The Poverty of Economics and the Hope for Humanities in Comparative Law

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> [T]he most profound obligation of each of us in using his or her language is to try to recognize what it leaves out, to point to the silence that surrounds it—to acknowledge the terrible incompleteness of all speech, and thus to leave oneself open to hearing other truths, in other languages.
>
> —James Boyd White[1]

INTRODUCTION

A discipline can help another discipline in one of two principal ways: either by showing the ways in which the two disciplines think and do things similarly, or by showing the ways in which the two disciplines think and do things differently. The former assistance is essentially confirmatory. It will tend to help the other discipline to think and act along its own established disciplinary lines. The latter assistance is essentially critical. It will tend to challenge the other discipline to think and act in new ways. A discipline like law which, in its professional and practical dimension (or pretension) has traditionally depended upon a professed sense of stability, may be more likely to welcome assistance of the former kind than assistance of the latter sort.

In this paper, I will argue that the discipline of economics and the disciplines of the humanities work to assist the discipline of law in different ways. My argument is that economics assists the law mainly in the former of the two ways outlined above, which is by way of confirmatory assistance; while the humanities assist the law mainly in the latter of the two ways outlined above, which is by way of critical assistance. This is not to suggest that the humanities are necessarily the opposite of law. On the contrary, the ultimate hope is that the legal discipline will rediscover its own nature as a humanity through exposure to the other humanities disciplines.

[1] White, JB (1987) 'Economics and Law: Two Cultures in Tension' (54) *Tennessee Law Review* 161 at 201. This is an appropriate place to thank Professor White for his comments on an earlier draft. I am also grateful for their suggestions to Richard Dawson, to the editors of this special issue of the Journal of Comparative Law and to an anonymous referee.

Humanities can be what Peter Goodrich calls 'Non-law'. Non-law 'suspends law, brackets out the essence of the juridical so as to question the perspective and vision of lawyers', even as it thereby helps to institute or constitute a new type of law.[2] Advocates of economic analysis of law will argue that some versions of their approach can offer an external critique of law, but I would counter that the critical aspect of classic microeconomic analysis is in many respects weak. For one thing, it fails to critique the law in precisely those aspects of legal thought and practice—for example, abstraction, reduction and categorization—which, being in the nature of internalized disciplinary habits of law, are precisely those aspects for which external critique is most required. An appreciation of law derived from the perspective of the humanities will also have its weaknesses, but its great strength is that it challenges those habits of legal thought and practice which the law itself is least able to revise and reform by its own internal methods and means.

The proposal made here, that the law should prefer interdisciplinary engagement with the humanities to interdisciplinary partnership with economics, is of special importance to comparative law in at least three respects. The first is that the extra-disciplinary voices of the humanities are advantageous to comparative law scholarship on account of the ways in which they open the legal ear to hear more fully what the outsider is trying to say. The second is that comparative law is a serious matter. It has the potential to promote friendly relationships between nations. It therefore seriously matters that comparative law should be approached with the humane ethos that the humanities seek to engender. We can even hope that more open and humane ways of hearing, thinking and speaking as comparative lawyers might constitute a new scholarly community, and that this in turn might constitute a new comparative law. The third aspect is the most concrete. It is simply that some societies, including many First Nations of the North American continent, have not separated law from the arts to the extent that has become habitual in 'Western' States. Examples of such societies will be cited towards the end of this paper, but in general we can say that engagement with law and humanities encourages appreciation of the artistic dimension of law. Such engagement will therefore encourage deeper appreciation of societies in which law is closely identified with art. By the same token, attending only to 'law and economics' will be poor preparation for engagement with societies, perhaps especially 'non-Western' societies, that do not regard law economically. This brings us to the next section.

THE POVERTY OF ECONOMICS

> [W]hen I look at economics I see a language that is deeply inadequate for talking about what is best in our shared existence; indeed, I think it is destructive of it.
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> —James Boyd White[3]

[2] Goodrich, P (2012) '*Interstitium* and Non-law' in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar Press 213 at 214, 227-8.

[3] White 'Economics and Law' supra note 1 at 197.

> [T]o reduce comparative law to its function and purpose (*instrumentum*), or to reduce it to efficiency-related considerations, is to reduce comparative law to *calculating* thinking
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> —Igor Stramignoni[4]

The ultimate aim of this paper is to present a positive argument in favour of law and humanities scholarship in the field of comparative law. A large part of its method, however, is to critique a certain species of law and economics. I will critique this species of law and economics in precisely those aspects that law and humanities does better, so that the negative critique of the former becomes a positive case for the latter.

I have no complaint against a modest form of microeconomics, which might assist us to see the economic costs associated with laws, judgments and political choices. Economics certainly plays a practical part in the formulation of legislation and in the resolution of disputes concerning matters as diverse as family property, motoring negligence and commercial fraud. My complaint is against the same 'particular type' of law and economics that Martha Nussbaum has criticized.[5] That particular type is one which, in the language of its leading proponent, Richard Posner, proceeds 'on the assumption that human beings are rational in every department of human life and not just when trading in markets'.[6] It is one in which the rationality of the individual actor is bent upon the maximization of wealth (a term which is supposed to include more than mere money), with the result that 'the ultimate question for decision in many lawsuits is, what allocation of resources would maximize efficiency'.[7] What a fantastic assumption is perfectly rational humanity! What a pessimistic assumption is perfectly wealth-oriented humanity! Writing nearly two decades ago, Nussbaum characterized Posner's *homo economicus* as 'a self-interested maximizer of his own satisfactions (or, occasionally, a classical utilitarian maximizer of social welfare)'.[8] One of her main criticisms of Posnerian law and economics was that it provides an inadequate account of human behaviour. In particular, that it reduces altruism to 'a type of egoism, in which people get reputational or psychic goods for themselves'.[9] She argued that 'we need to recognize sympathy and commitment as independent sources of motivation'.[10] Nussbaum's conclusion was that Posnerian law and economics was in 1997 'as yet underdeveloped and crude'.[11] Following shortly after Nussbaum's article (but making no reference to her work), a book appeared in which a 'second wave' of law and economics was proposed. The aim of this 'second wave' was not to supplant Posner's approach but to supplement it. Gillian Hadfield was one of the leading proponents. She expressly acknowledged that Posner's approach (the first wave) was 'rhetorically

4 Stramignoni, I (2002) 'The King's One Too Many Eyes: Language, Thought, and Comparative Law' *Utah Law Review* 739 at 752.

5 Nussbaum, MC (1997) 'Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics' (64) *University of Chicago Law Review* 1197.

6 Posner, R (2009) *Law and Literature* Harvard University Press (3rd ed) at 229.

7 Posner, R (1973) *Economic Analysis of Law* (1st ed) Little, Brown & Co at 320.

8 Nussbaum 'Flawed Foundations' supra note 5 at 1211.

9 Ibid.

10 Ibid.

11 Ibid., 1210.

powerful',[12] so it is no surprise that her 'second wave' project, complete with its defining metaphor, was from the outset constituted in overtly rhetorical terms:

> I wish to lay out the emerging trends in law and economics as a call to give up what was so appealing about the first wave of law and economics—namely the illusion of resolution, certainty and mastery over complex legal issues – in favour of greater partiality, imperfection, and multiplicity, but also greater wisdom. The emerging law and economics—what I am calling the second wave of law and economics—is a humbler endeavour, one that shows greater respect for the complexity of law.[13]

This is all very laudable, but developments since 1999 suggest that the second wave did not come to much. That, I suppose, is a weakness inherent in the metaphor of surfing the wave. Sooner or later the wave fizzles out to foam and the surfer gets stuck in the sand. Nevertheless, to the extent that the spirit of the second wave was to seek out something superior to Posnerian law and economics, the spirit lives on and there is still hope of progress. The best hope lies in the possibility of opening up law and economics to hear the humanities. Nussbaum warned that:

> Law and Economics is currently still somewhat impoverished. It is impoverished because it did not proceed in the way that Aristotle recommends, sitting down with the arguments of eminent predecessors to see what can be learned from their years of labor.[14]

Nussbaum's complaint is that law and economics has failed to sit down with the wisdom of the past. The equivalent error in comparative law takes at least two related forms. The first is a failure to attend to the cultural history that supplies the context for local law.[15] The second is a failure to sit down with predecessors whose cultural influence has reached far beyond their nations of origin, including, to cite examples originating in the Western tradition, Aristotle, Shakespeare, Kafka and Voltaire.[16] In one recent case in English law, the question arose whether trustees of a fund should be free to continue to exercise their discretion to distribute the capital of the fund in favour of a beneficiary who desired to give away the money to charity in discharge of a personally felt moral imperative. The judge, Hart J, said:

> How, as Mr Le Poidevin asked rhetorically, can the court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary's own views on the subject? That is certainly not a question to which the court can give an abstract answer, whether by reference to the Bible or to Bentham, to Kant or the Koran. The answer has to be found in the concrete examples provided by

[12] Hadfield, G (1999) 'The Second Wave of Law and Economics: Learning to Surf' in Richardson, M and Hadfield, G (eds) *The Second Wave of Law and Economics* Federation Press 50 at 52.

