

# ESTABLISHING RELATIONS BETWEEN LAW AND OTHER FORMS OF THOUGHT AND LANGUAGE

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## Abstract

The law does not, and could not, exist in an intellectual or linguistic vacuum. No one believes that the law is or should be impervious to other languages, other bodies of knowledge. In this sense the argument about the ‘autonomy’ of law is an empty one: law cannot be, should not be, perfectly autonomous, unconnected with any other system of thought and expression; yet it plainly has its own identity as a discourse, its own intellectual and linguistic habits, which it is our task as lawyers to understand and develop. It follows that an essential topic of legal thought is the proper relation between law and other forms of thought and expression – a topic that is important, difficult and full of interest.

## 1 Law and Ordinary Language

Those who actually practice law, including both lawyers and judges, must always be prepared to go back and forth between the language of law and the languages of other disciplines and communities. One of these is the ordinary language<sup>1</sup> of the culture that is normally spoken by the parties, the witnesses

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<sup>1</sup> By this term, often used by analytic philosophers in the last century, I mean the whole cluster of dialects and idiolects spoken by people in the course of their existence (other than professional or disciplinary or other specialized discourses). You might say that someone’s ‘ordinary language’ is language at what feels like its most normal, least self-conscious, ‘just how we speak.’ But that does not mean that

and the jurors (if there are any). After all, the events upon which a lawsuit is based are experienced by people who may not have any idea about what the law says or how it says it: the client has been damaged in an automobile crash, or by prescription medicines that were perhaps misprepared, or by police who beat him on the street, or by the failure of a building contractor to do what in the client's view he agreed to do. The client has his own ways of talking about these experiences and what they mean, which may or may not be influenced by the law, and it is these he brings to his lawyer.

The client can in fact to a large degree process and deal with many of his experiences without ever consulting a lawyer. His own social and linguistic competence is normally enough for him to be able to say what happened, in his own terms, to articulate what ought to happen next, and to figure out a way to try to make that occur, or to come to terms with the reality that he cannot. It is when his ordinary social competence is not adequate to deal with the situation that he comes to a lawyer, whose task it will be to make sense of those events in another language, that of the law.

The primary world in which the parties and witnesses actually live is not then the legal world, whatever lawyers may be inclined to think, but the world of ordinary life and talk. When a lawyer is consulted, the obvious question is: What relation can and should be established between that world and the law? What can the things that the client is experiencing and saying be made to mean in legal terms? What happens when his story, cast in his own language, is recast into the language of the law? What, in short, will the lawyer be able to say, in what language, and with what effect?<sup>2</sup>

The conversation between lawyer and client is thus an exercise in perpetual translation and retranslation, moving from one way of talking to another and back again. In an explicit legal arena the case will for the most part be presented in legal language by a lawyer who draws distinctions and asks questions that might never have occurred to the client: about jurisdiction, for example, or choice of law, or modes of statutory construction or (especially in the common law) the way to interpret a key case. Part of the lawyer's task is to teach the client enough of the language of the law so that he can understand many of the forms of speech – the questions, the issues, the arguments, the genres of expression, the specialized words – that make up the way in which his case will be thought about in the

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it is not complex and interesting, nor that it does not vary, sometimes deeply, from speaker to speaker within a language community.

<sup>2</sup> Much of the life of the lawyer takes the form of asking these two questions: What can we say? What can they say? He is constantly imagining a conversation with an actual or possible adversary not only when he has a case that is the subject of litigation, but in planning as well, as he drafts contracts or other documents that will shape a relationship.

law, and do so well enough to enable him to make the judgments that only the client can make.

The translation is not in only one direction. If the lawyer is to speak meaningfully to his client, or to a witness or juror, or even to a judge, he must always be ready to frame his legal argument, his legal conclusions, his thoughts (however technical they may be) in an ordinary language of fairness. He must show that he knows how these events look to a party or a witness or a juror, and find a way to speak to them on that basis.

Judges know this well, and in their questioning often ask the lawyers, implicitly or explicitly: “How are we to explain the outcome you support in the ordinary language of the public world?” The kind of explanation that the judge is imagining is in fact necessary if a democracy is to accept the institution of law, for the law must make enough sense, enough of the time, to be tolerable to the citizenry. This means that the result the law reaches must in principle be justifiable not just in strictly legal terms, but also in ways of thinking and talking that are much more generally accessible in the relevant society and culture. The same is true of the arguments that lawyers make. To ensure that this is the case is one of the great aims and strengths of a public judicial system, especially when it involves the use of the jury.

The fact to which I am here drawing attention is, for me at least, one of the reasons that the practice of law is full of interest and value, both for the public and for its practitioners. The lawyer is not permanently enclosed in a single conceptual or linguistic system, the implications of which he elaborates by logical deduction, but is constantly faced with the wonderful task of working out claims of meaning in contrasting and competing languages. This fact has the benefit for the lawyer that he or she is constantly learning new ways of thinking and talking, new systems of knowledge and discourse, which is for most of us a source of real interest and pleasure. For the law as an institution it means that the law is in principle open to innumerable ways of thinking and talking about the problem before it; it is open, that is, to being informed and challenged from every side, a fact that is crucial to its democratic legitimacy.

