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Critical Legal Theory

Mitchel Lasser (Moderator),
Duncan Kennedy, David Kennedy,
Nathaniel Berman (Discussants), *Norman Silber and*
Lawrence Kessler (Commentators)

Mitchel Lasser:

First, I would just like to thank Susan Tiefenbrun for inviting us all to take part in this terrific conference. I would also like to take a couple of minutes to explain what, after lengthy negotiations, we've decided to do and, furthermore, how we're going to try to do it.

This panel is called "Law, Literary Theory, and Critical Legal Theory: A Forum." What we've decided to do is simply to have a conversation among a few people who are engaged in some project that seeks to bring together the three elements of the triad: law, literary theory, and critical legal theory. The subject of the conversation really boils down to this: What should be the relation between the three elements of the triad, bearing in mind that the meaning of any of the three elements is quite up for grabs?

In order to highlight the similarities, nuances, and differences between us on these issues of so-called interdisciplinary practice, and in order to promote a conversational approach, we've decided to structure the debate in the following manner. The discussion will move forward in three phases, each of which will begin with a question that I'll throw out and to which we'll each have about five minutes to respond. We'll then move on to the next question. After the last question, we'll pass the buck to our two respondents who can respond in whatever way they'd like.

So what are the three questions? The first is a set-up question that is intentionally problematic: Insofar as each of us is engaged in some project that brings some "other" discipline to the table in the performance of our legal scholarship, what "non-legal" works—be they drawn from "lit theory," literature, or the visual arts—are, or have been, or should be the most important to you in the furtherance of that project?

Having hopefully gotten some field of references from the answers to this first question, the second question will be: What is or should be the relation between that "other" discipline (whether it's literary theory, literature or the visual arts) and "legal" scholarship?

The third question will then seek to refine the discussion. If, as I suspect, we will each tend to answer the second question by propounding some version of what might be called "counterdisciplinarity" or "antidisciplinarity" (as opposed to "interdisciplinarity"), what do these slogans really mean? The ensuing discussion will, I hope, refine our answers and flush out certain subsidiary issues. For example, what is meant by the terms *eclectic borrowing* or *ruthless appropriation*? Furthermore, do you, or should one, feel some sort of responsibility to the projects of the "other" discipline or to the projects or boundaries of our "legal" discipline?

That said, allow me to introduce quickly the three other members of the panel. They are David Kennedy and Duncan Kennedy of the Harvard Law School, and Nathaniel Berman of the Northeastern University School of Law. Our two respondents, both of whom teach here at the Hofstra University School of Law, are Norman Silber and Lawrence Kessler.

Let us begin then with the first question. To reiterate: Insofar as each of us is engaged in some project that brings some "other" discipline to the table in the performance of our legal scholarship, what "nonlegal" works—be they drawn from "lit theory," literature, or the visual arts—are, or have been, or should be the most important to you in the furtherance of that project?

Duncan Kennedy:

Hi! It's nice to be here. The morning session was just riveting.

I thought what I'd do is to talk for five minutes and try to answer the question by beginning with the distinction between policy work and theory work. I do both as a law professor. I teach low-income housing law and policy, and I do quite a bit of work which amounts to trying to figure out what left-wing proposals for changing the legal system ought to be, or how leftists can relate to the American legal system from a point of view of challenge, from a perspective that's to the left of American liberalism, that's more radical than that. For those of you who were at the luncheon, I, too, read *Citizen Tom Paine* in my fifteenth year, and it had a big effect on me.

So that's one kind of work. There's another kind of work which has been going on the left since the beginning of the left, which is the "theory" stuff. This theory stuff in the United States often has a bad name, and seems unbelievably abstruse and irrelevant, and who cares about it? It's all in hopelessly technical language which I'm now going to use absolutely shamelessly on the grounds that I'm going to talk at a conference at NYU on Friday about homelessness, and as far as I'm concerned, this is an occasion for being as "fancy" as you want to be. If you hate theory talk, you're probably just going

to find this discussion intolerable. But in that case, I invite you to the REACH Program's event on homelessness and housing policy at NYU which starts at 11 o'clock in the morning in the NYU auditorium.

So: Theory. What's it got to do with anything? From the beginning, a left-wing project in the area of legal theory seemed to me to mean something not too far from what Robin West was describing this morning when talking about the contribution of Robert Cover. In the sixties and seventies, the left legal academics and leftists interested in legal theory were overwhelmingly preoccupied with demonstrating that the right legal answer to legal questions was on the side of the oppressed, so that the Constitution showed that the people whose struggles you endorsed had constitutional rights to all the things that you thought they ought to have. At the lower levels of legal theory, this meant adhering to the conviction that the common law embodied exactly our most cherished political ideals, and that when judges didn't go along with this vision, they were doing something that was in violation of the norms of the legal order.

As opposed to this approach, people like me, who thought of themselves as radical intellectuals in that period (and still today), thought that it was a good idea—and would be ultimately a politically correct and politically desirable left-wing thing to do—not to engage in that activity alone. I did my share and I still do my share of engaging in the activity of arguing that the correct meaning of the legal materials is that the left should win, and I believe it is often the case that the correct interpretation of the legal materials is that the left should win.

But we also wanted to do something else, which was to criticize the effect of necessity that people underwent or experienced when confronted with an argument that claimed that there was a correct legal outcome. In other words, as opposed to going on arguing just that the left was legally correct and that's why we should win every case, we wanted to attack legality itself, that is, to attack the idea of "right answers" by trying to open up a consciousness of the multiplicity of possible interpretations. The idea was partly to show how much of the actual law in force was the product of political projects either of the right or of the moderate left, so that we could then argue for more radical projects, not on the grounds that they were legally correct, but on the grounds that they were right and that if people wanted to do them, the fact that the law didn't do them was no criticism.

So the idea was actually to attack legal determinacy and the experience of being bound that classic American civil libertarian and civil rights rhetoric emphasize, and to push for the plurality of plausible interpretations of the law and for the presence of nonlegal or extralegal or prelegal political motivations in judicial lawmaking. Earl Warren was a liberal. He wasn't just a judge who was doing what the Equal Protection Clause required; he was putting a legal/political ideology into effect as positive law.

So what seemed to be useful in order to engage in this project? I myself was just a complete pack rat, cannibalizing, you know, like an abandoned car pulled apart in no time flat. My view of literary theory, Marxist theory, or structuralist

theory was that it was an abandoned car, and I was a kid in the neighborhood, and there was no reason why I shouldn't steal the hubcaps, use a hammer on them, and turn them into Art Moderne dinner plates if I wanted to.

The idea was just to pull pieces out of the theory of the people who seemed most useful to cannibalize and put them to work to support the proposition that law was more like a language in which you could say a lot of different things than it was like the Code of Hammurabi telling you what to do to a thief. Legal discourse is more like a language in which you could say a lot of things, but not just anything.

So what was useful? Well, I actually found useful a lot of things inside the left or progressive legal tradition in legal realism, but also quite a few things that are in some sense part of literary theory. For instance, I think that anyone interested in doing legal theory should begin by reading Saussure's *Course on General Linguistics*, the message of which is the distinction between a language and a speech or sentence uttered in that language. That's the first basic message, which insists that we think about legal talk as a language inside a language. In other words, saying it in English is restrictive because English is a particular language of a particular vocabulary. Saying it in legal English means that there is another language or another set of restrictions on speech when you are doing legal discourse.

So what does that mean? Here is an example of what it can mean, borrowing directly from Saussure. It's the idea that when lawyers and judges produce legal arguments, there are a very limited number of conventional arguments that they use over and over again.¹ For example, if you adopt this rule, no one will know where they stand; or this rule is much too rigid; or this rule makes people responsible without fault; or if between two people one has to pay, the person who caused the injury should pay even if she isn't at fault. These are typical, recurring legal arguments. There are maybe a thousand of them used over and over again. They're like the words of a language that can be combined with other arguments that are also words in the language of law to produce the equivalent of a sentence in English that is a complete and formally correct legal argument in law.

That emphasis on legal discourse as a language with words that are arguments defined partly in relationship to each other turned out, I think, to be incredibly useful in understanding how it could be the case that very right-wing and very left-wing positions can be taken in a way that's apparently fully consistent with interpreting the Constitution in good faith. That is, the question is how can good faith interpreters turn the Constitution into a right-wing document and also into a moderately progressive document? The theoretical borrowing had the purpose of demonstrating this kind of interpretive possibility and was, I think, useful to that extent.

