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The Interpreters

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JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM. By *James Boyd White.* Chicago: The University of Chicago Press. 1990. Pp. xvii, 301. $29.95.

In his 1984 book, *When Words Lose Their Meaning,* James Boyd White[1] offered us a way of thinking about reading. A text's most important meanings, he concluded, are to be found in the relations the writer and reader establish with each other, and in the larger communities that the text addresses and helps to shape. In *Justice as Translation,* White brings this way of thinking to bear on both the writing and the reading of judicial opinions. He analyzes a number of opinions as texts in which Justices[2] not only compose new meanings for authoritative texts (the Constitution, statutes, judicial precedents) but also offer new definitions of themselves, of their intended readers, and of their communities (both the legal profession and the larger society). *Justice as Translation,* like White's earlier work, provides a refreshing reminder that the humanities, despite the pummelling they have recently endured, can be humane.

In writing an opinion, White says, a Justice necessarily acts as a translator, seeking to find and to communicate meaning across cultural boundaries. Sometimes opinion writing closely approaches translation in the conventional sense, transmitting meanings across ethnic and other divisions in America's multicultural society. But, in White's view, opinion writing is a form of translation even when the ethnicity ingredient is absent. In every case, the Justice must seek to penetrate the culture inhabited by those who wrote the authoritative text, and seek to render the meaning of the text in the context of today's issues, embedded as they are in today's culture. The book begins with White's views of language and its uses, turns to the judicial opinion as a work of "compositional art," and concludes with some general observations on justice as translation.

Who among White's readers will not share his wistfulness as he laments the difficulty of finding integration — of the society, of the self — in our segmented world? But lamentation is neither the book's

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1. L. Hart Wright Professor of Law and English, University of Michigan.

2. All of the opinions analyzed are written by Justices of the Supreme Court of the United States.

main mood nor its purpose. The opening chapters mark out a path toward integration, one that begins in our perception and uses of language. White's examples of the ways in which "we" regard "our" language and use it are taken from the writings of academics and professionals. He identifies two styles of thinking that impede integration. First is the notion that language is "transparent or neutral, merely a way of pointing to something outside of itself" (p. ix). White contests the view that language does its work when it conveys from one mind to another "propositions" and "concepts," both of which have meanings independent of language. This type of thinking and speaking, he argues in Chapter Two, tends to channel us into discourse that is assertive, even imperialistic, and thus to divert us from an important truth: that our own acculturation severely limits our recognition of what counts as a concept and what counts as a reason. Language that is abstract and theoretical lends itself to a linear, if-*A*-then-*B* sort of reasoning and inhibits more diffuse, literary ways of grasping reality. The language of assertion thus projects its aggressive and defensive spirit into the spheres of ethics and justice, with sad consequences for a society of many cultures.

White's second linguistic target is the discourse of economics (ch. 3) — not the discourse of all economists, but the language of neoclassical microeconomics prevalent in the "law-and-economics" school. This way of talking, White argues, routinely diminishes persons to their roles in a system of exchange, regarding them as calculating machines or objects to be manipulated or both. In Chicagoese, everything — every thing and every value — is interchangeable with everything else through the medium of exchange, and competition is the pool in which we self-interested maximizers hunt our prey. To the economist who says, "This way of speaking is not a picture of the world but a set of models, a series of value-free hypotheses about human behavior," White responds that the models have a way of taking over a world view. He uses economic discourse to illustrate one of the book's main theses: that language is a way of being and acting in the world, of assigning meaning to behavior and thus creating culture. And the culture so created is anything but value-free; it promotes a view that reduces persons to their wants, their calculated pursuit of acquisition, and their competition for dominance.

Dissatisfied with both the economic and the conceptual-propositional forms of discourse, White proposes a more literary way of thinking about and using language, not just in law but in all our social life. He calls this style "intellectual integration" (ch. 1). Its modal question is neither "What proposition are you advancing?" nor "How much do I get?," but "Who are you [the writer] in this text, who am I [the reader], and what kind of conversation do you seek to establish between us?" (p. 39). White speaks of integration in a sense that has become familiar to all of us in discussing race relations, to embrace a

diversity of ways of thinking and talking and writing. In describing the reading and writing of judicial opinions as examples of the art of composition, he evokes a double meaning that resounds in the words "compose" and "composite": "a putting together of two things to make out of them a third, a new whole, with a meaning of its own" (p. 4). To compose a legal text is thus to engage in ethical and political action in the world, to make a "gesture" that responds to earlier gestures and may one day evoke the making of new texts, further gestures still.

White's concluding chapters, relating "the activity of translation" to law and justice, also draw on his view of reading as the making of a new text (chs. 11-12). Translation involves the effort to know and respond to another person and another language, but it also involves the assertion of the translator's own self and language. The translator must stand between two languages, must inhabit "a culture in the space between cultures" (p. 244). A good translator understands the impossibility of carrying a text's meaning from one language to another without loss or gain — understands that translation is the art of composition, of "integration" in White's sense. What is required is the establishment of the right relations between the initial writer and the translator, between the two languages (and thus the two cultures), and between the translator and the reader of the new, translated text.

