Introduction

On the Origins and Prospects of the Humanistic Study of Law

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[It is] a fact too often forgotten – that law touches at some point every conceivable human interest, and that its study is, perhaps above all others, precisely the one which leads straight to the humanities.

– Ernest W. Huffcutt “The Literature of Law” (1892)

At the start of the twenty-first century, interdisciplinary is the watchword in legal education and legal scholarship. In law schools and within the liberal arts, practitioners of various “law and” movements find themselves much in demand. Law and economics, law and social science, law and history, empirical legal studies: These labels are by now quite familiar. One of the most recent of these “law ands” is the burgeoning field of Law and the Humanities.

Today, scholars in that field are supported by a well-developed infrastructure of professional associations and scholarly journals, but the precise contours of this field are anything but clear. What is its relationship to law and literature? What, if any, relationship does it have to the qualitative social sciences, for example, anthropology? In addition, there are open questions about the significance of Law and Humanities work. What payoff does work in the humanities promise for legal scholarship and legal understanding? How does the examination of law enrich the humanities?

Law and the Humanities: An Introduction brings together a distinguished group of scholars from law schools and an array of the disciplines in the humanities to address those questions. Our contributors come from the United States and abroad in recognition of the global reach of this field. This book is, at one and the same time,

1 Professional associations include: the Association for the Study of Law, Culture, and the Humanities; the Law and Society Association; the American Society for Legal History; the Society for the Study of Political and Legal Philosophy; and, since 2003, the Consortium of Undergraduate Law and Justice Programs, whose stated purpose is “to support and promote programs in law and justice broadly conceived.” There are now three academic journals devoted solely to the study of law and the humanities: the Yale Journal of Law and the Humanities; Law, Culture, and the Humanities; and Law and Humanities.
a stock taking of different national traditions and of the various modes and subjects of Law and Humanities scholarship. It is also an effort to chart future directions for the field. By reviewing and analyzing existing scholarship and providing thematic content and distinctive arguments, it offers to its readers both a resource and a provocation. Thus, Law and the Humanities: An Introduction marks the maturation of this “law and” enterprise and will, we hope, spur its further development.

The Genesis of the Field—I: From Law and Literature to Law and the Humanities

Efforts to bring humanistic perspectives to bear on legal questions are by no means new. As the statement by E. W. Huffcutt in the epigraph attests, a sense of the interrelatedness of law and the humanities was self-consciously articulated in the Anglo-American tradition during the Victorian era, alongside a pronounced interest – notably among lawyers – in the interrelations between law and literature. (Huffcutt defined the humanities as literature, and literature as poetry and fiction.) Reaching back to the classical period, one hears distinct echoes of this idea in Cicero’s admonition that rhetoric without poetics is a dead letter.

The first blush of the humanistic study of law in the modern era occurred with the exploration of the conjunction of law and literature, an exploration sparked in turn by the publication of James Boyd White’s seminal textbook, The Legal Imagination (1973). As is now well known, since that book’s publication scholars have devoted themselves to the examination of law in literature, ferreting out legal themes and images from canonical as well as less well-known works of fiction.

There have been significant moments of institutional interest in the idea of law as one of the liberal arts, for example, the Harvard conference in 1954 on the teaching of law in the liberal arts, and the 1975 report by the Law Center Consultative Committee at the University of Massachusetts, which noted the following: “[there is a] coherent body of knowledge about the social functions and consequences of legal institutions and processes . . . [that amounts] to more than the extraprofessional study of law; it is itself a new scholarly enterprise . . . The perspectives of law, on the one hand, and of social science or humanities on the other, cannot merely be placed side by side. Only an uneasy accommodation, perhaps spliced by occasional moments of communication, can result from that approach. What is needed is an effort toward a real synthesis of the intellectual heritage and analytic capabilities of law, social science, and the humanities – one that aims at the creation of a distinctively new and broader scholarly discipline with law and legal systems at its core.” These efforts are discussed in LJST and Interdisciplinary Legal Scholarship, http://www.amherst.edu/~ljst/aboutus.htm#program, quoted in Austin Sarat, ed., Law in the Liberal Arts (Ithaca and London: Cornell University Press, 2004) 2–3.


Law and Literature as a movement is typically divided into two related but distinct approaches to the convergence of the legal and the literary: law in literature and law as literature. On the one hand, these designations are historical terms, that is, ones that mark out phases – here the two earliest – in a movement that has been succeeded by increasingly complex and expansive notions of what constitutes...
Still others have been more concerned with the literary dimensions of legal life, identifying features of narrative, rhetoric, and genre in lawyers’ arguments or judicial opinions. In the formation of the community of Law and Humanities scholars, this last emphasis has been most influential and most controversial, and White has been either the legal or the literary text. On the other hand, the phrases are definitional and denote two broad and persistent categories or rubrics with their respective evolutions. Law in literature, for example, arguably begins with John H. Wigmore’s various classifications of the “legal novel” in “A List of Legal Novels,” The Brief 2 (1900): 124–7. For representations of the lawyer-as-figure of resentment, see Richard H. Weisberg’s The Failure of the Word: The Protagonist as Lawyer in Modern Fiction (New Haven: Yale University Press, 1984) as well as Poetics, and Other Strategies of Law and Literature (New York: Columbia University Press, 1992).


