Yale Law School
Yale Law School Legal Scholarship Repository

Faculty Scholarship Series | Yale Law School Faculty Scholarship

1-1-2006

Law and the Humanities: An Uneasy Relationship

Jack M. Balkin
Yale Law School

Sanford Levinson

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
Balkin, Jack M. and Levinson, Sanford, "Law and the Humanities: An Uneasy Relationship" (2006). *Faculty Scholarship Series.* Paper 233.
http://digitalcommons.law.yale.edu/fss_papers/233

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Essay

Law and the Humanities: An Uneasy Relationship

Jack M. Balkin* **and Sanford Levinson****

I. INTRODUCTION: IS LAW PART OF THE HUMANITIES? A TALE OF TWO SPEECHES[1]

In 1930, Judge Learned Hand, widely regarded as one of the most distinguished judges in our nation's history, spoke to the Juristic Society at the University of Pennsylvania Law School. In his address, "Sources of Tolerance," he told his listeners

I venture to believe that it is as important to a judge called upon to

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

** W. St. John Garwood and W. St. John Garwood., Jr., Centennial Chair in Law, and Professor of Government, University of Texas at Austin.

1. We originally wrote this essay for a project sponsored by the American Academy of Arts and Sciences on the current state of the humanities. Other essays written for the project considered the state of contemporary history, philosophy, comparative literature, African-American studies, and English literature. All were recently published, including a shorter version of this essay, in *Daedalus*. *See* Jack M. Balkin & Sanford Levinson, *Law & the Humanities*, Spring 2006 DÆDALUS 105 (2006). We thought it appropriate to focus on whether law merited a place in such a project; that is, what, if anything, made law one of the "humanities" in the twenty-first century.

> pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.[2]

Hand's remarks assume three points that form the central focus of this essay. The first is that the study of law is either part of or is strongly connected to the humanities. The second is that the lawyer or legal scholar called upon to discuss and analyze legal questions cannot do so by looking merely within the confines of traditional legal materials: cases, statutes, and "books which have been specifically written on the subject" of law. Instead, he or she needs assistance and edification from other sources. The third is that those external sources of knowledge are to be found not in the natural sciences or the social sciences, but in subjects that we customarily call "the humanities."

Hand is not merely assuming these things. He also presents himself to us as a wise jurist who has been influenced by the "great books" he has selected for our attention. Because he is himself familiar with each of the writers he mentions, he enjoys membership in a "republic of letters," the sort of membership that is necessary for anyone who wishes to "live greatly in the law."[3] There was nothing particularly unusual about these assumptions in the early twentieth century, particularly coming from an elite member of the legal profession like Hand. Moreover, membership in the American republics of law and letters had run both ways. Robert Ferguson's important book, *Law and Letters in American Culture*, discusses the many late-eighteenth- and early-nineteenth-century American writers who had been trained as lawyers (and in many instances, had actually practiced law), including Charles Brockden Brown, Hugh Henry Brackenridge, Washington Irving, William Bryant, and James Fenimore Cooper.[4] One might also think of Hand's contemporary, the Harvard Law School-educated poet Archibald McLeish, or, closer to our own time, writers ranging from Louis Auchincloss to Scott Turow and John Grisham.

Nonetheless, few legal scholars today share Hand's assumptions; indeed, these assumptions were already under attack at the turn of the twentieth century. Consider what is perhaps the most important single

2. LEARNED HAND, THE SPRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 81 (1951).

3. OLIVER WENDELL HOLMES, *The Profession of the Law: Conclusion of a Lecture Delivered to Undergraduates of Harvard University on February 17, 1886*, *in* COLLECTED LEGAL PAPERS, 29, 30 (1921).

4. ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984); *see also* MICHAEL MELTZER, SECULAR REVELATIONS: THE CONSTITUTION OF THE UNITED STATES AND CLASSIC AMERICAN LITERATURE (2005).

lecture in the history of American law: "The Path of the Law,"[5] delivered by Oliver Wendell Holmes, Jr., who had taught briefly at Harvard Law School before fleeing to the Massachusetts Supreme Judicial Court. Speaking in June 1897 before the students and faculty of the Boston University School of Law, Holmes predicted that "[f]or the rational study of the law the black-letter man [i.e., the master of legal case law] may be the man of the present, but the man of the future is the man of statistics and the master of economics."[6]

Holmes and Hand were friends, but they clearly disagreed about the future direction (or path) of the law. While Hand advocated the study of the humanities, Holmes advocated the study of the social sciences, particularly economics. Although Hand made his remarks a generation after Holmes's, his vision of interdisciplinarity was in some ways an older one that saw a career in the law as continuous with membership in a republic of letters. From the vantage point of a full century after Holmes's address and seventy-five years following Hand's, one can confidently state, whether regretfully or not, that Hand's assumptions—that law is centrally located in the humanities, and is not complete unless it draws nourishment from them—no longer seem so obvious.

One reason may lie in the development of the American college curriculum after World War II, when colleges and universities were transformed from bastions of the upper classes to venues where middle class students—and even occasional members of the lower classes—could seek an education that previously was rarely accessible to them. One could no longer assume that law school matriculants had studied the *Iliad* and the *Odyssey* in English, let alone in the original Greek.

A second reason is the change in the structure of what is today aptly called the "legal services industry." Although there certainly continue to be substantial numbers of small-town general practitioners, "boutique" firms, prosecutors, criminal defense lawyers, legal academics, and the like, it is hard to gainsay that the dominant role in this industry is played by ever-larger law firms, many of them multinational in organization, that operate like great knowledge- (or rhetoric-) production factories.[7] These firms have increasingly complicated links to other fields like finance and accounting. Lawyers have become key players in an ever-expanding globalizing technocracy; and contemporary law schools (especially at the

5. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

6. *Id*. at 469.

7. Consider the opening sentence of Alison Frankel, *Growing Pains*, THE AMERICAN LAWYER, May 1, 2006, at 94: "Since 1986, when *The American Lawyer* first published a list of the 100 highest-grossing firms in the United States, the total number of lawyers in The Am Law 100 has almost tripled. In 1986, it numbered 25,994. In 2005, it reached 70,161." Of all American lawyers (approximately 1,086,500 in 2004), over six percent are employed by one of these firms. Frankel immediately goes on to note that the average profits per partner in these hundred firms were in excess of one million dollars. Eleven U.S.-based law firms now have over one thousand members. *See The A-List*, THE AMERICAN LAWYER, Sept. 1, 2005, at 106.

elite level), eager to provide a steady stream of cogs for this great machine, have turned not to comparative literature but to economics and rational-actor methodologies. The student at an elite law school today is more likely to be acquainted with Ronald Coase's Theory of the Firm than with Plato's Theory of the Forms,[8] with agency costs than with Acton, and with rent-seeking than with Rabelais.

Is it therefore only a play on words to call law "a humane profession" in a way that is different from, say, medicine? Nothing, after all, could be more humane than trying to relieve the suffering of one's fellow human beings, but most of us would properly associate medicine more with the sciences than the humanities. Has Holmes so completely won out over Hand that it makes little sense to think of the study of law in the same category as, say, philosophy or literary criticism?

To answer this question one must consider the sea change in professional self-consciousness that has occurred between the time when Hand spoke and the present. Part of this change involves the very meaning of what it is to be a *professional* lawyer and, therefore, what lawyers do and what count as the relevant materials of study, both for those who learn in law schools and for those who teach in them. We emphasize the term "professional" for good reason: One can certainly study law without becoming a practicing lawyer. But one cannot, at least in the United States, become a lawyer without going through the particular discipline of a law school.

What does (or should) constitute that "discipline" is a central (and much disputed) question. In fact, it encompasses three related questions. The first is whether the canon of standard-form legal materials is sufficient to do good work in law. Although Hand was one of the consummate professional judges of his era, he nonetheless seems to suggest to his audience that studying only standard-form legal materials is a mistake. Indeed, one might even infer from Hand's pronouncement (though we doubt that this was his intent) that one might not need to be a lawyer at all in order to have cogent, well-formed opinions about what the law is or should be. Holmes, too, had his doubts about studying only standard-form legal materials, particularly when a knowledge of statistics and economics might produce better legal decisions.

The second question is whether law is a genuine "discipline," with its own distinctive methodologies and standards of argument and proof; or is law, on the contrary, merely a "subject matter"—similar, say, to the city of

8. In fact, a study by Yale Law School librarian Fred Shapiro discovered that Ronald Coase's classic article, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), was the single most-heavily cited article by legal academics. Fred Shapiro, *The Most Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996). Whether citation counts should constitute proof of scholarly influence is a controversial question on which our somewhat irreverent analysis of Shapiro's study touches, Jack Balkin and Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843 (1996). Nevertheless, Coase's placement at the top of the list it is an apt symbol of the influence that the law and economics movement maintains in the contemporary legal academy.

New York or the nineteenth-century settlement of the American Midwest—that can be approached in any number of ways? If the latter, then there is nothing necessarily distinctive, at least from a purely methodological perspective, about being a lawyer or having received professional legal training.

