

THE IMAGINATION OF JAMES BOYD WHITE

Lee C. Bollinger*

For several decades, James Boyd White has been a unique voice in the law. It is a voice of extraordinary intellectual range, of erudition, and of deep commitment to a life of self-understanding and of humane values. His point of access is language—all language, in every context. Armed by a lifetime of thought about words, he justifiably has regarded no field or discipline or communicative activity as foreign and outside his ken. Whoever reads him must feel his sense of intellectual empowerment that our world, sectioned as it is by expertise, would deny us.

I remember vividly when Jim's teaching book, *The Legal Imagination* appeared and was followed by *When Words Lose their Meaning*. They were remarkable achievements. In the prior decade of the 1960s, the view that law could benefit by integrating the knowledge and perspectives of other fields had gained a solid hold, especially within the legal academy. Economics, psychology, sociology, political science, anthropology, and several other disciplines were quickly joined with legal study, and with enormous consequences, mostly beneficial. But Jim's early books transcended disciplines altogether and singularly opened up a way of approaching any text, whether a poem or a judicial opinion. While disciplines had fractured understanding while, to be sure, deepening it, Jim's focus on language, intention, and meaning created opportunities to live in an a-disciplinary world, where we could approach all efforts to grasp at understanding life and to relate to others.

Prolific and seminal are the right—one might say, meaningful—words to characterize Jim's scholarly career. Books and essays have emerged from his pen with enviable regularity. His fundamental framework has provided him with a fountain of material to explore, and he has not wasted any of it.

Jim's readiness to hurdle the intellectual barriers of specialization has also led him to teach an unusual array of courses. Countless students have, therefore, benefited from his restless and fearless imagination, and over the years I have heard from many of them how Jim's courses gave them a treasured, life-long belief in the potential intellectual riches that always lie beneath the grist of daily life.

Forever the student himself, he has done the hard work throughout his career of learning new languages in order to better grasp the beauty and insight of masterpieces of thought. In doing so, he has set an example for all of us in how to live the life of the mind.

For all of these reasons, and for the many who have lived better lives because of Jim's distinctive voice, as he retires from a formal position at the University of Michigan Law School, we can hope that he finds still more

* President, Columbia University

time in which to write. Certainly, though, this is an appropriate moment in which to give him a standing ovation.

EDUCATIVE FRIENDSHIP—A PERSONAL NOTE

Jeanne Gaakeer*

In 1992, when I started my doctorate research in the interdisciplinary field of Law and Literature, *The Legal Imagination* was one of the first books I read. To European eyes, it was a most unusual book since in continental legal theory in those days, the Anglo-analytical tradition was predominant, and French deconstruction had for some time been the up-and-coming stream. Fascinated as I became with Professor White's works, I decided to try to get in contact with him in order to ask him about the genesis of his ideas. So much for the dangers of the intentional fallacy Whimsatt and Beardsley warned us against! My supervisor agreed wholeheartedly when I told him about my project, though, with hindsight, probably because he thought the whole enterprise preposterous. After all, from our European perspective then, it would be outrageous to suppose that any famous American professor, and one of the founders of an expanding movement at that, would ever grace such a request with an answer. Nevertheless, write I did, and to my surprise I received a reply, saying, in a letter of September 8, 1992, "It is a great honor to me that you have such an interest in my work." I was elated!

It was not until I arrived in Ann Arbor that I truly experienced what the concept of translation which Professor White elaborated in *Justice as Translation* really meant. On the day of my arrival, I asked the cleaning lady at my lodgings with the grand name of Oxford House for the way to the law school; I wanted to check the distance to make sure I would be on time for our first interview the next day. She told me that I could not miss it because it was an impressive and very old building. Well, I walked and walked past many buildings, some of them nineteenth-century Oxbridge style, but I did not find the law school. Why? Because it had never occurred to me that the buildings I saw were "very old." With most of the European universities "very old" is late Middle Ages, or early renaissance. There's old for you! And it worked the other way around too, when in a letter of January 10, 1995 Professor White wrote in a postscript, "Could you possibly bring yourself to call me Jim rather than Professor White? I do not want to tax your European sensibilities beyond reason, but I really think that this degree of formality is not necessary." He was right about the European sensibilities, but how could I possibly be the first to suggest to continue on a first-name basis, even in the educative friendship we had by then started to develop?

Words do indeed have different histories in different cultures, and translation, even in simple cases, is necessarily imperfect as Professor White has

* Professor of Legal Theory, Erasmus University Rotterdam, the Netherlands; Judge, Regional Court of Middelburg (criminal law section).

consistently argued. Hence the importance of a professional negotiation of the relation between languages, discourses, and people. Hence the importance of the legal imagination for the process of translating a text, a case, or a precedent to a new situation in the world. The whole process, of course, is a coming to terms with different claims of meaning, recognizing the pitfalls and peculiarities along the way, more specifically the danger of reification and cliché. Professor White consistently and emphatically warns the legal storyteller not to yield to the temptation of reducing human experience to legal cliché, of reducing people of flesh and blood to objects. And temptation there is, when you come to realize that the things you want to say have to be said in a technical language that cannot provide you with the nuances necessary to do justice to actual human experience.