David Kennedy:

I would like to respond to Mitch's question by talking about some dilemmas that arise in trying to carry out the interdisciplinary projects Duncan proposes. The first difficulty arises from the fact that the law is itself ravenously interdisciplinary. People who wish to enlist interdisciplinarity in the project of critical writing about law face the difficulty that there are a lot of texts out there, lots of books, ideas, disciplines that would or ought or should or might be relevant. To pick up on Duncan's metaphor, there are a lot of abandoned cars lying around. And most of them have already been picked pretty clean by interdisciplinary borrowers committed to restablizing rather than criticizing law. As a result, saying you favor interdisciplinarity is not enough—we need to speak about the strategy for specific borrowings in service of particular projects.

Perhaps one can simply revisit the old junkyards and reenlist sociology or literary theory or psychology in a critical rather than a reconstructive way. And it is nicely liberating to think that there are no classic texts one needs to read. One mustn't feel demobilized by not having (yet) read Hegel or Rousseau or Derrida or whomever. It's abandoned automobiles all the way down. But we might also think strategically about which abandoned car to approach, which hubcap to take, whether the fender might also be useful, and so on. Some texts—Wittgenstein, for example—have been cannibalized by a variety of both critical and reconstructive legal projects.

In my own field of international law or international economic policy it has seemed to work to take a bit of this and a bit of that. One could argue about what Adam Smith or Keynes really meant, but it may be better simply to juxtapose a few sociological hubcaps with some bumpers from postcolonialism. In general, I am skeptical that any one interdisciplinary key will unlock the field. But this creates a problem in interdisciplinary forums when you are asked what texts are most important—as if the work were being done by the texts you scavenge rather than by your own strategies of reading and intervening in your own discipline. Talking about interdisciplinarity can be a way of not talking about one's actual scholarly projects and objectives. For scavengers, there is also the anxiety of ignorance: "If I name a text, then I'll have to remember what was actually in it, and perhaps I don't remember; and I'm just a lawyer and not a philosopher, and so on."

And then there is the rat hole problem—if you say the name of your cross-disciplinary guru, you can easily disappear into the guru's own fifteen minutes of fame. If you don't pick a classic text but rather something lying around in today's academy, you might make the error of picking whatever you studied as an undergraduate. If you studied literary theory in the eighties, for example, and picked Derrida, by the time you write a law review article applying Derrida's fourth insight to your field's eighth dilemma, it's too late. You're the Derrida guy, and we all know what his problem was, and you've got it, too.

Moreover, the strategy of interdisciplinary text selection looks somewhat

different in teaching than in writing. In the classroom, in my experience, you don't want Hegel, but you don't want Dale Carnegie either. You want a middle-level text, preferably short and entertaining. The more theoretical, the shorter, to add the powerful feeling that comes with saying "We've now read three paragraphs of Wittgenstein and will discuss how he would have us rethink all of constitutional law." Two short pieces of this sort that I've used are cuts from Clausewitz, describing war as a language, and an essay by Roland Barthes on the Eiffel Tower. Reading both texts can get students asking new questions—what if I saw the United Nations like Barthes sees the Eiffel Tower?

Mitchel Lasser:

I really like this hubcap image, so I think I'll run with it. The problem that I face is what to do if in some way, shape, or form you have a claim of some sort on the car that's being cannibalized. In my case, the issue is that I teach in a law school but that I have a degree in comparative literature. I'm therefore constantly faced with the question: How am I supposed to react to the kids on the block taking the hubcaps of an intellectual automobile that I'm in some way deeply implicated in? The answer is that I actually feel fine about it, primarily because I'm sitting on both sides of the disciplinary fence. I don't actually feel, or believe in, the disciplinary divide; it's not something that I take seriously, despite the fact there are people who seem to have a lot of stock in that divide's supposed existence.

Moving to the pedagogical issue: Since my place on the divide depends on the context that I'm in, I'm going to assume that this is a predominantly legal context, and that I'm faced with the questions, "What are you taking from the 'other' discipline, and how are you using it?" The answer would have to be one that might be expected from one of David's old students. There's no pantheon of "literary" or "theoretical" texts to which I would claim adherence, if only for defensive reasons, precisely in order to avoid the response, "Clearly this person is an adherent of so and so, and given so and so's problems, we can just relegate this person to the side."

I would claim adherence, however, to a certain pedagogical method, a certain mode of reading, a certain strategy toward approaching texts that I was first exposed to on the "lit" side. I actually have quite a bit of faith in this mode of reading which, as I understood it, worked on the basic premise that one should engage in what we used to call, quite simply, "close reading." I took this to mean that one should pay particular attention to the way in which a text talks about itself. The fundamental notion is that a text—whatever the text may be—is composed of a series of signs that tell you something not only about the nature of the relationship between the text's constitutive elements, but also about why the text is put together the way that it is. Those signs represent claims of one kind or another; and these claims need to be taken seriously, and therefore need to be evaluated, at the very least, on their own terms.

This approach to reading is one that I totally adhere to in both the "lit" and the "law" contexts. If I had to list the pantheon of canonical "lit theory" texts that were always introduced as those that called for such "close reading," engaged in it, and served as the pedagogical models that gave students the means to arrive at the vantage point of the "close read," the series of names would start with Saussure, go through such structuralist texts as Genette,² Jakobson³ or Barthes,⁴ and continue through De Manian deconstruction.⁵

If this discussion were occurring somewhere else, and if I were asked the same question in a predominantly "lit" context, I would tell the same story and give the same answer. The only difference would be that I would construct a different pantheon, this time a "legal" one, and produce a series of names that would begin this time with Hohfeld.⁶ That said, I think that the form and substance of the answer would be identical.

Nathaniel Berman:

I want to pursue the notion of the "strategic" use of theory in order to contrast "counterdisciplinarity" with "interdisciplinarity." Many critical alleged writers have deployed theoretical techniques from other disciplines' "master thinkers" to crack the unitary facade of their own disciplines. The counterdisciplinary strategy is quite different from the interdisciplinary aspiration to establish some kind of "dialogue" across disciplines or to "apply" the insights of one to the other. I will describe a specific instance of this phenomenon: the deployment of "theory" by those engaged in the new critical rereading of international legal history.

If we wanted to categorize the wide variety of historical projects now being pursued in light of their relation to "theory," we could divide them in two: those devoted to the "pluralization of international legal history" and those focused on the "identity-constitutive" role of international law. The "pluralization" projects reject linear progress narratives and focus on disparate and conflictual genealogical lines. The mainstream account of international legal history is the story, if not of a smooth organic development, then of a limited set of dramas with a predetermined dénouement. This telling often begins with the "Grotian moment" of the seventeenth century, in which a small number of European states recognized each other as sovereign equals. It then describes the subsequent challenges to this restricted "international community" and asserts that the "community" has gradually become more and more inclusive.

The two most important sites from which the critique of this linear narrative has emerged have been those of postcoloniality and feminism. Those who describe the past in terms of a genealogy of postcoloniality displace the origin of the sovereignty focus of modern international law from the seventeenth century to the sixteenth century.⁷ They argue that modern international law's obsession with sovereignty may be traced as much to that earlier period of colonial encounter as to the later period of intra-European conflict. The role of intra-

European developments in the evolution of sovereignty are not necessarily dismissed, but an alternative chronology, focusing on the role of colonial crises in the periodic reconstruction of sovereignty, are given at least equal stature.