[13] Ibid., 50.

[14] Nussbaum 'Flawed Foundations' supra note 5 at 1214.

[15] See, for example, Watt, G (2012) 'Comparative Law as Deep Appreciation' in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar Press 82-103.

[16] On the value of the Hellenistic tradition for comparative law see Brooks, R (2006) 'The Emergence of the Hellenic Deliberative Ideal: The Classical Humanist Conception of Comparative Law' (30) *Hastings International and Comparative Law Review* 43.

> the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth.[17]

There was in fact no binding legal authority on the point. One might have thought, therefore, that best guidance on such an issue would ideally have been sought in non-legal sources of wisdom. However, the judge refused to hear any extra-legal wisdom on the matter.

Suppose this had been an issue of comparative law. How could one engage in unbiased comparative study between, say, English law and Islamic Law without attention to the Koran? Comparative discourse requires us to step out of our native libraries. For comparative lawyers that means to step out of the law library.

Nussbaum's echo of Aristotle's call (for us to sit down with our learned predecessors) was not heeded, and the result is that law and economics scholarship remains in a state of poverty. The work of attuning oneself to other ways of thinking is no doubt time-consuming (and testing in other ways) and it may be financially inefficient, but perhaps we can comfort the economic thinker with the assurance that the investment will yield rich rewards. We can see some of the best proof of this in the work of James Boyd White and those whom he has inspired.[18]

It is not only law in general that will reap the rewards of attunement to the humanities, but also 'comparative law' in particular. Ralf Michaels saw some hope for comparative law in Hadfield's vision of the second wave of law and economics:

> [M]odern comparative law is no longer a pure social science (if it ever was); instead, the discipline has learned from the humanities and from softer social sciences such as anthropology. This means that thick description is sometimes necessary, even if coding of the law is then no longer possible.[19]

The problem is that one cannot simply add humanity to law and economics as if placing a surfer on top of a wave. The wave of law and economics is not designed to carry humanity very far. The authors who asked 'Can Law and Economics be Both Practical and Principled?'[20] gave the following pessimistic answer: 'With respect to the common law and its moral heartland, we think not'.[21] Ultimately, Ralf Michaels himself seemed resigned to the same conclusion: 'methodological rigour and sensitivity to legal system seem to be, to some extent, mutually exclusive'.[22]

I have two main complaints to make against a particular type (I will call it the Posnerian type) of economic analysis of law as regards its suitability to inform comparative law. The first complaint, which is rather well-trodden but is not yet trite, and has not been very often applied in the context of comparative law, is that Posnerian law and economics is too

[17] *X v A* [2005] EWHC 2706 (Ch); [2006] 1 WLR 741 at para 43.

[18] An excellent recent work which appreciates the light that James Boyd White sheds on 'law and economics' (not just 'law and literature') is Dawson, R (2013) *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* Routledge.

[19] Michaels, R (2009) 'The Second Wave of Comparative Law and Economics' (59) *University of Toronto Law Journal* 197 at 211.

[20] Hoffman, DA and O'Shea, MP (2002) 'Can Law and Economics be Both Practical and Principled?' (53.2) *Alabama Law Review* 335.

[21] Ibid., 417.

[22] Michaels 'The Second Wave of Comparative Law and Economics' supra note 19 at 211.

simple, too sparse, too superficial. The second complaint is that the species of economics and the species of law that are brought together by Posner are not of the sort that will be scrutinized by the critical lights of the other discipline, but of the sort that will find comfort and confirmation in the attentions of the other.

The first complaint against Posnerian law and economics, the complaint against simplicity and superficiality, is highly pertinent to comparative law. The complaint is that it operates with insufficient cultural contextualization and an insufficiently humane ethos. Posnerian law and economics is not deeply appreciative of law's cultural context, but is dismissive of it. The relationship between law and culture is revealed to be richer and more complex the deeper one delves. It therefore suits the Posnerian project to be content with a thin and superficial reading of law. A positivist strain of economics supplies a methodological justification for simplicity and therefore allows the Posnerian scholar to circumvent the inconvenient complexity of culture.

Supporters of Posnerian law and economics can be said to regard the vernacular of efficiency and wealth maximization as a sort of transnational language. Posnerians with an eye to comparative law might run the following argument: *homo economicus* is *homo non-domesticus*, so the language of wealth maximization is an international language that makes it ideally suited to assist in comparative law projects. Robert Cooter posits precisely this possibility in his testimonial blurb on the back cover of Ugo Mattei's book *Comparative Law and Economics*:[23]

> Unlike law, microeconomics is the same whether taught in Berkeley, Bombay, or Brussels. Scholars in comparative law have long sought a neutral language applicable to different legal systems and cultures. Does economics provide that language?

The hypothesis of a transnational economic language falls into the error that comparatists have fallen into when they have occasionally supposed that a common European discourse can be created to overcome the obstacle of divergent local languages.[24] The error does not lie in the desire to find a common discourse, but in the assumption that a *new* discourse should be created for that purpose and that it should supplant existing local discourse. Simone Glanert has convincingly argued that there is no simple way to bypass the complexity of our cultural commitment to our national, communal tongues: 'the presence of local languages, understood as languages of tradition, *must* be regarded as an obstacle to the development of a European private law' (emphasis added).[25] Comparatists who look to a uniform language to supply a transnational discourse make the same mistake that was made when the creators of Esperanto sought to create a transnational language for Europe.[26] The mistake was to underestimate the commitment of individuals to varieties

[23] Mattei, U (1997) *Comparative Law and Economics* University of Michigan Press.

[24] Kjær, AL (2004) 'A Common Legal Language in Europe' in Van Hoecke, M (ed) *Epistemology and Methodology of Comparative Law* 397. López-Rodríguez, AM (2003) 'Towards a European Civil Code Without a Common European Legal Culture? The Link Between Law, Language and Culture' (29) *Brooklyn Journal of International Law* 1195 at 1220.

[25] Glanert, S (2012) 'Europe, Aporetically: A Common Law Without a Common Discourse' (5) *Erasmus Law Review* 135 at 137. Compare John Henry Merryman's reference to a 'Babel of laws' (Merryman, JH (1981) 'On the Convergence (and Divergence) of the Civil Law and the Common Law' *Stanford Journal of International Law* 357).

[26] Hobhouse, Sir J (1990) 'International Conventions and Commercial Law' (106) *Law Quarterly Review* 530 at 535.

of languages that they consider to have been naturally (and to a great extent natively) cultivated. Indeed, the promoters of common European discourse in comparative law, promoters of a common legal code for Europe, supporters of Esperanto and supporters of Posnerian law and economics in many cases make essentially the same species of mistake, which is to pursue the supposed pairing of uniformity and efficiency without regard for individual commitment to culture.

Economic thought of a Posnerian sort cannot appreciate the rich complexity of the individual in his or her cultural context, so it purports instead to locate the individual in a society that is constituted through relationships of a purely commercial and transactional type. That idea predates Posner by at least half a century:

> [T]he true unit of economic theory is not an individual but a going concern composed of individuals in their many transactions of principal and agent, superior and inferior, employer and employee, seller and customer, creditor and debtor, bailor and bailee, patron and client, etc.[27]

Every individual is no doubt located within a complex mesh of commercial transactional relationships, but why should we ignore other types of relationships within which individuals live their lives? Taken to its logical conclusion, the process of locating an individual within their social dealings must require us to consider the individual within the context of his or her community and whole culture, and not merely in their commercial transacting. James Boyd White observes the artificiality of respecting commercial relationships without at the same time having regard for the culture which gives rise to those commercial relationships and for which those commercial relationships are ultimately pursued.[28] White makes the point that a true 'self-interest' requires one to assert an interest in the culture and the community of which one is a part.[29] Something like the same sentiment emerged in a dialogue between Arjo Klamer and Barend van Heusden:

> Klamer:
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> What I am particularly concerned with is the absence of any sense of culture in current economic theory. Culture does not play a role in economic analysis. That seems unfortunate as culture in the general sense, Dutch culture for example, might make a difference to how economic processes evolve.
>
> Van Heusden:
>
> I would go further than that. Listen, economists study human behavior and human behavior is in a large part cultural, that is, semiotic behavior. So if economists decide to leave out culture from their theories of economic behavior, they have at least the duty to explain how this human being, cultural from head to toes, suddenly leaps out of culture when s/he is being 'economic'.[30]

[27] Commons, JR (1925) 'Law and Economics' (34) *Yale Law Journal* 371 at 375.