Daily legal practice shows how amazingly difficult it is to resist what Professor White in his most recent book *Living Speech* terms "empire of force." I found that out when I entered the judiciary. We should indeed beware of our own prejudices, professionally and otherwise, and counter the risks of mechanical, bureaucratic applications of the law by making our performances in law the object of our own critical attention as Professor White suggests.

The other day I had to decide what seemed on the surface after having read the file an open-and-shut case of simple vandalism. After a night of heavy drinking, a young man had smashed up several cars on his way home from the bar. Standard sentence: a fine and the order to pay damages. The defendant entered the courtroom accompanied by a lady twice his age. Surely, this must be his mother I thought. It often happens that young men bring a parent, usually to impress the judge that they are really decent boys after all. Somewhat vexed, I immediately asked the lady who she was. It turned out that she was a therapist from the institution where the defendant was being treated. He was a Dutchbat veteran who had witnessed the fall of Srebrenica, and had been suffering from a post-traumatic stress syndrome ever since. Gone was the simplicity of the decision when the defendant told me that he suffered from bouts of aggression he could not sense in advance, let alone explain, and when his therapist testified that in such a state the defendant could not be held fully liable for his actions.

Articulating the rule or principle on which a judicial decision rests indeed forces the judge to recognize that the instruments in the legal toolbox are not self-applying, and it demands cultural humility from the legal translator. In offering us translation as an ethical model, Professor White has made a consistent plea for open-mindedness, which he himself exemplifies. His is a contribution to law and legal theory most welcome in an era in which we will have to put all our strength into keeping or making our world a place fit to live, and in which we should continue to resist a variety of empires of force. In contemporary legal academia on both sides of the Atlantic we remain preoccupied with the question of the purpose of legal scholarship—is our intended audience restricted to law professors, or does it include practitioners?—and of legal education—vocational or purely academic?. I think we would do better to cherish the value of friendship as

Professor White defines it, that is, the recognition of others and the establishment of educative and reciprocal relations, because in theory and practice the relational aspect of law is indeed its central value.

A TEACHER

H. Jefferson Powell*

James Boyd White is, above all, a teacher. Of course, that is in fact an inexact statement: Jim White is many things, some of them of greater or more central human importance—husband, father, friend, person of faith. But in this essay my concern is with Jim as an academic, and in that context I believe that the title teacher captures best his goals and his achievement.

Several years ago Jim generously agreed to travel to Durham to meet with a small seminar (five students) that I was then teaching on constitutional law opinions as a genre of writing. It was an extraordinary experience for the seminar, including the official instructor. Jim engaged my students at the deepest level of his own thinking about the activity of writing law. He challenged them, and me, to reach beyond what they and I were doing together: it became imaginable, in those two hours or so, to see constitutional law not as the ideologically riven and substantively empty discourse it so often seems, but as an intellectually and morally demanding means by which this society wrestles with fundamental questions of justice and humanity. For me, and I believe for my students, the effect was somewhat similar to what I suppose a master class by a visiting and eminent teacher in one of the performing arts—dance, say, or voice—can be like for student performers. In retrospect, I have often thought how remarkable it was that Jim was willing to put the time and care he obviously did into what many other leading academic lawyers would have been too busy to undertake at all. That seminar is my only direct experience of Jim White as a classroom teacher, but I have no doubt that it exemplifies his practice over his years of teaching.

White's interest in teaching was not a late development in his career as an academic. His first book, *The Legal Imagination* (1973), made clear early on his passionate interest in the process of teaching and learning the law. Perhaps the strangest and the most wonderful casebook ever put together for use in a law school classroom, *The Legal Imagination* addresses not a discrete subject (contracts or torts or property) or a specific legal tool (for example, statutory interpretation) but, as White wrote years later, "the activity of being a lawyer," an activity that he has consistently described as bound up with what one can and cannot do with thought and language, and thus a subset of the activity of being human, "a mind and a person struggling with one's language, its enablements and constraints." The very possibility of teaching another person anything about that most intimate of human activities, White clearly believes, depends on a willingness to struggle oneself, as a

* Professor of Law, Duke University Law School.

teacher, with language and to seek to evoke from the student a similar struggle.

