

# Dialogue

## A Conversation Between Milner Ball and James Boyd White

**Milner S. Ball\* & James Boyd White\*\***

*The editors of the Journal invited me to review James Boyd White's Acts of Hope.<sup>1</sup> In response I proposed inviting Professor White to join me in a conversation about his work. First the editors and then he accepted the proposal. Professor White and I agreed that we might call a halt to this experiment at any time because we would not subvert our friendship in the attempt to enact an instance of it in print. The editors accepted the risk that we might at last have no pages for them. — MSB*

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1. JAMES BOYD WHITE, *ACTS OF HOPE* (1994). Subsequent page number citations are enclosed in parentheses.

## I. INTRODUCTION

BALL:

*Acts of Hope* is an elegant volume. It belongs to a body of work in which the quality of your reading of texts demonstrates what a lawyer can learn from literature. In this book, the texts range from Plato's *Crito* to Shakespeare's *Richard II* to Dickinson's poetry to speeches by Nelson Mandela and Abraham Lincoln. And your readings here become an affective exploration of the art and action of authority.

Your books, taken together, constitute an author who has gained dimension in the 20 years since I reviewed *The Legal Imagination*, the book with which you began.<sup>2</sup> The authorial persona, although richer and more complex, is nonetheless reliably familiar. Such continuities, along with the surprises in your writing and the fruitful differences of opinion it engenders, are as necessary to the friendship between you the author and me the reader as they are to any other that would flourish over the long term. I have no illusion that we can capture in a few pages the life of that relationship, but maybe we can give ourselves and others some glimpses of the hope that animates it.

Your published work makes a fine companion for exploring what our culture makes it possible to say. In my own journey I have been emboldened by your books and nourished by particular insights and phrases of yours along the way. There is no mistaking how much you have meant to me and a host of others. But friends can disagree. In what follows perhaps we can give good evidence of how they may disagree *as friends*. Perhaps we can, at the very least, indicate that book reviews need not take the form of "egotistical journalism masquerading as scholarship."<sup>3</sup>

Let me open with some continuities, then move to a difference, and make way for your response.

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2. Milner S. Ball, *The Legal Imagination*, 44 U. CHI. L. REV. 681 (1977) (book review) [hereinafter *Imagination*].

3. D.S., NB, TIMES LITERARY SUPP., Dec. 29, 1995, at 14 (quoting Patrick O'Brien). O'Brien hopes to augment and improve the fallen world of book reviewing. I wish him every success, but I doubt that many reviewers in the legal academy will take to the prescribed rigors of transformation: "[R]eviewers must be purified before approaching the sacred task . . . . A preparatory period of penitence, say forty days or so, on a cleansing diet, free of all stimulants, in which they would be encouraged to contemplate and abjure their sins, would seem to be the very least one could ask from any truly serious reviewer." *Id.*

## II. CONTINUITIES

A. *The Joint Venture*

BALL:

Early and late you have invited readers to join you in an essential journey of exploration that is both agonistic and celebratory. You say that we begin with the given languages and institutions that shape us; that we grapple with their inadequacies to experience and attempt to remake them; and that we may hope by the struggle to constitute an authentically human identity. As you say in your discussion of Emily Dickinson: “[T]he struggle is to make an identity, a voice and language, out of the materials one inherits, in a process by which the authority of the expectations that govern the meaning of what one says is being repeatedly established, conceded, eroded, destroyed, and transformed” (226). The movement is that of what Arthur Danto calls “the transfiguration of the commonplace.”<sup>4</sup> It is the *basso continuo* of your earlier books and the undermusic in this one for the diverse themes you find in texts ranging from Plato to Nelson Mandela.

Is it the deepening of your experience over the last 20 years? mine? both? that leads me now to be conscious more of the agonistic than of the celebratory at the core of your writing?

WHITE:

I have to start by saying that I feel awkward talking about my work at all, for I have done in it everything I felt I could do at the time. I do not have any explanations of my books that I have kept hidden from the reader, and I would not like whatever I say here to be read as such, or taken as a statement of what I really meant to say. What I have done in my writing is what I really meant to do, and it must make its own way with its readers. On the other hand, as you say and I believe, there is in any conversation a ground for hope, and I will try to respond to your questions as directly as I can.

About the agonistic and celebratory: I cannot answer the question in exactly the terms in which you frame it, for I do not think of myself or my work as moving along such a spectrum.

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4. ARTHUR DANTO, *THE TRANSGURATION OF THE COMMONPLACE* (1981).

But the question does suggest a line of thought that you may find at least partly responsive. In writing *The Legal Imagination*,<sup>5</sup> I was full of a sense of the limits of language, especially of legal language—its friability, its misleadings, its control over the mind that uses it, its impossible forms, and so on. Accordingly I put the question to my reader in terms of mastery or control: Will you control your language or will it control you? This question assumes that the first is a possibility, both in life as a general matter and for the lawyer in particular—if, that is, the student can write herself to a position from which she can make it true. The rhetorical assumption is that all the problems are outside, in the world and its languages, not with “you”; but of course when one works hard on these questions, trying to realize the possibilities for meaningful thought and life of which one has intimations, the work is in fact largely internal, as one tries to change one’s own capacities for thought and writing, one’s own imagination. There is a celebration here, then, of the possibilities for meaningful life in the law, but it is highly conditional—if you can make them real—and there is a lot of agony, if not an *agon*, in trying to realize that condition.

*When Words Lose Their Meaning*<sup>6</sup> may seem more explicitly celebratory, for it locates law, and especially American constitutional law, among the great cultural achievements of our world. Not the rules of law that exist at any one moment, or in any particular place or time; but law as a collective activity of mind and spirit, which has the possibility of goodness, of value, even of greatness. Here as in *The Legal Imagination* it is with the possibility, not the often lamentable current conditions, that I am concerned. Perhaps I am answering a voice, in myself or in the culture, that says that there is no such possibility; that law is only the exercise of power by one person or group over another, or only a branch of bureaucracy, or only money-making, or only instrumental; that it has no real and independent value for the person or the community. Thus I ask whether we can imagine law as an activity that in its ideal form, at least on occasions, has true intellectual, imaginative, ethical, and political worth. If we can, this would give us both something to aim for and a more workable and trustworthy ground for the criticism of what we see around us. In *When Words Lose Their Meaning* I tried to work out a sense of such a possibility, by which we might shape our own efforts and with which we might criticize what we achieved. In this sense I celebrate the law; but again this celebration is

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5. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

6. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

conditional, dependent upon the perception and realization of the possibilities inherent in legal life.

In doing this I try to show that the law can be seen as a particular instance of a human activity that is far more widespread than law itself, and of which we have splendid exemplars from which to learn: the activity of making meaning in language in relation to others. To see law this way opens a whole set of issues for analysis in the law (and in other instances of meaning-making too): the quality of the language that a particular person inherits and uses; the nature of her transformation of that language in her use of it; and the kind of relation she establishes with the people she speaks to or about. These are wonderful questions—learned I should say partly from the law itself—and to explore them I found I could turn to a set of the very greatest works in the western tradition.<sup>7</sup> My effort is to show that the law is a field of action and expression in which virtually every intellectual virtue and vice, every ethical quality, can come into play; and to the proper practice of which, therefore, the study of these things is relevant, indeed critical: what Swift has to teach us about our susceptibility to false dichotomies, for example, or Samuel Johnson about the hold that platitudes have on our minds, or Austen about the nature of human friendship, or Homer or Plato about the way a defective language can be transformed in one's use of it, and so on. In this way I have tried to show how these texts, and others like them, can be of the deepest value to one engaged in the practice or criticism of law.