[28] Compare Foster, NHD (2007) 'Comparative Commercial Law: Rules or Context?' in Nelken, D and Örücü, E (eds) *Comparative Legal Studies: A Handbook* Hart Publishing 263.

[29] White 'Economics and Law' supra note 1 at 191.

[30] Van Heusden, B and Klamer, A (1996) 'The Value of Culture: A Dialogue between Barend van Heusden and Arjo Klamer' in Klamer, A (ed) *The Value of Culture: On the Relationship between Economics and Arts* 44 at 47. See further Klamer, A (1987) 'As if Economists and their Subject Were Rational', in Nelson, JJ; Megill, A and

Economics, which derives from the Greek for domestic management, is shamefully shortsighted when it purports to tell us how to run an efficient household, whilst failing to keep in view the reasons why a household matters and is meaningful. We can look to economics to make a house, but we must look to the humanities to make a home.

If it is an error to underestimate individuals' commitment to the culture of their country or local community as expressed in language, it is equally an error to underestimate individuals' commitment to the culture of their country or local community as expressed in other matters, including norms of law. Guido Calabresi, one of the founders of the law and economics movement, appreciated this error early on. He even wrote an open letter to Ronald Dworkin to express his view that the move by which we simplify law for transnational operation is the move by which we condemn the law to superficiality and erroneous simplicity. He wrote that 'discussions of the role of courts that do not distinguish England from America (let alone both of these countries from Italy and France) seem to me prima facie suspect.'[31] He did not in express terms direct this dart at the over-inflated transnational ambitions of analysis based on 'efficiency' and 'wealth-maximisation', but he should have. Avery Katz identifies a mistake that is closely related to the error of underestimating individuals' cultural commitment. He identifies the error of failing to take account of individuals' commitment to obey law. He points out that this error is committed by commentators and analysts who adopt a disinterested super-national approach to comparison between national systems of law:

> [W]hen discussing a foreign legal system, one might ask 'does Finnish law reflect the efficiency norm' in the same way that one might ask 'does Finnish law contain a doctrine of adverse possession.' The former question is more complicated, and would require a greater number of ad hoc empirical judgements, but as an outsider one conceivably could ask the question without caring much how the answer comes out. Insiders, however, care; they will view the legal rule as something to be followed once discerned. Thus, description by insiders will always have stronger overtones of normative argument.[32]

Katz acknowledges that Posner has conceded the last point,[33] but Posner's concession does not diminish his commitment to the claim that law and economics is factually descriptive and factually predictive but not normative.[34] Posnerian law and economics purports to tell us why such and such a law is economically efficient and to predict how greater efficiency could be achieved through such and such a law, but it does not purport to tell us on any ground other than efficiency (of wealth maximization) whether such and such a law is good or bad and ought to be followed. Posnerian law and economics defines itself to be

McCloskey, DN (eds) *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* University of Wisconsin Press 163; Klamer, A (2007) *Speaking of Economics: How to Get in the Conversation* Taylor & Francis; Klamer, A (1984) *The New Classical Macroeconomics: Conversations with the New Classical Economists and their Opponents* Roman & Allanheld.

31 Calabresi, G (1979) 'About Law and Economics: A Letter to Ronald Dworkin' *Hofstra Law Review* 553 at 561-562.

32 Katz, AW (1996) 'Positivism and the Separation of Law and Economics' (94) *Michigan Law Review* 2229 at 2259.

33 See Posner, RA (1990) *The Problems of Jurisprudence* Harvard University Press 373-74.

34 See Posner, RA (1979) 'Some Uses and Abuses of Economics in Law' (46) *University of Chicago Law Review* 281 at 285.

non-normative in any moral sense,[35] even if it must concede (as Nussbaum contends) that it is normative in so far as its foundational assumption of individuals' rational choices promotes rationality as a norm.

Posner's version of 'law and economics' is a pure version. It purports to produce a scientifically distilled version of law, in which all the unaccountable impurities of culture and tradition have been taken out to leave only the most basic and calculable constituents. It takes out the flavour, the element of taste. Posner turns wine into water. Posner is as likely to read this as a compliment as he is to read it as a complaint. After all, he is a committed advocate of the 'unity, power, and fundamental simplicity of the economic approach to law'[36] and he acknowledges that:

> [A]n economic theory of law is certain not to capture the full complexity, richness, and confusion of the phenomena—criminal activity or whatever that it seeks to illuminate.

This might sound like humility until he adds that 'lack of realism does not invalidate the theory; it is, indeed, the essential precondition of a theory'.[37]

On closer examination we see that such claims are part of a carefully crafted rhetorical conceit. Posner wishes his economic theory to be considered akin to one of Newton's scientific theories. Because abstraction is a virtue in science of the purest Newtonian sort, Posner embraces abstraction in his economic theory. However, the unacknowledged flip-side to this conceit is that if Posner's theory turns out *not* to be of the purest scientific sort, its abstraction and lack of realism would have no justification. It would then not be a virtue. Indeed, I argue that in the less than purely scientific world of human culture and social relations it would be a vice.

A great many, perhaps most, commentators find something lacking in Posner's approach. For some, the distilled water is too neutral in a moral and political sense. It does not present a complex solution, but presents itself as a basic solvent just as able to deliver social poison as to deliver social medicine. It is sobering to recall that Posner's theory struggles to supply an outright objection to slavery.[38] For others, the distilled water is too insipid in a social sense. It fails to deliver the full flavour of human communal and cultural relationships. So we find numerous supporters of 'law and economics' engaged in a project of adding flavour to the pure version in order to make the distillation more rich and palatable. This project very often takes the form of a call to incorporate disciplines which, like the pure version of economics, have empirical or scientific credentials—for example, sociology and psychology. Arguably 'law and economics' is no longer law and economics when it is law *and* economics *and* psychology *and* sociology. It may be better to talk of 'law and economics' combined with 'law and psychology' combined with 'law and sociology'. For an even fuller flavour, one must also add the humanities. There is,

[35] Michelman, FL (1979) 'A Comment on Some Uses and Abuses of Economics in Law' (46) *University of Chicago Law Review* 307.

[36] Posner, RA (1975) 'The Economic Approach to Law' (53) *Texas Law Review* 757 at 781.

[37] Ibid., 773.

[38] Posner, RA (1983) *The Economics of Justice* Harvard University Press at 86. See the discussion in Malloy, RP (1990) 'Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis' (24) *Valparaiso University Law Review* 147 at 159. Malloy likens Posner's creation to Frankenstein's monster.

of course, another approach. Instead of turning wine into water and then adding the components artificially in order to recreate the wine, one can attempt to appreciate the complexity of the original wine taken as a whole. Only a law and humanities approach can assist us in the appreciation of the fullest flavour. Thus law and humanities should not come as the last additive to a chemical process, but a humanities ethos must be guide us from the outset.

