

## A Humanities of Resistance

### Fragments for a Legal History of Humanity

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I first realized that there was something strange about the term “Humanities” when, as the director of my university’s Humanities Institute, I participated in a meeting to set up a European Consortium of Humanities Centers. Except for the host center in Utrecht and mine, no other participating European university had a Humanities Institute. The aspiring founding fathers and mothers came from single disciplines: Archeology, English, Dutch, Media, and Philosophy. Then it struck me: No proper or widely used term translates the term Humanities in Greek or Italian, their supposed mother tongues. The Humanities, despite their desperate look eastward and backward, are a consummately modern and decidedly American invention. No faculties, courses, or centers for the Humanities existed in European universities until recently. The few British exceptions – of which my own institution is a shining example – do not follow a long tradition of Humanities education. They are, rather, the result of our “special relationship” with our transatlantic cousins and of the managerial culture that has replaced the older genteel governance of universities, and is perennially trying – and on the whole failing – to create economies of scale, grant-producing interdisciplinary initiatives, and a teaching, scholarship, and evaluation culture that rather pathetically imitates the marketplace.

What are the Humanities? According to the flourishing American debate, the Humanities have been defined in two related ways. They are either a set of academic subjects that typically consists of Classics, Philosophy, History, and Literature (the disciplinary approach) or an attitude toward teaching and learning that could be extended to all types of subjects (the humanistic approach). Humanities subjects are linked through a common origin, through their shared object of concern, or through the use of common strategies.

The Classics had initially pride of place in the enumeration of Humanities disciplines. “As late as 1918 . . . the word *humanities* and the phrase *Greek and Latin* [were

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used] as synonyms.” Ullman reported in 1946 that in Scotland, “a professor of Latin is called a professor of humanity.”<sup>1</sup> The 1934 edition of Webster’s dictionary defined the Humanities as “the branches of polite learning regarded as primarily conducive to culture; esp., the ancient classics and belles-lettres.” As the sciences gradually became dominant in universities and wider society and the emphasis on the classics started waning, the definition became negative and parasitical on the Humanities’ competitors. A number of reviews conclude that the Humanities “are whatever science is not.”<sup>2</sup> The once mighty humanities have now a reduced kingdom, “a musty place filled with tombs, monuments, libraries, and talkative old guides who stroll around with their hands in their pockets, wearing glasses and out of touch with reality, conducting you for a small fee to the graves of Beethoven, Shakespeare, and Sophocles.”<sup>3</sup>

At the other end, the attempt to defend the Humanities against the onslaught of the “soulless” scientific mentality emphasizes the humanistic tradition and extends it “to embrace whatever influences conduce to freedom,”<sup>4</sup> or, even more grandiosely, to the study of “the sum total of man’s activities.” The Humanities chart “greatness, monumental scale, fineness of artistic sensibility, and deep insight” as they examine “the nature of human experience as an object of awareness, and the nature of human acts as both content of awareness and events observed.”<sup>5</sup> In this second sense, every scientific endeavor and object of study can be approached humanistically. These claims are grand on the surface. Yet the Humanities seem to be in perennial crisis, which has generated a huge literature defining its contours and principles, defending its standing in relation to other fields, in particular the sciences, and even discussing the role of the Humanities in wartime. The repetitive and occasionally embarrassed tone of the debate indicates, however, that the stakes are lower. They are a last-stance defense of the modest kingdom of university Humanities and a shield to protect their “small fee” in the form of fast-diminishing research funds.

It is not unreasonable to conclude that the Humanities as an academic institution are closely associated with American education. The long debate about their scope and value, indeed about the meaning of the term Humanities is linked with the survey course in Literature and History degrees. Such courses were first introduced at Striggs College and Stephens College in 1928 and at Chicago in 1931. The Chicago Humanities course was widely publicized and “probably has done most to

<sup>1</sup> B. L. Ullman, “What are the Humanities” 17/6 *Journal of Higher Education* 301, at 302 (1946).

<sup>2</sup> James Schroeder, “The Enemy Within” in 25/8 *College English* 561(1964); cf. “If ‘the humanities’ indicates a set of nonrelated subjects, then it would include those areas that could not be classified under the sciences,” Walter Feinberg, “To Defend the Humanities” 3/2 *The Journal of Aesthetic Education* 91 (1969).

<sup>3</sup> Schroeder, *ibid.*

<sup>4</sup> Ralph Barton Perry, “A Definition of the Humanities” in *The Meaning of the Humanities* (Princeton: Princeton University Press, 1938), 4.

<sup>5</sup> Richard Kuhns, 1/2 *The Journal of Aesthetic Education* 7 (1966), 12, 15.

associate the term *humanities* with a survey course.”<sup>6</sup> The pedagogical value and organization of the different disciplines into a single subject in which “everything was dumped in” is a mainstay of the debate.<sup>7</sup> The Great Books or the dead-white-men tradition in Humanities survey courses has been criticized from many directions. The relationship between these bucket courses and their constituent disciplines is uneasy; the compilation course dumps down the disciplinary expertise and undermines the independence and integrity of the disciplines. Still the term Humanities seems to refer either to federal administrative and financial arrangements (Humanities Faculties or Schools) or to “from Plato to NATO” survey courses that form the backbone of liberal arts education.

In genealogical terms, the Humanities are as much the product of pedagogical and disciplinary concerns of American educationalists as of the Classic and Renaissance humanistic tradition. Against this background, interest in law and literature and, recently, law and the humanities takes additional importance. What is the link between these two disciplines that, on first look, are miles apart?

### Law with Humanities

In 1943, while World War II was raging, Roscoe Pound, perhaps the greatest American legal theorist, penned a remarkable article entitled “The Humanities in an Absolutist World.”<sup>8</sup> Pound wrote at a point when the rift between the Western powers and the Soviet Union, which would dominate the postwar period, had become all too evident, and he finds many shared pitfalls between what he calls autocracies and Western autocratic democracies. Pound is scathing about the emerging new era of materialism and consumerism; of “unmanageable bigness” in government; of obsession with power, security, and “grandiose schemes of world organization” the West promotes. One would be hard pressed to improve on this list of evils for our world today.

Pound draws a sharp line between the sciences and the Humanities. Unlike the standard humanist position, however, he argues that the Humanities are dispensable and are dismissed for political and ideological reasons. “Men are to be trained in the physical and natural sciences so as to promote material production. They are to be trained in the natural sciences so as to promote passive obedience” (pp 12–13). For that to happen, however, Pound avers sarcastically, “the past is to be cancelled. We are to begin with a clean slate. Our accumulated control over external nature has gone so far that there remains only the task making it available for universal human contentment . . . The causes of envy and strife are to go with want and fear. Mankind

<sup>6</sup> Ullman, op. cit., 304.

<sup>7</sup> Ibid., 303.

<sup>8</sup> Roscoe Pound, “The Humanities in an Absolutist World” in XXXIX/1 *The Classical Journal* (October 1943), 1. Page numbers in the next part of the text refer to this article.

will settle down to a passive enjoyment of the material goods and will neither require nor desire anything more” (pp 2–3).