All this was very exciting to do, and perhaps that comes across to the reader; but if my enthusiasm for the possibilities I describe is read as a celebration of the current state of things, or as optimism about the prospects for its transformation to create a more just world, that is a deep mistake.

When I do try to assess particular efforts at the creation of legal meaning, particularly in the form of judicial opinions, as I do in *Justice as Translation*,<sup>8</sup> the verdict is of course mixed, for there is a great deal to complain of, both in particular decisions and in the methods of thought that they embody. But in the judicial opinion as a form, and especially in the work of Justice Harlan, I find a model of thought and life that I can admire, and would wish to emulate, on the grounds of its own value. It is not reducible to politics or economics or results, but represents another kind of cultural and ethical achievement, one peculiar to the law.

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7. Why that tradition? This is where my own education lay; of course one could turn to others as well, if one had the education for it.

8. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* (1990).

To say this is a form of celebration, I suppose, but not of the present condition of things, nor of any predicted future; rather, as has been my concern from the beginning, it is a celebration of the possibilities for human life and meaning that the forms and activities of the law imply.

It is also true that in *Justice as Translation* there is another strain, an elaboration of the difficulty at the center of *The Legal Imagination*, the difficulty, that is, of all language use, all communication, for which I use the trope of translation. The idea is that translation is always imperfect, always adding and subtracting meaning, but that it is nonetheless absolutely necessary; so too with interpretation, (which is simply the same activity within a single language), including those interpretations of each other by which we live each day. The question is one of art: By what art can this inherent difficulty be addressed, in the world at large and in the law? That there is an art of translation is a ground for hope; that it is inherently imperfect, impossible, is a ground for struggle and for the discipline of expectations. The same issues are of course present in my earlier books, but here perhaps they are brought to a sharper point, and to a point more overtly controversial, for in *Justice as Translation* I argue that the discourses of economics and contemporary philosophy are inappropriate models. (In my view it would be better for economists and philosophers to look to the law with respect, as a place to learn how to think and talk, rather than the other way round.)

In all of this work I have an interest in generalization, but not of the usual sort. I do not try to articulate propositions of general application or validity, in a scheme or system of such propositions; rather, I try to define an activity or practice that is a human universal, or nearly so, focusing upon particular instances with the idea of increasing my understanding both of the activity in question and how it can be done well—and “well” in all the senses of that term I can imagine: intellectually, ethically, aesthetically, politically, and so on. In *When Words Lose Their Meaning* it is the activity of making meaning with language in relation to another; in *Justice as Translation* it is the activity of “translation,” that is of moving from one way of speaking to another; in “*This Book of Starres*” it is the activity of learning to inhabit the language of another; in *The Legal Imagination* it is the activity of using a language in such a way as to control its deficiencies and take advantage of its resources.

In *Acts of Hope* the practice is that of granting or withholding authority—to an institution, a person, a way of thinking or talking. I try to show that this phenomenon is extremely widespread in human life, present indeed whenever we think or speak, because it is always an issue what authority we should grant to the language we are given in which to do these things. This is an issue for the individual person growing up in a world—say Fanny Price in *Mansfield Park*, or Huckleberry Finn in Twain's racist America, or the young law student in one of our classes—who must find a way to negotiate the tension between the person she “is” and the language she “uses,” when the language, and the practices it entails, do much to shape the person herself. It is also an issue in the law, of course, where the determination of authority is the topic of explicit thought and argument: Should this case or statute be regarded as having authority over our decision, or not? Between the poles of the personal and the legal, the same activity shows up in a thousand forms and places. In my own book I discuss a Platonic dialogue, the *Crito*, that contrasts the authority of the law with that of philosophy; a play, *Richard II*, that contrasts the authority of a king by birth with that of a king by force; a treatise, Hooker's *Laws*, that faces the tension between the authority of tradition and that of a sacred text in the construction of a church; an essay, by Hale, that asks how far a legislature in a parliamentary system should regard itself as free simply to remake the law, how much it should regard itself as bound by what it has inherited; a novel—*Mansfield Park*—that tells the story of a person establishing her own identity against and within the languages of authority that dominate our world; a set of poems, by Emily Dickinson, that challenge part but not all of the very idea of “poetry” by which the expectations of her audience are formed; a speech by Lincoln that asks what authority the Union should have; and another speech, by Mandela, that contrasts the authority of the South African regime with his own practices of sabotage.

I do not argue for a set of statements about the nature of authority, or defining when it should be resisted or granted; the questions presented by the element of authority in human life and thought seem to me not suited to that kind of analysis, but to be questions of art that can best be explored through the detailed analysis of particular instances, which can be held in the mind as examples, to be remembered and put to use when we face analogous questions in our own lives.

This is a complex and perhaps longwinded way of responding to your question about the celebratory and agonistic. A common theme is my interest in the discovery and definition of possibilities of good or decent thought and action; to that extent I may seem celebratory

throughout. Another theme, however, is the great difficulty of real attainment, and the certainty of imperfection, and in this I can be taken to define and redefine a struggle. As I have gone on, I do think I have become more interested in and aware of my own limits of mind and imagination, so perhaps the struggle seems even harder to my reader, and to me, than it once did.<sup>9</sup>

Such are the reflections your innocent question has suggested—perhaps not so much about the celebratory and the agonistic as about the tensions, this among others, that run through my work, giving it such consistency and unity as it may have.

BALL:

In what I identify as a struggle at the core and you identify as a tension, which traditions from the eastern Mediterranean—the heroic of Athens or the redemptive of Jerusalem—do you find exerting the greater influence?

To clarify what I mean by the question, allow me to return to your reflections on Dickinson. You say that “[w]hen an artist like Dickinson struggles with the resources of her language, and the authority of the expectations that determine the status and the meaning of what she does, she acts not only for herself but for all of us” (226). Later you specify what you mean: Dickinson established an authority “perhaps a little like that of legal precedent. Since this has now been done, other things are possible, and Dickinson legitimates them. Think, for example, of Wallace Stevens, at such moments as this: ‘Among twenty snowy mountains, / The only moving thing / Was the eye of the blackbird.’ Does not Dickinson make this kind of poetry more intelligible and more acceptable?” (270).

Is your Dickinson’s struggle and its outcome—her acting for all of us—heroic or redemptive? Or something else?

I should add that, when you liken her achievement to legal precedent, you liken it no more than “perhaps a little.” You thereby avoid claiming too much for law while indirectly inviting the reader to imagine relationships between law and poetry. All along the way, as I read your books, you have not pressed for a formal subject matter of law and literature but have instead explored at the disciplinary boundaries and across them what it is possible to say in the language of law and therefore what it is possible for a lawyer to become. This is primarily a matter of exemplary performance rather

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9. Perhaps it is better to see *The Legal Imagination* as defining the struggle for another person, and my work since then as my own attempt to meet some of the challenges defined by that book—to do my version of what I there ask my student to do. As some have noticed, after all, nearly everything I have written since has its adumbration in that book.



than of analysis. In this you are perhaps a little like Dickinson. Your achievement in writing and finding a publisher for *The Legal Imagination* and then the volumes that have followed has made other things possible for other lawyers, including me.

WHITE:

I know this question has enormous importance for you—its implications recur in your lengthy disagreement with my reading of *Casey*—but for me the opposition between Athens and Jerusalem is not as salient as it is for you, and as perhaps it should be for me. I think of the plays of Sophocles, for example, as instinct with religious feeling, and of much of the Bible as full of heroism. Perhaps this is because both traditions came to me first as filtered through English, but I think not entirely so, since I can now read the Greek texts and hear them speak across or over or around their earlier translations.