The phrases of White's that I quoted just above are from an essay entitled "Teaching Law and Literature," published in his 1999 collection of essays on law and legal education entitled, *From Expectation to Experience*. Those essays, like many others in White's various books, remind us that he is perhaps best known in academic circles as one of the leading exponents of the approach to legal teaching and scholarship called Law and Literature. White himself would demur from almost everything in the last sentence, at least as an accurate description of his own goals—another essay in the 1999 book is "'Law and Literature': No Manifesto"—but the reputation is not wholly inaccurate. Before Jim White began publishing books and articles, the idea that law and literature might be related was, to the extent it existed at all, little more than the observation that some works of literature deal with law-related themes and some judges, usually with unfortunate results, like to adorn their opinions with literary flourishes.

All that has changed: Law and Literature (capital letters essential) is an official, if contested, subject in the contemporary American law school, and what those who write in it produce is sometimes extremely interesting. Much of that change, even if he has mixed feelings about his responsibility for it, is Jim White's doing: in essay after essay, he has illustrated the ways in which literary works demand of the reader the very engagement of mind and heart that good legal work requires of the lawyer. I believe that the key reason that White's work in this vein is so influential has to do with his vocation as a teacher: he does not use the literature he discusses as a tool, much less an adornment, but clearly strives to learn from and to teach what he reads, to see what it has to say and to ask of teacher and student alike. Law and literature, in White's work, is an attitude toward reading and, in his and our turn, speaking and writing (one reason, by the way, that he insists on defining the literature that he engages very broadly). A dilettante might employ literary knowledge as a means of self-display: White, always a teacher, is invariably, genuinely, engaged with his subject, intent on what we can learn from what we are reading.

The results when White the teacher puts his lessons in print are always fascinating and often marvelous. White's most recent book, *Living Speech: Resisting the Empire of Force*, is at one and the same time a response to a famous essay on the *Iliad* written by Simone Weil (Weil's essay is the source of White's subtitle), an interpretation of the freedom of speech protected by the First Amendment, a profound reading of Dante's *Divine Comedy*, a discussion of how judges should and (tellingly) should not write opinions, and an incisive social and political critique of contemporary American society, with cameo interpretations of other texts such as Robert Frost's "The Road Not Taken" thrown in for good measure. In the hands of almost anyone else, such a book would be a pretentious hodge-podge: from Jim White the result is a seamless joy, an opportunity to share in the fruits of White's long engagement with many different texts, and one that invites the

reader to take our words as seriously as White takes his own and those of others.

What it means to say that James Boyd White is, centrally, a teacher can be seen best, perhaps, in his one book that on its face has nothing to do with the law. *"This Book of Starres"* is, as its subtitle implies, a teaching book: it is an entire course, in print, on *Learning to Read George Herbert*. Herbert is, to be sure, an important figure in the history of English-language poetry, but I suspect that his American readership outside required survey courses in Eng. Lit. is mostly limited to those attracted by what White accurately describes as a "sentimentalized" reading of Herbert as an exponent of a sweet (and indeed saccharine) piety. But that reading is false, as White shows, although he does so not through polemic but through a slow, painstaking attempt to hear what Herbert is actually saying in his poems, an attempt that White in turn shares with his readers. We have to *learn* to read Herbert rightly—and White's reader has no doubt that the "we" here includes White himself—a difficult but compelling task in which White serves as resource, mentor, and challenge. White's objective, like that of any true teacher, is to empower the student to leave him behind, and *"This Book of Starres"* fully enacts that goal. White leaves the last Herbert poem he presents, entitled, "Love," and beginning "Love bade me welcome," "without comment, not because it does not warrant any but because it warrants so much For us, let it stand as marking the point where I stop telling the reader what a poem means, leaving it wholly to him or her. In some sense all of *The Temple* [Herbert's collected poetry] leads up to this, and all of this book does too." This comment perfectly captures Jim White's commitment to teaching in all his writing, his fervent belief that we can learn, and learn important things and important ways of living humanly, from the writing of others, and that there is no time to be wasted on false or disingenuous talk, including the falseness of pretending that all ways of talking, all ways of reading, are equally human and truthful.

I began this little essay by distinguishing James Boyd White the academic, who is centrally a teacher, from Jim White the person, who is many other things. But that distinction is imprecise in much the same way that a failure to see him in other lights than the academic would be. One of the most important things Jim White has taught us is that the divisive categories we create to describe ourselves and others are themselves one of the central obstacles to any effort to live humanly and well. Jim's practice in his formal teaching and in his writing is not something separate and distinct from the rest of his life—as those of us privileged to know him personally can attest. Cardinal Newman adopted as his motto "Cor ad cor loquitur, heart speaks to heart." That is, I believe, a good description of Jim White's concept of what it means to be a teacher . . . and a person.