New historicist considerations of the relationship among literary narrative practices, genre, and specific legal forms and concepts have no Ur-text per se. Rather, they participate in the general new historicist impulse to specify an “anecdote” and read it for its instantiation of the various discourses circulating at its specific cultural moment. In the case of law and literature, those discourses are legal and literary, and the anecdote may be any legal form, for example, the construction of chains of circumstantial evidence, as in Alexander Welsh’s Strong Representations: Narrative and Circumstantial Evidence in England (Baltimore: Johns Hopkins University Press, 1991). Welsh’s study has influenced numerous similar investigations (notably of English law and literature) including Lisa Rodensky’s study of criminal intention and narrative omniscience, The Crime in Mind: Criminal Responsibility and the Victorian Novel (Oxford: Oxford University Press, 2003); Jonathan Grossman’s paralleling of the sites of justice with specific literary forms in The Art of Alibi: English Law Courts and the Novel (Baltimore: Johns Hopkins University Press, 2002); Jan-Melissa Schramm’s analysis of testimony in Testimony and Advocacy in Victorian Law, Literature, and Theology (Cambridge: Cambridge University Press, 2000), and Kieran Dolin’s study of the normative functions of both law and literature in Fiction and the Law: Legal Discourse in Victorian and Modern Literature (Cambridge: Cambridge University Press, 1999). For objections to the practical irrelevance of the law and literature enterprise generally, see Richard Posner, Law and Literature: A Misunderstood Relation (Cambridge: Harvard University Press, 1988).

among the most prominent of its advocates. For more than three decades he has argued that legal education can and should be a liberal education, in the Arnoldian sense of a formation that develops a sense of culture. Lawyers, he said, should be given “a training in the ways one can learn from one’s own experience and acquire experience of a new and better kind; in the ways one can learn from one’s culture and contribute to it; in the ways one can live with an increased awareness of the limits of one’s knowledge and mind, accepting ambiguity and uncertainty as the condition of life.”

White’s concern lies with how lawyers are trained to think, write, and speak. He calls for legal education to cultivate in students a self-reflexive sense of how they use legal forms as they acculturate to law’s language and processes. If this point of view could be reduced to a maxim, it might be this: Law is a language and language matters. Another way to put it would be to say that the education of lawyers should include the cultivation of a meaningful appreciation of law as a rhetorical practice – not just in the sense of an art of persuasion, but of a disciplined, textured, self-directed habit of reading, speaking and, above all, writing, that has at its root a critical understanding of the links among language, consciousness, and power. The idea is that what we say matters and is indissociably bound up with the forms in which we say it. These forms may not be of our devising, but this does not mean that we cannot make them our own; and in the case of law, where the consequences of our rhetorical acts of interpretation are not merely symbolic – law takes place on a “field of pain and death” – we owe it both to ourselves and to each other to assume responsibility for our use of the linguistic forms and processes of law and to speak and write in a voice that is our own. “The central task for the lawyer from this point of view,” White observes, “is to give herself a voice of her own, a voice that at once expresses her own mind at work in its best way and speaks as a lawyer, a voice at once individual and professional.”

In short, White calls us to a vision of the lawyer as artist. It is a vision of art in which beauty and sublimity of thought and expression are not ends in themselves, but rather one of the best defenses we have against what White, in his most recent book,


Living Speech (2006), calls “the empire of force.” We need to make sure that our speech is alive – that we mean what we say, say what we mean, and have something to say – so that our language, especially our legal language, does not become an empty instrument for the unrestrained exercise of power.

Indeed, if there is a concern that runs throughout and drives White’s work, it is one born of a keen sense of what happens to legal language—and thus to the human beings whose lives are subject to it—when legal actors have to come to terms with law’s fragmentariness, inconsistencies, incommensurabilities, and attendant uncertainties. When confronted with these and with the moral pressures of adjudication, the temptation is great to shirk the burden of judgment and displace the locus of responsibility onto the language of law itself, to empty law of its meaning and conceive of legal judgment as the impersonal, methodological enactment of a linguistic form, a mere procedure.

Here it seems that White’s version of law and literature is at bottom a critique of liberalism. In this connection, the following description of Lionel Trilling’s

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12 See ibid., 72–5: “It is common for people to try to learn law, at the beginning of the process, as if it were a set of rules to be applied more or less routinely to the facts of cases as they arise. This is to think of the law as a simple system of commands. But as almost every law student learns, often to his or her profound discomfort, this image of the law will not work, either in law school or in practice. The lawyer and judge are constantly presented with real difficulties of interpretation and harmonization of the law, in relation to facts that are themselves uncertain, all presenting a set of problems about which much can be said on each side and through which they must think their ways as independent minds. . . . In the law, as elsewhere, the task of the legal mind is to find a way to be present as a mind, a person, a voice, in a context that seems to invite the replication of standard forms. The lawyer who simply moves phrases around in his head and on the page, never really meaning anything he says—and there are plenty of lawyers like that—is never actually thinking about the case, or the law, and is certainly incapable of saying something fresh or transformative. As for judges, the need to be present in one’s speech and writing is even more crucial, for there are serious public consequences. The judge who simply articulates phrases, concepts or ideas in an unmeaning way can likewise not be attended to, for he is not present as a mind or person. This means that his opinion cannot be read with the care and attention lawyers are trained to give authoritative texts in the law; it means, too, that he in a real way cannot be responsible for what he is doing. This kind of writing, to use the distinction made prominent by my colleague Joseph Vining, is authoritarian, not authoritative. It is part of what Simone Weil would call the empire of force.”

