (Ibid., 16).

White's appropriation of the building metaphor is bound up with his understanding of law as 'an art, an art of language and judgment, an art of the maintenance and repair of human community' (Ibid., 17). Law as a structure and, simultaneously, its maintenance and repair—this is law as 'constitutive rhetoric' (White 1985, 28). Indeed, in what might be taken to be a (further?) strange metaphorical turn, but one which flows from White's understanding of law as laid out in the first few pages of the article, it turns out that White's use of 'structure' and 'built on' leads to his explicit assertion not that law is like a building but that it is 'like a poem' (White 2012, 5)—and judges and lawyers like poets (Ibid., 15). As he says somewhat autobiographically:

I saw law, as I continue to see it, as an activity of mind and language: a kind of translation, a way of claiming meaning for experience and making that meaning real. It is not a system of rules, as I said earlier, but a structure of thought and expression built upon a set of inherently unstable, dynamic, and dialogic tensions. In this it is like a poem (Ibid., 5).<sup>6</sup>

2 On law as a 'discipline,' see Dedek forthcoming.

3 It may be striking that White says 'law as a structure of rules' is a view of law 'from the outside' (2012, 5). But, in his seminal work, H.L.A. Hart himself (who famously writes about an internal standpoint) wrote that his *Concept of Law* 'may also be regarded as an essay in descriptive sociology' (Hart 1961, vii).

4 These are 'between language and ordinary language' (White 2012, 5), 'between law and other specialized languages' (Ibid., 7), 'between the opposing lawyers' (Ibid., 8), 'between competing but plausible readings of the law' (Ibid., 9), 'between substance and procedure' (Ibid., 11), 'between law and justice' (Ibid., 12), 'between the past and the present—and the future too' (Ibid., 13).

5 Compare with Holmes 1946, 1: 'The life of the law has not been logic; it has been experience.'

6 Here, as opposed to earlier in the text, 'inherently unstable' qualifies the tensions and not the structure itself.

Perhaps we ought to take this turn to the poem as an outright rejection of the building metaphor. After all, White previously wrote ‘in this fluid world without turf or ground, we cannot walk, but we can swim’ (White 1985, 40). No ground means no foundations and hence no building; the English ‘ground’ and the German *Grund* translate the Latin *fundus* from which we have fundament(al) and foundation(al). For most of us, swimming as opposed to walking would require constant—and deliberate—effort and care whereas walking—and ground—suggest security and comfort. Perhaps learning to swim, and learning to tread water, is learning to be self-grounding... although, as the editors emphasized in their comments on the piece, ‘it is necessary for the water to make some resistance for us to be able to swim.’

However, treating the turn to the poem as an outright rejection of the building metaphor—and the work it can do—would be moving too fast. For instance, White thinks of architecture as an art akin to poetry. He writes:

In calling what the lawyer and judge engage in an *art*, I have in mind the thought that all art—whether music or painting or architecture or poetry or drama—proceeds by way of tension and resolution: a conflict is stated or hinted at or felt; the tension between opposing elements is developed and expanded; and at the end a resolution is reached—but never a final resolution, only a momentary one. (White 2012, 16.)

The poem does not mean we leave behind law as a structure; rather, it invites us to think of law as a structure we not only pass by or use but inhabit, and to consider the kinds of inhabitants we are. Like Martin Heidegger, White sees poetry—from *poiein*, the Greek verb to make—as a paradigmatic and revelatory human ‘activity’. Rather than constitute an outright rejection of the building metaphor, the turn to the poem re-poses some of the important questions raised by the metaphor, questions relating to what it means to make, to build—even to dwell (Heidegger 1971a). This turn to the poem is a kind of homecoming<sup>7</sup> in which language and poetry, with all their fluidity and slipperiness<sup>8</sup> are experienced—as is fitting for a ‘humanities’ perspective *internal* to law—as our element, our home. As White says in many places, what we now know as law’s so-called inter-disciplinary turn to the humanities is actually in our legal tradition ‘something very old-fashioned indeed’ (White 2011, 31).

What may strike some as a cavalier use of the building metaphor and its ultimate jettisoning in favour of the poem, turns out to be a subtle and revealing engagement with the name of the journal, ‘No Foundations’. In the following pages, I attempt to draw out some of that engagement, to spell out a little bit the oft-used ‘(no) foundations’, to transform ‘foundations’ from shorthand to keyword. To turn a

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<sup>7</sup> Heidegger writes ‘[l]anguage is the house of being. In its home human beings dwell’ (Heidegger 1998, 239) but notes that ‘[h]omelessness is coming to be the destiny of the world’ (Ibid., 258). In *The Legal Imagination*, in a section entitled ‘the right relationship to language’, White turns to Shakespeare’s *Troilus and Cressida* and uses, among others, the example of Ulysses, ‘the master of rhetoric, the great persuader’ who ‘stands outside the languages he uses’ (White 1973, 44).