My second major complaint against Posnerian law and economics is that for the purpose of providing external critique, economics stands at an insufficient distance from law. It cannot be denied that all interdisciplinary engagement with law has some potential to challenge law's linguistic and conceptual monopoly with a new language. An outsider language in the closed confines of the law can sometimes be productively irritating, as the foreign grit in an oyster is irritatingly productive of the pearl. James Boyd White, who has done so much to irritate law by the grit of the humanities, has been generous enough to acknowledge that even economic language has some such potential:

> I think the greatest contribution of economics has been to complicate our sense of our own language, and of the world, by showing us that other, often paradoxical, formulations are possible. It offers some of the mischievous pleasure of disturbing settled views. As one voice among many, one way of claiming meaning among many, it thus has a place in the legal process even outside the economic zone.[39]

The question is whether we have White's ability to discern when the voice of economics is speaking with a different voice to the law and when it is merely echoing the speech patterns of the law. Avery Katz argues that the rhetoric of law is different to the rhetoric of economics, because the rhetoric of economics is positivistic, whereas the rhetoric of law is normative. He observes that:

> [T]he underlying division between law and economics is methodological and cultural. The two fields use different rhetorics, different styles of discourse, different epistemologies, and different literary forms in developing and articulating their respective accounts of the world.[40]

No doubt law and economics have different rhetorics, but they are different in the way that the circles of a Venn diagram are different—distinct from one another but to some extent coinciding. It is more accurate to say that there is a range of different rhetorics within the law, another range within economics and another range within 'law and economics'. The rhetorics that constitute these three schools of thought have the potential to overlap to greater or lesser degree. We are presented with the challenge of trying to appreciate (and to be alert to the inherent dangers of) the possibility that one rhetorical community will adopt, or align itself with, the rhetoric of another. Where alignment occurs, the assumption that there is a distance and distinction between their rhetorics, if it is persisted with, brings in a number of dangers. The main danger is that points of collusion between disciplines might be presented in the guise of one discipline offering external critique of the other

[39] White 'Economics and Law' supra note 1 at 197. For a recent appreciation of White's work see Etxabe, J and Watt, G (2014) *Living in a Law Transformed: Encounters with the Works of James Boyd White* Maize/Michigan University Press.

[40] Katz 'Positivism and the Separation of Law and Economics' supra note 32 at 2230.

when in truth it is lending external support and confirmation. A related danger is that we will be hampered in our ability to appreciate where the influence of one discipline is having a deleterious effect on another. So when McCloskey observes that 'It is by blending rhetorics that law and economics achieves its best work',[41] another observer might perceive that lawyers sometimes recruit the rhetoric of economics as a way of covering up, or even of justifying, the very worst work of the law. Comparative law is not immune to these risks. It is depressing to read a reference in the *Elgar Encyclopedia of Comparative Law* to an emerging 'domain' of 'comparative law and economics' which has as one of its aims (no other aims are described) to 'question whether differences between legal systems can also be explained on efficiency grounds'.[42] Instead of establishing a new 'domain' it would be better to be one of Igor Stramignoni's Heideggerian 'comparatist poets' who 'poetically dwell in the distance and so can properly think the experience of difference'.[43]

Katz takes an optimistic view of the 'economic theory of the common law'. He argues that 'it is like traditional legal discourse, tending to a holistic style' whereas typical positivistic classical microeconomics 'is atomistic and reductionist'.[44] I am more circumspect. We should not underestimate the potential for quite extensive coincidence between the rhetorics of law and economics. There are strong similarities between certain modes of legal and economic thought. In both disciplines we can observe, for example, an habitual impulse to categorise, reduce and abstract without due regard for the human narratives and cultural content that are thereby excluded. There are even some commentators, John R Commons being the first amongst them, who have been convinced of 'the fundamental unity of law and economics'. Commons writes:[45]

> [T]he science of economics, which is a science of the good and bad habits and common practices of farmers, landlords, business men, workingmen and others in their mutual adjustments to scarcity of resources and in their competitions and conflicts imposed upon them by that scarcity, is a science of the fundamental concepts on which the science of law is also grounded.[46]

And later:

> [T]he unity of law and economics, emerging, as it does, out of the same mysterious force, the Human Will, on which each science is grounded, becomes the interaction of Efficiency which creates a national output of human services, Scarcity which distributes the services as prices and income, Futurity which makes them valuable, Custom which regulates them, and Legislation which organizes and experiments upon them.[47]

Commons argued that law and economics are the same, and that they are the same in being the same 'science'. McCloskey criticizes this scientist assumption,[48] preferring

41 McCloskey, DN (1988) 'The Rhetoric of Law and Economics' (86) *Michigan Law Review* 752 at 763.
42 Smits, JN (2012) *Elgar Encyclopedia of Comparative Law* (2nd ed) Edward Elgar Publishing at 2.
43 Stramignoni, I (2003) 'Meditating Comparisons, or the Question of Comparative Law' (4) *San Diego International Law Journal* 57 at 80.
44 Katz 'Positivism and the Separation of Law and Economics' supra note 32 at 2259.
45 Commons 'Law and Economics' supra note 27 at 379.
46 Ibid., 374.
47 Ibid., 382.
48 McCloskey 'The Rhetoric of Law and Economics' supra note 41 at 763.

instead to regard the rhetoric of law and economics as a 'literary matter'. McCloskey cites the 'contrasting rhetorics' of economics and law as one possible reason 'why economics has become influential in law. It is a new way of arguing, and lawyers are on the watch for new ways of arguing'.[49] If true, this demonstrates the potentially dangerous possibility to which I alluded earlier. Namely, that one discipline might find it convenient to align itself with an ostensibly distinct discipline for its own purely instrumental ends. McCloskey's 'contrasting rhetorics' may amount to little more than contrasts in style (for example, preference for different metaphors) that distract us from the fact that other significant dimensions of the two rhetorical systems—notably the dimension of ethos—are very similar.

So what does Posner himself have to say on the interdisciplinary dynamic of law and economics? He says a great deal in his main work, *Law and Economics*, and in his other extensive writing expressly devoted to the subject of law and economics, but it is in another of his books, *Law and Literature*, that we find one of his most helpful statements on the matter. It is most helpful because, in the context of that book, Posner summarizes law and economics for the information of outsiders to that discipline. The passage I want to focus on is rather long but it is worth setting out in full. It comes at the very start of chapter six of the third edition:

> Every field of law, every legal institution, every practice or custom of lawyers, judges, and legislators, present or past—even ancient—is grist for the economic analyst's mill. The criminal, the prosecutor, the accident victim, the adulterer, the soapbox orator, the religious zealot, the con man, the monopolist, the arbitrator, the union organizer—all are modeled as 'economic man.' Economic analysis of law is critical as well as descriptive. It brims over with proposals for reforming the doctrines, procedures, and institutions of the law to make them more efficient, with 'efficiency' defined in cost-benefit terms.
>
> The movement is controversial. It challenges many assumptions that lawyers have held about their field. It challenges the very autonomy of law—the idea of law as a self-contained discipline that can be understood and practiced without systematic study of any other field. It asks lawyers to learn an alien and difficult set of concepts. It rests or seems to rest on assumptions about human nature that many people, especially people trained in the humanities, find incredible, disturbing, even repulsive. It aspires to be scientific, not humanistic. It even uses math. And it is the flagship of the application of social science to law, while law and literature is the most humanistic field of legal studies. A collision was inevitable.[50]

Posner spins a thread of rhetoric that is very revealing when unravelled. One might pause, for example, upon his subtle suggestion that people are 'trained' in the humanities, as if they had been inculcated into dogmatic disciplinary habits. In fact the best education in the humanities is characterized by the education of an open and critical mind. One could also point to Posner's perfect willingness to describe himself and his fellow economic analysts as people who grind law as one might grind grain in a mill. He thereby blithely runs the

[49] Ibid., 752.
[50] Posner *Law and Literature* supra note 6 at 229-230.

risk that they will be likened to Dickens's fictional schoolmaster Thomas Gradgrind, who (being a parody of Jeremy Bentham) was said to 'weigh and measure any parcel of human nature, and tell you exactly what it comes to',[51] just as if humans were raw materials to be exploited in mechanized mills. Most people would run a mile from any such resemblance. Educationalists, we might have thought, would run furthest and fastest.[52] Not so Posner. He is seemingly happy to be a modern Gradgrind.

For all these alluring threads of rhetoric, the ones I want to focus on are more subtly woven. For example, where he states that: 'The movement is controversial. It challenges many assumptions that lawyers have held about their field'. Here, Posner cleverly invites us to think that his version of 'law and economics' is controversial *because* lawyers feel challenged by it. Actually, it has proven most controversial not because lawyers have been defensive of their discipline, still less because scholars of law and literature have been on the defensive, but because jurists have found Posnerian law and economics to be inherently offensive on its own terms. The rhetorical aim of Posner's next sentence is even more insidious. He writes that law and economics 'challenges the very autonomy of law'. This appears at first to be a bold claim.[53] If it were true, Posnerian law and economics would certainly qualify as a truly critical interdisciplinary endeavour. In fact, Posner quickly dilutes the claim by means of a qualifying sub-clause. The claim in full is that law and economics 'challenges the very autonomy of law—the idea of law as a self-contained discipline that can be understood and practiced without systematic study of any other field'. The problem with Posner's claim is that he wrongly assumes (or would have his readers wrongly assume) that interdisciplinarity *necessarily challenges* the autonomy of law. An interdisciplinary approach to law might suggest at a superficial level that it necessitates an assault upon law's autonomy, but at a more substantial level we have seen that certain modes of interdisciplinarity may be exploited to serve and to support the autonomy of the disciplines engaged in it.