Feminist rereadings of international legal history provide another source of "pluralization," advancing very different chronologies than either the Eurocentric or postcolonial tellings.⁸ The vicissitudes of self-determination provide an important site for such rereadings.⁹ Mainstream legal historians usually look at the great moments in the history of self-determination—the post-World War I period, decolonization, and so forth—for their contribution to the linear narrative of ever-greater inclusiveness (limited only by considerations of "stability"). In contrast, feminist historians show the many ways these purported transitional moments form a continuous part of the perennial subordination of women. They also describe women's struggles to create ruptures in that perennial story. Finally, postcolonial feminists demonstrate the dissonance between Eurocentric and postcolonial accounts of the place of women in the international legal system.¹⁰

It should be clear, by now, how the deployment of "theory" has contributed to these genealogical inquiries which presume irreducible conflict between alternative accounts. At the substantive level, these writers draw on postcolonial and feminist theorists to criticize the discipline's triumphalism. At the historiographical level, they deploy Nietzschean or Foucauldian techniques for criticizing its teleological narrative.¹¹ At the level of disciplinary theory, their attack on international law's unitary facade constitutes a kind of "writing against the discipline" in alliance with those anthropologists who advocate "writing against culture."¹² Both reject any understanding of a cultural formation which does not highlight plurality, incompatibility, and power struggle.¹³

The second kind of rereading of international legal history focuses on the "identity-constitutive" role of international law. For example, one of the striking things about the last two decades is the way international law appeared to have absorbed the Third World challenge. The first generation of postcolonial international lawyers seemed to have given up their radicalism and to have been assimilated into the system. This individual assimilation seemed replayed on the state level, in the efforts of the Third World states to perform their identities in conformity with international stage directions. An even more complex dynamic may be found in the way that non-state groups have continually shifted the internal and external constructions of their identity. Such shifts have operated in tandem with shifts in the international projection and valorization of such identities: at various times over the past century, a single group may have presented its identity as a "religion," a "minority," a territorial "people," a transfrontier "nation," an "undeveloped" people, and so forth. Nationalists everywhere perform, transform, and deform these international legal identities in relation to those identities' cultural meetings, legal implications, or tactical consequences.

The main theoretical strategies deployed to pursue these inquiries come from

the reappropriations by postcolonial¹⁴ and feminist writers¹⁵ of Foucauldian and psychoanalytic notions of identity. Critical legal writers often deploy insights such as those of Judith Butler, when she writes that "[t]here is no self prior . . . to its entrance into the conflicted cultural field."¹⁶ Assimilation and resistance to the "international community" are located in the shifting ways in which the subjectivity is constituted in relation to power—power exercised, in part, through international law. This account of "subjectification" means that the focus on the "identity-constitutive" role of international law entails a rejection of reading the history of international law as a simple story of increasing inclusiveness. Like the "pluralization" projects, this focus deploys a counter-disciplinary strategy, fundamentally attacking the liberal triumphalist narrative of linear programs.

Mitchel Lasser:

Now that we have our field of references, let's move on to the second question. What is or should be the relation between "other" disciplines (whether they're literary theory, literature or the visual arts) and our "legal" scholarship?

David Kennedy:

The second question asks, "What does it mean to read law as an art form, or to read law as a cultural or literary form?" Let me describe at least two projects of this sort that have interested me. First, treating laws as literature can often counteract the tendency in many judicial opinions and other fancy legal texts to ally law with famous literary and other cultural phenomena. For example, Shakespeare sums up a lot in legal argument and is actually one of the most cited people for some legal propositions. To my mind, it can be helpful to relate law precisely to low cultural phenomena, to try to see the relationship between styles of argument that are current in law in a given moment and the styles of popular culture and entertainment that exist simultaneously. Doing so can highlight the existence of fashion in law and break the sense of law as an unfolding search for right answers without saying "its all political" or that "its all really done by people to further their motives." This sort of work highlights the elements of desire, of what's "in" and what's "out," which are also part of legal argument and the developments of legal rules and institutions over time.

A second useful way of looking at law as a cultural or literary form is actually exemplified by a very funny article that Nathaniel wrote in which he compares international law to high rather than low culture. He picked an obscure international lawyer from the 1930s who had the unfortunate name of Redslob and compared this fellow to Picasso. In Nathaniel's telling, Redslob and Picasso were actually the same person. They were influenced by the same things; they thought about things in the same way; and there was a great deal of cubism in Redslob's plan for the partition of Upper Silesia. What is interesting here is not

whether Redslob and Picasso were actually the same person or influenced by one another. What is interesting is the way this juxtaposition foregrounds the role of the individual as a culture worker, the producer of legal texts and institutions. His project asks us to ask "What was Redslob's strategy?"

So two reasons to read law as literature would be to highlight the elements of culture and fashion which can't be reduced to either pragmatism or politics and to foreground the importance of particular people with particular projects. My own view is that these two things are utterly interior to law. I don't know what goes on in art history or how a reader of Picasso would understand the relationship to Redslob, and I don't know enough about contemporary cultural studies to have a sense for what they mean by "fashion." I'm sure the very idea of "fashion" has now been critiqued. My own work is completely within the discipline of law and the subdiscipline of international law, in which fashion has hardly been discovered, let alone out of style. My strategic situation is within a discipline that doesn't take itself seriously enough as a discipline, while taking other disciplines far too seriously as disciplines. My own feeling is that we should be paddling the canoe in the other direction, trying to take our own discipline more seriously as a collective project in a particular cultural space, and avoid being deflected from that task by too earnest an interpretation of what's going on in the other field.

Mitchel Lasser:

I don't think we have an argument on the disciplinary issue. I just think that it's trite to say that "law is literature." Obviously, law speaks in language and therefore uses literary media and techniques. Needless to say, the critical work on literary techniques should therefore be brought to bear in the analysis of legal texts. It's equally trite to say that "literature can be read as law." Obviously, literature operates under externally and internally imposed rules, and therefore can be read as "law."

I simply object to the separation of the two disciplines as if they were actually distinct. If you look, for example, at the relation between what literary theorists do and what legal theorists do, I think you'll find that as a matter of fact they do a lot of the same kind of work; in both academic fields, the theoretical problematics and projects are remarkably similar. Just think, for example, of how much is being done in both spheres in the way of cultural studies, postcolonial studies, feminist studies, or gay studies. A lot of the same work is being done by the same kinds of people in the two supposedly distinct disciplines.

The danger, I think, in separating out the two disciplines is that you end up in the frequently recurring and extremely frustrating predicament in which most of us have probably found ourselves on different occasions, usually in the context of assorted "Law and" situations, whether it's "law and literature" courses or *interdisciplinary* conferences. You attend a course or conference as

a "law person," and, after much anticipation, you listen to a "lit person" whose work you've respected for years, have read and reread a thousand times, and have used repeatedly in your own work; and sure enough, this person elegantly sets out some incredibly complex sociolinguistic problematic, but then turns around and tries to "apply law" to the problem. This person, who is usually so wonderfully sophisticated in his or her own "literary" analyses, suddenly appears to have some blind faith that, for example, "legal rules produce determinate solutions" and can therefore be used to resolve intractable linguistic conundrums. It's as if the person has simply forgotten the most basic premises of his "own" field, and plunges headlong into a form of analysis that he would be the first to dismiss if someone were to engage in it in his own, "literary" discipline.

It seems to me that the problem of the disciplinary divide consists largely of a projection of each side's insecurities, desire for, and fear of, the other side. The key, I think, is that the decision to become a lawyer or a "lit person" is a form of social and theoretical positioning of oneself (or of various aspects of oneself) within a constellation of possible moves of Self- (or Selves-) definition. But that initial positioning doesn't end the matter, for another positioning occurs within the lit and legal spheres when one decides, say, whether to become an academic. And once again, within the respective academic spheres, there is the decision about, on the one side, whether to be, to pick a few obvious and unimaginative possibilities, a "new historicist," a "feminist neo-Freudian," or a "De Manian deconstructionist," or on the other, whether to be, for example, a "law and econ" type, a "law and society" type, a "progressive civil libertarian," a "republican tradition" type, or some relatively novel combination thereof.

All I'm getting at is what Duncan might call "nesting," or what a "post-De Manian, post-Freudian deconstructionist" might call—ironically and with a wink—"repetition compulsion." I think that if you know each discipline well enough to know where to look in the "other" discipline, you'll find that your double is always already there, with, needless to say, the possibility of certain variations. So if you're going to go to the "other" discipline in the hope of acquiring some form of "deep" knowledge that you're going to "bring back" and "apply" in your own discipline, I suspect that you're likely to be sorely disappointed, unless, of course, you've simply failed to map out the "other" discipline sufficiently. You may get some rudimentary knowledge of some other field, but usually, when it comes down to the big questions, you'll probably find that at that point, the people have already aligned and positioned themselves within their own disciplines in a manner strikingly similar to the way they have in yours over questions and problematics that end up, once again, remarkably similar to yours.

At that point—at least in the disciplines I know something about, namely "law" and "literature"—I don't think that there is any transfer of knowledge that's going to resolve the big questions that might have sent you running to the other discipline for help in the first place. You are likely to be left with the

same array of possibilities as what you've got in your own discipline.