<sup>8</sup> Elsewhere, White writes of ‘the shimmering and fluid world of language’ (White 1990, 35).

word into a keyword is to allow oneself to be struck by the word, to begin to spell out what we take for granted as we use it, even to allow it to open up or reveal a world for us.<sup>9</sup> Accordingly, I aim to articulate some of what is beautifully packed into both White's appropriation of the building metaphor and the name of the journal itself. In so doing, I consider not only the name of the journal but the original subtitle, 'Journal of Extreme Legal Positivism', before the re-launch with 'Interdisciplinary Journal of Law and Justice' as the new subtitle. I also reach out to White's work more generally as well as to Heidegger's thinking—but without seeking to rigorously present or reconstruct these. 'No Foundations' emerges as neither a warning sign (as in 'enter here at your peril') nor a rule of engagement (as in 'leave the disciplinary foundations that provide you comfort at the door'), nor a self-congratulatory celebration, but as a poetic call, an invitation. The following pages attempt to let the call resonate, to attune us to the call such that we can accept the invitation, and dance to its tune.

## 2. Metaphysical architecture

'[I]nherently unstable structures' and foundations that turn out to be 'tensions' appear to subvert the building metaphor because of the dominance of its metaphysical version: a structure, particularly of knowledge, is to be built *for all times* upon 'unassailable' foundations (Seery 1999, 460). Political theorist John E. Seery tentatively and provisionally refers to this use of the metaphor as located in an "Edenic" as opposed to "constructivist" tradition of 'Western political theorizing' (Ibid., 470). In the Edenic tradition, foundations have the capacity to be unassailable because of their belonging to a 'separate spatial' and 'temporally prior realm' (Ibid., 470). Seery suggests that political theorists who use the term foundations 'as a virtual synonym for "metaphysical commitments", "unshakable premises", and "normative universality"', are, whatever their actual positions, playing into this Edenic tradition and its tropes (Ibid., 465). 'What carpenter has ever actually believed that one-size foundation fits all buildings?' he asks (Ibid., 465). And what kind of 'maintenance and repair', to borrow White's words, would such imagined buildings require, if any?

As a story about human beings building their way to or towards God, the story of the tower of Babel (Genesis 11:1) 'figures in Western philosophy as the first metaphysical interpretation of architecture', writes Daniel Purdy (Purdy 2011, 53). In his study of 'architectural metaphor in German thought', he notes that Peter Bruegel's 'baroque adaptation' of the myth of the Tower of Babel had 'glorified' the project. In reaction to this kind of glorification, the likes of Immanuel Kant turned Babel into 'an attractive metaphor with which to critique both metaphysics and absolute power' (Ibid., 53).<sup>10</sup> The tower is no longer to be celebrated but to be held up as an example, perhaps *the* example, of the finitude of human beings. Human and divine knowledge are irrevocably separated and human beings ought no longer to aim for

9 On 'keywords', see Williams 1976.

10 Indeed, the tower of Babel may remain an attractive metaphor. See e.g., Klink 2011.

the heavens. Certain kinds of buildings are not possible for human beings, who must attend to and use the kinds of plans and materials that are actually possible for, or available to, them. With Kant, the ‘bourgeois house replaces the tower’ (Ibid., 55). What is more, as Purdy notes, ‘[e]difices are always threatened with collapse; they are not unproblematic and secure. The construction of a foundation always entails the danger that it will fail to support the building raised upon it’ (Ibid., 75). For Kant, suggests Purdy, ‘[w]ith the house metaphor comes the ruin, the destruction of a system of thought, and then again with the collapse there emerges again the potential for rebuilding, or at least reapplying portions of the collapsed structure for another purpose’ (Ibid., 75-76). No human construction is everlasting.

On one reading of the name, ‘No Foundations’ is a refusal of *metaphysical* buildings and foundations. Indeed, the first sub-title of the journal, ‘Journal of Extreme Legal Positivism’ was presumably meant to shed light on the name. The *Extreme Legal Positivism* research group was created in 2005 and is the source of the journal’s original name. The group distinguished legal positivism from scientific positivism,<sup>11</sup> and radicalized legal positivism, turning toward an extreme legal positivism, or even a ‘critical legal positivism.’<sup>12</sup> According to the group, legal positivism holds the promise of escaping the limitations of scientific positivism; it does not even appear as a category of it. Legal positivism, when radicalized, made more extreme or critical, no longer mimics scientific positivism’s demand for ‘just the facts, please’ by asking for ‘just the law, please.’ As the research group’s web page relates, *Extreme Legal Positivism*’s project was to take a legal positivist insight—that law is a contingent, human practice—further than legal positivism does. How? By re-thinking the study of law out of a fresh re-appropriation of a ‘conceptual scheme’ organized around the ‘norm.’ Not by jettisoning the norm but by using the norm as a starting point so as to inquire into how legal practices construct so-called ‘social reality.’ In short, by taking further the ‘constructivism’ and ‘relativist epistemology’ of legal positivism.<sup>13</sup> Constructivism here, in the Kantian vein, suggests that there are ‘no foundations’ *other than the human, finite ones we give ourselves*.

