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978-0-521-89905-5 - Law and the Humanities: An Introduction

Edited by Austin Sarat, Matthew Anderson and Cathrine O. Frank

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## Introduction

### On the Origins and Prospects of the Humanistic Study of Law

Austin Sarat, Matthew Anderson, and Cathrine O. Frank

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

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

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

Today, scholars in that field are supported by a well-developed infrastructure of professional associations and scholarly journals,<sup>1</sup> but the precise contours of this field are anything but clear. What is its relationship to law and literature? What, if any, relationship does it have to the qualitative social sciences, for example, anthropology? In addition, there are open questions about the significance of Law and Humanities work. What payoff does work in the humanities promise for legal scholarship and legal understanding? How does the examination of law enrich the humanities?

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

<sup>1</sup> Professional associations include: the Association for the Study of Law, Culture, and the Humanities; the Law and Society Association; the American Society for Legal History; the Society for the Study of Political and Legal Philosophy; and, since 2003, the Consortium of Undergraduate Law and Justice Programs, whose stated purpose is “to support and promote programs in law and justice broadly conceived.” There are now three academic journals devoted solely to the study of law and the humanities: the *Yale Journal of Law and the Humanities*; *Law, Culture, and the Humanities*; and *Law and Humanities*.

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a stock taking of different national traditions and of the various modes and subjects of Law and Humanities scholarship. It is also an effort to chart future directions for the field. By reviewing and analyzing existing scholarship and providing thematic content and distinctive arguments, it offers to its readers both a resource and a provocation. Thus, *Law and the Humanities: An Introduction* marks the maturation of this “law and” enterprise and will, we hope, spur its further development.

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

Efforts to bring humanistic perspectives to bear on legal questions are by no means new.<sup>2</sup> As the statement by E. W. Huffcutt in the epigraph attests, a sense of the interrelatedness of law and the humanities was self-consciously articulated in the Anglo-American tradition during the Victorian era, alongside a pronounced interest – notably among lawyers – in the interrelations between law and literature. (Huffcutt defined the humanities as literature, and literature as poetry and fiction.) Reaching back to the classical period, one hears distinct echoes of this idea in Cicero’s admonition that rhetoric without poetics is a dead letter.<sup>3</sup>

The first blush of the humanistic study of law in the modern era occurred with the exploration of the conjunction of law and literature, an exploration sparked in turn by the publication of James Boyd White’s seminal textbook, *The Legal Imagination* (1973).<sup>4</sup> As is now well known, since that book’s publication scholars have devoted themselves to the examination of law in literature, ferreting out legal themes and images from canonical as well as less well-known works of fiction.<sup>5</sup>

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

<sup>3</sup> Peter Goodrich, “Rhetoric and Somatics: Training the Body to Do the Work of Law,” *Law/Text/Culture* 5 (2002): 241, 253, quoted in Susan Sage Heinzelman, “‘Termes Queinte of Law’ and Quaint Fantasies of Literature,” *Law in the Liberal Arts*, 166–92, Austin Sarat, ed. (Ithaca and London: Cornell University Press, 2004): 16.

<sup>4</sup> James Boyd White, *The Legal Imagination* (Chicago and London: University of Chicago Press, 1973).

<sup>5</sup> Law and Literature as a movement is typically divided into two related but distinct approaches to the convergence of the legal and the literary: law in literature and law as literature. On the one hand, these designations are historical terms, that is, ones that mark out phases – here the two earliest – in a movement that has been succeeded by increasingly complex and expansive notions of what constitutes

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Still others have been more concerned with the literary dimensions of legal life, identifying features of narrative, rhetoric, and genre in lawyers' arguments or judicial opinions.<sup>6</sup> In the formation of the community of Law and Humanities scholars, this last emphasis has been most influential and most controversial, and White has been

either the legal or the literary text. On the other hand, the phrases are definitional and denote two broad and persistent categories or rubrics with their respective evolutions. Law in literature, for example, arguably begins with John H. Wigmore's various classifications of the "legal novel" in "A List of Legal Novels," *The Brief* 2 (1900): 124–7. For representations of the lawyer-as-figure of resentment, see Richard H. Weisberg's *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven: Yale University Press, 1984) as well as *Poethics, and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992).

