

Interview met James Boyd White

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James Boyd White (1938) is Hart Wright Professor of Law, Professor of English, and Adjunct Professor of Classical Studies at the University of Michigan. He was in Tilburg at the occasion of the second Montesquieu Lecture. As early as 1965, James Boyd White wrote that he deplored the then prevailing lack of professional intimacy between law, history, and literature, fields once common to the legal profession. He himself has made a formidable contribution to a revaluation of this humanist tradition in law by emphasizing the importance and the consequences of our engagement with language. This emphasis follows from his view that the essence of a lawyer's work lies in the process

‘(...) of identifying and construing authoritative texts, of translating from another discourse into the law’ and these are literary activities, arts, (...) or what the Greeks would call *technai*.’

All this, for White, involves an ‘enterprise of the imagination’, ‘an enterprise whose actual performance is the claim of meaning against the odds: the translation of the imagination into reality by the power of language’.¹

In this interview professor White will discuss a broad array of topics, varying from the possibilities and impossibilities of Law and Economics, and Law and Literature, to legal interpretation and the interrelation of law and politics, with the issue of Guantanamo Bay as a poignant example.

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1 The Legal Imagination, Boston, 1973, at 758.

1 'When language meets the mind': the Montesquieu lecture

For your Montesquieu lecture you used as a motto Simone Weil's, 'Only he who knows the empire of might and how not to respect it is capable of love and justice'. What was the reason that you chose this text and in what way does it exemplify important themes for your view on law?

The essay from which this sentence is taken, *L'Iliade, ou le poeme de la force*, has been in my mind ever since I first read it over forty years ago. Weil's reading of the *Iliad* deeply influenced my own interpretation of that poem in *When Words Lose Their Meaning* (1984), and the larger view out of which Weil was writing, captured in that brief sentence, has become increasingly significant for me.

It is wonderful in many respects. For one thing it takes the position that the deepest human motive is the desire to be capable of love and justice, which seems to me both true and original. Who would willingly or happily say of himself that he was not capable of love or of justice? Yet love and justice are often not thought of as related, but in some sense opposed: love is personal, nonjudgmental, an emotion; justice is impersonal, rational, driven by standards and rules. Weil is saying not that these are the same thing, but that they are compatible, and together the most important thing of all. Justice without love would not be justice at all; and love without justice would be false. The desire for love and justice is so deep that it makes us vulnerable, and we tend to hide it behind other things – rationality or democratic theory or a view of life as choices or acts of consumption. But this phrase captures, for me at least, what life is about at its center.

In addition, it is her idea, hinted at here but developed more fully in the essay, that the empire of force is not simply a matter of brute power of a military or economic kind but resides in the habits of mind and imagination by which we dehumanize others or trivialize their experience, and this seems to me exactly right. A system of brute power depends ultimately upon the acceptance of a way of thinking about the world, and oneself within it, that the actors in the system share, perhaps unconsciously. The members of a secret police must share a loyalty to their leader or the organization will collapse. For an example of another sort think of American racism, which inhabits the mind of everyone raised in my culture and with which every decent person must struggle.

Weil's sentence then tells us where we can start to understand and resist the empire of force, which is with the way it works in our own minds and imaginations, leading us to objectify others, to disregard their reality. Our double task is to understand this fact—to see as well as we can how we are the captive of evil forces in our world—and to learn how 'not to respect' the empire, that is, how to resist it in our own thought and imagination and feeling.

How does this relate to law and to the life of the lawyer? Directly, in my view, for the meaning of law depends entirely upon the way in which it is practiced, in the aims and understandings that move those who inhabit its world. What we call law can on the one hand be a salient and powerful instrument of empire, denying humanity and trivializing human experience; or, on the other, it can be an important way – perhaps our best way – of seeing, recording, resisting empire. It depends entirely upon the way in which law is done, upon the quality and direction of the lawyer's or judge's mind at work: does it seek to understand the empire at work in the world and in the self and learn how not to respect it? If so, and only if so, that mind, and the law itself, may become capable of love and justice.