## **2 Law and the languages of expertise**

### **2.1 Contradiction**

Another context in which the lawyer must connect the law with other languages is the courtroom, especially when, as we see every day, one side or the other seeks to introduce expert testimony. The problem here is structurally similar to the problem presented by the tension between law and

ordinary language, for the lawyer and judge are constantly asking what relation can properly be established between these different ways of thinking and talking. But it is worked out in a more self-conscious way, as one side or the other pushes the expert to express himself in ways favorable to its cause, as the other resists, perhaps making objections, and as the court rules on these objections and perhaps on proposed instructions to the jury as well. How the expert is to be allowed to speak is a topic of complex and elaborate thought in the law. From the point of view of the lawyer, this opportunity to face the difficulties, the impossibilities, of the moment of interaction between such languages can be an entrancing challenge.

Think, for example, of the testimony of the psychiatrist (or psychologist) in a criminal case in which the defense has argued for acquittal by reason of insanity. A standard formulation of this defense in the United States would require the trier of fact (judge or jury) to find that “by reason of mental disease or defect” the capacity of the defendant “to appreciate the criminality of his conduct” or “to conform his conduct to the requirements of law” was “substantially impaired.”

What happens when an expert psychiatrist (or psychologist) is asked to testify in a particular case as the sanity or insanity of the defendant? Of course he must ‘examine’ the defendant, that is engage him in a conversation of a certain sort as a result of which the psychiatrist is supposed to form a professional opinion relating to his sanity or insanity, taking into account as well other information about his history of behavior and treatment. Experts in the field have extensive experience in carrying on such interviews and drawing conclusions from them. This is a part of what they do professionally.

But what happens when such an expert testifies? One possibility is that he will be asked whether he or she has formed an expert opinion about the issues that the statute directs the trier of fact to decide: Does the defendant suffer from “mental disease or defect,” is his “capacity” to “appreciate the criminality of his conduct” or to “conform his conduct to the requirements of law” in fact “substantially impaired” or not?

Think of the situation of the psychiatrist asked these questions. Are they from his point of view fair and intelligible, within his expertise? Perhaps so, we think; after all, he must be used to classifying patients; his profession defines various “mental diseases or defects”; if he cannot tell us whether this patient suffers from such an affliction, who can? He should be similarly experienced at making judgments about the capacity of patients to ‘appreciate’ – not just intellectually but affectively – moral and emotional realities, such as the criminality or wrongfulness of their conduct, and their ‘capacity’ to conform their conduct to external norms.

But in fact psychiatrists often have a terrible time in these situations. The difficulty is not that they do not know how to carry on interviews or read files or to make judgments about mental disease or about the capacity to

appreciate or conform, but that they are used to doing these things for completely different purposes from those the law is now asking them to serve. They normally ask themselves these questions, that is, as part of a process of treatment. The fundamental issues for them are what treatment should be used, and how; whether they can expect treatment to work; and, sometimes, whether the person is likely to be dangerous to others and therefore needs some kind of restraint. In the courtroom the psychiatrist is being asked to use something that looks like his language to answer a completely different question: whether this person should be excused from criminal punishment.

This is not something within his expertise, to put it mildly. It is not a question the psychiatrist ever asks. His question is how to help the person, or perhaps how to prevent future harm, not whether he should be punished. He is in a situation that Kafka might have designed, where he is asked to use what looks like his language, what looks like his expertise, for purposes for which it is not suited at all, thus creating a situation in which he cannot make sense in his own professional language. Even worse is the ethical issue: He is for the moment asked not to imagine the defendant as a patient to be treated to the best of his ability, as an ill person in need of the kind help that is all the psychiatrist as such knows how to offer, but to declare whether the defendant should be treated as such person at all or instead be subjected to something called punishment, a practice that is shaped by the state for its own purposes, at least some of which involve using the person as part of a program of social control, that is, as a means to a social end and not as an end in himself.<sup>3</sup> These purposes are completely inconsistent with the kind of relation the psychiatrist establishes with his patient, which is never as an object, always as a person.

Suppose that a psychiatrist said to the court something like this:

I can use these labels, and others like them, for purposes of therapy and healing, but I cannot use them for the purposes of the law, for marking out the limits of the institution of criminal punishment, which in fact I do not understand. The question you are asking me to address is not a medical or therapeutic question, but a question of justice: Who should be punished for their wrongdoing, who excused by reason of insanity? And on that question I have no expertise at all. The fact that you have used a version of my language to articulate it does not mean that I can speak to it intelligibly. To try to force me to do so is a cruel joke.

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<sup>3</sup> For a fuller analysis of the relation between psychological and legal language in connection with the insanity defense, see my *The Legal Imagination* (Boston: Little, Brown and Company 1973) 317-361.

