CHAPTER 1

The Revival of Legal Humanism

Klaus Stierstorfer

The chapter title rightly implies that the connection between law and "the humanities" is not a recent invention. It is prominent in classical antiquity, most notably in Aristotle,[1] and intimately tied in with the Western origins of rhetoric;[2] it can be traced in Hebrew cultural history, where the central, closely allied corpora of the *halachah* and the *haggada* could be translated as "law" and "literature" respectively, as P. G. Monateri points out;[3] and wherever an inclusive definition of "literature," following the Latin meaning of *litteratura* as "use of letters, writing, system of letters . . . writings, scholarship,"[4] has been applied, law texts of all kinds would automatically fall within the wider purview of literary or textual scholarship. Thus, when the first complete narrative history of English literature appeared in 1836, Blackstone's *Commentaries on the Laws of England* or Jeremy Bentham's writings on law were, as a matter of course, presented in their respective periods under the category of "Miscellaneous Writers," and hence as part and parcel of that literary history, just as with major works in historical scholarship or in science (such as Newton's *Principia*).[5] The historical depth, but also the conceptual as well as quantitative scope of this tradition, especially in the connection between literature and the law, has been

[1] See for instance Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 2014).
[2] Michael Gagarin, "Rhetoric and law in Ancient Greece" in Michael MacDonald (ed.), *The Oxford Handbook of Rhetorical Studies* (Oxford: Oxford University Press, 2014). See www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199731596.001.0001/oxfordhb-9780199731596-e-002 (accessed October 7, 2016).
[3] Pier Giuseppe Monateri, "Diaspora, the West and the law" in D. Carpi and K. Stierstorfer (eds.), *Diaspora, Law and Literature* (Berlin and Boston: De Gruyter, 2016), pp. 7–22, 13.
[4] "literature, n." *OED Online*, esp. "etymology" and meanings 1, 2, 4, and 5. See www.oed.com/view/Entry/109080?redirectedFrom=literature#eid (accessed October 7, 2016).
[5] Robert Chambers, *History of the English Language and Literature* (Edinburgh: William and Robert Chambers/London: Orr and Smith, 1836), pp. 185f, 263f.

impressively documented in recent bibliographies.[6] Moreover, myth-like founding figures and events have also emerged. In the German tradition, there is Jakob Grimm's famous assertion that law and literature had "risen from the same bed,"[7] and the fact that the first meeting of *Germanisten*, which memorably took place in 1846 in Frankfurt, was convened by a law professor and emphasized in its denomination not its object of study in a body of texts in the German vernacular, but an orientation toward Germanic as opposed to Roman law.[8] Further instances can be traced in the past where legal scholars or practitioners, such as C. K. Davis or James Fitzjames Stephen in Britain or John H. Wigmore and, most notably, Benjamin N. Cardozo in the United States, had literary leanings and hence frequently figure in a pre-history to the developments described in the following.[9]

For all this long and chequered relationship throughout the course of Western cultural history, however, the renewed emphasis on the necessity of exchange between law and the humanities with the aim of "rehumanizing" the law is recent. The revival of legal humanism is now regularly identified with a particular moment in American academia in the 1970s: the rise of what has come to be labeled as the "law and literature movement." Although the developments in that particular phase of legal scholarship are steeped in a long tradition of humanist approaches to the law, their specific impact was incisive and had a long-lasting influence on what has since been done in the rich and blossoming interdisciplinary scholarship between law and the humanities worldwide.

Two main lines of explanation, which are not mutually exclusive, have been established to answer the question about the causes for the renewed interest in the humanities in the American law schools at that point in recent history. First, and perhaps less intriguingly, it is seen as a consequence of the academic job market in the United States. Student numbers in the humanities had risen exponentially in the 1960s, with a consequent surge in the numbers of doctorates and hence aspiring new academics

[6] Christine A. Corcos, *An International Guide to Law and Literature Studies* (Buffalo and New York: William S. Hein & Co, 2000); Thomas Sprecher, *Literature und Recht. Eine Bibliographie für Leser* (Frankfurt: Vittorio Klostermann, 2011).

[7] Jakob Grimm, "Von der Poesie im Recht," *Zeitschrift für die geschichtliche Rechtswissenschaft*, 2(1) (1816), 25–99. §2: "Dasz recht und poesie miteinander aus einem bette aufgestanden waren, hält nicht schwer zu glauben."

[8] See Klaus Röther, *Die Germanistenverbände und ihre Tagungen: Ein Beitrag zur germanistischen Organisations- und Wissenschaftsgeschichte* (Köln: Pahl-Rugenstein, 1980), pp. 15–16.

