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Legal scholars have heard literary critics proclaim the death of the author. Yet, as this Symposium shows, it is one thing to hear the death of some generalized author announced, quite another to be an author reading his or her own obituary. Authors seem inevitably drawn to the Romantic vision of their task, in which the product of their pens is somehow an expression of their very own individuality. To be told that texts "are"—or at the very least will become—what readers make of them is to deprive Romantic authors of something they believe to be at the core of their activity.

When we think of ourselves as commentators on the legal work of others,[1] we are not troubled in asserting that what an opinion means, for example, is what it is taken to mean by its readers.[2] One line of inquiry developing from this assertion would explore the ways in which particular phrasings affect the meanings readers give an opinion. Obviously, readers who see the words, "Affirmative action programs are subject to strict scrutiny and are permissible only under the most compelling circumstances," are likely to take the words to mean something different from, "Affirmative action programs are permissible when they are reasonable means suitably adapted to rectifying a legacy of discrimination."[3] At the least, readers are likely to think it more difficult to justify affirmative action programs after reading the first phrase than they would after reading the second.

This suggests that the editorial process, in which an author's words are subjected to revision by a first set of readers, may affect what the words that are ultimately published mean. I want to suggest, however, that the effects of this first transformation are likely to be significantly smaller than the already-in-place routines that the larger

* Professor of Law, Georgetown University Law Center. I am aware of the two most obvious senses in which the title of this comment can be taken.

1. I acknowledge immediately the problem in this statement, which implicitly purports to distinguish between our "commentary"—taken to be something that exists outside the critical enterprise described by the phrase, "the death of the author"—and that which we comment on, which is the object of—and therefore in some sense subordinate to—our commentary.

2. And not, in particular, what the opinion's author "meant" it to mean.

3. Or maybe not so obviously. On one (controversial) interpretation of the "death of the author" theory, the proposition is obvious only because readers are already socialized into an understanding of the distinction between "strict scrutiny" and "reasonableness."

audience of readers uses in reading the ultimate product.[4] The meaning of a sentence in the passive voice, to use the conventional example, is indeed different from the meaning of a sentence in the active voice, but the margin is, I believe, quite small compared to the differences in meanings that arise from discrepancies between an author's routine and those deployed by readers.

My observations here result from my reflections on recent experiences with an article I wrote. The experience can be summarized in this way: The article I thought I wrote is not the one readers appear to have read, although the words in the article I thought I wrote are the words in the article readers read.

For the past few years I have been playing around with the idea that literary style has something to do with the ability of judicial opinions to become authoritative.[5] Roughly put, the idea is that the "better written" an opinion is, the more likely it is to become an authoritative precedent. In pursuing that idea, I have tried to explore two lines of inquiry that I suspect are linked.

First, and obviously connected to the theme of this comment, literary style is a social construction. So, for example, I have tried to think through propositions like, "Justice Robert Jackson's reputation as a literary stylist is founded primarily on his ability to get off quotable lines rather than his ability to develop a sustained argument, and the ability to get off quotable lines is given a positive value in a setting in which the principal means of communication about law is the short newspaper story."

Second, and more problematic, I have been intrigued by the thought that there may be some connection between the judicial virtue of integrity and literary style. Here I have worried that I may be misled by the fact that we can use the word *integrity* to refer both to the artistic integrity of a literary production, which is itself a virtue in that context, and to a personal characteristic.

One article in the group I have written examined three topics: the literary style of some Supreme Court opinions, the personal characteristics revealed in a hearing on the confirmation of a Supreme

4. Such as it is for law review articles.

5. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) [hereinafter Tushnet, *Degradation*]; Mark Tushnet, *Style and The Supreme Court's Educational Role in Government*, 11 CONST. COMMENTARY 215 (1994); Mark Tushnet, *Constitutional Interpretation, Character and Experience*, 72 B.U. L. REV. 747 (1992); Mark Tushnet, *Character as Argument*, 14 LAW & SOC. INQUIRY 539 (1989) (reviewing HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988)).

Court nominee, and the literary style of important recent work in the field of jurisprudence.[6] The principal opinion I discussed was Justice Blackmun's separate opinion in *DeShaney v. Winnebago County Department of Social Services*.[7] His opinion contains the widely noted phrase, "Poor Joshua."[8] Although many commentators take the opinion, and the phrase, to show how a judge's empathy can be expressed in his opinions,[9] I found it to be bathetic instead. I contrasted Justice Blackmun's personalization in his *DeShaney* opinion with what I believed to be the more effective personalization in Justice Brennan's dissent in *McCleskey v. Kemp*,[10] and I tried to explain why I believed Justice Brennan's rhetoric was more effective than Justice Blackmun's. This discussion of the opinions' literary integrity was coupled with a discussion of some problems I encountered in reading some passages in several prominent works of narrative jurisprudence. I argued that those passages displayed problems of literary integrity paralleling those in Justice Blackmun's opinion. These discussions of literary integrity bracketed a discussion devoted to establishing as carefully as I could that Clarence Thomas had lied before the Senate Judiciary Committee, which raised the question of judicial integrity.

I think it fair to say that essentially no one saw the article as I did. It has generally been taken as a vicious attack on narrative jurisprudence, and on the work of Patricia Williams in particular; the rest of the article has been ignored.[11] Some of the criticisms articulate inter-

6. Tushnet, *Degradation*, *supra* note 5.

7. 489 U.S. 189 (1989).

8. *Id.* at 213.

