

The Challenge Ahead

Owen M. Fiss

The Yale Law School has a long and distinguished tradition of interdisciplinary work. In fact, sometimes its involvement with allied disciplines has been so intensive and far-reaching as to call into question its identity as a law school. This journal, founded by a remarkable group of students in the Law School and the Graduate School, continues in that tradition, but has created for itself a unique challenge—the definition of its field of inquiry. The law has been cojoined with a discipline, or group of disciplines, or a perspective—“the Humanities”—that itself has no easily ascertained boundary or content.

Academic administrators can, of course, easily define “the Humanities” by reference to their catalogues: “the Humanities” consist of those departments which are neither part of the division of the social sciences nor the physical and biological sciences. The inadequacy of this institutional definition of “the Humanities” becomes clear, however, when we consider the example of “history,” or even worse, “political science”—are they part of “the Humanities,” or do they belong in the social sciences? Of even greater significance for purposes of defining the scope and mission of this journal, is the failure of this institutional approach to disclose the method or perspective common to the disciplines that might be bunched under the banner of the Humanities.

In some academic circles today, it is fashionable to use the concept of “interpretation” to define the humanistic approach and the present editors of this journal are obviously drawn to that strategy. One cannot help but be struck by the frequent references in their prologue to “culture” and “meanings,” and by their proclamation, “Law is an interpretive concept, and in a world in which ‘there are no facts, only interpretations’ we must grow more reflective in our examination of the meanings embedded in our culture.” In my view, however, any attempt to define “the Humanities” in terms of interpretation risks stretching the concept of interpretation to the point of utter distortion or possibly excluding disciplines such as philosophy that must be at the core of any understanding of “the Humanities” or of any interdisciplinary investigation of “Law and the Humanities.” John Rawls—probably the most prominent American philosopher and the one whose work has had the greatest impact on law—has in fact (recently) introduced contextual or historicist elements into his work, but no one

would think that *A Theory of Justice* is an exercise in interpretation or a cultural study.

In the years ahead, the editors of this journal will have to struggle with the question of domain and definition, perhaps more so than usually is the case. These struggles need not be endless or fruitless—they can become the occasion for great surges of creative energy. For this to occur, however, the editors should not be ruled by any institutional definition of “the Humanities”; nor should they search for a universal or a priori criterion, such as “interpretation,” that might be used as a boundary marker. Such a marker probably does not exist. Instead, the emphasis should be placed on the specific historical forces that led to the founding of this journal. Understanding these conditions will not fix boundaries, but it will reveal the deepest aspirations of the founding editors and thus give the journal a thrust and direction that in the years ahead should be respected, and that today should be celebrated.

Over the last two decades, economics has emerged as the queen of the social sciences, or for that matter of the university. The number of students and faculty attracted to its method and courses has grown enormously. The economic model—individuals trying to maximize their welfare under conditions of scarcity—now dominates a number of allied disciplines such as history, political science, and sociology. Its influence can even be found in philosophy, particularly in the work of those who seek to derive principles of justice from a highly individualistic process of rational choice.

The impact of economics has been felt in the law too, and is nowhere more manifest than in the emergence of “Law and Economics” over the past two decades as *the* interdisciplinary method for studying law. Economists are now on the faculties of all major law schools—Yale has two. Many law professors have received advanced training in economics, and see themselves as wholly committed to applying economics to law. Books and articles in this genre have proliferated. Over the past decade Yale has initiated two journals—one student edited (*Journal on Regulation*) and the other faculty edited (*Law, Economics and Organization*)—principally devoted to Law and Economics. A number of wealthy foundations have established training programs in economics for judges and law professors, and have lent their resources to this branch of interdisciplinary work because Law and Economics has helped supply the theoretical foundation for the trend toward deregulation and privatization.