This sentence is the motto not only of my Montesquieu lecture, but of my forthcoming book, *Living Speech: Resisting the Empire of Force*, which develops at length the ideas I have just sketched out.

Does this also apply to your choice of Dickinson's poem 'I like a look of agony', or is there another perspective involved as well, given the fact that you also spoke about Abraham Lincoln's speech at the end of the Civil War?

I include Dickinson's poem as an example of a text that shows the writer understanding and not respecting the empire of force in one of its most important forms, namely deep sentimentality – which is simultaneously the stock in trade of authoritarian political regimes and a vice against which the poet must constantly struggle. In Dickinson's case, as a woman poet in nineteenth century America, she was expected to write saccharine verse full of false feeling, one object of which would be to maintain a reduced and sentimental image of the woman herself. In 'I like a look of agony' Dickinson confronts and resists those demands directly, insisting on the reality of her own experience as one who grew up surrounded by false thought and false speech. She reveals this directly in the biting next line – 'Because it's true' – unlike the rest of what she was offered by her world.

Dickinson represents for me a mind doing just what Weil recommends, confronting the empire of force as it is at work in her culture and her own mind, and showing us how not to respect it.

Abraham Lincoln does much the same thing in a very different context, as a political leader giving a speech near the conclusion of a war, a speech that is meant to be the occasion for founding a new community on the ruins that the war has left. Lincoln confronts the language of empire in one of its most familiar forms, the language of war and triumph, of hatred and dehumanization, and finds another way to imagine the warring parties, in this case as equally culpable actors in a moral and providential drama.

What does the title of your lecture refer to, then? I mean, given your ideas on language, it would seem that it is not a matter of meeting. Can the one be at all without the other in Cartesian fashion?

You are quite right to raise the question of the title, which seems to assume that there is something called the 'mind' which exists unpolluted and pristine until it confronts this alien thing called 'language'. Of course our minds are in large part shaped by our languages; this is in fact how the empire works, taking over our imaginations without our quite knowing it. So the task is much harder than the title would imply: not how to defend yourself against an invasion that takes place now, in your maturity; but how to deal with the fact that the habits of mind and imagination I call the empire of force – those that sentimentalize and falsify and dehumanize and trivialize – are already at work in you and all of us. This is what must be understood; and it is this that one must learn the art of not respecting. The title does not quite suggest this, but I have not thought of a better way to put it; and I hope the lecture itself makes what I have just said sufficiently plain.

One view I do want to resist is the idea that we are nothing but our languages or discourses, sites in which struggles take place between cultural entities and forces over which we have no control. Our minds are not pristine, not unpolluted, but at our very best we are able as writers to show that it is possible to hope that we can exert some control over what we say and who we are – as Homer does, Dickinson does, and Weil does.

*What does this mean for your views on judicial interpretation? The reason I ask is that Justice Antonin Scalia's New Textualism has strong politico-interpretive cards and it seems that Martin Garbus' prediction in *Courting Disaster*,² 'Time is on the side of the forces on the right. George W. Bush (...) will probably appoint two or three justice to the Supreme Court. If he serves two terms, he may appoint up to five, a Bush majority to go along with Scalia and Thomas' has come true. You have written, convincingly in my opinion, about the role of the Supreme Court in your analysis of *Casey* in your *Acts of Hope* when you say that the most notable aspect of the Joint Opinion of Justices Kennedy, O'Connor and Souter is that it addresses the citizens when it explains the need to respect precedent. Moreover, it urges them not to be swayed by political issues of the day in that the opinion specifically turns to (...) those who themselves disapprove of the decision's results, but who nevertheless struggle to accept them.'*

I think that the judicial opinion is a crucial forum for the issues I identify, for it can be either a central instrument of the empire of force, or, on the other hand, a place where the writer shows that he or she understands the empire

