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Peter Goodrich

Benjamin N. Cardozo School of Law, goodrich@yu.edu

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Intellection and Indiscipline

PETER GOODRICH*

A discipline will usually become the object of study and its relationship to other disciplines a moment of concern when its borders are precarious and its definition in dispute. Law, 'the oldest social science', is arguably both prior to discipline – it emerges initially and most forcefully as a practice – and without discipline, its object being potentially all human behaviour. If law is necessarily between and among disciplines, both prone to moonlighting and everywhere homeless, it will also always be in some mode of scholarly crisis. Certain conclusions follow. Law is paradoxically dependent upon other disciplines for its access to the domains that it regulates. The greater its epistemic dependency, however, the slighter its political acknowledgment of that subordination. Which allows a positive thesis: the epistemic drift of law can carry the discipline to a frank acknowledgment of the value of indiscipline both to novelty and intellection.

... there's some corner of a foreign field
That is for ever England. There shall be
In that rich earth a richer dust concealed;
A dust whom England bore, shaped, made aware ...
(Rupert Brooke)

The mapping of a discipline is both an historical and a theoretical project. When the discipline in question is law and so itself quintessentially disciplinary and disciplining, a reality conferring enterprise, then the project is more complex still.¹ Viewed over the *longue durée*, as social structure, as

* *Cardozo School of Law, Yeshiva University, Brookdale Center, 55 Fifth Avenue, New York, NY 10003, United States of America*
goodrich@yu.edu

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1 For a recent discussion of the juristic invention of the real, see B. Edelman, *Quand les juristes inventent le réel. La fabulation juridique* (2007).

defining the trinity of persons, things, and actions as also institutions and norms, law has played a coercive role in relation both to what counts as knowledge and with respect to the hierarchy of disciplines. In claiming to speak from the space of truth, in issuing verdicts, in thus promulgating knowledge that exceeds the vernacular and mundane, law institutes its own epistemic field – its jurisdiction – and in the process potentially negates those disciplines that lay claim to evaluate the epistemology of legal judgment. Not much of this is consciously purveyed in the legal texts most normally encountered but, at common law in particular, is rather unwritten, tacit, assumed through prior judgments and esoteric codes that allow judges to claim variously that law is not logic, that law is not in the words but in the truth, that the half truths of one generation become the norms of another, that scholarship cannot comprehend the hard law that is case law, that on occasion black is white, that men are women, that Barcelona is in London, or that tradition, unwritten custom and use, conscience and good morals are coeval with and inherently dictate what courts must do. The last vestiges of serious social speech are arguably in the hands of self-professed fiction mongers, euphantastists, as they were once called, who make things up, and sometimes commendably so, to suit their case.

A discipline is a tradition, both transmission and betrayal of the past. The etymology of the word is instructive, coming from a root meaning of disciple or follower. The institutions of law are social constructions and what gets passed on as knowledge of law is equally a product of relationships, events, and networks of dissemination in the *schola* or classroom, in seminars and symposia, in courtrooms and Inns of Court, chambers and council rooms.² The discipline controls. It quietly establishes a hierarchy within that reflects the hierarchy without. The social system divides epistemically into lesser systems. In law too – and why should it be any exception? – groups form, a hierarchy is ensconced in the new generation, social norms are established, usually tacitly, and others – defined by race, class, gender, political or theoretical affiliation, by lack of credentializing status – are excluded. The establishment reconvenes in slightly younger form and the order of juristic things gains its new mediations, its embodiment and expression, its tokens of success, its symbols of status, its figures of truth. A new generation takes on the self-disciplining functions of bureaucracy, and how easily that role seems to be assumed. It is important to a critical apprehension of the sociology of knowledge that such networks, movements, schools, trends, and fashions

2 F. Wacquet, *Les Enfants de Socrate. Filiation intellectuelle et transmission du savoir XVII–XXI siècle* (2008) provides an extraordinary history of the master-disciple relationship in the academic world. On the conflict between discipline and law, see, particularly, M. Foucault, *Society Must be Defended* (2003). For a recent collection of encounters between and among disciplines, but with law not included, see J. Chandler and A. Davidson (eds.), *The Fate of the Disciplines*, published as (2009) 35:4 *Critical Inquiry*.

also be traced as the lines of power or fields of force that contingently dictate what constitutes truth about law, or in the rather shoddily applied terms of research assessment exercises, what is excellent or internationally recognized or properly part of the core discipline. Such lists or putative appraisals of contacts and associations, the hierarchy of persons and actions, texts and letters, becomes the form of life, the grid through which the discourse of law flows. It plays its role, in turn, in defining and circulating things, bodies, and words, the key elements in the longer-term patterns of epistemological development, institutional presence and definition. They are what defines the discipline and they also dictate its relationship to other disciplines, because the interdisciplinary is as much a matter of culture and *mentalité*, of the theory of comparison, as it is an abstract question of purely systemic interrelations.³

