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Comment on James Boyd White's book "Living Speech" (Princeton 2006)

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Comment for J. B. White, Living Speech  
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First, on a personal note. Last night we heard from Professor Mautner that in James Boyd White there is a complete overlap between the nobility of the writings and the nobility of the author who has penned them.

I have been fortunate enough to attend his classes, and then honored to have him as a member of my doctoral committee, and I would like to add to Menny's observation, by saying that this same fit exists in his teaching and mentoring style. In a law school classroom, Professor White practices – *embodies* – the same aversion to authoritative speech that he expresses in his writing. He never dictates or speaks in a rhythm or form that caters for dictation. He never finishes a sentence with an exclamation mark, except when he quotes someone else's words. His class is conducted as a thoughtful conversation, not of “mind to mind” but of mind with mind. We the students were asked to listen carefully to different voices and assess them, just like what we are invited to do as readers of the text at the center of this morning's workshop. To demonstrate what it was like to sit in his free speech class, the closest analogy that comes to my mind is of a listening class in a music school, where one needs to notice the multiples voices in the symphony, and trace the most nuanced components of tempo, tone, and variation.

If I were to speak in cliches, I would say that Professor White practices what he preaches, but ... he doesn't preach – that is the whole point of his approach – an aversion to all-knowing stances. So I can say, perhaps, that as a teacher and research advisor, he gave me permission and tools to appreciate tensions, to open up questions, and encouraged me to explore them despite their complexities. And for this I am truly grateful.

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There are many ways in which the chapters that we read for today are relevant to questions that currently engage Israeli lawyers. When preparing for today, I considered talking about the recent law proposals that the Knesset is currently considering, proposals that will tell us what to think and what to say – such as the law that would limit the ability to refer to the Nakba, Arabic for the “catastrophe” that the 1948 war was for the Palestinian citizens of Israel, or the initiative by which every university student in Israel will be required to take two classes on Jewish heritage and Israeli history.

I also considered discussing the disappointing over-protection that commercial free speech is given in Israeli adjudication.
But I decided that a more valuable exercise would be to make explicit and formulate in words the resonance of Professor White's ideas in the questions that engage me as a scholar. So I am not going to offer a critique of White's book, but rather an application of it in a particular field of law that interests me: anti-discrimination law. I would like to talk about two veins that run through this book. I named them “Living Silence”, and “Radical Optimism.”

**Living Silence**
Professor White introduces a new way for thinking about speech; a new measure for assessing it. He invites us to use speech carefully and responsibly, in what he calls “living speech.” Caring about the value of speech is not merely an aesthetic endeavor. As meaning making creatures, as “centers of meaning,” we should know how to recognize the speech that is essential to our humanness. Because living speech is “what enables any of us to be a person in the first place.” 16.

Although his invitation to stick to living speech is true to all forms of speech (at least all forms of speech that is significant for us – maybe not when we try to get to the manager in a phone conversation with a costumer service representative), it seems that there is particular urgency and importance for him in bettering the way we speak in law. The ability to use speech in a “deeper and truer way than we now do” in law, “will ultimately rest on our capacity to speak out of silent places within ourselves, to places of silence in others.” 45.

How can we recognize living speech? The short answer that White gives us, which is indeed poetic and at first sight quite vague, is that living speech is “speech that comes from inner silence and takes place in outer silence.” 41

What is this silence for him? What does it represent? What role does it play?
I think silence here stands for a space within the speaker and the listener that is free of predetermined judgement, of knowing in advance everything there is to know about the case. Silence within the speaker and the listener represents their ability to suspend judgement and create unexpected, maybe even surprising and innovative, meanings to the question at hand. It is not a peaceful quietness, but an alert one. One that expects not merely to do things with language, but for the things language will do with us. Such usage of language is bound to produce new insights, both through what is said, and through the silences that surround it.
One of my research interests is exploring the different manifestations of the body in law. In reading cases that deal with the meaning that the body, and other forms of self signification, such as clothes or names create, I repeatedly encounter points in which language will not do; in which using language to describe the body, or a wrong that is located in the body, will simply not suffice, and worse than that – in which submitting the matter at hand to language might even increase the pain or the damage that one is trying to mitigate by using the law, and legal language.

