Creative Acts of Translation: James Boyd White's Intellectual Integration


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Responding to James Boyd White's writing is in some ways an intimidating venture. In *Justice as Translation: An Essay in Cultural and Legal Criticism*, White calls us to rise above the often deadening and dreary language in which we are taught to write professionally—and, at the same time, to transcend the segmented and limited thinking that accompanies the fencing-off of intellectual endeavor into separate "disciplines" in our universities. It is hard to imagine equaling the clarity or eloquence

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* I would like to thank the Honorable Richard Cudahy for giving me the opportunity of learning from a dedicated and talented practitioner of the art James White describes in this book. While White may be correct that "the law is now in peril of losing its essential character" because of expedient readings (and refusals to read at all), it is comforting to know that there remain some for whom "the sense of obligation to give meaning to the texts that make up our world" still yields a vision of "a community of difference and respect." J.B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 223-24 (1990). I have seen no more profound challenge to the overly simplistic legal realist vision that White critiques than the painstaking care taken with the language of precedent (and of new opinions) in Judge Cudahy's chambers.
of White's challenge. The apparently effortless grace of his prose conveys complex thoughts with deceptive simplicity.

And yet White's invitation is hard to turn down, for it opens the possibility of a truly interdisciplinary discussion that

will reflect more fully what we actually know to be true of ourselves and our minds, of our languages and our cultures. Can we find or create voices that are more fully our own, speaking to audiences more fully recognized as the minds and people they actually are? Or, to put it in the terms with which I began: What might it mean to integrate, to put together in a complex whole, aspects of our culture, or of the world, that seem to us disparate or unconnected. . .?¹

White poses his idea of integration against other images for interdisciplinary work: the "findings" conception, in which findings or results from one field are simply transmitted untranslated to another field; and the "technology" conception, in which the machinery of one field's methodology is to be hooked up to the raw material of another field. White's vision of interdisciplinary exploration is quite different: "what I mean by integration is a kind of composition, and that in a literal, and literary sense: a putting together of two things to make out of them a third, a new whole, with a meaning of its own."²

My own reading of Justice as Translation is shaped in part by an interdisciplinary background that combines law and anthropology (and, in particular, anthropological linguistics). I found many congruences between White's vision and anthropological approaches to language, and would like to suggest ways of bringing these two understandings together. At the same time, there are also differences in the ways of thinking about language that have emerged in anthropology, and I want to explore what would happen if this differing perspective were brought to bear on the questions White asks. Although it is a language that is newer to me, I will also attempt to bring to bear a plural voice, a polyphony of voices, from the legal feminist and critical race theory approaches. These voices sound some of the same themes as White does and their silence in his text was both puzzling and disappointing.

I accordingly take seriously White's invitation to put together two (or more?) things to make out of them something new. At every turn, I'm afraid, I will be falling into the somewhat clunky and less than elegant language of the social science I am attempting to translate. Nonetheless, I will attempt to bring together what seem to me to be shared ideas about language from several traditions, focusing on commonalities and diver-

². Id. at 4.
gences in an effort to discover what these traditions could learn from one another.

I. LINGUISTIC CREATIVITY

White follows his initial plea for a new integrative approach with a critical discussion of the word "concept." In this discussion he moves very close to some of the most interesting work in anthropological linguistics, work that has for several generations been bringing us an ever keener appreciation for what I and others have called "linguistic creativity."³ Let us first consider White's view of the word "concept":

The first pressure of the term is to direct attention away from language to something else: to the realm of ideas, to what is in the mind, or to some field of intellectual reality, and in each instance to something that is assumed to exist in a realm apart from language. . . . To talk about concepts is thus to take a step in the direction of talking as if words had no force of their own, as if they were in fact transparent or discardable once the idea or concept is apprehended.⁴

Talking about concepts, White tells us, invites a scientistic discourse that is definitional and deductive. This approach presents rationality as an exercise in patterns of definitional equivalence, and rational discourse as inherently propositional in character. For those who view language as transparent, the "same" concept is thought to exist in the minds of speakers everywhere; translation is merely the act of finding the word that conveys that concept to speakers of different languages. Concepts exist apart from language, which has no formative effect whatever on meaning. Talk of concepts, according to White, also tends to represent language in a dichotomous and linear fashion.⁵

White then explicates his own quite different view of language:

In ordinary language we use our words in richly overlapping, sometimes contrastive ways, and we know that we define our terms partly in the way we use them. . . .

. . . .

[W]ords are not discrete and definable entities. . . . They do not


⁴. J.B. White, supra note 1, at 28-29.

⁵. Id. at 32.
carry their meanings like pieces of freight. . . . Much of the meaning of words therefore lies in silence, in the unstated but accepted background against which they have their meaning. . . . What is more, in our actual speech words normally do not exist as discrete units . . . but as parts of sentences or other expressions, each of which is located in a particular linguistic, intellectual, social and cultural context. It is not the words themselves but their various uses [ ] that have meaning. . . . Sentences are better thought of as "practices" than propositions. . . .

. . . .

[O]ur languages, and acts of language, are not transparencies through which thoughts or objects are to be seen, but ways of being and acting and living in the world. Forms of language are forms of life. 6

White stresses that language is at once a very personal and individual matter (because the unique distillation of any person's experience with language affects and shapes the meanings of that language) and strongly social (because we learn language from and speak it with others).