For studies that contextualize literary representation in legal history, see for example, Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton: Princeton University Press, 2003); Brook Thomas, *Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville* (Cambridge: Cambridge University Press, 1991); Jon-Christian Suggs, *Whispered Consolations: Law and Narrative in African-American Life* (Ann Arbor: University of Michigan Press, 2000); Deak Nabers, *Victory of Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852–1867* (Baltimore: Johns Hopkins University Press, 2006).

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

<sup>6</sup> Where studies of law in literature focus on literary (typically narrative, novelistic) representations of legal professionals, the use of legal forms and documents, legal settings or, more fundamentally, the pervasiveness of legal culture that literature both helps to constitute and critique, law as literature reads the law for its own narrative procedures and rhetorical functions. For Benjamin N. Cardozo's classic argument for reading law as literature, see "Law and Literature," *The Yale Review* 14 (1925): 699–718. For a general assessment of the place of storytelling in law, see Peter Brooks and Paul Gewirtz's collection of essays *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996). Martha Nussbaum discusses the empathic potential of the narrative imagination in *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge, MA: Harvard University Press, 1997). For studies of law indebted to the use of literary critical methods of interpretation – the hermeneutic approach to law – see Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (London: Blackwell, 1986) and *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York: St. Martin's, 1987); Sanford Levinson and Steven Mailloux, eds., *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston: Northwestern University Press, 1988). For rhetorical and cultural analysis of specific legal processes, the act of confession, for example, see Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000).

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among the most prominent of its advocates. For more than three decades he has argued that legal education can and should be a liberal education, in the Arnoldian sense of a formation that develops a sense of culture. Lawyers, he said, should be given “a training in the ways one can learn from one’s own experience and acquire experience of a new and better kind; in the ways one can learn from one’s culture and contribute to it; in the ways one can live with an increased awareness of the limits of one’s knowledge and mind, accepting ambiguity and uncertainty as the condition of life.”<sup>7</sup>

White’s concern lies with how lawyers are trained to think, write, and speak. He calls for legal education to cultivate in students a self-reflexive sense of how they use legal forms as they acculturate to law’s language and processes.<sup>8</sup> If this point of view could be reduced to a maxim, it might be this: Law is a language and language matters. Another way to put it would be to say that the education of lawyers should include the cultivation of a meaningful appreciation of law as a rhetorical practice – not just in the sense of an art of persuasion, but of a disciplined, textured, self-directed habit of reading, speaking and, above all, writing, that has at its root a critical understanding of the links among language, consciousness, and power. The idea is that what we say matters and is indissociably bound up with the forms in which we say it. These forms may not be of our devising, but this does not mean that we cannot make them our own; and in the case of law, where the consequences of our rhetorical acts of interpretation are not merely symbolic – law takes place on a “field of pain and death”<sup>9</sup> – we owe it both to ourselves and to each other to assume responsibility for our use of the linguistic forms and processes of law and to speak and write in a voice that is our own. “The central task for the lawyer from this point of view,” White observes, “is to give herself a voice of her own, a voice that at once expresses her own mind at work in its best way and speaks as a lawyer, a voice at once individual and professional.”<sup>10</sup>

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

<sup>7</sup> White, *The Legal Imagination*, xv.

<sup>8</sup> *Ibid.*, xxi: Consider, for instance, the following passage from his “Introduction to the Student.” “To ask how to read and write well is to ask practically everything, one might say, and indeed a legal education could be defined by saying that one learns to read and write the professional language of the law, to master a set of special ways of thinking and talking. Your central question in the course could then be put this way: what does it mean to give yourself such an education, to learn to think and speak like a lawyer? You will see that the question so stated has two obvious branches: how do you do it, in what does the lawyer’s art consist? And what does it signify to have mastered that art – what have you gained, what lost?”

<sup>9</sup> Robert Cover offers this formulation in his celebrated essay, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601.

<sup>10</sup> White, *The Legal Imagination*, xv.

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*Living Speech* (2006), calls “the empire of force.”<sup>11</sup> We need to make sure that our speech is alive – that we mean what we say, say what we mean, and have something to say – so that our language, especially our legal language, does not become an empty instrument for the unrestrained exercise of power.