The debate over whether law is a distinctive discipline or a mere subject matter (or, in contemporary parlance, a form of area studies) is quite old. Recall the famous dispute between King James I and Lord Coke. James, King of England and Scotland by divine right, claimed the right to interpret the law on the basis of his own reason. Coke would have none of this. Legal questions, he insisted, must be resolved through the "the artificial reason" of the law, something quite different from the teachings of "natural reason."[9] Only legal adepts were authorized or competent to engage in this special form of investigation.

For obvious reasons, few lawyers have ever wholly rejected the notion that law is a distinctive methodology as well as a subject matter. To do so, after all, would remove any rationale for the *de facto* institutional monopoly that lawyers enjoy in trying cases and representing clients for large sums of money. Lawyers' demands for professional legal skill is most insistent with respect to staffing the judiciary, especially at its highest levels where, ironically, the questions posed are most freighted with social and political consequence and where legalist algorithms are least helpful and least determinate.

The third question is whether law is a "science," defined by reference to distinctively disciplinary procedures and norms, as with other sciences, or something else, perhaps the "art of governance," whose study would be much closer to the humanities than to either the natural or the social sciences.[10]

The modern American legal academy begins in 1870 with the appointment of Christopher Columbus Langdell as Dean of the Harvard Law School. Langdell's avowed mission was to transform American legal education into "scientific analysis," and he had been appointed to the deanship by Harvard President Charles Eliot, himself a scientist. For Langdell, "legal science" consisted, principally, of the art of reading a relatively closed set of materials found in libraries: the decisions of

9. EDWARD COKE, 12 REPORTS 63, 65 (4th ed. 1738), *reprinted in* 77 Eng. Rep. 1342, 1343 (1907). *See* W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 429-31 (2d ed. 1937); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 30, 39-40 n. 15, 57 (1981); *see also* Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 58 (1997) (discussing the claim that law represents the understandings of the legal community).

10. Consider that the British Empire drew many of its administrators and leaders from those who had studied classics and history at Oxford and Cambridge, presumably on the grounds that this training developed a necessary capacity for civilized "judgment." C. J. Dewey, *The Education of a Ruling Caste: The Indian Civil Service in the Era of Competitive Examination*, 88 ENG. HIST. REV. 262 (1973).

judges, particularly those at the appellate level.[11] From these decisions the legal scientist would then discern, through the power of legal analysis, the structures of overarching doctrine that could unite such seemingly disparate topics as the sale of potatoes and the sale of slaves into one subject matter called "contracts." We do not know how well-read Langdell was, but we are fairly confident that he would have looked askance at a student (or a Harvard law school professor) who thought that it was more important to immerse oneself in Dante or Shakespeare than in the case law generated by courts. It would be as if a paleontologist preferred reading Aristotle to carefully assessing the fossil record.

Ever since Langdell, the standard psychodrama of American legal education has revolved around the recurrent slaying of the Langdellian beast in the name of humanism, social science, or some other form of interdisciplinarity, only to be followed by the phoenix-like resurrection of elements of Langdell's original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources). Still, only the most foolhardy academic today would describe doctrinal analysis as "scientific." The preferred term today is "craft," which continues to be used as an evaluative term, especially by those educated at the Harvard Law School.[12] (And by legal craft, few mean the ability to weave in references to Homer, Hume, or Rabelais.) As we shall see, however, the highly influential law-and-economics movement, which has made steady inroads into the American academy since the early 1970s, is not at all averse to emphasizing the scientific status of economics to justify its own claims to authority. And so the drama continues.

---

11. As Landgell explained:

> If law be a science, it will scarcely be disputed that it is one of the greatest and most difficult of the sciences and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can be learned and taught in a university by means of printed books. . . . If printed books are the ultimate source of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him,—then a university, and a university alone, can furnish every possible facility for teaching and learning law . . . . We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museums of natural history is to the zoologists, all that the botanical garden is to the botanists.

Christopher Columbus Langdell, *Preface to the First Edition*, *in* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION ON THE LAW OF CONTRACTS (2d ed. 1879). See also *id.* at viii (explaining the purpose of the selection of cases). As Professor Hans Badde has pointed out in conversation with Levinson, Langdell's original casebook on contracts included more cases drawn from the United Kingdom than from the United States.

12. On Harvard Law School and the "craft" tradition, see, e.g., LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, 219 (1986); JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 78 (1978); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurispurdence*, 15 CARDOZO L. REV. 601, 635 (1993); *see also* RICHARD A. POSNER, OVERCOMING LAW 81 (1995) (attacking the tradition of scholarship associated with Herbert Wechsler).

II. INTERNALISM AND EXTERNALISM

Our previous discussion posed three questions: whether law is sufficient to itself or needs help from outside sources; whether law is a discipline or merely a form of area studies; and whether legal reasoning is a distinct science or is continuous with—and therefore might appropriately be nourished by—knowledge and skills from other areas of study. Each question suggests a basic divide between an "internalist" and an "externalist" approach to law and legal education. Each of these approaches can, in turn, be further divided into two basic issues. First, what methods, skills, and forms of knowledge are necessary or appropriate for arguing, analyzing, discussing, and deciding legal questions? Are these methods wholly internal to law or do they come from outside it? This is the question of the disciplinary canon. Second, what attitude should a student or scholar of the law have about the subject? Must the student or scholar be a participant who understands herself as furthering the aims and purposes of the enterprise of law, or should she take the (relatively) detached attitude of a social scientist studying a social phenomenon from the outside? This is the question of disciplinary attitude.

Although we have used the term "legal questions" in both of these formulations, what counts as a "legal question" from an internal perspective may be quite different from what qualifies as a "legal question" from an external perspective. The former might include questions about the best interpretation of the phrase "prior to December 31st" in federal legislation regarding mining claims[13] or of the word "torture" in a number of federal statutes and international conventions.[14] The latter might include questions like "Why did tort law change during the Industrial Revolution?" or "Why do so many corporations prefer Delaware law?"

An internalist approach to the disciplinary canon makes two claims. First, there is a set of arguments, approaches, skills, and forms of knowledge distinctive to law that one must master to discuss law competently, interpret legal documents, and resolve legal disputes. Second, these distinctive skills are more or less sufficient to decide legal questions. Until quite recently, the internalist view has been the traditional perspective of the American law school, whose faculty have tended to view themselves as judges manqué who (consciously or unconsciously) invite their students to play the role of the judge in talking and arguing about law.

An externalist approach to the disciplinary canon, by contrast, argues that discussions of law are incomplete without knowledge and skills from other disciplines, including, most prominently, the natural sciences, social

13. *See* United States v. Locke, 471 U.S. 84 (1985).

14. *See, e.g.*, Sanford Levinson, *In Quest of a 'Common Conscience': Reflections on the Current Debate About Torture*, 1 J. NAT'L SEC. L. & POL. 231 (2005).

sciences, and the humanities. The moderate version of the externalist position is that all of these are necessary supplements to a serious study of law; a more extreme version would contend that they are sufficient, and that the "artificial reason of the law" that Coke celebrated obfuscates what is really going on in legal decisionmaking. For the radical externalist, legal decisionmaking is just a special form of ordinary political or moral decisionmaking, and hence it will be better performed to the extent that it can make use of those forms of knowledge that assist people in making political and moral decisions.

A parallel dispute occurs over the appropriate disciplinary attitude one should have about the enterprise of law. For the internalist, the very point of studying law is to further the enterprise of deciding legal cases and justifying legal doctrines. This may be done at a very concrete level of doctrinal synthesis or at the most abstract levels of legal theory. In both cases, however, the goal is to move the enterprise of law forward. An internalist attitude toward law identifies with law and with its aims. It may hope to make law more rational, more coherent, or more just; it may seek to offer the most persuasive interpretation of the law or of a legal document in order to further the interests of a client; or it may simply be devoted to explaining what the law is and insisting that the law be obeyed because it is the law.

An externalist attitude, by contrast, studies law as a social phenomenon, much as an anthropologist might study the ancient beliefs of the Mayan religion without adhering to them. One may need to think about law from the internalist perspective to understand how it operates, but the point of this understanding is not to further the enterprise but to understand its history and social effects. An externalist does not ask "what is the best interpretation of this legal document?" or even "how can I manufacture arguments that will persuade a judge to decide in favor of my client?" Rather, one might study questions such as who claims the ability to interpret; what are the political and social backgrounds of adjudicators (and what is the connection between these backgrounds and the decisions they make); who actually benefits or loses from given decisions; how do social movements organize themselves around certain kinds of legal claims and influence legal decisionmaking; and finally, does legal decisionmaking have more or less effect on the real world than lawyers and judges think it has. Such questions tend to be the focus of social scientists who study law. In like fashion, literary critics might be interested in the rhetorical operations of law; historians might be interested in the development of law in its social and political context, and so on.

The division between internalist and externalist attitudes about law is analogous, in some respects, to the question whether a law school is more like a divinity school, on the one hand, or a department of religion on the other. Although there may be atheists in seminaries studying theology and

true believers in departments of religion, the general distinction between these departments seems clear: to participate in the intellectual life of the seminary is, with very rare exceptions, to promote faith and the working out of the beliefs and values of a particular religion to which one is devoted; a department of religion, by contrast, implies no necessary requirement that those who teach or those who learn believe in the religions they study or work on their behalf. The goal is rather to study the social, historical, political, and economic features of religion(s).