SPEECH, SILENCE, AND ETHICAL LIVES IN THE LAW

Robin West*

As his many appreciative readers know, James Boyd White brought his learning to bear on the relation between ethical living and ethical speaking, and particularly as it pertains to how we live and speak in law. His prodigious writing, teaching, and speaking career, as far as I can tell, was motivated by a singular, passionate belief: that the human capacity for language can and should serve as a bridge from mind to mind and spirit to spirit, so that we might cohabit the earth not only peaceably, but with the pleasures and grace of each other's company. Language, White taught, can both facilitate friendship across the space that divides us as individuals, and create a just and lively cooperation across the oceans that divide our nations, our beliefs, and our communal codes for living. Ethical speech in law, White argued across the span of four decades, can address injustice, forge bonds of shared struggle, unearth a shared human essence across difference, ease suffering, create a human community, and articulate both our promises to each other and our hopes that we can live up to them.

In his books, his essays, his lectures, and no doubt in his day-to-day teaching, James White interpreted and taught from exemplary instances of profoundly ethical speech: Socrates' reflections on the meaning and value of citizenship the night before his beloved City-State put him to death, Huck Finn's casual embrace of friendship as he defied the institutionalized enmities of slavery, Nelson Mandela's *Oration from the Dock* on the subject of liberation as he anticipated his sentencing, Abraham Lincoln's *Second Inaugural*, on the awesome destructiveness of both a necessary war and an unjust peace in a national family, Justice O'Connor's opinion on the communal value of shared precedent to a community of diverse individuals while striking down a divisive law. These men, women, and children's oratory soared, but all lawyers, White taught us, could and should engage in ethical speech. Lawyers distinctively employ speech as they live out their professional and ethical lives, and with their speech they create civic space for others to do likewise. They should, then, speak ethically. Jim White has been the guide, as his readers and students strive to learn how; Huck Finn, Nelson Mandela, Abraham Lincoln, and Socrates are the teachers. Lawyers could do a lot worse than to follow Jim White's eloquent, learned lead through the ethical monuments in our cultural heritage. Jim White loves law and he loves literature and he loves oratory, and he loves them for the moral breakthroughs that at least on occasion this exemplary speech facilitates.

* Professor of Law, Georgetown University Law Center.

I wonder, then, if it was with some sadness that toward the end of his career White turned to a study of the ways in which language, speech, and verbal formulae, in law and outside of it, sometimes serves the dehumanizing ends of power, rather than the aspirational goals and hopes of citizen heroes and admirable statesmen. We have, in our linguistic heritage, Mandela's *Oration From the Dock* and Lincoln's *Gettysburg Address* and *Second Inaugural*, and Dr. King's *I Have a Dream*, and Plato's *Crito*, and White has helped us understand them all. He could have left it at that. But we also have mountains of advertising copy that numb us to words' capacity for conveying truths about the world, and volumes of pornography that differently but just as assuredly desensitize us to the human in the machine, and, now, "torture memoranda" from the Bush Administration's Office of Legal Counsel that mock the hopes and promises of the Geneva Conventions. And, of course, we have more than a few centuries worth of censorial speech, militarist jingoism, and nationalist propaganda, much of it protected or promulgated by law and law's verbal minions. So, why did Jim White, who loves language for its ethical potential, who thinks of speech as a paradigmatically ethical moment, who loves what we might say for the way it might unite us—why did he turn, in his latest book, to a study of advertising, propaganda, pornography, and to a study of the ways in which language can dehumanize, can dumb us down, can make us inattentive to or complicit with the empire of force? This last book—*Living Speech: Resisting the Empire of Force*—is not as exhilarating a read as his earlier ones. It is our lesser speechifying selves, not our better selves, he subjects to scrutiny. So—why did he take up this topic? I don't know, but I must say that the book that resulted is hugely clarifying. I love this book just for that. Language, White teaches, can bring us to an ethical life or it can lead us away from it. We need to understand and appreciate this tool of ours. White has already taught us that. In his last book, he reminds us that we need to fear it a bit as well.

White's turn to language's potential for dehumanization was unexpected, but not really surprising, at least to me. White had listened carefully and appreciatively for a good thirty years, as his critics told him, again and again, that his jurisprudence is misguided. Law, some of us have argued, to, against, and with Jim White, *contra* his undue and generous-to-a-fault audacious hope, is the language of power, not of ethical living; law's language can alienate, as well as unite, law can and often does—whether paradigmatically or not—work through the intimidation of the sword, not the sweet persuasion of the shared Word. And so on . . . Don't you see? White always graciously responded to us—his legal positivist critics—that he actually knew all of that, no fool he, and that he has never, in fact, made the claim that either law or language could not be put to other ends. Nevertheless, he tended to say, he wanted—he chose—to study the ways in which we might sometimes give voice to our ethical aspirations in law. To do that he had to study the hope we express through law, not the duplicity. We, his critics, of course, believed him on this declaration of intent—why not? This last book, though, shows why we were right to do so. Only someone who passionately loves language for its affirmation of life could also so thoroughly under-

stand, and convey, the power of language to destroy that which is human within us. Again—this turn to law's language in the service of force and duplicity, rather than hope and community, was unexpected, from Jim White. But was the power and clarity of the analysis that resulted surprising? No.