If the court insisted that he answer, saying that the category of ‘mental disease and defect,’ say, must be meaningful to him, the psychiatrist might answer:

I cannot use these categories where the purposes for which they are used are so fundamentally inconsistent with what I do. In fact, I do not think I can apply any labels at all in a meaningful way, where any of the contemplated outcomes would involve treating the defendant not as a person but as an object. And even if in some sense legal and medical categories can be said to overlap, there will always be borderline cases, and to address those I need to know as fully as possible the purposes for which the category is being applied. Indeed that is true not only at the edge but at the center of a term like ‘mental disease or defect.’ So: Can you tell me what the purposes of the insanity defense are? Or, since this defense is an exception to more general practice, can you first tell me what the purposes of criminal punishment are, then tell me the purposes of this defense?

This is a deeply embarrassing question. Although every state, and maybe every culture, has practices that could be called ‘criminal punishment’, every first-year student of criminal law should be able to tell us that we in the law have in fact no coherent answer to the question, “What are the purposes of the criminal law?”

We speak in terms of revenge (or retribution) for a wrong committed; in terms of deterrence of future misconduct by those who will be tempted to behave in criminal ways exhibited by this defendant; we speak of rehabilitation of the defendant himself, that is, his therapy or healing; we speak of his incapacitation, that is, preventing him from doing again what he did this time. But it is obvious on reflection that these do not form a coherent program. There are conflicts and contradictions between them, perhaps impossible to resolve.

I need not elaborate the difficulties further. For present purposes it is enough to see that there is an immense barrier between the languages of psychiatry and the criminal law, which arises from the contradictions between the nature of these two practices: between their respective purposes and between the set of human relations they each imply or require. This contradiction is intensified when we realize that the purposes of the criminal law itself cannot be rendered consistent or coherent.

What is the law to do? As for the inconsistency within the criminal law, I have argued elsewhere that the only hope for coherence is to give up the idea of deterrence as a goal (though of course any system of punishment will have some deterrent effects).<sup>4</sup> As for the tension between the language of psychiatry and that of criminal law, in practice the only hope seems to be

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<sup>4</sup> See ‘The Criminal Law as a System of Meaning’ in *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press 1986) 192-214.

to allow the witness to talk at length about his experience of the defendant, in whatever range of terms seems to him suitable, without testifying to legal conclusions, for example whether he suffered from “mental disease or defect” and whether his “capacity to appreciate the criminality of his conduct” was in fact “substantially impaired,” and so on. But even that involves the psychiatrist in a deep conflict of roles. The terrible problem of applying a defense to a system of punishment that cannot itself be rationalized will be left, where it probably best belongs, to the trier of fact.

I say this with no sense that I am proposing a systematic solution to the conflict of languages I describe. It is the nature of such conflicts that they must be addressed in particular ways, in particular cases, by an art of language and judgment that itself requires a healthy sense of the limits of the human mind, by a kind of wisdom in fact. My aim is rather to define the difficulty than resolve it, and to claim that the tension between languages seen here is an instance of a problem that runs throughout the law, close to its very heart.

## 2.2 Interaction

The lawyer must learn to manage the tensions between law and other languages not only with respect to the ‘ordinary language’ with which I began, but also, as we have just seen, with respect to the languages of a great many disciplines and professions, from engineering to linguistics to computer science to anthropology to medical science, and so on, indeed to any field of human expertise. This is never just a matter of translating individual terms, or giving them professional definitions, but always involves the establishment of a relation between two systems of language and of life, two discourses, each with its own distinctive purposes and methods, its own ways of constructing the social relations through which it works, and its own set of claims, silences, and meanings.<sup>5</sup>

To engage in the translation from another language into law and back again, as the lawyer must constantly do, is an activity that at once requires and offers an education in the nature of language itself, in the limits and power of the human imagination, and in the always hopeless, but always hopeful, quest for ways to claim effective meaning for experience. Perhaps more clearly than anyone else the lawyer sees that at moments of crisis we always have choices to make between systems of meaning, kinds of meaning; and that these choices must always be justified in immediate and

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<sup>5</sup> For more on the nature and difficulties of translation see A.L. Becker, *Beyond Translation* (Ann Arbor: University of Michigan Press, 1995) and my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press 1990).

particular ways, as the best that can be done in this rich and difficult situation. The next case, the next issue, will require another balance, another act of composition, of writing, in an effort of the mind to find ways of talking that will work to express what most needs to be expressed.

The lawyer is always interacting between different languages, different ways of making sense of life, different systems of thought and expression. To manage this interaction well, to help the law say what needs to be said, is at the center of his art. Like the translator, who despite his best efforts to be faithful to the meaning of the original always changes it, the lawyer seeks to do something that it is impossible to achieve with perfection, without flaw, but something that it is nonetheless necessary to attempt: to create effective and comprehensible working relations between different systems of language and thought.

The question of the proper relation between other disciplines and the law is thus not a new question for the law, not daring or original, but the stuff of the lawyer's life. It is a particular instance of a general problem that drives his or her whole professional life.