Nathaniel Berman:

I'd like to describe the article of mine that David mentioned¹⁷ as an example of counterdisciplinary strategy. The juxtaposition of a legal text, doctrine, or writer to a painting or painter may stem from a variety of motivations. Here are the motivations that don't interest me: because painting is viewed as more interesting than law, because a painting is respected more than a legal artifact, because artists are cherished more than lawyers. This evaluation of relative cultural stature may or may not be accurate, but it would be irrelevant to the strategic conception of a counterdisciplinary work. It would simply mean valorizing some other discipline, as Mitchel noted.

In contrast, my motivation in juxtaposing the work of Robert Redslob, a now-obscure French legal writer from the interwar period, to a Picasso painting was precisely its counterintuitiveness. I did not base this exercise on any supposed analogy between law and art, or on the notion that "culture" might provide "context" for law. On the contrary, I was trying to see what kind of surprising insight might emerge from the juxtaposition of specific, dissimilar cultural artifacts. I tried to use this counterintuitive juxtaposition to break the conventional theoretical and pragmatic frameworks in which international legal history is usually analyzed. Rather than seeing the writer's contribution to the perennial search for truth or utility, I imagined him as a historically specific cultural innovator, whose relation to the discipline was one of rupture and reconfiguration.

The painting to which I juxtaposed this legal writer's work was *Les Femmes d'Alger*, of which most of you probably have some image. It is a painting of five figures, probably female (although the history of the painting is intriguingly ambiguous on that point), whose faces appear to be masks, some of Iberian folk art origin and some of African origin. It's also the first painting of Cubism, initiating the distinctive Cubist fragmentation of Renaissance representational space. The key thing about this painting for me was the way Picasso enlisted the energy he perceived in the so-called primitive to break with the conventions of his medium and to initiate the sophisticated technical experimentation that inaugurated Modernism.

This painting could thus be inscribed in several different historical trajectories. It could be inscribed in the trajectory of male fantasies about women, in the trajectory of European fantasies about the "primitive," and so forth. From these perspectives, one might focus on genre history, on the way Picasso deploys these fantasies against convention to establish a new form of high-cultural creativity.

Turning to post-World War I innovators in international law, I reimagined them as cultural figures involved in projects of fantasy, projection, rupture, and reconstruction, which form a series with other Modernist innovators. I

reimagined international legal artifacts as themselves constructing a "Modernist moment," in which new forms of authority were legitimated through the projection and reappropriation of a new set of fantasies about the "primitive." Legal innovation would thus be wrenched out of a linear progress narrative and be identified as one site of European self-reinvention effected through such shifting fantasies as reappropriations. Rather than seeing law as a reflection of a larger historical context, I argued that it should be seen as one site in which that context was constructed. In this recasting of writers like Redlob as constructing a Modernist moment in the "conflicted cultural field" which is international law, one vies the history of notions of theoretical truth and pragmatic utility as functions of the discontinuous history of cultural fantasies and reappropriations, rather than vice versa.

Duncan Kennedy:

I'm going to talk about another way in which one can draw a parallel. This is just a different way to do it. I said before something about my own identity and about my own mind as a politically correct leftist kind of person. But I have another idea of what I'm doing in my scholarly life besides being a leftist. I also think of myself as a boho type, as an arty boho person who comes from a very specific American cultural tradition which is committed to modernism and then to postmodernism in the arts, and to unconventional lifestyles, and blah blah blah. So my parents were arty boho type people, though they were sort of upper-middle-class arty boho type people, and they brought me up to believe that one of the most important things you should do, whatever you do, is that you should be an artist. That meant that you have to be somewhere in the history of art—you don't have a choice—so whatever you're doing, you need not only have your relationship to its politics but you also have to be pursuing an aesthetic project. You could be a formalist, a mannerist, a modern art type; you could be a postmodern art type; you could be a surrealist, a dadaist; but you need to be part of that aesthetic project as well.

This project is in deep tension with the political project. In fact, aesthetic modernism in the West has just had a tortured relationship with the more radical forms of leftism, mainly in the form of the radical leftist slaughtering cultural modernists, or in Europe, under Communism, and in the United States, earnest political leftists tending to detest arty boho types. There are only a few moments in American cultural history, resulting in the production of lots of great posters between about 1966 and 1972, when there's really been an entente between cultural or aesthetic radicalism and modernism and political radicalism.

So this aesthetic agenda is a different agenda; and the agendas are often in terrible conflict in the way that I've already sort of defined. So just as in legal scholarship, I wanted to be a participant in a left legal theory project that would split the legal academy from its spineless centrism and polarize it into left and right camps. Have a little playground sparring instead of a lot of limp 1950s

nonpolitical consensus. That might be described as the political project.

The aesthetic project was more to participate in a movement of law professors who in offices, not garrets, produced law review articles—that's what we were producing—which would have at least to some extent the effect of the *salon des refusés*. That is, it would have the effect of being a collection of law review articles that would be a symbolic, aesthetic, avant-gardist rejection of the earlier generations, of their aesthetic formalism. It was a very different agenda.

It doesn't correspond to anything the three other speakers have talked about, though I don't think it's incompatible with what they've been talking about; and I think that they are all involved in doing it to one extent or another. But in this take on art, the point is that we're not studying art, and we're not studying legal discourse. We're producing legal artifacts, which could be judicial opinions, or could be briefs, but in the case of the professoriate, it's articles or deformations and inflections of the law review article form; and there are lots of ways in which the avant-gardist impulse can be incorporated into the activity of writing law review articles. In fact, as I look out into the audience, I see two people I know who have actually done it in very dramatic ways, and all three of these panelists have done it to one extent or another.

So the idea is to use the avant-garde arty boho, living in a garret, slapping the paint on in a way that will make people say, "A monkey could have done that" or "It doesn't matter which way you hang it: There are four possibilities, and it makes about as much sense when we hang it this way as that way," in order to arouse a response. In my sort of lexicon, this is called the longing to *épater les bourgeois*, to shock the bourgeois art audience. *Épater les bourgeois*, shocking the bourgeois cultural audience, is different than appropriating, on behalf of the people, the bourgeois' own means of production. But there's a deep parallel between the idea of *épater*-ing them and nationalizing or socializing the means of production, as well as deep conflicts between the two projects. But there's no reason why one shouldn't try to keep the two projects alive, going back and forth at the same time.

Mitchel Lasser:

Should we go to the last question and the final round of answers? We've each, it seems to me, been propounding some version of what might be called "counterdisciplinarity" or "antidisciplinarity" (as opposed to "interdisciplinarity"). But what might such terms really mean? Let's take this opportunity, then, to refine our answers and flush out certain subsidiary issues. For example, what is meant by the terms *eclectic borrowing* or *ruthless appropriation*? Furthermore, do you, or should one, feel some sort of responsibility to the projects of the "other" discipline or to the projects or boundaries of our "legal" discipline?

Nathaniel Berman:

I would like to confront a common question that comes up in discussions of "interdisciplinarity." What is the responsibility of the legal theorist to the disciplines from which he or she draws? In a variety of ways we've all been advocating a strategic use of other disciplines. That strategic focus means that what we are really aiming at is a deconstruction of our own discipline, a deconstruction to which conventional "interdisciplinarity" sometimes constitutes a quite formidable hindrance.

The relationship, therefore, of my work to "Picasso Studies" is something about which I'm utterly agnostic. I simply have no idea whether it would be a critical move in Picasso Studies to juxtapose the artist to contemporaneous international lawyers. In my own work, it has been critically useful to understand the relationship of cultural Modernists to the politics of their time. But I am not sure, given the current disciplinary situation of cultural history, these same moves would have a critical edge.

For me, the productivity of surprising juxtapositions across disciplines—such as that of a legal theorist to a painter—is measured by their ability to break the linear progress narratives that govern disciplines' self-understanding. This productivity is also measured by the quality of the inevitable debate in which the inventors of new progress narratives oppose the inventors of discontinuous and disjunctive genealogies. Counterdisciplinary strategy is a quintessentially Modernist move: the juxtaposition of dissimilar artifacts undertaken with the aspiration of reaping some unpredictable political, cultural or libidinal charge.

Duncan Kennedy:

About the question of the relation to the other discipline, I agree completely with Nathaniel's statement of agnosticism about the question of responsibility to that other discipline.

But I'd just like to describe something again. I'm proselytizing here for counterdisciplinary work, especially left-wing counterdisciplinary work. It seems to me that one of the things that's fun about it is the experience of taking the abandoned car and doing what you want with the hubcaps: That's great! My relationship to the discipline represented by the car is—by the way, the car/discipline is, after all, still there; everything that's done to it is in the imagination—very much organized around an idea that's a reaction formation. The idea is that I don't care what they think about what I do with their stuff; and I know they'll never read anything I write; and I'm just a law professor; they're in Paris; and I hope they all die soon; and I hope that no more brilliant theorists on whom I'm dependent for raw materials come into existence until I'm dead so that I'll be outside the horrible grip of their patriarchal and matriarchal influence.