9. *See, e.g.*, Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1675 (1990).

10. 481 U.S. 279 (1987).

11. The term *vicious* has been used in conversations. I have collected citations to the article, and quote parenthetically the descriptions to which the citations are attached: Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 255 (1994) ("at pains to point up the limitations of the storytelling genre"); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 752 n.90 (1993) ("discussing stylistic flaws in certain influential narratives which undermine the format's effectiveness as legal scholarship"); Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 345-46 n.85 (1993) ("Mark Tushnet has suggested analogous views" to those expressed in articles constituting a "counter-reaction which questioned the uniqueness of a black voice, and asked if minorities promoted their best interests by demanding to be judged by a standard different from the meritocratic norm purportedly used by white America"); David A. Skeel, Jr., *Practicing Poetry, Teaching Law*, 92 MICH. L. REV. 1754, 1769 n.55 (1994) (reviewing LAWRENCE JOSEPH, BEFORE OUR EYES (1993)) ("Legal storytellers have recently come under attack by commentators questioning the accuracy of the storytellers' 'real-life' accounts"). For the record, my view is that Delgado's characterization is the most accurate among those critical of the article, and that other even more qualified characterizations are even more accurate. *See, e.g.*, Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1896 n.43 (1993) ("criticizing *certain* feminist and critical race narratives") (emphasis added); Daniel A. Farber & Suzanna Sherry, *Telling Stories*

esting analyses, actually congruent with my interest in the social construction of standards of style.[12] As an author, my reaction to these comments has ranged from a bemused, "Some of these things are interesting comments on a certain view of narrative jurisprudence in general, but they have little to do with what *I* wrote," to a sterner annoyance at the "mis"-characterization of my views.[13]

On reflection, however, both reactions reflect the Romantic view of authorship that, in my critical writings, I reject. For, in any relevant sense, the article now "is"—and therefore is (without scare quotes)—an attack on narrative jurisprudence, because that is how it has been read by the relevant community of readers.

Some comments on this "transformation" seem worth making.[14] First, we might think that there were some limits to the process. Perhaps it is not worth worrying too much about whether law review editors insert too many passive voice constructions into an otherwise elegantly written article, although I will comment on that issue in a moment. We might think, though, that certainly an article cannot come to mean the opposite of what it "says." That, we might think, would be as if the community of readers inserted the word *not* in a sentence like, "Justice Marshall has argued that the death penalty was unconstitutional under all circumstances," to make it either, "Justice Marshall has not argued . . .," or "Justice Marshall has argued that the death penalty was not unconstitutional under all circumstances." My experience suggests that the limits are rather broad. My article said the following: "I find it largely uninteresting to ask whether the Benetton or Au Coton stories 'actually happened,' because events like those certainly have happened."[15] The critics of my article regularly assert that I do not believe Williams's account of the events.[16]

Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 807 n.3 (1993) ("Mark Tushnet critiques *some aspects* of legal storytelling") (emphasis added).

12. Especially the first and most detailed, Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992).

13. In particular, at the transformation of a critique of selected passages into a criticism of narrative jurisprudence in general.

14. Again, the scare quotes are necessary.

15. Tushnet, *Degradation*, *supra* note 5, at 273 n.101.

16. The incompleteness of my statement was justified by the issue I was discussing. A more complete statement would have been that it was both uninteresting and irrelevant to ask whether the events had actually happened, because Williams's work presents itself as on the contested border between imaginative literature and historical reconstruction (and is designed in part to raise questions about that distinction itself). In one sense, then, the events could not have happened (did Hamlet "actually" kill Polonius?), and in another sense they must have (of course Hamlet "actually" killed Polonius). The events Williams describes exist—for her readers—only within the text itself.

Second, we might explore how the transformation came about. Again, this would commit us to a controversial view of how meaning is constructed. One reason the transformation occurred, I believe, is that it was published along with a severely critical response. What happened was the not uncommon phenomenon of the dissenting opinion defining the scope of the majority opinion.[17] I certainly have occasionally read the response to an article to find a summary of the original's argument, only then turning to the "original," but of course with my view of the article already affected by the response I have read.

Here I invoke what I am inclined to call a socio-political analysis of how readers read. So, for example, I would ask, "What is it about the sociology and politics of the contemporary legal academy that led a community of readers to take my article as it did?"[18] This suggests, however, that authors might properly be concerned about the insertion of too many passive voice constructions, if they are concerned about their works' reception. For, it could be—although we would actually need to do some socio-political analysis to be sure—that readers systematically attach less value to articles with many passive voice constructions than they do to articles with few such constructions. They might do so, for example, if they were regularly told that articles with many passive voice constructions were, for that reason alone, worse than other articles.

Authors, then, might not be completely moribund. They might retain some control over what their works mean, if they understand the sociology and politics of the community of readers.[19] This is not the full-blown Romantic account of authorship, but it may be all that we have.

And yet, at the end of the day, sometimes I certainly want to say, "But that's not what my article says, and it's not what I meant."

17. I owe this observation to my colleague Daniel Ernst.

18. I developed that analysis in my reply to Peller, and need not elaborate it here. Mark Tushnet, *Reply to Peller*, 81 GEO. L.J. 343 (1992).

19. I should note one difficulty that I have elided to this point. Authors confront not a single community of readers, but multiple communities, each with its own socio-politics. An author might therefore be able to exert some control over a work's meaning within one community of readers and simultaneously, because of the very strategies used to exert that control *there*, lose control completely within another community.