To the extent that law school is like a school of divinity, law professors *believe* in the enterprise of law (including those suspensions of disbelief necessary to separate what is deemed "law" from what is deemed "politics"). Many will practice law or give legal advice to others, and all will seek to inculcate in their students the techniques of arguing to legal decisionmakers who are also internal to that enterprise. However, to the extent that law schools are "departments of law," law professors need not practice law and may not particularly care whether one case or another is rightly decided from an internal perspective. Rather, their goal is to study law as a literary, cultural, economic, or social phenomenon. If, on occasion, they make arguments about what the law *should* be, their reasoning will be largely from the standpoint of what would be good policy as distinct from what the law commands or requires.

Taking these distinctions together, we can see that there are four basic combinations of internal and external views about disciplinary canon and disciplinary attitude:

	Use materials and skills internal to the traditional practice of law to study and decide "legal questions"	Use materials and skills external to the traditional practice of law to study and decide "legal questions"
Internalist attitude about the enterprise of law	1	2
Externalist attitude about the enterprise of law	4	3

At the risk of exaggeration, we might say that the history of the American legal academy in the twentieth century has been a continuous flight from Box 1 to Box 2 with occasional forays into Box 3. That is especially so if we may regard Langdellianism as the epitome of Box 1—a strong belief that the point of legal study is to further the professional values of law coupled with an equally strong belief in an internalist legal "science" both necessary and sufficient to correctly analyze and resolve legal questions.

American legal scholars have reacted to Langdell's efforts in one of two ways. They have maintained the ultimate aim of promoting professional goals while bringing ever new interdisciplinary tools to bear to achieve those goals (Box 2); or, dissatisfied with the intellectual strictures necessary to maintain the internalist attitude, they have sought to study law as a social, cultural, political, historical, literary, religious, or economic phenomenon, using whatever disciplinary resources they believed were most appropriate to the task (Box 3).

Box 4, an externalist attitude to the study of law that insists on using only materials internal to the traditional enterprise of law to do its work, has been relatively infrequent in the American legal academy. The reason is not difficult to imagine. Once one abandons the notion that one must look at law from the perspective of lawyers, judges, and legal practitioners, the gravitational pull of other disciplines is difficult to resist. Nevertheless, a lawyer or legal philosopher influenced by Wittgenstein might conclude that if law is its own distinctive form of social life, the only way to truly engage in legal discourse is to immerse oneself in its characteristic forms and practices. In this case, one would cycle back around to Box 1. This is, in fact, the view of a number of legal scholars.[15]

The turn to interdisciplinarity, we should point out, has been largely an American invention—only now are significant numbers of legal scholars in other countries, no doubt influenced by American scholarship, becoming interested in interdisciplinary research agendas. Formalist tendencies in other countries, particularly Europe and Latin America, remain quite strong, much to the consternation of Americans. Nevertheless, in hindsight, the turn to other disciplines in American legal scholarship seems inevitable. Americans are pragmatists, and love the authority of science. The very claim that law is sufficient to itself flies in the face of the fact that the most familiar modalities of legal reasoning often seem to call upon knowledge that other disciplines might easily provide. For example, arguments about which legal rule would have better consequences are legion in legal reasoning. Surely they might be enriched by work from a wide variety of social science disciplines, including, most prominently, economics and sociology. Arguments from constitutional structure could gain from the learning of political scientists, while arguments about how best to interpret ambiguous texts might benefit from the work of public choice theorists as well as students of literary theory. Not surprisingly, legal scholars in the past fifty years have turned to all of these fields, and others as well.

Then too, American lawyers continually make arguments about legislative and constitutional history, particularly when appealing to the understandings of the founding generation. To reject the importance of

15. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); DENNIS PATTERSON, LAW AND TRUTH (1996).

specialized training in history would be to suggest, in effect, that "anyone can do history," that there is no distinctive methodology (or set of methodologies) that require years of disciplinary training. American lawyers pride themselves particularly on their versatility and ability to absorb facts quickly, and so legal scholars have often convinced themselves that the work of other disciplines holds no terrors for them. Mark Tushnet, a recent president of the American Association of Law Schools, once referred derisively to what he called "the lawyer as astrophysicist"[16]—the notion (or fantasy) that a clever lawyer, armed only with a J.D., could, over the weekend, become sufficiently competent in the literature of astrophysicists to engage in professional-level conversations (or cross-examinations) of those who have spent their lives in the field. There is a technical term for this particular attitude of lawyers: *chutzpah*.

We jest only a bit. Consider that neither of the two most prominent "originalists" on the United States Supreme Court—Justices Scalia and Thomas—has any professional training as historians, but that has not stopped them from criticizing their colleagues and others for failing to abide by what the framers meant. Conversely, most academics with joint degrees in history and law tend to be highly skeptical of the claims asserted by the most stringent "originalists," not least because of the fact that most trained historians are considerably more nuanced in their conclusions about the meaning of past events than are originalist lawyers. Indeed, a familiar criticism of lawyers, whether or not they are originalists, is that they engage all too often in what is called "law-office history"—mining the historical record to support their favored legal conclusions.

Thus, we can see that a lawyer's native sense of overconfidence produces two different and opposite effects. On the one hand, lawyers in the past rejected the work of other disciplines because they believed they could do everything themselves. On the other hand, legal scholars today embrace other disciplines, but their interdisciplinary work may be shallow because, once again, they think they can pick it up with comparatively little effort. Tushnet's quip about "the lawyer as astrophysicist" was not directed at lawyers who rejected interdisciplinary scholarship, but at those who too eagerly embraced it. However, we note that the shallowness of legal interdisciplinarity is receding somewhat as more and more J.D./Ph.D.'s enter the teaching profession, and as the field becomes increasingly sophisticated in its aims and approaches.

The clockwise progression from Box 1 to Boxes 2 and 3, however, is simply a general tendency, and oversimplifies a much more complicated story. In fact, a powerful gravitational force continually pulls the straying legal academic back in a counterclockwise direction: toward an internal

16. *See* Mark Tushnet, *Constitutional Scholarship: What Next?*, 5 CONST. COMMENT. 28, 31 (1988); Mark V. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX L. REV. 1307, 1338 n. 140 (1979).

attitude about the point of legal study as well as toward the traditional materials of legal practice. That gravitational force is professionalism—the fact that, unlike most other members of the humanities, legal scholars teach in professional schools designed to turn out practicing lawyers who are thoroughly enmeshed in the enterprise of law and who must be trained to make traditional legal arguments about traditional legal materials before judges and other legal decision-makers. Although it is safe to say that an increasing number of legal academics inhabit Box 2 today—and that new hires are increasingly expected to bring interdisciplinary skills to their scholarship if they wish to receive tenure—there are very strong pressures to keep them from moving to Box 3 and making a permanent home there. In this respect, law schools still have much more in common with divinity schools than departments of religion.

III. THE RISE OF INTERDISCIPLINARY LEGAL STUDIES

Interdisciplinary legal studies is the result of a long and slow process that occurred in fits and starts throughout the twentieth century, though it was surely heralded in Holmes's "The Path of the Law."[17] Stated in terms of the diagram above, Holmes was urging lawyers to move from Box 1 to Box 2 as fast as their legs could carry them. Hewing to traditional practices of legal argument was outmoded, Holmes insisted. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[18] In particular, he suggested, "every lawyer ought to seek an understanding of economics."[19]

In stark contrast to Learned Hand's vision of law as part of a noble republic of letters, Holmes offered a vision of interdisciplinarity that sought to discard all forms of humanist sentimentality. Law was a "business," Holmes insisted, in which "people . . . pay lawyers to argue for them," and "predict[] . . . the incidence of the public force through the instrumentality of the courts."[20] In one of the most famous passages in "The Path of the Law," Holmes argues that to understand law one must view it from the perspective of the "bad man,"[21] who wants the lawyer's assistance only insofar as it will help him to achieve his selfish ends, regardless of the consequences for justice or the greater good of society. The lawyer's task, Holmes argues, is advising such "bad men" and helping them to achieve their ends within the parameters of legal doctrine. Law, Holmes, insisted, was too easily confused with morality, and Holmes

17. Holmes, *supra* note 5, at 457.
18. *Id*.
19. *Id*. at 474.
20. *Id*. at 461.
21. *Id*.

speculated "whether it would not be a gain if every word of moral significance could be banished from the law altogether."[22]

While Hand welcomed the edifying influence of the humanities, Holmes strove to make law more scientific and even industrial. Consider that Hand's list of great books included not a single economist—not even Adam Smith—and that Holmes's imagined alternative to black-letter law was "statistics." Holmes's prediction came true, but only in part. Economics has indeed become the most successful disciplinary invasion into legal studies, although "the man of statistics" has not yet entirely displaced "the black-letter man." Rather, the embrace of economics and other disciplines has created a continuing tension—and in a few institutions, outright warfare—about the nature and future of legal education. Nevertheless, Holmes might well be pleased by recent trends in law-school hiring. Although most law professors are still hired with only a J.D. degree, a steadily increasing proportion of new hires hold Ph.D.'s in other disciplines, particularly in history, philosophy, and economics. Very soon, if not already, a Ph.D. in economics will become a necessity for those seeking to do cutting edge law-and-economics work in fields such as antitrust and corporate law at the most prestigious law schools. No doubt we will see increasing numbers of legal historians and legal philosophers with doctorates in history and philosophy.