I also have an exhibitionist fantasy, which is that having dismantled the car,

pounded the hubcaps into Art Moderne dinner plates, and served up this great bizarre artifact inside legal scholarship that represents avant-gardism as well as theoretical sophistication therein, that they would just happen to be sitting in the toilet one day and pick up a reprint—that I hadn't sent them, but that someone else had sent them—and reading along, they'd say "Wow!! This kid is fucking dynamite! I'd love to have him over for dinner." I would then get from Jacques Derrida a little envelope in which there would be a round-trip airplane ticket to wherever in France he lives, with an engraved invitation-like document saying, "Please come for dinner."

So the problem here is to maintain a particular attitude. As I see it, I am just an earnest moralist trying to maintain the attitude of "I don't care, I don't care what they think," or "What they have to say about it has absolutely nothing to do with it;" but at the same time, this fantasy is still there. It's a delicious fantasy; and as a fan, I've run up to many of these people at one point or another and shaken their hand and said, "You know, Mr. Derrida, your work has had a gigantic influence on my life, and I've really gotten off on it," and then sort of walked off thinking, "You know, he doesn't even know I exist." I would describe my relationship to the other discipline that way.

David Kennedy:

Let me try to bring together some strands suggested by this slogan "counterdisciplinarity." One would be not looking in other disciplines for canonical texts. This is the hubcap idea. A second strand would be building on the whole education of the person who is doing the work rather than on the particular disciplinary claims of the field from which the person has imported a text. This avoids the tendency to stereotype the field from which one imports, as in "Anthropology tells us. . . ." The idea here is to understand oneself as an interdisciplinarily influenced artisan of legal culture rather than as an insight importer. A very important text in my own upbringing was the Boy Scout oath; more important to me even than Derrida. I try to remember to think of myself as coming to the law with everything I've got, which is some knowledge of a variety of different texts from different places. My job is to mobilize them in a project.

Third, the slogan "counterdisciplinarity" suggests to me an emphasis on the critical rather than the reinforcing impulse in turning to another field. I'm more interested in the attempt, within law, to look to the other discipline as a way of unsettling law's special claims to be related to either pragmatics or politics. We've talked about a number of different ways of doing that, such as heightening the analogies to low cultures, seeing law people as artists, and trying to understand the legal production as a broader kind of cultural or social project.

I don't see the alternative strand of interdisciplinary work suggested by the slogan "counterdisciplinarity" having as its project the attempt to break down the barrier between disciplines, or to compensate for law's lack of a sophisticated

understanding of how language is all put together, or as an attempt to account for law's lack of awareness of its context or to account for law's lack of something else. I see this as a project that's within the discipline and tradition of law. In the discipline of law, interdisciplinarity is one of our things. So the question is not whether to be interdisciplinary, but how to be interdisciplinary. What kinds of interdisciplinarity does one validate, what interdisciplinary projects are interesting to pursue?

Mitchel Lasser:

I think, as a final tidbit, that I'd like to tell a story. It was a delightful moment at a conference that we had on comparative law in Utah two or three weeks ago. It happened on a panel on law and interdisciplinarity that I listened in on from the audience. One of the panelists ended his intervention by reading a passage from a book, which was clearly a very "theoretical" text, and then rereading the passage with a little twist. The gist of the passage was that literary theory had for too long stood in the shadow of philosophy; that literary theory was a discipline in its own right, and was worthy of study; that, actually, lit theory was perhaps more pragmatic in its knowledge than was philosophy; and that literary theory, therefore, might well be able to teach philosophy a thing or two. Then came the rereading. The rereading substituted literary theory for philosophy, and legal theory for literary theory. What had therefore been a critique of the proposition that philosophy is somehow superior to literary theory became a critique of the proposition that literary theory is somehow superior to legal theory.

I thought it was a terrific moment, especially since the panelist neglected, to the best of my recollection, to mention the source of the original passage. The source of the original passage, which was made to read as "legal theory is at least as good as lit theory," was actually the ultimate "lit theory" person. It was Paul De Man. The passage was from *The Resistance to Theory*.¹⁸ The panelist, by the way, was Duncan. I find it amazing that David seems to have made the same point just now, namely, that legal theory shouldn't turn to lit theory because of some undeserved inferiority complex.

I have no position on the relative merits of disciplines. The move was nonetheless worth something because it added something to the disciplinary question which hadn't been there before. The effectiveness of the move, furthermore, was only heightened by the fact that it was originally coming from another discipline's talking about its relation to yet another discipline.

Now, I don't know how many people attending the conference actually caught the reference. To some extent, I'm not sure that it really matters. Either way, it was both enlightening and encouraging to hear a "lit theory" person standing up to "philosophy" in the way that many "legal theory" people would like to stand up to "lit theory." Although I don't believe that philosophy is any more distinguishable from lit theory than lit theory is from legal theory, I still think

that the move (the reading and rereading of this passage) was tactically and situationally effective. It was something that we all seem to be fond of, which is the recasting of questions in such a way that they suddenly acquire some new impetus. The questions don't really change, but the perspective does.

In terms of what I do, for example, I find it relatively tiresome to talk about judicial decisions in terms of realism versus formalism, pragmatism versus conceptualism, or judicial activism versus judicial restraint. I find those terms to be stale conceptual constructs; they're played out. I've found, on the other hand, whether in my written work or in my class, that if I recast the questions in terms in which they're not currently asked, the results are amazingly better, even though the questions may not actually be all that different. So that if I ask, "How does this judicial decision present itself? Does it present itself as a metaphor for the primary legal source, that is, does the decision claim to be standing in for that primary source on the basis of the decision's inherent similarity to that source? Or is it presenting itself as a metonym which stands in for the primary legal source on the basis of some claim that it's meaningfully related—but not inherently similar—to that primary source?" I've found, as an empirical matter, that the answers to such questions tend to be infinitely more powerful and insightful than those that I've gotten by asking whether a given judicial decision is "formalist" or "realist."

So the recasting of questions in the terms used by another discipline may accomplish no more than that; but it's something. I'm reluctant to say what the actual force of the move really is, except that it reinvigorates me as I ask a series of questions that legal academics have, I think, been asking for a very long time.

Maybe it's time to pass the buck to our respondents.

Norman Silber:

First I want to thank everybody who has spoken so far. It has been an extremely interesting conversation. Larry Kessler and I are new guests arriving late to the dinner table. We didn't know the structure the panelists would choose or the questions they would be posing. Nonetheless, there are a lot of different places to start from.

When Mitch was just talking, he said something like he takes "no position on the relative merit of the various disciplines." I think that's an interesting comment, because having no position about them *is* a position. It implies a certain relativism about discipline. It implies a certain egalitarianism about interdisciplinarity, which in itself carries with it certain problems. One problem is that—continuing Duncan's car metaphor—it allows you to steal the hubcaps from whatever car happens to be sitting at whatever street corner you've ended up at. The car might be a Yugo, or it might be a Mercedes—to push the analogy too far.

An example: I personally came to law with a Ph.D. in history. While I was

a historian, but not a lawyer, I had completed an oral history with Herbert Wechsler about a number of subjects including the Nuremberg trial and the internment of the Japanese.¹⁹ Roughly ten years later, after having been through law school, I decided to reedit as a law review article the interview I had done essentially as a historian.²⁰ Adopting the lens of a lawyer, suddenly a lot of the questions that I had asked as a historian I now dismissed—in much the same way my first year law professor dismissed me, when I was a student and raised a question and the law professor said "That's not the point" or "You haven't addressed the question" or "That's not the legal issue involved." And every time I picked up the lawyer's lens with the interview and looked at my own work, I was sitting smugly in judgment of myself. I knew exactly what discipline I was in. I was a trained lawyer now. I was going to analyze those other disciplines from the prism that I had obtained while I was a law student.