In what follows I will make the argument that understanding the interdisciplinary requires that the element of the 'inter', the aspect of homelessness, of drift, of spaces between and without *archos* or law is intrinsic. The properly interdisciplinary travels betwixt and through disciplines, it appears at intervals, is there and gone, indisciplined in the positive sense of pleated and becoming, nascent, inchoate, not yet known. There should be an element of indiscipline to the trajectory and evaluation of any discipline. Irreverent questions are needed. Such as what did you enjoy? Did this tell us anything? Was their passion, force, wit in this conversation? And by the same token, flipside, stripped of regalia, status credentials, hierarchical pinnacles, the aura of seriousness and self-worth, was this text or speech still bearable? Relevant? Engaged with thought? Thinking for itself? In that spirit I will first map the jurisdictions and disciplinary roots of our dear English common law and subsequently move to track the relationship between that history, those tendrils, roots, and branches of a tradition, a way of knowing, a form of life, and the other disciplines with which law engages and against which it oftentimes defines itself. The current crisis in legal studies lies very much in the fact that law can no longer act in such a negative manner nor claim such hauteur or superiority as once was the effortless and not always unwarranted garb of the *ius peritus* or doctor of law.

3 This point is extensively and well argued by Pierre Legrand. See, for example, the discussion, ending with the concept of comparison as caress: P. Legrand, 'The Same and the Different' in *Comparative Legal Studies: Traditions and Transitions*, eds. P. Legrand and R. Munday (2003) 240–311.

First the backface, the long term of common law as a discipline.⁴ It bears restatement if only because the Englishness of common law is part of a political imaginary, a literary fiction on the part of lawyers, and this merits elaboration. As with any of the arts, the first question is the relation of law to Latin and the transmission of the classic texts. The Renaissance reception of Roman law falls into three parts. This tripartite geographical and loosely jurisdictional division also suggests a threefold method of law. If we follow the academic lawyer Giorgio Agamben's recent and riveting history of Western administration, a narrative that he elucidates as based upon the Trinitarian theology of 'oeconomy' – meaning rhetorical disposition as well as household management – then the trilogy of European legal methods can also be understood in terms of doctrinal differences.⁵

The position of the father is occupied by Roman law, the infinitely detailed scholastic exposition of the *Corpus iuris civilis* and the so-called *mos Italicus* of the predominantly German jurisdictions that stuck strictly to the text, the letter of the Roman exemplar.⁶ This law of the father could speak through all merely temporal jurisdictions and local expressions. It was the basis of a science whose laboratory was not even as diverse as Langdell's later (and equally teutonic) reliance upon the constraint of the law library. For the first generation of glossators, the science of law was based on a single body of books housed in a single room in a tower in Pisa where the Florentine manuscript of Justinian's text was guarded jealously behind barred windows and a locked door, coming out only at night to be read under guard and by candlelight. The second position, that of the son, both filial and in Freud's terms oedipal, is taken by the French school, technically that of the *mos Gallicus*, in which the work of the father is taken up by destroying the father in favour of historical method, philological precision, and attention to the earlier sources upon which the *Corpus iuris* was based. Justinian, or

4 G. Samuel, 'Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?' (2009) 36 *J. of Law and Society* 431–59. Samuel does not address the English Renaissance and Anglican humanist tradition in law, nor does he include it in 'the rather short' history of its scholarship. What follows here is a supplement and corrective. The notion of a backface is taken from J. Selden, *The reverse or back-face of the English Janus* (first published as *Jani Anglorum facies altera*, in 1610) and designates the hidden or 'other' history of common law, its secrets, its skeletons, its positive unconscious.

5 G. Agamben, *Le règne et la gloire: Homo sacer II,2* (2008), an extended meditation on the maxim *rex regnat sed non gubernat* (the sovereign rules but does not govern). T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997) makes a variant but comparable argument in terms of a distinction between the penetrative scheme and the juridical soul.

6 For an introduction to the distinction, see P. Stein, *Roman Law in European History* (1999) 75 ff. A more detailed discussion can be found in D. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990) chs. 8 and 11.

more politically, Tribonian, the chief compiler, became the name of an error.⁷ Standing on the shoulders of the classical giant, the early modern humanists relied upon philology, the historical method, to see further than the ancients, and specifically further than Justinian and Tribonian who had so hurriedly compiled the master text that was now to be unravelled.

