Traditions and Trajectories in Law and Humanities Scholarship

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I

The invitation to reflect on "changes in law and the humanities over the past decade" provides an opportunity to pause and to take stock, to ask what difference Law and Humanities scholarship has made to our understanding of law or the humanities, and whether that scholarship has lived up to its promise. In this comment, I note three factors that ten years ago, at the founding moment of the Yale Journal of Law & the Humanities, seemed likely to shape the trajectory of Law and Humanities scholarship, and I urge three responses that I hope might shape it in the future. I take as my text for this exercise the three "Introductions" contained in the inaugural issue of this Journal. Those Introductions, one by the Editors, one by

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the then Dean of Yale Law School, Guido Calabresi, and the third by Yale Law Professor Owen Fiss, are instructive in many ways.

First, despite several disclaimers,\(^1\) they remind us that ten years ago some saw Law and Humanities scholarship as a corrective to certain tendencies in law schools and in professional legal education, among them, and most importantly, the rise of value-neutral, technocratic approaches that allegedly undermine the vision of lawyer as "statesman."\(^2\) This view is embodied in Fiss's claim that the turn to the humanities is a response to the hegemonic position of economics in law schools and a resource that might help to free "contemporary law from its own barrenness."\(^3\) In addition, Dean Calabresi suggested that turning to the humanities was important to the degree that it "feeds" law.\(^4\) 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."\(^5\)

The admonitions of Fiss and Calabresi 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 rescues law or, depending on one's historical perspective, helps to recuperate parts of law that might otherwise be lost. This trope is perhaps most visible in the work of James Boyd White who contends that attention to literature is an antidote to a conception of law as a machine operating on society.\(^6\) As White put it,

To imagine the law as a rhetorical and literary process may help us to see each moment in the law differently . . . . It leads to a different conception of the teaching of law and may help the practitioner conceive of its practice differently too . . .

. . . . [T]he poems by Frost, Dickinson, and Keats do much to suggest standards by which we might learn to do . . . [law] better.\(^7\)

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1. *Note from the Editors, 1 Yale J.L. & Human. v, v-vi (1988) ("We are committed to the belief that this project can survive only if scholars both inside and outside the legal academy are integral to our inquiry.").
5. *Id.*
Reading "great" literature expands the imagination, and, as a result, it enables lawyers and judges to make more impartial, yet empathetic, judgments.\(^8\)

Second, closely related to the trope of recuperation is a "high culture" conception of the humanities. The humanities, correctly understood, provide uplift and inspiration; they raise the deepest questions about our lives and the values we pursue. It is not, I suspect, coincidental that Calabresi names Kant, Bentham, Captain Vere, and Athol Fugard, in addition to Tacitus, as examples of humanities texts,\(^9\) or that Fiss warns that a definitional equation of the humanities with "interpretation" would exclude the work of John Rawls.\(^10\) Yet by pointing out the "high culture" preferences among some who turn to the humanities to help rescue law, I do not mean to denigrate the authors, works, or characters cited. Surely there is nothing to be gained from reigniting the canon wars. But, in measuring the progress of Law and Humanities scholarship we might ask how far we have come from a high culture conception.

Third, in his introduction to the inaugural issue Fiss cautioned against too rigid a bounding of Law and Humanities scholarship,\(^11\) as if interdisciplinary eclecticism would in itself provide a valuable contribution. And eclecticism has certainly been the prevailing mode. Even the casual reader of the *Yale Journal of Law & the Humanities* will recognize that no orthodoxy has prevailed in its pages. It is open and inviting rather than forbidding. In this sense it is clear that the great books conception of humanistic scholar has not carried the day. Over its first ten years this *Journal* has published an outstanding variety of scholarship, including almost every type of work that might conceivably be labeled Law and Humanities.

