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Budding Translation

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BUDDING TRANSLATION

Milner S. Ball*

BLACK ELK SPEAKS: BEING THE LIFE STORY OF A HOLY MAN OF THE OGLALA SIOUX. By *Black Elk* and *John G. Neihardt*. Lincoln: University of Nebraska Press. 1979. Pp. xix, 299. \$30.

“This they tell, and whether it happened so or not I do not know; but if you think about it, you can see that it is true.”¹

Among the American classics in my library, *Black Elk Speaks* is one of the least willing to rest closed on the shelf. It is the story of a vision, the duty that accompanies the vision, and the life of those whom the vision would animate. It can be justly read as tragedy, indictment, and struggle with the past. But it can also be read as affirmation and as invocation of hope for the future, possibilities that present themselves on this revisit.

There are risks in making *Black Elk Speaks* the subject of a Classics Revisited, more risks than in Kenji Yoshino’s choice last year of Albert Camus’s *The Fall*,² which, as he noted, was riskier than Steven Lubet’s decision two years ago to initiate the series with Harper Lee’s *To Kill a Mockingbird*.³ At least in those books, law and lawyers make their way into the text. No lawyer appears in *Black Elk Speaks*, nor does the word “law.”

And we can never say with certainty exactly whose speaking this book is. Black Elk knew no English, and John Neihardt knew no Lakota. And translation required difficult negotiation between two worlds as well as between two languages. In Black Elk’s world, the word is powerful and performance is essential, for there is no writing, and hence no literature and no concept of literature. The speaking had to travel between Lakota orality and Western textuality.⁴ It made the

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1. P. 5. Although there is a 2000 edition of the book, testifying to its continuing viability, I still rely on my old copy of the 1979 edition.

2. Kenji Yoshino, *Miranda’s Fall?*, 98 MICH. L. REV. 1399 (2000).

3. Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339 (1999).

4. Black Elk’s friend Standing Bear illustrated the book. I have seen no commentary on his worthy, instructive drawings of visions and events. Leslie Marmon Silko observes that ancient Native American artists “took the modest view that the thing itself (the landscape) could not be improved upon,” so that realism did not catch their imaginations, and they therefore sought to abstract what they saw as the key elements of the things observed, not to recreate them. Leslie Marmon Silko, *Landscape, History, and the Pueblo Imagination*, 57

journey from Black Elk, who told the vision, through his son Ben, who repeated in English the words his father uttered, then through Neihardt's daughter Enid, who took stenographic notes and produced a re-ordered transcript, and then through Neihardt, who wrote from the transcript and made alterations suggested by his own memory of the sounds and silences, by his poet's gift for working words, and by Black Elk's singular openness to him.⁵

And puzzlement remains in what is not written. The book covers the period from Black Elk's birth in 1862 to the Wounded Knee massacre of 1890. Neihardt first met Black Elk in 1930. Nothing is said about the intervening forty years and Black Elk's life between the ages of twenty-seven and sixty-seven. In that meantime the Lakota holy man had apparently been silent about his vision and had become a catechist of the Roman Catholic Church.⁶ He would compromise neither the vision nor the Christian faith that he continued to teach. If there was tension between the two, he would live in it.

And then, too, readers should approach this book with watchfulness.⁷ As Vine Deloria points out, it is tempting to read too much into Native American tribal traditions, "to romanticize [them] and make it seem that they had more power and insight than they were capable of producing."⁸ It is equally tempting to read too little in them and to overlook their pointedness and particularity and so eliminate what Gerald Torres and Kathryn Milun call "differences the dominant culture perceives as destabilizing."⁹ Readers will justly resist such temptations.

ANTAEUS 83, 85 (Daniel Halpern ed., 1986). Standing Bear's drawings reflect a similar respect for his subject matter. They are an independent aid to understanding the world of *Black Elk Speaks*.

5. JOHN G. NEIHARDT, BLACK ELK, & RAYMOND J. DEMALLIE, *THE SIXTH GRANDFATHER: BLACK ELK'S TEACHINGS* (1984) includes the transcript, an account of the interviews and the ceremonies and events in which they took place, and details about Black Elk's relation to Neihardt. DeMallie says that "Neihardt suppressed unnecessary details, altered awkward expressions, and introduced a tone of reverence and solemnity, transmuting the oral narrative into literature. For the general reader the omitted details clutter up the story. . . ." P. 291; see also pp. xv-xix, 277-99 (Preface and Appendixes). What DeMallie describes as unnecessary, awkward, and cluttered could be described by others as necessary, sophisticated, and essential. See *TRADITIONAL LITERATURES OF THE AMERICAN INDIAN* (Karl Kroeber ed., 1981); *SMOOTHING THE GROUND* (Brian Swann ed., 1983).