Finally, third but not least, there is the *mos Britannicus*, the Anglican and thoroughly mixed tradition of common law.⁸ The holy spirit is a hybrid figure, part father, part son, filial and rebellious, providential and practical; it is associated by Agamben with the classical chorus, and specifically with the rituals, acclamations, liturgies, and praises that both invest the sovereign and express the *genius loci*, the unwritten spirit of locale or *terrae*. For the English, it is the integrity of the island that seems to matter most and that needs to gain expression in the insular identity of the laws. Thus the expulsion of the first Rome, that of the papacy and the pontifical jurisdiction, gained secondary expression in a fierce, if often imaginary, nationalism of common law. This was a tradition distinct from that of the civilians, a pattern of practices and precedents that preceded books of law and did not need written expression except as contingent evidence of prior oral forms. The seamless web of common law was a species of the map that is described by Borges as being identical in size to the terrain being mapped. The common law was a myriad of cases and it was cases, not book law, that were enrolled, tabled, and fined, as also mooted and bolted.

Of all the three traditions of European law, the *mos Britannicus* is historically the one that is furthest removed from the universities and the least prone to exposition of its own method. Critical though the common lawyers were of the civilians, they were also subject to and aware of the lambasting of Anglican law as a junk-pile of cases lacking method and open to manipulation, to borrow a phrase, by the most unlearned of learned professions.⁹ This poor illiterate reason was not simply less than science, it was not even a discipline, and so desperately needed the aid of Latin and learning which could together reform and systematize this houndless pursuit.¹⁰ It was not only the civilians who criticized the common lawyers.

7 On the *emblemata Triboniani*, see V. Hayaert, *Mens emblematica et humanisme juridique* (2008) 111–47. For discussion of emblems and other epistemological enigmas, see P. Goodrich, ‘Legal Enigmas: Antonio de Nebrija, *The Da Vinci Code* and the Emendation of Law’ (2010) 30 *Oxford J. of Legal Studies* (forthcoming).

8 *Mos Britannicus* is sometimes used to refer to the Druidic style but I am striving here for a juridical neologism. It might be that *mos Angliae* is more accurate but it does not fit the tripartite scheme quite so well.

9 The source is Erasmus, but the citation is from Sir J. Doderidge, *The English Lawyer. Describing a Method for the managing of the Lawes of this Land* (1631) 33: ‘in scorne some have called the crew of unlearned Lawyers, *Doctum quoddam genus indoctorum hominum*’.

10 Sir R. Wiseman, *The Law of Laws: or the Excellency of the Civil Law Above all Humane Laws Whatsoever* (1666) is the most lucid, systematic, and convincing of the

There was 'The Reverent and Learned Sir John Doderidge Knight, one of the Justices of the Kings Bench, lately deceased' who in 1631, which truth be told is not that lately, suggested in his treatise on legal method that we need to commend some of the 'sedentarie' judges of yore, who:

were men excellently skilled in all generall good learning, as doe witnesse the works of that worthy *Judge Henry de Bracton*, and *John Britton* sometimes a learned Bishop of Hereford, skilfull in the Lawes of this Realme.¹¹

There were also dissident Anglican critics, internal opponents, amongst whom we can trace a course which would include the theologian Cardinal Reginald Pole, the philosopher Abraham Fraunce, the polymathic William Fulbeck, the Ramist systematizer Sir Henry Finch, the jurist and humanist advocates of codification of common law, Thomas Lupset, Francis Bacon and, much later, Jeremy Bentham, and now, in this instance, *ecce homo*, a university man, a francophile, my former colleague (his office was opposite mine at Lancaster University back in the era of big hair), Professor Geoffrey Samuel.¹² He asks two related questions. Is law a science? If it is not, if it has no special disciplinary identity – as opposed to authority and status – then what contribution does law make to the university or the episteme? These are questions that sound peculiar to modern ears, anachronistic perhaps, syncretic even in being radical and academic, internal to law and yet sharply critical of its method.

THE LIBERAL SCIENCE OF LAW

The backstory is reasonably well known. At the time that the printing presses turned to making common law available, the English, with their usual flair for compromise and confusion, were teaching Roman law in the universities, recording court proceedings in Latin, arguing in a garbled species of French, and practising a predominantly local law, a formulaic system of writs and local customs mixed with royal edict and decree. The first significant drive to reform common law did not really aspire to present law as a science but rather to introduce a little learning, a touch of disciplinary skill, a modicum of method, into the presentation and teaching of law during the course of

critics. I traverse some of this literature in P. Goodrich, 'Critical Legal Studies in England: Prospective Histories' (1992) 12 *Oxford J. of Legal Studies* 195. On the status of Latin and its educational history, see F. Wacquet, *Latin, or, the Empire of a Sign: From the Sixteenth to the Twentieth Centuries* (2001).