This vision of linguistic meaning—as multiple and overlapping, as emergent from the use of language in context, as culturally forged and shaped in a practice of speaking that is different in different cultures and languages (and that is not transparent)—is a vision that lies at the heart of much of the most exciting current work in anthropological linguistics as well. This current work draws together many strands of linguistic thought.

One important strand is the work of Benjamin Lee Whorf, whose path-breaking approach to language and culture demonstrated that the differences between languages do affect how speakers approach the world:

Such terms as 'summer, winter, September, morning, noon, sunset' are with us as nouns, and have little formal linguistic difference from other nouns. They can be subjects or objects, and we say 'at sunset' or 'in winter' just as we say 'at the corner' or 'in an orchard.'

. . . .

In Hopi however all phase terms, like 'summer, morning,' etc. are not nouns but a kind of adverb, to use the nearest SAE [Standard Average European language] analogy. They are a formal part of speech by themselves, distinct from nouns, verbs, and even other Hopi "adverbs". . . . These 'temporals' are not used as subjects or objects, or at all like nouns. . . .

. . . .

Our own "time" differs markedly from Hopi "duration." It is conceived as like a space of strictly limited dimensions, or sometimes as like a motion upon such a space. . . . Hopi "duration" seems to be inconceivable in terms of space or motion, being the mode in

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6. Id. at 32, 34, 215.
which life differs from form. . . .

Whorf proceeds to examine the different visions created in different language forms as they connect with their cultural and social settings. Compare Whorf, then, with White:

The central danger presented by our talk about concepts is that we may find ourselves speaking as if there were no reason why people in different cultures cannot have the same concepts, no reason why different languages cannot express the same concepts. To the part of our mind that works this way, indeed, variety of language may come to seem mainly a nuisance, a bother to be eliminated. . . .

It is Whorf who takes us into the details of different languages in a sensitive excavation of how they create different universes of understanding and expression.

Although Whorf was originally subjected to rigidly determinist readings that missed entirely the subtleties of his insight, recent readings have restored for us Whorf's careful explication of the 'habitual' character of language patterning. It was never Whorf's goal to link differences in language with rigid limits on mental functioning—as if a speaker raised in one language could never learn different ways of talking and understanding. Rather, in his view, the regular use of the categories and ways of talking of a particular language/culture shape speakers' habitual understandings of the world. These habitual understandings can be amended or shifted, but Whorf tells us that such an amendment will always occur through and in language. Again, compare with White: "As lawyers know—to their cost—it is very difficult to say things habitually, even things one doubts, without coming to believe them."

Curiously, White tells us that among those whom he would accuse of conceptual thinking are anthropologists who "talk[ ] about the Hopi 'concept' of time"—and that sounds like Whorf to me. It is, in fact, the case that Whorf talks of "concepts." But the entire thrust of his work is to uncover the way in which patterns in language shape our experience—to question the notion that our ideas and concepts exist apart from the language expressing them. Here, I think, we can discern a difficulty with pinning the substantial problem White is concerned with onto a particular word, as if use of that one word were the problem. For as White himself begins by saying, "there is no reason in principle why 'concept'

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8. J.B. WHITE, supra note 1, at 31.
10. B.L. WHORF, supra note 7, at 139-40.
11. J.B. WHITE, supra note 1, at 54.
12. Id. at 29.
could not be used by one writer or another in a way that is adequately, even beautifully, controlled or qualified.” 13 Indeed, it is precisely Whorf’s point (and that of current linguists building from his insights) that habitual patterning of understanding through language happens through the use of whole systems of language (grammars) day after day throughout speakers’ lives. Current work in anthropological linguistics warns us against a focus on individual words, as if they could by themselves embody realms of thought—or as if meaning inhered in those segmented chunks of language rather than emerging from the active, creative use of a whole web of related sounds and meanings.14 Indeed, anthropological linguist Michael Silverstein and literary theorist Jacques Derrida have both pointed (from somewhat different perspectives) to a focus on words as itself an example of the kind of objectifying tendency White decries.15

This is a point at which anthropological linguistics has something to contribute, because it speaks of language not as a combination of words but as a complex structure that conveys meaning in multiple, interconnected ways. This would not seem to be a vision that contradicts White’s fundamental view. Rather, I think it adds further to his image of an expression as

a gesture the meaning of which is indissolubly tied to its immediate and unique context: to its language and culture, to the social relations out of which it emerges and upon which it acts, to the prior texts that its author and audience use to establish and understand its terms, to its location in a particular place in the physical world, and so on.16

I can only begin a sketch of the view from anthropological linguistics here, but let me indicate some of the ways in which our emerging understanding of linguistic creativity adds depth to White’s picture.

The first step in this understanding is an exciting reversal of the usual ideas about grammatical structure. Much work on grammar has proceeded as if the main point of language structure is to convey concepts, propositional information, or meaning that exists apart from any particular context. By contrast, Silverstein and others are moving us to a fundamentally different view of language structure, building from the understandings of a group of linguists known as the Prague School, from

13. Id. at 26. Although White clearly recognizes the limitations of focusing on individual words (see text accompanying note 8 supra), I think that here he falls into the trap that he sets himself by actually using a single word as the focal point of his discussion.


15. See Chandler, The Problem of Purity: Jacques Derrida’s Reading of Ferdinand de Saussure (on file with author) for an exciting exposition of the continuities between these two traditions; it is from reading his work that I have seen this possible parallel.