Many factors contributed to law's increasingly interdisciplinary focus. First, American universities produced a glut of Ph.D.'s in the 1960s and 1970s, and some of these students gravitated to law schools, and eventually to the legal academy, bringing their training and interdisciplinary perspectives with them. Foundations like the Russell Sage Foundation actively promoted using the social sciences to study law.[23] Second, the civil rights movement and the second wave of American feminism opened doors for a generation of women and minorities, who began to enter the law schools in far greater numbers in the 1970s and 1980s. Slowly but surely, women and minorities entered the ranks of the legal academy, bringing new approaches with them, as well as new additions to the legal canon. To critique existing legal arrangements, legal feminism, critical race theory, and gay legal studies drew heavily

22. *Id*. at 464. For further reflections on this point, see Sanford Levinson and J. M. Balkin, *The "Bad Man," the Good, and the Self-Reliant*, 78 BOSTON U. L. REV. 885 (1998).

23. One of us (Levinson) went to the Stanford Law School in 1970 courtesy of a Russell Sage grant after obtaining a Ph.D in political science from Harvard. Given that the grant was for only two years, however, one might doubt that the Foundation actually intended to encourage recipients to become lawyers, much less that they should migrate to the legal academy from social science departments. That being said, not only does Levinson have a joint appointment in the Government Department at the University of Texas, but his recent work is returning to his original roots as a political scientist. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (critique of structural features of the Constitution that are rarely considered in the legal academy); David Law and Sanford Levinson, *Why Nuclear Disarmament May be Easier to Achieve than an End to Partisan Conflict over Judicial Appointments*, 39 U. RICHMOND L. REV. 923 (2005) (game theoretic analysis of congressional conflict over judicial appointments).

from other disciplines, particularly from the humanities. Law professors like Patricia Williams and Derrick Bell deliberately merged their legal scholarship with literary models, while other feminist and critical race theory scholars experimented with narratives as a method of social and legal criticism.[24] The law and literature movement that we will discuss later in this essay overlapped with the new emphasis on race, gender, and sexual orientation studies in law schools.

Third, and perhaps most important, the interdisciplinary invasion that began in the 1960s and 1970s resulted from long term trends in American governance that began far earlier with the rise of the regulatory and administrative state in the early twentieth century. Classical legal forms proved inadequate to comprehend the increasingly complex realities of governance. It is not simply that one lost faith in the ability of judges, using traditional modes of legal reasoning, to make judgments about the panoply of issues that daily present themselves to courts, legislatures, and administrative agencies. One also lost faith in a certain form of the enterprise of legislation, in which a parliamentary body (i.e., Congress) would, after due deliberation, come to some sort of decision, reflected in explicit legislation, about a matter of social controversy.

Instead, at least since the New Deal, Congress has more and more frequently passed legislation demanding that administrative agencies make their own decisions "in the public interest" or to safeguard "the public health." Standard-form legal analysis provides almost no guidance in deciding what constitutes "the public interest." As courts in the twentieth century were delegated (or took on for themselves, depending on one's preferred version of the story) increasingly complicated issues of governance, their work began to merge with the work of forming and implementing public policy. The revolution in consumer protection law that began mid-century[25] and the rights revolution symbolized by the 1954 decision in *Brown v. Board of Education*[26] are only two examples. Indeed, more emblematic than *Brown*, in many ways, was the Supreme Court's 1955 follow-up decision, *Brown II*, in which the Court announced that the judiciary would be required to implement the original ruling "with all

24. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado, ed.,1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1988).

25. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring); *Henningsen v. Bloomfeld Motors*, 161 A.2d 69 (N.J. 1960); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960). For a brief history, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REFORM 197 (1997); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

26. 347 U.S. 483 (1954).

deliberate speed."[27] This meant, as a practical matter, that courts would accept long-term responsibility for designing and monitoring remedies for the constitutional violations and social ills they had identified. In the words of Owen Fiss, the country and the courts had entered the era of the "structural injunction" in which courts might supervise diverse features of social life ranging from police departments and mental hospitals to workplaces, school districts, and prisons.[28] Courts were no longer insulated oracles of eternal legal verities. Like legislatures and administrative agencies, they were widely seen, for good and for ill, as agents of social transformation and promoters of social policies.

These realities had vast jurisprudential consequences. The basic trend in twentieth century legal studies, at least in the United States, has been a rejection of what legal scholars dismissively called "formalism." Formalism itself is a rather nebulous concept; sometimes one feels that it stands for whatever things the speaker thinks are wrong with the study and practice of law.[29] In fact, to the extent that formalism means belief in the importance of rules to organize conduct, belief in formalism has never departed the legal academy; indeed, it is more popular than ever.[30] What American legal scholars rejected during the twentieth century was not rules or rule application, but two assumptions about legal thinking: (1) the belief that the sole job of the legal mind is to work out the correct solution to legal problems through the law's materials and internal logic, and (2) the correlative belief that the internal logic of those materials, and not any forms of knowledge outside them, determines whether a legal argument is good or bad. Twentieth-century legal theory in the United States repeatedly rejected this type of internalism in favor of realism, on the one hand, and proceduralism, on the other.

Realism refers to the themes generally associated with the American legal realist movement—that (1) legal actors do not and can not make decisions wholly free from their ideological beliefs and attitudes; (2) legal reasoning has much in common with political reasoning and policy argument; (3) judges inevitably draw upon a wide variety of non-legal norms to decide concrete cases; and (4) lawyers, judges, and legal scholars should try to make law responsive to facts about the world, to the insights of other disciplines, and, above all, to changes in society as a whole. Such attitudes lead fairly quickly to interdisciplinarity, and many of the original legal realists avidly embraced social science in the 1930s and 1940s in the

27. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

28. Owen M. Fiss, *The Supreme Court October 1978 Term: Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); *see also* EDWIN L. RUBIN AND MALCOLM M. FEELEY, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

29. See Robert Gordon's imaginative list of different accounts of formalism and the reasons why people were opposed to them in Robert W. Gordon, *The Elusive Transformation*, 6 YALE J.L. & HUMANITIES 137, 154-57 (1994) (reviewing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992)).

30. *See, e.g.*, Fredrick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

hope that it would help them solve important questions of legal administration. Nevertheless the legal realists made only limited progress during those early years due to a combination of factors: the difficulty of getting funding for social science studies, the rudimentary nature of social science in the United States, and the fact that the early realists, who had been trained as traditional doctrinal lawyers, were not particularly good at doing social science.[31] As it has developed over the years, American legal realism is as much a mood as a set of doctrines. It reflects the experience, felt on occasion by all who study the law, that the discourse of lawyers, and the forms of legal reasoning, are often too musty, circumscribed, and closed in upon themselves, and therefore inevitably fall out of touch with social and political realities.

The second major tendency in twentieth-century American legal theory was proceduralism. Indeed, proceduralism became the favored response to what some considered the "nihilism" of legal realism. Like realism, it also responded to the problems posed by the rise of the administrative state. Proceduralism begins with the incontrovertible insight that legal disputes often raise controversial questions of morality and policy. This is particularly true of the sorts of problems faced by administrative agencies, which took on increasingly elaborate tasks and extended the state's influence in increasingly large areas of social life in the twentieth century. If one cannot tell what the right answer should be on the merits, it is far better, proceduralism teaches, to create a series of procedures through which the legal system can settle the "right answer" for the purposes of the legal system. Lawyers are particularly well suited to this task because creating and following procedures are the lawyer's stock in trade. The Legal Process School of the 1950s—identified particularly with Harvard,

31. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995). Equally important debates about the rule of law had occurred in Europe in the late nineteenth- and early twentieth-centuries, provoked by the rise of overt class-based politics, the development of administrative welfare state, and the pressures of war. Albert Venn Dicey, a leading English constitutional lawyer, bewailed what he viewed as the potential demise of the "rule of law" in the jaws of the new administrative state. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1st ed. 1885) (His views would later become influential in this country through analogous arguments made by Frederich Hayek's *The Road to Serfdom* (1944). Even more fundamental debates took place in Germany among Max Weber, Hans Kelsen, Carl Schmitt, and Franz Neumann. *See, e.g.*, WILLIAM SCHEURMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW (1997). Although little of this debate filtered into the American legal academy, it did influence a number of other disciplines in the United States. The American attack on the pretensions of "the rule of law" was carried out almost exclusively by persons linked with "progressive" politics and the defense of the New Deal and the administrative state. By contrast, those attacking "the rule of law" in Europe were as likely to be right-wing authoritarians like Schmitt as leftish progressives. Indeed, as Edward Purcell demonstrated some years ago, many American legal realists became considerably chastened in the 1930s and 1940s, when attacks on "rule of law" became identified with National Socialism and Communism. *See* EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973). This did not necessarily mean, of course, that the critiques of "the rule of law" were genuinely overcome, only that they were shunted aside in what tended to turn, especially in the 1950s, into a celebration of the American legal order. The emergence of the civil rights movement in the 1960s and the Vietnam War brought that celebration to an end, with the concomitant revival of American legal realism in the form of what came to be called Critical Legal Studies.

then almost certainly the dominant law school in the United States—assimilated and co-opted elements of the realist critique[32] and concluded that the job of lawyers was not so much to decide what was right and wrong but to determine which particular institution—legislature, executive, administrator, or judge—should decide what was right and wrong, and how they should go about deciding it. As a result, Legal Process scholars spent a great deal of time thinking about questions like the proper methods of statutory construction; the proper balance of power between various branches of the federal government and between the federal government and the states; how courts should assess the procedural status of claims brought by litigants; how courts should review the decisions of administrative agencies; and so on.