Another way to put it is to say that the two “traditions” work in my life in completely different ways. I look to the Greek for examples of excellence in the use of mind and language, and in the constitution of community, with which I can compare other instances, closer to home, including in the law. The side of life I think of as theological, invoked by your reference to Jerusalem, is by contrast intensely personal and deeply inexpressible. Thus I find your question almost impossible to respond to, largely because I cannot imagine how to use theological language in a context like the present one. It presents, in my experience, perhaps the clearest example of the nontranslatability of discourses. Virtually anything I try to say in this vein would, I think, be completely misunderstood, both by those who thought they disagreed and by those who thought they agreed, and I see no way to overcome this gap in understanding. “*This Book of Starres*”<sup>10</sup> is largely about this problem, and carries me as far as I have been able to go in a public context.

About the distinction between the heroic and the redemptive in connection with Dickinson’s poetry: If your idea of the heroic is that of a person acting against a background of meaninglessness, achieving momentary and evanescent significance of a deeply ephemeral kind; the redemptive of a more permanent transformation, then I would have to place Dickinson in the latter category. One of the miracles of writing is that it can render such achievements public and in a sense permanent, making them available to others who are similarly engaged in a struggle with their language and the other conditions of their life.

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10. JAMES BOYD WHITE, “THIS BOOK OF STARRES” (1994) [hereinafter “STARRES”].

*B. The Canon*

BALL:

Phyllis Tribble writes about the pilgrimage that the Bible makes.<sup>11</sup> Other texts, too, along with paintings and pieces of music, make journeys in our lives. The same novels, poems, plays, and essays take on very different realities as they come venturing back to us, old companions returning with fresh challenges. The phenomenon makes me increasingly wary of book reviews.

Book reviews undoubtedly perform some service as shoppers' guides (limited by the degree to which they are extensions of publishers' marketing). And they may even serve to moderate disciplinary rage and individual self-advertisement by giving vent to them. The best—and I speak as a thankful author who has been a beneficiary—are those in which the reviewer opens a book's possibilities to other readers by suggestively creating some of the possibilities herself.

However, not even the best of imaginative reviewers can foresee what a just-published text may come to mean in the course of its journeys. Perhaps we should review a book when it first goes on sale and then re-review it years later after it has had time to travel.

Your books contain types of book reviews, reviews of texts from the western canon. They are exemplary both of fine, honest scholarship and of what book reviewing can become. You write from long, reforming familiarity with the texts that are your subject. Your writing is evidence of the journeys those texts make in your life. Your material keeps returning and advancing.

In *Acts of Hope*, you register the comment of a friend that what you write about is “drawn exclusively from the humanistic tradition of Western high culture” (80). I do not wish to excite a defense of your material. I do solicit your reflection on your relationship to it.

One of the themes sounded in *Acts of Hope*, more prominent in your volume on George Herbert, “*This Book of Starres*,” is that of rewriting. You say that in writing as in living we keep beginning all over again. Or hope to. You say that the poetry of Herbert and of Robert Frost is “a way of starting over again on the same basic problems of life, and it is in the activity itself, not in any summary of positions or propositions, that its meaning can be found.”<sup>12</sup>

Jack Queen was a master carpenter in the mountains of north Georgia. He built his own house, and for as long as I knew him he

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11. PHYLLIS TRIBBLE, *GOD AND THE RHETORIC OF SEXUALITY* (1978).

12. “STARRES,” *supra* note 10, at 151.

continued to rebuild it. He was forever taking down parts, adding others, revising the whole. I commented to him once that he reminded me of Thomas Jefferson. "Yes," he said, "that's right. You build and build, and then you die." His way of saying it, the speaking of his eyes, made me understand that he was affirming life. He took delight in his vocation's returning and rest.

Contrast his kind of rebuilding to that identified by Robert Hass in a review of two Cormac McCarthy works, *The Crossing* and *The Stonemason*. Hass says that McCarthy

parts company with post-modern practice in thinking, not that everything . . . refers to nothing, but that in human life certain ancient stories are acted out again and again. A writer's moral relation to these stories is like nothing so much as a craftsman's relation to his tools, and nothingness is not to be counted for the pleasure of merely circulating, but built against, sentence by sentence . . . if hopelessly, in the knowledge of the doom of all human intention, then indefatigably, in the knowledge of the skills of a trade that has been passed down to one and that will be passed in turn to other hands.<sup>13</sup>

Hass describes this attitude and practice as "a male ethic. It may be *the* American male ethic, but it descends to us from sources as old as the 'Odyssey' and the 'Aeneid' . . ." It is an "old ethic of work, a male ethic undertaken in pity and desperation . . ."<sup>14</sup>

Your returning to your material ever and again may well be a version of the old male-heroic ethic of work, and it certainly displays regard for craft, but I do not find you repeatedly building against (or circulating) nothingness enticed by the hopelessness of the enterprise. Your work has more the spirit of Herbert and Frost, Thomas Jefferson and Jack Queen. You do after all write about acts of *hope*.

You say that Herbert wrote and re-wrote because "[p]oetry, like preaching and prayer, is at once necessary and impossible."<sup>15</sup> Karl Barth gave the same explanation for his writing and rewriting of theology.<sup>16</sup> Although the writing of Herbert and Barth began in grace and ended in affirmation, they were nonetheless always rewriting. Their affirmation was a gift and not an achievement, and it was never static. It always sent them back to the beginning. Because they were non-despairing realists, the ongoing necessity and impossibility of their work is marked by hope rather than optimism.

13. Robert Hass, *Travels With a She-Wolf*, N.Y. TIMES BOOK REV., June 12, 1994, Sec. 7, at 1, 40.

14. *Id.*

15. "STARRES", *supra* note 10, at 55.

16. KARL BARTH, *THE WORD OF GOD AND THE WORD OF MAN* 186-217 (Douglas Horton trans. 1957).

What is your sense of this distinguishing difference of hope—and its source—in your own writing and rewriting? How the hope in the returning of your material to you and you to it?

WHITE:

First about the reading, then about the hope.

For me reading of the kind I write about is always rereading: These are texts that have compelled and rewarded my attention, not just once but again and again, and in new ways when I come back to them at a later stage in life. I started reading Homer as an adult about twenty-five years ago, and am still doing so; much the same could be said about Plato and Austen and Shakespeare. And I read for an education: That is, I read these works as written by individual people, each situated a certain way in the world, and speaking to us; and I do this with the object of learning as much as I can from the activity in which they offer to engage us.

In doing so I give myself a set of memories that I can use to help understand and structure my own experience, both in the law and elsewhere. By this I mean nothing esoteric. All of us, I think, make our way through life by bringing to bear on the present our memories of the past. We have heard this sentence, or that, in one version or another, a thousand times, and know how to read it when it comes again, whether as a surprise, a joke, or a deeply felt allusion. The same is true with social relations: We read this gesture or that against a background of prior gestures, by which it gets its meaning. How else do we know what someone means when they hold out their hand, palm to the side? We have all shaken hands. Similarly a family will develop its own language over time, made up of peculiar words, sentences, allusions, stories, all of which are ways of locating present experience in the language of the past. Reading does this too: I find myself constantly referring to Jane Austen, or Dickens, or Homer as a way of understanding and shaping the world I inhabit. Reading in this way can be, as Kenneth Burke said, “equipment for life.” This is no surprise for lawyers, for the common law has long been an elaborate and complex system for the memory and use of prior experience.