Humanities is a last-stance defense against the imposed ignorance and philistinism that must cancel the past to usher in the new era of consumerism, absolutism, and apathy. A generation cut off from its past cannot fully understand and criticize the present. The Humanities help develop a historical and critical approach; they can be used to resist the all-out attack of utilitarian materialism. This is precisely why they must be downgraded, why a clean slate is necessary. Choosing to base his defense on the importance of learning the classical languages rather than literature, Pound castigates those who find the study of the classics a waste when “time is needed for the natural and physical sciences which teach us how to harness more of external nature to producing the material goods of human existence and to the social sciences which are to teach us how these goods are to be made to satisfy desires” (p 9).

Pound dispels any suspicion of prejudice against the social sciences and a facile recapitulation of the “two cultures” argument. He proudly declares that he taught jurisprudence from a sociological perspective for forty years but adds curtly that the social sciences “do not impart wisdom; they need to be approached with acquired wisdom,” which only the Humanities offer. Throughout the essay, the argument remains deeply political. “If we are content to seek nothing more than a general condition of undisturbed passivity under the benevolent care of an omniscient government, we can well leave education to the sciences which have to do with providing the material goods of existence and those [social sciences] which teach us how the government secures or will secure them for us” (p 14).

For Pound it is a question of resisting a certain type of autocratic government that bases its power on the biopolitical manipulation of desire (his preferred pejorative term is “contentment”) through the production and consumption of material goods, in the hope that this would end strife. Pound correctly anticipates the move toward a disciplined hypercapitalism in which material success becomes the sole aim in life. Citizen contentment can be achieved only after the blind satisfaction of material wants has been raised into the goal of individual and state and has been accompanied by a governmentally promoted political apathy. The role of science is central: The natural sciences develop new ways of using material resources for the production of goods while the social sciences manipulate the psyche and install political and cultural passivity.

This is a scathing attack not so much on science as on the politics and ideologies that Pound rightly feared would dominate the postwar period. Coming from a patrician culture steeped in the Greats, Pound finds in the Humanities and the Classics, in particular, strategies of resistance against this catastrophic turn. Law is not discussed explicitly but the essay is full of references to legal learning and scholarship. Without a good understanding of the Greek and Latin languages and culture, law could fall into the same predicament as the wider culture. Pound

castigates the uneducated, almost illiterate students who cannot read the Bible or the *Magna Carta* in the original, do not understand the meaning of proceedings *in rem* or mistake *son assault demense* for Anglo-Saxon and *non compos mentis* for French (pp 10, 11). We are all used to tales of student ignorance and examination script gems. If I were to argue today that law students should have a passable knowledge of Latin (I am often tempted to do so), I would be laughed out of court and my radical credentials would suffer irretrievably. Pound must have been the last American to do so.

Palpable elitism and an antidemocratic whiff color these examples. The Humanities make the human but their work must be done before university in families, schools, and on Main Street. One either has humanity or not; it is a matter of birth, early education, and class. Pound's defense of classical education sounds occasionally anachronistic and even reactionary, but there is also a melancholy *finis Austriae* tone throughout the essay. Pound's classical education will not survive. The cultural barbarians are at the gates; resistance is both necessary and impossible. Yet its tenor differs from later defenses of the Humanities. The Classics are a bastion of resistance, a last-ditch defense against rising political apathy and oppressive state omnipotence. Their gradual displacement accompanied by the idiotic assertion that only the sciences are necessary for democracy will make intelligent Americans "bow the knee to Baal" and "sink into materialistic apathy" (p 14). This is a lament and obituary for a dying patrician world but also a battle cry against the looming biopolitical turn of postwar culture.

Some sixty-five years after Roscoe Pound's wartime cry of despair and pessimism, the question of the role of the Humanities has returned to the cultural and educational agenda as the present volume attests. Have his Cassandra-like predictions come true? Can the Humanities play the role he assigned to them in 1943? What can a humanistic education offer the young student and aspiring lawyer at a time when humanism and the values of liberalism and democracy have allegedly triumphed? Is it possible today to remain loyal to Pound's injunction and develop a new Humanities of resistance?

Two recent essays address these issues, giving almost opposing answers to the question of the relationship between the Humanities and Law. Martha Nussbaum's "Cultivating Humanity in Legal Education" and Jack Balkin and Sanford Levinson's "Law and the Humanities: An Uneasy Relationship"<sup>9</sup> share much in their diagnosis of the state of legal education. Although Nussbaum gives a rather timid defense of the Humanities, Balkin and Levinson dismiss any substantial link.

Nussbaum, a classicist and historian of ideas turned law professor, has consistently promoted the role of the Humanities in education and legal education in

<sup>9</sup> Jack Balkin and Sanford Levinson, "Law and the Humanities: An Uneasy Relationship", 18 *Yale Journal of Law and the Humanities* 155 (2006).

particular.<sup>10</sup> For Nussbaum, the Humanities mission is extremely broad. They address the problems of “how to live with dignity as a rational animal, in a world of events that we do not fully control. Issues . . . of vulnerability and need, of terror and cruelty, also of pleasure and vision.”<sup>11</sup> Such a huge agenda is delivered through three core values: Socratic self-examination, world citizenship, and the narrative imagination. The first refers to a reflective approach to self and tradition closer to Habermasian liberal orthodoxy than to classical Greece. Students should be taught to defend sound values and criticize those that do not stand the test of deliberation. They should learn to “reason logically, and to test what one reads or says for consistency of reading, correctness of fact, and accuracy of judgment.” Second, the Humanities should prepare for world citizenship, a rather fashionable oxymoron in the post-1989 world. Nussbaum, a key promoter of neo-Kantian cosmopolitanism, wants to cultivate the humanity of citizens and their ability to see themselves as not simply citizens of some local region or group but also, and above all, as human beings bound to all other human beings by ties of recognition and concern. Bonds of recognition and concern should be built not just with our immediate group but also with minority cultures and people and with humanity at large. Finally, the literature and the arts help develop something called “narrative imagination.” This is the “ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person’s story, and to understand the emotions, desires, and wishes that someone so placed might have” (pp 269, 270).

Turning to legal education, Nussbaum concedes that is a form of specialized professional training. In a rather amazing admission for a staunch defender of the Humanities, she accepts that the “values and goals of [humanity] are not germane to legal education” (p 272). In a further twist of old-style positivism, Nussbaum claims that students “need to learn the law as is.” Lawyers are out to win, not to fight for truth, and in this sense they are closer to the Sophists rather than to Socrates.

Yet historically the relationship between Law and the Humanities has been intense and intimate. All great philosophers, from Plato to Hobbes, Kant, Hegel, and Weber, either studied the law or had a deep understanding of legal operations. Legal issues have been central to philosophical and political concerns throughout history. Well before the creation of the various disciplines, when thinkers wanted to contemplate the organization of their society or the relationship between authority and the citizen they turned to law. Plato’s *Republic* and Aristotle’s *Ethics*, as much as Hegel’s *Philosophy of Right*, are attempts to examine the legal aspects of the

<sup>10</sup> Martha Nussbaum, “Cultivating Humanity in Legal Education,” 70/1 *University of Chicago Law Review* 265 (2003). Page numbers in the next part of the text refer to this article. See also “Humanities and Human Development” 36/3 *Journal of Aesthetic Education* 39 (2002). Both essays are applications of Nussbaum’s wider thesis in *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge: Harvard University Press, 1997).

