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Law & the humanities: an uneasy relationship

In 1930 Judge Learned Hand, widely regarded as one of the most distinguished judges in our nation's history, spoke to the Juristic Society at the University of Pennsylvania Law School. In his address, "Sources of Tolerance," he told his listeners,

> I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon, and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.[1]

Here Hand presents himself as a wise jurist, a legal scholar whose judgment has been profoundly informed by the great books he has selected for our attention. Because he himself is familiar with all of the writers alluded to, he not only enjoys membership in a 'republic of letters' – he is able to "live greatly in the law."[2]

There was nothing particularly unusual about Hand's range of references in the early twentieth century, particularly coming from an elite member of the legal profession. Moreover, for many years, membership in the American republics of law and letters had run both ways. Robert Ferguson's important book, *Law and Letters in the New Republic*, concerns, among other topics, the many late eighteenth- and early nineteenth-century American writers who had been trained as lawyers (and in many instances, had actually prac-

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1 Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand* (New York: Knopf, 1952), 81.

2 Oliver Wendell Holmes, "The Profession and the Law," in *Collected Legal Papers* (New York: Harcourt, Brace, and Howe, 1920), 29–30.

ticed law), including Charles Brockden Brown, Hugh Henry Brackenridge, Washington Irving, William Bryant, and James Fenimore Cooper.[3] One might also think of Hand's contemporary, the Harvard Law School–educated poet Archibald MacLeish, or, closer to our own time, writers ranging from Louis Auchincloss to Scott Turow and John Grisham.

Nonetheless, few legal scholars today share Hand's assumptions – that law is part of the humanities and that law is not complete unless it draws nourishment from them. Indeed, these assumptions were already under fierce attack by the start of the twentieth century.

Consider perhaps the most important single lecture in the history of American law: "The Path of the Law," delivered by Oliver Wendell Holmes, Jr., who taught briefly at Harvard Law School before fleeing to the Massachusetts Supreme Judicial Court. Speaking in June 1897 before Boston University's students and faculty, Holmes predicted that "[f]or the rational study of the law the black-letter man [i.e., the master of legal case law] may be the man of the present, but the man of the future is the man of statistics and the master of economics."[4]

Holmes and Hand were friends – but they clearly disagreed over the substance of legal studies. While Hand in 1930 advocated the study of the humanities, Holmes advocated the study of the social sciences, particularly economics. Hand evoked Shakespeare and Milton; Holmes's imagined alternative to black-letter law was statistics. Where Hand welcomed the edifying influence of moral philosophy, Holmes strove to make law more scientific and even industrial, discarding all forms of humanist sentimentality. Law is a "business," Holmes said, in which "people . . . pay lawyers to argue for them," and "predict . . . the incidence of the public force through the instrumentality of the courts."[5] It was a mistake to confuse the law with morality, he insisted – and he wondered "whether it would not be a gain if every word of moral significance could be banished from the law altogether."[6]

Of these two legal scholars, it is undoubtedly Holmes who has proven more prescient. Economics has indeed become arguably the most important discipline within legal studies – such that law to this day has an uneasy relationship to the humanities. The student at an elite law school today is more likely to be acquainted with Ronald Coase's Theory of the Firm than with Plato's Theory of the Forms,[7] with agency costs

3 See also Michael Meltzer, *Secular Revelations: The Constitution of the United States and Classic American Literature* (Cambridge, Mass.: Harvard University Press, forthcoming), 95.

4 Oliver Wendell Holmes, Jr., "The Path of The Law," *Harvard Law Review* 10 (1897): 457, 469.

5 Ibid., 461.

6 Ibid., 464. For further reflections on this point, see Sanford Levinson and J. M. Balkin, "The 'Bad Man,' the Good, and the Self-Reliant," *Boston University Law Review* 78 (1998): 885.

7 In fact, a study by Yale Law School librarian Fred Shapiro, "The Most Cited Law Review Articles Revisited," *Chicago-Kent Law Review* 71 (1996): 751, discovered that Ronald Coase's classic article, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1, was the single most heavily cited article by legal academics. Whether citation counts should count as proof of scholarly influence is a controversial question, on which see our somewhat irreverent analysis of Shapiro's study, "How to Win Cites and Influence People," *Chicago-Kent Law Review* 71 (1996): 843. Nevertheless, Coase's placement at the top of the list is an apt symbol of the influence that the law and economics movement maintains in the contemporary legal academy.

than with Acton, and with rent-seeking than with Rabelais.