That attitude says to me something about what "interdisciplinarity" can mean to lawyers. Nathaniel Berman wrote something about the reasons why he had done his work—in a piece that I read of his, which I would like to read here. Not the piece in which Berman compares Picasso to Redslob,²¹ but a piece about modernism in interwar Europe.²² Berman gets to the end of the piece and states that "unlike traditional practitioners of American Law and Humanities studies, I'm not trying to enrich the law with cultural sophistication, rather I'm trying to show how the juxtaposition of law and other cultural domains can shed light on both, and in particular highlight the promises and dangers that are implicit in all forms of modernism."²³ If one asks the question, what is the purpose of Berman's exercise comparing Picasso to Redslob,²⁴ or comparing interwar political statements with artistic movements, it seems to me there is some ambiguity in the answer.

One purpose might be just to adorn and to ornament. Presumably a lot of law review literature is so intended because law reviews are anxious to have something that broadens their scope and makes them appear eclectic. I don't think that's what Berman is about. His task appears to be connecting legal theory to cultural preoccupations. To be frank, I see that the "juxtaposition of the law and other cultural domains" does "shed light on both and in particular highlight the promises and dangers implicit in all forms of modernism," but I personally would hope for more—for him to enlarge his stated purpose to include the identification of particular legal arguments that can or should be rejected or accepted.

This line of reflection leads me to ask what the purposes and dangers of interdisciplinary work are. I mean, I can rattle off a lot of reasons why I am a historian. I like to bring history to law because it might wake up the legal community by making it less insular and more self-aware. The students here in the audience have been to law school where we've trained them in Karl Lewellyn's way—you know, the *Bramble Bush* way; we've trained you to think "like a lawyer" and not to think in other ways. One wonderful thing about much interdisciplinary work is that it is taking those few who may be reading a law

review article and shaking them up, saying "Think again about where you came from." It is providing creative insight to tell us the way the legal system really operates, to destroy its myths, to advocate particular paths of political change, to destabilize texts. Some of the work has been terribly important and meaningful to me. But there remains too much of a gap between the abstract and the concrete in some of this work.

What has kept running through my mind as I was reading a number of these articles and preparing for this talk and listening here today is a Woody Allen movie (sorry to bring in a Woody Allen film). Woody Allen is around age twelve and he's sitting on a couch and he can't get any work done. His mother has taken him to a child psychologist. He is sitting there and he just can't act like a normal kid. He's terribly troubled because he reads in the paper that *the universe is expanding*, and he can't do any of his work, and his mother keeps shouting at him; she says, "*but it's not expanding in Brooklyn!*"

Allen could be critiquing us. We work in the world of law, and we have a world of lawyers who we need to speak to and learn from. Communication between theorists and lawyers who are practitioners is poor. As it is, practitioners are terribly suspicious of legal theory—whether it is about jurisprudence or fact finding or whatever. How much more, I mean, how much more suspicious not of legal theory but of advanced social theory out of a strange world that we're not even vaguely familiar with. It seems as though interdisciplinarity may be seen as the guerrilla assault on students and practitioners who, to choose for example, God knows, have no education in semiotics. I mean, our law students if they had semiotics as undergraduates are at least one step ahead of their faculty. So it is threatening to practitioners and to law students because interdisciplinary rhetoric is not in a vernacular—not in a special vocabulary—that they're trained in. Perhaps they should be, but the case must be made.

Which brings me to another problem with interdisciplinarity: the intrinsic difficulty of envisioning falsification of the views that are expressed by the people who are reading it. I mean somebody comes to you and says, "Read Clausewitz." Maybe we can read Clausewitz and enjoy it and profit from it, but our capacity for judging is taxed and impoverished when somebody comes and brings a foreign discipline to us and we're not accustomed to the new media or methodology. I'm reminded of the fact that in the 1930s when radio actually became universal, commercials were incredibly powerful. People had been accustomed to salesmanship in print, but they weren't accustomed to radio. The new coin of the realm assigned an exaggerated importance and commercial impact in the period in which people were adjusting to it. I think some interdisciplinarity has a lot of unwarranted shock value for the reason that it amounts to a new form of salesmanship. Well, that's my reaction to a very provocative conversation.

Lawrence Kessler:

I'm sort of at the end of the table, and I wasn't sure whether my placement here was to protect you from me or me from you. Of course, we've never met before, so you are certainly not familiar with me though I'm familiar with much of your works. I'm a trial lawyer who got to be a law professor; and when you talked about the relation between the arts and the law, I must say that my initial take was that you were talking about me. That is, I'm the artist; I'm the actor; I'm the person who looks interdisciplinarily to the psychologists for help with jury selection, to manipulate and influence the trier of fact; and I've been doing that for a couple of hundred years, though I look younger. When I was asked to participate as a commentator, I wasn't exactly sure what I was doing here since I am a teacher of, and someone who is much involved in, the area of trial advocacy, and I'm not, other than as someone who's come across your work in general reading, a student or a follower. I therefore thought it was peculiar to have been selected, and I figured they needed somebody else and that they were pretty desperate.

However, as I listen to you talk, and indeed as I read some of your works, it seemed to me that you were more the trial lawyer than I had initially thought. Indeed, as we talked about the strategy of using the external doctrines from other fields for the purpose of enhancing the political agenda that you have within the legal field, I was very comfortable with that. I mean, that's what I've been doing all the time, and that's what I do with juries, and that's what I do with judges as much as I possibly can.

Obviously, I can't be as comfortable in using the language of the other disciplines as you are because it is critically important for me to be immediately understood. I must tell you that since I felt I should prepare myself by reading as much of your works as I could, there certainly is a barrier constructed to communicating with people like me. I was absolutely delighted, however, as I sat here and listened to you, to find that many of the same ideas can be expressed without interposing that barrier. There was very little multisyllabic jargon that I wasn't familiar with; I understood all of the ideas. I must say that as I listen to you here and as I read your work, I wish that you would make more of an effort to make it accessible to me because I feel that I am part of your audience, and I'm not sure that I'm being appropriately coddled: I'm the jury.

But I did feel quite comfortable in listening to you, and I also felt that much of the problems I had reading some of the works were answered. That is, there had not seemed to be an exploration of the other fields. There tended to be a selection of a particular thinker, a distillation of his thought, and then the application of that thought to particular legal position. Of course, now that I see that it is persuasive argument, it certainly makes a great deal of sense. But it does lead me to ask the question, in terms of theoretical legal analysis, whether or not there isn't a separate role for understanding the legal system by reference to these other fields, as distinguished from just using these fields as the swords

to destroy one's opponent in an argument involving nothing but the political left and right in the law.

Duncan Kennedy:

Seeing that I'm the one who has made the most of the political agenda, maybe I should respond. Thank you for the comments; they're really helpful and interesting. Let me put it this way. The question about the role for understanding is an interpretation of the abandoned car/hubcap image which is perfectly plausible. But I make a distinction, in my own mind, between two different activities. As I said before, there's a first activity which is policy-oriented advocacy. It's focused on trying to figure out both what legal rules ought to be and how they ought to be changed, and to intervening in actual legislative or judicial or academic policy debates. Then there's also the attempt to figure out, at least in my case, how legal argument works.

I'm starting from the idea—it's a very strong intuition—that legal argument is enormously flexible, open ended, and plastic. This is a perception that I'm sure you fully share. It's very hard to imagine that you could be both a practitioner and a professor who teaches in the field of trial advocacy without a very strong sense of the flexibility and malleability of legal discourse.

So the question is: How to account for the combination of that property of legal argument, as experienced by the practitioner and by the professor of trial advocacy, with the very common experience of compulsion produced by legal reasoning? This experience of compulsion is everywhere in the culture; a constant aspect of the culture is the belief that particular rules—whether they're rules that flow from constitutional rights or from property rights or whatever—are legitimate because they are the correct rules of law.

In approaching this question, I see the borrowing from other disciplines as borrowing for purposes of constructing a theory of legal argument, a theory of legal indeterminacy and of legal determinacy. In this respect, what Robin West said this morning about Robert Cover might be true of him, but it's certainly not true of the "crit" strand of the indeterminacy critique, which has put an enormous emphasis from the beginning on the experience of closure and determinacy as well as on the experience of indeterminacy. So there I see the borrowing as not "politically" motivated in any straightforward way. The borrowing is to try to get elements from the other theories that will be helpful in understanding legal discourse as something that's flexible but that also constantly generates intense feelings of determinacy and boundness. Methodological eclecticism or the scavenging approach isn't done piece by piece for political effect; it's done out of a very straightforwardly scientific curiosity about how to construct a good theory for understanding the relationship between advocacy and boundness as two different aspects of the experience of law.