Proceduralism can be—and has been—ridiculed as a flight from substance. It has been criticized for encouraging lawyers to focus obsessively on formal niceties while avoiding or obscuring deeper questions of substantive justice and thus fomenting ever new forms of excuse for preserving the status quo.[33] Yet, at the same time, proceduralism has its own normative commitments and its own ethics: a belief in orderly deliberation, and a conviction that the legal system functions best and gains the most political authority when it assigns difficult and controversial decisions to the institutions or persons that are most likely to have the necessary expertise or have the most legitimacy to make a decision.

Realism and proceduralism are the two great legacies bequeathed by American jurisprudence, and each responds to the other in a great spiraling dialectic. Every important jurisprudential movement in the United States—and most of the unimportant ones too—owes something to this dialectic. Realism demands that lawyers look up from their procedural fetishes and attend to the world as it is, with all its warts and injustices; it seeks to throw open the curtains that cloak the musty halls of law and bring in the light and fresh air of other disciplines so that law might better reflect changing social realities and attitudes. Critical Legal Studies, legal feminism and critical race theory, not surprisingly, all share the realist call for law to awake from its dogmatic slumbers and attend to law's complicity with social hierarchy. Proceduralism, on the other hand,

32. The key text, of course, is the famous compilation of materials by Henry Hart and Albert Sachs, *Legal Process*, which, was offered only in a manuscript "tentative edition" in 1958 and was not officially published until 1994. HENRY M. HART JR. AND ALBERT M. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge & Philip P. Frickey eds., 1994). On the intellectual milieu of legal process, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 251-66 (1995); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 247-68 (1992); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 228-233, 241-47 (2002).

33. *See, e.g.*, Garry Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988); William N. Eskridge, *Metaprocedure*, 98 YALE L.J. 945, 947-51, 962-66 (1989) (reviewing ROBERT COVER, OWEN FISS AND JUDITH RESNIK, PROCEDURE (1988)).

worries that making law too overtly political will endanger law's legitimacy; it insists that the key to preserving values of democracy, fairness, and the rule of law will come from cultivating questions of procedure, even when these seem dry and abstract to the outside world.

Realism and proceduralism are not only America's gift to legal science; they are also the features of American legal thought that most distinguish it from the Civil Law tradition, which has tended to be far more formal in its approach. To this day, most European lawyers—and many professors—find American legal theory bizarre and almost the opposite of truly "legal" reasoning. Americans are far less likely to delve deeply into the intricacies of legal codes to figure out how each part fits with the others. Instead, Americans ask what to the Civil Law mind are non-legal questions like "What rule would be most efficient?" or "Given that people will inevitably disagree about certain basic values, what procedures are best suited to resolving disputes over such issues as abortion, affirmative action, or the death penalty?"

What is particularly important for our purposes, however, is that although realism (and, to a lesser extent, proceduralism) made law increasingly interdisciplinary in its ambitions, neither necessarily brought law closer to the study of the humanities. (The one major exception, of course, is the continuation of the realist tradition in legal feminism, critical race theory, and critical legal studies; each of these movements has drawn from the work of philosophers, literary critics, and historians in the humanities.) Indeed, both realism's fascination with facts and proceduralism's attempt to harness the expertise necessary to run the administrative state pushed law further and further away from the humanist vision we see in Learned Hand's opening quotation and brought it closer and closer to becoming a branch of policy science. In this respect Holmes proved more prescient than his friend Hand. Legal realism and legal process were much less likely to produce humanists and renaissance persons than lawyer-economists and technocrats. This spawned yet another set of reactions by those who felt, and continue to feel, that law has lost a good deal of its humanity and its humaneness; these scholars have sought to reconnect the study and the practice of law to what they regard as humanist ideals. This tendency cuts across ideological divisions and the many different movements in the American legal academy. It can be found in the "critique of rights" offered by some adherents of Critical Legal Studies, in the works of the "law and literature" movement that seeks to think about law in humanist terms, and in Anthony Kronman's *The Lost Lawyer*, which decries the soulless practice of corporate law and the equally soulless calculations of contemporary law and economics scholarship.[34] The urge to recover humanism—often identified, whether

34. ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

correctly or incorrectly, with what people in humanities departments are actually doing these days—is one species of response to the American law school's technocratic tendencies.

IV. LAW'S RESISTANCE TO COLONIZATION

Although it is impossible to understand contemporary legal theory without recognizing its strongly interdisciplinary character, law has a most curious relationship to interdisciplinarity. Law seems endlessly to poach upon other disciplines and absorb many of their insights while still remaining law. Conversely, many disciplines have tried to invade and colonize law over the years, yet the legal academy still continues to produce legal scholarship that asks recognizably traditional sorts of legal questions. For example, arguments about what judges should do in particular cases, what legal rules should be created, and how legal texts and doctrines should be interpreted still dominate the field. What explains law's ability to take in outside intellectual influences without being drastically altered, to absorb the successive invasions of other fields of research in what we might call a sort of intellectual rope-a-dope?

The reason is the institutional context in which law is taught: the modern professional school.[35] The vast majority of legal academics are trained in and teach in professional schools whose primary business is training lawyers who will go out and practice law and make legal arguments before judges, legislatures, and administrative agencies. This institutional context continually reorients legal scholarship back toward its professional origins and, many might say, its professional obligations. Thus, at the end of the day, no matter how interested legal scholars may be in Derrida, rational actor theories, or Herman Melville, they have to return to the classroom and teach J.D. students to become lawyers. The Yale Law School, where both of us have taught, is perhaps the closest to a traditional graduate program, but even at Yale the overwhelming percentage of students do not intend to become legal scholars.[36] Some of them, to be sure, will become novelists, politicians, and investment bankers, but most of them will become lawyers, and, in particular, corporate lawyers. At other schools the percentages are no doubt even higher. This fact distinguishes graduate education in law from graduate education in most areas of the humanities. Relatively few law students, even at the elite schools, actually wish to emulate their professors by becoming academics themselves.[37] It would be a strange graduate program in the humanities

35. For a more detailed argument, see J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 965-70 (1996).

36. As a rough proxy, the Yale Law School placement office reports that out of 12,137 living Yale Law School graduates, 1,017 (or approximately 8.4 percent) are members of faculties that belong to the Association of American Law Schools (AALS). E-mail from Pamela Sims, Alumni Affairs Coordinator, Yale Law School, to Jack M. Balkin (June 28, 2006) (on file with Balkin).

37. Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955

that was populated by Ph.D. candidates with no interest at all in a scholarly career. Not so the average J.D. student.

In law schools, almost all of the students do not want to grow up to be like their professors, and almost all of the law professors have consciously chosen not to become practicing lawyers. This creates occasional mutual incomprehension between students and teachers. Similar tensions sometimes surface between the academy and the profession when legal scholarship strays too far from the familiar work of offering expert advice and advocacy on contemporary legal questions for the benefit of the bench and bar. Until the 1970s, offering such advice was the standard practice of law professors, and their legal scholarship viewed judges—and especially Supreme Court Justices—as their ideal readers. The legal profession honors legal academics who continue this practice, but displays considerably less esteem for the increasing number of legal academics whose work strays too far from this paradigm.

Indeed, members of the bench and bar are not shy in saying so. For example, a decade ago Judge Harry Edwards of the Court of Appeals for the District of Columbia, himself a former legal academic, complained of the "growing disjunction" between what law professors write in scholarly journals and what lawyers and judges expect from them.[38] Legal academics have become less like their colleagues in the bench and bar, and more like their colleagues in the rest of the university. Increasingly, they write about things likely to interest their academic colleagues at peer institutions. Conversely, judges are far less likely to read academic articles, which, of course, simply generates ever less incentive for academics to imagine judges as their intended audience. Yet despite Edwards' qualms, basic features of American legal education—including the fact that most law students are destined for the profession and not the academy—continuously reorient the study of law back towards a set of traditional professional concerns. If this were not so, the disjunction Edwards complains of would be far greater than it is.

V. LAW'S PRESCRIPTIVISM

The second key reason why law resists complete invasion by any other discipline is that law's professional orientation produces a curious kind of normative attitude that is quite different from the normativity that appears in many parts of the humanities. By normativity, we mean simply the way that persons within a discipline take normative positions, and the kinds of

(1981).

38. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For a response to Edwards, see Sanford Levinson, *Judge Edwards' Indictment of "Impractical" Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010 (1993).

normative claims that they are expected to make.[39] In law, the form that normativity takes is quite narrow.[40] We might call it prescriptivism—the demand that each piece of scholarship offer some account, however nebulous, of the stakes for how the law should be modified or interpreted or how legal decisionmakers should do their jobs. This prescriptivism has a daunting effect on scholars who would seek to avoid it, for their colleagues (and their own interior dialogues) continually insist that all interdisciplinary work be cashed out in prescriptive terms.[41] "Now that you've told me about Deleuze and Guattari," a colleague will say, "what does this have to do with telecommunications law?" The demand that legal scholarship be cashed out in policy prescriptions deeply circumscribes the legal imagination and the permissible boundaries of legal scholarship, while simultaneously reorienting legal scholarship towards legal practice and policy science.