What was *more* surprising, at least to me, than his focus on law's and language's potential for destruction, in his latest book, is the attention he bestows in that book on *silence*. Drawing on his experience as a practicing Quaker, and fully mindful of the paradox inherent in the attempt, Jim White tries to articulate in this book—I think for the first time—his respect for silence. Silence, White writes, carries the recognition of humanity that must in turn precede the communicative moment at the heart of ethical speech. I for one was not prepared for this newfound attention to silence, not in the slightest. Here's the exasperated version of this question: Why does this man who so loves language, speech, oratory and the world's great literature *now* tell us that what he *really* loves are those painful drawn-out silences in Quaker meeting houses? How can this man who taught us, for decades, to appreciate the connections between just living and just speech, who for so long taught that the ethical impulse is to be found in the linguistic act, turn four-square and embrace silence? How did he come to love silence? Why does he think we all should?

I truly don't know, but I do have a theory. At a conference almost fifteen years ago, at St. John's Law School, Jim White shared a memory with a few of us, in an unpublished side conversation. In his mind's eye, he told us then, there he stood, several years back, as a young man, in front of a large plexiglas window in the nursery of a big-city hospital, looking for his newborn baby among dozens of others, neatly laid out in rows and rows of bassinets. As he recollected the moment, he had a common, near-universal perhaps, but by no means trite, reaction to those rows and rows of babies: how similar they all are! My *god*, they all look alike. They sound alike too. They *are* alike. Many of them don't even have *names* yet, none bear marks of tribes or nations. None have distinguishing accents that bond them to their community of origin and delineate and separate them from others. They are so much alike. Yet, these many black and a few white babies are destined for such disparate futures, some tragically so.

Let me elaborate just a bit on this thought, reported fifteen years after the fact, some ten years ago, by this scholar of language, great literature, and law. Some of these look-alike babies that so impressed themselves on the young Jim White would eventually endure parenting that was not, as developmental psychologists sometimes put it, "good enough." As we know, not-good-enough parenting risks sociopathology at worst, social and emotional isolation at best. Many more of those just-alike babies, even with perfectly good, or good-enough, parenting, would eventually endure social institutions that are not "good enough" or anywhere near: not-good-enough institutions that virtually guarantee lives of need, struggle, and frustration for some, criminality and considerable desperation for others. Some, a very few of those babies, and, not coincidentally disproportionately white, in that

City Hospital, would eventually enjoy excellent parenting and really terrific social, educational, and institutional supports. They would go on to lead good and successful lives. Yet, all of these differently hued babies were just so alike. There's no earthly excuse for those divergent paths, the better of them pre-determined by privilege and the lesser of them so pre-determined by this country's history of racism, slavery, xenophobia, antipathy, fear, and hate. Or so thought James Boyd White, young academic, linguaphile, new father.

The memory Jim White shared with us that day evokes a common enough image, from our shared national memories of mid-century life, in the decades before large City hospitals started putting the newborns in their mothers' maternity rooms. The new father, in a black-and-white Life Magazine sort of photo, barred from the delivery and recovery rooms, stands scanning rows of identical babies, asking anyone who will listen, "which one's mine?" Someone, somewhere, perhaps the nurse in starched white, perhaps the reader or viewer, takes that vaguely ridiculous scene in, and sort of wants to respond—"hey, they all are, pal." So likewise, there stood Jim White, scanning rows of infants, with a part of him asking "where's mine," but a part of him thinking, "they all are." In his own personal moment of Quaker-like silence in the hospital nursery, White tells us, he stood silently looking for his own newborn child, while feeling protective, human, responsible for, and connected to them all. As we all know, but are too inclined to forget, a year or more of infancy precedes all those years of communicative *linguistic* speech from mother or father to infant. Think of that: a full year of human interaction without language. If that year is *ethically spent* between the parent, infant, and larger society, so might be the speech, and much of the life, that follows. Likewise, we might say, that act of ethical silence in front of the nursery plexiglas, preceded Jim White's own equalitarian, communitarian, and deeply ethical speech. I like to think that he never forgot the lesson of that moment of silence, and in his latest book, he's paid his respects to its hope and promise.