### 3. Materials matter

The conceptual scheme of the norm determines what is knowable for jurists and legal researchers who ascribe to legal positivism. With *Extreme Legal Positivism*, it does not determine what is knowable but rather *how* so-called social reality is knowable as produced by law, even if produced as ‘extra-legal.’<sup>14</sup> In any case, part of what is at

11 See <<http://www.helsinki.fi/nof/exlegpos/theory.html>> (visited 15 June 2014).

12 See <<http://www.helsinki.fi/nof/exlegpos/researchers.html>> (visited 15 June 2014).

13 See <<http://www.helsinki.fi/nof/exlegpos/theory.html>> (visited 15 June 2014).

14 See Johns 2013 for a fascinating treatment of ‘non-legality’ in international law. As she writes, ‘International lawyers make law as they go about their daily work, but they also make non-law. International lawyers, that is, routinely shape understandings of what stands opposed to or outside the reach of legal norms’ (Johns 2013, 1). Johns examines selected ‘international legal knowledge practices’ (Ibid., 9) that produce extra-legality, pre- and post-legality, supra-legality, and infra-legality.

stake is thinking about the *form* of law, whether as presented by legal positivism, by those who wish to radicalize it, or simply by some general pre-conceptions about law.

In the building metaphor, legal form becomes the building materials, the matter with which foundations are laid and the structure itself is erected. In the common uses of the building metaphor, rules and doctrines are the 'matter' of the structure of law, which is built on principles, the matter of the foundations. Principles allow for the structure to be both stable and coherent. Law, on this understanding, is a set of rules but, thanks to its foundations, it is more than a sum or an aggregate; it is a veritable unified system. This understanding of law dominates much thinking, writing, and teaching about law. Myriad courses are named 'foundations of law', as are many books and even book series. According to White, this understanding of law is mistaken, not because it is completely wrong, but because it is incomplete and fails to bring to 'light' an important 'reality' about law. What appears to be the entire structure of law in the common uses of the building metaphor becomes just one part of the structure in White's use.

To take one example: James Gordley's *Foundations of Private Law* tries to identify 'the principles that underlie basic fields of private law' (Gordley 2006, 3). 'Fields' to be sure are not 'structures' or 'buildings'. However, *Foundations of Private Law* follows on his magisterial *Philosophical Origins of Modern Contract Doctrine* in which he explicitly adopts the building metaphor. In *Origins*, Gordley attempts to identify and articulate the common principles of contemporary contract doctrine that would allow its 'edifice' to be 'rebuilt' after its 'razing' by critics (Gordley 1991, 9). He finds the principles underlying private law in the work of the late Scholastics, who reorganized 'Roman law into a systematic doctrinal structure on the basis of Aristotelian philosophical principles' (Gordley 2006, 4). Gordley's account of private law, in my opinion, is more persuasive, more textured, more historically and philosophically sensitive than most doctrinal accounts. Moreover, his account, with its emphasis on Aristotelian 'prudence' [*phronēsis*] (Gordley 2006, 7), an ethical and not intellectual virtue, is congenial to White's understanding of what it means to do law. Nevertheless, Gordley, at least in these and like passages, swims in the metaphorical mainstream of 'doctrine' built on 'principles'. Again, this is significant because of those aspects of law the use of the building metaphor brings to light.

In order to bring something else to light, White plays with the building metaphor. He substitutes 'dynamic and dialogic tensions' for principles (the materials of the foundation) and 'thought and expression' for rules or doctrine (the materials of the building). These substitutions invite one to ask whether and how law rules through rules,<sup>15</sup> or resides in rules (as opposed to, for example, in examples or even paradigms).<sup>16</sup> White's appropriation of the building metaphor deprives law of the stability and solidity rules, doctrines, and principles are supposed to provide, thereby actively resisting the reduction of law to a system of positive law. Coherence

<sup>15</sup> See e.g., Frank 1985 on Aristotle and the rule of law.

<sup>16</sup> On the paradigm, see Agamben 2009, 9 and following.

and systematicity, demands of reason—or perhaps rather of rationality<sup>17</sup>—lose their pride of place, their pedestal. In undermining the demands of rationality, White reveals the metaphysical cast of much legal indoctrination,<sup>18</sup> even of those varieties that are apparently non-metaphysical. How does he do so?