<sup>11</sup> Nussbaum, “Humanities and Human Development,” 39.

social bond, to discover and promote a type of legality that attaches the body to the soul, keeps them together, and links them to the demands of living. Seen from the perspective of the *longue durée*, the law represents the principle of social reproduction. Whenever classical philosophy occupied itself with the persistence of the social bond, it turned to law and became legal philosophy, the great source from which political philosophy and then the disciplines, sociology, psychology, and anthropology, emerged in the seventeenth and nineteenth centuries, respectively. All major early modern philosophers were jurists. Thomas Hobbes was preoccupied with the common law; *Leviathan* is a clear exercise in jurisprudence. Immanuel Kant, the philosopher of modernity par excellence, wrote extensively on legal issues and at the end of his life came up with a blueprint for a future world state based on international law and respect for freedom and rights. Hegel and Marx wrote superb jurisprudential texts but were also well versed in the positive law of their time. Emile Durkheim and Max Weber, the founders of sociology, wrote extensively on law and used types of legality as markers for the classification of different social systems. The birth of the disciplines out of the womb of legal study led to a cognitive and moral impoverishment of legal scholarship and education, which have become an entomology of rules, a guidebook to technocratic legalism, and a science of the existent.

In an essay written in 1993, Nussbaum argued that philosophy should be incorporated into legal education because it is necessary for the understanding of key concepts.<sup>12</sup> Free will, the emotions, sexuality, the quest for a good life are germane to legal questions and only philosophy can clarify them. Following Plato's *Theaetetus*, Nussbaum accepts that philosophy begins in "wonder" and criticizes the use of "science as normative for legal reasoning," which places emphasis on the "right answer." "[L]et the law students learn to wonder, and then perhaps, wherever they are, they will feel the pressure of a Socratic question rising up to annoy them as they are trying to be simple."<sup>13</sup>

Yet, by 2003, Nussbaum has accepted the poverty of legal education, and, against Pound's injunction, sees the Humanities as just a palliative. Marx classically described the bourgeois as a split person who goes about his business using and exploiting people during the working week but who, reverse-Cinderella-like, turns into a citizen concerned with the common good on the Sabbath. A similar inner split of the lawyer allows a small role for the Humanities: Lawyers, in addition to being aggressive litigators unconcerned with truth and justice, are influential citizens. They should be trained, therefore, into "normative ethical reasoning by examining alternative accounts of decisionmaking, social justice, and related topics" (p 274).

<sup>12</sup> Martha Nussbaum, "The Use and Abuse of Philosophy in Legal Education," 45 *Stanford Law Review* 1627 (1993).

<sup>13</sup> *Ibid.*, 1640.

Nussbaum admits that these are diversions, adornments, and peripheral-only problems. In 1993, she had advocated the appointment of philosophers in law schools. In 2003, the solutions proposed are anodyne. The need to teach ethical reasoning is partly met by the standard course in legal ethics. Essay writing should replace the obsession with written examinations; courses in international and comparative law would encourage a more global and a la mode understanding of the world, and innovative courses such as the “decisionmaking” one Nussbaum has been teaching at Chicago would expose students to good normative reasoning and an empathetic *education sentimentale juridique*. Nussbaum admits, on the other hand, that her law and literature course failed in this quest. Students expected a “lighter more entertaining” kind of course about the literary representations of legal situations. Law and the Humanities courses end up entertaining and lightening the heavy load of law students as well as giving them a useful cultural gloss. A few references to Sophocles, Shakespeare, Melville, and Kafka can impress the professional cocktail party circuit.

This is humanism of the lightest kind. It has been repeatedly and incisively criticized, and there is no need to add much here.<sup>14</sup> The cosmopolitan self and the ethical community Nussbaum envisages are too closely modeled on the values and norms of American liberal elites suitably finessed to extend humanitarian empathy to the unfortunates of the world. Rational deliberation, ethical reasoning, and a fictive changing of places do not go far in addressing social inequality, oppression, and domination. As Rosi Braidotti put it, Nussbaum has claimed “monopoly over basic values of human decency by allocating them exclusively to . . . American liberal individualism.”<sup>15</sup> As we know, this kind of individualism is often accompanied by high-altitude bombers and ethically aware torturers.

Martha Nussbaum’s loss of nerve is intriguing. Lawyers are sophists, rhetoricians, and litigators, people driven, like society, by profit. They try to persuade audiences at any cost rather than search for the truth. There is not much that can be done to improve their ethical sense. Nussbaum’s defense of the (limited) role of the Humanities in legal education takes therefore a methodological and hermeneutical form. It is not so much the traditional Humanities that can improve the moral compass of lawyers but the values they promote. Law should be taught humanistically, helping to develop a reflective approach, moral values, and critical reasoning.

Roscoe Pound’s prediction has come true: Even the professor of Humanities concedes that she has little to offer to the cultivation of culture in law. Nussbaum openly admits it at the end of the essay. Legal education makes “ambitious idealistic

<sup>14</sup> Homi Bhabha, “Unpacking my Library . . . Again” in Iain Chamber and Lidia Curti, eds. *The Post-colonial Question* (New York: Routledge, 1996); Rosi Braidotti, *Transposition* (Cambridge: Polity Press 2006).

<sup>15</sup> Braidotti, 15.

young people become narrower, more fixed on narrowly instrumental goals . . . Soon [the law students] will be out working for firms. Meanwhile, while they are here, while they have time to deliberate and imagine, let us cultivate their humanity” (p 279). The role of humanistic legal education is to instill a sense of liberal morality and openness to the students who come to law school without the elite cultivation that Pound could still rely on in 1943. The Humanities have retreated from Roscoe Pound’s agenda: They can offer no resistance to the firm. Could it be, however, as Roscoe Pound insinuates, that it is precisely the kind of “humanism light” Nussbaum advocates that leads to the neglect of deliberation and imagination and facilitates rather than resists the efficient integration of the young lawyer in the mentality of the firm? Could it be that liberal legal pedagogy has contributed to the predicament Nussbaum both accepts and regrets? In Roscoe Pound’s terms, the barbarians are not just amassing at the gates. They have entered the citadel and the guards have abandoned the fight.

### Law without Humanities

If Nussbaum offers a tepid and unconvincing defense of the Humanities, Balkin and Levinson’s article marks the near abandonment of the ideas and values for which Pound stood.<sup>16</sup> These authors proclaim the realist, pragmatic, and brutal nature of American legal education. Their attack on Pound’s and Nussbaum’s *bien pensant* humanism is twofold. The belief that great works of art convey moral notions is wrong. In any case, law’s business is to promote tough-mindedness rather than moral values. “[L]aw seems almost to relish the extirpation of [tender-heartedness] as if tender-heartedness were a mental disease that only the discipline of law can cure” (p 184).

Our authors disagree with Pound in most particulars. The establishment of the advanced administrative and administered state (Pound’s great fear) has been a great success. It released the courts from being “insulated oracles of eternal legal verities” (p 169). Judges, like legislatures and administrators, are now involved in complicated issues of governance, in the definition of the public interest for all aspects of social life, and in the implementation of public policy. As a result, economic efficiency has become the aim of the legal system; economics the most relevant discipline for legal scholars; law and economics the dominant jurisprudential tradition; the rational actor approach its methodology and technical internalist legal argument, enriched by interdisciplinary social scientific expertise, the form of legal education. If they are right, Pound’s prediction has come true but it is not as bleak as he thought. Against his fears, these developments are a great achievement of American law, scholarship, and pedagogy.

<sup>16</sup> Balkin and Levinson op. cit., fn. 10. Page numbers in the next part of the text refer to this article.