11 Doderidge, op. cit., n. 9, p. 33.

12 My initial inspiration here is to respond to Samuel, op. cit., n. 4. Also important are G. Samuel, 'Droit Comparé et théorie du droit' (2006) *Revue Interdisciplinaire d'études juridiques* 1; G. Samuel, 'Is Law Really a Social Science? A View from Comparative Law' (2008) 67 *Cambridge Law J.* 288; G. Samuel, 'Can Legal Reasoning be Demystified?' (2009) 29 *Legal Studies* 181.

apprenticeship at the Inns of Court. A diversity of factors seem to have been in play. The presses exposed common law to a degree of literate public scrutiny, aided also by the translation of law texts into the vernacular. The technological change brought a heightened degree of criticism of legal pettyfoggers, and wrought a shift in the institutional self-consciousness of lawyers. A more structural facet of reform was the paradoxical drive to distance common law from both the papacy and the continent, the tincture of Normanism, as it was then called, while at the same time resorting to classical treatises on method, Roman rhetorical handbooks, and the latest in continental theory to reform the Anglican morass of 'commune ley'. This theological and political assertion of the sovereignty of the English monarch and the national distinction of common law was ironically carried through by borrowing from the very continentals who, at the political level, were being disparaged and evicted from the curriculum of prefatory discourses to institutional treatises, occasional polemics, and sparsely reported precedents.

The historical details can be followed elsewhere; for present purposes it is important not to allow either temporal distance, or linguistic unfamiliarity, or technical opacity to disguise the early meaning of interdisciplinary legal study. For practical purposes, and notwithstanding its itinerant excursions into the provinces, common law was a royally dispensed enterprise taught, determined, and housed in a collection of Inns located next to the theatres in central London. In American jargon, common law was an off-Broadway production, a theatre of justice and truth that obeyed a distinct but not wholly different set of unities to those of the dramatic stages that adjoined and on occasion even reproduced it.¹³ Legal drama was a ritual enterprise, a ceremony of truth, a solemn exercise in *dicta* and dictation without any very evident scholarly apparatus, disciplinary identity or theoretical support beyond the theology of sovereignty and the diverse patterns of a multiple linguistic and cultural heritage that mingled Saxon lists, Gaelic rites, and Norman customs.

The common lawyers turned to their continental contemporaries. The Prince or principal reformer resorted to by the scholars and humanists amongst the common lawyers was Petrus Ramus, the neo-scholastic French exponent of dialectical method as the means to schematize and so systematize any discipline whatsoever. It was Ramist logic that inspired the reform of legal method from Fraunce to Finch. It was an external and foreign influence, a continental fashion in philosophy that brought common law face to face with the failings of its pedagogy and the inadequacies of its

13 On the relation between the Inns of Court and the stage, see S. Mukherji, *Law and Representation in Early Modern Drama* (2006) ch. 5; on the internal stages of the Inns, see P. Raffield, *Images and Cultures of Law in Early Modern England: Justice and Power, 1558–1660* (2004). For the interesting architectural observation that the Inns are designed as an ear, see D. Evans, 'The Inns of Court: Speculations on the Body of Law' (1993) 1 *Arch-Text* 5.

methods. So much so, if a pun is permitted, that George Ruggles, one of the best of university based satirists of the logical and linguistic lacunae of native law, invents the epithet *Ignoramus* – ignorant of Ramus – as the name of his pitiful protagonist, ‘an English lawyer’, and of his eponymous play.¹⁴ First point then, *prima regula*, common lawyers as a guild were resistant to the competing claims of method and scholarship, publicity and vernacular dissemination, that the Renaissance and the winds of humanist reform demanded of them. They needed criticism, satirical prompting, theatrical denunciation to force them to think and to change.

Common law grew up outside the established university system and curriculum. It was an insular law lodged and developed in an architectural island in London. It has a structural antipathy to scholarship and method, expressed most directly and still to some degree, in the guild mentality of the practice and the professional constraint upon education as most obviously dictated by the latter stages of training, the non-academic phase. Let me not get ahead, however, of either *nomos* or narrative. The initial point is that the common law gloried in an oral and auditory tradition, a practical mentality devised in lists and rolls, chancelleries and chambers, and it was only the technological changes generated by print, pressure from outside, the barbs of satire, and the castigations of pamphleteers and dramatists that forced change into the other-worldly atmosphere of the juridical cloisters. A political exchange, a coming to terms with the exigencies of the day which led, in one clever exercise of renaming, to the Inns of Court becoming called ‘The Thirde Universitie’.¹⁵