We do not wish to exaggerate. Much legal scholarship today is barely distinguishable from political theory or economic modeling. But such analysis, however distant from legal doctrine it may appear, is always understood to have consequences for either the legitimacy or the reform of existing legal institutions. Even though legal scholars, have, over the years, rebelled against the prescriptivism of the legal academy in countless ways, they are continually drawn into the gravitational orbit of law's normativity, which, in turn, reflects law's orientation to legal practice. When scholars seek to treat law as a cultural or aesthetic object, much as one might do in art history, their colleagues in the academy inevitably want to know how the work furthers debates about the choice and interpretation of legal norms. If a scholar responds that he or she had no intention of doing anything of the sort, the work is likely to be judged irrelevant or "not law."

Legal philosophy and legal history are exempted from this demand, but only because their work is generally viewed as auxiliary to law's normativity. Legal philosophy helps legitimate the legal system and

39. The idea of "normativity" is premised on the fact that there are many different ways to take a normative position, and many different aesthetics and styles for doing so. For example, one can make normative claims through criticism of the status quo without offering alternatives or through positive proposals for reform; and proposals for reform, in turn, can be directed at improving institutions or conventions, or at individual or group self-awareness or self-improvement. One can criticize (or praise) a person, a practice, a cultural tradition, or an institution. One can work on showing contradiction or inadequacy in reasoning, attempt to demonstrate bad faith, impure motives, self-delusion or hypocrisy, or focus on bad consequences. One can offer normative judgments directly or make them indirectly through comparative or historical study. Finally, some disciplines and practices insist that they are interested solely in description so that people within them must take normative positions through implication and stealth.

40. The critique of law's particular normative stance has been made most ably by Pierre Schlag. *See* PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, AGAINST THE LAW (1996); PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND (1996).

41. *See* Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2055-58 (1993); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 808-815 (1991).

clarifies its basic concepts, while legal history provides useful data for making normative legal and policy arguments. Whether philosophers and historians would accept these characterizations of the importance of their work is irrelevant; the point is that they are valuable to others in the legal academy because of their relationship to a legal academy dominated by prescriptivism.

As we have noted, law's normativity is produced by the institutional context in which law professors teach and work. And it continually pushes legal scholars back towards some form of internalism. This influence is pervasive both in the classroom and in recruitment of new scholars. The standard-form job talk for those seeking entry into the legal academy continues to include, as its conclusion, the implications of the presenter's argument for the solution of some contemporary legal issue.[42] Although legal historians are treated somewhat differently, since their job is primarily to account for historical developments in law, there is continuous—albeit sometimes unacknowledged—pressure for legal historians to write history in presentist terms or to use their historical work to show that a current line of existing law has taken a wrong path.

What then, if a legal scholar adopts a forthrightly "externalist" stance and declares that law schools should be less like seminaries teaching the dogmas of a particular faith—in this case faith in "the law"—and more like departments of religion where professors can be genuinely interested in the phenomena of "the law" but lack any particular faith in it?[43] Most law students, members of the bench, and members of the bar would be unhappy with such a development precisely because it would signify abandonment of the professional and internalist enterprise that takes legal analysis on its own terms with consummate seriousness. Indeed, it is overdetermined that at most law schools externalism will be welcomed so long as it furthers the general enterprise of law (that is, that the work falls into Box 2). Most law schools, we suspect, will ensure that legal scholars who are externalist in their attitudes as well as in the knowledge they employ (that is, those scholars who fall into Box 3) will be kept in their place—tolerated, as it were, but not allowed to dominate or set the scholarly agenda, so that law schools may continue to present themselves as non-apostate members of the community of legal faith. State-supported law schools in particular might face the possibility of political retaliation should they publicly abandon their traditional roles and self-conceptions in

42. It would be interesting to compare the relative weight of "job talks" in the legal academy with departments in the arts and sciences. One factor accounting for the very high (often inordinate) weight placed on such talks in law schools is that, at least until recently, most job candidates had in fact written quite little that one could actually read and evaluate. (This is changing, however, especially as more applicants have in fact written dissertations or published articles.)

43. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 155-179 (1988).

significant measure, and even most private schools would have to consider the loss of financial support from their alumni.[44]

A few years ago, one of us (Balkin) had a conversation with Austin Sarat, a key figure in the Law and Society movement and, along with Balkin, one of the founders of the Association for the Study of Law, Culture, and the Humanities. Given Balkin's undoubted interest in the study of law as a cultural phenomenon, Sarat asked, why didn't he join Sarat and found a Ph.D. program in law that would escape the constricted agendas that professional schools of law generally impose? Balkin gave his answer in a single word: "Xeroxing," by which he meant that because he worked at a richly endowed professional school, he got all his xeroxing for free, while Sarat still had to purchase copy cards. The tax professor down the hall, Balkin explained, subsidized his scholarship on law and post-structuralism. 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.

The moral of this story is that although "humanists," however defined, may be welcomed into the company of professional legal scholars, they are welcomed with the understanding that the humanities are not central to the legal academy's future. One sometimes sees at elite law schools seminars on subjects that would not be amiss in humanities departments, but these seminars are made possible because most law professors continue to teach the traditional skills of legal analysis and argument with their strongly prescriptive orientation. The humanities, rather than something that the law celebrates, as Learned Hand imagined, are something that the law enjoys as long as it can afford them.

VI. THE RHETORICAL DEMANDS OF LAW

There is, however, an important feature of professional legal education that has a strong connection to the humanities, at least as classically conceived: rhetoric. Simply put, lawyers are rhetors. They make arguments to convince other people. They deal in persuasion. Practicing lawyers represent clients, and they make arguments that support their client's interests. They do not actually have to believe what they say;

44. We use the word "publicly" because, of course, some scholars at law schools have effectively abandoned internalist and professional self-conceptions, moving, in effect, from Box 2 to Box 3. But most law schools certainly do not advertise this fact; rather, interdisciplinary scholarship is often sold to alumni as a particularly valuable example of Box 2—a prestige item that helps further the discovery and promotion of professionally useful knowledge. A school's interdisciplinary aspirations—and increasingly its international ones—are signs that the school is up to date and can attract the finest scholars. As a result, interdisciplinarity burnishes the school's status in the pecking order and helps preserve the value of the alumni's degrees. Establishing and preserving the professional status and accreditation of their students' law school degrees, is, after all, one of the major functions of American law schools; thus we can rest assured that no law school dean in his or her right mind would jeopardize that hallowed goal by publicly turning the law school's back on its professional aspirations.

rather, they need to produce arguments that their audience will believe. To that end, they will borrow from any source and from any species of learning they can to construct arguments that will persuade their audience and help their client win.

Although legal scholars do not have clients, this rhetorical orientation carries over to legal scholarship. Much legal scholarship aims to persuade other people about what legal rule or legal interpretation to adopt. As we have noted, this follows from law's narrow version of normativity—the notion that contributions to legal scholarship are judged in terms of how they might promote prescriptive solutions to legal problems.

Lawyers' roles as rhetors would seem to make them natural allies of the humanities. After all, rhetoric was one of the central subjects of the humanities for many years, and the work that practicing lawyers do today still has much in common with the lessons of classical rhetoric taught centuries ago in the great humanist academies of Ancient Greece and Rome.[45] It is no accident that the author of *The New Rhetoric*, Chaim Perleman,[46] was also a legal theorist, or that the literary critic Stanley Fish has more recently taken delight in studying—and manipulating—the rhetorical tropes of contemporary American legal theory.

Ironically, though, law's very foundations in rhetoric also limit its absorption of other disciplines in the humanities. Interdisciplinarity has made gains in law to the extent that it has allowed lawyers and legal scholars to do what they had already been doing—making persuasive arguments for the justification, change or interpretation of legal norms. This means, first, that lawyers are more likely to embrace disciplines that produce facts or bestow authority on facts that lawyers can use to impress others and persuade them. Other than history, the disciplines of the humanities have proven less useful for this purpose in recent years than have the social and natural sciences. Second, it means that when lawyers adopt knowledge and skills from other disciplines, the latter must be altered (some would say simplified or distorted) for the purpose of lawyerly persuasion. In short, legal scholarship borrows and transforms what it receives from other disciplines and converts it into persuasive arguments about legal norms. That which cannot be so used is disfavored, forgotten, or transformed until it can be so employed. When it comes to interdisciplinarity, law is truly the Procrustean bed. It welcomes visiting disciplines to serve its own ends, and then cuts or stretches their work to fit law's normative template.

We have already noted one consequence of law's incessant habits of borrowing: dilettantism. A second is perversion or prostitution: the subtle reorientation of the goals of humanities scholarship as it makes its way

45. *See* J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211, 211-14 (Peter Brooks & Paul Gewirtz eds., 1996).