The downgrading of the role of the Humanities in legal education is programmatic, global, and somewhat ironic if not cynical. Lawyers and legal academics are gladiators (rhetors) out to win battles (arguments) with different audiences. They are motivated by a strong prescriptive urge. Other disciplines are useful to lawyers only as aids to victory. This premise determines their cognitive and political function: legal philosophy's role is to help legitimate the legal system and clarify its main concepts; legal history provides useful data for making normative legal and political arguments (pp 175–6). Interdisciplinary studies are admitted to the extent required by the prescriptive nature of legal scholarship and a professional, results-oriented pedagogy. Knowledge of economics helps the lawyer's quest for scientific authority and rhetorical persuasion. As Justice Holmes apparently would have put it, "reading literature or engaging in the humanities [does] not have edificatory effect" (p 186). Only the study of rhetoric is useful because it improves the forensic skills of litigators.

I have neither the expertise nor the brief to defend American legal education against this portrayal. I would be surprised if American legal theorists would recognize (or approve) the image of law and education presented here as an amoral, gladiatorial, results-driven enterprise that colonizes other disciplines. The authors could claim that this is a realistic depiction and not their own preference. After all, they aver in passing that they carry out research in law and poststructuralism, that they promote law and the humanities, and that they have launched a new field called law and the performing arts. Yet their own claim is that legal academics see themselves as legislators or judges. Lawyers describe in order to prescribe; our authors are lawmakers because they are legal academics; because they are interdisciplinary (one has a Ph.D. and the other is a poststructuralist and reads Derrida, 'a literary theorist,' and Deleuze and Guattari); and because, finally, they teach in prestigious universities.

Balkin and Levinson's law is crystal clear: A "good lawyer" is a rigorous thinker who does not waste time denouncing injustice at the expense of legal analysis. The job of the lawyer is, following the *bon mots* of O. W. Holmes, to become a supple tool of power and to help his fellow citizens to go to Hell if that is what they want. Their job is not "to do justice," but "to play the game according to the rules. . . ." (p 185). Pragmatism is identified with dominant ideology and a moral *grundnorm* that reads "succeed at all costs" – let us call it the "xeroxing" principle.

One of the authors describes an exchange with our editor, who invited him to help set up a PhD program in law and the humanities. Professor Balkin's refusal was monosyllabic: "xeroxing." He worked in a richly endowed law school and all his xeroxing was free, whereas our editor had to buy copy cards. "A law department that cut itself off from the goal of professional education would soon find itself as well supported financially as the average art history or music department, which is to say, it would not be very well supported at all" (p 177). This simple morality tale confirms the prescience of Roscoe Pound. In the sixty-five years since he wrote his article,

material “contentment” has become the motivation for scholarship, “free xeroxing” the drive of intellectual life. To be sure, if free xeroxing is the aim of academic life, it would have been much better for many of us to go into the legal profession and own the xerox machine itself.

“A favourite phrase of the realist is ‘the brute facts’; a phrase used not in sadness that there should be such facts, but with a certain relish, as if brutality were the test of reality . . . the significant things in the world are force and the satisfaction of material wants”<sup>17</sup> wrote Pound in 1943. Balkin and Levinson offer an interesting twenty-first-century example. Commenting on the infamous torture memoranda drafted by Justice Department lawyers from the “highest reaches of the elite legal academy” to legitimize the practices of the American military and give President Bush absolute power to conduct war, they find little surprising or worrying in this capitulation. Against Roscoe Pound’s protests, they believe that a Humanities education would have made no difference. “Acquaintance with Homer and Shakespeare would not have changed what ambitious young lawyers in the Office of Legal Counsel wrote to please those in power. Even a torturer can love a sonnet . . .” (p 186). To support their claim they mobilize the humanist judge Learned Hand and the realist O. W. Holmes who, the authors speculate, would have perhaps agreed with the interpretations of the elite lawyers. Whether these legendary judges would have concurred with these counterintuitive interpretations is a moot point. No evidence is given in support, something that stands at odds with the essay’s proclamations of cool reason and hard realism. This is the lesser problem nevertheless.

The post-WWII Western consensus was that certain acts – torture is prime among them – are not tolerable in liberal democratic societies. In the West, torture was declared unacceptable and was discussed as part of a barbaric and long-gone history. Torture, we were told, takes place elsewhere only, in exotic and evil places, in dictatorships and under totalitarian regimes. This consensus, however, has now broken down. Torture has become a respectable topic for conferences on practical ethics, and the “ticking bomb” hypothetical offers entertainment at dinner parties. What is particularly disturbing is the way in which lawyers are prepared to enter into debate about the morality and legitimacy of torture and to develop detailed plans about ways of legalizing it through torture warrants, sunset clauses, and judicial supervisory regimes.<sup>18</sup> As Lord Hoffman put it in a case examining the legality of detention without trial in the United Kingdom, “the real threat to the life of the nation comes not from terrorism but from laws such as these.”<sup>19</sup> The problem is not

<sup>17</sup> Pound, *op. cit.*, 3.

<sup>18</sup> Michael Ignatieff, *The Lesser Evil* (Edinburgh: Edinburgh University Press, 2004); Alan Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002); For a hilarious retort see: John Gray, *Torture – A Modest Proposal in Heresies* (London: Granta, 2004), 132.

<sup>19</sup> *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56, Para 97.

the torturers who love sonnets,<sup>20</sup> but the lawyers and philosophers who are prepared to dress in legal and moral verbiage the dictates of brutalizing power and the legal academics who offer scholarly support.

In this world of brute facts, law is technical reason assisted by appropriate scientific expertise at the service of power. References to justice, on the other hand, are a waste of time indulged by the feeble-minded and the emotional. “It is only the insufficiently rigorous and well trained, whom legal training has inadequately ‘disciplined’ who think that the solutions to a legal problem is resolved by asking which result is more just” state our authors ambiguously located between constative affirmation and performative irony (p 185). To assert that a legal system is unjust, says Alf Ross, is an “emotional expression. To invoke justice is the same thing as banging on the table: an emotional expression that turns one’s demand into an absolute postulate.”<sup>21</sup> Nonformal conceptions of justice are “illusions which excite the emotions by stimulating the suprarenal glands.”<sup>22</sup> When “someone says “that thing is unjust” what he means is that the thing is offensive to his sentiments.”<sup>23</sup> This radical separation of law from justice is, however, both cognitively wrong (deciding what is lawful is impossible without an evaluation of the moral, just, or desirable outcome) and morally impoverished (it reduces morality to private subjective choices and/or to a predication of legality). It became the legitimation and rationalization of the atrocities of the last seventy years.

Allow me here a little detour that briefly sketches a different approach to the nexus of law and justice. The eternal return of (new versions of) naturalism despite its repeatedly proclaimed fallacy indicates that law and morality are not opposed. They are linked in inner and paradoxical ways. For the Greeks and Romans, justice was the prime, albeit missing, virtue of the polity and the spirit and reason of law. A just constitution was a legitimate constitution and a just legal system has a valid claim to the obedience of its citizens. We find similar ideas in the writings of the common lawyers. Justice is cumulatively the foundation, the spirit, and the end of the law. As law’s immemorial and unwritten foundation, justice links the common law with divine will and its expressions in nature and reason. After the Reformation, justice as equity is explicitly associated with the divine order and becomes law’s spirit. When law and justice, in the form of equity, are in conflict, the law must give way to higher reason. In all these formulations, justice is seen as the “primitive reason”<sup>24</sup> of law, its virtue and ethical substance, an ideal or principle that gives rules

<sup>20</sup> As we know of a number of people who tortured prisoners in Guantanamo Bay and Abu Ghraib, an interesting social scientific research project would examine their artistic and cultural preferences and determine whether certain cultural “memes” lead to torture practices.