The second point, if one reads the sources, is that the emergence of common law as a discipline was a rather sorry affair. The trajectory could be framed as follows. Common law is inherently a practice rather than a theory, method, or scholarly tradition. As a practice, it engages with the social pathologies of everyday life, as well as facilitating the transactions of commerce, the passage of property to and through death, the status and offices of persons. It deals with everything and so also, in methodological terms, with nothing. Law, as a practical activity, a guild knowledge of which writ to file, when, and in what place, did not seem to cry out for scholarly elaboration. The lawyer knew the law, a set of rites tied to the resolution or displacement of conflict and controversy. To this all too recognizable anti-intellectualism and dogma, the humanists opposed the necessity of art and knowledge of ‘the Sciences Liberrall’.

14 G. Ruggles, *Ignoramus. Comoedia Coram regia maiestate Iacobi Regis Angliae* (1630). The play was first performed in Cambridge in 1615.

15 See G. Buc, *The Third Universitie of England* (1615) vol. 3, at 966:

But admit that this city had no other colleges in it: but the Inns of Court, nor other sciences studied and professed in it, but the laws, yet might London (as Justice Fortescue well observed, and held) be as worthily styled a university as either Angers or Orleans in France, or as Pavia, or Perugia in Italy, wherein the study of civil law, is only professed.

Using Sir John Doderidge, author of one of the first substantive treatises on common law method, as my principal example, the initial task is one of saving the profession from the potential embarrassment and consequent social obloquy caused by uncouthness and stupidity. This very basic desideratum gains expression as a double negative: ‘We seeke not hereby to institute I know not what manner of vulgar professor of the Lawes, no common blatterer or temerist . . .’.¹⁶ There are plenty of similar examples but the point is that of the evident expression of tension and stress between guild and academy, cloister and community. The first task of scholarship is in this respect curious and illuminating. A more rigorous education will produce a better image of the lawyer, and Doderidge’s text on method indeed begins, first page, entry for content, by exhorting those that study law to ‘covet and contemplate with their inward eye the *expresse and perfect Image of an English Lawyer*’.¹⁷ Art can aid in improving the public perception of the profession and it can facilitate dissemination and acceptance of decisions if the lawyers know what they are talking about. If, to borrow one of Doderidge’s examples, a case concerns ‘a maim’, say loss of an arm, then the advice of surgeons and medics should be sought so as to understand what the injury means. Without knowledge, law is vacant.

The remedy for juridical ignorance is also interesting. Law touches potentially on all disciplines. It is truly interdisciplinary in the sense of being without discipline. There are two reasons for this. The first is that jurisprudence is, for civilians and common lawyers alike, a knowledge of things divine and human. In touching matters spiritual, in addressing and being addressed by the divinity, law reflects whatever God or sovereign might care to say. And they can, as we know, on occasion say anything: declare war on imaginary grounds, devise elaborate internal regimes of expense account, announce, in a recent example in the United States, that the medically dead are still living. So too, the causes that come before the lawyer, the pathology, madness, and injuries that get litigated can call upon any number of skills of apprehension and determination. That being so, the best training is general and expansive. Law, in Ramist Latin, is *scientia scientiarum*, the Science of Sciences:

and therein lies hid the knowledge almost of every other learned science: But yet I pray consider, that those forraigne knowledges, are not inherent or inbred in the Lawes, but rather as a borrowed light not found there, but brought thither . . .¹⁸

All knowledge is potentially relevant to law. All disciplines can be invoked, or nest hidden there, and law must be open to them. Doderidge is not exceptional in making this argument. We find it also in Fraunce and in

16 Doderidge, op. cit., n. 9, p. 39.

17 id., p. 1.

18 id., p. 35.

Fulbeck, in Cowell and in Finch. The mark of the excellent lawyer is 'generall good learning'.¹⁹ Everything within the liberal sciences, the conceptual disciplines, that might train the mind or increase the knowledge of the subject will be of aid.