6. See NEIHARDT ET AL., *supra* note 5; MICHAEL F. STELTENKAMP, *BLACK ELK* (1993). Black Elk was given the name Nicholas when he was baptized in 1904. NEIHARDT ET AL., *supra* note 5, at 14.

7. There is an implied caveat to readers in what James Clifford refers to as the "disquieting quality" of the modern West: "its taste for appropriating or redeeming otherness, for constituting non-Western arts in its own image, and for discovering universal, ahistorical 'human' capacities." JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 193 (1988).

8. Vine Deloria, Jr., *American Indians and the Moral Community*, *CHURCH & SOCIETY*, Sept.-Oct. 1988, at 27, 37.

9. Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *DUKE L.J.* 625, 630.

So there are pitfalls. But Black Elk took great risks, and his example invites following if only along the little path of a review. *Black Elk Speaks* is, after all, a great and classic read.

1. *The Vision and the Life*

Black Elk had already heard voices calling him before he had a vision of sorts at the age of five. The great vision that took central importance in his life came to him four years later when he was (outwardly) seriously ill and fell into a twelve-day coma. He was caught up by a cloud and carried to “where white clouds were piled like mountains on a wide blue plain” and then “suddenly there was nothing but a world of cloud” and a great white plain amidst snowy mountains (p. 22) and he saw legions of horses wheeling and dancing in formation. A cloud became a teepee with an open rainbow door. In council within sat the six Grandfathers — the powers of the four directions and of the sky and earth. In elaborate ritual turn, each bestowed upon Black Elk the gift of a great power.

The fourth Grandfather, of the south, gave him the power to make his nation live. It had the form of a red stick that sprouted and branched and then was filled with leaves and singing birds. Black Elk momentarily glimpsed beneath it in its shade “the circled villages of people and every living thing with roots or legs or wings, and all were happy” (p. 28) and then he looked down to earth “and saw it lying yonder like a hoop of people, and in the center bloomed the holy stick that was a tree, and where it stood there crossed two roads, a red one and a black,” (p. 29); the former good, the latter the way of trouble and war.

He also saw the future. He saw that his nation would walk the black road, that its hoop would be broken, and that the tree would die. It was then that he would be called upon to repair the nation’s hoop, to set the stick at its center, to make it bloom and make the people live and walk again the good red road.

Memories of this vision inhabited Black Elk for years without his talking about them. He could not “make words for the meaning” (p. 49). But “these things . . . remembered themselves It was as I grew older that the meanings came clearer and clearer . . . and even now I know that more was shown to me than I can tell” (p. 49).

What follows in the book is the intertwining of the vision and the life. Black Elk alone relates the vision. When he turns to the narrative of his life and that of his Oglala Band of the Lakota, he has the help of friends. Fire Thunder, Standing Bear, and Iron Hawk add their parts to the accounts of growing up, of games, hunts, wars, and ceremonies. Black Elk talks about his relative Crazy Horse, a strange but powerful man and a great chief. He, too, had visions. He would enter “the world where there is nothing but the spirits of all things. That is the real

world that is behind this one, and everything we see here is something like a shadow from that world” (p. 85).

In the world we see here there was war with the Crow. One night a Crow enemy was shot while stealing horses. “When I got there to see, a pile of coup sticks was lying beside the Crow and the women had cut him up with axes and scattered him around. It was horrible. Then the people built a fire . . . and we had a kill dance. Men, women, and children danced right there in the middle of the night . . .” (p. 89).

The first sign of forthcoming trouble with another enemy was a Custer expedition into the Black Hills. The soldiers found gold. More Wasichus (white people) and hostilities followed. Black Elk took part in the first skirmish when he was thirteen. Shortly thereafter he took his first scalp in the battle against Custer at the Little Big Horn. That day he thought of his vision, and as he did so it gave him strength.¹⁰

The victory was short lived, and Black Elk’s nation began to walk the black road. They lost the Black Hills. The Wasichus lured Crazy Horse into Soldiers’ Town for talks and then killed him. The Oglala fled to Canada when Black Elk was fifteen.