Indeed, if there is a concern that runs throughout and drives White’s work, it is one born of a keen sense of what happens to legal language—and thus to the human beings whose lives are subject to it – when legal actors have to come to terms with law’s fragmentariness, inconsistencies, incommensurabilities, and attendant uncertainties. When confronted with these and with the moral pressures of adjudication, the temptation is great to shirk the burden of judgment and displace the locus of responsibility onto the language of law itself, to empty law of its meaning and conceive of legal judgment as the impersonal, methodological enactment of a linguistic form, a mere procedure.<sup>12</sup>

Here it seems that White’s version of law and literature is at bottom a critique of liberalism.<sup>13</sup> In this connection, the following description of Lionel Trilling’s

<sup>11</sup> James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006).

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

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

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landmark work of literary criticism *The Liberal Imagination* (1950),<sup>14</sup> in a recent retrospective essay by the American literary scholar Louis Menand, merits lengthy citation, as it provides a context for understanding the inspiration behind White's work:

In Trilling's view, the faith that liberals share, whether they are Soviet apologists, Hayekian free marketers, or subscribers to *Partisan Review*, is that human betterment is possible, that there is a straight road to health and happiness. A liberal is a person who believes that the right economic system, the right political reforms, the right undergraduate curriculum, and the right psychotherapy will do away with unfairness, snobbery, resentment, prejudice, neurosis, and tragedy. The argument of "The Liberal Imagination" is that literature teaches that life is not so simple – for unfairness, snobbery, resentment, prejudice, neurosis, and tragedy happen to be literature's particular subject matter. In Trilling's celebrated statement: "To the carrying out of the job of criticizing the liberal imagination, literature has unique relevance . . . because literature is the human activity that takes the fullest and most precise account of variousness, possibility, complexity, and difficulty." This is why literary criticism has something to say about politics.<sup>15</sup>

There is, here, a clearly discernible line of influence and inspiration that runs from Arnold's *Culture and Anarchy* (1869),<sup>16</sup> through Trilling, to White's seminal book, *The Legal Imagination*. Menand's account of Trilling's text enables us to read White against the contextual backdrop of a critique of liberalism and to further our understanding of White's vision of the value of literature for legal education. If we follow Trilling's lead, literature can help cultivate a capacity for and tolerance of nuance, ambiguity, and uncertainty – what White calls the limits of knowledge and mind and Keats would term "Negative Capability"<sup>17</sup> – which in turn makes it possible to imagine integrating literature with the best uses of legal language. In other words, a literary sensibility helps legal education develop into a form of liberal learning.

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

classical Greece and Christianity. See *Putting Liberalism in its Place* (Princeton: Princeton University Press, 2006) 144.

<sup>14</sup> Lionel Trilling, *The Liberal Imagination* (New York: New York Review of Books, 2008).

<sup>15</sup> Louis Menand, "Regrets Only: Lionel Trilling and His Discontents," *The New Yorker* 29 Sept. 2008: 82.

<sup>16</sup> Matthew Arnold, *Culture and Anarchy* (Cambridge: Cambridge University Press, 1990).

<sup>17</sup> "Keats to George and Thomas Keats," London, 21 December 1817, *Letters of John Keats*, Robert Gittings, ed. (Oxford: Oxford University Press, 1970) 43: "I had not a dispute but a disquisition with Dilke, on various subjects; several things dovetailed in my mind, & at once it struck me, what quality went to form a Man of Achievement especially in literature & which Shakespeare possessed so enormously – I mean *Negative Capability*, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason."

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lend integrity to legal language not only because it can help us cultivate a sensibility and a voice as writers, but also because the psychological intimacy it affords makes possible moments of sympathetic identification with people whose experiences and contexts may be quite different from our own. This capacity to cultivate sympathy opens the possibility for literature to have a salutary counter-hegemonic effect; it can raise consciousness about the effects of power and historical patterns of oppression, exploitation, and marginalization. In White's view, we must not only make the forms of legal language our own, but also develop and integrate a sensitive understanding of the ways in which language can shape our perception of others and, thus, the way we treat each other. In short, literature can help us see, understand, and identify with those whose lives and experiences are often illegible before the law.