White's appropriation of the building metaphor seeks to undo the 'metaphysical interpretation' of the human being as *animal rationale* by returning to Aristotle's *zōon logon echon*, the living being that speaks (Heidegger 1998, 245-246). The common uses of the building metaphor in law bring *ratio* (reason, but also another word for ground) to light whereas White's brings to light not *ratio* but *logos* in all of its richness. In other words, the move from *ratio* to *logos* is a move to a *logos* that still belongs to, and has not been severed from, *muthos*. This return to *logos* is more readily grasped when one sees that White's displacement of rules necessarily goes along with the displacement of propositional and conceptual speech as the key parts or kinds of speech. Law does not rule by rules, and truth does not reside or happen in propositions (White 1985, 127; White 1990, 28; Heidegger 2002). For instance, Marianne Constable shows how H.L.A. Hart, in *The Concept of Law*, presumes that rules 'are writable' (Constable 1991, 86) and thereby insists that 'a practical knowledge' of 'how to act' (internal standpoint) is reducible to 'statements of rules' or 'propositional knowledge' (Ibid., 87) (external standpoint).

The move from *ratio* to *logos* enlivens the building metaphor with the 'living material' (White 1985, 126) of 'living speech' (White 2006) and allows it to resonate differently, perhaps leading one to experience 'dissonance in the form one has become' (Connolly 1993, 151). With a building metaphor that brings *logos* to light, the 'structure' of law emerges as a (literary, poetic) 'composition' (White 1990, 4), which can be more or less harmonious and not simply more or less coherent (Ibid., 231). Precisely because of the substitution of materials, law becomes 'a process by which the old is made new, over and over again' (White 2012, 1). Linear building upwards yields to a (hermeneutic) circle and to 'autopoetic', self-making, even self-grounding, poems (White 1990, 6).<sup>19</sup> By playing with the metaphor, White makes it harder to think of law as a kind of doctrinal (and hence conceptual, propositional) construction precisely because he makes it more pressing to appreciate how doing law involves dwelling poetically in language (Heidegger 1971b). In Heidegger's terms, White may help us see language as 'the house of being' (Heidegger 1998, 239). As we shall see below, this change of materials invites us to re-think the very laws that

17 See Antaki 2014 for a discussion of 'rationalism' in the context of the rise of proportionality in the adjudication of constitutional rights.

18 See the introduction to Simpson 1996 on the invention of leading cases meant to help students identify and master the 'fundamental legal principles' of the common law. Simpson quotes Professor Edward J. Phelps of the Yale Law School: "The very first and indispensable requisite in legal education [...] is the acquisition of a clear and accurate perception, a complete knowledge, a strong and tenacious grasp of those unchanging principles of the common law which underlie and permeate its whole structure, and which control all its details, its consequences, its applications to human affairs" (quoted in Simpson 1996, 4). Here, the principles are 'unchanging' but they need not be for the building metaphor to be deployed.

19 This is a different circle or cycle than the successive ruin and erection of philosophical systems Purdy (2011) refers to in his discussion of Kant.

govern the 'building' of all speech, including legal arguments and judicial opinions.

The shift to constructivism proffered by *Extreme Legal Positivism* could lead to a substitution of materials by de-centering the 'norm' so important to legal discourse and science. However, constructivism may not accomplish what White is doing here because the shift the Extreme Legal Positivists call for is grasped and presented as an *epistemological* shift. It is as if 'we jurists' choose to stand apart from and against our edifice of knowledge, bourgeois house or not, rather than accept that we dwell within it. White is prodding us away from seeing the building as a theoretical edifice of knowledge tied to 'conceptual schemes' and inviting us to see it as a place of language in which we dwell. So-called 'social reality' is lived before and as it is known or 'constructed' or built. Indeed, 'reality' is already 'social'. A *res*, a thing, is a matter of collective concern (see e.g., Heidegger 1971c, 172). As Heidegger says, dwelling is prior to building: '*Only if we are capable of dwelling, only then can we build*' (1971b, 157). Making epistemology primary inverts this relation, or altogether neglects dwelling.