So in my own case, I don't see myself as having, so to speak, reduced everything to the "political," partly because it seems to me to preserve the moment

of cultural radicalism which can totally crosscut and indeed explode or undermine "the political," and partly because it seems to me that the basic scientific endeavor—to figure out the most powerful way to conceptualize the relationship between a legal argument and a sentence, using these literary theoretical documents—can all go on at the same time. I think it should be highly ambiguous when one is in the domain of political advocacy and when one is in the domain of science, and I know that I hope it will be.

Lawrence Kessler:

It certainly helps persuasiveness. If I might, I did have another thought and another question. It actually focuses more on a substantive notion and it relates back to something that Mitchel Lasser said, which is that "you're dealing with a car that I have some relationship to." I wonder if there isn't a relationship between the necessity for a myth of legitimacy and the legitimacy of the legal system, and whether or not a consistent attack on the myths isn't essentially nihilistic and does not, if accepted as a legitimate analysis of the system, eventually destroy or prevent the existence of the system.

Mitchel Lasser:

I think I'll give this question a quick answer. The answer, I guess, is that I don't understand the premises of the question, in that it ends up sounding dangerously similar to questions that were once addressed to, say, Copernicus. I think that most legal academics are totally into the analysis of a legal system's myths. I would personally say that I'm totally into that form of analysis, and totally into exposing the results of that analysis. Why this would have to be nihilistic escapes me. To the charge that the analysis might have, or that one might even hope that it would have, some result on the system, I would answer that having such an effect would be terrific. That's absolutely what I see myself as being in the business of trying to do.

I don't see, however, why such a project must lead to nihilistic results. One could run all sorts of specific analogies. Does the question imply that going after or exposing the myths of *any* legal system is necessarily nihilistic? What if the legal system is not one that you would particularly endorse; so that, for example, one would be running the myths on, say, assorted totalitarian Eastern Bloc or Latin American legal systems? If the analysis were actually to have some effect on such regimes, would this be a nihilistic or a reconstructive event? The same, I think, holds true of anything that one analyzes in any way. It depends on a whole bunch of factors, not the least would be the circumstances under which one engages in the project, the sense of responsibility that one feels towards one's analysis and the object of that analysis, and the ethics with which one engages in the project. I'm an optimist, so such projects sound reconstructive, and not nihilistic, to me.

David Kennedy:

My own response to the nihilism question combines some testimony about my own state of mind with some sense for the situation within which critique of this sort occurs. One time when I worked as a duty lawyer in a child's court, I represented this kid who had broken into a lot of homes in a suburban neighborhood and had stolen all sorts of stuff. He was charged with breaking into three particular homes. When he was shown pictures of the three homes he was charged with having broken into, he defended himself by claiming that he'd broken into so many homes that he couldn't remember whether or not he'd actually broken into those particular ones. That seemed nihilistic to me; he had no relationship to any of the cars he was cannibalizing. For what it's worth, my own internal experience is quite different. I feel like a person living in a culture, meshed in a particular situation arising out of my relationship with lots of different texts, in which I am trying to do things and make arguments. It doesn't have that random or nihilistic feeling for me.

At the same time, I suppose I am less worried about nihilism because of my sense of the relative stability of our legal culture. If I thought that the situation was very unstable, that at any moment the legal system might unravel or people might stop believing in its myths, then I might get worried. I think our situation is rather one in which too many professionals who are part of my small corner of the culture, lawyers and law students, are believed too much and should be believed less. So this is a marginal nihilism.

The final thing I would like to say about nihilism would return to Duncan's point about the determinacy, as well as, the indeterminacy of legal discourse. In my own field of international law, for example, once one has shown that "sovereignty," is, say, contradictory or mythological, everything doesn't just collapse. On the contrary, the very next day they go out and invent another sovereignty while reminding you that they understood all along it was a myth. It's not just that the critique has been ineffective—it's that there is also a desire for sovereignty, a desire for closure, for formalism, and so forth, which can be obscured by the discipline's own posture of flexibility. We're talking about a legal culture of ambivalence, as much as contradiction. Part of the work is to explain the moments in which the culture takes a particular direction towards closure. As a result, the interdisciplinary borrowing is not always in the service of opening up—often it is in the service of explaining those moments when we feel resistance from the legal culture, a movement to closure that feels less rational or pragmatic than simply right.

Nathaniel Berman:

Let's directly address the frequent charges of the "nihilism" of "fancy theory." One of the reasons that much theoretical writing of the last two decades seems "fancy" is that it breaks with the notion that the only alternative to a

linear account of history or legitimacy is an amoral nihilism. This break often requires complicated theoretical maneuvers. Yet, it is often those who seek to maintain linear accounts who may most properly be accused of diverting attention from moral responsibility.

International legal history provides very clear illustrations of this point. Postcolonial and feminist critics demonstrate that historical or political unity is usually the product of struggles in which competing stories and legitimacy's have been defeated, suppressed, or otherwise assimilated. Far from diverting us from theoretical or political responsibility, attention to "plural" histories and to the "identity-constitutive" role of power serves to deepen the gravity of the moral context of our work. If international legal history is not a linear progressive narrative, if the appearance of its historical and political unity is a product of struggle, then one cannot simply proceed with the naive faith that one is pushing forward "the project" of world order. Rather, one is always already situated in a situation of struggle between competing stories and legitimacies—in which every act, whether in scholarship or practice, constitutes a moral choice. From this perspective, it is the linear progress narratives which obscure the moral situatedness of the discipline.

Mitchel Lasser:

Professor Kessler?

Lawrence Kessler:

Thank you. I asked the question of you because I was interested in the answer. I must say that it's your most recent work that led me to think about the issue, when you wrote about the degree to which the French and American systems have managed essentially to maintain legitimacy and flexibility at the same time.²⁵

Norman Silber:

I wanted to ask a question about responsibility. History is one discipline which is very easy for lawyers to poach upon. Probably for that reason there have been a large number of interdisciplinary attempts to write history by lawyers, discussions about inderdisciplinarity. Marty Flaherty has written a piece in the *Columbia Law Review*. The title of the piece is "History Lite."²⁶ He proceeds to sort of pass upon the way in which a number of leading scholars had all used history. I think it's not unfair to say that he basically comes down hard on several leading scholars and basically said that few, if any of them, took a historian's approach to history. To their fellow lawyers they might be a historian, but to a historian they are not conducting themselves as historians.

The question that I would ask would be, "Isn't there a responsibility for

people who profess interdisciplinarity to vet or otherwise to go through some process which tests the quality of their work by norms of the discipline they're leaning on?" I mean when you submit these things to a law review editor at a student law review, one wonders whether or not they would be sufficient. How do we all make sure that what we're doing is respectable in the eyes of the people who are in the profession? This would be a question to Duncan, because you said you hoped these people you're borrowing from would die soon. I mean you don't want to know about the way other professions evolve? You're going to grab a scholar A and hope that B, C, D, and E pass on because you don't really want to know what is the latest?

Duncan Kennedy:

History is a good example. I'll start out with the question of vetting. I've actually written quite a bit of history of legal thought, and I dared publish a certain amount of it, moreover. So, how do you make sure that you're performing in a way that the people in their discipline would consider to be respectable, as opposed to "just not a historian's work"? My most basic reaction to that is, what do I care? I do have a profoundly contemptuous attitude toward the professional ethos of modern historians, just as I have a very contemptuous attitude toward the basic ethos of modern law review scholarship. I don't see them as any better. How do I know what that ethos is like, and what particular critique would I make of that ethos? I took courses in college; I read books, history books; I know some historians; I know quite a few of the people who do interdisciplinary legal history, most of whom went to graduate school and are intensely proud of the fact that although they are law professors, the legal history that they use in their law articles is "of the highest standards of their doctoral program." So although they aren't teaching history, they were trained in it; and their training is very important to them; and they would be profoundly humiliated if people with whom they went to graduate school, and who are now teaching history, were to treat their work as not living up to the standards that they were trained into.

My reaction to this group of people, of whom there are rather a large number—and I've had them both as students and as contemporaries in law schools—is that the unbelievably important aspects of their ethos could be summed up in a set of ideological propositions like "the worst thing you can be is presentist;" that's an unbelievably important part of the training. It's very like the law school training that you described as having taken something away from your own reaction to your own historical work, although it's a different deformation than the idea that, for example, all that's relevant is "What should the judge do? Everything else is irrelevant."