Lastly, and here we approach most directly the concerns of Professor Samuel, the specific method for acquisition and manipulation of the knowledges that are necessary to law, comes traditionally in the form of the invocation of reason or the necessity of logic. Law may be unamenable to scientific method in its modern sense, in that it can never be practised in a closed environment, as also it will always concern human relations which, according to Aristotle amongst others, are not amenable to certainty but only to probability. That does not mean, however, that law cannot in its operation and application be subject to method, to disposition (*oeconomia/dispositio*), and to systematization. The substantive curriculum in law, as devised by the Ramists, was an exercise in scholastic reasoning, in dialectic and then the rhetoric of argument. The best example is probably Finch's *Nomotechnia*, or 'Art of Law'.²⁰ We start with general propositions, the maxims of law that Fortescue and then Bacon had elaborated as the exempla of legal argument. Clothed in Latin, and tabulated according to discipline, the maxims find their best systematization in Noy's collection compiled in the 1640s and organized according to their disciplines of origin: theology, grammar, logic, philosophy, politics, morality, law, and custom.²¹ Other authors offer similar schemes of seemingly esoteric though in fact quite ordinary propositions from diverse disciplines. From these premises, arguments can be drawn and methods of logical schematization developed. Fraunce is to the same effect.²² One takes the cases, extracts a maxim, a *dictum*, a rule and then elaborates it.

It is the fate of government and law as practices, as opposed to sovereign pronouncements, divine decrees or other manifestations of *regnum providentiae* or absolute power, to exist in uncertainty and probability.²³ They deal with relations and they require, returning momentarily to Agamben's thesis, management and administration, accommodation, and disposition in the sense of ordering, which we now more positively term

19 *id.*, p. 33.

20 Sir H. Finch, *Nomotechnia* (1613). I have used the 1759 edition, published in English as *Law or a Discourse Thereof in Four Books*. On the various texts and translations, see W. Prest, 'The Dialectical Origins of Finch's Law' (1977) 36 *Cambridge Law J.* 326.

21 W. Noy, *The Grounds and Maxims, and also an Analysis of the English Laws* (1641/1808).

22 A. Fraunce, *The Lawiers Logike, exemplifying the praecepts of logike by the practise of the common lawe* (1588).

23 Agamben, *op. cit.*, n. 5, pp. 197–203 usefully elaborates on the theology of the distinction between providence and destiny as at the root of the distinction between sovereignty and government as administration.

method. That being so, the early-modern move to systematize law did not push to constitute law as an autonomous discipline but, rather, sought to equip the lawyer with a training that would draw on all relevant disciplines and would recognize that this borrowing or translation into law required a degree of tact. It was important that the lawyer appeared well educated, articulate, knowledgeable, and equipped to judge. Jurisprudence, as one later systematizer of the visual presence of law expressed it, is the 'image of the public good'.²⁴ Logic, dialectic, and rhetoric could help substantially in perfecting that image of the lawyer and in retailing the institution and profession. The disciplines have their uses, a sentiment that Doderidge elaborates in terms of 'sciences and vertues intellectuall adorning the minde, as the Libera'll'.²⁵ The lawyer brings at best their innate *ingenii acumen* or ready understanding to these diverse pursuits. The law is the outsider. It is not as if there is anything particularly special about law as a discipline, even if the external and foreign sources of its respectability are generally kept well hidden. They are, as we have reviewed, generally continental and civilian, theoretical and textualist.

THE METHOD OF INDISCIPLINE

What is past is prologue. This is so in several senses. I will draw on two. First, a new technology generates what Derrida wittily called a 'crisis of destination' and thence a move to self-reflection, a hermeneutic reappraisal, within the disciplines.²⁶ The internet has not only repeated the seismic shift that print had earlier enacted upon the disciplines but it has also in many respects undone the hierarchy of texts as well as both the sanctity and storage of law that had been achieved by print and the indefinite murmur of writing confined to libraries. The new media generate a new world, a novel configuration of *ordo, lex, medium* in the classical trinity.²⁷ *Homo juridicus*, the space of law, the discipline of the jurist, the interdisciplinary knowledge of law have all again come under critical scrutiny, as also have the ethics of the lawyer and the justice of legal judgment. The *mos Britannicus* seems more than ever, or perhaps simply again and visibly disordered, somewhat random, lacking in scholarly discipline, theory, and method. This is what Samuel is concerned with and focused upon in a recent book, as also in an expansive series of articles published both here (which is to say there, namely England) and in France.

Professor Samuel is so disillusioned with common law method, so despairing of building a discipline out of the Anglican tradition, that he