Is it therefore only a play on words to call law a 'humane' profession in a way that is different from, say, medicine – a field that is certainly concerned with the humane care of sick people, but which is more strongly associated with the sciences than with the humanities?

To answer this question one must first consider the sea change in professional self-consciousness that has occurred between the time that Judge Learned Hand spoke, a full three-quarters of a century ago, and the present. Part of this change involves the very meaning of a professional lawyer – what lawyers do and what counts as relevant materials of legal study, both by those who learn in law schools and those who teach in them. We emphasize the term 'professional' for good reason: One can certainly study law without becoming a practicing lawyer. But one cannot, at least in the United States, become a lawyer without going through law school.

What does (or should) constitute that discipline raises three related questions.

The first is whether the canon of standard-form legal materials is sufficient to do good work in law. Although Hand was one of the consummate professional judges of his era, he nonetheless seems to suggest to his audience that studying only standard-form legal materials is a mistake. Indeed, one might even infer from Hand's pronouncement (though we doubt that this was his intent) that perhaps one does not need to be a lawyer at all in order to have cogent, well-formed opinions about what the law is or should be. Holmes, too, had his doubts about studying only standard-form legal materials, particularly when a knowledge of statistics and economics might produce better legal decisions.

The second question is whether law is a genuine discipline, with its own distinctive methodologies and standards of argument and proof. Or is law, on the contrary, merely a 'subject matter,' similar, say, to the city of New York or the nineteenth-century settlement of the American Midwest – a topic that can be approached any number of ways? If the latter, then there is nothing necessarily special – at least from a purely methodological perspective – about being a lawyer or having received professional legal training.

The third question is whether law is a science, defined by reference to rigorous procedures and norms, as are other sciences, or something else – perhaps the 'art of governance,' whose study would be much closer to the humanities than to either the natural or the social sciences.

The modern American legal academy begins in 1870 with the appointment of Christopher Columbus Langdell as dean of Harvard Law School. Langdell's avowed mission was to transform American legal education into 'scientific analysis,' and he had been appointed to the deanship by Harvard President Charles Eliot, himself a scientist. For Langdell, 'legal science' consisted, principally, of reading a relatively closed set of materials found in libraries – the decisions of judges, particularly at the appellate level. From these decisions the legal scientist would then discern, through the power of legal analysis, the structures of overarching doctrine that could unite such seemingly disparate topics as the sale of potatoes and the sale of slaves into one subject matter called contracts. We do not know how well-read Langdell was, but we are fairly confident that he would have looked askance at a student (or a Harvard Law School professor) who thought that it was more important to immerse oneself in Dante or Shake-

speare than in the case law generated by courts. It would be as if a paleontologist preferred reading Aristotle to carefully assessing the fossil record.

Ever since Langdell, the drama of American legal education has revolved around the recurrent slaying of the beast of legal science in the name of humanism and/or social science, followed by the phoenix-like resurrection of elements of Langdell's original program of analyzing legal cases and materials (albeit now suitably leavened by a sprinkling of nonlegal sources). Of course, only the most foolhardy academic today would describe doctrinal analysis as 'scientific.' The preferred term today is 'craft,' which people, especially those educated at Harvard Law School, continue to use as an evaluative term. (And by legal craft, few mean the ability to weave in references to Homer, Hume, or Rabelais.) As we shall see, however, the highly influential law and economics movement, although it rejects many aspects of Langdell's original program, is not at all averse to emphasizing the scientific status of economics to justify its own claims to authority. And so the drama continues.

The recurring conflict over whether law is a branch of the humanities or the sciences has coincided with an even more basic trend in twentieth-century legal studies, at least in the United States: a rejection of so-called formalism. Formalism is a rather nebulous concept; sometimes one feels that it stands for whatever the speaker thinks is wrong with the study and practice of law.[8] In fact, to the extent that formalism means belief in the importance of rules to organize conduct, formalism has never departed the legal academy; indeed, it is more popular than ever.[9]

However, the sort of formalism that almost all American legal scholars have rejected during the twentieth century is the notion that the sole job of the legal mind is to work out the correct solution to legal problems through the law's materials and internal logic, and the correlative belief that the internal logic of those materials, and not any knowledge of extralegal matters, determines whether a legal argument is good or bad.

Instead, twentieth-century legal theory in the United States has repeatedly rejected this type of formalism in favor of realism, on the one hand, and proceduralism, on the other.