To demonstrate, consider the issue of weight based discrimination. In some U.S. Jurisdictions, there are antidiscrimination clauses that explicitly state that employers cannot discriminate their employees on the basis of the employee's weight. Or in simpler terms: if one is not being hired or promoted because they are fat, they can go to court and sue for employment discrimination.

I think there are very good reasons to protect against weight based discrimination. That is, I think the principle underlying such laws is just – but I won't go into why this is so here today.

When actual weight discrimination claims reach the courts, however, they must surrender themselves to the discursive constraints of the institution. And often, the patterns of speech that the law uses unavoidably replicate the same language that oppresses them, the language that White recognizes as the language of force.

So for example, in reading those weight discrimination cases, we see a discursive convention, a habit of speech, in which the opinion specifies that “at the time her employment was terminated, she was fifty-five years old, 5'7" tall and weighed about 240 pounds and ..., previously, she had weighed as much as 311 pounds.” (Lamoria v. Health Care & Retirement Corp., 230 Mich. App. 801 (1998). Or we read that the plaintiff did not present evidence to show that his weight is a result of a genetic or metabolic condition.

I hope that such quotations raise in you a similar discomfort to the one I feel in reading them. Surely, the anti-discrimination provisions that allowed such cases to reach the court are well intended – they aspire to provide equal opportunity to people, regardless of their physique. But we cannot celebrate them without thinking about the kind of speech that they produce. Such speech reduces the person to a set of numbers, an “objective, measurable” data, that is supposed to help the law determine whether the plaintiff was indeed discriminated illegally.

This is a difficult dilemma. How to create conditions for protecting from unfair discrimination, and keeping anti-discrimination law as a viable and useful instrument, while refraining from flattening
and simplifying the way we talk about the person that is seeking legal protection.

This is precisely the point where White's idea that in order to be actors in the world, whose actions have significance, we need to find “ways of limiting, by silences, the languages that we use.” 43. The bodily experience of being “a person of weight” cannot be captured solely, or even mainly, through the numerical measures and medical framework. And for me, this is where antidiscrimination law fails in how it speaks about the individuals it wishes to protect.

Law, for White, should work “under the persistent pressure of silences: silences that shape the argument, recognizing what cannot be said, or should not be said; silences that recognize the limits of our understanding; silences that create the possibility of real attention to what is said.” 44-45.

My intention today is not to offer a solution to this difficult problem, but to lay it out on the table, and perhaps invite thoughts from Professor White and from anyone else in the room later.

White's vindication of silence brings me to my second point, which has to do with the meaning that we can expect to make with language. In this respect, I think we can characterize his approach as **Radical optimism**.

White's focus on language and meaning begs the question of where does he stand, where should we locate his approach, on the spectrum between structuralism and post-structuralism? Unsurprisingly White's scholarship resists easy classification. In fact, I believe he would even oppose the question, as relying too much on academic jargon and on gross categorizations. And still: There are moments in which his ideas sound genuinely poststructuralist, when, for example, he expresses aversion to binary thinking, to the possibility to classify arguments and ideas as true or false, right or wrong. He insists that meaning is ever-changing, unstable, and open ended, that we live in an uncertain world, void of authoritative answers.

And at the same time, he feels strongly that despite all this lurking uncertainty, it is still worth conversing: using language despite unavoidable failures, despite the losses in translation that are bound to happen; despite the fact that there is so much in our lives that merits not speech but silence. He refuses to retreat to a world in which ideas are relative, in which the value of texts is a mere matter of taste. He insists that “We owe it to ourselves and our world not to abandon our powers of collective judgment about good and bad speech.” 32.