13 This suggests a point of contact with Paul Kahn’s perspective. As Kahn elaborates in a recent book, the problem with liberalism is that it is often unmindful of its internal contradictions. These contradictions owe not just to the limits of reason, but also to an insufficiently critical sense of the extent to which the Enlightenment faith that the problems of experience and of political life will yield to the proper application of the faculty of reason and will find expression in the popular will—a faith that lies at the heart of classical liberalism—is just that, a faith. This means that we tend to underestimate the degree to which, to borrow Karl Schmitt’s insight, the forms and conceptions of the religious Judeo-Christian imaginary migrate to and haunt the secular liberal imagination that ostensibly displaces it. It also means, however, that we are insufficiently aware of what Kahn calls the “genealogy of liberalism” and the “architecture of the liberal world” —that is, the way that the classical liberalism of the Enlightenment builds upon two other traditions and structures of thought, namely those of

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landmark work of literary criticism *The Liberal Imagination* (1950), in a recent retrospective essay by the American literary scholar Louis Menand, merits lengthy citation, as it provides a context for understanding the inspiration behind White’s work:

In Trilling’s view, the faith that liberals share, whether they are Soviet apologists, Hayekian free marketers, or subscribers to *Partisan Review*, is that human betterment is possible, that there is a straight road to health and happiness. A liberal is a person who believes that the right economic system, the right political reforms, the right undergraduate curriculum, and the right psychotherapy will do away with unfairness, snobbery, resentment, prejudice, neurosis, and tragedy. The argument of “The Liberal Imagination” is that literature teaches that life is not so simple – for unfairness, snobbery, resentment, prejudice, neurosis, and tragedy happen to be literature’s particular subject matter. In Trilling’s celebrated statement: “To the carrying out of the job of criticizing the liberal imagination, literature has unique relevance . . . because literature is the human activity that takes the fullest and most precise account of variousness, possibility, complexity, and difficulty.” This is why literary criticism has something to say about politics.

There is, here, a clearly discernible line of influence and inspiration that runs from Arnold’s *Culture and Anarchy* (1869), through Trilling, to White’s seminal book, *The Legal Imagination*. Menand’s account of Trilling’s text enables us to read White against the contextual backdrop of a critique of liberalism and to further our understanding of White’s vision of the value of literature for legal education. If we follow Trilling’s lead, literature can help cultivate a capacity for and tolerance of nuance, ambiguity, and uncertainty – what White calls the limits of knowledge and mind and Keats would term “Negative Capability” – which in turn makes it possible to imagine integrating literature with the best uses of legal language. In other words, a literary sensibility helps legal education develop into a form of liberal learning.

For White, however, this is neither the only claim that literature has on law, nor the only foundation of a new interdisciplinarity. For White, the study of literature can

17 “Keats to George and Thomas Keats,” London, 21 December 1817, *Letters of John Keats*, Robert Gittings, ed. (Oxford: Oxford University Press, 1970) 43: “I had not a dispute but a disquisition with Dilke, on various subjects; several things dovetailed in my mind, & at once it struck me, what quality went to form a Man of Achievement especially in literature & which Shakespeare possessed so enormously – I mean Negative Capability, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason.”
lend integrity to legal language not only because it can help us cultivate a sensibility and a voice as writers, but also because the psychological intimacy it affords makes possible moments of sympathetic identification with people whose experiences and contexts may be quite different from our own. This capacity to cultivate sympathy opens the possibility for literature to have a salutary counter-hegemonic effect; it can raise consciousness about the effects of power and historical patterns of oppression, exploitation, and marginalization. In White’s view, we must not only make the forms of legal language our own, but also develop and integrate a sensitive understanding of the ways in which language can shape our perception of others and, thus, the way we treat each other. In short, literature can help us see, understand, and identify with those whose lives and experiences are often illegible before the law.

White’s emphasis on the discursive and rhetorical foundation of communities provided and still provides an important impetus for humanists to study law and to bring their insights to it. Yet for some it seems too bounded, too self-contained. For them it describes one important dimension of the way communities are formed and transformed, but, as Robin West argues in “Communities, Texts, and Law: Reflections on the Law and Literature Movement,” it leaves out much that is nontextual in our interaction with actual people. The textual and the nontextual often overlap, to be sure, but insofar as many people simply cannot participate in the reading, writing, and critical activity White describes, West observes, “Our community, defined by the interactive effects we have on others, is considerably larger than the community as defined by our texts.”

Putting her “interactive community” against White’s “textual” one, she freely allows that texts, whether legal or literary, have the capacity to “reflect,” “constitute,” and “convey” “moral and cultural traditions,” but their reach is not as extensive as, for example, that of a particular law, which actually shapes how we as people interact with one another. Understood as a real effect instead of a textual production, law impacts the subjectivity even of those who will never be part of the textual community. She also points out, one text will function differently in the two registers. Dred Scott, for example, embodied a moral respect for property within the textual community, but its impact on the interactive community was to make property of slaves.