A bad version of law might have a selfish motive for supporting a bad version of economics and the bad version of economics might, in return, support a bad version of law. When two tyrants inhabit adjacent realms, it supports the sovereignty of each to make a truce, and even to offer testimony in support of its tyrant neighbour. Each thereby helps the other to maintain its own domain, but neither challenges the other to liberate the people that live in subjugation to the tyrants' rule. The problem, in short, is that economic analysis does not challenge law where it most needs to be challenged. There is no tension between a bad kind of legal language and a bad kind of economic language, Posner's brand of law and economics is too much alike to his vision of law. Both employ abstract theoretical categories to simplify complex facts for the purpose of efficient practical disposition. To some extent this is true of many academic disciplines, but in Posner's formulation of law and economics, the lowest form of economics is pressed into partnership with the lowest form of law, and the product is a new low in the form of a mutually reductive 'law and economics'. If we doubt the tendency of Posnerian law and economics to drive both law and economics to their lowest common denominator, we may doubt it somewhat less

[51] Dickens, C (1854) *Hard Times* Bradbury and Evans Chapter 2.

[52] Watt, G (2011) 'Hard Cases, Hard Times and the Humanity of Law' in Bate, J (ed) *The Public Value of The Humanities* Bloomsbury Academic 197-207.

[53] One echoed by Frank L Michelman (Michelman 'A Comment on Some Uses and Abuses of Economics in Law' supra note 35 at 307).

when we read what Frank Michelman has to say. At one point, Michelman purports to explain what Posner meant when Posner wrote that 'efficiency […] may be the only value that a system of common-law rulemaking can effectively promote'.[54] The explanation proffered is that:

> [H]e can be understood as insisting on confining the politically unaccountable judiciary to furtherance of the set of socially uncontested values—a set of which the value of maximizing wealth (other things equal) is evidently thought to be a member, indeed the only known member.[55]

In other words, Michelman will have us believe that wealth is the only value that is politically neutral and therefore correct for the judiciary to pursue. This is clearly wrong, and the slippery, parenthetical 'other things equal' will not save it. The judiciary is constituted to further a wide range of social values, many of which are for the most part 'uncontested' in their essentials. 'Life, Liberty and the pursuit of Happiness' are three. Whoever believes that wealth (even expressed in terms of commonwealth) is a more basic good than any of these will kindly explain what price we should put on 'life' or 'liberty' or the 'pursuit of Happiness', other things being equal. Other values in the list of neutral or uncontested judicial aims include justice, fairness and equity. Few people would deny that these are social goods. Looked at from the other side, if the maximization of wealth really were the only value that it would be politically correct for unelected judges to pursue, citizens would be free to pursue whatever goals they desired, provided it had the effect of efficiently maximizing wealth. That cannot be an acceptable vision of law and society. My own view is that the orientation of law and economics is faulty when, in its descriptive mode, it identifies wealth as the basic unit of legal efficiency and, in its prescriptive mode, it sets law on a course to improve legal efficiency through the increase of wealth. What Posner passes off as a good theory, Charles Dickens took for a bad joke:

> The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

This passage appears in Dickens's *Bleak House*.[56] The gross legal inefficiencies pilloried in that novel did not lie in any lack of desire to maximize wealth, but rather in an almost unanimous desire amongst all parties to maximize wealth. The only characters connected to the cause that survive with life and human dignity intact are those who did not orient themselves in the direction of cash.

In Posner's analysis, law and economics are self-evidently twinned. He tells us that economics challenges law, but he presents a vision of law and economics in perfect harmony. His version of law and his version of economics never trouble each other. Do

[54] Posner, 'Some Uses and Abuses of Economics in Law' supra note 34 at 292; Michelman 'A Comment on Some Uses and Abuses of Economics in Law' supra note 35 at 313.

[55] Michelman 'A Comment on Some Uses and Abuses of Economics in Law' supra note 35 at 313..

[56] Dickens, C (1852-3) *Bleak House* Bradbury and Evans Chapter 39.

we not suspect that the leading lights in law and economics are mostly jurists who are voluntarily boxing themselves about their own heads with fists padded with economic fluff? Katz observed that 'The so-called positive economic theory of the common law was propounded much more often by lawyers and lawyer-economists than by economists without legal training'.[57]

In the field of law and literature, in contrast, it is literary scholars who are most active in picking up the gloves and setting about the law. We may add that, in the field of 'law and literature', it is currently literary scholars, not legal scholars, who are also most active in *teaching* across the interdisciplinary threshold. Anecdotal evidence of this is supplied by the recent publication *Teaching Law and Literature*,[58] for of the forty-six contributors (including the three editors) only eleven are scholars whose major affiliation is with a law school.[59] The vast majority of the rest are based in literature departments.

When law operates in pursuit of its purely practical and technocratic aims it proceeds on the basis of a myth of the abstract human being—the mask of the legal 'person' (*persona*) that remains when unnecessary humanity has been extracted. Positivist economics proceeds on the basis of a compatible, and comparably horrifying, myth—the shell of the economic wealth-maximizing actor that remains once inefficiency, irrationality, human error and passion have been removed. Neither husk is competent to supply the other with a heart.

Let is consider what the arts and humanities have to say about the sort of worth that counts because it is uncountable. In the first scene of Shakespeare's *King Lear*, Lear's youngest daughter, Cordelia, refuses to promise all her love to her father:

> […] Happily, when I shall wed,
> That lord whose hand must take my plight shall carry
> Half my love with him, half my care and duty:
> Sure I shall never marry like my sisters,
> To love my father all.[60]

Lear's resulting ire leads to Cordelia being disinherited and banished. For all her undoubted virtue in preferring to remain silent rather than speak a perceived falsehood, her (ultimately fatal) error was to imagine that love is a commodity of limited supply that must be apportioned to meet demand. She could have promised to love her father 'all' and at the same time to love her husband 'all'. The metaphysics of love allows this. Love is one of those uncountable qualities of human culture whose worth cannot be expressed in terms of empirical measurement. As Shakespeare writes elsewhere: love is the star 'Whose worth's unknown, although his height be taken' (Sonnet 116). 'Courage', the presence or lack of it, is another such quality. As Virgil wrote (In Bacon's paraphrase) 'It never troubles a wolf how many the sheep be'.[61] Friendship is yet another such. Staying with the analogy

[57] Katz 'Positivism and the Separation of Law and Economics' supra note 32 at 2260.

[58] Sarat, A; Frank, CO and Anderson, M (2011) *Teaching Law and Literature* The Modern Language Association of America.

[59] According to the brief biographies indexed at the end of the volume.

[60] *King Lear* 1.1.99-103; Muir, K (ed) (1972) *King Lear* (The Arden Shakespeare) Methuen & Co.

[61] This quotation from Francis Bacon's essay 'On The True Greatness of Kingdoms and Estates' appears to be a reference to Virgil, *Ecloga* VII, 51-52: '*hic tantum Boreae curamus frigora, quantum aut numerum lupus aut torrentia flumina ripas*'.

to sheep, Cicero observed in his treatise De Amicitia that every man knows how many goats and sheep he possesses but no man is able to count the number of his friends.[62] Obviously the problem of quantifying friends does not lie in any inability to count people, but it lies rather in our inability to calculate the value that we call 'friendship'.

Writing on 'Friendship', C S Lewis observed that if he has two mutual friends, Charles and Ronald, the death of Charles means that even though he now has Ronald to himself he actually has less of Ronald for he has lost that facet of Ronald which was Ronald's relationship to Charles.[63] Classical microeconomics is not able to account for the uncountable, inefficient quality that makes friendly and familial relationships so rich. English judges have confirmed Cicero's suspicion that it is impossible to number our friends according to any definition of 'friendship'.[64] Law in every nation State, and international law also, is bound to struggle to define, or even to conceive of, so much of what we value as being essential to our social lives. Those who are called upon to work within the constraints of the law—including judges, advocates, academics, students—are frequently vexed and sometimes troubled by the inadequacy of the tools at their disposal. Imagine what easy reassurance such actors in the legal realm might find in the discovery that there is another discipline, economics, which uses tools of a similarly restricted nature, not through practical compulsion, but through deliberate choice and as part of its commitment to a certain conception of the world. For lawyers, the temptation to adopt an economic mindset is a strong one. As Katz has observed: 'lawyers have as much reason to be positivists as economists do'.[65] Ugo Mattei goes further: 'the economic analysis of law is the only interdisciplinary effort available to lawyers that actually helps them in their technical everyday problem solving'.[66]

Economics, at least classical microeconomics, has the potential to lend disciplinary dignity to a species of law which would otherwise appear to have settled for a sparse, abstract and reductive view of human life. One of the systemic disgraces of the law is that it offers to compensate for loss of life and limb in the form of cash. As jurists, our response to this should be one of profound philosophical regret, albeit coupled with pragmatic resignation to the fact that this solution is better than 'an eye for an eye' and, in the absence of true justice, is probably the practical best that we can do. The shame of law and economics is that it takes away our shame. Where the story of law should be heard in terms of the humanity that is regrettably left out, Posnerian law and economics retells the story in terms of law's satisfaction with its achievement of reducing human social life to a simple, abstract form.