46. CHAÏM PERELMAN, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969).

into law schools to serve the rhetorical interests and objectives of lawyers. History provides an excellent example. Most historians, at least in the current generation, are interested in complexity; they endeavor to understand the complicated and contingent events that produce a world. Lawyers are not interested in complexity in the same way. Devoted to making persuasive arguments on behalf of particular normative positions, lawyers are prone to say, "Because of what Madison said in this debate, we know that the Second Amendment's right to bear arms is a personal right. Therefore federal regulation on handguns is unconstitutional." Similarly, lawyers on the other side of the gun control controversy will reply that Madison's comment in another debate demonstrates that he was interested in protecting only the rights of states to form militias of their own. Therefore, they will argue, federal control of private handguns is perfectly constitutional. For lawyers, the value of history is instrumental. Lawyers use history to make firm and authoritative pronouncements about what the law means, and different lawyers seek to do this on opposite sides of a disputed legal issue using whatever historical evidence they can find. This is the sort of approach to history that makes professional historians blanch.[47] Not surprisingly, legal historians who work in areas with some relevance to present day policy debates often find themselves caught between two disciplinary worlds. Law does this to history (and to every other discipline, we might add) because of its professional orientation.

In their quest for persuasive arguments, lawyers are always in search of authority that they can use to convince judges, juries, legislatures, administrative agencies, and other legal decisionmakers of the merits of their positions. Lawyers seek two basic sources of authority: the authority of legitimate power, on the one hand, and the authority of right reason on the other. The first source of authority includes past acts of power that possess political legitimacy, such as the statements of legislators in

47. As Daniel Hulseboch explains:

> [C]onstitutional law studies and history are separate disciplines. Typically, historians and legal scholars are trained separately, publish in different journals, and contribute to distinct conversations. When they encounter each other in the same venue it becomes clear that they value different sources, ask different questions of those sources, and apply different measures of fitness to interpret them. Criticism usually comes from historians, who scoff at "law office history," which they see as instrumentalist and blinkered.

Daniel Hulseboch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 664 (2005). There is a lively debate on how lawyers use (or misuse history). For a sampling, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Eric Foner, *The Supreme Court's Legal History*, 23 RUTGERS L.J. 243 (1992); Laura Kalman, *Border Patrol: Reflections On The Turn To History In Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203 (1993); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J. L. & POLITICS 809 (1997); Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 (1995); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996).

considering a bill, or contextual information about a historical moment that helps to explain the meaning of past political and legal acts. The second source of authority involves knowledge and expertise that establish that one position is more normatively justifiable than another.

Inevitably, lawyers, judges, and legal scholars are drawn to use what they borrow from the humanities or the social sciences as means of producing authority. If the work of a discipline does not enhance the ability to persuade or establish authority, it will be discarded, or, in the alternative, it will be recrafted so that it does help serve that function. In this way complicated historical and economic studies are often reduced to footnotes at the base of a lawyer's brief, laying cheek by jowl with cases, statutes, and other forms of legal authority. (They will even appear in the index to the lawyer's brief as part of the "Table of Authorities"). Even though law repeatedly invokes history, the historical world perceived by most lawyers is quite different from that perceived by most professional historians. Historians are far less likely to draw confident conclusions from complicated and multi-layered historical materials, which often feature conflicting accounts and have the potential to support multiple interpretations.

Philosophy provides another example of how law makes use of other disciplines. During the twentieth century the status of philosophy has tended to rise in the legal academy to the extent that legal scholars could employ the authority of philosophical arguments to promote particular legal positions. For example, in 1969, when the Supreme Court was still experimenting with constitutional protections for welfare rights, Frank Michelman used John Rawls' ideas to argue that the Fourteenth Amendment guaranteed minimum levels of assistance to the poor.[48] However, as the political climate changed and the judiciary grew increasingly conservative, legal scholars lost interest in Michelman's Rawlsian project, not because it was philosophically unworthy but because it fit poorly with the evolving canon of legal materials. With typical wit, John Hart Ely deflated the turn toward philosophy by imagining a Supreme Court that declared, "We like Rawls, you like Nozick. We win 6-3."[49]

Indeed, philosophers may be surprised to learn that in American law schools Richard Rorty and Thomas Kuhn may have been every bit as influential as John Rawls in the late twentieth century. Rorty's antifoundationalism and Kuhn's theory of paradigm shifts in scientific research resonated with feminist and critical legal scholars who wanted to debunk law's claims to neutrality and objectivity; legal pragmatists, on the

48. Frank I. Michelman, *The Supreme Court, October 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

49. JOHN HART ELY, DEMOCRACY AND DISTRUST 58 (1973).

other hand, tried to show how these philosophers demonstrated the value of traditional legal methods.

Ronald Dworkin's work helped to generate an extremely fruitful conversation between law professors and political philosophers in the 1970s and 1980s. Once again, however, the legal academy tended to value philosophy to the extent that it focused on topics that lawyers were otherwise interested in, like the nature and scope of constitutional rights, the moral justifications for the economic approach to law, the legitimacy of judicial review, or the proper methods of constitutional interpretation. As liberal legal scholars gradually realized that the Warren Court was never coming back, and as law and economics established itself as a dominant method, the conversation between legal theory and philosophy died down. Professionally trained legal philosophers increasingly turned to highly technical topics that most legal theorists find of little relevance to their own work, while an increasingly conservative judiciary made grand philosophical arguments for liberal judicial activism and new fundamental rights seem quaint and altogether beside the point. By the mid-1990s, Dworkin himself argued that not even Hercules—Dworkin's name for his "ideal" judge—could legitimately find Michelman's theory of rights for the poor in the U.S. Constitution even though it was what liberal political theory required.[50]

If law absorbs the work of other disciplines to the extent that they assist lawyers with their quest for persuasion and authority, what disciplines have proved most useful to legal scholars? It turns out that there have been three of them, and it is fairly easy to see how each of them is well suited to producing rhetorical authority in debates about law and public policy. The first is economics, and all forms of rational actor theory generally. These are useful because they offer predictions about what human beings will do in certain situations, and thus what the consequences of any policy will be. Indeed, the wonderful thing about economic concepts is that they can often be employed to argue both sides of an issue, precisely the sort of tool that any good rhetor needs. Economics is also valuable because it offers a normative criterion—economic efficiency—that can be used as a general purpose substitute for other goals of the legal system. And, finally, economics is valuable because it proclaims itself the most scientific of the social sciences, and thus more easily allows lawyers to claim scientific status for their arguments, whether deserved or not. The second discipline is history, because history explains the meaning of past events, making it particularly useful for offering appeals to past decisions and traditions. The third discipline is philosophy, because philosophy supplies methods for appealing to right reason, and methods of explaining and justifying both legal concepts and the legal system.

50 . RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36 (1993).

These three—economics, history, and philosophy—have had more influence in legal scholarship than any other disciplines precisely because the skills, techniques, and knowledges they provide are most easily adapted to the forms of legal argument and legal scholarship that already existed prior to their entry. They are used by lawyers and legal scholars because they are most useful to them. And if one looks at the doctoral degrees of law professors who do interdisciplinary work, they are disproportionately in these three areas.

Why did sociology, psychology, literary theory, and anthropology not achieve the same status? One can easily imagine how these fields might be useful to lawyers' demands for normativity, persuasion, and authority. And indeed, psychology, which actually made some inroads at an earlier time, is now the most likely to join the ranks of the big three. Nevertheless, in terms of what lawyers and legal scholars do, these disciplines have—at least so far—proved least useful in making persuasive arguments and appeals to authority.

VII. LAW AND LITERATURE

No doubt many readers are aware of the presence over the past thirty years of a "law and literature" movement within the legal academy.[51] In fact, the so-called "law and literature" movement has always had at least two distinct strains. Robert Weisberg wrote a classic article in the first issue of the *Yale Journal of Law and the Humanities* in 1988, distinguishing between a focus on "the law *in* literature" and a quite different focus on the "law *as* literature."[52] The first approach is perhaps best typified by those professors who write about Melville's *Billy Budd*, which, with its dramatic encounter of the (alleged) claims of law against the competing claims of morality, is surely the most widely taught piece of literature in the American law school.[53] The second approach is typified by those scholars, including ourselves,[54] who were far less interested in discussing *Billy Budd* or Franz Kafka than with mining the writings of various literary theorists (such as Jacques Derrida or Stanley Fish) for the insights they might provide about the rhetorical devices employed in law, the way legal rhetoric constructed and concealed political power and

51. The movement began more or less with the publication in 1973 of *The Legal Imagination* by James Boyd White. JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973). Another important figure is Richard Weisberg, who was instrumental in founding the *Cardozo Studies in Law and Literature*, now published at Berkeley as the *Journal of Law and Literature*.

52. Robert H. Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988).

53. In *The Failure of the Word*, Richard Weisberg argues that Captain Vere in fact misstates the relevant British law and that Melville expected his more sophisticated readers to know that this was the case. RICHARD WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984).

54. *See, e.g.*, Sanford Levinson, *Law As Literature*, 60 TEXAS L. REV. 373-403 (1982); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 97 YALE L. J. 743 (1987).

authority, and the proper methods of legal interpretation. The "law as literature" branch also drew on a host of anti-foundational philosophers and thinkers ranging from Friedrich Nietzsche to Richard Rorty.