The vision burdened him, but he also felt its power growing in him as the nation declined. When and how, he wondered, would he “bring the hoop together with the power that was given . . . and make the holy tree to flower in the center and find the red road again” (p. 147). The burden and the power grew into a compelling fear. Birds in the day and coyotes at night told him that the time had come. “Time to do what? I did not know” (p. 160).

When at last the fear overwhelmed him, Black Elk spoke to a medicine man about his vision and received from him a cure: “You must do your duty and perform this vision for your people upon earth” (p. 161). The vision had to be danced and sung into the world. So began a series of community performances that re-enacted first one part of the vision and then another. The Horse Dance came first, and, as Black Elk and the assembled company of horses and riders performed, he saw the vision again.

These occasions provided him with greater understanding of the vision and with a power that enabled him to heal the sick. Even so, although he could cure individuals, he could not help his nation. The nation’s condition grew disastrously worse. The Oglala returned from Canada and eventually descended to the reservation. “Everything the Power of the World does,” Black Elk observed, “is done in a circle,”

10. P. 110. Because Standing Bear and Iron Hawk were older than Black Elk and therefore had richer memories of the events, they do most of the talking about the battle. Some years ago I heard a National Park Service Ranger say that archaeological digging then in progress at the site was critical to an understanding of what had happened because no one survived to tell about it.

but on the reservation the people were made to live in square houses (p. 194).

Wasichus destroyed the last of the bison herds. Hunger and despair ruled Indian country. Black Elk felt the power of the vision grow, but he could not direct it into the renewal of the nation. He came to think that if he could explore the Wasichu world he might discover a better way. In 1886 he joined Buffalo Bill Cody's Wild West Show and traveled east.

He participated in his first performance at, ironically, Madison Square Garden. "I felt dead and my people seemed lost. . ." (p. 217). He agreed to accompany the show to England. Perhaps he could find a solution across the water. He performed for Grandmother England and found her a fine woman. "Maybe if she had been our Grandmother, it would have been better for our people" (p. 223). He found nothing else. He became separated from the Cody retinue, joined another show and continued his search across the Channel. He found nothing better on the Continent. A brief, cloud-borne, spirit journey home did nothing but discourage him more. When the road shows happened to intersect in 1889, Cody found him and sent him home.

After he returned, he was caught up in the messianic, Ghost Dance movement that had attracted members of other nations in despair. He became an active participant and had another vision, but he soon viewed this one as false. It diverted him from the duty and guidance of his true, great vision. Instead of providing salvation, the Ghost Dance only provoked official suppression by the United States and graver anxieties among the people.

December of 1890 brought scant food and bitter cold. Police killed one leading hold-out, Sitting Bull. And then Big Foot, desperate and desperately ill, gave up resistance and came in to the Pine Ridge Reservation with his band of four hundred starving and freezing people. Soldiers went looking for these new arrivals; Black Elk heard the rifle and cannon fire begin on the morning of the 29th. When he arrived at the site, he saw soldiers firing into a gulch:

Dead and wounded women and children and little babies were scattered all along there where they had been trying to run away. . . . Sometimes they were in heaps because they had huddled together Sometimes bunches of them had been killed and torn to pieces where the wagon guns hit them. I saw a little baby trying to suck its mother, but she was bloody and dead. [p. 259]

Black Elk wanted revenge. He wanted to kill Wasichus. The next day he joined a firefight that forced the soldiers to retreat until black Wasichu reinforcements arrived and prevailed. "And so it was all over" (p. 270). Along with the butchered women and children, a "people's dream died there" (p. 270). There would be no revenge. There would be no nation. "It was the nation that" died (p. 180).

2. *Indian Giving*

The story begins with a vision and ends with a nightmare, and the nightmare prevails. Or does it?

Perhaps Wounded Knee was too much for Black Elk. He had not before encountered an enemy who would stop at nothing. Perhaps when he did he was stunned into silence for forty years, "frozen in a single moment of despair."¹¹ Perhaps not. Perhaps in his "daily life as a patriarch, rancher, catechist, and community elder . . . he made a successful life for himself and his family"¹² and simply found no need or occasion to speak. In any event, forty years after the nightmare, the vision reasserted itself and led him to speak it to Neihardt.