2 New York 2002, at 5.

and knows how not to respect it. As an example of the former, let me point to Chief Justice Taft's opinion in *Olmstead v United States* (the wiretapping case), which I discuss in *Justice as Translation*. This opinion is conclusory in the extreme, never addressing the questions of meaning it is necessarily resolving. It does this by claiming that the meaning of the relevant provision, the fourth amendment to the United States Constitution (which prevents 'unreasonable searches') is plain and obvious, when of course it is highly arguable whether wiretapping should count as a 'search', as Justice Brandeis makes clear in his rightly celebrated dissent. Taft's opinion is mechanical and literal-minded, failing to think at all about the large questions the case presents — about the meaning of the fourth amendment, the proper way to approach constitutional interpretation, the proper role of the Court, and so on — all of which are matters Brandeis examines and reflects upon with intelligence and good sense.

Such conclusory thinking and writing as Taft's, which hides the important issues by pretending they are not there, is inherently authoritarian, a refusal by the Court to discharge its obligation to subject its reasoning to the judgment of its readers, ultimately the judgment of the people. Such an opinion rests entirely upon the institutional authority of the Court. It is saying in essence, 'This is right because we say so.' An opinion that by contrast reveals the reasons upon which it rests and acknowledges the force of arguments the other way, exposing its own weakness as it were, can make a claim to true authority, the kind of authority that rests not upon appointment to an office but upon the earned respect of one's readers. Such an opinion is saying,

'This judgment is entitled to respect because you the reader can understand the premises and reasoning that support it. You can reject our reasoning, and if you do this in enough of our cases you will reject our institutional authority as well.'

The way I put this in *Acts of Hope* is still what I think: that when a judge writes an opinion applying a law made by others — whether a statute, a constitutional provision, or early judicial precedent — he or she has the obligation not just to defer to that source of authority, a deference that can be asserted in a conclusory or empty or politically driven way, but to reconstitute it in his or her argument. Authority is not then simply claimed for a text which is assumed to be problem-free, as Scalia often seems to proceed, but for the text as it is read and recreated in the opinion itself; authority is thus claimed not just for the prior text but for the mode of thought and imagination by which the Court reads and interprets it, in which the reader is able to participate at second hand, as he reads the opinion, and at first hand too

when he criticizes it. In this sense authority is shared with the reader, which is to say the citizen and the public. It is this that makes possible the true kind of authority that is earned by the mind that admits the existence of difficulties, seeks to address them with humility and learning, and shares with the reader these processes of mind. True authority is earned, to use Weil's language, by an opinion that shows that it understands the empire of force in all the many forms in which it tempts the Court – including self-certainty, sentimentality, authoritarian and bullying modes of thought, the denial of difficulty, the use of slogans and clichés, and so on – and knows how not to respect them. It would not be too much to say at the heart of a legal education should be the development of just these capacities – though perhaps all too often what we do seems to be the opposite.

*In Meaning what you say,³ you mentioned approvingly the dissenting opinion of Justice Jackson in *Shaughnessy v. Mezel* 345 U.S. 206,218 (1953), 'Fortunately it is still startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial.' It makes me think of what happens today in Guantanamo Bay. What is your idea about the interrelation of law and politics when it comes to issues like this?*

This is a timely and important question. In my own mind, the very worst thing my government has done in my lifetime is to repudiate as a matter of principle its duty to treat the people it seizes or captures with fundamental decency and respect. The administration has made clear over and over again that it does not regard these people as human beings in any sense of the term, but as objects to brutalized and tortured, or simply erased and forgotten. This is not a matter of a few rogue guards or interrogators, but of explicit national policy. Those suspected of 'terrorism' are said to be terrorists, with no human rights at all.