Silence acquaints us with that of God in each of us, so say the Quakers, but also, silence brings us to what we share, universally, with all the black, brown, and various shades of off-white infants in the nursery—so says Jim White. Conversational language—the "to do" lists, the high school book reports, the dinner table conversation—all of that can indeed bring us back, brick by brick, so to speak, to that silent moment of awe, appreciation, protection, and responsibility for the world's children. When those bonds are strong, sometimes, we then proceed, collectively, to use our powers of ethical speech to construct agreements, and contracts, and promises, and compacts, and treaties, with nations and states and municipalities and communities and strangers that are far flung from our own. Most important, though, with our powers of ethical speech, with those words we call law, sometimes we build the "just-enough" social institutions that might facilitate the "good-enough" parenting that enable all of our co-citizens' truly good lives, not just the good lives of the children we raise in our homes. With ethical speech and the moral law we might make from it, we on occasion

stay true to the promise that James Boyd White whispered silently, wordlessly, and from his heart, to all the world's children, when he stood at that 1960s styled nursery window in the hospital that day, excitedly searching out his own.

INTERVIEW WITH JAMES BOYD WHITE

INTRODUCTION

The occasion of the following interview was the Montesquieu Lecture at the University of Tilburg, which Professor James Boyd White delivered in February 2006.¹ In the lecture, entitled “When Language Meets the Mind,” Professor White discussed the manner of interpreting and criticizing texts, both in the law and in other fields, that he has worked out over his career.

The heart of this method, as described in the lecture, is to direct attention to three sets of questions:

- What is the language in which this text is written, and the culture of which it is a part? How are we to evaluate these things?
- What relation does this writer or speaker establish with this language as he uses it—does he just replicate it unthinkingly, or does he make it the object of critical attention or transformation? How are we to evaluate what he does?
- What relation does the writer or speaker establish with those to whom and about whom he speaks? How are we to evaluate these relations?

To ask these questions in a serious way invites one into a complex mode of thought: thought at once anthropological and linguistic, as it examines a culture and its language; at once literary and psychological, as it examines ways of simultaneously employing the resources and resisting the limitations of one’s cultural inheritance; at once ethical and political, as it examines the identities, the relations, and the communities we create and dissolve and recreate as we speak or write. The method is both descriptive and normative, and it treats both law and other forms of thought and speech. It underlies Professor White’s writing and teaching alike.

Jeanne Gaakeer, the interviewer (as well as a contributor to this tribute to Professor White), has long been interested in the relation between law and the humanities, having written her doctoral dissertation on the subject and having published a book on law and literature, with particular attention to the work of Professor White, entitled *Hope Springs Eternal*.

The work of which this lecture is an example is inherently interdisciplinary, making use throughout of humanistic and literary texts to help us understand the nature of legal thought and expression. As early as 1965, in a review of Myron Gilmore’s *Humanists and Jurists*, Professor White was critical of the then prevailing lack of connection between law, history, and literature, fields once common to the legal profession. Since then he has sought to connect these fields in large part through their shared engagement

1. In an earlier version this interview was published in the Netherlands in *The Netherlands Journal for Legal Philosophy and Jurisprudence* in 2006, and is here reprinted with permission.

with language. This emphasis follows from Professor White's view that the essence of the lawyer's work lies in the process:

[o]f identifying and construing authoritative texts, of translating from another discourse in to the law. [T]hese are literary activities, arts, . . . or what the Greeks would call *technai*.

All this, for Professor 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."

In this interview Professor White discusses 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.

MONTESQUIEU LECTURE:
"WHEN LANGUAGE MEETS THE MIND"

For your Montesquieu lecture you used as a motto Simone Weil's "Only he who knows the empire of force 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 poème de la force*, has been in my mind ever since I first read it over forty years ago.² Weil's reading of the *Iliad* deeply influenced my own interpretation of that poem in *When Words Lose Their Meaning*, 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

2. In French the sentence reads: *Il n'est possible d'aimer et d'être juste que si l'on connaît l'empire de la force et si l'on sait ne pas le respecter.*

or a view of life as choices or acts of consumption. But this phrase captures, for me at least, much of 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 our 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 the it works in our own minds and imaginations, leading us to objectify others and 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 force 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 recent 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 "I like a look of agony,"³ 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

3. Dickinson's poem reads: "I like a look of Agony, / Because I know it's true — / Men do not sham Convulsion, / Nor simulate, a Throe — / The Eyes glaze once — and that is Death — / Impossible to feign / The Beads upon the Forehead / By homely Anguish strung." Professor White discussed this poem in *Acts of Hope*.

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.

In his *Second Inaugural Address* 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, "When Language Meets the Mind," 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 one way 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.

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 exert real 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—"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, to whom 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 speaks 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 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 earlier judicial precedent—he or she has the obligation not just to defer to that source of authority, a deference that could

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 that 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 and 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 both the individual citizen and the larger 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 thought. 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," you mentioned approvingly the dissenting opinion of Justice Jackson in *Shaughnessy v. Mezel*, "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 be 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 twenty-four 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 to "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 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, as it is claimed, 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 an occupying force simply to terrify the local inhabitants.

It is true that there are lawyers seeking to challenge these practices, both in the United States and 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 ballot box. 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 in what you have called the rhythms of hope and disappointment?

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 good lawyer, one thinks that one's case is the most important in the world, that what happens in it matters enormously; as a good 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 good one.