The question for us, as lawyers and as independent minds, is this: With what memories, what prior texts, should we stock our minds? My own writing about the texts I have chosen, largely from Western high culture, is an argument for the value of these particular texts, not because they are in something called “the Canon,” or to make any claim about “the Canon,” but because they have been so extraordinarily valuable to me—as they have been of course to many others as well, which is, after all, why they have been so assiduously read

and reread over time. But it matters not only which texts one reads, taken one at a time, but what patterns the texts make, in one's life and in the world. What relation exists or can exist, for example, among your reading of Homer, your reading of Austen, your reading of *McCulloch v. Maryland*? One answer, common in our overspecialized and fragmented era, is "none"; or perhaps someone says that the first two are aesthetic objects, to be enjoyed like other such, the last real and political, part of the business of the world. One of my deepest efforts has been to try to show that productive and meaningful relations among such apparently disparate texts (and, at the same time, among apparently disparate sides of life) can be established by each of us, as we read and as we live. This is also a claim, of course, that life itself need not be fragmented but can, as I say in *Justice as Translation*, be fundamentally integrated, held together by a common set of questions and attitudes.

Yet perhaps the most important aspect of this reading is that it affords contact with another mind, sometimes a mind incomparably superior to one's own, from which one can learn in even deeper ways, as one rereads and rereads. I have the sense, for example, that if I lived long enough I could read Plato indefinitely, taking as many centuries as it would require to read him through with care, and do so to endless profit.

It is not that writers are like people, they *are* people; and we can learn from them as we learn from parents, friends, teachers, not only about what is good and bad in thought, language, speech, and action, but also something even more general than that, about what it means to be a complete person with a complete mind.

Now for the second question, that of hope. In a sense I suppose I have answered it, for the reading I talk about, and the writing, are obviously animated by highly particular hopes: that what I read will have meaning for me, that what I write will have meaning for another. But you are asking, I think, a much grander question, with theological overtones, about hope as a more general phenomenon or condition: How can one have hope at all in a world like ours?

Just think: In our country, which we like to think of as democratic, and committed to the principle of human equality, we allow tens of millions of people to live in a kind of material and cultural poverty that makes one shudder even to imagine it. And this is unnecessary, for we surely have the resources to change this feature of our life. What is more, one might think that we had already been taught, and learned, the lesson that the brutally impoverished are people, with feelings and imaginations and needs, like the rest of us; that they count, and should count, each one of them, as a full person, in whose future each of us has a stake. When I first read Dickens, I felt that

his terrific attacks on the callousness of Victorian England, his exposure of the misery of the poor, were appropriate to another age, out of which we had matured. People living in cardboard boxes were to be found in Calcutta, not America. Now when I read Dickens, I feel that he speaks directly to our world, and about our central problem, and that this is at bottom not one of poverty at all, but of heartlessness: a failure to recognize, in Dickens's terms, that the poor are indeed "fellow passengers to the grave, and not another race of creatures bound on other journeys."<sup>17</sup>

Or think of a particular scandal of our national life, the way in which we treat those whom we incarcerate for crime, namely by subjecting them to more crime, and crime of especially brutal and inescapable kinds. Or of the utterly moronic destruction of the natural world upon which we depend for life. Or of the gross ugliness of almost everything that is built on the edges of our towns and cities, many of which were once beautiful.

To be hopeful about eliminating war, or poverty, or selfishness, or ugliness, is not I think sensible; these are manifestations of permanent aspects of the human character, including one's own, and the most we can hope for is temporary melioration. It is obviously worth trying to do what we think is right, but more out of a sense that integrity requires it than the expectation that a new day will dawn. I have certainly been no friend to the kinds of revolutionaries who say, "Throw away all that you have and trust to us to build a better world," for I have had so far no reason to think their world would be better, and plenty of reason to think it would be worse.

Yet I certainly do not feel that I am writing against a background of nothingness or despair. In all of these circumstances one sees examples of human goodness, sometimes extraordinary ones: the Moldavian woman who sells her house and car so that she may adopt six otherwise unadoptable children in her impoverished country; the Detroit man who gives hours of his time every week to help high school boys stay in school; the woman who gives her coat to the child of another. These are dramatic and material examples, but the same thing can be found in the texture of life in a thousand other places: in every human act of kindness, or understanding, or openness to another's situation in life; in every instance of courage at pain or disease or loss; in every moment that a person takes pleasure in the joys of others, or suffers in their pains. The true work of the world is present as a possibility in each and every life. We cannot hope to

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17. CHARLES DICKENS, *A CHRISTMAS CAROL* 9 (The National Library ed., Bigelow, Brown & Co.) (1843).

eliminate material or cultural poverty, for it is a function of selfishness; but we can hope to reduce our own poverties of spirit and mind.

Another way to put this is to say this: All around us are processes of life and creation that are fundamentally good, in which we can and do participate all the time, both as actors and beneficiaries. Teaching is such a process, and we participate in it both ways, as we learn from those who precede us and try to help those who come after, in our families, our schools—including law schools—and in our culture. What we can hope is to increase our own sense of attunement to the world we inhabit, to other people, to the conditions of our life, and to our inner selves: a hope of meaning.

All this is to speak of the eternal human capacity to make meaning or goodness, even in horrible situations: in the room of the dying, in prison, in the orphanage. We are not alone in our efforts, but have each other and the assistance of the formative influences of our culture: what we call our values and manners and institutions and practices, all of which I think of as captured in our languages. These can be better or worse, can improve or decay. One of our deepest duties, therefore, is the preservation of what we have been given by the past—the equipment for life that it offers. This is true both in the law and out of it. Thus a large part of my energy has been given to trying to understand what is good in the practices of legal thinking and action that we have inherited from the past—especially the legal hearing, the separation of powers, and the judicial opinion—and to trying to maintain them in a world in which they are under attack, from the left and the right. This is the direct analogue to what I mentioned above, my effort to keep alive certain texts from the Western past, by showing how they can be of real and immediate value in our own world, including in its political and professional aspects. In both respects I have been trying to keep an inheritance alive and usable.

### C. *Enactment*

BALL:

The words and the person, language and life are not for you discrete categories. We rewrite in our living the material that animates us. So does George Steiner observe that “the best readings of art are art.”<sup>18</sup> One of the fine readings of Emily Dickinson was Julie Harris’ realization of her in *The Belle of Amherst*.<sup>19</sup> Harris

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18. GEORGE STEINER, *REAL PRESENCES* 17 (1989).

19. *The Belle of Amherst* is a one-person play in which Ms. Harris portrayed Dickinson. WILLIAM LUCE, *THE BELLE OF AMHERST: A PLAY BASED ON THE LIFE OF EMILY DICKINSON* (1976).

performed the meaning of the poems. As Steiner would put it, she was an executant who gave Dickinson presence by investing her "own being in the process of interpretation."<sup>20</sup>

I think that your not pressing for a formal Law and Literature has to do with your inclination to perform the subject. What engages you, and me, is performance, performance in which the person is invested. One consequence of this engagement is disengagement from the ordinary politics of the discipline of academic law, or at least from that aspect of it conducted in law reviews. You do not often engage in the received dialogue and diapolemic of the conventional law review article. This does not mean that you have abandoned criticism and politics but that you aspire to a different form of participation in them. Simon McBurney remarked about theatrical performance and its "politics of the imagination" that "it can be more political to make people dream a bit than to be able to actually articulate a critique, operate a critique."<sup>21</sup>

Do you not hope to have us dream a bit? To dream and then to awake to rewrite our dreams in our lives? So that the end from which we begin again is the practice of a critical-ethical politics?