In my view no one should ever be denied access to counsel or the right to communicate with one's family, let alone subjected to the tortures of repeated near drownings, beatings, deafening music 24 hours a day for weeks and months and years, freezing temperatures, threatened or actual attacks by dogs, endless deprivation of sleep, sexual humiliation and degradation, deprivation of the right to practice one's religion, not to mention being shipped to secret prisons abroad or 'friendly' regimes for even more hideous forms of torture. This is the empire of force in its most explicit form, and I think it is a direct violation of the fundamental premises both of our Constitution and of democracy itself. It is a rejection of the very idea of law.

What makes it even worse is that the torture has no legitimate security goals. Experts are so far as I know in virtually unanimous agreement that

3 Sarat, A., (ed.), *Law in the Liberal Arts*, Ithaca/Londen 2004, p. 109-139.

detainees can be made to talk with nothing like this treatment. To me this means that the purpose of the notorious infliction of inhumane and degrading treatment is not to acquire information, but rather to demonstrate our own brutality and lawlessness, as a way of making anyone who thinks of opposing us afraid to do so. We are not bound by principles of law or decency, and make a parade of the fact. What this government is doing is in fact a form of terrorism, in its essential structure like the murder of innocent people by Nazis in an occupied town simply to terrify the locals.

It is true that there are lawyers seeking to challenge these practices, both in my country and here in Europe, and that some headway has been made against them, even in the Supreme Court. But nothing has reached what occurs in secret prisons abroad, and I think nothing can, except the exercise of the power of the people to reject a terrorist administration driven by contempt for law, for democracy, and for humanity alike and replace it with one that has some respect for the fundamental principles of law and decency. While we have law, and legal institutions, we have hope, but these are at present being deliberately perverted in a systematic way by the government. The outcome is still uncertain.

Can we then as legal professionals ever hope to achieve any form of justice if we have to accept that this can only be done on what you have called the rhythms of hope and disappointment?⁴

As you know, I talked originally (in *From Expectation to Experience*) about the rhythms of hope and disappointment as they occur in the life of the teacher, who always starts off a course full of hope for himself or herself, and for the students too, but must then face the realities that disappoint these hopes: the limitations of the students, of oneself, of the material. But you are right to suggest that I think this to be a feature of human life more generally. A kind of idealization of others and oneself is necessary to many kinds of human activity, from marriage to teaching to psychotherapy to the practice of medicine or law, even to reading a book. One is constantly allowing oneself to hope for what cannot be; then experiencing disappointment; then, in a healthy situation, allowing oneself a tempered satisfaction for what one has achieved.

This is a fundamental rhythm of human activity and of course it occurs in the law. As a lawyer, one thinks that one's case is the most important in the world, that what happens in it matters enormously; as a judge one wants to achieve perfect justice, perfectly explained and analyzed. Such perfection is denied us, but that does not mean that the activity is not a very good one.

4 'The Rhythms of Hope and Disappointment in the Language of Judging', 70 *St. John's Law Review* 1996, p. 45.

What you have called 'reading by imaginary participation' in When Words Lose Their Meaning and your attention to the singularity of the community of two between reader and text has brought you the critique of advocating a purely New Critical interpretive position which is untenable for law.

A couple of points just to clear the air. First, about New Criticism: this mode of close reading is often attacked on the grounds that it is a-historical and a-political. There may be instances of that kind of work, but the best criticism of this kind is quite the opposite, deeply grounded in culture and history and concerned, if not with politics with that upon which politics depends, the way in which the human being and human life are imagined. (For history I think of Rueben Brower's book about Pope's use of classical texts, *The Poetry of Allusion*; for the image of the human being and human life I think of Leavis's work on D.H. Lawrence.) The idea that New Critical reading is radically decontextualized seems to me just wrong.

Second, while I grew up in the world in which people talked about New Criticism, and my own work does involve close reading, I think of what I do as having a deeply ethical and political purpose. *The Legal Imagination* is in some sense all about the fundamental ethical challenges presented by a commitment to legal thought and legal institutions; *Justice as Translation* and *Acts of Hope* are both about the ethics and politics of judicial opinions; *The Edge of Meaning* is about the activity of imagination by which we imagine a shared world, the fundamental activity of political life.