[9] Apart from the bibliographies listed in n. 6, see Richard Posner, *Law and Literature: A Misunderstood Relation* (Massachusetts and London: Harvard University Press, 1988), p. 12 (and footnotes 24 and 25).

in the humanities far beyond the needs generated by the expansion of the studentship. When the rise in student enrolment numbers flattened out in the early 1970s, the job market quickly became tense, a development exacerbated by significant budget cuts in the humanities in the late 1970s.[10] Hence, graduates from the humanities had to seek employment elsewhere. Looking back from 1985, Martha Minow described the impact of these developments on the law departments:

> [T]he job market for Ph.D.'s [sic] constricted dramatically in the last 15 years. Bluntly put, people who in the past would join academic departments instead went to law school and joined law faculties. These people brought with them questions and methods of inquiry common in nonlegal disciplines, and subjected law to scrutiny.[11]

This view may reflect aspects of the academic job market at the time, even if it is currently still more a claim than an insight drawn from sustained analysis and research. As an explanation for the reorientation of legal studies toward the humanities it carries, however, a potentially pejorative undercurrent. It presents the humanist revival in law as an accidental contingency of market developments, and, moreover, carries the implication that the inspiration for the revival was itself less inspired than it was driven by dire (economic) necessities and spearheaded by academics who could not find employment in their field of choice, and hence did not constitute their discipline's elite who, even under constrained circumstances, would get the few tenured positions on offer in their own fields.

The second line of explanation understands the revival of legal humanism as a reaction precisely against such approaches of reducing social and cultural developments to market forces, as notably seen in the work that is usually labeled "law and economics." A movement that has evolved into a widely established constituent in American law departments and in the curricula of legal training,[12] the modern origins of law and economics are generally identified in the early 1960s. By most accounts, the credit for this

[10] The funding levels for the National Endowment Fund for the Humanities can here be taken as an indicator. See www.humanitiesindicators.org/content/indicatordoc.aspx?i=75 (accessed October 8, 2016).

[11] Martha Minow, "Law turning outward," *Telos*, 73 (1987), 91. See also Richard Posner, "Law and literature: a relation reargued," *Virginia Law Review*, 72 (1986), 1353; Harold Suretsky, "Search for a theory: an annotated bibliography of writings in the relation of law to literature and the humanities," *Rutgers Law Review*, 32 (1979), 727–39; and Jeanne Gaakeer, "Close encounters of the 'third' kind" in D. Carpi and K. Stierstorfer (eds.), *Diaspora, Law and Literature* (Berlin and Boston: De Gruyter, 2016), p. 66 (footnote 87).

[12] See, for a standard textbook, Robert Cooter and Thomas Ulen, *Law and Economics* (Boston: Pearson Education, 1986; 6th edn., 2012), and Richard Posner's classic *Economic Analysis of the Law* (New York: Wolters Kluwer Law and Business, 1970; 9th edn., 2014).

initial impetus is shared on the one hand by Ronald Coase at the University of Chicago, and specifically his 1960 article "Problem of Social Cost," and on the other by Guido Calabresi at Yale and his work on tort law from 1960 onwards, as presented in particular in his seminal article "Some Thoughts on Risk Distribution and the Law of Torts."[13] As Cooter and Ulen explain, law had of course had some traditional overlap with economics long before in areas such as "antitrust law, regulated industries, tax, and some special topics like determining monetary damages";[14] however, the new movement brought economic expertise to fields of legal concern not usually associated with economic considerations, "such as property, contracts, torts, criminal law and procedure, and constitutional law,"[15] which now, it was claimed, benefited from the strengths of economic reasoning: "Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) for analyzing the effects of the implicit prices that laws attach to behavior."[16]

Richard Posner, another of the galleon figures of law and economics, neatly summarizes the scholarly attractiveness of this approach:[17]

> To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses . . . Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.

Such eulogy of law and economics is strongly reminiscent of the "two cultures" debate popularized in C. P. Snow's Rede Lecture in 1959. It is contemporary with the beginning of the law and economics movement, whose agenda clearly tries to establish law on the side of the sciences, not the humanities.

[13] Ronald Coase, "The problem of social cost," *Journal of Law and Economics*, 3 (1960), 1–44; Guido Calabresi, "Some thoughts on risk distribution and the law of torts," *Yale Law Journal*, 70(4) (1961), 499–553. For a survey, see, for instance, Martin Gelter and Kristoffel Grechenig, "History of law and economics," *Preprints of the Max Planck Institute for Research on Collective Goods* (2014–15); Francesco Parisi and Charles K. Rowley (eds.), *The Origins of Law and Economics: Essays by the Founding Fathers* (Northampton and Massachusetts: Edward Elgar Publishing, 2005).