16. J.B. WHITE, supra note 1, at 236.
work on the social context of language by sociolinguists, and from the work of Roman Jakobson, Edward Sapir, and Whorf (to name but a few). In this view, it is the social and expressive function of language—the contexts of culture and social relations, of prior texts and immediately surrounding language, of specific speech situations—that organize its structure. Grammatical structure is at every point responsive to the fact that it is a system created in use, for speaking, for carrying on social relationships and constituting cultures.

Here, then, is a very different view of language structure from that imagined by White when he talks of grammar:

Or think of grammar: Is this the blueprint by which the language is built, the engineer's design document? Much language-teaching seems to assume so, but of course nothing could be further from the truth. Grammar is what we use when we do not have enough experience of a language to make it our own.

I picture my ninth grade Latin book as I read this passage, and understand the kind of grammar White has in mind. But this is not the kind of grammar we work with as anthropologists. For us, grammar is the ever-changing web of relationships between sounds and meanings emergent in the millions of uses to which speakers put their language every day. It is the most social aspect of language, in the sense that it is the common

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17. It is frustrating to attempt to represent rich and complex traditions by listing names in a single sentence—and even at that, my list is radically adumbrated, for I have not mentioned Charles Sanders Peirce or Ferdinand de Saussure, Vygotsky or Bakhtin (and I could go on). And so, at the very least, I want to beckon the reader interested in a deeper understanding to just a few of the key texts from these traditions: M.M. Bakhtin, The Dialogic Imagination (M. Holquist ed. 1981); M.M. Bakhtin, Speech Genres and Other Late Essays (C. Emerson & M. Holquist eds. 1986); P.J. Garvin, A Prague School Reader on Esthetics, Literary Structure, and Style (1964); C.S. Peirce, Collected Papers of Charles Sanders Peirce, Vol. 2 (C. Hartshorne & P. Weiss eds. 1974); E. Sapir, Culture, Language, and Personality (1970); F. de Saussure, Course in General Linguistics (C. Bailey & A. Sechehaye eds. 1983); L. Vygotsky, The Collected Works of L.S. Vygotsky, Vol. 1 (R. Reiber and A. Carton eds. 1986); J. Wertsch, Vygotsky and the Social Formation of Mind (1985); Jakobson, Closing Statement: Linguistics and Poetics, in Style in Language 350 (T. Sebeok ed. 1969); Jakobson, Shifters, Verbal Categories and the Russian Verb, in Selected Writings II 130 (1971).


structuring that brings us close enough that we can find some way to communicate our private meanings in a shared tongue—and that is precisely why a vision of grammar as constantly shaped and renewed in crucial ways by its use in social context makes such good sense.

This socially-grounded grammar provides a reservoir from which flow even routine acts of linguistic creativity in our everyday interactions. It is through the creative use of this shared structure that we can (in and with our language) forge relationships, hurt someone’s feelings, rupture the normal order of a meeting, or interpret precedent in a novel way. Why does this matter? It matters to me because so much of the meaning we create lies not in those segments we call words but in the subtle structuring of larger stretches of discourse. These larger stretches of discourse are responsive to contexts of many varieties—social (e.g., we are people of unequal social power speaking in a classroom), generic (e.g., I am using the genre known as storytelling, building on a shared cultural sense on previous stories we both have heard), intralinguistic (e.g., I am playing this new image against the images of my immediately preceding utterance), speech contextual (e.g., I am referring to previous contexts of speaking, or to the one I am currently creating as I speak), and many more. And at every point, these contextual dimensions are conveyed and absorbed in grammar.

In approaching the problem that is for White centered upon the word “concept,” then, we would look not at the word but at a grammatical structuring of use which permits speakers to talk of ideas much as they would of things. This structuring focuses attention away from the constitutive and creative character of language and toward aspects of meaning that are knowable before the event of speaking. In listening to the way people talk, we would certainly find the reifying tendency described by White in places where the word “concept” never appears, and we could actually find the word “concept” used to attack this tendency. As we traced this structure of language in use across sociocultural divisions and across time, we could begin to understand what kind of social and cultural foundations contribute to the particular shape of this reifying tendency in our society and in our language. And to the degree that we

20. And note, interestingly, that linguists have yet to find a satisfactory definition for the word “word.”


22. I say “particular shape” because some have indicated that this objectifying tendency might be a universal feature of language (and cultural reflection on language) everywhere. See Silverstein, Linguistic Ideology, supra note 3; Silverstein, The Limits of Awareness, 84 WORKING PAPERS IN SOCIOLOGY 1 (1981). However, even in the more universalist accounts, this reification takes different forms in different societies (compare the Javanese and Western examples in Silverstein, Linguistic Ideology, supra note 3). Thus it would seem to make sense that the shape of cultural reification of language reflects the social structuring of language in particular societies.
found a part of the sociocultural world to which this reifying tendency was true, we would also bracket our own critique, understanding that at some point the ideology might capture some aspect of the social system of which it is a part. I think that a disciplined inclusion of social foundations as part of our analysis of linguistic creativity is one of the most important contributions of this anthropological approach.

Although there are important differences here between the approach I am describing and White's view, there is also a point of continuity, when White alludes interestingly to the social foundations of the objectification found in law and economics discourse. In a resounding and courageous critique of the language and worldview of Posnerian-style law and economics, White strips away the pretenses of the language to reveal a barren and troubling vision which

imagines a social universe that is populated by a number of discrete human actors, each of whom is competent, rational, and motivated solely by self-interest. . . . [E]conomics cannot, in principle, talk about any activity, any pleasure or motive or interest, other than the acquisitive or instrumental one that it universalizes. . . . This is not to be "value-free," as its apologists claim, but to make aggressive self-interest the central, indeed the only, value, for it is the only one that can be talked about in these terms. . . . [T]o reduce all value to self-interest . . . is intellectually and ethically intolerable. How could one educate one's children or oneself to live in a world that was neutral on all the great questions of life, except that it reduced them to acquisition, competition, and calculation?23

This is just a small slice of White's rich account, which looks at the discourse as a political system and as an economic system, employing the author's sensitive ear for language to powerful effect. Of particular interest to me were two further contextualizations of this account.