White's emphasis on the discursive and rhetorical foundation of communities provided and still provides an important impetus for humanists to study law and to bring their insights to it. Yet for some it seems too bounded, too self-contained. For them it describes one important dimension of the way communities are formed and transformed, but, as Robin West argues in "Communities, Texts, and Law: Reflections on the Law and Literature Movement," it leaves out much that is nontextual in our interaction with actual people.<sup>18</sup> The textual and the nontextual often overlap, to be sure, but insofar as many people simply cannot participate in the reading, writing, and critical activity White describes, West observes, "Our community, defined by the interactive effects we have on others, is considerably larger than the community as defined by our texts."<sup>19</sup>

Putting her "interactive community" against White's "textual" one, she freely allows that texts, whether legal or literary, have the capacity to "reflect," "constitute," and "convey" "moral and cultural traditions,"<sup>20</sup> but their reach is not as extensive as, for example, that of a particular law, which actually shapes how we as people interact with one another. Understood as a real effect instead of a textual production, law impacts the subjectivity even of those who will never be part of the textual community.<sup>21</sup> She also points out, one text will function differently in the two registers. *Dred Scott*, for example, embodied a moral respect for property within the textual community, but its impact on the interactive community was to make property of slaves.

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

<sup>18</sup> Robin West, "Communities, Texts, and Law: Reflections on the Law and Literature Movement," *Yale Journal of Law and the Humanities* 1 (1988): 154. West writes: "A law can affect the subjectivity of the lives of many creatures – human and otherwise – who will never produce, participate in, or criticize its textual meaning." Robin West, "Communities, Texts, and Law: Reflections on the Law and Literature Movement." *Yale Journal of Law and the Humanities* 1 (1988): 154.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

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study of the way law constitutes persons proceed? Shifting our attention from the relative merits of academic versus practical approaches to law and legal texts, West encourages an appreciation of those points at which the theoretical merits of law run up against the real, potential travesties of its impact in human experience. Hers is an argument, therefore, about the relationship between legality and justice. West sees that our judgment will depend on whether we position ourselves within the textual or interactive community and concludes that “justice” might better be gauged by law’s effects on people, even where that seems to contradict the central texts of law.<sup>22</sup>

Turning to the “narrative voice and law-and-literature movement,” West declares that these have become the best, if not the only, means for lawyers to hear the stories of the “textually excluded” (inclusive of the natural world).<sup>23</sup> Seeing only a partial solution in White’s efforts to improve community by creating “better readers,” West looks for a way to create “better people.”<sup>24</sup> The best way of changing how we treat others in the interactive community, how lawyers understand the human consequences of their legal texts, she argues, was to heed the stories of the oppressed.

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

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

Fifteen years after White’s book, in 1988, the first scholarly journal devoted exclusively to the field, the *Yale Journal of Law and the Humanities*, was launched. Born at the Yale Law School, the journal bore a prestigious pedigree, but more than that it embodied an aspiration to be something other than a traditional law review.<sup>25</sup>

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

<sup>22</sup> *Ibid.*, 155.

<sup>23</sup> *Ibid.*, 156.

<sup>24</sup> *Ibid.*

<sup>25</sup> Thus, its editorial staff was drawn from the graduate school at Yale as well as the law school.



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preliminary to “real work” but as an adjunct to it.<sup>26</sup> Sensitive to the material as well as symbolic effects of legal culture, the editors urged cultural analysis that would look at the way legal culture, in concert with “other cultural forms,” organizes and informs perception in the first place.<sup>27</sup> As they put it: “The study of law must be informed by an examination of the socio-cultural narratives that shape legal meaning and empower legal norms; conversely, the study of culture requires an understanding of the law as a normative edifice and coercive system.”<sup>28</sup> In other words, the layperson’s conception of law and, more importantly, the average person’s affective attachment to and support of the idea of law is generated through culturally specific narratives that can become more apparent and be better understood when approached from the perspective of the humanities.