[14] Cooter and Ulen, *Law and Economics*, p. 1.

[15] Cooter and Ulen, *Law and Economics*, p. 1.

[16] Cooter and Ulen, *Law and Economics*, p. 3.

[17] Richard Posner, "Foreword" in M. Faure and R. van den Bergh (eds.), *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses* (Antwerpen: MAKLU, 1989), pp. 5–6, 5. The quotation has achieved emblematic status through its use as an epigraph in Cooter and Ulen, *Law and Economics*, p. 1.

Movements trigger counter-movements: What happened in some American law departments in the 1970s can be understood in these terms. The discipline that was brought in as a counterweight to economics was literary studies. The law and literature movement, which gathered momentum from the 1970s onwards, clearly set out to give weight to the humanities in legal scholarship, in opposition to a more science-based approach as brought in by the economists. And movements need protagonists. Although the law and literature movement has several foundational figures to look up or back to, the opening shot is widely credited to James Boyd White in his textbook *The Legal Imagination*, first published in 1973.

In the 1985 preface to the abridged version of this book, White succinctly sums up the position he takes in it: "For me law is an art, a way of making something new out of existing materials – an art of speaking and writing. And . . . this book accordingly addresses its law student reader 'as an artist'."[18]

With this, White turns against "certain kinds of dehumanizing modern institutions and practices"[19] to be found on the law and economics side. White had studied classics for his BA at Amherst College, then went on to Harvard for graduate studies in English literature, and only then moved to Harvard Law School for his LLB. As his MA in English was completed in 1961, his move into law certainly predates the suspicion of being motivated by the statistics of flagging job markets in the humanities during the 1970s, and his distinguished career as, at the same time, Hart Wright Professor of Law, Professor of English Language and Literature, and Adjunct Professor of Classical Studies at the University of Michigan amply testifies to his multidisciplinary talents.[20] The linkage between English literature and the law had been a surprising and enlightening experience in his early career, as he writes: "When I went to law school after doing graduate work in English literature, I found a continuity in my work that I had not expected."[21]

White takes his departure from the view that the legal profession is very much bound to language in general, and to a specific, professional

[18] James Boyd White, *The Legal Imagination: Abridged Edition* (Chicago: University of Chicago Press, [1973] 1985), p. xiv.
[19] White, *The Legal Imagination*, p. xiv.
[20] For James Boyd White's biographical details, see his personal homepage at www-personal.umich.edu/~jbwhite/.
[21] James Boyd White, *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984), pp. xi–xii.

language in particular. He thus positions himself in between what he calls the "natural law tradition" on the one hand, which he sees as "positivistic and rule-focused," and what has come to be called "critical law theory" on the other, where he sees law reduced "to policy choices and class interests." For him, law is, as he puts it, "what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations – what might also be called a culture."[22] He further elaborates:

> The law makes a world. And the law in another sense, as the profession we teach and learn and practice, is a kind of cultural competence: an art of reading the special literature of the law and an art of speaking and writing – of making compositions of one's own – in this language. It is a branch of rhetoric.[23]

In his discourse analysis *avant la lettre*, White identifies law as a way of world-making which discursively establishes what can be said and seen and what is excluded, silenced, or overlooked. His argument rests on rhetoric which he trims with a legal focus: "As the object of art is beauty and of philosophy truth, the object of rhetoric is justice: the constitution of a social world."[24] He further defines rhetoric as "the study of the ways in which character and community – and motive, value, reason, social structure, everything, in short, that makes a culture – are defined and made real in performances of language." Hence law for him becomes "an art essentially literary and rhetorical in nature, a way of establishing meaning and constituting community in language."[25] Here is also the link to poetry: "Indeed, in its hunger to connect the general with the particular, in its metaphorical movements, and in its constant and forced recognition of the limits of language, the law seemed to me a kind of poetry."[26]

By instilling such language awareness in his law students and training them to be in "control over a language by taking a position outside it," they will be able "to recognize, more than the language in other hands would be made to say, more than it seems to want to say." This is the lesson to be learnt from the literary author who "speaks two ways at once: using a language and at the same time recognizing what it leaves out. He is defined less by the language he uses than by the relationship with it . . . less by his material than by his art."[27]

The focus on literature in this rehumanizing project of the emerging law and literature movement against the dehumanizing forces of "the market"

[22] White, *The Legal Imagination*, pp. 12f. [23] White, *The Legal Imagination*, p. xiii.
[24] White, *When Words*, p. xi. [25] White, *When Words*, p. xi. [26] White, *When Words*, p. xxiv.
[27] White, *The Legal Imagination*, p. 71.