White's playing with the metaphor may help us hear what we no longer hear: the 'to dwell' in 'to build'. To build says to dwell. The Oxford English Dictionary tells us that 'the two fundamental senses [of to 'build'] are "to construct a dwelling" and "to take up one's abode, dwell"'. Similarly, Heidegger points out that '[t]he Old English and High German word for building, *buan*, means to dwell' (Heidegger 1971b, 144). As he writes, '[t]he nature of building is letting dwell' (Ibid., 157). This primacy of dwelling over building (as commonly understood), which undermines epistemology's claims to primacy, is made even more explicit by Heidegger: 'The old word *bauen* [to build], to which the *bin* belongs, answers: *ich bin, du bist* mean: I dwell, you dwell. The way in which you are and I am, the manner in which we humans *are* on the earth, is *Buan*, dwelling' (Ibid., 145). The two-fold sense of to build also allows White's use of 'maintenance and repair'<sup>20</sup> to resonate back, so to speak, to the building metaphor. To repair is not just to fix something broken but also to 'make one's way', 'to return', 'to be present or assembled', even 'to stay, dwell, reside' (O.E.D.). Perhaps communities and structures of 'thought and expression' are both repair and always to be repaired.

#### 4. Laws of building

The editorial of the second issue of 'No Foundations: Journal of Extreme Legal Positivism' hints at a further step, perhaps beyond constructivism, towards what White is accomplishing in his appropriation of the building metaphor. In this editorial, a 'classical' but 'unsatisfactory' answer to what constitutes knowledge proper is briefly recounted: knowledge as a 'belief with grounds (reasoning, justification, explanation)' is distinguished from 'opinion which appeals by way of persuasion' (NoFo 2006, 2). In short, knowledge is (well) founded whereas opinion is not.

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<sup>20</sup> Recall that White writes of law as 'an art of the maintenance and repair of human community' (White 2012, 17).

This answer, however unsatisfactory, to the question of what constitutes knowledge proper reflects the sway of the ‘principle of sufficient reason’ or ‘the principle of ground’, ‘which among other things implies that every true statement requires its grounds’ (Heidegger 1984, 5). However, more than requiring reason or ground, the principle requires that reason or ground be rendered, be re-presented or made present (Heidegger 1991, 22), hence the parenthetical reference to ‘reasoning, justification, explanation.’ It would seem that if one is to talk about justice *in* the law (White 2012, 1, my emphasis), perhaps if justice is ‘to be seen to be done’, as the adage goes,<sup>21</sup> then justification must be possible.

While White’s de-rationalizing of the building metaphor need not be seen as embracing the distinction between knowledge proper and persuasion, it does invite a movement from *ratio* to *logos*, from science to rhetoric, from theoretical knowledge of unchanging things (*epistēmē*) to practical deliberation and seeking counsel regarding changing matters of human concern (see e.g., Smith 1998). It thus appears to de-throne the principle of sufficient reason tied to law as a science. Roger Berkowitz tells the story of Leibniz’s codification efforts as the story of the rise of positive law, of law as a science. He writes, ‘Leibniz’s metaphysics, and specifically his embrace of the principle of sufficient reason (*nihil est sine ratione*), shifted the inquiry from a knowing of law itself to a knowing of the reasons, grounds, and justifications for law’ (Berkowitz 2005, 7). White’s de-rationalization of the building metaphor calls into question the very possibility of justification (the representability of ground or reason) though perhaps not justice itself (for example, judgment as grounded or well founded).

White engages with the question of the representability and representation of ground, for instance, when he says ‘the judge knows that her written opinion can never express or justify what the center of herself is doing, the secret spring of judgment at her core’ (White 2012, 11) and ‘[t]he opinion therefore, however honestly written, has some of the characteristics of a false pretense: This is why I decided the case as I did, the opinion says; but the judge knows that the true springs of decision are deep within her, and can never be fully known or explained’ (Ibid., 11, footnote 11). Whatever properly grounds (or ‘springs’) judgment generally, including the judicial decision, is ultimately un-representable and, as White’s use of ‘spring’ reflects, beyond human will and mastery. Of course, this ultimate un-representability does not mean we ought to dispense with judicial opinions and judicial reasoning; rather, it invites us to read judicial opinions as poetic compositions and not as demonstrations, as well as to keep in mind ‘the limits of expression and of our minds’ (White 1985, 124).<sup>22</sup>

The movement from *ratio* to *logos* does not simply reveal the limits of justification, of the giving of reasons, it also reveals what we might call the violence

21 See Lord Hewart’s dictum in *R. v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B., 256 that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done.’

22 The title of Sachs 2009, *The Strange Alchemy of Life and Law*, points to the element of ‘mystery’ White (1985, 24) writes about.

of justification. As Heidegger writes regarding the modern epoch, 'the unique unleashing of the demand to render reasons threatens everything of humans' being-at-home' (Heidegger 1996, 30). The unrelenting demand to render reasons leads, paradoxically, not to proper building and dwelling, but, rather, to 'discursive strip-mining' (Manderson 1995, 317), for instance in the strip-mining of judicial opinions in search of representable grounds, of *rationes decidendi* (for which cases 'stand'), of propositional articulations of rules. Using similar, but less violent, imagery, White writes: '[t]he meaning of a text is not simply to be found within it, to be dug out like a kind of mineral treasure' (White 1984, 19). These *rationes* and grounds are crucial points of leverage in argument often deployed and experienced as a kind of intellectual arm-twisting. White writes '[t]his kind of discourse [conceptual, propositional] is structurally coercive, in the sense that the writer seeks to prove something even to an unwilling reader who resists with all his might until forced by factual or logical demonstration to yield' (White 1990, 29).<sup>23</sup>