First, White points to the context of our own culture as a powerful influence on the thinking of law-and-economics writers who might try to escape the ordinary meaning of words like "self-interest." He argues that "in a culture like our own, which is so heavily dominated by the motive of self-interest in the usual sense, that of selfishness or self-centeredness," it is unlikely that speakers could entirely avoid the usual meaning of the term. He then points out that focusing on economic exchange might make sense in studying "spheres of life that are in fact characterized by exchanges that take place on conditions roughly matching the assump-

23. Although White does not make the distinction, I think that somewhat different and more carefully circumscribed worlds emerge in the work of law and economics scholars who counter the Posnerian position; see, e.g., Donahue, The Impact of Federal Civil Rights Policy on the Economic Status of Blacks, 14 Harv. J.L. & Pub. Pol'y 41 (1991); Ayres and Miller, "I'll Sell It To You At Cost:" Legal Methods to Promote Retail Markup Disclosure, 84 NW. U. L. REV. 1047 (1990).

24. J.B. WHITE, supra note 1, at 51, 57-58, 59.
tions of the discourse." 25 Thus, the assumptions about people and motives that White critiques so resoundingly might actually be correct if one is focusing upon "the economic life of the investor or entrepreneur in a capitalist economy." 26 This is the same sort of bracketing that we do in studying linguistic reification, where analysis of social foundations at times leads us to accept an objectifying approach as adequate to certain aspects of social reality. 27 Social context, ideological reflection on language, and language structure all meet at such points. 28

Often the larger structuring of discourse that I have been discussing is not something that speakers are consciously working with—but therein lies the power of this kind of meaning. Here is where individual creative use and socially shared structuring come together, at a level that is deeply cultural because it is only partly available to conscious awareness. 29 How intriguing it is that so many of the key political and ritual discourse forms in other cultures structurally mirror, in very subtle and complex ways, the very model of society or language that they attempt to reinforce. 30 Creative acts of language use, playing against past routinized usages, 31 enter the shared reservoir and change it. 32

None of this runs against the grain of White's description. Indeed, although he does not ask about the role of grammar in the patterning he finds, White discovers in political and legal texts exactly the kind of subtle mirroring that anthropologists have found in grammatical and discourse structure. White's discussion of the definition of "deliberation" in the Federalist Papers is to me startlingly similar to linguistic anthropo-

25. Id. at 61.
26. Id.
27. See M. Postone, Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory (forthcoming) for another version of this thought as applied to the social theoretical analysis of capitalism, where reificatory analyses can be similarly "adequate to" the objectifying processes they seek to capture. This is always just one moment of the account, however, and it is crucial that this reificatory approach be recognized as such, and be circumscribed by a broader awareness of the limits of reification.
28. This is, however, only a very limited example. Of more interest are the points at which reificatory models are inadequate, and it is here that the anthropological vision of contextual structuring offers a wonderful opening for unifying understandings from linguistics and literary criticism, on the one hand, and from social theory and history, on the other. See Silverstein, Language and the Culture of Gender, supra note 18.
29. See Silverstein, Linguistic Ideology, supra note 3; Silverstein, The Limits of Awareness, supra note 22.
31. This is what Silverstein (Linguistic Ideology, supra note 3; Metapragmatic Discourse, supra note 14) discusses as the play between presupposing indexicality, where language points to aspects of the setting we already knew about, and creative indexicality, where language, in pointing to its social context, creates that very context.
logical discussions of the creative and contextual character of language, which is always structured by its use (but also, we would add, always using its structure). Thus, White tells us that the good writer "give[s] her terms meaning in her use of them," and goes on to demonstrate how this happens in the Federalist Papers: "How is 'deliberate' defined? Never by explicit description, never conceptually or stipulatively. . . . Instead, the term is given meaning by a kind of performance or enactment in the text itself."\footnote{33} This enactment of a structure of meaning in the structure of a text is quite similar to what anthropologists have found in key ritual and political genres in other cultures.\footnote{34} Because this kind of enactment is quite subtle, and often is not overtly signalled or consciously reflected upon, it can contribute in a powerful way to a speaker's sense that the model being mirrored (of society, of language, of the polity, of interpretation) is somehow natural or "given." Much of the rest of White's book is an exploration of this kind of enactment in a series of American legal cases, as he unpacks his vision of law as a conversational process.

II. CREATIVE ACTS OF TRANSLATION AND THE INTEGRATION OF VOICES: NONTRANSPARENT LEGAL LANGUAGE

At the heart of White's book are seven carefully crafted analyses centering on Fourth Amendment cases and on cases dealing with the treatment of racial minorities. Throughout a number of these chapters White traces again and again continuities between the vision of the judicial task held by judges and the way they craft their opinions.