### 2.3 Translation

My main point so far is a simple one: that the law does not exist in a linguistic or intellectual vacuum but must establish relations with other forms of thought and language. These range from the ordinary speech of the jurors and witnesses (and voters too) to the languages used by various experts: not only psychiatrists of course, but engineers, medical doctors, linguists, diamond merchants, navigators, chemists, geologists, tree surgeons, race car drivers, and so on and on, through all the rich multiplicity of human endeavor. This means that when we as lawyers turn to the relations between law and other disciplines in the university we are actually on familiar ground. It is not a new thing for us to face the difficulties of trying to establish relations between law and other forms of thought and expression, but a constant feature of the practice of law, for lawyer and judge alike. In thinking about interdisciplinary work in the university, we as lawyers may be able to draw usefully from the general experience of our profession and thus to make a special, perhaps unique, contribution to understanding. To use the image suggested above, we are translators by profession, and this should help us think about the relation between law and other languages in a range of contexts.

As I have already suggested, and argued at length elsewhere, the activity of translation is an art that can never achieve its goals without distortion, for the new text always adds meaning to the original, removes meaning from it, and in doing so distorts the whole.<sup>6</sup> Yet translation is

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<sup>6</sup> See *Justice as Translation*, above n. 5.



necessary; all interpretation is a species of this art, and interpretation is necessary not only to the law, but to all social life. As we saw in the insanity case, there is simply no way that the psychiatrist can speak directly to the legal questions he is ultimately asked to address, yet it would be deeply wrong to say that he has nothing to contribute.<sup>7</sup> The question for the law is how to make possible an effective translation between these systems of discourse and human action, with some real awareness of the inherent distortions in what it does.

As the insanity case indicates, this effort often presents an immensely difficult and interesting problem, since statements cannot in fact simply be lifted from one language, and from the social and cultural context in which they function, and dropped into another. There is always real distortion. Yet it is also obviously important that the law must be able to find a way to benefit and learn from other disciplines, other professions, other systems of thought, such as those listed earlier. What is required in all of these cases, and many more, is that the lawyer, and the judge too, learn something of the language in question, understand at least roughly its purposes and limits, and thus become aware of the gap between those and the purposes and limits of the law—the gap it is his task to address in the compositions he creates. All of this is necessary to the task of translation I describe, with its special interests and challenges.

## 2.4 Tension

A second, more complex point emerges from the insanity example. We see here that each system of thought and language – whether an academic discipline, a profession or informal vernacular – has its own terms, its own structure, its own purposes, its own social and cultural context. Thus the psychiatric profession exists to heal or cure or make better, and its central concerns are with the identification of the mental difficulty and with assessing modes of treatment. The law, as we have seen, has as its central concern justice, and in the insanity case its task is to find a way to identify those whom it would be unjust to punish.

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<sup>7</sup> It should be plain from what was said about the insanity case that one cannot, as a certain social-science mentality might propose, ask experts simply to testify to the ‘facts’, as though that could be done in a language-independent way, perfectly transparent and perfectly translatable to another system of thought and expression. Even where the two languages have used the same or similar words (mental disease, for example), the words have different meanings in the intellectual and social activities represented by the two disciplines, here ‘healing’ and ‘punishing’, serving distinct goals, there ‘health’ and ‘justice’.

As an actor in his own field, the psychiatrist is engaged in trying first to interpret the patient, what he says and feels and thinks, and then to establish a relationship with him that will help that person come to greater health and understanding, whether by talk therapy or drugs or behavioral modification. The actors in the legal field are interpreters too, but they work with different material. They are always trying to interpret prior authoritative texts – whether constitutions, statutes, regulations, contracts or some other form – in the context of a particular set of facts, or perhaps a more generally recurring set of facts. Here the text whose interpretation shapes the lawyer's basic task is the statute defining the insanity defense, in the terms quoted earlier.

When they meet in the courtroom, the lawyer and the psychiatrist constantly face two tensions: the tension between the language of their profession and the human reality with which it deals, and the tension between psychiatry and law, tensions that call upon both, but especially the lawyer, to be a translator.

### **3 Disciplinary imperialism: law and economics**

I have so far suggested that the art that is required when one seeks to connect the law and another discipline is a form of translation. This is an art that can never be performed perfectly, as I say, for it always changes what it uses, but it must nonetheless be performed if the law is to learn anything from other fields and systems of discourse and put its learning to use. One of the appealing aspects of this vision of legal work is that it resists the idea that any one language is to be treated as having exclusive and automatic authority; rather, it invites the lawyer, and the law, to establish productive relations among many ways of thinking and talking, of imagining the world and acting within it. The law is in this way open to other worlds of meaning and thought. This fact is an important intellectual merit, for it works as a way of limiting the claims of the institution of law, which as an instrument of the state always has a tendency towards univocal authoritarianism, insisting instead on the boundedness of law, and of all human thought. It is a way of seeking to create and acknowledge a radical many-voicedness in human affairs. It is also a political merit, for it opens the law to other ways of speaking-, subjecting it to wider cultural and political processes. It even has built into it a principle of humility, for we always know that our ways of speaking are not the only ones.

It is possible, however, to think of the relation between discourses in different ways, and I wish to sketch out two of those briefly in what follows, for they both appear in contemporary legal studies.

The first of the two modes I have in mind is a form of imperialism rather than translation, namely an effort to insist that everything of value can be done in one language to the exclusion of all others. This could in principle

be done with any language, including the law, but has in my experience been done most fully and energetically in the field known as law and economics. I will accordingly take that as my example in the present section.