The structural coercion of propositional discourse operates much like one might think the laws of physics, such as gravity, do. Of course, the laws of physics are crucial to actual buildings standing, and hence to the dominant resonance of the building metaphor. White's switch of building materials and his ultimate turn to the poem invite us to experience human thought and expression, including law, as not governed by laws of thought akin to the laws of physics as grasped by laypersons. Elsewhere, White is rather explicit about this point: rules of logic such as the rule of non-contradiction pre-suppose and require propositional and univocal language (White 1990, x-xi and 32).

Ordinary language, however, does not function as propositional language does and appears to escape the jurisdiction of logic. What is more, '[i]t is in fact the point of certain kinds of poetry—the greatest, in my view', says White, 'to capture assertion and denial at once, to carry the reader to the point where her languages break down' (White 1990, 32-33).<sup>24</sup> Putting dwelling first, taking seriously the change of materials to the 'living material' of poetic 'living speech', invites us to reconsider how we think of building such things as arguments and to reconsider whatever 'laws' might govern this building. Indeed, to de-throne the principle of sufficient reason and the laws of logic more generally is to continue to reveal the metaphysical cast of the dominant uses of the building metaphor.<sup>25</sup>

White's appropriation of the building metaphor shifts the key human faculty or experience from reason to imagination (White 1973),<sup>26</sup> and to an imagination

23 On the origins of the coercion of reason, see e.g., Arendt's treatment of Plato's ideas in Arendt 1961, 107 and following. See also Antaki 2007.

24 'The conception of excellence as the comprehension of contrariety or contradiction is an idea that leads out of poetry, as the idea of organic form does too, but perhaps less in the direction of art and architecture and music than that of drama, history, psychiatry, anthropology, and law. In each of these fields, it is a commonplace that the most significant truth is a simultaneous statement of opposing truths' (White 1985, 114-15).

25 On the 'metaphysical foundations of logic', see Heidegger 1984.

26 Note that the sub-title to White's classic *Legal Imagination* (1973) is *Studies in the Nature of Legal Thought and Expression*.

that is not asked to do the systematic and systematizing work of reason (see e.g., Antaki 2012). The shift from reason to imagination is the shift from the faculty of giving principles and foundations (Heidegger 1996, 71) to the faculty of receiving the gift of world. Following Hannah Arendt's thinking on Kant's critiques, the shift from reason to imagination goes along with the shift from rational beings to sensible beings who share a world as fellow dwellers and travellers in that world (see Arendt 1982). This is a crucial point for Arendt because only with the *Critique of Judgment*, she suggests (Ibid.), does Kant make primordial 'the fact that men, not Man, live on the earth and inhabit the world' (Arendt 1958, 7).

The coercion of propositional speech, as exemplified by its univocity, reflects an impatience with the 'human condition of plurality' (Arendt 1958, 7). Can it be that Babel is subtly—or not so subtly—present in any human attempt to build arguments with the materials of propositions in accordance with the rules of logic? The success of this everyday or ordinary project of Babel would secure justification but would make 'justice as translation' (White 1990), justice for sensible human beings in the condition of plurality, unnecessary. However, with the shift to imagination, intellectual arm-twisting gives way to rhetoric, understood and experienced as the appeal to and renewal of a shared world.

## 5. Musical grounds

White's appropriation of the building metaphor moves us from language as propositional or conceptual to language as poetic, from logic to rhetoric, from the solid and stable to the fluid and unstable. Paradoxically, this is a *grounding* movement through which propositional language and logic appear as derivative or modified forms of something more originary. In a movement similar to White's and following Heidegger's work,<sup>27</sup> P. Christopher Smith shows how 'dialogical conversation (*dialegesthai*)' is to be found 'beneath logic's monological and private "pointing out" to oneself (*apodeiknusthai*)'. And beneath dialogical conversation, Smith uncovers 'rhetoric's public con-sultation or our communal taking counsel with each other (*sumbouleusthai*)' (Smith 1998, 6). This uncovering (but not strip-mining) movement from 'demonstration' to 'rhetoric' (by way of 'dialectic') is a movement from solitary reason to a world in which we find ourselves always already with others (Heidegger 1962, 78). Indeed, 'being-in-the-world' is the 'basic state' (*Grundverfassung*) of human beings on which (representational) knowing is 'founded' (Ibid., 90). It may be of the kind of language characterized by 'care' (Ibid., 227), one belonging to world, that White says 'language is also the ground on which we meet' (White 1985, 27).