Lawyers, and not just those in so-called 'adversarial' systems, have a cultural faith in the ability of different and opposing parties to yield outcomes superior to those that any one party could yield alone. It is therefore perfectly in keeping with legal culture to form a partnership with another discipline, and even to engage in playful opposition to another

[62] Cicero *Laelius de Amicitia* ('On Friendship') 17.62: '*capras et oves quot quisque haberet, dicere posse, amicos quot haberet, non posse dicere*'.

[63] Lewis, CS (1963) [1960] *The Four Loves* Fontana at 58-59. Lewis's observation had been inspired by something written by Charles Lamb, probably his letter to Mr. Manning dated May 10th 1806 which contains the famous line 'we die many deaths before we die'. Compare the discussion in Booth, WC (1988) *The Company We Keep: An Ethics of Fiction* University of California Press at 239.

[64] See, especially, *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, CA.

[65] Katz 'Positivism and the Separation of Law and Economics' supra note 32 at 2268.

[66] Mattei *Comparative Law and Economics* supra note 23 at 5.

discipline, in order to yield an outcome superior to any that the law could have achieved alone. In the case of the partnership with economics, the great benefit yielded to the law is a rhetorical transformation of the law's disciplinary weakness into what, for economics, is a disciplinary strength. The full rhetorical flourish comes when the law pretends that the language of economics has been enlisted to cast a critical light upon the limits of the law. The truth is that lawyers tend to expose themselves only to those economic lights that will confer the warm glow of confirmation.

Arguably, 'law and economics' is not intent upon disrupting the discipline of law, still less that of economics, but is intent rather upon establishing clear and strong boundaries to frame its own identity as a distinct discipline. The ethic of scholarly engagement is not an 'interdisciplinary' one in the open-minded sense of that term. It would be more accurate to say that the bulwark of law and economics having being erected, the distinct disciplines of economics on the one side and law on the other act as buttresses to the bulwark of the discipline 'law and economics'. The question is whether we should seek to support the discipline of 'law and economics', which promotes the lowest common denominator of law and economics, or whether we should aspire to pursue our highest common humanity?

THE NARRATIVE NATURE OF LAW AND ECONOMICS

Hope for the influence of the humanities in law, including comparative law, will grow when we start to see through the rhetorical claims that are made for law and economics. One of the most subtle of those claims is that we are still doing 'law and economics' when we do 'law and economics with psychology', 'law and economics with sociology' and so forth. Robin Malloy makes that claim in these terms:

> While all of us are offering alternative approaches to law and economics, each of us is *doing* law and economics […] Law and economics is a diverse and colorful marketplace of competing ideas […] law and economics consists of each of us sitting down to a different, perhaps a unique, puzzle. Some of us may discover that we are completing a picture puzzle of an ocean scene; others, of a country landscape; and still others, of an urban skyline. In this sense, of everyone working separate (different) puzzles, we are all learning something about the method of doing puzzles, about the process of relating individual pieces to a spatial, color, and shape oriented whole—this is law and economics.[67]

Note how the rhetoric of diversity can (perhaps inadvertently) serve to promote a project that is more narrow than it needs to be. The metaphor of the picture puzzle is telling. It suggests a mindset that believes in one simple solution that can be achieved by combining a closed set of component pieces. There may be variety in the types of law and economics, but if Malloy is accurate in his choice of metaphor we must conclude that workers in every type are all proceeding on the assumption that the whole picture is in their box and on their box to begin with. The metaphor, and the associated mindset, appears to leave little room for genuine disruption by an external critical voice—a voice that might warn that the picture is not fixed and is partly what we make it.

[67] Malloy 'Is Law and Economics Moral?' supra note 38 at 149.

> James Boyd White cautions us to resist the totalizing claims of law and economics:
>
> The law, at its best, is a system of translation that acknowledges its own inadequacies. It should listen to economics, regarding it as one language, one set of metaphors, among many, and be willing to use it when appropriate and with appropriate qualifications. But the last thing it should do is turn itself over to this other culture, working on such different linguistic, social, and political principles.[68]

I read Professor White to be saying here that it may be safe to attend to the stylistic aspects of economic speech, provided that we remain alert to the need to resist the substantive ethos of law and economics. It is important to recall that, earlier in the same paper, Professor White had put economics firmly in its place:

> The point of my remarks is not that the market, or its study, should be abolished, but that both should be subordinated to the values and practices of our larger culture.[69]

White makes clear that economic metaphors may be used instrumentally to ornament the narrative, but should by no means drive the plot:

> [W]hatever its merits, the language and practice of economics cannot be justified in its own terms. Whoever is to think and speak seriously about this matter must in the end turn to some other discourse, some other language, than economics.[70]

Gregoy Scott Crespi, likewise:

> There is no viable alternative open to those scholars in the field who wish to insure that the useful insights and metaphors of economic analysis remain accessible and relevant to policy questions except to take on the task of incorporating those many pearls of wisdom into a broader and much more ideologically diverse set of explanatory schemes and evaluative standards. If this cannot be done, then it may well be time to discard altogether the economic approach to understanding and resolving legal questions and seek other sources of guidance to assist us in the conduct of our affairs.[71]

According to McCloskey, 'The Rhetoric of Economics is a Literary Matter'.[72] Crespi affirms this when he writes that scholars who employ neoclassical economic discourse are writing in a 'literary genre'.[73] In the same place, he clarifies in an accompanying footnote that 'law and economics writing is more appropriately regarded as a subjective, impressionistic, rhetorical, polemical form of literature than as a form of scientific explication'. Regarding economics' discourse in this way leads McCloskey to argue that:

[68] White 'Economics and Law' supra note 1 at 202.
[69] Ibid., 197.
[70] Ibid., 199.
[71] Crespi, GS (1991) 'The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias' (67) *Notre Dame Law Review* 231 at 252.
[72] McCloskey, D (1983) 'The Rhetoric of Economics' (21) *Journal of Economic Literature* 481 at 499.
[73] Crespi 'The Mid-Life Crisis of the Law and Economics Movement' supra note 71 at 232.

> If economists tell stories and exercise an ethical sense when telling them, then they had better have as many stories as possible. This is a principled justification of pluralism, an argument for not keeping all one's eggs in a single narrative basket.[74]

There is a sense in which I agree with this, and a sense in which I do not. What I do not agree with is the implication that we can achieve real critical diversity by splitting economic narratives into different baskets. Real critical diversity comes when we hold the economic basket in one hand and the basket of another discipline in the other. That is perhaps too pedantic an objection, but there is a risk that a gesture to openness to new approaches can disguise what it is really an instrumental assimilation of new approaches.

My point of agreement with McCloskey is more substantial than my point of disagreement. McCloskey is motivated by Booth's observation that 'Powerful narrative provides our best criticism of other powerful narratives […] The serious ethical disasters produced by narratives occur when people sink themselves into an unrelieved hot bath of one kind of narrative'.[75] My key objection to Posnerian law and economics, as outlined earlier, is that it sinks lawyers into an economic narrative, and moreover that it is just one kind of economic narrative and most of all that it is a bad kind. Indeed, it may be more accurate to say that it sinks lawyers and economists into one kind of 'law and economics' narrative; the underlying unity of the narrative being masked by the interdisciplinary label that has been applied to it.