Yet when the editors proclaimed their intention that the *Journal* be "a forum for interdisciplinary investigation,\(^12\) one might ask what they might have meant by interdisciplinary. Much of what goes under the name of Law and Humanities scholarship is by no means interdisciplinary; most often it takes the form of scholarship by someone in a humanities discipline writing about a legal subject, simply extending

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10. See Fiss, supra note 3, at x-xi. It is also important to note that the first issue of *Yale Journal of Law & the Humanities* included two articles, one by Hendrik Hartog, see Hendrik Hartog, *Mrs. Packard on Dependency*, 1 *Yale J.L. & Human*. 79 (1988), and one by Anthony Chase, see Anthony Chase, *An Obscure Scandal of Consciousness*, 1 *Yale J.L. & Human*. 105 (1988), that did not subscribe to such a high culture conception of Law and Humanities scholarship.
11. See Fiss, supra note 3, at ix.
12. Note from the Editors, supra note 1, at v.
their disciplinary expertise to a new domain. If interdisciplinarity is achieved it is achieved by juxtaposing scholarship from one discipline with that of another. While the editors of the first issued worried that "too often boundaries are crossed, genres blurred, for their own sake," today I worry that there has been too little crossing of boundaries and blurring of genres. There has been too little effort by individual scholars to broaden their own horizons, to make their own work internally interdisciplinary.

II

As we look to the future, to the next ten years, I would urge three things, each of which follows from one of the previous observations.

First, as someone who teaches in a liberal arts college, I am tempted to argue that Law and Humanities scholarship would be better off if those who do it ignore law schools, legal education, and lawyering except as an object of inquiry. We should aspire to do more than to rescue, or recuperate, any particular conception of legal education or of lawyering. The value of our work should not be judged primarily by its contribution to the reform of legal education or law practice. Law schools and professional legal education have their own distinctive problems; the humanities, however conceived, might not provide helpful responses to those problems. While law professors have done, and will continue to do, immensely valuable work in the field, the vitality of Law and Humanities scholarship cannot be measured primarily by what it contributes to lawyering.

Second, we need to find ways of thinking about law and the humanities that do not canonize the humanities. We must move from rescue and recuperation to critique. Is it possible to do work that might march under the banner of law and the humanities while thinking of oneself as a neo-humanist, a post-humanist, or even an anti-humanist scholar? The answer seems clearly to be yes. One can worry as much about the ways in which some humanities scholarship has inscribed particular patterns of advantage/disadvantage, or hidden contingency under a veil of false universalism, and still effectively participate in a scholarly enterprise that examines the ways law is "implicated in the creation of symbols and structures which provide

13. Id.
The aim of ... criticism is not to recover the virtues of the heroic age but to fashion new ones. Thus conceived, the cultural criticism of law is part of the work ... of choosing what kind of culture we hope to have and what kind of identities we hope to foster.

Id.
meaning in everyday life.”\textsuperscript{15} The important work published in the Journal’s Symposium “Intersections: Sexuality, Cultural Tradition, and the Law” provides but one of many example of such work by scholars whose work challenges traditions and conventions in the humanities.\textsuperscript{16} Not only should Law and Humanities research be self-conscious about the limits and blindness of the humanities, but it should push the boundaries of that work still further to nurture a cultural studies of law. Cultural studies has advanced much further elsewhere than it has when applied to law.\textsuperscript{17} It is not that important efforts have not already been made;\textsuperscript{18} surely that is not the case. Yet work that takes popular culture seriously, that reads the surfaces of legal life, still seems to be marginalized. Such work often is treated as providing just another example of the way law is “represented,” as if the image of law were still in some fundamental way regarded as separate from the thing itself.\textsuperscript{19} A cultural studies of law not only helps to challenge traditional ideas of culture,\textsuperscript{20} but it also may help to advance a new conception of law, a conception that examines law as a world of images the power of which is not located primarily in their representation of something exterior to the image, but is found in the image itself. We need to take seriously the possibility that the proliferation of law in film, on television, and in mass market publications has altered/expanded the sphere of legal life itself. Just as almost a century ago legal realists reminded us that the enactment of law is law, so today perhaps a cultural studies of law would help decanonize law further.