The vision had always been forward looking. It had always been opening out, being grown into, becoming danced and understood. Neihardt appends a postscript to the narrative in which he briefly notes how, at the conclusion of the interviews, Black Elk said he wanted to stand a last time on Harney Peak in the Black Hills, the center of the world to which the spirits had taken him in his great vision. The trip was arranged, and at the summit Black Elk sent forth his frail voice to the Great Spirit. He remembered his vision. He prayed for his people, for the reconstitution of their hoop and for their return to the good red road.

On that occasion, as he had done before, he referred to himself as "a pitiful old man" who had "done nothing" with his vision.¹³ Raymond DeMallie suggests that this theme is a type of Lakota ritual attitude, "for the efficacy of prayer depended upon making oneself humble and pitiable before the powers of the universe."¹⁴ In the course of telling his story, Black Elk said that the visions and ceremonies made him "like a hole through which the power could come to the two-leggeds. If I thought that I was doing it myself, the hole would close up and no power could come through" (p. 205). To give voice to sorrow, humility, and despair is to make oneself like a hole.

The vision characteristically achieves its greatest realization of power in the powerlessness of the person. The vision first came to Black Elk when he was "lying like dead" (p. 48). And at the end, when he raced toward the gunfire at Wounded Knee, he rode unarmed except for a ceremonial weapon. "I carried only the sacred bow of the west that I had seen in my great vision" (p. 256). Nevertheless, in that encounter with the unthinkable, he led a charge that drove the soldiers

11. Roger Dunsmore, *Nicolaus Black Elk: Holy Man in History*, in *A SENDER OF WORDS* 143, 155 (Vine Deloria, Jr., ed., 1984).

12. NEIHARDT ET AL., *supra* note 5, at 57.

13. P. 273; *see also* pp. 180, 270.

14. NEIHARDT ET AL., *supra* note 5, at 56.

from their slaughter in the gulch. "I just held the sacred bow out in front of me with my right hand. The bullets did not hit us at all" (p. 258).

That protection was the last manifestation of the vision's efficacy — unless the book itself is another. Roger Dunsmore observes that Black Elk does not arrive "at the *Truth*" but is instead "deeply involved in not knowing, and confronts the risk that when he gives his vision away it will be ignored, misunderstood, or misused."¹⁵ When he committed his vision to John Neihardt, Black Elk disclosed to outsiders sacred knowledge that had life and truth in the arcanum. He could not know what effect his doing so would have on either the vision or himself. Both might die:

I have lain awake at night worrying and wondering if I was doing right; for I know I have given away my power when I have given away my vision, and maybe I cannot live very long now. But I think I have done right . . . for I know the meaning of the vision is wise and beautiful and good . . . [p. 206]

In hesitation and doubt, but also in hope, relying on the power of its images and words, he released the vision into becoming a text. The concluding prayer from Harney Peak, addressed to "Grandfather, Great Spirit," includes the petition: "It may be that some little root of the sacred tree still lives. Nourish it then, that it may leaf and bloom and fill with singing birds" (p. 274). His telling the vision may be read as his way of planting it and so of fulfilling his duty to set the stick he was given in the center of the circle.¹⁶

To non-Indians, "Indian giver" can be a term of disparagement. An Indian giver makes a present and then takes it back. However, as Lewis Hyde points out, in a gift economy like that of the Lakota "the gift must always move."¹⁷ It may be returned to the giver, but it is enhanced if it is passed on to someone else. Indian giving is an expression of relatedness and circularity, an affirmation "that all are relatives in the great hoop of the world."¹⁸

The dedicatory page of *Black Elk Speaks* carries a statement from Black Elk: "What is good in this book is given back to the Six Grandfathers and to the great men of my people" (p. v). The vision has moved from Black Elk through Ben Black Elk through Enid Neihardt through John Neihardt, and then through *Black Elk Speaks* back to the Six Grandfathers. By taking the form of a written text, the vision continues to enrich a widening circle of others.

15. Dunsmore, *supra* note 11, at 145.

16. Harney Peak, where Black Elk stood in his vision, was the center of the world. "But," he said, "anywhere is the center of the world." P. 43 n.8.

17. LEWIS HYDE, *THE GIFT* 4 (1983).

18. Dunsmore, *supra* note 11, at 157.

In form and substance, what is said is said for the community and is not appropriable by any one member. A gift like Black Elk's vision must be given away. It must continue to move. Individuality is valued, but it takes expression "in the right to decide when and how to give the gift. The individual controls the flow of property away from," rather than acquisitively toward, herself.¹⁹

Black Elk was highly selective in his decision and its timing. When he did speak, it became a community's event, and friends joined in the work of telling. To make nice attempts to sort out exactly whose speech the book is would be foreign to the subject and its performance. Once Black Elk spoke the story, the only fault in the hearer would lie in arresting its movement to others.