Realism refers to the jurisprudential insights of a highly influential legal movement called American legal realism, insights which, we should add, have nothing whatsoever to do with the philosophical position called realism. Legal realists claim that legal actors do not and cannot make decisions wholly free of ideological beliefs and attitudes; that legal reasoning has much in common with political reasoning and policy argument; that judges inevitably draw upon a wide variety of nonlegal norms to decide concrete cases; and that lawyers, judges, and legal scholars should try to make law responsive to facts about the world, to the insights of other disciplines, and, above all, to changes in society as a whole. Given these characteristic claims, it is not surprising that many

8 See Robert Gordon's imaginative list of different accounts of formalism and why people were opposed to them in Robert W. Gordon, "The Elusive Transformation," *Yale Journal of Law and the Humanities* 6 (1994): 137, 154–157, a review of Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

9 See, e.g., Fredrick Schauer, "Formalism," *Yale Law Journal* 97 (1988): 509.

of the original legal realists avidly embraced social science in the 1930s and 1940s, hoping that it would help them solve important questions of legal administration.

Nevertheless, the legal realists made only limited progress during those early years due to a combination of factors: the difficulty of getting funding for social science studies; the rudimentary nature of social science in the United States; and the fact that the early realists, who had been trained as traditional doctrinal lawyers, were not particularly good at doing social science.[10] As it has developed over the years, American legal realism is as much a mood as a set of doctrines. It reflects the experience, felt on occasion by all who study the law, that the discourse of lawyers and the forms of legal reasoning are often too musty, circumscribed, and closed in upon themselves, and therefore, inevitably fall out of touch with social and political realities.

The second major tendency in twentieth-century American legal theory – indeed, the favored response to legal realism – has been proceduralism. Proceduralism begins with the incontrovertible insight that legal disputes often raise controversial questions of morality and policy. That is particularly true of the sorts of problems faced by administrative agencies, who took on increasingly elaborate tasks and extended the state's influence in increasingly large areas of social life in the twentieth century. If one cannot tell what the right answer should be on the merits, proceduralism teaches that it is far better to create a series of procedures through which the legal system can settle the 'right answer' for its purposes. Since creating and following procedures are the lawyer's stock in trade, lawyers are particularly adept at this task.

The legal process school of the 1950s – identified particularly with Harvard,

10 John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995). Equally important debates about the rule of law – provoked by the rise of overt class-based politics, the development of the administrative welfare state, and the pressures of war – had occurred in Europe in the late nineteenth and early twentieth centuries. A. V. Dicey, a leading English constitutional lawyer, bewailed what he viewed as the potential demise of the rule of law in the jaws of the new administrative state. His views would later become influential in this country through analogous arguments made by Frederich Hayek's *The Road to Serfdom* (Chicago: University of Chicago Press, 1944). Even more fundamental debates took place in Germany among figures including Max Weber, Hans Kelsen, Carl Schmitt, and Franz Neumann. See, e.g., William Scheurman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Mass.: MIT Press, 1997). Although little of this debate filtered into the American legal academy, it did influence a number of other disciplines in the United States. The American attack on the pretensions of the rule of law was carried out almost exclusively by persons linked with progressive politics and the defense of the New Deal and the administrative state. By contrast, those attacking the rule of law in Europe were as likely to be right-wing authoritarians like Schmitt as leftist progressives. Indeed, as Edward Purcell demonstrated some years ago, many American legal realists became considerably chastened in the 1930s and 1940s, when attacks on the rule of law became identified with Nazis and Communists. See Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (Lexington: University Press of Kentucky, 1973). This did not necessarily mean, of course, that the critiques of the rule of law were genuinely overcome, only that they were shunted aside in what tended to turn, especially in the 1950s, into a celebration of the American legal order. The rise of the civil rights movement in the 1960s and the Vietnam War brought that celebration to an end, with the concomitant revival of American legal realism in the form of what came to be called critical legal studies.

then almost certainly the dominant law school in the United States – assimilated and co-opted elements of the realist critique and concluded that the job of lawyers was not so much to decide what was right and wrong but to decide who should decide what was right and wrong and how they should go about deciding it. As a result, legal process scholars spent a great deal of time thinking about questions like the proper methods of statutory construction; the appropriate balance of power among various branches of the federal government and between the federal government and the states; how courts should assess the procedural status of claims brought by litigants; how courts should review the decisions of administrative agencies, and so on.