In addition to the ethical problem, there is at least one other problem with economists' failure to regard their discourse as narrative in nature. I am referring to the problem of non-falsifiability. The narrative mode of reasoning on which law and economics is based allows it to adapt its story to every new factual event. There is nothing that law and economics cannot account for. Posner claims as much.[76] Does universal explanatory power look more consistent with a scientific theory or with a fictional narrative? The descriptive capacities that are sometimes claimed for law and economics can be strikingly arrogant. It is no exaggeration to say that certain scholars of 'law and economics' claim to know that judges are talking about economics when the judges themselves think that they are talking about law and justice. In other words many scholars of 'law and economics' claim that judges do not know what they are talking about. Oliver Wendell Holmes famously, and I think correctly, observed that 'The life of the law has not been logic: it is has been experience'.[77] Yet Parisi, Palmer and Bussani can claim that 'economic analysis unveils the underlying logic of what would otherwise appear to be an ad hoc application of the exclusionary rule driven by a fuzzy judicial pragmatism'.[78] What do they mean by 'underlying logic'? Judges do not proceed logically in a philosophical sense, but nor do they proceed irrationally. They proceed according to the practical wisdom that comes from long exposure to messy encounters between lives and law, and no doubt under the influence of their own human stories and predispositions. When promoters of law and economics purport to have discovered the underlying logic of a judicial approach, they do not purport to discover

74 McCloskey, DN 'The Missing Ethics in Economics' in Klamer *The Value of Cultures* supra note 30 at 197.
75 Booth *The Company We Keep* supra note 63 at 237.
76 See the long passage from *Law and Literature* set out above.
77 Holmes, OW (2005) [1881] *The Common Law* (1881) digireads.com at 1.
78 Parisi, F; Palmer, VV and Bussani, M (2007) 'The Comparative Law and Economics of Pure Economic Loss' (27) *International Review of Law and Economics* 29 at 39.

any logic that the judges would recognize.[79] The underlying logic that the theorists reveal is their own logic. They look at the law through a 'law and economics' filter, from which it follows that they only see the logic of 'law and economics' and that only they see it.

To illustrate the all-encompassing capacity of law and economics narrative let us take the example of the man who wears a hat in circumstances where there is no juridical law or any equivalent norm requiring him to do so. Microeconomic analysis can easily formulate a story to explain in very simplistic terms why the man might have gone to the effort of putting on the hat. It might, for instance, talk of defence (for example in the form of protection from the weather) and display (for example, to demonstrate personal qualities of invention or creative individuality). It might even amuse itself in the sophisticated exercise of trying to determine the precise ratio of defence to display as factors determining the man's decision. Now suppose that the man removes his hat when entering a church. A microeconomic narrative can account for this. It will say, for example, that:

> [W]hen we see a man remove his hat in church, we might interpret his behavior as evidence that the utility he enjoys from wearing his hat is outweighed by the negative utility he would suffer (in the form of the loss of esteem) should he fail to remove his hat consistent with social convention.[80]

Suppose, however, that the church is empty. A microeconomic narrative has no trouble responding to this new factual datum:

> If a man takes off his hat in an empty church as readily as in a crowded one, his behavior might be better explained by the internalization explanation than by the esteem explanation.[81]

Suppose now that he is a fireman entering a burning church. The microeconomic narrative is undaunted by the fact that the fireman wears a helmet. Change the facts as you wish, microeconomic narrative can provide an account to explain why the man's conduct at every turn was ultimately based on a rational desire to maximize wealth (not mere money of course) in the most efficient way. This is not to regard microeconomic narratives as uninformative, but only to say that an economic account of the past is just a story like any other—with its own metaphors, motifs and narrative flow. We can judge the economic description of law's past just as we can judge any story—we can assess its attractiveness, its accuracy and its attunement to human experience.

To conclude this section we can say that law and economics is constituted by the rhetorical narrative of a certain community of scholars and practitioners. The nature of the narrative changes with the nature of the community, but the underlying dynamic remains consistent. Posnerian economic analysis is not the disinterested science it purports to be, but rather a rhetorical exercise designed to sustain a non-falsifiable, narrative account of law. To introduce the next section we can say that what is required is to develop a

[79] Witness Lord Justice Stephen Hedley's exasperated response to law and economics: 'Law affects and is affected by everything it touches, economics and plumbing included. But it becomes none of those things, and none of them, not even plumbing, is, I respectfully suggest, entitled to make law either its captive or its handmaiden.' (Hedley, S (2007) 'Law and Plumbing' (2) *Journal of Comparative Law* 192 at 194.)

[80] Korobkin, RB and Ulen, TS (2000) 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (88) *California Law Review* 1051 at 1130.

[81] Ibid., 1130.

rhetorical and narrative practice—a way of speaking and listening—that will produce a more humane community of comparative law thought.

CONSTITUTING A COMPARATIVE LAW COMMUNITY

> Conversation of the kind [James Boyd White] invites […] is by definition unpredictable. Such conversation involves creative acts of the analogical imagination, with each party willing to risk her or his self-understanding by engaging with the other. We can expect to become different than we were. An economist, for example, who promotes a certain image of *Homo economicus* may be inclined to convert his image into someone who is capable of conversing—capable, that is, of giving and receiving neighbourly love.'
>
> —Richard Dawson[82]

> [E]ven if we consider the possibility […] of non-translatability of discourses […] Translation as a mode of thought and as an ethical model, I would claim, can help us to resist anomie because it constitutes the challenge as well as the assignment of acknowledging and respecting the other, be it a discourse or a human being.
>
> —Jeanne Gaakeer[83]

Imagine for a moment what the future ideal of the world envisaged by comparative lawyers might look like. Might it be a world in which all peoples of all nations operate under a single efficient system of law? Some will argue that this is the only future able to render affordable, transparent and identical justice to every individual. Perhaps that would be true if we could be confident of sufficient resources to meet demand and if we could be guaranteed unimpeachable benevolence and fairness in those who control and administer those resources. Others will complain that unitary and efficient law is an assembly line or factory-style of law that must proceed on the wrongful assumption that a one-size product will fit all. They will further complain that such a system can only be achieved through the totalitarian control of the extreme political left or the extreme political right and that there is no such person as the tradition-free, history-free, culture-free, atomized individual who is supposed to operate within, and to be served by, such a system.

There is another vision of the future ideal influence of comparative law scholarship. It is a vision in which individuals and groups retain the richness of their connections to their cultures, including connection to their laws. In this vision, borrowing between cultures grows out of cooperative conversation and is not imposed by the pressure of efficient economics or the search for a global code. What is the path to this vision? One route is to take seriously James Boyd White's contention that community is constituted through conversation. If White is correct, conversations within the community of those who are interested in comparative law become the very constitution of what comparative law is and what comparative law might lead to and become:

[82] Dawson *Justice as Attunement* supra note 18 at 73.

[83] Gaakeer, J (2012) '*Iudex translator*: The Reign of Finitude' in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar 252-269 at 269.

> [I]n important ways we become the languages we use—the language of computer analysis or military domination or economics—and […] our habitual practices, whether with computers or jackhammers, rifles or fly rods, help to make us what we are, both as individuals and as communities. […] In time the soldier wants to go to war.[84]

Professor White applies this reasoning to the case of economic theory:

> [D]espite its claims to be merely hypothetical, economic theory becomes a culture of its own […its…] habits of thought and language have tendencies, pressures of their own, that can perhaps be checked or controlled, but ought certainly to be reckoned with.[85]

Attention to the capacity for discourse to constitute a community can help lawyers to appreciate economists, and it can equally help the jurist in one jurisdiction to appreciate more fully what jurists in other jurisdictions have to say. This possibility for comparative law recently formed the basis of Günter Frankenberg's fascinating anthropological analysis of participation in the Trento Common Core project, which he regarded in terms of 'constructing friendship'.[86] Some years earlier, substantially the same possibility had been implied in something that Avery Katz wrote:

> The key to making the exchange between law and economics a useful one is the same as with any other cultural or interdisciplinary exchange. One must consider the foreign discipline's practices on its own terms, and only then consider whether and how those terms and practices shed light on one's own. It will not do to borrow superficially the practices of another discipline or culture, such as efficiency analysis or formal modeling, without understanding the larger terms in which those practices are understood […] this will require, in its way, becoming multicultural, as does all true interdisciplinary exchange. It requires insiders to think about what it is like to be an outsider; it requires natives to act occasionally like anthropologists.[87]

Katz spoke in terms of rehabilitating and reinvigorating law and economics as a discipline. Perhaps his interdisciplinary, multicultural, anthropological vision could be achieved without prioritizing law and economics. Perhaps we could retain law and economics as one possible descriptive account of particular cases, whilst preferring law and humanities to supply the ethos and meta-narrative of our enterprise.[88] This is not to concede that the ethos of law and humanities is impractical. It is in fact intensely practical because it guides the ways in which we think and hear and speak and conduct ourselves in every context of life. There are also practical cases in which law and humanities provides a methodology for which law and economics provides none at all. An example would be comparison between US law enacted as legislation and the law enacted as ceremony within the Navajo

[84] White 'Economics and Law' supra note 1 at 166.