Rhetoric belongs to and exemplifies the 'basic state' of human beings. Being-in-the-world means to be with others (Heidegger 1962, 155), to be-attuned by way of one's mood (Ibid., 172) and to be concerned with what is to be done. Rational beings need not be *attuned* to the world or *moved* to do things, they need only 'think'. But being attuned and moved, not just when listening but when speaking, is part of what

<sup>27</sup> Especially Heidegger's treatment of Aristotle's *Rhetoric* in Heidegger 2009.

it means to dwell with others. Thinking, feeling, and others are equiprimordial.

Accordingly, rhetorical or original speech is not simply meant to make something visible theoretically or to change someone's beliefs; it is meant to attune and thereby to move. Smith writes, 'the response to dialectical and logical argument is merely "Yes, I see it that way" or "No, I do not see it that way", the response to a rhetorical argument is "Yes, I (we) will" or "No, I (we) will not"' (Smith 1998, 7). Consequently, in rhetoric (as opposed to logic and dialectic), Smith says, 'the character or *êthos* of the speaker and the feeling or *pathos* communicated about the subject matter' are 'indissociable from the communication of the logical content' (Ibid., 7). For instance, White draws attention to how, on a rhetorical as opposed to logical reading, '[i]n every judicial opinion, the judge gives himself a character or personality,' 'a judicial persona or ethos' (White 1990, 111). Judicial opinions thus create their own 'authority', their own ground (Ibid., 112).

Thus, when White turns to 'spring' in his account of the limits of judicial justification, he is shifting attention from that on which a decision *rests* to that from which, however un-representable, a decision emerges. He is drawing attention to how actual human beings are moved to speak, to act, to judge as well as to how they are *attuned* to a world they cannot master but into which they are thrown (Heidegger 1962, 219).

'Living speech', bodily speech, voice (*Stimme*) re-attunes human beings to another mood (*Stimmung*<sup>28</sup>) and moves them, or resolves them to move.<sup>29</sup> This resolve or movement is part of the meaning, the sense, the resonance, of living speech. As White says, '[t]here, in the music the voices make, whether beautiful and harmonious or raw and ugly, is where the meaning lies' (White 1990, 231). The separating out of 'thought' and 'expression' is the casting aside of voice such that language becomes a means by which ideas or concepts 'in here' are ex-pressed and conveyed to someone else (see e.g., White 1990, 31-36). As we have seen, propositions, concepts, and the laws of logic are often inimical to embodied beings who have voices, who speak, who listen and who, by way of their listening, heed, are persuaded, or even obey.<sup>30</sup>

White's appropriation of the building metaphor, the movement from *ratio* to *logos*, and ultimately to the poem, return such things as rhythm and tone, indeed musicality, to human 'speech'. In the passage quoted above, White draws attention to what Smith calls 'the ultimate origins of argument in the ground and soil of voice' (Smith 1998, 305) or the '*acoustical* ground, or better said, *groundless* origins of

28 As Macquarrie and Robinson point out in a note to their translation of '[...] die Stimmung, das Gestimmtsein' as 'our mood, our Being-attuned,' '[t]he noun "Stimmung" originally means the tuning of a musical instrument, but it has taken on several other meanings and is the usual word for one's mood or humour' (Heidegger 1962, 172).

29 Smith draws attention to how 'Heidegger radically redirects Aristotle's line of thought here [*Rhet.* 1357a10-23]: the enthymeme, he says correlates with *enthumeisthai* or "taking something to heart [*to the thumos*]", and it is primarily in this, not in the number of its premises, that its *logos* or argument is to be distinguished from the *logos* of a dialectical syllogism. For the task of the latter is only *apophainesthai*, only to let something be seen, to make something visible' (Smith 1989, 27-28).

30 Ob-audire gives rise to 'obedience'. As White notes, *peithô* 'is usually defined as "to persuade" in the active voice, "to obey" in the middle and passive' (White 1984, 35).

speech' (Ibid., 293). As Smith writes, '*logos*, namely reasoned argument in speech, originates [...] in a primarily acoustical experience where the principle of sufficient reason, *nihil est sine ratione*, and the logical "laws" of non-contradiction and self-identity propping it up have yet to obtain' (Ibid., 302).