Rules cannot be easily classified as just or unjust. Poems are not *either* beautiful *or* ordinary and
trivial – at least not rules or poems that are worth our time as jurists or as poetry readers. In fact, it is particularly such rules or poems that challenge our ability to classify them that present us with the best questions, with the deepest tensions and uncertainties.

This is why I think we can characterize his approach “radically optimistic”: radical in his resistance to simple and stable meaning, and optimistic because language is still worth our while, because speech is what enables “a polity based upon communication across difference, committing us to the acknowledgment of the reality of the experience of others.” 42.

It is this tolerance to ambivalence of meaning that often lacks in the discrimination cases that I study. The legal subjects that challenge the doctrine (and I thinkvaluably so) are ones whose identity resists easy classification and immediate deciphering. The woman that does not change her surname in marriage, or the man that takes his wife's surname – both interrupting the social code by which personal status and lineage can be easily decoded. The African American woman whose hair is bleached, and when she applies for a job as a hotel maid, her interviewer says that she is perfectly fit for the job, except her hair color is “too radical.” A white woman with a blond or bleached hair would not look exceptional, thus it is the way the black woman performs (or mis-performs) her race that challenges the interviewer's ways of seeing and classifying people according to readymade racial categories. Another example might be the bearded man whose reasons for growing a beard cannot be articulated in identifiable terms such as religion. And finally, the man who wears a dress, but is not a transsexual: that is, he does not submit himself to a teleological trajectory by which his transgressing of the gender lines is only temporary, until he undergoes an operation and achieves a closer fit between his body and his performance. Such individuals challenge the doctrine of anti-discrimination because this doctrine relies on binary comparison. In the case of the man in a dress, for example, in order to prove that he was discriminated on the basis of sex, he needs to position himself as a member of a particular sex, and compare the treatment that he received to that of the opposite sex. This is where things get complicated: What should he claim to be the point of comparative reference for his case: that a similarly situated woman wearing masculine clothes would be better treated? Or perhaps that a similarly situated woman wearing a dress would be better treated? You see my point. These formulated categorizations do not fit the case at hand. They do not represent, or allow room for representing, this legal subject's experience.
In a case from the seventies, an American lawyer argued that it was sex discrimination that female lawyers were not required to wear a tie to court, while for males a tie was mandatory. In his aspiration to avoid the tie, he was a cross-dresser of sort – he resisted the symbolic reinforcement of sexual dichotomy. The court in this case writes: “At least until that dreadful day when unisex identity of dress and appearance arrives, judicial officers . . . are entitled to some latitude in differentiating between male and female attorneys, within the context of decorous professional behavior and appearance.” Perhaps this outcome is justified, but as for the reasoning, its tone and standpoint... well, using White's terms I would say that we cannot trace a place of silence from which the writer speaks, from which he is ambivalent, and has room to consider the viewpoint of the plaintiff. Nor can we identify that he leaves room for the reader to participate actively in the meaning making process.


These days in Israel we have an emerging case, that might reach the courts (it is still in pre-litigation stages) in which lobby waitresses in a prestigious hotel are required to wear mini-skirts as part of their job requirement. Should a court respect the employer's prerogative to introduce such a dress code, or should it allow the space for the waitresses to use the vocabulary of clothes in a way that feels less constraining and belittling to them? Note that they do not oppose the uniform requirement: they are willing to wear the hotel uniform, but ask to be allowed to wear trousers and not just min skirts.

White's radical side would invite us, I think, to recognize that the hotel's attempt to reinforce an image of femininity as attentive, ever-ready, walking in small and delicate yet efficient steps and adding to the “decorative ambiance” of the lobby – that this attempt is a futile chase after an ever-evasive stability of gender identity. Just as the meaning of language shifts constantly, so does the meaning of embodying a sexed body, of doing gender, constantly takes new shapes and adopts new practices.

White's optimistic vain would hope that the judges attending to this case would treat the waitresses with dignity, enabling them to draw “a circle of silence around the self,” as if telling them, as the classic jazz number goes, “hush now, don't explain.”