<sup>21</sup> Alf Ross, *On Law and Justice* (London: Stevens & Sons, 1958), 274.

<sup>22</sup> *Ibid.*, 275.

<sup>23</sup> Friedrich von Hayek, *Law, Legislation, and Liberty* (London: Routledge and Kegan Paul, 1972), 168, fn 30.

<sup>24</sup> Sir H. Finch, *Law, or, A Discourse Thereof in Four Books* (London: Society of Stationers), 1627, at fol. 57.

their aim and limit, and remedies their defects. Justice is also something outside or before the law, a higher tribunal or reason to which the law and its judgments are called to account. In this sense, a law without justice is a law without spirit, a dead letter; it can neither rule nor inspire.

Legal justice is only one limited facet of justice. It misfires and decays if it stays on its own, unaccompanied by the wider conception that has inspired European critical legal theory.<sup>25</sup> This is a justice that operates in relationship to the other as a singular, unique, finite being with concrete personality traits, character attributes, and physical characteristics. This finite person puts me in touch with infinite otherness. Both inside and outside, justice is the horizon against which the law is judged for its routine successes and failings and for its broader neglect and forgetting of oppression and domination. Whether we see the law as an historical institution or as a formal system of rules and decisions, the deconstruction of its operations discovers the violence of origins in its daily operations and unravels the ordered bipolarities (fact-value, public-private, objective-subjective, lawful-unlawful), showing that they cannot stabilize the legal system.<sup>26</sup>

The axiom of justice “respect the singularity of the other” is radically different from our authors’ injunction “be a winner,” “success succeeds,” and get free photocopying. This principle emerges in theological, philosophical, and literary texts as well as in the legal archive. It indicates what a Humanities of resistance might look like today against both liberal beautification and realist simplification of Law and the Humanities. Unless this or some other defensible principle of justice informs legal teaching and scholarship, academics become functionaries of power and technicians of skills accepting our exclusion not just from the Humanities but from all intellectual endeavor and political aspiration.

### Fragments for a (Legal) History of Humanity

Three ways of linking law and the Humanities have emerged from the discussion thus far. The Humanities can help resist the onslaught of materialism, consumerism, and an all-powerful state (Pound); they have a limited role in cultivating the moral and rational abilities of law students (Nussbaum); finally, they have no major role to play because they can neither help lawyers win arguments nor prepare law students for the battles ahead (Balkin and Levinson).

Now this seems to me a rather restricted way of pursuing the link. It is associated more, as argued previously, with the perceived needs of American education rather

<sup>25</sup> Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Oxford: Hart, 2006) Ch. 1–4.

<sup>26</sup> Balkin’s earliest writings were not inimical to these ideas; see Jack Balkin, “Deconstructive Practice and Legal Theory,” 96 *Yale Law Journal* 743 (1987). The 1990s made both Nussbaum and Balkin move toward a more “brutal” pragmatism. The undergraduate character of the Law degree, the relaxed connection with the legal profession and the enduring influence of the Critical Legal Conference have somewhat shielded British academics from this trajectory.

than with the history of the two fields. Indeed even if we were to restrict our search to the academic aspects of the relationship, the itinerary would be different. It would first explore philosophy, literature, and law as the oldest forms of Western education. The Greeks, lacking a clerical caste and holy books, learned about their past, their world, and their Gods from a poet. Homer became the tradition, textbook, and source of learning for young Greeks, from the sixth century BC – a matter that greatly annoyed Plato and set up the ongoing ancient quarrel between philosophy and literature. Poetry – a central case of the Humanities – and the law were from the beginning the main ways of learning and ruling.

After the Christianization of Europe, the role of philosophy was assumed by theology. Theology and law were taught to students versed in the *artes liberales*, mainly the *trivium* (grammar, dialectic, and rhetoric), which formed the backbone of the medieval university. This expertise brought together patristic and secular study and cross-fertilized them. Bologna, the first European university, was established in the twelfth century as a law school but it developed out of the liberal arts that flourished there early in the eleventh century. By the thirteenth century, up to 10,000 students from all over Europe studied in Bologna. After graduating, they went to work for Church and the nascent state, using their legal expertise to protect secular leaders from ecclesiastical incursions. The task of these jurists was to extrapolate from principles of canon law the axioms of a secular legal science, helping develop on the way the theory of royal sovereignty and legitimacy against papal claims. The various types of knowledge placed today in the basket called Humanities had an intrinsic link with law and were the mainstay of education from Classical Greece to the late pre-Modern period.

Once this *longue durée* approach is taken to the Law–Humanities nexus, the focus of interest changes. If the two areas are closely linked, the zone of intersection should be sought in the target of their intervention, the ground concept that unites them. This is humanity, the human, human nature: a family of concepts and institutions that have brought together the exploration of man’s civilization, tradition, culture, and values with the age-old attempt to discipline the subject and regulate the social bond.

“In the large sense the humanities mean the sum total of man’s activities – nothing that touches man is alien to the humanities,” wrote John Dodds in 1943 alluding to Terence’s dictum that “*Homo sum; humani nil a me alienum puto.*”<sup>27</sup> If we accept this expansive definition, the Humanities and human rights, modern law’s noblest claim, share their concern to address every aspect of humanity. Human rights are the acme of modern law; they have been created for the sake of humanity. As a combined term, they draw both from the moral and political tradition of (legal)

<sup>27</sup> John Dodds, “Place of the Humanities in a World of War,” *Vital Speeches of the Day* (March 1943) 311.

humanism (with its obvious links with the Humanities) and from the institutional and conceptual empire of law. If according to a standard approach, human rights are a category of rights given to people on account of their humanity and not because of any other attributes or belongings, the history, the (contested) concept, and meaning of humanity are important normative sources for contemporary law that escape the parochial nature of jurisdiction.

Liberal philosophy adopts a normative definition of humanity according to which, in one version, “our species is one, and each of the individuals who compose it is entitled to equal moral consideration.”<sup>28</sup> Yet throughout Western history, the meaning, extension, and scope of humanity has varied wildly. Slaves have been excluded from humanity and are typically defined as things (*res*) among others by Aristotle, the philosopher of philosophers. Pigs, rats, leeches, and insects, on the other hand, were regularly and formally indicted and tried in law courts in the Middle Ages. In early modernity, companies became recognized as legal persons. A strong movement argues today that animals as well as trees, parks, and other natural objects should be given the protection of rights. The question of human nature has continued to “haunt modern thought and has become more complicated as a result of the contradictions engendered by positive science and historicism.”<sup>29</sup> My argument is that humanity has not been a normative attribute shared by all humans, as liberal jurisprudence asserts, or a universal standard of civilization and distinction, as argued by the academic Humanities. Despite these important normative claims, humanity has acted as a strategy for ontological separation, distribution, and classification. Law and the Humanities share this strategic use. Let us start with a brief history of humanity.