Although West does not abandon literature, her perspective pushes beyond the literary and poses a new question for humanists interested in law: How would a


19 Ibid.

20 Ibid.

21 Ibid.
study of the way law constitutes persons proceed? Shifting our attention from the relative merits of academic versus practical approaches to law and legal texts, West encourages an appreciation of those points at which the theoretical merits of law run up against the real, potential travesties of its impact in human experience. Hers is an argument, therefore, about the relationship between legality and justice. West sees that our judgment will depend on whether we position ourselves within the textual or interactive community and concludes that “justice” might better be gauged by law’s effects on people, even where that seems to contradict the central texts of law.  

Turning to the “narrative voice and law-and-literature movement,” West declares that these have become the best, if not the only, means for lawyers to hear the stories of the “textually excluded” (inclusive of the natural world). Seeing only a partial solution in White’s efforts to improve community by creating “better readers,” West looks for a way to create “better people.” The best way of changing how we treat others in the interactive community, how lawyers understand the human consequences of their legal texts, she argues, was to heed the stories of the oppressed.

To claim that an understanding of law needs the humanities hardly seems polemical to us these days, so far have the arguments of White and West (and many others) spread. The only clear difference between then and now is that other humanities disciplines have energetically joined the fray in seeking to cultivate the kind of sensibility and potential for critique for which West calls. In so doing, as the work collected in this book demonstrates, they have altered the terms of engagement with law as well as the terms on which humanistic understanding and criticism can be offered.

The Genesis of the Field-II: The Yale Journal of Law and the Humanities and the Rearticulation of the Humanistic Ideal

Fifteen years after White’s book, in 1988, the first scholarly journal devoted exclusively to the field, the Yale Journal of Law and the Humanities, was launched. Born at the Yale Law School, the journal bore a prestigious pedigree, but more than that it embodied an aspiration to be something other than a traditional law review.

Explaining that the “humanist’s vision of the law” had grown “more complex” by virtue of its engagement with the “coercive and the constitutive” bases of law, the editors of the Yale Journal of Law and the Humanities set this vision – examples from Kafka, Dickens, and Dostoevsky show it was a distinctly literary one – alongside a legal point of view, which was beginning to see engagement with the humanities, not as a

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22 Ibid., 155.
23 Ibid., 156.
24 Ibid.
25 Thus, its editorial staff was drawn from the graduate school at Yale as well as the law school.
preliminary to “real work” but as an adjunct to it. Sensitive to the material as well as symbolic effects of legal culture, the editors urged cultural analysis that would look at the way legal culture, in concert with “other cultural forms,” organizes and informs perception in the first place. As they put it: “The study of law must be informed by an examination of the socio-cultural narratives that shape legal meaning and empower legal norms; conversely, the study of culture requires an understanding of the law as a normative edifice and coercive system.” In other words, the layperson’s conception of law and, more importantly, the average person’s affective attachment to and support of the idea of law is generated through culturally specific narratives that can become more apparent and be better understood when approached from the perspective of the humanities.

Conversely, it is only when we appreciate that even aspects of our subjective selves as fundamental as personal desire have been informed by the complementary legal processes of reward and punishment that we can begin to comprehend why we tell the particular stories we do. These two projects, the editors suggested, would encourage readers to become more self-conscious and reflective cultural critics, not for the sake of an idle, academic interest but specifically to “develop a critical stance that allows us to imagine a more tolerant, plural community.”

In light of such a far-reaching remit, Owen M. Fiss predicted that the journal’s greatest challenge would be to provide a “definition of its field of inquiry,” or to answer “the question of domain and definition” – and he was not wrong. The task was made especially challenging, as he saw it, because the allied field of the humanities was (and remains) itself so capacious: neither institutional attempts to define it (merely as a group of disciplines not found in the social and natural sciences), nor efforts to identify a common methodological foundation (for example, in interpretation) could succeed because they were either too restrictive or too broad, respectively. If resistant to categorical definition, however, the field could still be described, and in no way better than by considering the actual motive forces and cultural conditions that informed the journal’s creation.

Law and humanities were, as Fiss saw it, a reaction specifically to law and economics and the dominance of “the economic model” – “individuals trying to maximize their welfare under conditions of scarcity” – of social organization. As the

27 Ibid., vi.
28 Ibid.
30 “Note from the Editors,” vi.
32 Ibid., ix.
33 Ibid.
34 Ibid.
articles in the inaugural issue show, law and humanities scholarship then was identified with new historicism, cultural studies, and, most strongly, with law and literature all of which shared a desire, according to Fiss, to escape the individualistic, conservative politics of an economic movement that assumed market forces were the best regulator of social – and human – relations. He is quite clear that at its inception Law and Humanities had a politics (“left-leaning,” “progressive and liberal”), but he suggested that theoretical foundations were even more important than political orientations.

In contrast to the “instrumental” view of law’s function and the “scientism” of its study, law and humanities – and the journal specifically – aimed “to restore to legal studies a proper place for the question of values.” Having offered this view, however, Fiss is careful to point out the potentially negative side effects of the assumption that law itself cannot raise questions about value without being wedded to another value-oriented discipline. (In fact, where interdisciplinary work makes law look less like law, he suggested, it diminishes the professional relevance of academic inquiry.) Ever attuned to the present cultural conditions, however, Fiss’s sense of the “barren” state of legal studies and legal practice made humanistic inquiry into law an “imaginative response to urgent practical needs.”