This whole process is "a model of law and justice" (p. 230), exemplified in those judicial opinions that deserve to be called excellent. For White, legal interpretation is translation, the composing of one text in response to another. Like the translator, the interpreter must be faithful to the original text and the culture that gave it birth, and must take responsibility for interpreting that text's meaning in a new context: its application to people in today's culture. Thus, "[t]ranslation and justice . . . are both ways of talking about right relations, and of two kinds simultaneously: relations with languages, relations with people" (p. 233). An opinion — any text — creates "an Ideal Reader, the version of himself or herself that it asks each of its readers to become" (p. 100). The root question for justice, like the root question for translation, is "Who are we to each other?" (p. 233).

Bracketed by these introductory and closing discussions of language, law, and translation are seven chapters in which White elaborates his views through criticism of judicial opinions. To call these analyses literary criticism is merely to underscore White's central thesis: that law is "at its heart an interpretive and compositional — and in this sense a radically literary — activity[,] . . . a way of reading, comparing, and criticizing authoritative texts, and, in so doing, . . . constituting, through conversation, a community and a culture of a certain kind" (p. 91). He sees the judicial opinion as central in this

activity, "the main model of thought for the lawyers, . . . the representative legal text" (p. 90).

What entitles a judicial opinion to be called excellent? White's answer is grounded in his conception of law as "inherently aspirational" (p. 137) and therefore a compositional art. The corollary to that conception is an ample view of the authority and responsibility of judges to translate authoritative texts by creating new meanings for our time. A reader who generally shares those views of law and judging (as I do) will find much that is congenial in White's analysis of excellence in opinion writing. A reader with a more restricted view of the legitimacy of judicial lawmaking — say, a Henry Monaghan[3] or a Robert Bork[4] — surely will be harder to persuade.

Let it not be thought that White ignores the weight of the authoritative texts. To the contrary, he chides judges who look past the language of the texts to find meaning in the intentions of those who wrote them. White agrees that fidelity to a text implies an effort to understand how its meaning was shaped by the context of its times. What he rejects is the claim that "the intention of the Framers" should take precedence over this effort to interpret the text itself. He makes his sharpest attack on this view in a criticism of Chief Justice Taney's opinion in the *Dred Scott* case,[5] which is not only a clear-cut denial of the Constitution's aspirational character (pp. 137-38) but an especially perverse example of how a Justice can work backward from a conclusion about the case at hand to a premise about "original intent" (pp. 129-32).

White does not so much confront the legitimacy question raised by the Borks and the Monaghans as make an end run around it. The original intent argument, he says, comes into play only when the language of the text presents difficulties in the context of today's issue. Necessarily, then, invocation of the Framers' supposed intentions is itself an interpretive choice guided by the present issue — which, given the difficulty of reading the text, the Framers almost certainly did not consider.[6] Today's substantive preferences will intrude into this process no less than they do in a candid effort to translate the meaning of the text for application to today's context. In White's view, reliance on the Framers' intent, even when it is sincere, is an evasion of the

3. *See, e.g.*, Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

4. *See, e.g.*, R. BORK, THE TEMPTING OF AMERICA (1990).

5. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

6. White has much in common with other critics of reliance on "original intent." *See, e.g.*, L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). In this chapter White fits these criticisms into his larger theory of legal interpretation as translation.

difficulties of reading and the responsibility of a judge to exercise judgment (p. 135).

A related sin in opinion writing, says White, is the pretense that a textual authority (the Constitution, the precedent) is speaking, and not the judge. This kind of authoritarian opinion, here exemplified by Chief Justice Taft's opinion in *Olmstead v. United States,*[7] not only denies the responsibility of the judge as translator/lawgiver, it also denies the possibility that the opinion will engage its readers in the further conversation that is the essence of lawmaking in a democracy (ch. 6).

In contrast, White applauds Justice Brandeis' famous dissent in *Olmstead* as the product of a judge who is aware of his own potential contributions to the growth of the law through sensible interpretation of an old text (the fourth amendment's proscription of unreasonable searches and seizures) to apply to a new condition (communication by telephone). Brandeis looks beyond the words of the text to seek its deeper principles (the protection of privacy). In writing his opinion in language that is accessible to nonlawyers, Brandeis establishes a footing of equality for himself and his readers, and invites a conversation among citizens on the immediate subject (wiretapping by law enforcement officers) and on larger issues as well.