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. In The Edge of Meaning you write that the main aim of the book is to address the question whether we can find, or make, a way of imagining the

self and the world and the others within it so that we can make possible coherent and valuable forms of speech and thought and action. On this view, what are the ethical consequences, then, for legal professionals?

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 ahistorical and apolitical. 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 relations that such texts create with their readers have 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 thus hold out new possibilities by which he can shape his own aspirations.

LIFE AND WORK . . .

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?

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 her professional life in a more satisfactory way, including its ethical dimension.

That is to put the matter abstractly. My idea was to bring the 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 practiced as an activity, 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. In this climate work like mine has somewhat less natural resonance with legal culture, at least in law schools, than it did thirty years ago.

What is your impression of the reception of Law and Literature in general and your ideas in particular?

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 courses 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*, and the California Press publishes the well-established journal, *Law and Literature*. Another lively 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.

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. In fact, 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 same-sex unions are regarded as legitimate simply because in her world they were not, or that Plato has nothing to teach us, as egalitarians, because he is a member of an elite upper class. It is of course true that texts in the canon have sometimes 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.

And, on this view, what do you think of the claim defended as passionately by some, 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. Obviously 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" 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 you claim the image of knowledge as purely objective or wholly shareable is wrong for law, and perhaps all other fields, in that where 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; 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 nonproblematic precedent for others.

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 questions of value and community. You speak in *When Words Lose Their Meaning* of a politics of persuasion to claim meaning, one that is present whenever 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 the original concept of translation and 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 the way Posner set 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"? Can such a dichotomy be made?

Let me try to respond to all these 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 in the first instance to judgments of others—expressed in statutes or constitutional provisions or regulations or earlier decisions by courts—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 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, not justice, 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 nonproblematic, in fact automatic. That process is the heart of the life of judge and lawyer, and it calls upon the 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 economics can never answer the legal question, which has to do with the meaning of particular legal texts, read independently and in light both of each other and of the larger culture of which they are a part.

Law is inherently interdisciplinary for it 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 the 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, their translation into jury instructions, and the composition of briefs and opinions putting those texts together in new contexts, no other field can properly preempt the law, for the distinctive responsibility of the law is the identification and interpretation of those authoritative texts in new compositions of its own. 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 that the translator is trying to get across) and insisting, as a translator necessarily does, on the value of its own language and its premises.

It is also crucial that the authority of the authoritative texts 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.

Law and Economics works very 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 seems to have 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, Law and Economics typically denies that any translation is necessary or that any other field has anything to teach it or the law.

This means that Law and Economics is not only unable to think about what interests me, namely what lawyers and judges actually do with the materials of authority that define their task, but is also handicapped in its chosen field, that of policy, for it does not, so far as I know, engage in the kind of translation that is essential to the integration of diverse and conflicting sources of understanding, but seeks to reduce all thought to a single system.

The result—unlike the law—is in effect 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 beyond its presumed self-evidence.

The idea of Law and Economics then, as I understand it, 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, which does not have the characteristics and virtues essential to what we mean by law.

Finally, and very briefly, what I call the theory of economics is sometimes used as a political theory, not an economic one, which 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. In addition, the effect of a systematic belief in the market is often 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 (at least in law schools) 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 legal methods of thought. The effort to supplant law by a certain kind of economics is an effort to destroy the 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.

To return, if only briefly, to your choice of texts, why did you choose Plato's Phaedrus as the center of The Edge of Meaning?

I should start with a little background. Each of my principal books focuses on a particular activity of mind and language: in *The Legal Imagination* it is the activity of learning to speak and think like a lawyer; in *When Words Lose Their Meaning* it is the compositional activity in which we engage when we work with the language of our culture, laden as it is with value and presupposition, to try to create meanings of our own and to establish constructive relations with other people too; in *Justice as Translation* it is the activity of translation, of which interpretation is an important form, especially the kind of interpretation represented in the judicial opinion; in *Acts of Hope* it is the activity of claiming external authority for one's judgments, in the law and elsewhere, an activity by which one reconstitutes the source of authority in one's writing; in "*This Book of Starres*": *Learning to Read George Herbert*, it is the activity of learning the language of another mind, in this case that of the poet Herbert; in *The Edge of Meaning* it is the activity in which we seek to imagine the world, and ourselves and others within it, in such a way as to permit us to claim meaning for our experience; in *Living Speech* it is the activity of struggling to understand the empire of force, in the world and in ourselves, and to learn how to stop respecting it.

In each case I compare the way the activity in question works in the law and in other fields of life and thought, including philosophy and history and literature, and also in our ordinary experience. In each case I regard the activity as simultaneously intellectual and ethical, a work of the mind and imagination but also one for which we are responsible as ethical actors. And in each case I regard the relation of the mind to language as problematic, seeing language as both a friend and enemy, giving us enormous capacities for thought and life but also restraining and sometimes misleading us. So a constant question is: How is one to manage the relation with the language one is given by one's culture to use? This of course is the theme of the Montequieu Lecture as well.