The editors and Fiss remind us that they, like White, see in the union of law and the humanities a corrective to certain tendencies in law schools and in professional legal education, among them most importantly the rise of value neutral, technocratic approaches which allegedly undermine the vision of lawyer as “statesman.” In addition, Guido Calabresi, then dean of Yale Law School, suggested that turning to the humanities was important to the degree that it “feeds” law. For him the test of law and humanities scholarship would be its impact on the character and conception of lawyers. Thus he recounted how former Supreme Court Justice Hugo Black told him, on the second day of his clerkship, that if he had “never read Tacitus . . . then, you are not a lawyer.”

The admonitions of Fiss and Calabresi, as well as White’s, depend on a trope of rescue or recuperation, a trope that remains quite powerful in certain genres of law and humanities scholarship. Turning to the humanities helps to rescue law or, depending on one’s historical perspective, helps to recuperate parts of law that might otherwise be lost. As White put it, “[t]o imagine the law as a rhetorical and

35 Ibid., x.
36 Ibid., ix.
37 Ibid., x.
38 Ibid.
39 Ibid., x–xi.
40 Ibid.
42 Ibid.
literary process may help us to see each moment in the law differently . . . It leads to a
different conception of the teaching of law and may help the practitioner conceive of
its practice differently too . . . the poems by Frost, Dickinson, and Keats do much to
suggest standards by which we might learn to do . . . [law] better.”43 Reading “great”
literature expands the imagination, and, as a result, it enables lawyers and judges to
make more impartial, yet empathetic, judgments.

Closely related to the trope of recuperation is a “high culture” conception of the
humanities. The humanities, correctly understood, provide uplift and inspiration;
they raise the deepest questions about our lives and the values we pursue. It is not,
we suspect, coincidental that Calabresi names Kant, Bentham, and Captain Vere,
in addition to Tacitus, as examples of humanities texts,44 or that Fiss warns that a
definitional equation of the humanities with “interpretation” would exclude the work
of John Rawls.45 By pointing out the “high-culture” preferences among some who
turn to the humanities to help rescue law, we do not mean to denigrate the authors,
works, or characters cited. Surely there is nothing to be gained from reigniting the
canon wars. In measuring the progress of law and humanities scholarship we might
ask how far we have come from a high-culture conception.

We look back to the first issue of the Yale Journal of Law and the Humanities,
as a valuable point of reference for the work that Law and the Humanities: An
Introduction attempts to do. Today, as the work collected here suggests, critical
impulses abound, not looking to save or humanize law or lawyers, but to expose
the hidden assumptions that structure their work, the values that privilege some
views and silence others, the identities that law privileges and those it pushes to the
margins and, in so doing, to call law and lawyers to account.

Looking at the field as it is today, one might ask: Does the current, self-consciously
programmatic constellation of interest in law and humanities as a field really repre-
sent something new? How has the field benefited from the inclusion and incorpora-
tion of global perspectives and voices outside the American frame? To what extent is
law and humanities scholarship still linked to the effort to rescue professional legal
education and to the artifacts of high culture? What is the field’s genealogy and
institutional history? What, if any, are its politics? We invite readers of this book to
contemplate these questions as they examine its contents.

Resistances to Law and Humanities

From the beginning, the development of the humanistic study of law has met
resistance on both sides of the disciplinary divide. In American law schools, law and

43 James Boyd White, “Imagining the Law,” The Rhetoric of Law, Austin Sarat and Thomas R. Kearns,
humanities is sometimes perceived as “useless”; despite the efforts of White and others, a common view is that the field does not offer anything useful for a practical understanding of law or the purposes of legal reform. On the other hand, from the perspective of the humanities, the study of law is frequently viewed with suspicion and resisted because it feels treacherously close to a preprofessional orientation and thus seems at odds with a humanist’s commitment to more putatively “disinterested” modes of enquiry and learning.

Moreover, many now feel that there is something not only elitist but, more to the point, counterfactual in the idea that the humanities are a propaedeutic to humane action, that to think of the humanities as offering a kind of moral supplement to law is to misunderstand the ambit of humanistic learning. The objection is as familiar as it is well grounded; one need not look far, after all, to find examples of atrocities committed in the shade of a refined humanistic sensibility. This questioning of the relationship between liberal learning and ethical conduct – especially with respect to the conduct of our civic life – is one of the central, productive tensions surrounding the humanities. Indeed, it is still the case that with varying degrees of self-reflexivity the stated mission of the humanities today is more or less a version of Matthew Arnold’s argument for “culture” as a bulwark against “anarchy” – and by the latter we are meant to understand, pace Raymond Williams, the depredations of industrialization and the even more terrifying prospect of liberal democracy, the Scylla and Charybdis of the modern age.

Continuing doubts about the usefulness of the humanities to and for law require that we either expand our notion of what is useful, meaningful, and important in legal studies to encompass the good that can come from humanistic learning – a revalorization not just of the humanities as they pertain to law but of the humanities tout court – or that we at least suspend the notion of usefulness with some

46 Resistance to the idea of law and humanities in American law schools has its roots in the intellectual and institutional history of legal studies. Put differently, law already is a discipline, and introducing the humanities into legal studies means coming to terms with the history of law’s early efforts to establish itself institutionally – more specifically, as a form of systematic knowledge that would have the status and methodological rigor of a science. This is not the place to rehearse in detail the history of Legal Formalism, or of the rise of Legal Realism as a response to its felt shortcomings. We note only that although Legal Realism, in its concern with the real-world effects of law and its concomitant turn toward the social sciences – sociology, psychology, and, above all, economics – marks a sharp departure from the hermeticism and doctrinal scholasticism of Legal Formalism. Both schools of thought favor a way of knowing and of thinking about knowledge that orient itself in terms of the paradigms of the sciences.