We begin with Frankfurter's opinion in \textit{Rochin v. California},\footnote{35} which White takes as an illustration of the way in which "[i]n every judicial opinion the judge gives himself a character of personality, demonstrating by the performance certain intellectual and ethical qualities which he of necessity asserts to be appropriate to his role."\footnote{36} In \textit{Rochin}, Frankfurter moves outside of the terms of previous cases to apply the exclusionary rule where there is conduct that "shocks the conscience." White views Frankfurter as stepping outside of the realm of reasoning discourse to assert simultaneously "the power of the moral, aesthetic, and civilized actor over the language and categories of the law,"\footnote{37} the role of the

\textsuperscript{33} J.B. \textit{White}, \textit{supra} note 1, at 37.

\textsuperscript{34} In the technical vocabulary of semiotics, these are "indexical icons"—"indexical" because they are deeply dependent upon the context they create, and "icons" because they mirror in the structure of their performance the social or linguistic reality they seek to forge. As should be evident from the preceding discussion, anthropologists have looked at different levels and kinds of structuring of discourse than White is dealing with here. But I think that the two inquiries come very close in their discovery of a quiet mirroring, at subtle levels of the text, of the message it seeks to convey.

\textsuperscript{35} 342 U.S. 165 (1952).

\textsuperscript{36} J.B. \textit{White}, \textit{supra} note 1, at 111.

\textsuperscript{37} Id. at 109. For a discussion of White's view of reasoning discourse, see \textit{infra} notes 54-61 and accompanying text.
Court as the "conscience" of the nation, and a judge's capacity (to judge well) as the ground for judicial decisionmaking. The form of the argument mirrors the model of judicial decisionmaking (and of the authoring judge) upon which the opinion rests.

White then considers examples of "original intention" approaches found in the opinions of Justice Story in \textit{Prigg v. Pennsylvania} \textsuperscript{38} and Chief Justice Taney in \textit{Dred Scott v. Sandford}.\textsuperscript{39} He again traces the way the opinions model in their form their claimed basis of authority. Here, the authors attempt to pierce the language of the text to find the intent behind it, eliding the multiple possible voices of the text itself and of its many "authors" (as well as of the people implicated in any particular case) in an image of "a masterful and coherent human actor who knows everything about both his own wishes and the possible circumstances in which these wishes will be significant."\textsuperscript{40} This masterful actor is at once the original "intender" and the author-judge, writing in a style that erases contradictions and alternative voices.

In examining the majority and dissenting opinions in \textit{Olmstead v. United States},\textsuperscript{41} White again discovers a kind of textual imaging. This time we see in Chief Justice Taft's authoritarian majority opinion the use of a "plain meaning" approach to authorize wiretaps under the Fourth Amendment. This is a rhetorical style that asserts the raw power of the author's conclusory statements about what language means as a foundation for judgment. By contrast, White sees Justice Brandeis in his dissent as "a defender of individual rights who speaks as an individual and to us as individuals":

The heart of Brandeis' opinion lies in a vision of human culture working over time, in a sense that we have something to learn from the past as well as something to give to the future. . . . For Brandeis the individual and the community alike are engaged in a continual process of education, of intellectual and moral self-improvement; the law in general and the Constitution in particular provide a central and essential means to this process.\textsuperscript{42}

I think it is fair to say that this view closely approximates the approach to (at once) law and translation, language and community, that White would advocate.\textsuperscript{43}

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\item[38.] 41 U.S. (16 Pet.) 539 (1842).
\item[39.] 60 U.S. (19 How.) 393 (1857).
\item[40.] J.B. White, \textit{supra} note 1, at 134.
\item[41.] 277 U.S. 438 (1928).
\item[42.] J.B. White, \textit{supra} note 1, at 157.
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These essays, then, begin an excavation along lines White indicated in a previous book, *When Words Lose Their Meaning*,\(^44\) where he focused on several key points in understanding texts: the contexts provided the author by language and culture, the remaking of those contexts through creative use of (nontransparent) language, and the kind of community that is created with readers of the text. In this volume, White concentrates on particular aspects of those concerns in reading the texts that are Supreme Court opinions: “the character the opinion gives the court . . . the kind of relations it establishes with those it talks to (and about), and . . . the kind of conversation it establishes for the future.”\(^45\) His exploration yields both an image of what legal opinions can and should be—a conversational process in which ‘democracy begins’\(^46\)—and a discouraging conclusion as to the current state of that conversation.

Although there are many points at which to engage these rich discussions, I can choose only a few. I have begun by continuing the dialogue of the first section of this essay between White and current anthropological linguists, for both are intrigued by the mirroring of worldview in discourse form that often characterizes key political and legal texts in many societies. This mirroring is not automatic or necessary, but it is a powerful reinforcement of the image that a text seeks to create or reinvigorate. It is one way in which nontransparent language works creatively. White’s essays are thus also a further demonstration of his insistence that language is not transparent. Ideas are forged in the language of the text; they are not preexisting entities clothed in language.

As we have seen, anthropologists, among many others,\(^47\) share this view, insisting both that language does not transparently reflect preexisting “concepts,” and also that it does not transparently reflect the social divisions it often seems to mirror and reinforce.\(^48\) This last point is precisely why the connection between any particular shape of discourse and a message it seeks to convey must be viewed as contingent rather than necessary or automatic: while it is possible for certain kinds of language to achieve certain results (e.g., formal language creating distance), these results always follow from creative acts of culturally-interpreted lan-


\(^{45}\) J.B. White, *supra* note 1, at 214.

\(^{46}\) The quotation is from Dewey.