### 3.1 Authority

I should say at the outset that it is perfectly possible for the law to make use of economics, as it does with other fields, in the way I have been describing above. On this view, the law would turn to an economist - whenever an economic question arose in the law - for example, when the legislature protects against predatory or unfair pricing, or against combinations in restraint of trade with the hope and expectation that he might have something helpful to say. But we would naturally expect that conversation to take place across exactly the kinds of barriers that we have seen with respect to psychiatry, since the mission and function of law are entirely different from those of economics. Economics is concerned with the description and prediction of certain forms of behavior, which it typically evaluates in terms of what it calls efficiency. Law is concerned with justice, a fundamentally different matter, especially since a crucial part of what the law means by justice is not simply a measuring stick by which to evaluate outcomes, but, of at least equal importance, the complex set of relations among legal actors defined by our legal institutions.

For the central idea of law in our constitutional system is the separation and distribution of power among different official actors, and private citizens as well. Thus the federal legislature has certain powers, the state legislatures others; the various judicial offices have their respective jurisdictions, which they can not exceed; agencies that are the creature of legislation likewise have their zones of authority; the individual citizen too has rights and competences of his own.

This means that when, in any given case, lawyers turn to the law, they ask a certain set of questions: What legal actors speak with authority to the case before them, and in what texts they do so; how those texts should be interpreted, in the light of all the other texts shown to be relevant; and to what degree the judgment reflected in them should in fact be accorded authority, and hence deference, and why? In briefest outline, the process of legal analysis is one of identifying the texts that speak with authority to the case, interpreting them and deciding what degree of deference is due to them: all issues on which we can expect the lawyers to argue vigorously from the perspective of their clients.

Economics can do none of this. It cannot identify or interpret legal texts; it has no way of respecting the authority of judgments made by other agencies or people, which is the principle at the heart of all legal institutions; and it certainly cannot speak the language of the law. What it can do is speak

to economic questions, addressing them in ways that serve the purposes of economics, not the law. When it does so, the law must face the familiar gap and tension between languages I describe above. The people of the law will have to bring what they can from the other language into their world, where they will use it in their fundamental activity of defining and interpreting the authority of legal speakers. This way of connecting law and economics, that is, would be an instance of the kind of work I have been talking about from the beginning.

### **3.2 Erasure**

But all too often what is called law and economics does not seem to work in this way. Rather, its tendency is to focus upon questions of policy abstracted from the network of texts and traditions and understandings by which the law works, and thus to disregard or erase the whole discourse I have described, the whole structure of legal thought.

Beyond certain clearly factual issues within its domain, the only question that law and economics can actually address is: What is the right outcome or rule under its own theory of efficiency? This is fundamentally a question of policy, in this context divorced from law, and invoking a normative theory with its own questionable premises and methods. Economics cannot do what law does, which is to serve as an arena in which many languages can speak and be heard and interact, as a center of translation.

The analysis typical of law and economics does not seek to inform the law, but to erase it by reducing legal judgment to the application of a single way of imagining the world and acting within it – a way that has no place for the distribution of authority among different agencies, no place for deference to the judgments of others, no place for the arts of interpretation and translation. What is more, the proposed way of doing law entirely lacks the democratic authority that law itself has; for unlike law, what is claimed to be authoritative here, namely a certain theory of human motivation and interaction, lacks the basis in democratic politics upon which the law itself systematically rests.

At least in this extreme form, the law and economics is not really interdisciplinary work in my sense at all, for it does not seek the kind of translator's cross-understanding that characterizes such work – the establishment of a relation between systems of thought in which each may learn from the other – but for the erasure of everything that is different from itself. It seems often to be assumed that this field has nothing to learn from history or philosophy or literature or engineering or anthropology or natural science or literature or any other field, including law. It is taken to be a complete and adequate system of thought, despite the fact that one simply

cannot do what the law does in this language. The results are not only intellectually but politically disastrous.<sup>8</sup>

## 4 Comparing modes of thought and expression: law and literature

### 4.1 Activity of mind

I wish to draw attention here to another form of interdisciplinary work, which takes the form neither of translation nor imperialistic erasure, but works by the comparison of forms of thought and speech, or what I often call languages. It happens to be the form of interdisciplinary work that has most engaged me, especially in my work on law and literature, upon which I shall draw in what follows.

The idea of this kind of work, as I imagine it, is not to look to another field for propositions or ‘findings’ about the world (or for ‘methods’ that might be borrowed<sup>9</sup>), nor to argue for the desirability of one rule over another, nor indeed to produce any material the law might use as a source of authority, but rather to find a way of thinking about the activities of mind and language in which lawyers and judges characteristically engage, the activities that define both legal education and the field of law itself.