WHITE:

What you say captures my aim exactly, to enact or perform something that cannot be stated in propositional terms; this being so, obviously the work must stand on its own. But I can respond to what you say about "dreams." The overtones of that word are not quite right for me, I think, since I would resist the implications of unreality—of unconnectedness to the actual, of self-indulgence—which the term carries with it. But in another sense the word is appropriate, for in everything I do I am trying to work out a sense of what it is that law should be, that human life should be, towards which we can direct our energies, and in this to define possibilities that can be used as the basis for critical judgment and for creation too. I think, that is, that the activity of law is inherently idealizing; that it requires its practitioners to have a sense of what it should be; and that in arriving at such a sense we can and should draw on the larger resources of our culture and our lives.

Let me add, in response to what you say about "Law and Literature," that I do not think of this as a "movement" with a

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20. STEINER, *supra* note 18, at 8.

21. McBurney is an actor, writer and director, and co-founder and Artistic Director of Theatre de Complicité, a remarkable company based in London. The quotations are taken from an interview conducted by David Tushingham and published under the title *The Celebration of Lying* in LIVE 1: FOOD FOR THE SOUL: A NEW GENERATION OF BRITISH THEATREMAKERS 13, at 21, 22 (1994).



common program or set of objectives. In this respect it is as far from, say, “law and economics,” as one could imagine. Rather, we have seen people turn from law to literature for different purposes and in different ways, many of them extremely productive; here I would be celebratory, and celebratory of diversity, finding in this very variety great strength and hope. As for me, I turn to “literature”—including all kinds of things not usually placed in that category—in order to think about general questions that present themselves in the life of a lawyer. My questions are somewhat different from those of other people, as are my texts and my methods; I regard that as all to the good.

### III. A DIFFERENCE

BALL:

My dependence on your work emboldens me to venture a Whitean criticism of the reading you give in *Acts of Hope* of the Supreme Court’s opinion in *Planned Parenthood v. Casey*.<sup>22</sup>

You focus on the Joint Opinion of Justices Kennedy, O’Connor, and Souter—the Three. They do not formally overrule *Roe v. Wade*<sup>23</sup> even though they would not originally have supported it. You read their struggle—the “drama” of upholding *Roe*—as an enactment of the rule of law that is “the central moral fact of *Casey*”(181). I wonder whether your exclusive focus on the opinion of the Three, especially this aspect of it, led you to a reading that is overly generous and optimistic.

You characteristically read texts in context, and the contexts of this opinion—the stream of cases in which it falls, the whole of the opinion of which it is a part, and the critical response surrounding it—are telling.

#### A. *The Stream of Cases*

One of the contexts of the Joint Opinion is the flow of documents to which it belongs. The opinions now issued by the Court seldom carry with them the real, human presence of an author. They read as though they are the product of staff negotiation. You say that the Joint Opinion “was largely written, I think, by the justices themselves and not by their clerks”(168). Is it not disheartening that we must remark upon it when a text from the Supreme Court of the United

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22. 505 U.S. 833 (1992).

23. 410 U.S. 113 (1973).

States appears actually to have been written by the designated authors?<sup>24</sup>

As it turns out, even with respect to the Joint Opinion in *Casey* you are careful to add a judicious qualification: You think it was “largely” written by the justices. Later you address portions of the opinion that appear to you “written by an altogether different hand” (181). What does it say about the Joint Opinion and its claim on us that it stitches together real writing and staff negotiation?

### B. *The Whole of the Opinions*

Another context is that formed by the other opinions and the case as a whole. Chief Justice Rehnquist, in an opinion joined by Justices White, Scalia, and Thomas—the Four—reads the Joint Opinion as not really upholding *Roe* at all. Because it replaces *Roe*’s standard for evaluation (strict scrutiny) with another (undue burden) and because it also disregards *Roe*’s trimester framework, the Joint Opinion, says the Chief Justice, leaves us with something like a storefront set on a western movie: “a mere facade to give the illusion of reality.”<sup>25</sup> He also points out that the Joint Opinion’s fidelity to past decisions is qualified by the fact that it freely overrules in part cases that had implemented *Roe*’s protections.

In a separate opinion, certainly written by his own hand, Justice Blackmun applauds the significant “advances made by the joint opinion.” But he, too, like the Four, believes that “strict scrutiny implemented through a trimester framework” was essential to *Roe* and to the accommodation of a woman’s rights with state interests. He therefore reads the Joint Opinion with both praise and great caution and finds its promise outweighed by the more there is to fear in the Chief Justice’s opinion. He is moved to express palpable anguish: “I fear for the darkness as four justices anxiously await the single vote necessary to extinguish the light.”<sup>26</sup> He sees *Casey* in a larger context of politics and judicial politicization, and he leads the reader to wonder how the Three may vote in the future, when present colleagues are replaced by new ones and a different politics takes hold of the Court.

As a whole *Casey* leaves an impression of present doctrinal disarray. It also makes future results unpredictable, although a reader could come away with the belief that *Roe*’s protections are likely to

24. See JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986). Compare your reflections on the presence of the author on the pages of the manuscript of Dickinson’s poems (244-45).

25. *Planned Parenthood v. Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in judgment).

26. *Id.* at 923 (Blackmun, J., dissenting).

suffer further erosion. This belief would be based on the decision's specific holdings and real effects. If the disagreement about approach and theory is bitter, the cobbling of majority votes on the specific provisions of the statute is complex. The bloc of the Three is constant, but the majorities of five, seven, eight, and nine (as I count them) are variously assembled. The invalidation of the statutory provision requiring spousal notification—the only burden struck down—draws the smallest majority. All of the statute's other restrictions, including an onerous 24-hour waiting period, are upheld by the larger majorities. Notwithstanding the heated disagreement on *Roe* and *stare decisis*, then, the Court upholds most of Pennsylvania's restrictions on abortions, including some that are virtually identical to those that cases since *Roe* found unconstitutional. A reader could conclude that the sound and fury on the surface leave unaffected a gathering movement below in the votes allowing greater restrictions upon a woman's rights.

### C. Critics

A final context of the Joint Opinion is that constituted by critics outside the Court. You grant that *Casey* may seem "insufficiently respectful" of *Roe* and that reasoned arguments can therefore be made against it. You add that "some critics" have perhaps responded from "exasperation" and "have been infuriated with the opinion"(181). I am unsure whether I am among the "some critics," but I am sure that my response is born of sadness and responsible remonstrance rather than of exasperation and fury. In fact, I believe that my response is Whitean and herewith invite instructive correction of this belief. Here is my thinking:

You note that part of the Joint Opinion seems to have been written by a different hand (181), but you give only brief attention to this other section and relegate largely to a footnote the operative portion of the opinion upholding most of the contested, restrictive provisions of the Pennsylvania statute. You remark that this section of the opinion is largely of a piece with what has already been said because it, too, looks "to essentials and not to details" and follows the "central holding of *Roe*"(180 n.23).

Instead of dwelling on the discordant, operative part of the opinion, you focus attention on what you regard as morally central: "The central moral fact of *Casey* is that the three justices would presumably not have supported *Roe* when it was decided but now assume a responsibility of office to uphold it" (181). You align the Joint Opinion with other texts you admire—Hooker, Shakespeare, and Plato. Like them, it enacts its authority, "and it is thus for its own

language, for its own procedures, that the text most deeply argues. If these are mirrored in the actual practices of the institution, the argument supports that too; if not, the performance suffers from an incoherence between the surface claims and enacted meanings" (223).