Where I do continue to function out of New Critical premises is in my insistence that the human self is not simply the product of cultural forces but has the capacity to act upon, to use and to resist, the materials of meaning that have helped to shape it.

For me, the very best work – like the *Iliad* say, or Jane Austen's novels – has a direct ethical and political significance, for the relation such texts create with their readers has both political and ethical content, and can help us understand possibilities for such relations in our own lives. Thus Austen's *Emma* is about friendship simultaneously in its imagined world, where Emma is such a bad friend to Harriet Smith and Miss Bates, and learns to be a good friend, and in its relation to the reader, to whom Austen, through this text, is a model of a certain kind of sympathetic and corrective friend. Likewise the *Iliad* creates a relation with its reader that can bring us to see and criticize the essential inhumanity of the culture it represents. For the lawyer or judge who reads either text well the experience should be one that expands and sharpens his sense of the political and ethical significance of what he says and does, and holds out possibilities by which he can shape his own aspirations.

2 Law and the humanities

*Since the publication in 1973 of *The Legal Imagination* you have passionately proposed a view of law as a cultural practice, i.e. a humanist approach. In retrospect, do you perceive any changes in legal education, scholarship or practice in the USA?*

I meant in *The Legal Imagination* simply to make available in a new way a necessary aspect of the practice of law, namely what might be called its literary or creative aspect. The lawyer must after all speak an inherited language of authority, and therefore has the task of coming to terms with its constraints and limits, and also of seeing as fully as possible what can be done with it. This is to think of the lawyer as writer or speaker, which he or she surely is, and to suggest to the students that they need to focus their attention in a fresh way both upon legal language and what can, by art and invention, be done with it. This in turn is to raise the question of critical judgment: what do you think of these constraints, these enablements? What should be done with it, either in general, or in this particular case? All this has an ethical element as well, for it is through imagining oneself as a writer that I think the lawyer may come to understand his or professional life in a more satisfactory way, including its ethical dimension.

That is to put the matter abstractly. My idea was to bring these issues home to the student through the kinds of questions I asked, and through the use of examples from literature, history, philosophy, and ordinary life.

There was a sense in which this was a somewhat shocking and novel approach at the time. But this was an era in which law was taught and practice as an activity, as a practice, as a set of things we do with language and ideas and each other, and to that extent my book and course fit with more widely accepted images of the law. (I think especially of Hart and Sacks, *The Legal Process*, or Edward Levi, *The Nature of Legal Reasoning*.) But since then I think it is fair to say that many law teachers have become interested not so much in the activity of law as in social policy, a sort of work that really has nothing to say about law as a practice, which is what interests me. This trend is especially pronounced in what is called 'law and economics', which is for the most part really not about the activity of law at all, but just the application of a certain kind of economics to determine a set of policy recommendations. In this cultural climate work like mine has less natural resonance than it did thirty years ago.

*What is your impression of the reception of *Law and Literature* in general and your ideas in specific in the USA?*

Despite what I have just said (or perhaps because of it) there is a real interest in many American law schools in thinking about law in a humanistic way.

Someone put together a list of schools in which course in law and literature or law and humanities were taught, and as I remember it was over one hundred. There is an active organization, The Association for the Study of Law, Literature, and the Humanities, which has a Journal (*Law, Culture, and Humanities*) and an annual convention drawing a couple of hundred people. Yale Law School has for several years had an excellent journal, *The Yale Journal of Law and the Humanities*. Another fine journal, the *Legal Studies Forum* is also centered on this field. Books come out every year on law and literature, or law and film, or law and art. So a lot is happening. And to the credit of the movement, it does not have a single program or theory. Rather, the idea is that people should work out different questions and methods for themselves, and let a thousand flowers bloom.

Does it differ from the reception in the continental tradition?