The hope is not to inform the law, then, so much as to inform us, as lawyers and judges, about the law, about what we do when we think and talk as lawyers, so that we may learn to do these things more effectively and with greater intellectual and ethical awareness. This kind of work does not have the purpose, or the potential good effect, of more usual interdisciplinary work, which does seek to provide the law and lawyers with information they can use; but it does not have the characteristic problems of that kind of work either, for the very reason that it is not engaged in the effort to carry propositions about the world from one language to another. Instead, as I say above, the method of this work is to compare the activities of mind and language that are characteristic of law with others, with the object of making us more fully aware of what we do and enabling us to judge what we do, and to do what we do, more fully and intelligently.

In this kind of work we look at law itself not as the formation of policy judgments, nor as consisting of a set of rules that are more or less

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<sup>8</sup> For more on this topic, see chapter three of my *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago 1994) and the interview published in 105 *University of Michigan Law Review* 1403 (2007).

<sup>9</sup> For more on this point, see my ‘Law and Literature: No Manifesto,’ in *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press 2001) 52-72.

complete and self-interpreting, but as an activity of mind and expression. From this perspective the rules of law, and the various texts in which they are articulated – from statutes to judicial opinions to contracts and regulations – are the primary materials for this activity of mind and expression: the activity that is the center of what lawyers do, and what law school teaches. Similarly, the law is not imagined as a set of existing institutions that can simply be described and evaluated, as if they exist always the same, for they are themselves constantly being created and recreated by judges and lawyers in the way in which they think and argue.

Two central questions for the lawyer and law student from this perspective are present in every moment of legal thought: What are these activities of mind and language? And: How can I master them? A third quickly follows: What does it mean, for me and for the world, that I have committed by mind and imagination to life on these terms? How, that is, do I evaluate the language of the law, the practices by which it lives, both as a social matter – Is this good for our world? – and as an individual one: Is it good for me, as an independent mind and person concerned with the ethical significance of what I do?

The aim of the sort of comparison I have in mind, then, is to study the activities that define the field of legal thought and expression partly from the outside, by placing pieces or instances of legal discourse next to others, all as a way of seeing more fully what law is and what it might become. This is of value not simply as an academic matter but as a way of learning to practice law better, whether as lawyer or judge, and to teach it better too. One does not look to literature, say, for statements about poverty or gender discrimination or the concentration of wealth or the incidence of taxation for material to cite in a lawyer's brief or judge's opinion, but for something quite different: for a ground of comparison that may elucidate what we do as lawyers and open it up to judgment.

#### 4.2 Thoughtful experience

By what I say here I do not mean anything especially odd or arcane, but to draw on an experience that is I think common among lawyers, which was in fact the premise of my early book, *The Legal Imagination*.<sup>10</sup> When I left law school, my sense was that I and my law school classmates had learned, reasonably well, a complex way of thinking and talking a language and a way of using it, which we called "thinking like a lawyer." But we did not have a good way of thinking *about* what we had learned, and how it might be understood and improved. What exactly are the forms of thought and expression that characterize the lawyer's life? What do they mean, for the lawyer, for the client, for society? How might they be improved, either in the

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<sup>10</sup> J.B. White, *The Legal Imagination*, above n. 3.

course of particular performances or in a more radical way? For students in law school, the question can have a somewhat threatening cast: What does it mean for me to learn these practices of mind, to make them part of myself? Who do I become when I become a lawyer?

My premise was that what the lawyer has learned is not just a form of knowledge that can be expressed in statements about the world (“The law on this point is as follows”) but, much more interestingly and importantly, a capacity for thought and argument that will enable him or her to represent a client in a case that is different from any theretofore decided – as almost every case is, once you think about it hard enough. A legal education, that is, offers a capacity both for using legal language to think and argue well in new situations and for seeing what is new in a situation in the first place. The language of the law does not just flow through the mind of the lawyer, printing itself out in what he says or writes; it is the material of the lawyer’s art, always transformed, for good or ill, by the way his mind works with it and upon it.

The lawyer is at the center a writer and speaker, the composer of written and oral texts, and no question is more important to him than what excellence he can attain in this art, and how. This art of composition, of language use, is what we practice and what we teach; it is the central activity of the lawyer-present whenever the lawyer thinks about any professional question at all, whether of law or fact. It is crucial to our professional success that we learn how to write and speak, and sometimes transform, this language in compositions of our own, and that we do so with power and originality. It is crucial to our ethical success that we learn how to do this with honesty and decency, and out of a proper understanding of ourselves, of other people, and the situation we share.

How are we to understand and learn these things? That was and still is my question. It was obvious to me that little could be said about this in a prescriptive language of instruction: Do this, and then that. An art cannot be reduced to a how-to manual or a green-and-black book entitled *Legal Expression for Dummies*. The lawyer or judge is a writer, a speaker, a composer of art forms. How are we to learn to understand and criticize, and perhaps to transform, the conventions by which he does this, by which we do this?

One might try simply to examine these questions, in the manner say of an analytic philosopher, but I did not see how that could get us very far. What is the ground upon which we would stand when we did that? What was needed, I thought, was thoughtful experience of the work of others who are engaged in work that is at once similar and different, a set of comparisons that might give us a new sense of the realities and possibilities of legal expression to which we were devoting ourselves and our minds.