47 Arnold, Culture, 82: “Now, if culture, which simply means trying to perfect oneself, and one’s mind as part of oneself, brings us light, and if light shows us that there is nothing so very blessed in merely doing as one likes, that the worship of the mere freedom to do as one likes is worship of machinery, that the really blessed thing is to like what right reason ordains, and to follow her authority, then we have got a practical benefit out of culture. We have got a much wanted principle, a principle of authority, to counteract the tendency to anarchy which seems to be threatening us.”
semblance of good faith. Given the genealogy and institutional history of legal study, asking about the field’s use-value from within the established perspectives of legal studies approaches the tautological. Humanistic perspectives on questions of value, meaning, and interpretation are, in some sense, defined out of law’s framework of normative concerns, treated as trifles, when law moves to establish itself as a discipline in the Anglo-American tradition, in the nineteenth century.48

This skepticism does not mean that we should abandon any concern with the question of the usefulness of such investigations. Quite the contrary, if many scholars are animated by an interest in this field it is precisely because they see it not only as useful but also important, for a range of reasons. One reason, as we have seen in Fiss’s introduction to the inaugural issue of the *Yale Journal of Law and the Humanities*, has to do with the politics of knowledge in legal studies. We agree with Fiss that law and humanities gets much of its institutional momentum as a self-consciously programmatic response to the pervasive influence of law and economics. (Today we would add empirical legal studies.)

The idea is that the humanities can provide a much-needed counterweight and help ground the law in a standard of value that is qualitative, not merely quantitative. Moreover, scholarship in law and the humanities can unearth the privileged identity categories that comprise law’s taken-for-granted world, help to give voice to the marginalized while reminding us that voice does not guarantee power, help to expose the constraints that legality seeks to impose on national sovereignty while pointing out the ways sovereignty exceeds and/or manipulates the law for its own purposes.

In addition, the emergence of law and humanities as a field can be read against the backdrop of a philosophical crisis of value that goes well beyond legal studies, one that still encompasses much of Western thought – what Jean-François Lyotard calls “The Post-Modern Condition.”49 Lyotard claims that in the vacuum created by the loss of faith in both the traditional and modern meta-narratives that organized and gave meaning to experience (i.e., the Judeo-Christian religious imagination, secular ideas of the inevitability of historical progress), efficiency – the standard of economic logic – has emerged as the sole criterion of legitimation.50 His account provides a

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49 Jean-François Lyotard, *The Postmodern Condition* (Minneapolis: University of Minnesota Press, 1984) xxiv: “[s]implifying to the extreme, I define *postmodern* as incredulity toward meta-narratives.”
50 Lyotard, *The Postmodern Condition*, 50–1: “[i]t is only in the context of the grand narratives of legitimation – the life of the spirit and/or the emancipation of humanity – that the partial replacement of teachers by machines may seem inadequate or even intolerable. But is probable that these narratives are already no longer the principal driving force behind interest in acquiring knowledge. If the motivation is power, then this aspect of classical didactics ceases to be relevant. The question (overt or implied) now asked by the professionalist student, the State, or institutions of higher education is no longer “Is it true?” but “What use is it?” In the context of the mercantilization of knowledge,
useful philosophical context for understanding the stance of law and humanities because many would see it as aptly describing the condition of legal studies: The doctrinal thought of Legal Formalism opens to the world of experience, through Legal Realism, only to see legal studies then brought under the influence of a similarly self-enclosed and limited system of meaning, the science of economics.

The idea that drives humanistic resistance to law and economics is not that the values of efficiency, productivity, and supply and demand should not obtain, but that they should not be the only ones; that the logic of the marketplace cannot be left to stand alone as the sole standard of value, in legal studies no less than in the world. A well-functioning, well-regulated economy can lead to prosperity, which in turn can provide, when equitably distributed, the material well-being without which the idea of freedom and human flourishing is empty. That said, notwithstanding the mantra that “a rising tide lifts all boats,” many feel that there is not any rational, historical basis for crediting the belief that the market is the necessary and sufficient answer to questions of social justice. It is hard to tell whether that position still counts as a politics, in the wake of the recent collapse of global credit markets, but if it does, then it is a partial answer to the question of whether law and humanities has a politics; it does. (A partial, not complete answer, because it does not speak to structural inequalities and histories of oppression that many would argue are not reducible to economic forces even though they have a strong basis in them, for example, traditions of racism or patriarchy.)

Yet some favor a more disinterested understanding of the aims of law and humanities scholarship. That is, one might argue that research in the humanities, at least in the United States, has never aimed for anything more than the production of knowledge. This claim is unconvincing for two reasons. The first is not hard to find. In the wake of Foucault, the notion that the project of knowledge could ever be decoupled from the interests of power has been subjected to a withering critique; in the contemporary humanities, one would be hard pressed to find claims made for the autonomy and disinterestedness of any of the disciplines. We have grown accustomed to the idea that the modern disciplinary configurations of knowledge – the social sciences, in particular – emerge in tandem with the rise of the liberal

more often than not this question is equivalent to: “Is it saleable?” In the context of power-growth: “Is it efficient?” Having competence in performance-oriented skill does indeed seem saleable in the conditions described here, and it is efficient by definition. What no longer makes the grade is competence as defined by other criteria true/false, just/unjust, etc. – and, of course, low performativity in general.” See also, ibid., xxiii–xxv.