For me, Whitean that I am, just such incoherence is the central moral fact of *Casey*. I agree with Justice Blackmun and the Four: To abandon strict scrutiny and the trimester framework is to abandon the heart of *Roe*, and to that extent it is to abandon those women whose rights depend most upon judicial protection. This abandonment is enacted in the real holding of the case, in the effective part, done by a different hand, which upholds all but one of the essentially restrictive provisions of the statute. The Joint Opinion claims respect for *Roe*, for the office of Justice of the Court, and for people committed to the rule of law. The claim is discrepant with the case's performed meaning. The laudable sincerity of the Three in the part they did write seems to me more to complicate than to allay this failure.

That failure directs me to what you say about the importance of *Casey* to authority and to the rule of law. The Joint Opinion expresses concern for citizens who disagreed with *Roe* but who struggle to accept it as the Three themselves do, and you identify this as "an extraordinary moment in the history of American law"(177). You join the Three in seeing the struggle to accept *Roe* as essential to character and community: "Only at such moments is the commitment to the rule of law a meaningful one: when you agree with the law, there is no problem; when you resist and oppose, you are refusing to accord law respect"(178).

It may well be that, as you say, "fidelity to the law becomes an important ethical possibility" exactly "where the divisions among us are so strong and irreconcilable"(183). But what is "the law" to which I owe fidelity? The law of the Supreme Court is not the only law that has moment for my life, and even if it were, what could be said to be the law of *Casey*? Should I follow the Court as the Court followed *Roe*? And in what does "fidelity" to law consist, and who gets to say? I do not think, and do not believe you think, that fidelity to the law is to be equated with obedience to the Court, or to three of its members, or to one of its tortured opinions. Are there not occasions, perhaps at times frequent, when resistance and opposition are forms of faithful respect for law?<sup>27</sup>

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27. For evidence of my own early struggle with *Roe*, see MILNER S. BALL, THE PROMISE OF AMERICAN LAW 122-24 (1981). For evidence of my struggle with the notion of an obligation to obey the law, see Milner S. Ball, *Obligation: Not to the Law But to the Neighbor*, 18 GA. L. REV. 911 (1984).

As you say, the Joint Opinion is concerned not with those who resisted and opposed but with those who struggled to accept *Roe* notwithstanding their disapproval of its result. It is to such an audience that the Joint Opinion undertakes "to remain steadfast." I suspect that this audience—I confess to difficulty in identifying particular members of it—takes comfort from how much *Casey* dismantled *Roe* and not from the little it left standing.

What concerns me here is the Zelig factor, a predisposition to identify with the powerful, the rich, and the celebrated, a predisposition to want to believe them even prior to the employment of their considerable means to manipulate public opinion to such an end. To endure suffering produces character, but to bend to a powerful court against conscience seems to me Zelig-like and corrosive of character.

You draw a connection between the Joint Opinion and Socrates' performance in Plato's *Crito* (305). Your comments on that dialogue are well-taken. In particular, your reading of the speech of the Nomoi has worked well in classes of mine. You understand the speech as Socrates' performance of educative friendship: It is not a unitary presentation, but rather a series of rewritings that lead Crito from one way of thinking to another, "from the authoritarian and propositional to the authoritative and enacted"(40). I think that if a connection is to be drawn between the *Casey* Three and anything in Plato, it is less with Socrates than with the court which condemned him and with the Nomoi as he invents and you read them. Socrates speaks to us strangely; he also speaks to us very differently than the Joint Opinion. He has no power to harm us immediately. And in the text, it is he who suffers the violence of law. That text's authority is wholly dependent upon the thought and imagination it enacts. It does not speak from a height of worldly power. (The same is to be said of *Richard II*, Dickinson's poems, Mandela's speech from the dock, and Lincoln's Second Inaugural Address, all of which you also present compellingly in *Acts of Hope*.)

Not so the Joint Opinion. It is handed down to us from Capitol Hill. The high Court has power, and it can cause immediate harm. Many, maybe most, of the women who will suffer the harm have never read *Roe*, and will never read *Casey* or know anything about the particulars of those cases. The people whom the Joint Opinion should have been most concerned with were those who will be most hurt by the dismantling of *Roe*'s protections,<sup>28</sup> for it is their struggle

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28. The district court had noted, for example, how the Pennsylvania statute would subject women to costly delays and the abuse of hostile antiabortionists. The Three said the district court's observations "are troubling" but not a demonstration of an undue burden. Planned

that will be decisive of the law's legitimacy or illegitimacy. As it is, the opinion is institutionally self-directed. Its focus rests upon its authors, and upon their undoubtedly sincere struggle with *Roe*, and upon their acting for people who accepted *Roe* against their inclinations, and upon the nurturing of the Court's own credibility and power. Notwithstanding the sincerity, this institutional self-concern is hubris and not authority.

Hubris is to be read in the Joint Opinion's statement about the Court calling "the contending sides of a national controversy to end the national division by accepting a common mandate rooted in the Constitution."<sup>29</sup> Justice Scalia draws a connection between the authors of this statement and Chief Justice Taney writing in *Dred Scott*.<sup>30</sup> (I think both that the connection is valid and that Justice Scalia draws the wrong lesson from it.) That opinion, too, came at a time when the divisions among us were strong and irreconcilable. Those who disagreed with the result of *Dred Scott* but nonetheless accepted it were probably not made better either by their struggle or Taney's. Those who disagreed with *Dred Scott* and who also then opposed and resisted it probably were made better in their struggle.

When those who have the power of force over us claim authority, their obligation is to speak with a just and circumspect humility, and ours is to listen with a just and active skepticism. When differences among us are irreconcilable, the Court betrays a fundamental responsibility if it speaks with an uncertain voice. At such times, a judicial-political text may do far greater service by plainly setting before us the darkness of our divisions than by presuming to compose them.

In the course of your well-taken, helpful comments on Lincoln's Second Inaugural Address, you cite his statement about sinking the wealth piled by the labor of slaves for 250 years and about paying every drop of blood drawn by the slavemaster's lash with another drawn by the sword. This is an awful notion, not least because of its truth and justice, and Lincoln attributes it to the will of God.<sup>31</sup> The statement, like the war which was its subject, captures the darkness.

Parenthood v. Casey, 112 S. Ct. 2791, 2825 (1992). You, unlike the Court, bore the affected women in mind and expressed concern about this aspect of the opinion, but you subordinated it to what you regard as the more central moral fact of the Three's relation to *Roe*.

29. Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992).

30. 60 U.S. (19 How.) 393 (1856).

31. For brief discussion of the "terrible" statement, see Eric Foner, "*Honest (But Passive) Abe*," NATION, Nov. 20, 1995, at 622, 628 (reviewing DAVID DONALD, LINCOLN (1995)).

The terror in the statement is jarringly highlighted by the equanimity of the very next sentence: "With malice toward none; with charity for all . . . let us finish the work, bind up the nation's wounds and care for those who bore the battle as well as their widows and orphans." *Id.* at 628. Such astonishing juxtaposition of judgment and touching solicitude is an accomplishment of familiarity with biblical texts. I wonder how the President spoke two such sentences next to each other. What kind of silence did he create by pausing between them?

It is a text of terror.<sup>32</sup> Such texts tear at meaning and the possibility of meaning, but they are true to dreadful experience which must be expressed and not papered over. These texts tell us that sometimes divisions cannot be talked together, that in fear and trembling we must choose one world or the other, and that we cannot then have it both ways.

WHITE:

You argue that the *Casey* opinion is not entitled to the sort of respect and admiration I give it, and perhaps that it is not entitled to authority either.