In *The Legal Imagination* the comparisons I suggest range very widely, from the students' own experience of the ways of thinking and talking they have learned in the course of their ordinary lives, to high literature (as in the work of Jane Austen and Homer and Malory) and philosophy (as in Plato and Aristotle and Wittgenstein) and history (as in Thucydides and Gibbon and Parkman) and sociology (as in Myrdal), and 'cost-benefit analysis', as in the Report of the Third London Airport Commission. It also includes such odd things as selections from Emily Post's *Etiquette*, the diary of Robert Scott, Dick Gregory's autobiography, Fowler's *Modern English Usage*, The Rules for Prisons in Wisconsin, Colorado, and Texas, the Constitution of Brook Farm, and so on and on. I do not look to any of these texts for statements about the world that can be used in the law, or for reforming it, but for performances with which we can compare our own.

How does the process of comparison work? Partly by just holding one text or language against another and asking what emerges, and what we think about it, but mainly in the service of a large set of themes or questions, of which the following are samples.

- First a general question: How can you use legal language without having it take over your mind, turning you into a caricature of a lawyer? Can you find a way to use the language and recognize what it leaves out? Is it helpful here to think of the way literary writers do these things, by metaphor, ambiguity and irony? Is the secret to all good writing to learn how to talk two ways at once?
- In any one case the lawyer will have conversations with many people: his client, the lawyer on the other side, the judge, the jury, to pick obvious ones. How do these conversations differ from each other, in purpose, role, style? How does the law regulate what can be said and how it can be said, and what can you do with and to those regulations? How can you speak well in all of these conversations? What is the art you are called upon to exercise here?
- Often a statute is the central text governing a case. How does a statute typically affect, for good or ill, the conversation by which it is interpreted and applied? What is the art required of the writer of a statute: managing the thought and conversation of others? Can you draw upon other instances of that art, in literature or life, to improve your own performance?
- How does the language of the law talk about the people whose conduct and lives it regulates: as caricatures, empty stick figures, or as the full and complex beings we know they are? Think here of the insanity defense already discussed, and the problems presented by the words of a statute that speaks, say, in terms of 'mental disease or defect.' How would you draft a statute dealing with this defense? Or think of the sentencing judgment: how should that be performed,



how regulated? Can you draw upon literature that has as its object the training of your capacity to form judgments about others (say Austen's *Pride and Prejudice*) to assist you? Or think of the ways in which the law uses the language of race to talk about people: Can you imagine doing that in a satisfactory way?

- Law is reason at work in the world, we learn in law school. But what kind of reasoning is it? How, for example, do you come to the conclusion that a particular analysis by a lawyer, or opinion written by a judge, is a good one? Where do you find a language in which to think about excellence in reasoning? Is it useful to look to other forms of writing here, say Plato's image of the cave or The Report of the Third London Airport Commission? This raises the question of legal criticism: how is it to proceed?
- In any real case, narrative is an essential part of what the lawyer does. What kinds of narrative does he tell, how do they move and work? How do they resemble or differ from other types of narrative, in literature and in life? The lawyer not only tells a story, he or she produces a legal analysis of it, and these are very different modes of thought and imagination: What relation can you create, or can you see others creating, between them?

And so on.

As these questions suggest, *The Legal Imagination* is a text for a course in writing (and speaking) as a lawyer. The students are asked to write a paper each week, bringing their attention to some difficulty or problem in legal language and expression. Often the assignment asks them to think about a situation in the world both as it is talked about by lawyers or judges and as it is talked about by others, including literary and philosophical and historical writers, and including also the students themselves in their ordinary lives. The idea of the assignment is always to put them in the position of the one whose fate, whose curse or privilege, it is to write and speak the language of the law, and see what they can do with it. The question is: How can they do it well, and 'well' not only in the sense suggested by a word like 'success', but well in a deeper way, at once ethical and political. Can they find a way to use legal language that will enable them to respect themselves and the profession they have chosen? The main way these questions are presented is through comparison, between legal language and other languages, legal thought and other forms of thought.

This is not exactly a 'law and literature' book, then, but a book about law itself, about how lawyers think and express themselves, asking this question always by comparison with other modes of thought and expression, and always from the point of view of one learning to be a lawyer and anxious about what this might prove to mean. This kind of work is not imperialistic, like law and economics, nor does it involve translating

propositions from one language to another, as happens in expert testimony, but works rather by a complex process of comparison that is meant both to suggest certain questions and to make possible fresh responses to them. In engaging in this comparison I use literature and various humanistic texts because that is what I know; but in teaching this course I would urge the students to use anything they knew, from music to mathematics to journalism to physical practices like gymnastics or horse-breaking. What I wanted was for them to have active in their minds aspects of themselves, capacities for functioning, by which they could test what they were learning as law students and which, in turn, what they learned in the law might affect, both in understanding and performance.