Proceduralism can be – and has been – ridiculed as a flight from substance. It has been criticized for encouraging lawyers to focus obsessively on formal niceties while avoiding or obscuring deeper questions of substantive justice and thus fomenting ever-new ways to preserve the status quo. Yet, at the same time, proceduralism has its own normative commitments and ethics: a belief in orderly deliberation and a conviction that the legal system functions best when it assigns difficult, controversial decisions to the institutions or persons most likely to have the expertise and authority to make a legitimate decision.

Realism and proceduralism are the two great legacies bequeathed by American jurisprudence, and each responds to the other in a great spiraling dialectic. Every important jurisprudential movement in the United States – and most of the unimportant ones too – owes something to this dialectic. Realism demands that lawyers look up from their procedural fetishes and attend to the world as it is, with all its warts and injustices; it seeks to throw open the curtains that cloak the musty halls of law and bring in the light and fresh air of other disciplines so that law might better reflect changing social realities and attitudes. Critical legal studies, legal feminism, and critical race theory, not surprisingly, all share the realist call for law to awake from its dogmatic slumbers and attend to law's complicity with social hierarchy. Proceduralism, on the other hand, worries that making law too overtly political endangers law's legitimacy; it insists that the key to preserving values of democracy, fairness, and the rule of law comes from cultivating questions of procedure, even when these seem dry and abstract to the outside world.

Realism and proceduralism are not only America's gifts to legal science, they are also the features of American legal thought that most distinguish it from the civil law tradition practiced in Europe, which has tended to be far more formal in its approach. To this day, most European lawyers – and many professors – find American legal theory bizarre and almost the opposite of truly 'legal' reasoning. Americans are far less likely to delve deeply into the intricacies of legal codes to figure out how each part fits with the others. Instead, Americans ask what to the civil law mind are 'nonlegal' questions like "What rule would be most efficient?" or "Given that people will inevitably disagree about certain basic values, what procedures are most suitable for resolving disputes over such issues as abortion, affirmative action, or the death penalty?"

What is particularly important for our purposes, however, is that though realism (and, to a lesser extent, proceduralism) made law increasingly interdisciplinary in its ambitions, neither necessarily brought law closer to the study of the humanities. (The one major exception, of course, has been the continuation of

the realist tradition in legal feminism, critical race theory, and critical legal studies; each of these movements has drawn from the work of philosophers, literary critics, and historians in the humanities.) Indeed, both realism's fascination with facts and proceduralism's attempt to harness the expertise necessary to run the administrative state pushed law further and further away from the humanist vision we see in Hand's opening quotation and brought it closer and closer to becoming a branch of policy science.

Thus, both legal realism and legal proceduralism tended to produce not humanists but technocrats. This result has spawned yet another set of reactions by those who feel that law has lost a good deal of its humanity and its humaneness; these scholars have sought to reconnect the study and the practice of law to humanist ideals. This humanist tendency cuts across ideological divisions and the many different movements in the American legal academy. It can be found in the critique of rights offered by some adherents of critical legal studies; in the works of the law and literature movement, which seeks to think about law in humanist terms; and in Anthony Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993), which decries the soulless practice of corporate law and the equally soulless calculations of contemporary law and economics scholarship. The urge to recover humanism – often identified, whether correctly or incorrectly, with what people in humanities departments are actually doing these days – is one species of response to the American law school's technocratic tendencies.

Nevertheless, the two key institutional contexts in which law is practiced and taught – the 'legal services industry' and the modern professional school – limit the links that can be established between law and the humanities.

Outside of the academy, the practice of law today is organized around law firms ranging from small-town general practitioners to large firms specializing in federal regulations and corporate counsel, to even larger multinational firms that have increasingly complicated links to fields like finance and accounting. Lawyers have become key players in an ever-expanding globalizing technocracy – and contemporary law schools have tended to turn, not to comparative literature, but to economics and rational-actor methodologies, in an effort to produce lawyers geared to this legal services sector.

This industry continually reorients legal scholarship back toward its professional origins and, many might say, its professional obligations. Thus, at the end of the day, no matter how interested legal scholars may be in Jacques Derrida or Herman Melville, they have to return to the classroom and teach J.D. students to become lawyers. Yale Law School, where both of us have taught, is perhaps the closest to a traditional graduate program, but even at Yale some 80 percent of the student body do not intend to become legal scholars. Some of them, to be sure, will become novelists, politicians, and investment bankers, but most of them will become lawyers, and, in particular, corporate lawyers. At other schools the percentages are even higher.