What I have called the movement from *ratio* to *logos* does not simply return bodily voice to speech, it also returns the body to speech. Moving from music to dance, White suggests that 'we can imagine languaging as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context' (White 1990, xii). Languaging as dance is reminiscent of Thrasybulos Georgiades's fascinating account of the 'musico-rhythmic quality' (Georgiades 1973, 73) of Greek, of 'the unity formed by [Greek] language and music' (Ibid., 93). Georgiades distinguishes Greek from modern languages, showing it to be *fundamentally* bodily. As he says, '[t]o experience words and verse as solid bodies, as something physical, means automatically to experience them *through* the body, physically. Since verse expresses itself in time, as the molding of time, as movement, its physical character expresses itself as visible physical movement, as dance' (Ibid., 82).<sup>31</sup> For the Greeks, 'languaging', including and as poetry, was *experienced*, not simply 'imagined', as dance.

And so, as we journey with White in his appropriation and transformation of the building metaphor, we find ourselves not only with poems but with dances. To dwell poetically in language, to hear and heed rhythm and tone, it turns out, *is* to dance—and, at least for the Greeks, dancing involves the solid *footing* of living speech, however 'shimmering and fluid' the 'world of language' (White 1990, 35) might be. This 'solidity' of living speech, though, involves movement and 'instability', even 'inherent instability'.

## 6. Post-script: (re-)hearing, (re-)grounding

White's appropriation of the building metaphor—including his turn to poetry, music, and dance—engages with the history of metaphysics. Metaphysics turns out to be not so much a question of mistaken or delusional *belief* in ultimate grounds but rather, or in addition, a question of our *experience* of speech, of language. Our modern loss of footing may be tied to how we fail to experience and appreciate the musicality of speech.

Perhaps, as Smith argues, invoking Friedrich Nietzsche, metaphysics, including the unrelenting demand that grounds be re-presented, emerges with the forgetting, the no longer hearing, of the acoustical ground of speech. As he writes,

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31 As Georgiades explains, the Greek experience of words as *physical* means that speakers of Greek did not have the control over their words and speech modern speakers experience: '[i]n English ... as in any other Western language neither the emphasis nor the length of the syllable conditioned by it, neither the lightness nor the brevity as exemplified in the word endings, are objective qualities of the word; they are not characteristics of the "word-body" itself, but instead are allied closely with the meaning, with the speaker and with what the speaker means to express' (Georgiades 1973, 56).

[...] the history of metaphysics begins with an abstraction and withdrawal from acoustical experience of temporal being and with a turn to optical supervision, an overview, of static spatialized being, a turn coincident with the turn from *phônê* and *phasis*, voice and saying something out loud, to *graphê*, the written mark, or in the terminology of Eric Havelock and Walter Ong, the turn from orality to literacy. (Smith 1998, 293.)

It would be fitting then, to attend to Heidegger's attempt to let the principle of ground (*der Satz vom Grund*), the 'principle of sufficient reason', *resonate differently so as to attune us and move us differently*. As he writes:

The principle of reason is one of those principles that remains silent about what is most proper to it. Whatever remains silent divulges nothing. To hear what is silent requires a hearing that each of us has and no one uses correctly. This hearing [*Gehor*] has something to do not only with the ear, but also with a human's belonging [*Zugehörigkeit*] to what its essence is attuned to. Humans are at-tuned [*ge-stimmt*] to what de-termines [*be-stimmt*] their essence. In this de-termining, humans are touched and called forth by a voice [*Stimme*] that peals all the more purely the more it silently reverberates through what speaks. (Heidegger 1996, 50, all the square brackets are the translator's and not mine.)

Heidegger invites us to hear the principle as speaking *of* being rather than *of* or even *to* beings. A different 'intonation' (Heidegger 1996, 49) transforms what the principle says from something like 'foundations' to something like 'no foundations'. When we hear '*nothing is without reason*', the principle says that every being has its ground or reason, a ground or reason that can be re-presented, even produced, as a being, as *something that is*. When we hear '*nothing is without reason*', the principle allows us to begin to experience ground not as a representable being but as belonging to the being of beings (Ibid., 50). Because being is itself not a being, and hence is not subject to the principle of sufficient reason, the new intonation allows us to hear the principle as 'no foundations'. Indeed, Heidegger says 'being: the abyss [*Ab-grund*]' (Ibid., 52). However, precisely because 'to being there belongs something like ground/reason' (Ibid., 50), the new intonation of the principle keeps saying something like 'foundations'; re-presentable grounds give way to unmasterable *grounding*.

With the new intonation, we are also invited to experience the plurivocity of speech. Indeed, the new intonation calls for 'a leap [*Satz*] into being' (Ibid., 54). As Heidegger says: 'If we fully think through the polysemic word *Satz* not only as "statement", not only as "utterance", not only as "leap", but at the same time also in the musical sense of a "movement", then we gain for the first time the complete connection to the principle of reason' (Ibid., 89). With the new intonation and the shift from univocity to plurivocity, Heidegger shifts the principle of ground from a ground-principle (*Grundsatz*) of reason into a call, an invitation, that attunes and moves human beings.

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