51 The question of the relationship between truth and “Power” radiates throughout Foucault’s work even when, as is the case in his early works, “Power” (see above “Power”) is not explicitly named. For a useful, brief introduction in English to his conceptualization of this relationship, see Michel Foucault, “Truth and Power,” in The Foucault Reader, Paul Rabinow, ed. (New York: Pantheon, 1984) 51–75.

52 For an exception, see Stanley Fish, Save the World on Your Own Time (New York: Oxford University Press, 2008).
bureaucratic state and cannot be conceived of apart from the role they play as technologies of governance; it is understood that they are ways to exercise and maintain power by shaping and defining the domains of subjectivity and, thus, an entire matrix of material, social, and political reality. In this account, with the turn to the so-called “sciences of man,” knowledge is not merely descriptive but normative and constitutive of subjectivity: the disciplines make each person knowable as an individual subject and thus bring her within the domain of régimes of truth and normalization. A discipline is never a mere body of knowledge and an intellectual practice; it is part of an institutional structure that produces docile, useful bodies to serve the interests of the state and, behind it, of power.\textsuperscript{53} In short, there can be no such thing as “mere” research.

The second reason why the idea of the autonomy and disinterestedness of the humanities disciplines has a hollow ring to Western ears, and tends to be muted even when it is proffered, is less appreciated but equally telling. It is because the idea of academic research has been unmoored from the philosophical understanding that provides its rationale in its original context. Indeed, although it is frequently noted that the University of Berlin and its conception of the academic disciplines as being research intensive serves as the model for Johns Hopkins University—a model that is then replicated widely throughout the United States in the development of programs of graduate study—it is often forgotten that the underlying vision that shapes and motivates the founding of the University of Berlin owes to Alexander von Humboldt and German Idealist philosophy, notably the philosophy of Fichte, who held the first chair of philosophy at Berlin, and of Hegel, who succeeded him.\textsuperscript{54}

In this model, the disciplines are overseen by philosophy, the “queen of the faculties,” which does not direct their discrete practices but articulates the regulative idea that orients and discloses the meaning of the project of knowledge and makes it intelligible as belonging to a single, shared universe of ideas—that is, makes the disciplines visible as constitutive of a university. From a Fichtean viewpoint, the significance of research, or Wissenschaft, lies not so much in its content as in its form; the critical distance, or disinterestedness, that the disciplines deepen and

\textsuperscript{53} Michel Foucault, \textit{The Foucault Reader}, 180–2: “The classical age discovered the body as object and target of power. A body is docile that may be subjected, used, transformed, and improved. These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed on them a relation of docility-utility, might be called ‘disciplines.’ Many disciplinary methods had long been in existence in monasteries, armies, workshops. In the course of the seventeenth and eighteenth centuries, the disciplines became general formulas of domination. The historical moment of the disciplines was the moment when an art of the human body was born, which was directed not only at the growth of its skills, or at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely. Thus discipline produces subjected and practiced bodies, ‘docile’ bodies.”

\textsuperscript{54} Lyotard provides a succinct account of this history. See Lyotard, \textit{The Postmodern Condition}, 31–5.
depend upon is a manifestation of our capacity for self-consciousness, that is, our ability to stand apart from our own consciousness and thus be aware of it.\textsuperscript{55}

Today, in the arts and the interpretive humanities the hermeneutics of suspicion – typically of Freudian, Nietzschean, or Marxist inspiration (e.g., critiques of globalization or elaborations of Frankfurt school approaches to culture and ideology) – still figure as the most common horizon of expectation. It is, as Auden observes, an “age of anxiety,”\textsuperscript{56} of self-doubt and pessimism, in which many are deeply skeptical, indeed apprehensive, of even the barest suggestion of a meliorist narrative about the project of knowledge or the trajectory of Western civilization; an age in which, to borrow from Yeats, “the best lack all conviction, while the worst are full of passionate intensity.”\textsuperscript{57}

If law and humanities scholars do not quite recognize themselves in this portrait of cultural exhaustion, it is not just because we may be wary of such high-minded despair, but also because for many the gods are not yet dead or even dying. Indeed a reverence for law can be a form of faith, in the fullest sense. Indeed, in the case of the United States in particular, the religious imaginary is more than vestigial; it is arguably at the core of the American cultural experience of the idea of the rule of law.\textsuperscript{58} After Bush, reverence for the rule of law and anything that sustains it is very attractive to many who not so long ago were some of its severest critics.

If we typically forget this philosophical inheritance in our thinking about the rationale of the academic research disciplines, it is no doubt, in part, because of our visceral unease with its history. The unease is understandable: Fichte is sometimes considered the father of German nationalism – his late work, \textit{Rede an die Deutsche Nation}, is often considered its foundational text – and it is not hard to trace a line of thought that runs from German Idealist philosophy, through German Romanticism, up to National Socialism. The rhetoric of self-consciousness and freedom can lend itself to a kind of triumphalism, much as a dialectical vision of history as the progressive manifestation of an idea can become messianic, if not apocalyptic. It is a short step, from there, to the idea that the people – the Volk – through whom this understanding of freedom and history has been made manifest have a special destiny; the consequences of the German experience of this idea are still fresh in the collective memory of Western civilization and haunt its conceptual imagination.