The authoritarian opinion has no such democratic aims; it suppresses all doubt as it suppresses the possibilities for conversation. White appreciates not only the candor of a judge who, like Brandeis, acknowledges his responsibility as a translator (p. 150), but also the candor of a judge who imagines an Ideal Reader with a mind and heart, one who is capable of thinking independently about the interpretive issues at hand (pp. 100-01). Such a judge will develop competing lines of argument, recognizing the force of positions opposed to her own and "exposing to view what is most deeply problematic both in our resources of legal meaning and in the case upon which they bear" (p. 92). In *Olmstead,* Brandeis remarked that government is a teacher;[8] White, congratulating Brandeis for respecting the reader's capacity for reflection, adds that "Brandeis himself establishes his own voice as that of a teacher" (p. 155).

If Brandeis taught by example in *Olmstead,* elsewhere he showed that he knew how to teach by authoritarian precept. In *Whitney v. California,*[9] for example, he lectured his readers on the true meaning of the first amendment and its adopters' purposes. Similarly, Justice Black's opinion in the school prayer case of *Engel v. Vitale,*[10] plainly

7. 277 U.S. 438 (1928) (police wiretapping did not violate fourth amendment because it involved no literal search or material seizure).

8. 277 U.S. at 485 (Brandeis, J., dissenting).

9. 274 U.S. 357 (1927).

10. 370 U.S. 421 (1962).

addressed to the public at large, is not so much an invitation to a conversation as an exposition *ex cathedra* of what the establishment clause compels. Whatever style a Justice may choose, at bottom law is command, even when it is commanding tolerance of political outsiders or inclusion of religious outsiders. To the Governor of Arkansas who sought to keep black children out of Little Rock's Central High School, the Supreme Court properly spoke in the stern tones of Authority.[11]

Throughout White's analyses of Supreme Court opinions he distinguishes sharply between "votes" or "results" on the one hand and the opinions of the Justices on the other. Here and there he notes his awareness that results are important (pp. 95, 157-58), but repeatedly he sounds the theme that "[t]he great contribution of the judicial mind is not the vote but the judicial opinion, which gives meaning to the vote" (p. 91). When he refers to "judicial excellence" (p. 93) he means excellence in opinion writing: "[I]n an important sense what distinguishes the work of a good judge is not the vote but the achievement of mind, essentially literary in character, by which the results are given meaning in the context of the rest of law, the rest of life" (p. 92). I think this view undervalues both the importance of consensus-building in the Supreme Court and the doctrinal and political momentum that a line of decisions can generate even when they are poorly explained. In the margin, by the passage just quoted, I wrote: "Earl Warren?".

Brown v. Board of Education[12] taught only a minor part of its complex lesson through the medium of its two opinions. Partly because Warren was seeking unanimity among the Justices, neither opinion exposed what was problematic in the issues at hand. *Brown I* focused on education and said nothing about dismantling Jim Crow; *Brown II* announced the "all deliberate speed" formula as a logistical necessity and disingenuously disclaimed any political accommodation. In the next few years, when the Court held unconstitutional a great many forms of state-sponsored racial segregation, it "spoke" only in grunts: curt orders that offered no explanation beyond citations to *Brown I*.[13] These decisions, by their results alone, carried meaning of the weightiest kind. They were new "texts" only in the thinnest imaginable sense, and yet in the aggregate they amounted to an "acted document"[14] that expanded the embrace of our national community. If Brandeis was a great judge, so was Warren.

Henry Hart once recorded his scorn for "shallow-minded lay com-

11. Cooper v. Aaron, 358 U.S. 1 (1958).

12. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown I*); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*).

13. *See, e.g.*, State Athletic Commn. v. Dorsey, 359 U.S. 533 (1959) (state-regulated athletic contests); New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (parks); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

14. C. GEERTZ, THE INTERPRETATION OF CULTURES 10 (1973).

mentators" who simply looked at results, "crying, 'One up (or one down) for subversion,' 'One up (or one down) for civil liberties,' 'One up (or one down) for states' rights.' "[15] He hoped for a time when members of the legal profession and others would again understand "that reason is the life of the law and not just votes for your side."[16] Ironically, the form of reason Hart had in mind was just the sort of propositional reasoning that White seeks to minimize, as opposed to the literary way of thinking and talking that enables judges to be translators and builders of community. In our recent history, "One up for civil rights" has had a dynamic — and a moral force — of its own. All of us who travel in countries where we lack the language know that with good will we can go a long way on gestures that are wordless. And even those of us who stay home know that actions often speak louder than words. The Supreme Court, like other actors both individual and corporate, teaches not only by what it says but by what it does.

By putting in a good word for the importance of votes and results I mean only to emphasize that judicial opinions are not the whole story when we think about the excellence of judges as teachers, as community-builders, even as translators across cultural boundaries. But this reminder, like my comment on Earl Warren, is a note at the margin of a book that enlightens at every turn. It is no great failing, after all, that Leonardo did not fully develop the background of the Mona Lisa. In his portrait of the judge as translator, White practices what he preaches. In offering to create a community with his reader, he does not demand submission but invites the sort of conversation that can lead to new and more inclusive definitions of the larger communities they both inhabit. May *Justice as Translation* find the widest possible audience of Ideal Readers.

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15. Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 125 (1959).

16. *Id.*