[85] White, JB (1990) *Justice as Translation* The University of Chicago Press 28, discussed in the chapter on 'Culture' in Dawson *Justice as Attunement* supra note 18 at 84.

[86] Frankenberg, G (2012) 'How to Do Projects with Comparative Law: Notes of an Expedition to the Common Core' in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar 120-143 at 121-128.

[87] Katz 'Positivism and the Separation of Law and Economics' supra note 32 at 2261.

[88] For an argument preferring the Hellenistic humanist tradition to the scientific Enlightenment tradition in comparative law see Brooks 'The Emergence of the Hellenic Deliberative Ideal' supra note 16.

or Hopi nations of North America.[89] Another example would be comparison between the constitutional law of a modern State and the jurisprudential and constitutional capacities of woodcarving amongst the Haida people of the Canadian northwest coast.[90] Without wishing to speak for such peoples or to romanticize their culture, it is surely more practical in such cases that the outsider should start with an appreciation of law as an art of cultural expression than to start with an assumption that law is best regarded as a rationally efficient allocation of resources.

Bearing in mind the need to hear the other side in any comparative law conversation, we must sooner or later face the fact that when we talk 'interdisciplinarity' in comparative law, we must even talk comparatively about our use of the term 'interdisciplinarity'. There is inevitably an international comparative dimension even as regards our understanding of the extent to which disciplines differ from each other and as regards our use of labels to gather 'disciplines' into groupings such as 'humanities' and 'social science'. An English understanding of the disciplinary divide between 'social science' and 'humanities' will be subtly different to those of, say, the French.[91] It is a nice question whether an interdisciplinary approach to comparative law, such as a 'law and humanities' approach, will increase or reduce the barriers to appreciating a foreign legal system. Perhaps it is safer to begin a comparative discourse in the particular, without resorting to such general labels as 'humanities' and 'arts'. One could, for example, begin with 'law and the novel' or 'law and cinema'.[92] A pessimistic view is that the obstacles to appreciating an alien legal system must be increased and compounded by any simultaneous attempt to understand an alien view of the humanities. A more positive outlook will point to the transnational, indeed virtually universal, appeal of artistic output and humanist thought, and will be impressed by the capacity for cross-border appreciation of such thinkers as Aristotle and Shakespeare. Mutual appreciation of the arts and humanities may supply meanings that will bridge the chasm that can seem to separate conceptions of law in one country from another. To give an example close to my own heart, we can dare to hope that deep engagement with Aristotle and Shakespeare will reveal cross-cultural appreciations of the value of 'equity' as an ethical idea, even though shallow attention to legal conceptions of 'equity' may suggest that an unbridgeable chasm lies between technical understandings of that term in, say, a Common Law system on the one side and a Civil Law system on the other.[93]

[89] Soliz, C and Joseph, H (2011) 'Native American Literature, Ceremony, and Law' in Sarat, A Frank and Anderson *Teaching Law and Literature* supra note 58 at 217.

[90] Tully, J (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity* Cambridge University Press.

[91] Samuel, G (2008) 'Is Law Really a Social Science? A View from Comparative Law' (67) *Cambridge Law Journal* 288 at 289.

[92] See Samuel, G (2012) 'All that Heaven Allows: Are Transnational Codes a 'Scientific Truth' or Are They Just a Form of Elegant 'Pastiche'? in Monateri, PG (ed) *Methods of Comparative Law* Edward Elgar Press. See further section 7 of that chapter, entitled 'Lessons from the Humanities' (at 186-190). See, also, Johnson, R (2014) 'Reimagining "The True North Strong and Free": Reflections on Going to the Movies with James Boyd White' in Etxabe, J and Watt, G (eds) *Living in a Law Transformed: Encounters with the Works of James Boyd White* Maize/ Michigan University Press 173-189.

[93] Witness the international, inter-disciplinary work of Professor Daniela Carpi in this context (briefly summarized in Carpi, D (2011) 'Equity: Assessing the Results of a Project' (5) *Law and Humanities* 221).

CONCLUSION

It would appear from the evidence of articles in law journals and courses in law schools that one of the most popular pairings of law with another discipline is the pairing of law with economics. Let us suppose for a moment that law and economics can do everything that its most ardent promoter would claim for it—let us say that it really does provide the most accurate possible theoretical description of law's past development and the most accurate possible theoretical prediction of law's future progress. That fact, if true, would be the most damning indictment of all. Any species of legal thought that has the support of a perfectly correspondent and agreeable species of economic thought is a species of legal thought whose every error will be exaggerated by the echo of consent. It will resemble a government that does everything its treasury tells it to do, on the understanding that the treasury will do everything the government asks of it. In short, a perfectly functioning economic analysis of law will provide an accurate account of law's past action and mutually self-serving prescriptions for future action, but all without a much-needed element of external critique leading to instructive and constructive doubt.

In this paper my principal concern has been with the ethos of Posnerian 'law and economics'. My ethical critique applies to some degree to all versions of 'law and economics', and applies more strongly the more closely it approaches the Posnerian variety. I have not set out to demonstrate by means of practical examples that the classical microeconomics favoured by Posner does not work. On the contrary, I have shown that the narrative nature of its rhetoric more or less guarantees that it will have explanatory power. Once one is committed, as most economic analysts are, to the idea that every rational person would want to do more efficiently whatever it is that they do, there is very little that cannot be accounted for. The apparently uneconomic and inconvenient conduct of the person who selflessly spends a day with an elderly relative when an hour would have 'sufficed' is not easily explained in economic terms, but the all-encompassing capacity of law and economics' narrative fiction will find a way. I do not argue that we cannot work with law and economics as a tool. My objection is to the way we are required to work when we work the Posnerian way. We are required to grind life down—in a mill or in a mortar: atomistically, scientifically. Much of this has been said before. My new complaint is that Posnerian law and economics works rather too well in the hands of an instrumental, reductionist kind of law. Most commentators who have considered closely the rhetorics of law and economics have concluded that one differs from the other in a way that has the potential to shed new light on the other. My complaint is that even talk of interdisciplinary critique between law and economics can itself become a rhetorical conceit designed to cover up ethical, or unethical, collusion.

Jurists should have the ethos of never being wholly content with the practical compromises that have to be made in the pursuit of legal solutions to real-life problems, but some have welcomed economic analysis because it has the capacity to make them feel content with practically attenuated justice and because, in the process, it appears to confer the respectful regard of another discipline. Perhaps none of this matters much to the way things work, but it matters a great deal to who we are. Perhaps it does not matter, micro-economically speaking, that a bridge was built by slaves, provided it stands; but we should not stand for such a bridge.

If less pure (more nuanced) versions of law and economics will claim to have filled the gaps in Posner's simple brand with insights drawn from sociology, psychology and

so forth, my response to them is to ask if the gaps might not have been better filled by reference to the insights on humanity that only the humanities' disciplines can bring. Perhaps economics theorists are fearful of the humanities' view of law—the idea that law is an 'expressive and rhetorical activity' in which the lawyer's mind is 'a source of its own energy, of invention, of what the rhetoricians called *ingenium*: the power to make something new [...] the capacity [...] to recreate or represent the world in language'.[94] Perhaps economists are disconcerted by the fact that imagination is economically inefficient in the way that it engenders limitless supply to meet a limited demand. Perhaps some comparatists fear to give imagination free rein because its products cannot be contained within a general rational theory or method. Reflecting on 'Comparative legal scholarship', Geoffrey Wilson preferred to celebrate precisely these features of imaginative engagement with law:

> It is of course difficult to generalize about what will contribute to a more imaginative comparative law since the sources of imagination are both open-ended and unpredictable.[95]

We cannot generalize about what will contribute to a more imaginative comparative law, but it will contribute something to attend more critically to the poverty of economics and the hope for humanities.

[94] White, JB (1999) *From Expectation to Experience: Essays on Law and Legal Education* University of Michigan Press at 20.

[95] Wilson, G (1998) 'Toward Comparative Law in the 21st Century' *The Institute of Comparative Law in Japan* Chuo University Press 1205 at 1218.