Third it may be time to move from interdisciplinary eclecticism to various new disciplinary syntheses, efforts to build a disciplinary study of law outside the law school, to complement the vision of law as profession and practice with a vision of law as one of the liberal arts.\textsuperscript{21} It may be time for humanists and others to do for law what the study of religion has done for theology. This vision is, of course,

\textsuperscript{15} Note from the Editors, supra note 1, at vi.
\textsuperscript{17} See, e.g., THE CULTURAL STUDIES READER (Simon During ed., 1993).
\textsuperscript{18} See, e.g., LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST) MODERN CRITICAL THEORY (Jerry Leonard ed., 1995).
\textsuperscript{19} See ALISON YOUNG, IMAGINING CRIME (1996).
\textsuperscript{21} As Calabresi put it in his introduction to the first issue, it is “impossible fully to understand law without a deep and sympathetic knowledge of the liberal arts.” Calabresi, supra note 4, at vii.
not new. As the late A. Bartlett Giamatti wrote when he was President of Yale:

The law is not simply a set of forensic or procedural skills. It is a vast body of knowledge, compounded of historical material, modes of textual analysis and various philosophical concerns. It is a formal inquiry into our behavior and ideals that proceeds essentially through language. It is a humanistic study—both as a body of material wrought of words and a set of analytic skills and procedural claims involving linguistic mastery . . . . To argue, therefore, for courses in the parts, principles, and purposes of law is not to argue for "professional" training in college in the techniques, accumulated lore and diverse iterations of method that training for the profession also entails. It is rather to argue for philosophic, textual and historical concerns, as one would argue for the teaching of any humanistic or . . . scientific inquiry meant to educate the nonprofessionally inclined student. It is to argue that the medium of cohesion and conflict, ligature and litigation, that is the law, must be part of the educated person's perspective in order to appreciate one of the grandest, systematic ways of thinking human beings have developed for their survival.\(^2\)

It is time to build new structures, new organizations, new associations that draw Law and Humanities scholars together to forge new collaborations.\(^3\) Yet what I am urging may seem at odds with the decanonization about which I have just written and, to some extent, it is. That is why I refer to various disciplinary syntheses. By emphasizing plurality, I hope to keep the forces of recanonization at bay. I believe it is now possible to organize undergraduate and doctoral level training in law around the idea of law as a set of historically and culturally specific institutions and practices that combine moral argument, distinctive interpretive traditions, and the social organization of violence.\(^4\) Such a conception demands that individual scholars take on the burden of bringing history, philosophy, anthropology, hermeneutics, and sociology, to name but a limited subset, to the study of law. This conception draws scholars to inquire

\(^2\) A. Bartlett Giamatti, The Law and the Public: Address to the Second Circuit Judicial Conference 36-37 (Sept. 1982) (on file with author). Judge Richard Posner, also an Adjunct Professor of Law at the University of Chicago, echoed Giamatti's sentiment. "Law," Posner argued, is now "an interesting subject of intellectual contemplation, a very important social system . . . studied for its own sake quite apart from any training in the legal profession." Martha Middleton, Legal Scholarship: Is It Relevant?, NAT'L L.J., Jan. 9, 1989, at 1.

\(^3\) One such effort is already underway with the formation of the Working Group on Law, Culture, and the Humanities, which held its first national meeting in March 1998.

\(^4\) This conception is reflected in the structure of the undergraduate major in law, jurisprudence, and social thought now offered at Amherst College.
about what happens to each of the elements of law as a result of their mutual interaction—to study how the enterprises of making judgments about right and wrong, assigning meaning to traditions and texts, and assimilating law with cultural practices, are braced by the pressing need to conclude arguments and decide issues, to examine how we read law as a set of images fully embracing law's normative qualities and aspirations. Yet others will see the enterprise differently and produce different disciplinary syntheses.

Without efforts to produce disciplinary syntheses, the humanistic study of law will remain either a handmaiden of legal education, or an aggregation of existing disciplinary perspectives that together neither challenge the ways in which law currently is thought about nor push us to see our existing disciplines in new ways. These efforts represent a third wave in Law and Humanities scholarship beyond repair and recuperation, beyond critique; they embody transformative aspirations that are only now beginning to be glimpsed.