This fact distinguishes graduate education in law from graduate education in almost every other area of the humanities. Relatively few law students, even at the elite law schools, actually wish to emulate their professors by becoming academics themselves. It would be a strange graduate program in history that

was populated by Ph.D. candidates with no interest at all in a scholarly career. Not so the average J.D. student.

In law schools, almost all students do not want to grow up to be like their professors, and almost all of the professors have consciously chosen not to become practicing lawyers. This creates occasional mutual incomprehension between students and teachers. Similar tensions sometimes surface between the academy and the profession when legal scholarship strays too far from the familiar work of offering expert advice and advocacy on legal questions for the benefit of the bench and bar. Until the 1970s, offering such advice was the standard practice of law professors, and in their legal scholarship they tended to view judges – especially Supreme Court Justices – as their ideal readers. The legal profession honors legal academics who continue this practice but displays considerably less esteem for the increasing number of legal academics whose work strays too far from this paradigm – and members of the bench and bar are not shy in saying so.

For example, a decade ago Judge Harry Edwards of the Court of Appeals for the District of Columbia, himself a former legal academic, complained of the "growing disjunction" between what law professors write in scholarly journals and what lawyers and judges expect from them. Legal academics, he lamented, have become less like their colleagues in the bench and bar and more like their colleagues in the rest of the university: increasingly, they write about things likely to interest only their academic colleagues at peer institutions. Yet despite Edwards's qualms, basic features of American legal education – including the fact that most law students are destined for the profession and not the academy – continuously reorient the study of law back toward a set of traditional professional concerns. If this were not so, the disjunction Edwards complains of would be far greater than it is.

Law's prescriptivism is a second major reason why legal studies resists becoming a branch of the humanities. Compared to their peers in the humanities, law professors generally demand that each piece of scholarship offer some account, however nebulous, of its practical implications: they want to know how a new theory will affect public policy and particularly how it might justify a change in the law. "Now that you've told me about Deleuze and Guattari," a colleague will say, "what does this have to do with telecommunications law?" The demand that legal scholarship cash out into policy prescriptions deeply circumscribes the legal imagination and the permissible boundaries of legal scholarship, while simultaneously reorienting legal scholarship toward legal practice and policy science.

We do not wish to exaggerate. Much legal scholarship today is barely distinguishable from political or literary theory. But such analysis, however distant from legal doctrine it may appear, is always understood to have consequences either for the reform or for the legitimation of existing legal institutions. When scholars seek to treat law as a cultural or aesthetic object, much as one might do in art history, their colleagues in the academy inevitably want to know how the work furthers debates about the choice and interpretation of legal norms. If a scholar responds that he or she had no intention of doing anything of the sort, the work is likely to be judged irrelevant or 'not law.'

In sum, 'humanists,' however defined, may be welcomed into the company of professional legal scholars – but they are

welcomed with the understanding that the humanities are not central to the legal academy's future. One sometimes sees at elite law schools seminars on subjects that would fit comfortably in graduate school humanities departments, but these seminars are possible because most law professors continue to teach the traditional skills of legal argument with their strongly prescriptive orientation. The latter practice subsidizes the former. Rather than celebrating the humanities, as Hand had hoped, the legal profession either enjoys or tolerates them – but only as long as it can afford them.

What, then, is the long-term future of the law as part of the humanities?

In one respect, the law will never abandon the humanities for the simple reason that law is rhetorical through and through. The work that practicing lawyers do today has much in common with the lessons of classical rhetoric taught centuries ago in the great humanist academies of Ancient Greece and Rome. It is no accident that Chaim Perleman, the coauthor of *The New Rhetoric*, a classic in the field first published in 1969, was also a legal theorist, or that Stanley Fish, the well-known literary critic, has more recently taken delight in studying, and manipulating, the rhetorical tropes of contemporary American legal theory.

Nevertheless, despite law's rhetorical features, law will never fully embrace the humanities, and law will never be a fully humanist subject – precisely because law's use of rhetoric is to legitimate particular acts of political power. That reality increasingly requires legal scholars to adopt technocratic forms of discourse that draw upon the social and natural sciences rather than the humanities.