is in keeping with a traditional conception of literature in its modern sense as it became established in the nineteenth century. In its classical foundations of the *literae humaniores* in the traditional universities, literature was promoted as a solid basis of general knowledge about what it means to be human beyond what theological arguments might have to say. In its vernacular traditions, literature had risen to a primary inspiration of national identity. It was widely perceived as a platform of moral instruction and orientation, gradually even replacing religion, which was losing its unifying focus given that, as in Britain, the nation was becoming (again) more inclusive toward its various denominations and sectarian creeds. The underlying concept of literature's function as a social and political corrective and a moral institution here goes back to Matthew Arnold's specification of culture, notably in *Culture and Anarchy* (1869), and reaches the law and literature movement through Lionel Trilling's view of literature and literary criticism as a critique of liberalism. In his milestone publication *The Liberal Imagination* (1950),[28] Trilling writes: "To the carrying out of the job of criticizing liberal imagination, literature has unique relevance, not merely because so much of modern literature has explicitly directed itself toward politics, but more importantly because literature is the human activity that takes the fullest and most precise account of variousness, possibility, complexity, and difficulty."[29]

Although James Boyd White is justly seen as one of the founding figures of the law and literature movement, his understanding and use of literature appears diffuse, in parts contradictory, and oscillates through his works. There is his wider use of the term "literature," which includes legal texts. This he needs for his agenda to project lawyers and judges as (literary) interpreters, critics, writers, and, indeed, artists. When he speaks about "the special literature of the law"[30] or writes about Shakespeare and other "non-legal literature,"[31] it is clear that legal texts form a subgroup within the wider literary domain. This inclusive use of the term clashes, however, with his references to Modernist approaches to literature in particular, such

[28] The historical line of influence from Arnold through Trilling to the Law and Literature Movement was succinctly described and analyzed by Robert Weisberg in "The law-literature enterprise," *Yale Journal of Law and the Humanities*, 1 (1988–9), 7. The connection is also revisited and further explained, without any reference to Weisberg, in Austin Sarat, Matthew Anderson, and Cathrine O. Frank, "Introduction: on the origins and prospects of the humanistic study of law," in A. Sarat, M. Anderson, and C. O. Frank (eds.), *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2010), pp. 5–6.

[29] Lionel Trilling, "Preface" in *The Liberal Imagination: Essays on Literature and Society* (New York: New York Review of Books, 1950), p. xxi.

[30] White, *The Legal Imagination*, p. xiii. [31] White, *The Legal Imagination*, p. 40.

as that of Henry James, E. M. Forster, and Joseph Conrad, who have a very specific and distinctive concept of a capitalized "Literature" and its epistemic, narrative, and social or cultural uses. At the same time, his references to literary texts can be described either as eclectic or panoramic, as they cover the classics, British and American literary history, and a number of other European samples, not to speak of pertinent works of criticism from the Renaissance to his own present.

At least three distinct, though connected, uses of such references to "Literature" emerge. First, other disciplinary idioms, "languages," or "literatures" such as the poet's, the critic's, or the historian's are presented in their specificity to create a foil for a clearer perception of the hallmarks of legal discourse. Second, such comparison may yield insight into a neighboring disciplinary "language," such as the novelist's or poet's, but may not be directly applicable to legal "language." Thus, metaphor, irony, and ambiguity are described as literary devices to "control language," which White considers "likely to be of little use to us as lawyers." Still, these literary strategies are instructive for lawyers in an indirect way, as they show how "the writer asserts control over a language by taking a position outside it"[32] – a feat White recommends to lawyers, too, even if they must achieve it by different means from those followed by literary authors. The third use of referring to literary history and literary criticism is White's suggestion that in certain instances, there can be direct application of literary devices and critical insight. T. S. Eliot's "Tradition and the Individual Talent" (1921) is perhaps the most revealing instance, even if White somehow fails to develop it to its full potential. He quotes Eliot on the "whole of literature" having "a simultaneous existence" and asks his student reader to transfer this to the "common law judge," but does not fully exploit the dynamics of Eliot's historical model here.[33] Another example is the differentiation between flat and round characters, as developed by E. M. Forster in *Aspects of the Novel* (1927). White comes back to this time and again in encouraging (future) lawyers and judges to strive for the round character type in their assessments, and not accept mere caricature.[34] In other words, lawyers and judges are warned against taking a reductive view of the people they have to deal with professionally by limiting them to "objects" in a legal discourse, but encouraged to contextualize and understand their wider personalities and circumstances.