The success of Law and Economics has, in very recent years, provoked a reaction, and the founding of this journal can be seen as part of that reaction. (No wonder that Richard Posner, one of the leading figures in the Law and Economics movement, has at this very moment raised *his* voice against the increasing popularity of Law and Literature—an area of interdisciplinary work which has challenged the hegemony of Law and

Economics and one which this journal is meant to nourish.) Part of the impetus is of course political—a desire to escape from the conservative political thrust of Law and Economics, a thrust which, I believe, stems not just from the individualistic orientation contained within all economic thinking, but also from the willingness of the practitioners of Law and Economics to see the market—bilateral exchange between two freely choosing individuals—as the preeminent mechanism for ordering social relations.

In this respect, the founding of *Yale Journal of Law & the Humanities* parallels the launching of two other student-edited journals at Yale this year—*Law & Liberation* and *Law and Feminism*. The political impulses behind those two journals are more explicit and perhaps more sharply focused, but they are not different in kind from those of *Law & the Humanities*. They are all left leaning, and thus part of the progressive and liberal revival now taking place at Yale and perhaps at other law schools. Though the editors of this journal avow a deep and genuine commitment to pluralism—one buttressed by the broad reach of this inaugural issue—this commitment springs forth, I believe, not from an indifference to ideology, but from a belief that the interdisciplinary study of the law is not the property of the right. In founding this journal, the editors seek to alter the political direction of interdisciplinary work in the law by altering the disciplines with which the law is allied.

But only part of the story is political, perhaps not the most important part. The rest is theoretical. The conservative political orientation of Law and Economics stems from its essential commitment to the market, but that commitment itself rests on a theoretical premise which this journal—or for that matter any academic project that invokes the name “the Humanities”—rejects, namely, that social inquiry can eradicate or ignore value judgments. The market is not a value-generating mechanism, but one that seeks to maximize the aggregate satisfaction of preferences (in the sense that both the shopkeeper and the consumer are made better off by the exchange of money for goods). Thus to claim, as the exponents of Law and Economics do, a centrality for the market—to make “market failure” the precondition for state intervention or to insist that such intervention replicate the result of the well-functioning market—they must reduce values to preferences and then assume that each preference has an equal claim to satisfaction. Only then can social mechanisms and regulatory devices—the market or law—be described in purely quantitative terms and questions of value eliminated.

In founding this journal, and building (or rebuilding) a bridge between the law and “the Humanities,” the editors mean to restore to legal studies a proper place for the question of values. More specifically, they mean to contest two features of modern legal scholarship that can be traced to the hegemony of Law and Economics scholarship. One is the heavy emphasis

on instrumental or purely technocratic inquires. Once the social goal can be agreed upon and formulated in purely quantitative terms, the central normative task for the legal academic becomes instrumental, that is, identifying those rules or legal situations that would most likely maximize the aggregate satisfaction of preferences. The second feature concerns the effort of Law and Economics—like economics itself—to appropriate some of the charisma that belongs to mathematics and the physical sciences—reigning monarchs of the university in the late 1950s and the 1960s. The practitioners of Law and Economics would have us believe that the only true method for the study of law is a scientific one. This scientific pretension—called into question by this journal—is most dramatically manifest in the effort of the practitioners of Law and Economics to introduce into legal scholarship (and even into judicial opinions) the value-less and formal language of mathematics, and to place a premium upon purely behavioral or empirical studies, which generally presuppose the existence of some measurable goal and a form of activity that is fully observable and which, like rocks rolling down a hill, remains undisturbed by observation.

To combat the instrumentalism and scientism of Law and Economics and to restore an appropriate place for value judgments in the study of law, one need not look outside the law and cojoin law with other disciplines such as literature, history, philosophy, psychiatry, which make inquiry into values central. One could look to law itself, as we did in the sixties. In fact, looking outside the law is risky—interdisciplinary work often blurs the distinctive qualities of the law, or widens the gap between the academy and the professional, rendering legal academic inquires of limited relevance to the practicing lawyer.

The sad fact, however, is that these days it is hard to look upon the law alone for those purposes, especially as it is forged by a Supreme Court that has increasingly become fascinated with separation of powers issues, and has turned its back on the Bill of Rights, the Great Book of our legal system. In these circumstances, interdisciplinary studies such as promised by this journal are not gratuitous, an idle display of learning acquired elsewhere, but an imaginative response to urgent practical needs. It is an attempt to free contemporary law from its own barrenness.