Then too, there has always been something puzzling about law's encounter with the humanities. Hand may wax eloquent about what lawyers can learn from the great humanists of the past and how the humanities can enrich the lawyer's moral imagination, but these hopes must confront the harsh reality that there has always been a dehumanizing tendency in legal education. Traditionally, the first year of legal education discourages sentimentality – it shows in case after case in which the poor and defenseless are caught in the web of legal doctrine that legal doctrines have their own logic; so to simply bemoan the results as unjust is no argument. A 'good lawyer' is a rigorous thinker who does not waste time denouncing injustice at the expense of legal analysis. It is only the insufficiently rigorous and well trained, whom legal education has inadequately 'disciplined,' who think that the solution to a legal problem is resolved by asking which result is more just. Even scholars who believe it important to emphasize issues of justice are careful to instill analytical rigor and skepticism in their charges. They, too, seek to distinguish what is law from what is right.

The aggressive and unsentimental nature of legal education, many think, has real consequences later in the careers of those trained in American law schools. A debate now raging through the legal academy concerns the work of Justice Department lawyers in the Office of Legal Counsel, several of them drawn from the highest reaches of the elite legal academy, who drafted memoranda for the Bush administration that narrowly and legalistically defined torture so that they could assert that American interrogators were not perpetrating it. These same memoranda forcefully argued that the president as the commander in chief had virtually absolute powers to conduct warfare; therefore, neither congression-

al statutes nor international agreements barring torture could restrict his authority.

Legal academics now debate whether these lawyers were simply doing their professional duty by representing their clients or, on the contrary, were betraying their professional commitments in the deepest sense. Here it is useful to return to Holmes, that most iconic of figures in American law. Holmes once suggested that his epitaph should read: "Here lies a supple tool of power."[11] He also wrote to Harold Laski, "If my fellow citizens want to go to Hell I will help them. It's my job."[12] Hand also told an oft-quoted anecdote about shouting out to Holmes, as they were departing company, "Well, sir, good-bye. Do justice." Holmes sharply replied, "That is not my job. My job is to play the game according to the rules."[13]

One wonders whether Holmes would have been at all shocked by the Office of Legal Counsel's torture memos or would have seen them simply as quotidian examples of lawyers' stock in trade – coming up with arguments to justify whatever their clients would like to do. One equally wonders whether Hand would have been taken aback by these memos, and whether he seriously believed that exposure to the works of Plato or Montaigne might have helped prevent these memos, or, at the very least, led their authors to leaven their lawyerly arguments with greater moral concern.

Holmes was a notably well-read man, but we have little doubt that he would have scoffed at the idea that reading literature or engaging in the humanities would have had the edificatory effect that Hand seemed to advocate. He would have insisted that acquaintance with Homer and Shakespeare would not have changed what the ambitious young lawyers in the Office of Legal Counsel wrote to please those in power. Even a torturer can love a sonnet, or, as we learned during World War II, even a Nazi can thrill to Wilhelm Furtwangler conducting Beethoven.

At the same time, Hand's admonition to study the humanities may have been motivated, at least in part, by a sort of cultural elitism; in particular, his concerns about the ambitious and grasping parvenus who were invading the legal profession of his day. Hand may have invoked the humanities primarily to defend the values of the traditional legal establishment. (There is an obvious analogy to the development of English as a subject matter to civilize the children of the working class who were entering universities for the first time.)

The political meaning of promoting the humanities in law has changed in half a century, and along with it the power and influence of the humanities. Hand wrote when the humanities formed the deep roots of an imagined republic of letters in which elite lawyers believed they participated. Contemporary legal scholars like James Boyd White and Patricia Williams refer to the humanities not to uphold the values of the legal establishment, but rather to criticize those values. Contemporary law and literature scholars offer the humanities as an antidote to a form of legal professionalism that they believe

11 Quoting Holmes, Yosal Rogat, "The Judge as Spectator," *University of Chicago Law Review* 31 (1964): 213, 249 – 250.

12 "Letter of March 4, 1920," in Mark De Wolfe Howe, ed., *The Holmes-Laski Letters*, vol. 1 (Cambridge, Mass.: Harvard University Press, 1953), 249.

13 Harry C. Shriver, *What Gusto: Stories and Anecdotes About Justice Oliver Wendell Holmes* (Potomac, Md.: Fox Hills Press, 1970), 10.

has become all too technocratic and divorced from any human values, save economic efficiency.

Does this mean that the humanities have been thoroughly routed by the forces of social science, so that they no longer play a significant role in the legal academy or the legal profession? Certainly not. Although institutional and professional constraints will continue to limit the influence of the humanities on legal studies, the law will always maintain an uneasy relationship with the humanities, as long as it remains a thoroughly rhetorical enterprise. But whether this kind of relationship will – or should – satisfy those humanists who gaze on the legal academy from the outside remains an open question.