Pre-Modern societies did not develop a comprehensive idea of the human species. Free men were Athenians or Spartans, Romans or Carthaginians but not members of humanity; they were Greeks or barbarians but not humans. The word *humanitas* appeared for the first time in the Roman Republic as a translation of the Greek word *paideia*. It was defined as *eruditio et institutio in bonas artes* (the closest modern equivalent is the German word *Bildung*). The Romans inherited the concept from Stoicism and used it to distinguish between the *homo humanus*, the educated Roman who was conversant with Greek culture and philosophy and was subjected to the *jus civile*, and the *homines barbari*, who included the majority of the uneducated non-Roman inhabitants of the Empire. Humanity enters the Western lexicon as an attribute and predicate of *homo*, a term of separation and distinction. For Cicero as well as the younger Scipio, *humanitas* implies generosity, politeness, civilization, and culture and is opposed to barbarism and animality.<sup>30</sup> “Only those who conform

<sup>28</sup> Michael Ignatieff, *Human Rights as Politics and Ideology* (Princeton: Princeton University Press, 2000).

<sup>29</sup> Claude Lefort, *The Political Forms of Modern Society*, John Thompson, ed. (Cambridge: Polity Press, 1986), 240.

<sup>30</sup> Ullman, *op. cit.*, 302.

to certain standards are really men in the full sense, and fully merit the adjective 'human' or the attribute 'humanity.'"<sup>31</sup>

The job of philosophy, literature, and learning is to instill *humanitas* in the deserving. Humanity is an acquired taste, a construct, the outcome of education, edification, and discipline. It marks the distinction between the cultivated man of letters, the exemplar of real humanity, and the uneducated, uncivilized beings who, because they lack the subtlety of aesthetic discrimination and judgment, are lesser humans. These two aspects, the artificial nature of humanity and its use for separating people have been a mainstay of Western history. The modern quarrel between the sciences and the humanities, exemplified in the two cultures debate between C. P. Snow and Leavis,<sup>32</sup> in attacks on the culture industry and the society of the spectacle and the juxtaposition between high and low culture, constantly reconstructs humanity's cutting edge. Richard Kuhns argued in 1966 that to be well educated is to be conversant with a set of great books. Kuhns claims unconvincingly that "executive cadres trained for our great industries, workers on assembly lines, businessmen who want to become 'humanized' . . . right now as I write are given training in the humanities which raises in the student beliefs about greatness, about goodness, about the quality of his contemporary cultural environment,"<sup>33</sup> Only the learned are fully human with the rest falling on a point between barbarism and animality.

The political and legal uses of *humanitas* follow a similar history. The concept of humanity has been consistently used to separate, distribute, and classify people into rulers, ruled, and excluded. This strategy of separation curiously entered the historical stage at the precise point when the first proper universalist conception of *humanitas* emerged in Christian theology; it was captured in the St. Paul's statement that there is no Greek or Jew, man or woman, free man or slave (epistle to the Galatians 3:28). All people are equally part of humanity because they can be saved in God's plan of salvation and because they share the attributes of humanity now sharply differentiated from a transcended divinity and a subhuman animality. For classical humanism, reason determines the human: man is a *zoon logon echon* or *animale rationale*. For Christian metaphysics, on the other hand, the immortal soul, both carried and imprisoned by the body, is the mark of humanity. The new idea of universal equality, unknown to the Greeks, entered the Western world as a combination of classical and Christian metaphysics.

The divisive action of humanity survived the invention of its spiritual equality. Pope, Emperor, Prince, King, these representatives and disciples of God on earth,

<sup>31</sup> H. C. Baldry, *The Unity of Mankind in Greek Thought* (Cambridge: Cambridge University Press, 1965), 201.

<sup>32</sup> See Shroeder, *op. cit.*

<sup>33</sup> Kuhns *op. cit.*, 12. Similarly, Nussbaum reports that the defense of some Classics scholars against criticisms of irrelevancy is that they prepare good managers.

were absolute rulers. Their subjects, the *sub-jecti* or *sub-diti*, take the law and their commands from their political superiors. More importantly, people will be saved in Christ only if they accept the faith because non-Christians have no place in the providential plan. This radical divide and exclusion founded the ecumenical mission and proselytizing drive of Church and Empire. Christ's spiritual law of love turned into a battle cry: let us bring the pagans to the grace of God, let us make the singular event of Christ universal, let us impose the message of truth and love upon the whole world. The classical separation between Greek and barbarian was based on clearly demarcated territorial frontiers. In the Christian empire, the frontier was internalized and split the known globe diagonally between the faithful and the heathen. The barbarians were no longer beyond the city as the city expanded to include the known world. They became enemies within to be appropriately corrected or eliminated if they stubbornly refused spiritual or secular salvation.

The meaning of humanity after the conquest of the New World was vigorously contested in one of the most important public debates in history. In April 1550, Charles V of Spain called a council of state in Valladolid to discuss the Spanish attitude toward the vanquished Indians of Mexico. The philosopher Ginés de Sepulveda and the Bishop Bartholomé de las Casas, two major figures of the Spanish Enlightenment, debated on opposite sides. Sepulveda, who had just translated into Spanish Aristotle's *Politics*, argued, "the Spaniards rule with perfect right over the barbarians who, in prudence, talent, virtue, humanity are as inferior to the Spaniards as children to adults, women to men, the savage and cruel to the mild and gentle, I might say as monkey to men."<sup>34</sup> The Spanish Crown should feel no qualms in dealing with Indian evil. The Indians could be enslaved and treated as barbarians and savages to be civilized and proselytized.

Las Casas disagreed. The Indians have well-established customs and settled ways of life, he argued, they value prudence and have the ability to govern and organize families and cities. They have the Christian virtues of gentleness, peacefulness, simplicity, humility, generosity, and patience and are waiting to be converted. They look like our father Adam before the Fall, wrote las Casas in his *Apologia*; they are unwitting Christians. In an early definition of humanism, las Casas argued that, "all the people of the world are humans and the only one definition of all humans and of each one, that is that they are rational. Thus all races of humankind are one."<sup>35</sup> His arguments combined Christian theology and political utility. Respecting local customs is good morality but also good politics: the Indians would convert to Christianity (las Casas' main concern) and also accept the authority of the Crown and replenish its coffers, if they were made to feel that their traditions, laws, and

<sup>34</sup> Gines de Sepulveda, *Democrates Segundo of De las Justas Causa de la Guerra contra los Indios* (Madrid: Institute Francisco de Vitoria, 1951) 33 quoted in Tzvetan Todorov, *The Conquest of America*, Richard Howard, transl. (Norman: University of Oklahoma Press, 1999) 153.

<sup>35</sup> Bartholomé de las Casas, *Obras Completas*, Vol. 7 (Madrid: Alianza Editorial, 1922) 536–7.

cultures were respected. Las Casas' Christian universalism was, like all universalisms, exclusive. He repeatedly condemned "Turks and Moors, the veritable barbarian outcasts of the nations" because they cannot be seen as "unwitting" Christians. An empirical universalism of superiority and hierarchy (Sepulveda) and a normative one of truth and love (las Casas) end up being not very different. As Tzvetan Todorov pithily remarks, there is "violence in the conviction that one possesses the truth oneself, whereas this is not the case for others, and that one must furthermore impose that truth on those others."<sup>36</sup>

The conflicting interpretations of humanity by Sepulveda and las Casas capture the dominant ideologies of Western empires, imperialisms, and colonialisms. At one end, the (racial) other is inhuman or subhuman. This justifies enslavement, atrocities, and even annihilation as strategies of the civilizing mission. At the other end, conquest, occupation, and forceful conversion are strategies of spiritual or material development, of progress and integration of the innocent, naïve, undeveloped others into the main body of humanity.