\(^{47}\) Again I am constrained by this context from a thorough review—but sociolinguists, anthropologists and scholars working on language and law from a sociological vantage have all converged on a view of language as nontransparent (see Mertz, *Language, Law and Social Meanings, supra* note 3, for a review of the literature).

guage use—and the interpretation can always move in another direction, creatively formulating new connections between discourse form and social effects (e.g., a parent using formal address as a “pet name” for a child to convey intimacy). This is why anthropologists may hesitate over a further movement in White’s writing, which takes a nontransparent approach to language and recommends it as a normatively “better” way of writing legal opinions, and indeed, of constituting communities in and through legal translations. This move from language to social effect elicits a queasy feeling among anthropologists that is not only a general ambivalence about normativity, but is also born of a questioning about the relationship between language and social power.

Thus, White carries the nontransparent vision of legal language to the very foundation of his argument about judicial opinions. For White, judicial opinions are occasions for careful reasoning about previously written legal language such as the Constitution or previous judicial opinions. The reasoned discussion White envisions does not treat previous legal texts as transparent to authors’ intent or policy arguments or static “plain meaning,” but respects the complex creative character of the language itself. In fact, as White so aptly remarks, “original intention” arguments “erase[,] the one intention we do know about, the intention to publish this language [of the Constitution] as authoritative.” He thinks that attempts to evade the language of legal texts by hiding behind “original intention,” “plain meaning,” or bald assertions of judicial conscience is an abdication of judicial responsibility to carry forward the complex ethical process of interpreting legal texts.

This point is developed further in an essay that examines judges’ attempts to use precedent to evade this responsibility—either through “commonsense” readings of prior cases coupled with straightforward determinations as to whether these cases have been overruled, or through a kind of “providential history” of which the judge is an observer: “‘Once we thought this, but we were wrong; gradually we have come to see the truth.’” The first of these approaches has much in common with a “plain meaning” reading, while the latter reminds us of the judge as “conscience.” Finally, White takes us through successive narrowings of the exclusionary rule in opinions that similarly escape serious consideration of prior legal texts through a focus on factual determinations. In these cases, the facts are weighed in an attempt to determine whether the cost of excluding evidence to the criminal justice system is balanced by possible deterrent effects on wayward law enforcement officials.

Against these evasions he poses an alternative vision:

49. J.B. White, supra note 1, at 135.
50. Id. at 172.
51. Id. at 211-21.
Our tradition has embodied a sense of law as a way of respecting that which is external to the present moment and to the present will, namely, the judgments and experiences of others as these are recorded or reported in authoritative texts. The law thus creates a political world characterized by the separation of powers, a world in which there is no despot but in which each of us must live with judgments with which we disagree, when made by those authorized to make them. Of course this authority is not absolute, but depends upon its perpetual reconstitution by the people of the law.52

The authority of legal texts, in White’s view, “must be created rhetorically, in the opinion itself . . . it depends upon the informed understanding of the reader and upon his acquiescence . . .”53 This vision of a community that is created by insuring opportunities for everyone to be heard and to be reasoned with is in some ways reminiscent of Michael Perry’s work. Perry stresses the value of a deliberative political process in which social transformations are accomplished through rational discourse, free of coercion.54 In a quite different vein, Jurgen Habermas55 also focuses on the role of participation in practical discourse. Through this participatory discourse the consent of all concerned could be obtained as a foundation for normative decisions.56

What, then, would be the source of anthropological hesitation over this scenario? On the one hand, anthropologists, unlike lawyers, have at least the theoretical luxury of abstaining from evaluation at certain points in their work (although, of course, we have found out increasingly how value-laden even seemingly neutral abstentions can be). Anthropologists are not as versed in normative arguments as legal theorists, and I think that there is much that they can learn from colleagues who routinely have to take positions on deeply divisive political issues as part of their work.57 I have thought this especially as I have become acquainted with the work of feminist and critical race theorists in the legal academy, whose work is an exciting blend of social, theoretical, and linguistic

52. Id. at 223.
53. Id. at 217.
56. See also T. Tyler, Why People Follow the Law: Procedural Justice, Legitimacy, and Compliance (1988) and J. Conley and W.M. O’Barr, supra note 48, for discussions of how permitting citizens a chance to be heard and reasoned with often facilitates acquiescence in otherwise unpalatable results. The political implications of this are, to say the least, deeply troubling.
57. It is difficult to specify the difference between the two fields in the sense that anthropology is no less a value-laden and political activity. However, legal scholars (who are generally also lawyers) occupy a specialized institutional niche that requires a practice of normative judgment with powerful social consequences (because of the institutional role of law in this society). See Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L.J. 201 (1987). As someone trained first in anthropology and then in law, it has been my experience that the normative engagement that is not optional in law provides an important perspective that could be drawn upon usefully by social scientists.
insight invigorated by an unabashed moral sensibility that is lacking in much social science work.

These theorists share with White an appreciation for the nontransparent and socially powerful character of language. Listen to Mari Matsuda talking about the transformative power of language:

Douglass' skill in transforming the standard text of American political life into a blueprint for fundamental social change is instructive. He chose to believe in the Constitution, but at the same time, refused to accept a racist Constitution. In his hands, the document grew to become greater than some of its drafters had intended. Douglass' reconstructed Constitution inspired black readers to endure the tremendous personal costs of resistance. Martin Luther King, Jr.'s reconstructed Constitution produced the same effect in the twentieth century.

This ability to adopt and transform standard texts and mainstream consciousness is an important contribution of those on the bottom. Black Americans... have turned the Bible and the Constitution into texts of liberation . . . .