24 F. Menestrier, *Le Véritable art du blason* (1673) preface.

25 Doderidge, *op. cit.*, n. 9, p. 36.

26 J. Derrida, *The Postcard: From Socrates to Freud and Beyond* (1992) 232.

27 On which, see P. Goodrich, 'Screening Law' (2009) 21 *Law and Literature* 1.

focuses almost exclusively upon the history of Roman law, and the *mos Gallicus* in particular. He is concerned to pose rhetorical questions. ‘Is law really a social science?’ The answer is no, it is a dogmatic pursuit within an authority paradigm. ‘Can legal reasoning be demystified?’ The answer is no, or at least not by lawyers playing at philosophy within an authority paradigm: they are ‘just rearranging the deckchairs on a fantasy ship’.²⁸ Finally, ‘should law be taken seriously by scientists and social scientists?’ The answer is no, law is trapped, as you have doubtless only very recently read, in an authority paradigm that precludes any very meaningful contribution either to science or to sociology. We need, in this view, to step away from the authority paradigm, show some respect to the other disciplines, and endeavour to comprehend, though here I am pushing his argument somewhat, the community of lawyers as a somewhat idiosyncratic form of life. To do this, we would do best to turn to continental thought, to treatises on epistemology, and specifically to the study of method as elaborated in and through comparative legal theory. It is not rights so much as it is method that needs to be taken seriously.²⁹ Sound familiar? This, of course, is precisely the theme that I have traced in the earlier English tradition. Common law needed method, it was as extant a sorry mixture of pathology and system, case and commentary that could only be deemed as lacking in both scholarship and logic by the Ramist inspired authors of the foundational era of properly Anglican government.

The earlier era of reform, the erudition of Fraunce, Fulbeck, and Finch, Smith, Spellman, Selden to name but a few, did not have too great a practical or, shall we say, distributive impact upon the discipline of law. Therein lies the interest in returning to them. They were never really incorporated, their suggestions remained suggestions. No successful university curriculum in common law was devised – the third university aside – and the compromises and conflicts between professionals and professors remained unresolved and seldom did the two meet or talk outside of the elite arches of Oxbridge where the discussions were more political than technical. When Dicey and others, and most notably Langdell in the United States, propelled common law into the university curriculum in the late nineteenth century, not so long ago as Samuel opines, their model, predicated closely on the suggestions of the Ramists as purveyed through Blackstone, in the end did little more than institute the tired schematic curriculum of cases, a compromise between profession and scholarship that so favoured the professional that it was practitioners and not scholars who formed the advanced guard of the new university discipline, did the teaching, and compiled the professional and pedagogic manuals. And then, as Samuel at one point caustically and incisively notes, law is taught today as it was taught 50 years ago. One could

28 Samuel, *op. cit.* (2009), n. 12, p. 210.

29 G. Samuel, ‘Taking Methods Seriously (Part One)’ (2007) 2 *J. of Comparative Law* 94, and ‘Taking Methods Seriously (Part Two)’ (2007) 2 *J. of Comparative Law* 210.

expand that. It is taught now pretty much as it was taught 100 years ago in the early days of the new syllabus. It is taught as a collection of cases organized around thematic topics conjured in the main from the subject-matter of the decisions studied. Add a few European Directives, some statutory subject-matter, a few classes on the legal system and its component parts, throw in an incoherent discussion of the ‘essential’ (and essentially contested) distinction between *rationes decidendi* and *obiter dicta*, and stop there. An elective in jurisprudence, an option in gender, crime, sociology of law, or some even more eccentric course on law ‘and’ – literature, history, film, aesthetics, psychoanalysis – may bring the student into contact with the questions of method and discipline that Samuel raises, but these are by now, at this point in the curriculum, secondary engagements, not real law but school lore.³⁰ So the argument and the practice goes.

Support for Samuel’s argument can be taken from some other contemporary sources. He mentions the lesser status of comparative law, if genuinely treated as comparative, and notes the frequent characterization of such an interest as a form of dilettantism, as if method, thought about the discipline, was an ornament, an illicit pleasure, a distraction. We can add Supiot’s *Homo juridicus*, an extended meditation on the growing irrelevance of law, its subversion and marginalization by the internationalization of markets and the global yet virtual presence of the web.³¹ Market drive, law and economics, the absolutes of cost benefit analysis, the ecfactic calculus take over the space of thought and hence also the terrain of law.³² So, too, the boundaries of promulgation and implementation are eradicated by the fluidity of fibre optics, wireless connections, and the laptop computer which can connect any subject, anywhere, to any place: appropriately enough the terminal is now called (Mac) ‘Air’, and nominally at least invokes a Pythagorean metaphysics. What cannot be confined to a jurisdiction escapes law. If territorial competence is a precondition of judgment, of the *lex terrae* as such, if the juridical is by definition attached to and circumscribed by text and territory, then the erosion of the boundaries of text and territory, the slippage into spectral portals, hypertext markup language (html), and the virtuality of the world wide web are all potentially witness to the diffusion and evaporation of the concept and procedures of legality. As Linda Mulcahy points out in her study of video appearances in court, you don’t

30 C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) *Law Q. Rev.* 632, argues that we are all socio-legal now, and this may be true, as F. Cowney, *Legal Academics: Culture and Identities* (2004) rather depressingly suggests, but this says a lot about the law professor’s self-perception as a scholar and nothing of what they teach or do within the institution as a mode of reproduction of law.

