

# The Humanities and Law School

Dean A. Strang\*

I encountered James Boyd White about a year after law school, not during. It was a late springtime trip down to the Seminary Co-op at the University of Chicago. There, a new arrival: White's *Heracles' Bow*.<sup>1</sup> I was hooked. Since then, only my direct mentors have had greater influence over how I think about, and practice, law. Moreover, one of his later books, *Living Speech*,<sup>2</sup> influenced greatly how I think about almost everything.

The tardy encounter with the scholar most associated with law and literature, perhaps with law and the humanities, was not entirely my fault. The humanities mostly have lost their place in law schools. In part, I assume this reflects an ongoing broader decline in support for the humanities across undergraduate and graduate programs as students have shifted to what they perceive as the practical and marketable. Whether relatedly or not, over the last half century much humanities scholarship has come to focus on difference, rather than universality, in human experience. My view, though, is that there is hope that new scholars, new pedagogical approaches, and new organizational sophistication may lead to a renewal in civic engagement and relevance of the humanities.<sup>3</sup>

In addition to the broader trend, reasons peculiar to legal education also explain the humanities' basement office in a law school. Those trace back to Christopher Columbus Langdell. Most associated with the case method that has dominated U.S. law schools since he was dean at Harvard Law School (1870-95), Langdell insisted foundationally that law is a science.<sup>4</sup>

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\* Distinguished Professor in Residence, Loyola University Chicago School of Law. A.B., Dartmouth College; J.D., University of Virginia School of Law.

1. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

2. JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006).

3. For provocative and expansive thoughts on this and more, see DAVID D. COOPER, *LEARNING IN THE PLURAL: ESSAYS ON THE HUMANITIES AND PUBLIC LIFE* (2014).

4. "If law be not a science, a university will best consult its own dignity in declining to teach it." *Address of Professor Langdell, November 5, 1886*, 3 L.Q. REV. 123, 124 (1887). See also C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii-ix (1879) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law."); William Schofield, *Christopher Columbus Langdell*, 55 AMERICAN LAW REGISTER 273, 277 (1907) ("Professor Langdell studied the law as contained in the reports in the same spirit in which the great scientists study the phenomena of nature."). In fact, Langdell did not invent the case method and others

Although sometimes critical of his formalism, legal realists later embraced Langdell's mindset in seeking the objective sources of law's rules. Legal positivism also is compatible in its *realpolitik*.<sup>5</sup>

Today, more than 150 years after Langdell's tenure began and decades after the crest of legal realism and its interest in external effects on judicial opinions, interdisciplinary work is thriving at law schools. Unsurprisingly, the social sciences dominate those intersections. For example, I got a good introduction to Law & Economics in law school during the early 1980's. It was sharply on the rise, thanks in good measure to important scholars at the University of Chicago. That was White's home for a time, too, and I understand THE LEGAL IMAGINATION partly as his dignified dissent to that emerging movement.

Microeconomics applied to law led to Behavioral Law & Economics and to Law & Psychology more generally. Political science, sociology, econometrics, game theory, even geography; all offer interdisciplinary approaches to law rooted in social science.<sup>6</sup> Relatedly, empirical methods became pervasive with their assessment of human responses to legal or other stimuli. Broadly speaking, the social sciences as applied to law share an approach: human beings and their behavior are objects of study; something objectively measurable from the outside.

This preeminence of social sciences and their methods was not always so. Before the rise of law schools, law's study—however limited or disorganized—was an exploration of corners of the humanities: rhetoric, moral philosophy, history, jurisprudence, even theology. Granted, much of that study involved plowing clumsily through English and later American treatises: Coke, Kent, Blackstone, Story, and so on. But it was unapologetically and subjectively descriptive and normative stuff, not objectively empirical.<sup>7</sup>

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preceded him in the idea that law is science. See M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986). The term "science" itself had broader, and somewhat different, meaning in the nineteenth century than it does today, too. And the social sciences, as we think of them now, only were beginning to emerge in the late nineteenth century.

5. For a similar, but not identical, brief overview of trends in law schools during the twentieth century, consider Richard A. Posner, *In Memoriam: Bernard D. Meltzer (1914-2007)*, 74 U. CHICAGO L. REV. 435, 435-37 (2007). Richard Posner's *Economic Analysis of Law* did more than anything else to launch the Law & Economics school. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)

6. Carceral geography is a useful and relatively recent area of interdisciplinary work. See, e.g., RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); *HISTORICAL GEOGRAPHY OF PRISONS: UNLOCKING THE USABLE CARCERAL PAST* (Karen Morin & Dominique Moran eds., 2015).

7. Before law schools took hold in the United States and expanded their curriculum from one year to two or three, preparation and education of lawyers was very uneven. Many had just a few months of self-guided reading before admission to the bar. See Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TULANE L. REV. 314, 315-18 & 315 n.5 (1985). Others were luckier. John Quincy Adams described his apprenticeship in the law office of Theophilus Parsons (1750-1813), later a chief justice of the Massachusetts Supreme Judicial Court, as including conversations that "ranged across 'law, physic, history, poetry, religion, and politics, by turns,' and readings included Buffon's *Histoire Naturelle*, the histories of Hume and Gibbons, Shakespeare, Butler's *Hudibras*, Rousseau's

Today, interdisciplinary work in the law and social sciences greatly aids understanding, designing, and criticizing law. But it does not always take seriously the question of justice, as distinct from law. The social sciences can explain the may and the how; they often do not attempt the ought and the why. Social sciences approach human experience from the outside in.<sup>8</sup> Practicing lawyers mostly work outside in, too: although ideally with empathy, they try to predict and modulate how law as an external force will buffet, or serve, a client.

With interdisciplinary social science scholars and lawyers aligned this way, humanities scholars have an unappreciated role in law schools. By contrast to the social sciences, the humanities explore human experience from the inside out. They treat the human being as subject, not object.

Scholars who take this approach do not always claim their connection to the humanities. Consider some in critical legal studies. At risk of controversy and reduction, I think critical theories are within the humanities, rooted originally in literary criticism, philosophy, and history. They explore inequality and, importantly, its effects on and within people. More, critical theorists query justice and its absence, injustice, which should be the core concern of lawyers.

James Boyd White appreciates practicing lawyers and that core concern, justice and injustice. Practitioners are in the center of the circle of his *Ideal Readers*. I admire that. Still, this symposium issue rightly is given over to law & humanities scholars. They occupy the best position to make the case that empiricism is not everything; that humans need not always be objects of study, objects of law's concern. No, human beings rightly can be the very subject of law and its study.

And human beings seek justice, not only law. The social sciences can help measure the absence of justice. Yet alone, they cannot create its presence. Justice, like love, must be found within and then enacted without.

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*Confessions*, along with legal texts like Blackstone's *Commentaries* (read three times in a year and a half), *Coke on Littleton* . . . "" and more. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 30 (1984).

8. Note that the mind sciences may monitor the internal externally, as with fMRI or other technology.