Those who lack material wealth or political power still have access to thought and language. . . . In poetry, the most concentrated form of language, black women have employed words to criticize and transform existing assumptions.58

Here is a respect for the constitutive and creative character of language that in many ways parallels White's. Their respect for the power of language leads these scholars to a suspicion of the nihilism characteristic of some radical "realist" approaches—a suspicion shared by White. Even though it may be deeply problematic, the language of legal rights matters:

It is true that the constitutional foreground of "rights" was shaped by whites, parcelled out to blacks in pieces, ordained in small favors, as random insulting gratuities. Perhaps the predominance of that imbalance obscures the fact that the recursive insistence of those rights is also defined by black desire for them. . . . "Rights" feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructing (deconstruction is too awful to think about!) at this point in history.59


Because they appreciate the power of language form, many legal-feminist and critical race theorists also share with White a suspicion of language-as-usual, of standard propositionally regimented speech. Compare White's final two chapters in \textit{Justice as Translation}, in which he drops standard writing format, with Derrick Bell's \textit{And We Are Not Saved},\textsuperscript{60} a book which similarly violates common scholarly writing norms, making its point in the form of the writing.

Here is White: "Do not look for propositions here. . . . Listen to the voices: my voices and your own."\textsuperscript{61} And here is Richard Delgado, insisting that we listen to excluded voices, voices that have not been heard in legal texts:

Members of outgroups should tell stories. Why should members of ingroups listen to them?

Members of the majority race should listen to stories, of all sorts, in order to enrich their own reality. Reality is not fixed, not a given. Rather, we construct it through conversations, through our lives together. Racial and class-based isolation prevents the hearing of diverse stories and counterstories. It diminishes the conversation through which we create reality, construct our communal lives. . . . Listening to the stories of outgroups can avoid intellectual apartheid. Shared words can banish sameness, stiffness, and monochromaticity and reduce the felt terror of otherness when hearing new voices for the first time.\textsuperscript{62}

In this comparison you can perhaps see the source of my disappointment and surprise at finding no reference to these alternative traditions in White's work, for it would seem that he of all writers would understand their plea to be heard, their urgent request for inclusion in the texts of other legal scholars.

But beyond a general ambivalence about normativity,\textsuperscript{63} there is a further anthropological discomfort with White's move from "is" to "ought." I am torn because the community of reasoning speakers, respectful of prior texts and committed to hearing many voices, is in many ways appealing—and I think that White has captured the aspirational core of the community of judges at their best. And yet I am troubled by the thought that any discourse form can be thought to carry in it, necessarily, (and without the specificity of social grounding) the key to a particular kind of community. This uneasiness became strongest as I read White's discussion of the slave cases, in which he tied a discourse

\textsuperscript{60} D. Bell, \textit{And We Are Not Saved: The Elusive Quest for Racial Justice} (1987).

\textsuperscript{61} J.B. White, supra note 1, at 231.


\textsuperscript{63} And it is more a lack of any clear disciplinary foundation, any really persuasive collective tradition for thinking about it, than a commitment to value neutrality.
form ("original intention" arguments) to the shocking abrogation of responsible argument embodied in Taney's use of overtly racist language to justify a racist result. Would the "same" result have been any better if the opinion had been phrased more deliberatively, with more thorough consideration of all of the legal texts, meanings, and voices involved? For, given the context of the law at the time, even with all of the possible arguments to the contrary in mind, it seems quite possible to have reached that sort of result after considered weighing of the legal authorities and texts at hand. White's full community in which all voices are heard might never follow from repeated, careful readings of this kind, if the documents and texts on which the readings are based themselves envision exclusion and subjugation.

And so it seems to me that, with full respect for the power of language—indeed, precisely because of that power—there are times when the kind of conversational process White envisions is simply not enough to achieve the community he seeks. This is because that conversational process is itself socially bounded—and here both the anthropological and the feminist and critical race theory perspectives can be brought to bear. White talks of the perpetual reconstitution of authority by the "people of the law," but there are so many people who are members of our wider society who are not represented or understood or even heard by "people of the law." Listen to Patricia Williams' voice as she speaks of slavery, not as a category over which legal actors will discourse and debate, weaving more and less reasoned arguments, but as social and psychological and physical violence:

The individual and unifying cultural memory of black people is the helplessness, the uncontrollability of living under slavery. . . . My great-great-grandfather Austin Miller, a thirty-five-year-old lawyer, bought my eleven-year-old great-great-grandmother, Sophie, and her parents (being "family Negroes," the previous owner sold them as a matched set). By the time she was twelve, Austin Miller had made Sophie the mother of a child, my great-grandmother Mary.

Subsequently Williams does take us into an imaginary courtroom, in which she attempts to use the language of the law to save her great-great-grandmother. She makes us aware of the deeply offensive character of all legal translations in that setting; we see that no available legal argument could have done justice to the injustice involved.

Legal feminists similarly stress the almost impossibility of translation

64. J.B. WHITE, supra note 1, at 126.
65. West makes much the same point in her discussion of White's earlier work. See West, supra note 43, at 154-56.
66. J.B. WHITE, supra note 1, at 223.
67. Williams, supra note 59, at 418-19.
68. Id. at 421-23.
into legal categories of some aspects of women's experience. This theme of almost impossibility should find a sympathetic ear in White, whose final chapter contains a delicate exploration of that very issue. But from this difficulty of translation, this boundedness of the community of legal discourse, this often exclusionary character of the past texts themselves, comes for me a question—is not the value of the conversational process White describes so beautifully not itself dependent upon who is being allowed to talk, on what texts we are to treat respectfully (think, painfully, of respect paid to the legal texts of Nazi Germany or of modern South Africa), on what languages are possible in this process? And do we not then have to add to our vision of conversations that might facilitate community and justice, an understanding of the socially-specific grounding of those conversations in societies?