In other words, if we resist the framework of German Idealist thought it is not simply because the idea of philosophy as the “queen of the faculties” strikes us as quaint. Rather, this resistance is the symptomatic expression of a far-reaching and widely felt cultural moment. According to Lyotard, as we have seen, a profound distrust of totalizing meta-narratives is the salient characteristic of this moment, a loss of faith both in the Judeo-Christian imaginary and the secular gospels of millennial progress through boundless scientific and technological innovation, the triumph of political and economic liberalism, or communism. All of the gods failed.

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\textsuperscript{56} Whyn H. Auden, “The Age of Anxiety,” \textit{Collected Poems}, Edward Mendelson, ed. (New York: Vintage, 1991) 449: “When the historical process breaks down and armies organize with their embossed debates the ensuing void which they can never consecrate, when necessity is associated with horror and freedom with boredom, then it looks good to the bar business.”


One can go further and suggest that in the United States more than ever the rule of law has the trappings of a civic religion. It is a point that Paul Kahn returns to repeatedly in his writings, notably *The Cultural Study of Law: Reconstructing Legal Scholarship*. As the title of the book suggests, Kahn proposes a cultural study of law, by which he means a critique of law – more specifically, of the rule of law in the United States – in the Kantian sense of an investigation of the conditions necessary for the possibility of experience. Drawing inspiration from Ernst Cassirer’s “inquiries into the varieties of symbolic forms,” Kahn views the rule of law as a culturally specific way of structuring experience – of imagining self, world, and the sacred – that both rests upon and cultivates a distinctive form of sensibility and consciousness: “This is just the spirit with which I approach the study of the culture of law’s rule, as a distinct symbolic form that constructs one possible world of meaning.”

The assumption, here, is that life under the rule of law is more than an implied social contract; it is a structure of feeling, a way of being in the world, which reflects a rich, complex, and deeply embedded set of traditions and cultural practices, a way of being that law and humanities scholars seek to understand.

As Kahn observes, there are two reasons why it is difficult to open up legal studies to philosophical critique and to a conceptualization of the study of law as a humanistic discipline. The first is that it means clearing a space in legal studies for research that is not directed toward legal reform, that is, toward “having an impact” on legal practice. The second, related reason is that the traditional, reform-minded conception of legal studies collapses the distinction between its subject (the legal scholar) and its object (the rule of law).

That is, it is difficult for legal scholars to step outside of the structures that shape their own legal consciousness and establish the necessary, self-conscious, critical distance. “To achieve such a disciplinary stance with respect to law’s rule is particularly difficult . . . because the study of law is itself a part of the practice of law. . . . Law professors, for the most part, are not studying law, they are doing law.” To be engaged in a practical project of reform is to be part of that which one would study. Again, for Kahn the problem is not that legal scholarship has been too theoretical and disconnected from the practice of law, but rather that legal scholarship has not been theoretical enough – that it has not established enough critical distance between theory and practice.

We are not as free as we may think we are, yet for Kahn the exercise of our critical faculty, which creates the distance necessary for those forms to become objects of

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61 Ibid., 171–2.
62 Ibid., 154.
study, is precisely what establishes the ground of a meaningful sense of freedom. In Kahn’s view, the exercise of this critical faculty represents a significant risk for us, because it means a willingness to put our identity at stake – to see it as bound to cultural forms and thus deeply contingent and variable. “[I]f the cultural study of law is to be a project of transcendental freedom, rather than another angle on the project of reform, then the beliefs exposed must be our own, and the distance created must be within ourselves. . . . Without putting the self at risk, there can be no experience of freedom. Philosophy, even in the form of a cultural study of law, need not justify itself at the bar of politics.”

It would be understandable to read the claim Kahn makes in this last sentence, about the relationship between a cultural study of law and “the bar of politics,” as polemical, that is, as an argument against connecting legal studies to political questions of social justice and legal reform. That is not his intent, however, and he is careful to recognize the overlap between philosophical and political understandings of the significance of legal scholarship, although insisting at the same time that it is vital to create and maintain a disciplinary space for an approach whose azimuth is defined by a capacity for critical distance, not political engagement. Kahn’s argument is not that we should not have politically minded or reform-oriented legal scholarship, but that it should not be all that we have – that there should be space enough both for such scholarship and for a disciplinary approach of the kind he explores.

Lest we be misunderstood, we share with Kahn the desire to decenter a narrow instrumentalism as the reason for being of law and humanities work. At the same time, we recognize the worry that his approach might both deify the rule of law and canonize the humanities. We think that it is possible to do work that might march under the banner of law and humanities although thinking of oneself as a critic of the rule of law as well as a neohumanist, a posthumanist, or even an antihumanist scholar. Indeed the contributors to Law and the Humanities: An Introduction represent such a diverse array of perspectives, many of which do not comfortably fall within the ambit of Kahn’s idealism. They remind us that one can worry as much about the ways in which some humanities scholarship has inscribed particular patterns of advantage/disadvantage, or hidden contingency under a veil of false universalism, and still effectively participate in a scholarly enterprise that examines the ways law is “implicated in the creation of symbols and structures which provide meaning in everyday life.”

Overview of the Book

Twenty years after Fiss’s contribution to the inaugural issue of the Yale Journal of Law and the Humanities, it is appropriate to reconsider the cultural conditions that frame...