3. *Denial in Law*

Indian giving encounters a notorious obstacle in law at the border between Native America and America, between the world of community obligation and the world of individual rights, between a gift economy and a consumer economy, between orality and textuality.

When the tribes first attempted to gain entry to American courts, they were turned away. In *Cherokee Nation v. Georgia*,²⁰ the Cherokee were found to be a tribe or nation, but for that reason, because they were neither a state nor a foreign nation, they had no standing.

In a modern case, the Mashpee Tribe was found to be not a tribe and for that opposite reason the courts denied admission to them, too. That case is revealing. The issue of land ownership posed by *Mashpee Tribe v. New Seabury Corp.*²¹ turned on the validity of a nineteenth century conveyance by the Mashpee to non-Indians, but the issue of whether they could litigate it depended on proof that they were a tribe and therefore a legal person. After a jury trial, the court decided that the tribe did not qualify. The Mashpee failed in the "contest between oral and literate forms of knowledge," James Clifford observes, where "the written archive" trumps "the evidence of oral tradition."²²

Trials are a form of theater in which competing stories are performed before a jury and judge in hope of a common sense, practically just resolution. But the judgment depends on a shared culture, Clifford notes, and in Mashpee the "shared culture and its common sense assumptions" were precisely what was at stake.²³ American assumptions about Native Americans are shaped by a few, basic West-

19. HYDE, *supra* note 17, at 79, n.*.

20. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

21. *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass 1978).

22. CLIFFORD, *supra* note 7, at 339.

23. *Id.* at 329.

ern stories that “are told, over and over, about Native Americans.”²⁴ In them tribes “are always either dying or surviving, assimilating or resisting,” but the Mashpee “were sometimes separate and ‘Indian,’ sometimes assimilated and ‘American,’ ” and “their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances.”²⁵ The Mashpee “lived and acted between cultures in a series of ad hoc engagements,”²⁶ and if the few, repeated stories did not include such Indians, neither would the law. The Mashpee “could not be seen for what they were and are,”²⁷ and the story they told about themselves could not be heard.

But sometimes courts do see and hear the tribes and grant them access. And the tribes win occasional and important victories.²⁸ The victories, however, may prove hollow, as *Worcester v. Georgia*²⁹ illustrates. *Worcester* was the Cherokee Nation’s second attempt at entry. Admission was granted because it was sought by a non-Indian surrogate, an American missionary to the Cherokee. Once inside, the tribes won a strong, clear statement of their nationhood and sovereignty, but it came to nothing, and the South was soon ethnically cleansed of tribes.³⁰

*United States v. Sioux Nation of Indians*³¹ is another, modern example of courtroom success that is loss. There the Supreme Court upheld a judgment awarding Black Elk’s people compensation for the taking of their Black Hills. Most of them have refused to accept the money, which they regard as no substitute for the return of the land they seek. Their lawyers had not told them that money damages would

24. *Id.* at 342.

25. *Id.*

26. *Id.*

27. *Id.* at 336.

28. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

29. 31 U.S. (6 Pet.) 515 (1832).

30. William McLoughlin’s *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* (1986) offers a comprehensive account of the Cherokee and what happened to them. Justice Stephen Breyer reads *Worcester* and the events that followed it as a “sad, premonitory tale” and notes that the only winner was the Supreme Court. *For Their Own Good, THE NEW REPUBLIC*, Aug. 2, 2000, at 32, 39. He says that the tribe and the Court were “allies, fighting on the same side of the issues” and draws from the outcome “a lesson about the insufficiency of a judicial decision alone to bring about the rule of law.” *Id.* He does not note that, in the meantime, the Court has joined the other side, nor does he discuss the effect of this switch on the rule of law. I have written about these and other U.S.-tribal relations before. See Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 *JOHN MARSHALL L. REV.* 1183 (2000); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 *MICH. L. REV.* 2280, 2296-2319 (1989); Milner S. Ball, Samuel Pool Weaver Essay, *Constitution, Court, Indian Tribes*, 1987 *AM. B. FOUND. RES. J.* 1 (1987) [hereinafter Ball, *Constitution*]. On U.S. relations with the native peoples of Hawaii, see MILNER S. BALL, *CALLED BY STORIES* 93-98, 153-86 (2000).