I would like to begin with a question: Can you imagine an opinion coming out with the result that *Casey* reached that you would admire and respect? If not, I think you are saying that abortion is an issue on which there is for you only one tolerable answer. So read, your question is an eloquent and passionate defense of the woman's right to choose whether or not to terminate the existence of a fetus within her.

The problem the law faces is that there are other people who maintain the opposite position with equal passion and eloquence, namely that abortion is the murder of an unborn child and that it should never, or almost never, be permitted. I think we cannot expect the two sides to agree on what they regard as the merits of the case. What the law can hope is to offer them something else on which they can agree, namely that decisions made by certain lawmakers, under certain conditions, should be granted respect and obedience, even if one disagrees with the choice they have made.

This is in the first instance the principle of majority rule in legislation: You make your argument to the legislature, and hope you win; but if you lose, you live with the consequences, perhaps planning to come back another day, because of your more general commitment to the larger process of which this particular action is only a part. The principle of constitutional adjudication is similar: Certain choices have been made authoritatively, by those who framed and adopted the Constitution (and its Amendments), and by those who have maintained it, particularly the Supreme Court. The search in this field of law is for basic constitutional principles that will override temporary and local majorities. In part because it is somewhat removed from the immediate political process, in part because of the characteristic ways in which it thinks and works—including, for our purposes most saliently, the principle that it regards its own prior judgments as

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32. The phrase is Phyllis Triple's. See PHYLLIS TRIBLE, *TEXTS OF TERROR* (1984).

authoritative precedents, limiting its freedom of choice—the Supreme Court is the agency our Constitution has primarily intrusted with the task of elaborating such a law.

In making an adjudication the Court faces its own version of the citizen's question, namely what authority a particular case should be held to have. You argue against the authority of *Casey*, and would presumably say that a future Court should feel entitled to disregard it and to cheerfully resurrect *Roe*.

I see two strains to your argument. First, you argue that *Casey* is simply wrong on the merits, implying that no case coming out this way would be entitled to respect or authority. This is, in my view, a perfectly comprehensible and fair position; but I take it you would regard it as one that you should yourself be entitled to take only rarely, when what you regard as absolutely primary issues are at stake. (You would not, that is, give to a future Court a list of all its prior cases, marked with pluses or minuses depending upon whether you agreed with the outcome, and maintain that they should respect the authority only of those marked with a plus.) For the law is essentially about the fact that people will disagree on the merits; it is a way of living with that disagreement, and this requires that we often respect judgments with which we disagree.

But not all judgments. Sometimes an issue will be of such overriding importance that a person's commitment to her judgment on it overrides all other forms of allegiance. Such, for example, might be the issue of human slavery, or the death penalty, or a criminal war—or abortion.

To take such a position is, to some degree, to separate one's self from one's polity; the question is, to what degree? One possibility is to become the enemy of the government, and seek its overthrow. But even here, as Mandela makes plain, there are a range of possible choices one can make, from sabotage to terrorism, with important ethical differences. As he argues in his Speech from the Dock, sabotage was in his view the most decent and civilized response he could make to the inhuman regime that ruled South Africa. Another degree of separation is represented by civil disobedience, in the tradition of Martin Luther King and the Quakers. Here the idea is that one violates the particular law that one finds odious, but demonstrates one's continued commitment to the community of which one is a part by doing so publicly, expecting to be sanctioned and not complaining about that fact. This is a form of witness, of which one's community is the audience; both in the disobedience and in the submission to law one is demonstrating one's fidelity to it.



For me abortion is not such an issue, but I can respect the sincerity and decency of those for whom it is, or some of them, and this on both sides of the question.<sup>33</sup>

Yet the existence of a strong and principled disagreement on the issue of abortion itself is just the kind of question to which the law exists to give answers, even if these answers are imperfect in process or result. The task of the law is to frame a language and to set up institutions to which people can conscientiously grant authority even when the results reached are at odds with their own preferences or principles. A second question is how well the *Casey* opinion does that. In my view rather well, in yours rather badly.

In discussing this issue we should assume that you could imagine a decision coming out as *Casey* did to which you would be willing to grant authority as a judge in a future case, or as a citizen in your own life. In this conversation certain traditional legal issues become relevant, for example the right reading of *Roe*. You agree with Blackmun that the trimester formula is essential to the meaning of that case; I agree with the Joint Opinion that it is not.

To support my position I would maintain that the trimester rule was the most objectionable part of the decision when it was issued, it being then widely agreed that the Supreme Court ought not to function as a legislature, promulgating rules of intermediate generality. Instead it ought to decide matters of fundamental principle, at a level of high generality, and apply them to the particular complexities offered by individual cases. One argument for this position has traditionally been that the Court does not have available to it, as the legislature does, the capacity to make the factual determinations necessary to the formulation of such rules, which

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33. For me, in fact—to speak now simply as a citizen and not as a lawyer—the real issue is not abortion but male dominance. What stands out to me in the current political dispute is the picture of men telling women what to do: men in the legislature, men running for office, men in the judiciary, men in the priesthood or pastorate, and, of course, men in the family. Suppose, by contrast, that all men agreed that abortion was an issue that particularly pertained to women and that women could be counted on to resolve it well for themselves. Suppose there then ensued debates on abortion in public, in the newspapers, in the legislatures, and in the courts, but always on the understanding that only women should participate either as speakers or as voters. Men would be silent. I can imagine that, after some years of such a process, a set of rules or principles governing abortion would emerge, perhaps with the support of an overwhelming majority of women. I also can imagine the possibility that these rules or principles might limit abortion in various respects, perhaps like the limitations upheld in *Casey* itself: requiring that women contemplating abortion acquaint themselves with some of the facts and arguments on both sides, perhaps imposing a counseling or waiting period requirement. Were that to happen, these rules would in my view have a completely different standing in the world from the present restrictions. I think, that is, that the present dispute is skewed or deformed by an element present on both sides, somewhat more prominently in those opposing abortion, that consists of a male desire to control female sexuality and reproduction. Whether I could find a way to say any of this if I were sitting on the Supreme Court is another question to which I at present have no answer.

inherently involve complex estimates of factual probability. Another is that the Court is the institution in which arguments of fundamental principle ought to be made, in part because it informs and limits itself over time through the practice of the judicial opinion and the principle of precedential authority. To one raised in this tradition it makes a great deal of sense to think of the trimester rule as a mistake, unnecessary to the heart of the opinion, and to conceive of the fundamental principle that protects a woman's choice as indeed the "core" of the matter. (Those who object from the "pro-choice" side often forget what the most likely alternative to *Casey* would have been, namely an overruling of *Roe* in all of its respects, and the denial of any constitutional protection for the woman's choice.) It is of course true that the Court in *Casey* upheld restrictions on the woman's right to abort a fetus; also true that it moved from a "strict scrutiny" to an "undue burden" test. Given the Court's acknowledgment of what can be said on the other side, and its adherence to its fundamental principle that it is for the woman to choose whether to carry a fetus to term, this seems to me fair enough.

All this has an extraordinary significance because the law is in a crisis, a crisis of authority. There is a real question whether those with power will respect judgments made by others in any significant way. That they should do so is the first requirement of legality; it is what is meant by the separation of powers and the distribution of competence to decide. Yet in legal education today, in the work of law journals, and in the criticism of the Court, one sees an almost exclusive focus upon issues of policy or result. In such debates the participants imagine that they have full power to implement whatever rule they choose; the question they pursue is what it should be. This is of course a worthwhile goal, but it is not the essence of law.