I know rather little about law and literature on the continent, except for your own work and that of Willem Witteveen in Tilburg and Francois Ost in Brussels, so I cannot give a fair answer. I do know that there is interesting work on law and language, and law and translation, being done on the continent, for example by Barbara Pozzo in Italy and Marta Chroma in the Czech Republic.

The Great Books, i.e. the literary canon of the Western world, are often used in Law and Literature as examples to show how the ethical component of law that traditional jurisprudence has left underexposed, can and should be revived. This usage of literature has met with a lot of critique, in that it presupposes an education in the classical cultural tradition which many people lack today, or that it accepts unquestioningly the social order described in these books. You also offer many examples from the canon to your reader. What do you think of the argument that in our present-day multicultural societies the idea of the canon runs into trouble?

I have heard this objection a lot and thought about it. I think there is not much in it, frankly, because it is based on the idea that the works of the canon in some blind way accept the social and cultural order in which they are produced. There may be examples of this, but certainly the texts that I have devoted the most attention to – Homer, and Plato, and Dante, and Shakespeare, and Thoreau, and Austen, and Twain, for example – are deeply critical of their cultures; indeed theirs is often the most telling and profound criticism of all. Indeed, as I have suggested above, what we have most to learn from them is the intellectual and imaginative process by which they criticize their culture, so that we in our context can do likewise.

I am simply not impressed by an argument, say, that Jane Austen has nothing to say to an era in which homosexual unions are regarded as wholly

legitimate simply because in her world they were not, or that Plato has nothing to teach us, as social democrats or American liberals, because he is a member of an elite upper class. It is of course true that texts in the canon have been taught or written about in empty or authoritarian or sentimental ways, but the texts themselves are not responsible for such abusive readings.

I have one more remark. In response to your question I have been using the standard phrase 'the canon', but I do want to cast some doubt on it, at least as applied to my work. I have not worked with the texts I have chosen because they were in something called the canon, or because other people thought they were valuable; I have worked with them because I found them deeply educative and rewarding and thought that they spoke both to me and my profession and my time in a useful way. Of course I could be wrong, but that is the principle of my selection. My feeling is that if my judgment has concurred with others over time, so much the better.

This is not to say that there are not other texts, in other languages and cultures, that would be equally valuable. Of course there may be. My own choices reflect my education, but I think that is inevitable.

On this view, what do you think of the claim defended as passionately, for example by Martha Nussbaum, as it is attacked by others, that literature when incorporated in the professional lives of lawyers can make not only valuable ethical but also social contributions?

Of course I think it can make valuable social contributions. The question is exactly how this might work, and in my view that depends upon the mind and character of the reader. Of course I do not think that reading Sophocles for example will automatically make you good or wise; that depends on how you read it, and if you read in a stupid and unreflective way, looking for clichés or slogans or confirmations of your prejudices, or read it as an item of high consumption, like fine wines or elegant wallpaper, it will do nothing for you at all. But I think Sophocles and Plato and Homer and Swift and Jane Austen have a great deal to teach us, especially about the nature of thought and language and the practice of cultural criticism, which would, in a person who read them well, greatly increase their power and their wisdom.

In your article 'Legal Knowledge'⁵ you write, 'I want to begin by saying: law is not a body of knowledge that can be reduced to propositions or rules; its primary object is not truth, as if it were a kind of science, but justice.' It would seem that you take a firm stand here against the Langdellian idea of law as science. But what, then, is 'justice'? I am asking you this specifically because, if,

5 115 Harvard Law Review, 2002, p. 1396-1431, at 1399.

as you claim, the image of knowledge as purely objective or wholly shareable is wrong for law and perhaps all other fields in that language is required to communicate, there is always a gap that can never be wholly bridged because language and translation are imperfect.