31. 448 U.S. 371 (1980).

extinguish their title. When they realized what would happen, the Oglala and Rosebud Tribes attempted to halt the claims and fired the lawyers. The lawyers pursued the claims nonetheless and entered a settlement without the tribes' knowledge and against their will. Attempts at judicial redress undertaken by other lawyers failed.³²

When tribes are admitted to court, they typically do not win even hollow victories and instead return from their border crossings to shrunken territory and diminished jurisdiction. The Supreme Court continues to reduce tribal reservations³³ and to conquer the tribes³⁴ and incorporate them into the United States.³⁵ It characteristically attributes responsibility for these present actions to past events that never occurred.³⁶

In these episodes, which can be identified as "colonizing" (Philip Frickey³⁷) or "jurispathic" (Robert Cover³⁸), the Court does not subdue Native American savagery with law. It overcomes Native American law with American law.

At the start of this revisit, my recitation of risks cautioned that lawyers and the word "law" do not appear in *Black Elk Speaks*, but of course there is law in the tribal world. In his Introduction to the 1972 edition of the book, Vine Deloria observes that the world Black Elk gives us contains a "relationship to the rest of the cosmos devoid of the trial-court paradigm" (p. xiv). There is law; it is simply not steeped in the paradigm of individual rights projected against hostile others in an adversarial system of litigation. There is a richness of law in the careful, enforced ordering of hunts, warmaking, family and community life, tribal migration, and inter-tribal relations.³⁹ There is law in the

32. See Steven Tullberg & Robert T. Coulter, *The Failure of Indian Rights Advocacy*, in *RETHINKING INDIAN LAW* 51, 53-54 (Nat'l Lawyers Guild ed., 1982); Curtis Berkey et al., *Written Communication to the United Nations Commission on Human Rights*, in *RETHINKING INDIAN LAW*, *supra*, at 141, 152-54. In *BLACK HILLS, WHITE JUSTICE* (1991), Edward Lazarus attempts to exonerate his father, the principal attorney involved, at the expense of prior counsel and the clients. *Compare* *Sioux Tribe of Indians v. United States*, 862 F.2d 275, 281 (Fed. Cir. 1988) (Newman, J., dissenting).

33. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

34. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

35. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

36. The purported "conquest" in *Tee-Hit-Ton* and "incorporation" in *Oliphant* were performative utterances that took place only when the opinions were published. See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 *HASTINGS L.J.* 1215, 1244 (1980); Ball, *Constitution*, *supra* note 30, at 34-46, 114-15.

37. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divergence of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1 (1999); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *HARV. L. REV.* 381 (1993).

38. Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

39. For an early, still interesting study of this law, see K. N. LLEWELLYN & E. ADAMSON HOEBEL, *CHEYENNE WAY* (1941).

storytelling where stories are arrows,⁴⁰ law in the metaphors that function like legal terminology,⁴¹ and law in the wampum belts.⁴²

A United States Agent, assessing the Wounded Knee slaughter, concluded that it was good, a good lesson. It taught Indians, he reported, that it is dangerous to oppose "the law of the Great Father."⁴³ That law would not tolerate the tribal world or its law.

4. Translation

Resurgent tribal identity offers a challenge to this monopoly. The tribes are subversive because they are at the same time firmly resident in and radically outside the United States.⁴⁴ But if they are subversive, they are promisingly so. Their developing life offers opportunity for release from the burden of refighting the Indian wars as we continue to do, not only in the courts but also in places like Vietnam⁴⁵ and our own inner cities (the police station as Ft. Apache in the Bronx). *Black Elk Speaks* embodies the subversion and its promise.

40. On the phenomenon, see Keith Basso, "Stalking with Stories": *Names, Places, and Moral Narratives Among the Western Apache*, 57 *ANTAEUS* 95 (Daniel Halpern ed., 1986); Barre Toelken & Tacheeni Scott, *Poetic Retranslation and the "Pretty Languages" of Yellowman*, in *TRADITIONAL LITERATURES OF THE AMERICAN INDIAN* 65 (Karl Kroeber ed., 1981); CHARLES L. WOODARD, *ANCESTRAL VOICE: CONVERSATIONS WITH N. SCOTT MOMADAY* 115-25 (1989).