The *Phaedrus* seemed perfect from this point of view. It is written in Greek, a problematic language for me and my reader, for it is foreign to all of us, and problematic for Plato, who is constantly trying to find ways to put its commitments and implications into question. The dialogue is about the possibility of meaning in the largest sense: how are to imagine ourselves, or what he calls our souls? What are we to think of our capacity for love, or in another mood, of our susceptibility to it? What is the proper relation between this, the deepest of human feelings and the life of the mind? What are the strengths and dangers of different forms of composition—stagey and paradoxical argument, Socratic conversation, literary criticism, and the creation of myth?

Plato for me is a model of excellence in the way he addresses all these questions, never resting upon the assertion of propositions but always engaging the reader in the activity of thought he recommends, teaching us not just by example but by our own experience.

Finally, at the time I wrote the book the focus on love seemed to me crucial, though I could not quite say why; but my work since that time with the sentence from Simone Weil that connects love and justice as the two central values of human life has simply confirmed that judgment.

CONCLUSION

In talking about the law, in this interview and elsewhere, I mean to speak not so much from the outside, as say a political scientist might, but from the inside, as a lawyer. I am not sure that I could devise a general definition of the social phenomenon of law—in fact I rather think I could not—but I do know what it is to teach law, and to learn it, and what I mean by the word *law* is mainly what we teach: a complex inherited language of analysis and argument, which has its origins outside of any of us, and a set of intellectual and social practices, again complex, by which that language can be put to use in the world—practices that can be done well or badly, with consequences, small and great. This language is not a product merely of the culture but also of our political process, and, unlike the theories of professors—including my own—it is ultimately based upon the authority of democracy.

I am confident that at its best the law we learn and teach is an immensely significant resource both for our society and culture generally, and for those of us lucky enough to live on its terms. It offers a way of approaching a real world problem in terms established by others who have faced similar problems in the past and expressed their views in the authoritative texts of the law, from statutes and regulations to constitutions and judicial opinions. In this sense, it is a way of benefiting from the experience of the past.

But to say that we use a language made by others is not to say that we are governed by a dead hand: as every law student learns, one finds in a very wide range of cases indeed, that arguments—rational, persuasive, decent arguments—can be made on both sides of the question. The law thus requires real choices from both judges and lawyers, but it informs those choices, which should not be merely a matter of preference or calculation, but should rather express the result of the mind's engagement with the materials of the law—an engagement that holds out the promise, sometimes realized, of a real education for the lawyer, the judge, and the world.

The law in this way creates the space and opportunity for its own change. At its best it makes its changes in response to real conditions and real needs. It is not a model of abstract reasoning, not a theory or an ideology, but a way of living responsibly in the world. It does not collapse into untutored choice, or simple analysis of the costs and benefits one happens to perceive, for it is

animated by the fact that its actors are responsible for what they do and must justify their discharge of those responsibilities in the language of the law itself.

These practices have at their center a perhaps somewhat surprising idealism: the statutes and judicial opinions that bear on a case are not read cynically, or reduced to the motives presumed to underlie them, but read as if they were composed by an ideal legislator, an ideal judge, someone who is saying what he means and meaning what he says. The judge is addressed, in the courtroom and in briefs alike, as if he or she were an ideal judge, and the lawyers too are spoken of with respect, as honorable advocates. This idealization is, of course, in some sense a fiction: neither judge nor lawyer nor legislator is always wise, always honest, always responsible, and sometimes they are the opposite of these things. But it is a positive fiction, creating a pressure on all parties to become and act better than they might otherwise.

There is another kind of idealism in the law, crucial both to its methods of change and to its meaning, that resides in the virtually universal but little noted convention that the lawyer and judge alike must credibly claim that the outcome for which they argue, or which they reach, is not only called for by the legal texts in question, but is in an important sense itself just. To say that the law requires an outcome, while admitting that it is unjust, or to claim that justice requires an outcome, while admitting that the law does not permit it, is to make a fatally incomplete and defective argument. The simultaneous insistence upon law and justice produces a constant pressure to think and rethink both what justice is and what the law requires. It is an engine for opening the law to our deepest values.

I have spoken here of the law at its best. Of course it is often corrupted, like any social and cultural form. Sometimes it is very bad: unthinking, conclusory, authoritarian, sentimental, erasing the experience of others, bullying, inhuman, not connected in any good way with either reality or justice. But it always has within it the seeds of its own excellence, and to spend a life thinking, as lawyer and teacher, about what these excellences are, and what they might be, has been for me an extraordinary pleasure and privilege.

—James Boyd White, March 2007.