These two definitions of otherness and strategies toward it are linked with our own needs and desire: They act as supports of Western subjectivity. The helplessness, passivity, and inferiority of the undeveloped others turns them into our narcissistic mirror image and potential double. These unfortunates are the infants of humanity – ourselves in a state of nascency. They are victimized and sacrificed by their own radical evil; they are rescued by us who help them grow, develop, and become our likeness. Because the victim is our mirror image, we know what his interest is and impose it for his own good. At the other end, the irrational, cruel, victimizing others are projections of the Other of our unconscious. As Slavoj Žižek puts it, "there is a kind of passive exposure to an overwhelming Otherness, which is the very basis of being human . . . [the inhuman] is marked by a terrifying excess which, although it negates what we understand as humanity is inherent to being human."<sup>37</sup> We have called this abysmal Other lurking in the psyche and unsettling the ego various names: God or Satan, barbarian or foreigner, in psychoanalysis death drive or the Real. Today they have become the axis of evil, the rogue state, the butcher of Baghdad, the beast of Belgrade, and the bogus refugee. They are contemporary heirs to Sepulveda's monkeys, epochal representatives of inhumanity.

Becoming human is possible only against this impenetrable inhuman background. Split into two, according to a simple moral calculus, the Other has a tormented and a tormenting part, both radical evil and radical passivity. He represents our narcissistic self in its infancy (civilization as *potentia*, possibility, or risk) and what is most frightening and horrific in us: the death drive, the evil persona who lurks in the midst of psyche and society. Empirical and normative humanity (humanity as

<sup>36</sup> Todorov op cit., 166, 168.

<sup>37</sup> Slavoj Žižek, "Against Human Rights," 34 *New Left Review* 56 (July–August 2005).

quality shared or as a project to be achieved) will eventually coincide through the West's surgical intervention. Either the deceased, unworthy, inferior members will be cut off or they will be humanized and integrated once they accept the wrong of their ways and agree to be civilized; severing or prosthesis are the ways of making human.

The religious grounding of humanity was undermined by the liberal political philosophies of early modernity. The foundation of humanity was transferred from God to (human) nature. Human nature as the common denominator has been interpreted as an empirical fact or as a normative value or both (Habermas). Science has driven the first approach. The mark of humanity has been variously sought in language, reason, evolution, or its upright posture (the etymological meaning of *anthropos*). It was legal and political innovations, however, that turned humanity, man as species existence, into the common and absolute value around which the whole world revolves. The great eighteenth-century revolutions and their declarations paradigmatically expressed the modern universalistic conception of humanity. Yet at the heart of this new universalism, humanity remained a strategy of division and classification.

We can follow briefly this contradictory process that both proclaims the universal and excludes the local in the text of the French Declaration of the Rights of Man and Citizen, the manifesto modernity. Article 1, the progenitor of legal universalism, states, "men are born and remain free and equal of right," a claim repeated in the inaugural article of the 1948 Universal Declaration of Human Rights. Equality and liberty are declared natural entitlements, independent of governments, epochal, and local factors. Yet the Declaration is categorically clear about the real source of universal rights. Article 2 states, "the aim of any political association is to preserve the natural and inalienable rights of man." Article 3 proceeds to define this association: "The principle of all Sovereignty lies essentially with the nation."

Natural and eternal rights are declared on behalf of the universal man; however, these rights did not preexist but were created by the Declaration. A new type of political association, the sovereign nation and its state and a new type of man, the national citizen, came into existence and became the beneficiaries of rights. In a paradoxical fashion, the Declaration of universal principle established local sovereignty. From that point, statehood and territory follow a national principle and belong to a dual time. If the Declaration inaugurated modernity, it also started nationalism and all its consequences: genocides, ethnic and civil wars, ethnic cleansing, minorities, refugees, and the stateless. The spatial principle is clear: Every state should have one nation and every nation should have its own state – a catastrophic development for peace as its extreme application after 1989 has shown.

The new temporal principle replaced religious eschatology with a historical teleology, which promised the future suturing of humanity and nation. This teleology has two possible variants: Either the nation imposes its rule on humanity or

universalism undermines parochial divides and identities. Both variants were evident when the Romans turned Stoic cosmopolitanism into the imperial legal regulation of *jus gentium*. In France, the first alternative appeared in the Napoleonic Wars, which allegedly spread the civilizing influence through conquest and occupation (according to Hegel, Napoleon was the world spirit on horseback); the second was the beginnings of a modern cosmopolitanism, in which slavery was abolished and colonial people were given political rights for a limited time after the Revolution. From the imperial deformation of Stoic cosmopolitanism to the current use of human rights to legitimize Western global hegemony, every normative universalism has decayed into imperial globalism. The split between normative and empirical humanity resists its healing.

A gap separates universal man, the ontological principle of modernity, and national citizen, its political instantiation and real beneficiary of rights. The nation-state came into existence through the exclusion of other people and nations. The modern subject reaches humanity by acquiring political rights of citizenship, which guarantee admission to the universal human nature by excluding others from that status. The alien as a noncitizen is the modern barbarian. She does not have rights because she is not part of the state and she is a lesser human being because she is not a citizen. One is human to greater or lesser degree because one is a citizen to a greater or lesser degree. The alien is the gap between man and citizen. In our globalized world, not to have citizenship, to be stateless or a refugee is the worst fate. Strictly speaking human rights do not exist: If rights are given to people on account of their humanity, then refugees, economic migrants, and prisoners in Guantánamo Bay and similar detention centers who have little if any legal protection should be their main beneficiaries. As we know, however, they have very few if any rights. They are legally abandoned, bare life, the *homines sacri* of the new world order.

The epochal move to the subject as the metaphysical principle of modernity is driven and exemplified by legal personality. As species existence, the “man” of the rights of man appears without sex, color, history, or tradition. He has no needs or desires, an empty vessel united with all others through three abstract traits: free will, reason, and soul – the universal elements of human essence. This minimum of humanity allows man to claim autonomy, moral responsibility, and legal subjectivity. At the same time, the empirical man who actually enjoys the rights of man is a man all too man: a well-off, heterosexual, white, urban male who condenses in his person the abstract dignity of humanity and the real prerogatives of belonging to the community of the powerful. Indeed, one could write the history of human rights as the ongoing and always failing struggle to close the gap between the abstract man and the concrete citizen: to add flesh, blood, and sex to the pale outline of the human and extend the dignities and privileges of the powerful (the characteristics of normative humanity) to empirical humanity. This has not happened, however, and is unlikely to do so through the action of rights.