41. Francis Jennings, *Conquest and Legal Fictions*, 23 *OKLA. CITY U. L. REV.* 141, 144 (1998).

42. See WILBUR JACOBS, *DIPLOMACY AND INDIAN GIFTS* (1950); FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE* (1984); Robert Williams, *The Algebra of Federal Indian Law*, 1986 *WIS. L. REV.* 219 (1986).

43. Commissioner of Indian Affairs Annual Report 412 (report of J. George Wright, Rosebud Agency, Aug. 27, 1891), quoted in Allison M. Dusias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773, 799 (1997).

44. See CLIFFORD, *supra* note 7, at 339 n.5.

45. In *THE FATAL ENVIRONMENT* (1985), Richard Slotkin provides an extended examination of the way in which America continues to repeat the war against the tribes in other forms. (On the subject of playing cowboys and Indians in Vietnam, see *id.* at 16-19.) And the phenomenon is embedded in our art: for example, in film in the figure of John Wayne; in the short story in the image of the old forest in Peter Taylor's work by that name, *THE OLD FOREST AND OTHER STORIES* 31, 53-54 (1985); in the novella in William Faulkner's *The Bear*, in *THREE FAMOUS SHORT NOVELS* 185 (1961) (especially chap. 4, at 244); and in Herman Melville's *MOBY DICK*. See Milner S. Ball, *Fundamental Disorders: Martial Clergy, Native Americans, Constitutional Communities, and Ships of State*, 21 *CONN. L. REV.* 943, 956-64 (1989). Melville's novel is particularly interesting because the tribal members in the Mashpee case were, as Clifford realized in the course of observing the trial, the "descendants of Tashtego, the Gay Head harpooner of Melville's Pequot." CLIFFORD, *supra* note 7, at 287. The cultural hero of the Mashpee Wampanoag is a giant, Maushop. *Id.* at 342 n.6. In one story recounted at trial, Maushop swims over to Gay Head on Martha's Vineyard and in returning becomes Moby Dick. *Id.* at 287.

Black Elk was transported to a world from which he could see down to this one. James Merrill's poem *A Downward Look* takes a similar point of view:

Seen from above, the sky
Is deep. Clouds float down there,
Foam on a long, luxurious bath.
Their shadows over limbs submerged in 'air'
Over protuberances, faults,
A delta thicket, glide. . . .⁴⁶

A critic notes that the poem not only makes readers look more closely at what is in front of them in the world but also transfigures what is seen. Merrill turns "the world upside down for you, making you wonder about that stuff you thought was 'air,' — and, in the bargain, about everything else as well, about just where you stand in relation to everything and anything."⁴⁷

Black Elk Speaks makes you see freshly the American and Native American worlds that share the continent, and it makes you wonder about that stuff you thought was "law." But *Black Elk Speaks* also gives something more than the possibility for understanding that the Merrill poem opens. As translation, the book affectingly performs its vision.

Translation in general, as James Boyd White allows us to think of it, is a guiding image for what lawyers do when they represent clients, and it is a guiding image, too, for what a life of just relationships requires of us. "[T]o attempt to 'translate' is to experience a failure at once radical and felicitous: radical, for it throws into question our sense of ourselves, our languages, of others; felicitous, for it releases us momentarily from the prison of our own ways of thinking and being."⁴⁸ To translate is not to pick up words from one language and drop them into another. White notes that the work of translation necessarily entails both deficiencies and exuberances, both the loss of some meaning from the original and the gain of some meaning available only in the other language.⁴⁹ The result is a third reality that did not exist before. The new reality does not destroy, absorb, or replace the original or the differences between languages. Translation is "a set of practices by which we learn to live with differences," and good

46. James I. Merrill, *A Downward Look*, in COLLECTED POEMS 589 (J.D. McClatchy & Stephen Yenser eds., 2001).

47. Daniel Mendelsohn, *A Poet of Love and Loss*, N.Y. TIMES, Mar. 4, 2001, § 7, at 16 (reviewing JAMES L. MERRILL, COLLECTED POEMS (2001)).

48. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 256 (1990).

49. *Id.* at 235-36 (developing an insight of Ortega y Gasset).

translation “proceeds not by the motives of dominance or acquisition, but by respect.”⁵⁰

Black Elk Speaks is a singular achievement of translation as text, as representation, and as respectful living with differences.⁵¹ The vision has made a long journey through two worlds, two languages, and two principals as well as a child of each. Differences abide in the text but lie down together without sacrifice of their integrity. The new, literal reality is at once strange and beautiful.