[32] White, *The Legal Imagination*, p. 71. [33] White, *The Legal Imagination*, p. 228.
[34] White, *The Legal Imagination*, p. 117 and *passim*.

This is as far as White took it at the time (and in several publications afterwards). Much of the criticism leveled against his approach ever since accuses him of a tendentious, moralizing view of literature, underpinning a political agenda, as Richard Posner comments: "He [White] mines literature for support for his political views."[35] While White's turn to literature and rhetoric was unmistakably in direct opposition to the conservative bias in law and economics, Posner's criticism must be seen as reductive of White's achievements, with his multiple and divergent uses of literature and rhetoric. Nevertheless, the political profile in the positions around the law and literature movement in America was becoming much more pronounced. Such deepening political entrenchment coincided with a cognate, second characteristic in the further development of the law and literature movement: During the 1970s and throughout the 1980s, literary criticism and theory hugely expanded both in the number of schools and approaches that emerged and in the emphasis and often the acerbity with which these developments were propounded or opposed, resulting in what is frequently referred to as the "theory wars," which lasted well into the 1990s: a profusion of – often mutually exclusive and regularly vituperative – theories and methodologies in literary scholarship. Structuralist and poststructuralist, (neo-)Marxist, feminist, gender, queer, new historicist, psychoanalytical, postcolonial, and other theories, with their resultant methodologies, had begun to inundate many literature departments across Western academia, providing scholars in law and literature with a bewildering wealth of new material and inspiration.

Both aspects – the political emphasis and the widening of theoretical and methodological horizons – are clearly marked in what Sarat, Anderson, and Frank identify with some justice as the second part of the "genesis of the field" of "law and the humanities": the 1988 founding of what they point out was "the first scholarly journal devoted exclusively to the field," the *Yale Journal of Law and the Humanities* (YJLH). In his introduction to the journal's first issue, "The Challenge Ahead," Owen M. Fiss, Stirling Professor at Yale Law School, did not mince his words: He saw "part of the impetus" of the new journal as "political – a desire to escape from the conservative political thrust of Law and Economics" and that school's "willingness . . . to see the market . . . as the preeminent mechanism for ordering social relations." Alongside some other new launches at Yale at the time, Fiss characterizes the journal as "part of the progressive and

[35] Richard Posner, *Law and Literature* (Massachusetts and London: Harvard University Press, 3rd edn., 2009), p. 470.

liberal revival now taking place at Yale and perhaps at other law schools," emphasizing that "the interdisciplinary study of the law is not the property of the right."[36] Fiss set the agenda to "combat the instrumentalism and scientism of Law and Economics and to restore an appropriate place for value judgements in the study of law," even if he warned at the same time not to "cojoin law with other disciplines such as literature, history, philosophy, psychiatry, which make inquiry into values central"[37] – a warning duly slighted by practically all contributors to the journal's first issue and ever since.

In fact, the most substantial contribution to the first issue of YJLH primed its focus directly on law and literature. In the expansive opening article, "The Law-Literature Enterprise," Robert Weisberg critically presented much of what had happened in the field so far and began to differentiate, assess, and order the various approaches he identified. He subdivided the law and literature "enterprise" into two main categories, "law in literature" and "law as literature." In his definition, the former "comprises works of fiction and drama (rarely lyric poetry) which deal with legal issues as express content," which then can be used "to educate lawyers – to deabstract and 'humanize' them."[38] The second, "more elusive part" he calls "law as literature," which in turn is split into two "sub-parts." Of these, one focuses on "legal writing in terms of style and rhetoric," with classical rhetoric as "the common denominator between literature and legal writing," as James Boyd White had elaborated. The other "sub-part" of law as literature takes its cue from the concept of interpretation. Here, as Weisberg sees it, "[l]awyers associate their difficulty in construing legal prose with the more prestigious difficulty in construing literature," and they thus "extend the forms of literary criticism to allegedly non-literary works."[39] It is Weisberg's great achievement to have traced and critically followed up these "forms of literary criticism" as they continued to evolve and, together with Guyora Binder, to have collected them in their magnum opus in the field, *Literary Criticisms of Law*, published in 2000. In this *summa*-like book, Binder and Weisberg expand, update, and systematize what Weisberg had started in his earlier article, offering now a comprehensive run-through of a large part of important approaches as they emerged and were discernible within the field of literary studies (interpretive, hermeneutic,

[36] Owen Fiss, "The challenge ahead," *Yale Journal of Law and the Humanities*, 2 (1988–9), v.
[37] Fiss, "The challenge ahead," vi. [38] Weisberg, "The law-literature enterprise," 17.
[39] Weisberg, "The law-literature enterprise," 42.