Here finally, in the common frame of reference between “humanism” and “legal humanism” we find the link between the Humanities and law. Humanism claims that there is a universal essence of man and this essence is the attribute of each individual who is the real subject. Linking empirical and normative humanity, humanism marks the concern of modernity to escape cosmological or theological determinations, to discover humanity’s worth exclusively in itself. “The *humanitas* of *homo humanus* is determined with regard to an already established interpretation of nature, history, world, and the ground of the world, that is, of beings as a whole.”<sup>38</sup> By dealing with beings as a whole, however, and accepting a dominant interpretation as absolute, humanism mistakes the transient and historically determined turn to the subject as eternal and assigns to it absolute mastery over the natural, social, and psychic world. This metaphysical closure is accompanied by the exclusion of those who do not fully meet the requirements of the human essence. Classical humanism juxtaposed the *humanum* to the *barbarum*; contemporary versions are followed by a “double marking, of a return to half-understood Greek ideals and a gesture of setting oneself apart from some perceived barbarism.”<sup>39</sup> Humanism, personified by the subject of human rights and exemplified by the academic Humanities, veers tantalizingly and dizzyingly between an empirical globality and a normative universalization, perennially excluding and subjugating those who do not meet its rigorous standards.

Legal humanism follows closely this metaphysics and shapes the institutions of humanism. It is the “tendency to posit man as the principle and end of everything . . . for nearly all modern thinkers about law, man is the author . . . of law.”<sup>40</sup> For legal humanism, the subject is an isolated monad with solitary consciousness who faced with a disenchanted, threatening but also malleable world, turns to itself as the basis for self-legislation. Legal humanism posits man as the author and end of law. “The starting point of the science of law is Man, as soon as man is constituted into a legal subject. The point of arrival of modern legal science is man. This science does not move, it starts with man and ends up rediscovering the subject.”<sup>41</sup> For the legal mentality, the essence of humanity is the free, willing, and solitary legal subject. The legal subject becomes the mark of humanity through the mediation and the restraints of the posited objective legal universe.

Modern law redefined human beings as creatures of will and desire by making rights its building blocks. There can be no positive law without the humanist legal subject, the bearer of rights and duties; there can be no conception of rights without

<sup>38</sup> Martin Heidegger, “Letter on Humanism” in *Basic Writings*, D. F. Krell, ed. (San Francisco: Harper, 1977), 201–2.

<sup>39</sup> Joanna Hodge, *Heidegger and Ethics* (London: Routledge, 1995), 90.

<sup>40</sup> Michel Villey, “L’Humanisme et le droit,” in *Seize essais de philosophie du droit* (Paris: Dalloz, 1969) 60.

<sup>41</sup> Bernard Edelman, *Le Droit saisi par la photographie* (Paris, Maspero, 1973) 102.

a positive set of laws and institutions that bring the subject into existence and endow it with the patrimony of rights. The Sovereign too is presented in the guise of a superindividual entity with desires and powers. Sovereign and subject, positive rule and right emerge together and presuppose one another.

Law's subject exemplifies the dialectics of legal enlightenment: As the double genitive indicates, the subject both legislates the law and is subjected to it. According to the humanist paradox, an external constraint supports freedom. In late modernity, however, autonomy recedes. The proliferation of rules and the obsession with regulation and governance turns human relations into legal rights. Technologies of power overwhelm the self-legislation of autonomy and the universalism of (legal) humanism retreats.

### **Prolegomena for a Law and Humanities of Resistance**

Human rights have expanded and are in the process of colonizing every part of daily life. Humanity is now defined in scientific terms, whereas the normative realm has been entrusted almost exclusively to law in the form of regulation. Law is no longer the form or the instrument, the tool or restraint of power; it has started turning into the very operation, the substance of power. Legal form is squeezed and undermined by the privatization of public areas of activity and the simultaneous publicization of domains of private action. Legal content, on the other hand, becomes coextensive with the operations of power. As a result, law is autopoetically reproduced in a loop of endless validity that becomes progressively devoid of sense or signification.

The global biopolitical turn has turned human rights, the moral high ground of modern law, into an integral part of the world dispensation. Rights precede, accompany, and legitimize the penetration of the world by neo liberal capitalism. The gap between normative principle and its realization, underlying structure and surface appearance, has been closing down. Immanent critique has little purchase and the utopian dream has atrophied, chased from the public domain by those who have the power to turn their interests and desires into normative common sense.<sup>42</sup> To put it another way, while the law in modernity expressed both the will of a community to live together from which it drew its normative strength and energies as well as the structure of domination and subjection or subjectivation, precarious as it always was, in the era of globalized capitalism this bifurcation is retreating.

Classical natural rights protected property and religion by turning them into apolitical institutions; the main effect of the ever-expanding reach of (human) rights is to depoliticize politics itself. Politics is fast morphing into a type of market economics legitimized by humanistic moralism. As an economic operation, politics has become the terrain where negotiations and compromises are worked out, accounted

<sup>42</sup> Russell Jacobi, *The End of Utopia* (New York: Routledge, 1996).

and aggregated between groups and classes that have accepted the overall social balance, distribution, and inequality. In the moral mode, the assumed agreement around values and principles replaces conflict and argument, leaving large parts of humanity unrepresented and defenseless. Law is in the process of becoming coextensive with the natural life of society, mapping the social landscape by replicating within itself the facts of social life and helping reproduce the existing order. At this point, science becomes the dominant paradigm for legal pedagogy. Yet as the early Nussbaum put it, “science is rarely Socratic . . . it cannot be scrutinizing its own conceptions and foundations.”<sup>43</sup> Justice becomes synonymous with the law (and therefore almost redundant) and the Humanities’ civilizing mission a palliative for the inhumanity of willing subjugation.

History has taught us that there is nothing sacred about any definition of humanity and nothing eternal about its scope. Humanity cannot act as the a priori normative principle and is mute in the matter of legal and moral rules. Humanity has no foundation and no ends; it is the definition of groundlessness. Its metaphysical function lies not in a philosophical essence but in its nonessence, in the incessant surprising of the human condition and its exposure to an undecided open future. Humanity exists as an endless process of redefinition and the necessary but impossible attempt to escape external determination. This speculative humanity can, however, only come forth in conflict with a subjugating legal humanism and a civilizing Humanities that divide and discipline.

Humanity as a concept is a floating signifier without a necessary or motivated signified.<sup>44</sup> It is both the prerequisite of autonomy and the construct of power, discipline, and strategy. The pressing moral and political task is to develop a Humanities of resistance to accompany a pedagogy of justice. The stakes are no longer or exclusively the development of the delicacy of discernment, the sharpening of hermeneutical aptitude, or even moral edification. Adopting from the classics and Roscoe Pound the idea of education as critique of dominant practices that divide, dominate, and oppress, the new Humanities must commit themselves to the reassertion of the principle of truth as unconditional resistance to the biopolitical turn of post-political politics and culture. The duty to resist places the university (Law and the Humanities) in opposition to many and great powers, which include the nation, the state and its sovereignty, and those mediatic, ideological, religious, and cultural forces that stop and prevent the cosmopolitanism to come.<sup>45</sup> More generally, the law must revive and strengthen its intimate relationship with justice, which nowadays is explored mainly in philosophy and literature, history and art. Law does not need the Humanities for their civilizing influence. Law is a central contributor to the project

<sup>43</sup> Nussbaum, *op. cit.* fn. 12, 1640.

<sup>44</sup> Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000) 253–61.

<sup>45</sup> Costas Douzinas, *Human Rights and Empire* (London: Routledge, 2007) Ch. 12.

of constructing the human. Against the dominant combination of Humanities, law, and education that separates the human from the inhuman and classifies into rulers and ruled, humanity achieves itself not as a future project of unification of the normative (civilization, culture, and liberalism) and the empirical but in overcoming finitude and facing the infinite within historical immanence (in the here and now).