Black Elk bestows the gift. In receiving and circulating it, Neihardt “exceeds his tradition for a moment and makes the moment live forever thereafter.”⁵² Their joint labor is a performance on the order of the Horse Dance. The book writes into our present world an other-worldly vision of hope for a just life together. It is, in American literature, the affecting triumph of translation over Wounded Knee that we await in American politics and in American law.⁵³

50. *Id.* at 257. Respect for the other distinguishes translation from conversion and therefore from the longtime official policy of the United States to “Americanize and Christianize” the tribes. Colonial “Christianizing” of tribes constitutes a betrayal of the biblical story and its humanism. That story bespeaks “God’s concern for all humanity,” and it arouses in believers “a willingness to listen to the stories of other faiths . . . from the conviction that [their] own faith ‘is the defender of life’ ” wherever, however, and by whomever lived.” NANCY J. DUFF, HUMANIZATION AND THE POLITICS OF GOD 172 (1992) (commenting on the theology of Paul Lehmann and James Cone, quoting the latter).

In the Hebrew Bible, although it is clear that Israel is not to worship the gods of other nations, the Israelites’ own God apportions to all nations their territories and their gods. See *Deut.* 32:8-9. These other gods are members of the divine order, and, because they serve “as center of value and meaning for other nations,” they “have their place.” Patrick D. Miller, *Deuteronomy*, in INTERPRETATION: A BIBLE COMMENTARY FOR TEACHING AND PREACHING 229 (John Mays ed., 1990).

On the need for respect of the other in the practice of proselytism, see JOHN WITTE, A PRIMER ON THE RIGHTS AND WRONGS OF PROSELYTISM, *FIDES ET LIBERTAS* 2000: THE JOURNAL OF THE INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION 12 (2000). Black Elk as both tribal Holy Man and Roman Catholic catechist is indicative of a fit relationship between tribe and Church.

51. It has won acceptance among both Native Americans and Americans. In 1947, Black Elk was apparently satisfied enough with what he and Neihardt accomplished to share with Joseph Epes Brown certain other tribal stories and rituals. See JOSEPH EPES BROWN, *THE SACRED PIPE* (1989).

52. N. Scott Momaday, *To Save a Great Vision*, in *A SENDER OF WORDS* 37 (Vine Deloria ed., 1984). Momaday notes that, in the oral tradition, a story “is always but one generation removed from extinction.” *Id.* Cultural survival depends upon speaking and speaking well. It depends upon “a certain spirit of language” that gives the oral tradition “a power incomprehensible to many people raised in the literate tradition.” *Id.* at 38. John Neihardt, he says, was committed to writing, but “[h]e is made the gift of another man’s voice, and he allows us to hear it distinctly, in the full realization of its meaning.” *Id.*

53. Native American courts have already achieved successes in the work of translation that American courts have yet to begin. The Supreme Court of the Navajo Nation provides a fruitful, instructive example with its employment of Navajo law in an Anglo based system. See, e.g., *Means v. District Court, Chinle Judicial District*, 26 Indian L. Rep. 6083 (Navajo 1999) (No. SC CV-61-98) (heard in the Ames Moot Court Room, Harvard Law School, and rebroadcast on C-SPAN); *Navajo Nation v. Crockett*, 24 Indian L. Rep. 6027 (Navajo Sup. Ct. 1996); *In Re Certified Question II: Navajo Nation v. MacDonald*, 16 Indian L. Rep. 6086 (Navajo Sup. Ct. 1989). See also Tom Tso, *The Process of Decision Making in Tribal Courts*,

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I was seeing in a sacred manner the shapes of all things in the spirit, and the shape of all shapes as they must live together like one being. And I saw that the sacred hoop of my people was one of many hoops that made one circle, wide as daylight and as starlight, and in the center grew one mighty flowering tree to shelter all the children of one mother and one father. And I saw that it was holy. [p. 43]

This he tells, and whether it will happen so or not I do not know; but if you think about it, you can see that it is true.

31 ARIZ. L. REV. 225 (1989); The Honorable Robert Yazzie, "*Hozho Nahasdlii*" — *We are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); The Honorable Robert Yazzie, "*Life Comes from It*": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).