Conversely, it is only when we appreciate that even aspects of our subjective selves as fundamental as personal desire have been informed by the complementary legal processes of reward and punishment that we can begin to comprehend why we tell the particular stories we do.<sup>29</sup> These two projects, the editors suggested, would encourage readers to become more self-conscious and reflective cultural critics, not for the sake of an idle, academic interest but specifically to “develop a critical stance that allows us to imagine a more tolerant, plural community.”<sup>30</sup>

In light of such a far-reaching remit, Owen M. Fiss predicted that the journal’s greatest challenge would be to provide a “definition of its field of inquiry,”<sup>31</sup> or to answer “the question of domain and definition”<sup>32</sup> – and he was not wrong. The task was made especially challenging, as he saw it, because the allied field of the humanities was (and remains) itself so capacious: neither institutional attempts to define it (merely as a group of disciplines not found in the social and natural sciences), nor efforts to identify a common methodological foundation (for example, in interpretation) could succeed because they were either too restrictive or too broad, respectively. If resistant to categorical definition, however, the field could still be described, and in no way better than by considering the actual motive forces and cultural conditions that informed the journal’s creation.<sup>33</sup>

Law and humanities were, as Fiss saw it, a reaction specifically to law and economics and the dominance of “the economic model” – “individuals trying to maximize their welfare under conditions of scarcity” – of social organization.<sup>34</sup> As the

<sup>26</sup> “Note from the Editors,” *Yale Journal of Law and the Humanities* 1 (1988): v.

<sup>27</sup> *Ibid.*, vi.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Austin Sarat and Thomas R. Kearns, “Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life,” *Law in Everyday Life*, Austin Sarat and Thomas R. Kearns, eds. (Ann Arbor: University of Michigan Press, 1993) 27–32.

<sup>30</sup> “Note from the Editors,” vi.

<sup>31</sup> Owen M. Fiss, “The Challenge Ahead,” *Yale Journal of Law and the Humanities* 1 (1988): viii.

<sup>32</sup> *Ibid.*, ix.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

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articles in the inaugural issue show, law and humanities scholarship then was identified with new historicism, cultural studies, and, most strongly, with law and literature all of which shared a desire, according to Fiss, to escape the individualistic, conservative politics of an economic movement that assumed market forces were the best regulator of social – and human – relations.<sup>35</sup> He is quite clear that at its inception Law and Humanities had a politics (“left-leaning,” “progressive and liberal”), but he suggested that theoretical foundations were even more important than political orientations.

In contrast to the “instrumental” view of law’s function and the “scientism” of its study,<sup>36</sup> law and humanities – and the journal specifically – aimed “to restore to legal studies a proper place for the question of values.”<sup>37</sup> Having offered this view, however, Fiss is careful to point out the potentially negative side effects of the assumption that law itself cannot raise questions about value without being wedded to another value-oriented discipline.<sup>38</sup> (In fact, where interdisciplinary work makes law look less like law, he suggested, it diminishes the professional relevance of academic inquiry.) Ever attuned to the present cultural conditions, however, Fiss’s sense of the “barren” state of legal studies and legal practice made humanistic inquiry into law an “imaginative response to urgent practical needs.”<sup>39</sup>

The editors and Fiss remind us that they, like White, see in the union of law and the humanities a corrective to certain tendencies in law schools and in professional legal education, among them most importantly the rise of value neutral, technocratic approaches which allegedly undermine the vision of lawyer as “statesman.”<sup>40</sup> In addition, Guido Calabresi, then dean of Yale Law School, suggested that turning to the humanities was important to the degree that it “feeds” law.<sup>41</sup> For him the test of law and humanities scholarship would be its impact on the character and conception of lawyers. Thus he recounted how former Supreme Court Justice Hugo Black told him, on the second day of his clerkship, that if he had “never read Tacitus . . . then, you are not a lawyer.”<sup>42</sup>

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

<sup>35</sup> *Ibid.*, x.

<sup>36</sup> *Ibid.*, ix.

<sup>37</sup> *Ibid.*, x.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, x–xi.

<sup>40</sup> *Ibid.*

<sup>41</sup> Guido Calabresi, “Introductory Letter,” *Yale Journal of Law and the Humanities* 1 (1988): vii.

<sup>42</sup> *Ibid.*