The antipresentist bias among historians produces a kind of ethic of not thinking about the past in terms of the present. "History might have an indirect effect, which might be the teaching effect or political effect you might achieve

in the present; but you must maintain the discipline of not allowing your current objectives to distort the utter otherness of the past or to distort the at least hypothetical and completely exotic character of past light and past consciousness," and so on. I mean, "Give me a break!" is my basic reaction to that. Get to the end of the book! And it's done under the aegis of unbelievably tense and desperately serious presentism. You can figure out on page 50 that the guy's a moderate liberal who's arguing that *Roe v. Wade* is actually constitutional. It seems about as convincing as any other such argument.

Another one of the historian's ideological propositions is the fetishism of original sources; it's incredibly important to being a serious historian. It's like fieldwork for anthropologists. Original materials for historians is utterly central in their experience of their dignity as members of their profession, and the guy who goes and finds in New Jersey a building with 1 million documents that no one had ever found before, which were produced for an occasion a long time ago, this guy thinks, "They're utterly primary!" It's sort of like an associate at Cravath finding a treasure trove of all the IBM internal memos at the moment that the antitrust suit is getting hyped up. That's an *associate*, you know. Again, give me a break. I basically don't care about whether the person is great at finding primary sources. I'm interested in whether she has some interpretation of the past that seems like it's going to have a plausible impact on me in the present. This is the hubcap stealer's approach. No loyalty at all.

Norman Silber:

The problem once again may be that over time that approach can have a dangerous effect on the way in which the other discipline sees the legal profession's work and on profession's esteem in the eyes of the other discipline.

Duncan Kennedy:

We're starting from a low base, though.

Mitchel Lasser:

I have the feeling that, once again, we've set up a false dichotomy. I actually don't know the first thing about history, but I would absolutely bet dollars to doughnuts that there are three historians out there—make it four—who are more or less situated to the field of history in about the same way as we are to the field of law. It's not as if the field of history, as an academic discipline, is a monolithic mode of thought in which there's a single take on what's the appropriate methodology for, or subject of, historical work. I'm sure that there are people who are coming up with just the kinds of variance that we're coming up with. I really think that if one only knew the field well enough, it would be fairly easy to locate those people.

Now here's my reservation about the hubcaps. My reservation is that if you take the hubcaps, I wonder whether you're really taking them from your counterparts in the other field. Furthermore, I wonder about the transferability of the hubcap's resonance. You think you're getting a critical edge by taking it, but who knows? I had an interesting experience in France a little ways back. I was taking Bourdieu and doing something I thought new and nifty with his old stuff. So I found myself in France, in Paris as a matter of fact, and I was suddenly hit by the fact that the Bourdieu followers are actually an incredibly monolithic blob in French legal thought. And it turns out that these Bourdieu types are all "enlightened Eurotechnocrats," as the French press would call them. Now what do you do with that? If you feel a responsibility toward some project, the problem is to "vet" the person from whom to take the hubcap and to watch out about taking that hubcap—with all its resonances, connotations and associations—from someone you think is your double, but is not. The concern is: What does the hubcap take with it?

David Kennedy:

I want to agree with Norm's statement of the last problem. I think that there is a reputational issue that's also a strategic challenge. You don't want to put yourself in the situation of having somebody say your economics is bad if you're relying on economics as a theory for your argument. If somebody else has relied on economics in their article to prove some proposition or to open some particular strategy toward some legal doctrine, it's great if you can say, like in another Woody Allen movie: "Really? I have an economist right here! And it's Marshall McLuhan; and Marshall McLuhan says that philosophy is as slippery as a rock." I think the vulnerability to this sort of challenge is a problem with borrowing, which needs to be managed in an advocacy mode. You can't effectively keep borrowing if you adopt too aggressively the posture "Here's what the historians say. . . ." The parallel problem would be to say "This article is an application of Derrida's Third Principle that $e = mc^2$ backwards" when all the Derrida people would say "That's not his formula" and everyone else would say "Oh, Derrida, we know what's wrong with him." My own strategy for this is simply not to mention the guy. It also is in the jargon department. When students come to me with papers deducing something from their favorite college theorist, I often find myself saying "If you just eliminate the theorist on whom you feel the whole thing is based, your analysis is great."

Mitchel Lasser:

I'm going to step in for a second to ask the audience whether there are any questions you'd like to ask, if only for just a couple of minutes.

Audience Member:

I'm a communications professor with a very critical position toward my own field and toward the nature of my own discipline. I'm very concerned that scholars create little boxes for themselves in which it's very comfortable to operate, which allows them then to clone other scholars in the same form and shape. In other words, I wondered what you do in the classroom. I wondered, might you be able to translate what you've been saying into a kind of a very short philosophy of what you do to students, and do you wish to create those students in your own image?

David Kennedy:

Here's my short story. I want to take the class and divide it in half, with a remainder. The class should be divided on an important question and experience, the subject is open to broad debate, in which they feel the pull of both sides. The remainder should be two or three people out of the hundred and fifty who will be interested in working with me academically and might become graduate students.

Duncan Kennedy:

In other words, here is David's and my philosophy. There's a legal question. The students in the class argue opposite sides of it, and they experience that not as a merely technical debate but a debate in which the two sides represent larger commitments of their own, which might be liberal against conservative on the legal issue or it might be men against women on the legal issue or it might be North against South. But the classroom experience is designed to cut through their impulse to believe that the law is the law and that they're there to learn it, and to replace this impulse with an experience of legal discourse as something that they can learn to do argumentatively in a way that's deeply connected with their substantive ethical and political views.

David Kennedy:

So I always ask them to vote. We sometimes vote two or three times a day, and I feel that I've failed if I haven't generated a question on which the students are more or less evenly divided, in which both sides of the question have a force that the students are feeling. Across the course, they find themselves, individually and as a group, making commitments.

Susan Tiefenbrun:

I wish we could go on. I sense that we all could go on, and maybe we will

at dinner. After dinner, we will all hopefully reconvene in the moot court room for *The Merchant of Venice* and the retrial of Shylock.

NOTES

1. See Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).
2. GERARD GENETTE, *FIGURES OF LITERARY DISCOURSE* (Alan Sheridan, trans., 1982).
3. See ROMAN JAKOBSON, *LANGUAGE IN LITERATURE* (Kristina Pomorska and Stephen Rudy, eds., 1987).
4. See ROLAND BARTHES, *MYTHOLOGIES* (Annette Lavers, trans., 1972).
5. See PAUL DE MAN, *ALLEGORIES OF READING* (1979). See also PAUL DE MAN, *THE RESISTANCE TO THEORY* (1986).
6. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).
7. See e.g., David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L. L.J. 1 (1986); Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOCIAL AND LEGAL STUDIES 321 (1996).
8. For an overview on feminist work in international law, see Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517 (1992).
9. See, e.g., Karen Knop, *THE MAKING OF DIFFERENCE IN INTERNATIONAL LAW: INTERPRETATION, IDENTITY AND PARTICIPATION IN THE DISCOURSE OF SELF-DETERMINATION* (1997).
10. See, e.g., Vasuki Nesiah, *Toward a Feminist Internationality*, 16 HARV. WOMEN'S L.L.J. 189 (1993).
11. See, e.g., Michel Foucault, *Nietzsche, Genealogy, History*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE* 139 (Donald F. Bouchard & Sherry Simon trans., 1977).
12. Lila Abu-Lughod, *Writing against Culture*, in *WRITING AGAINST CULTURE* 137 (Richard Fox, ed., 1991).
13. See, e.g., JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* (1988).
14. See, e.g., HOMI K. BHABHA, *THE LOCATION OF CULTURE* (1994).
15. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).
16. *Id.* at 145.
17. Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 13 CURRENT LEGAL THEORY 3 (1995).
18. See DE MAN, *supra* note 5.
19. See Norman Silber & Geoffrey Miller, *Towards "Neutral Principles" in the Law Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 (1993).
20. *Id.*
21. Nathaniel Berman, *Between "Alliance" and "Localization,"* 26 N.Y.U.J. INT'L L. & POL. 449 (1994).
22. Berman, "Modernism, Nationalism, and the Rhetoric of Reconstruction," *supra* note 17.
23. Berman, "Alliance" and "Localization," *supra* note 21.

24. Berman, "Modernism, Nationalism, and the Rhetoric of Reconstruction, *supra* note 17.
25. Mitchel de S.-O.-l'E. Lasser, *Lit. Theory Put to the Test*, 111 HARV. L. REV. (1998).
26. Martin Flaherty, "History Lite" in *Modern American Constitutionalism*, 95 COLUM. L. REV 523 (1995).