I cannot of course define justice in a couple of paragraphs! But perhaps I can say something about what I meant in that essay. I was responding in my mind to a friend, an art historian and psychologist, who asked me where truth was in the law, truth being for him the central intellectual value. Of course truth matters in the law, enormously – that is why we have trials – but the goal of the enterprise is not to establish the truth of a set of propositions but to do justice. And justice is above all relational: establishing the right relation between the parties to litigation or a contract, between the courts and the legislature, between the people and the legislature, and so on. But what is the right relation? All of law in a sense is directed to this question, and no single formulation in any part of it can fully answer the question. This is partly because language is inherently ambiguous, or subject to multiple interpretations; partly because no one can decide such questions in the abstract, as legislatures are required to do; and the result is that in every case there is in the end an act of judgment, by the judge, or by the lawyers, or both, which itself cannot be perfectly expressed, so as to serve for example as a perfect and non-problematic precedent for others.

3 Interdisciplinarity in law

Let's return to your argument about language, but a bit differently. You have consistently argued that law as a culture of argument addresses question of value and community. You speak in When Words Lose Their Meaning of a politics of persuasion to claim meaning, one which remains if there is a conflict between forms of discourse and or concepts, I would say the same goes when we deal with epistemological and methodological questions of interdisciplinary work, and it touches issues of the interrelations between interdisciplinary fields.

In the chapter entitled 'The Language and Culture of Economics' in Justice as Translation you compare the languages of law and economics and find in the economic thought dominant in the Chicago school of Law and Economics the Hobbesian vice of calculability and governability of human life associated with the idea of neutrality of language and concepts. In Acts of Hope, however, you took your argument one step further and considered the possibility that some languages may never be translated successfully, thus adding an element of limitation to his original concept of translation in accepting the possibility of non-translatability of discourses, of intransigent positions.

Does this mean you have changed your views on Law and Economics too? And, with translation and integration as the keys to the model of interdisciplinary scholarship that you espouse, what does all this mean for law? I mean, lawyers also show the vice of linguistic imperialism when it comes to the language of legal concepts. What do you think of Richard Posner's setting the tone when he divorced law from legal theory: 'Law is subject matter rather than technique. Legal analysis is the application to the law of analytic methods that have their source elsewhere'⁶, i.e. can such a dichotomy at all be made?

Let me try to respond to these three questions at once, if I may. I do think that languages and the practices they entail mark out distinct domains, and that translation between them is always imperfect. To think of economics and law from this point of view, I would say that these are radically different enterprises that work on different premises and by different methods. One cannot do economics in the language of law, nor can one do law in the language of economics.

Think for a moment of the fundamental activity of the lawyer or judge faced with a case or question in the world. It is to seek to resolve it by turning to judgments of others – expressed in statutes or constitutional provisions or regulations or earlier decisions by court – that claim to speak with authority to the matter at hand. The lawyer or judge must think about which of these texts is entitled to deference, and if so how much, and also what the text should be said to mean in this new context. All of these judgments should be reasoned out, and one can expect them to be contested. As I argued in *Justice as Translation*, the last judgment, about what the text means in this new context, is itself a species of translation, requiring the exercise of a most difficult and challenging art. And this whole legal enterprise has as its goal and central value the definition and achievement of justice.

The economist, functioning as such, cannot do any of these things. His or her question has to do with which rule or outcome is more efficient, for that is the issue to which economic analysis is directed. Economics has no way to respect judgments made by legislatures or courts or private parties, no way to engage in the art of deference which is essential to what we mean by the rule of law. Economics can compare what it describes as different legal regimes, but only on the assumption, which no lawyer would make, that the process by which rules are interpreted and applied is non-problematic, in fact automatic. That process is the heart of the life of judge and lawyer, and it calls upon with widest range of intellectual and ethical capacities.

I do not mean that the law has nothing to learn from economics, for of course it has, whenever it faces a question within the expertise of economics – about monopolization, for example under the antitrust laws. But econom-

6 'Law and literature, a relation reargued', 72 *Virginia Law Review*, 1351 (1986), at 1359.

ics can never answer the legal question, which has to do with the meaning of particular legal texts, read independently and in light of each other, and it can never answer the question of justice, for economics is not concerned with justice or equipped to address it. Its goal is the attainment of something else entirely, namely what is called efficiency. And if the argument is made that efficiency *is* justice, that is not a proposition of economics at all, but of law, or philosophy, and must meet the standards of those fields.