The answer from anthropology is a resounding yes. We must understand language in its social context. We cannot begin by assuming that particular discourse forms carry within them beneficial or detrimental social results. This is to assume a transparency between language and society, and such an assumption is no more valid than a presumed transparency between language and thought. It is because language is at once socially creative and socially grounded that we must always examine carefully the particular sociohistorical settings within which it operates. Although White at times appears to advocate such an approach, he at other times strongly hints that given social results flow from the use of particular discourse forms. For example:

... [Y]ou can gather that I think the proper result in Prigg would be to uphold the Pennsylvania kidnapping statute, in Dred Scott to find the plaintiff a citizen of the United States. In addition I think that the reading of the Constitution in a more lawyerly way would have led to substantial difficulties, emotional and intellectual, with the results reached in these cases. ... To focus, for example, upon the circumstances of Mrs. Morgan's freeborn child in a way that recognized that he was a person, entitled to freedom but needing his family, would have been to realize that Mrs. Morgan and indeed her unfree children were people too, a realization, which, if articulated with sufficient clarity would have tended to erode, not the discourse of law, which it would have exemplified, but that part of it which maintained slavery.

White seems to imply that recognition of the personhood of Mrs. Morgan and her children would follow from a lawyerly reading of the Consti-

70. This view is shared by many legal feminists and critical race theorists as well.
71. J.B. White, supra note 1, at 139-40.


tution. But that recognition would have to build not only upon a reading of legal texts, but also upon a particular socially situated construction of those texts and of social identity that would permit application of legal categories to people previously excluded from the legal and social category "person." This re-construction would be a powerful interpretive act responsive to the general balance of social power at the time, emergent cultural understandings, the general position of the courts in maintaining or disrupting the reigning social understanding, and the openness of a particular judge to new social constructions.

The particular interpretation or result reached by a judge, then, would not follow automatically from taking a certain approach to legal language, but would depend in important ways on the use of that language in a complex sociohistorical context. The language form alone does not provide sufficient grounding for the legal result. There appears, at least linguistically, to be a necessarily ungrounded moment in the leap from "is" to "ought." The grounding for the "ought," if there is one, must come from a rich unpacking of the social context of language use in particular societies at specific historical moments. We can then say with some measure of precision how a particular discourse form is participating in this or that social formation. Whether or not the social formation is a desirable one is a matter many of us hold strong opinions about, but we cannot ground our sense of that on how language works. Language works persuasively, some think beautifully, to produce what many of us view as horrendous social results—as when people are persuaded by very effective speakers to join hate groups. That I would not view any language producing such a result as "beautiful" is a social and substantive assessment that I can defend on normative grounds. I cannot, however, justify my assessment based upon linguistic form alone.

III. CONCLUSION

We have seen a number of points of continuity between White's view and that of anthropological linguists—appreciation for the nontransparent creativity of language, an understanding of it as simultaneously social and individual, an insistence on the importance of language-in-use, in performance, in context. In contrast to older approaches, this is a vision of language as valuable not because it affords insights into universal structures or because it conveys preexisting information or concepts, but rather because it is particularly sensitive to different social settings, particularly imbued with the social life of which it is a part.

Anthropology can add to this general picture both a fine-grained concern for the details of grammatical structure of language and a rich feeling for the socially creative and powerful character of linguistic interaction. Lawyers can add to anthropologists' vision a normative dimension, raising difficult questions about how to ground morality.
From feminist and critical race theory scholars comes a suspicion of propositional regimentation closely analogous to that of White, so that like White in his final chapter, their writing takes on new and challenging forms. Furthermore, the legal feminist and critical race theory approaches share with anthropology an appreciation of the need for socially-grounded accounts of language use. These accounts would at no point assume the transparency of language to social results (e.g., a certain kind of discourse form carrying within it given social results). Rather, the social results of language use are viewed as contingent. Analysis of how a particular discourse works in a given sociohistorical context is a crucial step in understanding the role of language in constituting that context.

There is also an insistence in these new approaches on true integration of scholars of color and women scholars into other authors’ texts—a realization that these different and challenging voices will be truly integrated only when they are taken seriously, responded to, and admitted to the conversation. This is a challenge, based upon a deeply felt recognition of the social power and foundation of our texts and language, that needs to be heard not only in law, but also, shamefully, in anthropology. This kind of inclusion would seem to fit very well with White’s project, because he writes so convincingly about the need for integration of many kinds, including intellectual and social, and because it would move us further toward the integrated community he envisions as the goal of legal and other translations:

The proper object of human community is the recognition of the equal value of each person as a center of worth and meaning. . . . Our deepest obligation and highest hope is to create a world in which each person is fully recognized, in which each may achieve the realization of his or her capacities for life.72

I have tried to bring together several alternate visions with the one described by White, in the hope that they can enrich one another, perhaps urging one another further along paths they have charted. Although I have voiced a number of differences in perspective and approach, I want to conclude by applauding the spirit of interdisciplinary discussion that is created in White’s text, his evident respect and openness to other minds and other texts, and his passionate plea for an integration in language that builds community as well as individual selves.

72. J.B. WHITE, supra note 1, at 269.