Most of the persons interested in "law *in* literature" accept the classic humanistic notion that one is morally improved by encounters with great art. James Boyd White has explicitly (even if, to our minds, rather implausibly) argued that truly "great" art has always conveyed admirable moral notions.[55] Perhaps not surprisingly, sustaining this position has produced significant disputes about the "real meaning" of such "great" works as *The Merchant of Venice*, with Richard Weisberg, for example, claiming that it is best understood as a critique of anti-Semitism rather than an illustration of the phenomenon.[56] Judge Richard Posner, by contrast, has rejected the claim that confronting questions of law and justice in great works of literature can edify and enlighten law students and legal practitioners.[57] Posner sees himself as a contemporary disciple of Holmes, sharing not only Holmes's acid skepticism about the claims of moral philosophers,[58] but also Holmes's esteem for economics as the guiding star for legal analysis. Posner has heaped scorn on the idea that the study of law and literature can improve anyone or, for that matter, provide significant illumination even as to the hermeneutics of legal analysis.

Both of us have, in the past, argued that "law *as* literature" is a more fruitful way to bring the insights of the humanities into legal scholarship than law in literature. More recently, we have argued that an even better analogy to law than poems and novels can be drawn from the *performing arts* such as music and drama. As we have elaborated elsewhere,[59] what these share with law is that they feature texts of some sort—think of scores, scripts, as well as constitutions, statutes, and regulations—and that these texts must be brought to life by performers. The performing arts involve a triangle of creators, interpreters, and audiences, each of which shapes what we call a successful or unsuccessful performance.[60] Indeed, "performance" involves not isolated individuals, but elaborate social networks that provide for the training and disciplining of performers—such as conservatories, drama schools, and law schools—as well as the panoply of different types of audiences and critics that shape the reception

55. *See* Sanford Levinson, *Conversing About Justice*, 100 YALE L.J.1855 (1991) (reviewing JAMES BOYD WHITE, JUSTICE IN TRANSLATION (1990).

56. RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 94-103 (1992).

57. RICHARD A. POSNER, LAW AND LITERATURE 306, 387-88 (rev. ed. 1998) ("Immersion in literature does not make us better citizens or better people.").

58. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999).

59. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991); J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513 (1999).

60. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 59, at 1529-1531.

and production of musical, dramatic, and legal performances. Nevertheless, however much we might hope that "law and literature" and, indeed, "law and the performing arts," might have a vital presence in the legal academy, we doubt they will rival the interdisciplinary influence of economics and history in the long run. Our central argument, after all, is that the success of interdisciplinary studies in law is strongly shaped by the professional orientation of law schools and the prescriptive nature of legal normativity. Those interdisciplinary studies will fare best that adapt themselves best to this institutional (and rhetorical) environment.

Precisely because law is a professional field devoted to rhetorical persuasion, it will never be fully taken over by any other disciplines, whether they be social sciences like economics and sociology, or humanistic subjects like history, philosophy or literary criticism.[61] Rather, law will co-opt the insights of those disciplines and turn them to its own uses. Yet ironically, law's thoroughly rhetorical nature, which most strongly connects it to the traditions of the humanities, also places the contemporary disciplines of the humanities at a relative disadvantage in legal scholarship. Law uses rhetoric to establish its authority and to legitimate particular acts of legal and political power. Nowadays, those tasks increasingly require legal scholars to adopt technocratic forms of discourse that draw more on the social and natural sciences than on the humanities. Lawyers are rhetorical opportunists and pragmatists: They are always looking for new ways to impress and persuade their audiences, and to bestow authority and legitimacy on themselves and on the institutions and practices they seek to defend. Whether justly or unjustly, the humanities rise or fall in relation to other disciplines to the extent that the humanities help lawyers perform these rhetorical tasks.

VIII. THE FATE OF THE HUMANITIES IN LAW

There has always been something puzzling about law's encounter with the humanities. Learned Hand (or James Boyd White) might wax eloquent about what lawyers can learn from the great humanists of the past and about how the humanities can enrich the lawyer's moral imagination, but these hopes must confront the harsh reality that there has always been a dehumanizing tendency in legal education. Legal education, and hence legal scholarship, tends to promote the tough-minded values that William James once famously described rather than the tender-minded ones.[62] Indeed, law seems almost to relish the extirpation of the latter, as if tender-heartedness were a mental disease that only the discipline of law could cure. The traditional first year of legal education discourages sentimentality; it is designed to show, as the poor and defenseless are caught in the web of legal doctrines in case after case, that these doctrines

61. Balkin, *Interdisciplinarity as Colonization*, *supra* note 35, at 965-67.
62. *See* WILLIAM JAMES, PRAGMATISM 7-21 (Bruce Kuklick ed., Hackett Pub. Co. 1981) (1907).

have their own logic; so to simply bemoan the results as unjust is no argument. A "good lawyer" is a rigorous thinker who does not waste time denouncing injustice at the expense of legal analysis. It is only the insufficiently rigorous and well-trained, whom legal training has inadequately "disciplined," who think that the solution to a legal problem is resolved by asking which result is more just. Even scholars who believe it important to emphasize issues of justice are careful to instill analytical rigor and skepticism in their charges. They too, seek to distinguish what is law from what is right.

The aggressiveness and unsentimentality of legal education, many think, has real consequences in the later careers of those trained in American law schools. A debate now raging through the legal academy concerns the work of Justice Department lawyers in the Office of Legal Counsel, several of them drawn from the highest reaches of the elite legal academy, who drafted memoranda for the Bush Administration that narrowly and legalistically defined "torture" so that it could be said that American soldiers and CIA operatives were not perpetrating it.[63] These same memoranda forcefully argued that the President as Commander-in-Chief had virtually absolute powers to conduct warfare; therefore neither Congressional statutes nor international agreements barring torture could restrict his authority. Legal academics have debated whether these lawyers were simply doing their professional duty by representing their clients, or, on the contrary, were betraying their professional commitments in the deepest sense.

Here it is useful to return to Oliver Wendell Holmes, that most iconic of figures in American law. Holmes once suggested that his epitaph should read: "Here lies a supple tool of power."[64] He once wrote to Harold Laski, "If my fellow citizens want to go to Hell I will help them. It's my job."[65] Once when Learned Hand shouted to Holmes as they were departing company, "Well, sir, good-bye. Do justice." Holmes sharply replied, "That is not my job. My job is to play the game according to the rules."[66] One wonders whether Holmes would have been at all shocked by the Office of Legal Counsel's "torture" memos or would have seen them simply as quotidian examples of lawyers' stock in trade—coming up with arguments

63. Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (discussing the application of 18 U.S.C. §§ 2340-2340(A) (2000). *See generally* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1.

64. Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 249-50 (1964) (quoting Holmes).

65. Letter from Oliver Wendell Homes to Harold J. Laski (March 4, 1920) *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 249 (Mark DeWolfe ed., 1953).

66. HARRY C. SHRIVER, WHAT GUSTO: STORIES AND ANECDOTES ABOUT JUSTICE OLIVER WENDELL HOLMES 10 (1970).

to justify whatever their clients would like to do. One equally wonders whether Hand would have been taken aback by these memos, and whether he seriously believed that exposure to the works of Plato, Montaigne, or any of the other authors he mentioned in the quotation that opens this essay would have prevented these memos, or, at the very least, led their authors to leaven their lawyerly arguments with greater moral concern. Holmes was a notably well-read man, but we have little doubt that he would have scoffed at any idea that reading literature or engaging in the humanities would have the edificatory effect that Learned Hand seemed to advocate. He probably would have insisted that 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 or, as we learned during World War II, even a Nazi can thrill to Wilhelm Furtwangler conducting Beethoven.

Nor should we discount the extent to which Hand's admonition to study the humanities may have been generated, at least in part, by a sort of cultural elitism, in particular, his concerns about the ambitious, grasping parvenus who were invading the legal profession of his day. For Hand and for many of the people in his Philadelphia audience, submersion in the humanities might have been a way of defending the values of the traditional legal establishment. (There is an obvious analogy to the development of English literature as an academic subject in the eighteenth and nineteenth centuries to civilize the children of working men who were entering British universities for the first time.[67])

The political meaning of promoting the humanities in law has changed in half a century, and along with it the power and influence of the humanities themselves. Hand wrote when the humanities formed the deep roots of an imagined republic of letters in which elite lawyers believed they participated. Contemporary legal scholars like James Boyd White and Patricia Williams use the humanities not to uphold the values of the legal establishment, but rather to criticize those values in the name of more egalitarian sensibilities which they (correctly or incorrectly) link to a humanist approach. Contemporary law and literature scholars now offer the humanities as an antidote to, or an escape from, a legal world which, they believe, has become all too technocratic and divorced from any human values save economic efficiency.

Does this mean that the humanities have been thoroughly routed by the forces of social science and rational actor methodologies, sothat they no longer play a significant role in the legal academy or the legal profession? Certainly not. The influence of the humanities will be filtered through law's professionalism and prescriptivism, and hemmed in by law's institutional constraints; yet the law will always maintain a genuine if uneasy relationship with the humanities as long as it remains a thoroughly

67. *See* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 25 (1983).

rhetorical enterprise. Whether this kind of relationship will—or should—satisfy those humanists who gaze on the legal academy from the outside remains an open question.