Law is in fact inherently interdisciplinary in a way that economics is not, for the law must always be open to learning what it can from other fields, from history to accounting, from physics to engineering to linguistics, from sociology to psychology. In fact there is in principle no limit on the fields that may be relevant to a legal case, fields on which experts may testify and which the lawyers may have to explain to the judges, the judges to jurors. Anything may turn out to be relevant to the legal dispute, and have something to teach the law.

But on the ultimate legal questions, namely the interpretation of authoritative legal documents and their translation into jury instructions, all in light of the meaning and requirements of justice, no other field can properly preempt the law, for the responsibility of the law is the identification and interpretation of those authoritative texts. The image of translation captures what law does here rather well I think, for it is simultaneously respecting sources of knowledge external to itself (the analogue to the text in a foreign language which the translator is trying to get across) and insisting, as a translator necessarily does, on the priority of its own language and its premises.

The authority of the authoritative texts rests to which the law defers is ultimately based upon democratic processes. The words of the legislature or the Constitution have authority because they are the words of the people's representatives. Earlier judicial precedent has authority because the courts that decided the cases had the right and duty under the relevant statutes and constitutions to do so. And taken as a whole, the cases and principles of law have the authority of the past, acquiesced in over time, and the authority of the kind of reason that seeks to render that past simultaneously coherent and just.

What is called law and economics works completely differently. Instead of seeking to learn from a wide range of fields, as law does, most law and economics assumes that economics can be used as the sole basis for the determination of a legal rule or result. It has nothing to learn from history or philosophy or sociology or anthropology or linguistics or engineering or physics or any other field. Instead of being a center of translation, with all the difficulty and interest that suggests, economics typically denies that any translation is necessary or that any other field has anything to teach it.

The result is not only foolish, it is profoundly antidemocratic, for in place of the law's authority, which rests on acts of democratically responsible agencies, economics proposes a theory, which has no democratic legitimacy whatever beyond its falsely presumed self-evidence.

The idea of law and economics, then, is not the sensible view that economics should inform the law when the analysis of economic questions becomes relevant to a case, but that it should in effect replace the law, and legal thought, substituting for the law's system of democratic, historical, and cultural authority, maintained by legal reason, another system, based solely upon a particular theory, which has in principle nothing to learn not only from the law but from any other discipline.

Finally, and very briefly, what I call the theory of economics is in fact a political theory, not an economic one, for it applies the assumptions of a certain kind of economics to the full range of human life, not just to economic transactions. These assumptions include some that are demonstrably false, for example that the world is made up of actors who are mature and competent and able to act rationally in their own self interest, and some that are ethically and politically offensive, for example that all human action should be regarded as self-interested. The effect is almost always to affirm an existing allocation of wealth and power, or to modify existing arrangements in the interests of the rich, who are of course able to function in the competitive way assumed by economics far more successfully than the poor.

So to return to your questions, I have not changed my view of law and economics, but continue to regard it as a threat to the idea of law itself, and to the law's democratic authority. Of course there are economic questions of great importance on which economists have much to say. Law has much to learn from economics in such instances. But in my view it must always be the law that decides legal questions, and it must do so using legal materials and methods of thought. The effort to supplant law by economics is an effort to destroy the entire fabric of legal thinking.

So you can see why I would say that nothing could be further from the truth than Judge Posner's statement that 'legal analysis is the application to the law of analytic methods that have their origin elsewhere'. For me, legal analysis is the practice of specifically legal modes of thought and judgment, and I think that it is both an intellectual folly and political disaster to attempt to supplant these with modes of thought that cannot possibly do what the law does at the center, namely to respect and seek to interpret the judgments of others. If 'legal analysis' is what Judge Posner claims it to be, it is not the law, but something else and not entitled to be treated or taught as law.