The essential question for the lawyer is not what the rule should be, or how a case should be decided, but how each case should be decided given the judgments made by others to which one is bound to pay respect—judgments made in the Constitution, in legislative enactments, in agency decisions or regulations, in contracts, or in private life. This means that deciding what authority such a judgment should have is an essential element of legal thought, though an element not much attended to in legal writing or education. This is what is truly at issue in *Casey*: what weight should be given the legislative judgment, what weight the private judgment by the woman, what weight the earlier decision by the United States Supreme Court in *Roe*, and so on. What I admire about the opinion in *Casey* is what you call its "institutional self-concern," that is to say its self-consciousness about its obligation to pay respect to sources of authority external to itself. This is, in my view, a step in the revitalization or

rehabilitation of law itself, at a time in which law is increasingly ignored or disregarded, particularly by those who are most charged with its maintenance, in the law schools and courts.<sup>34</sup> I continue to think that the *Casey* opinion is an ethical and professional performance of a very high order indeed, the best thing I have seen come from the Supreme Court since the retirement of John Harlan.

I do not mean to suggest that you do not know all this, but simply to explain something of why I put such an emphasis on the ethical and intellectual achievement of this opinion. I should also say that what matters most to me is not that someone agree that this opinion has the merits I claim for it, but that they see that the kind of question I raise, about the authority due to judgments made by others—and the ways in which we constitute authorities in our own speech and writing—is a legitimate and important one. I am happy to be disagreed with on the terms of my argument, for it is the significance of the argument itself with which I am most concerned.

Now I turn to your main point, which is I think not really about the merits of the abortion controversy, in the usual sense, nor about authority, but an institutional argument of another kind, namely that there are certain issues that are so stark, truths so terrible, that the Court should not seek to comprehend them in an overarching discourse, but let the differences on the merits speak in direct opposition to each other. On this view, one could say that the Court in *Casey* is maintaining a false and hypocritical image of decency and civilization against the reality of a terrible denial of women's rights; it follows, I suppose, that it would be better for the Court simply to be explicit about what it is doing and overrule *Roe*, thus bringing the real issue into the political arena where it will have to be settled in any event. This would be a gift of truth to the polity, the argument goes. *Casey* is like *Dred Scott*: Let the Court say what it is really doing, and we can hope to act in response; if it produces a meliorating and equivocating opinion, this will make it harder for us all to face the real question.

On this I really do disagree. From the point of view of one interested in the merits, on the side of a right to abortion, for example, I think this could lead to a disaster, for I have no confidence at all that "we" would win the ensuing political battle. And I think that the articulation of the question in the way most likely in such a

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34. Of course lawyers know what I am saying, for most of their argumentative life is about the meaning of authoritative texts external to any of the actors: what they mean, what weight should be given to them, and so forth. That is the essence of their lives. If they do not learn how to engage in this kind of thinking in law school, they will have to do so in practice; in that sense our failures in legal education may not be crucial.

dispute, namely “for” or “against” abortion, or a woman’s right to choose, is likely to lead to bad results, even if “we” do win. Abortion is not an easy issue for anyone, including for the women and men who face it, and our way of talking about it should reflect that fact—even if, for some of us, it is easy to know who should have the right to decide the question. Second, as an institutional matter, it is the nature of law, and essential to its most important contributions, to transform a dispute cast in one set of terms, in one social and rhetorical context, into another. In this way law is inherently fictive; this is not a criticism, for in doing this the law creates and maintains resources of meaning that make it possible for us to sustain a communal life. A necessary part of its activity is the respect paid the authority of some judgments external to the self; the question, which judgments, and how far, and why, is not reducible to rules or factors, but is the central question of legal thinking and legal art. What I admire above all in the *Casey* opinion is that it makes this question central and real, and that the Justices in my view not only recommend but perform the respect they speak of. Secondly, I think their identification of the most compelling elements of *Roe*, and of the authority of those elements in the present case, is for the most part highly persuasive. The fact that behind the opinion are the voices of those who would simply toss *Roe* to the wolves, as well as those who think it beyond criticism, just makes the achievement of the opinion all the more important.

So here we do have a disagreement. You say that it would have been better for the Court to set forth plainly the “darkness of our divisions” than to have “presumed to compose them.” Without accepting all the implications of your characterization of what the Court tried to do—in my view it was less to compose differences than to offer us a way to live with them, on both sides—I think the choice you prefer presents a certain element of peril and of loss. Peril, for it turns a matter over to a political process that is not in my view likely to lead either to composition or to a way of living together; loss, because it is an abandonment of the law’s essential role, which is to offer a language, and a set of institutions, parallel to those by which we lead the rest of our lives, to which we can turn when we need them. *Dred Scott* set forth starkly the darkness of our divisions over slavery, and helped precipitate our Civil War. Perhaps the outcome of that war justified it, as General Grant claimed in his memoirs, and perhaps therefore it was a good thing to precipitate it; perhaps it was a providential exaction, as Lincoln suggests, and on those grounds a good thing. But I do not have the kind of confidence either in happy outcomes or in providence that would lead me to encourage the Court to set forth the darkness of our divisions in the hope that this would

lead to their resolution. There is another element, after all: the depth of our commitment to the law, which is as real as the division, and it is this that the Court, in my view, rightly, invokes and performs.

I sense another difference between us as well, for I have the impression that you have a distrust of power, a sense of alienation from the things of this world, that I do not wholly share. This is largely a matter of emphasis, I know, but to me it is not bad but good that the Supreme Court exists and has power and uses it, even though I may strongly disagree with this or that exercise of it. The alternative is not a world in which no person has power over another, but one in which power takes different, and to me vastly less appealing forms.

Ever since Robert Cover wrote "Violence and the Word"<sup>35</sup> many years ago, it has been common for people to focus on the element of violence present in law itself, and particularly upon the way that our institutions and formulations tend to hide this violence. This is an appropriate point, but I think it is often greatly exaggerated. The paradigmatic legal event is not really the sheriff hauling someone away in chains, but two parties hammering out an agreement, usually one that meets all the desires of neither party, under pressure of adjudication; or an adjudication with the results of which both sides willingly, though sometimes unhappily, agree to abide. Our law works by agreement much more than it does by force. And when it does work by force, it seems to me a misnomer to speak of that as violence, at least in many cases; there is a large difference, to me, between a sheriff executing a judgment or a court ordering someone into jail for contempt, and what I think of as true violence, as exemplified by the behavior of mobs or criminal gangs or, often, victorious armies. The distinction between force and violence seems to me an important intellectual and ethical resource, and I would resist blurring it.

It is also important that the law protects us from violence: violence of criminals, violence of police, violence of public officials, violence of private power. It does so imperfectly, of course, but in the main I think Western law constrains violence a great deal more than it participates in it. And when one thinks of alternatives to our kind of law I think that it is easy to romanticize "community justice," as though violence were not a part of that: Lynching and stoning in public, coercion in private, occur in those systems, too.

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35. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

A final note: In choosing something to disagree about, it is not surprising that you choose *Casey*. As far as I can see almost no one agrees with what I say about that case. But what matters to me is not whether people agree with what I say, but whether they acknowledge the importance of the issue that the case raises, of the proper authority of the judgments of others. If that issue is taken seriously, the question then arises how such authority is to be determined, when granted and when withheld and why; this in turn raises the question, how it is to be thought about, in the law and out of it, and what we can learn from the performances of others about this set of issues. The determination of authority can then be seen as a fundamental human process which is of crucial importance in the development of the self, in the formation of community, and in the life of the law, and to define a central topic of thought and argument, on which our present efforts are far from adequate and which thus calls for continued and further work.