The ultimate idea of *The Legal Imagination* is that the law can be a wonderful field of life, for the practitioner and for the world, if we can make it so; if, that is, we do not learn it in dead and imitative ways but as an art of language and human relations. It has much to teach, as well as much to learn, and in my own writing I have tried to show how that works too.<sup>11</sup>

### 4.3 Recreated and redefined

The process of comparison that is at the heart of *The Legal Imagination* can work not only in a text that is composed for a class of law students but in a book of a different kind, for a more general reader. I can use as my example my own *Acts of Hope: The Creation of Authority in Law and Literature*,<sup>12</sup> which takes as its subject the central feature of legal thought I mention briefly above, namely the identification and interpretation of authoritative texts. My question is whether we can learn something about what lawyers and judges do, and how they can do it well, from other moments in life and literature in which a speaker claims authority for some text – or object or institution or practice – that is external to him. The instances I analyze here include Socrates's invocation (in the *Crito*) of the authority of the Nomoi of Athens, which he assumes forbid his escape after conviction; the claims made by Shakespeare's *Richard II* for the authority of the crown, which he calls upon to condemn resistance to his own unlawful acts; Richard Hooker's claims for the authority of the English church, against the claims of Roman Catholic and Puritan alike that it is heretical and false, in his *Ecclesiastical Polity*; Matthew Hale's way of thinking about the authority of prior law, not

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<sup>11</sup> The mode of analysis I work out in *When Words Lose Their Meaning* is in fact derived from my experience of law. In this book I bring it first to the *Iliad*, then Thucydides, then Plato, then a set of literary texts in English, and only at the end bring it back to the law, hoping that it derives new force and meaning from the uses that precede it.

<sup>12</sup> J.B. White, *Acts of Hope: The Creation of Authority in Law and Literature* (Chicago: University of Chicago Press 1994).

only over the judiciary but over the legislature as well, in his little-known but wonderful essay *On the Amendment of Lawes*; the authority that Jane Austen first gives to the language and culture of Mansfield Park, in her novel of that name, and then undermines and transforms; Emily Dickinson's struggle throughout her verse to transform the authority of sentimental and empty verse forms expected of poets of her era, especially of women; the way in which the plurality opinion in *Planned Parenthood v. Casey* defines and redefines the authority of *Roe v. Wade*; Abraham Lincoln's claims for the authority of the Union in his second inaugural address, and Nelson Mandela's comparable claims for the authority of the African National Congress, and his own acts of sabotage on their behalf, in the speech he gave from the dock after conviction.

These instances of the practices of mind and language by which a person claims authority for something external to himself, or resists or transforms that authority, demonstrate something remarkable. This is the element of creation I refer to in the subtitle of *Acts of Hope* and it works this way. When Richard, say, invokes the authority of the crown he does not simply point to the circlet of gold, or gesture towards what it has meant, but in speech after speech defines that object by an act of literary and intellectual creation, in what could be called a poetics of absolute monarchy. When Lincoln invokes the authority of the Union, it is not the authority of some object in the world to which he can simply point, but the authority of the Union that is created in his text. Similarly with Mandela and the authority of the ANC, Hale and the authority of prior law, Hooker and the authority of the church, *Casey* and the authority of *Roe*: In each of these instances it is the authority of the object not simply as seen or pointed to, but as recreated and redefined in the text itself that is invoked. To see this of course defines an enormous and important task for one who wishes, as lawyers and judges constantly do, to invoke an authority external to themselves; to do this well they must create it, and do so as an object deserving the authority that is claimed for it. This is a challenge worthy of any mind.

What is in fact ultimately authoritative in all these cases is in the end not the object or text itself, but the process by which it and its authority are understood and defended, the act and art of the creation of authority itself. What Richard is really saying is that if you support the monarchy you will have the benefit of his way of imagining the world, of speaking and thinking and being; if you reject his claim, all of that language will disappear, to be replaced by what? After Henry has seized the crown from Richard and claimed to be king, both in this play and the two parts of *Henry IV* that follow it, he faces what this means, for he has no language at all in which to describe and defend the 'crown' he claims or otherwise to justify his rule. Likewise, Lincoln is saying: Accept my claims and you will have this way of thinking about our nation and its history; reject them and you will not. Each

of the people studied here, in their own particular context and with their own particular needs and values, is engaged in the creation of authority, the creation of the authority of that for which they argue, an authority that is ultimately defined in their own processes of mind and language and character.

This art can obviously be performed well or badly. In assembling what seem to me excellent exemplars in a range of cases, I hope to present a challenge and an opportunity to the modern lawyer and judge, for they too must recreate in their prose the object for which authority is claimed, and it should be a real question for them how they can do this well.

## **5 Final remarks**

My aim in this paper has been to identify three different sorts of interdisciplinary work and to suggest that it is important, in many contexts, to keep clear the differences among them. First, the kind of translation from one discourse to another required in the insanity case, and in any case in which an expert testifies on a legal matter, indeed in any case in which one wishes to transfer findings or methods from one field to another. Second, the sort of imperialism, or anti-translation, which results when the proponents of one way of talking and thinking attempt to use it to perform functions it cannot perform and to erase the field they seek to take over, as I suggest is the tendency of much 'law and economics'. And finally, the comparison of modes of thought and expression, not to create propositions that another field can use, not to engage in imperialistic expansion, but as a way of making conscious, and hence the object of thought and attention, the modes of thought and expression that define the law we have learned, and practice and teach.