31 A. Supiot, *Homo Juridicus: On the Anthropological Function of Law* (2007), and for commentary, see P. Goodrich, ‘Law’s Labour’s Lost’ (2009) *72 Modern Law Rev.* 296.

32 On the ecfactic calculus, see P. Goodrich, ‘The New Casuistry’ (2007) *33 Critical Inquiry* 673, at 700.

really any longer have to show up. You can teleport in on a hard line, arrive as an image, answer in real time but from no legally recognized place, engendering perhaps a modern version of a classical legal fiction, which would go something like ‘X is on earth, Mars or Kansas, to wit in London’.³³

From a different though associated perspective the international community also suffers a species of demise along with the erasure of national boundaries. The fragmentation is well delineated by Carty in his *Philosophy of International Law*, a book that argues most forcefully that there is no philosophy of international law.³⁴ This absence of method deprives international law not only of any disciplinary identity but also of any critical or political relevance. Where Supiot, writing in a French context, argues that dogma and doctrine are suffering a contemporary destruction at the hands of international corporate self-interest, political indifference, and legal academic ineptitude – the blankness of ‘law and economics’ – leading to incoherent or inaudible resistance in favour of thought, Carty too views the decline in common lawyers’ critical apprehension of international law as lying squarely in their lack of erudition and their failure of will. The legal academy is more supine than disciplining in any strong sense, effectively abandoning doctrine, the invention of thought, scholarship proper and political, in favour of simply systematizing what states do and what international courts of precarious jurisdiction and dubious authority happen to say. The unhappy consciousness of the legal academic here proves debilitating rather than provoking any sustained intervention in the sources of unease, the practices of states.

There is a common trajectory to follow, a critical evaluation of a historical lack of will, a refusal of intellectual discipline within the legal academy, a resistance to theory, and an abdication of the creative role of doctrine as something more than second-order law reporting. The fault lies as much on the left as on the right, indeed, more so in that there is at least a species of guild consistency in excluding scholarly critical re-evaluation from the pragmatic isolationism of law as a solemnizing institution and serious social theatre of justice and truth. The absence of theory is the thorn that pricks Samuel’s side, and which he tracks remorselessly in terms of the failure to generate a discourse on method, leaving the legal academy without any independent object of study, and equally without intellectual purpose beyond self-reproduction of the guild. There is no answer to the fundamental question of what is doctrine, no discourse on whether it is anything more than or of any greater scholarly and political value than retailing what courts say. It is a question that Carty attacks in terms of the history of international lawyers treating the state as sacrosanct and so immune to meaningful critique because

33 L. Mulcahy, ‘The Unbearable Lightness of Being? Shifts Towards the Virtual Trial’ (2008) 35 *J. of Law and Society* 464, where she also notes the eradication of thresholds occasioned by video links.

34 A. Carty, *The Philosophy of International Law* (2007).

the proper object of legal academic choirs and juridical acclamations lies in celebration and promulgation of an unquestioned norm. The left mirrors acclamation in the mode of heckling, demystification, and denunciation with an equal absence of substantive content. Samuel treats a similar phenomenon in comparative law, an exemplary inter-discipline for his argument: lacking training in method, without critical tools with which to address the social pathologies, political over-investments, and relational corporate contexts with which law, national and international, regulatory and facilitative, has to deal, lawyers can offer little beyond the mouthing of platitudes and the timid vacuity of school-bound academic law, that very English idiom: 'it is fervently to be hoped that their Lordships will reconsider the remit and nuance of their decision in *Seldom v. Never*'; 'one is bound to acknowledge, though with the utmost respect, that the Court perhaps erred on the side of gratuitous generosity in their interpretation of *Cribbed v. Constrained*'; 'authority resiles to the fact that the rule in *Minimal v. Nothing* is now to be deemed otiose', and such and similar in tone and affray.

If we accept that the new technologies unsettle the time-honoured practices of professionalization of law students and equally acknowledge that this is not a novelty but just another historic challenge to an institution that changes only when it is left with no political choice but to change, then there are some preliminary conclusions to be drawn from the contemporary encounter, the dissonance between disciplines and law. The first is simple enough and common to all of the contemporary critics mentioned, Supiot and Samuel, Carty, Murphy, and Legrand. These critics are marginal and uncomfortable figures. Like Petrus Ramus and Abraham Fraunce, they appear foreign, external, ill at ease, and frankly estranged in common law. It is tempting, maybe salutary is a better word, to look at the excursions and the exodus, the diaspora of the critics of English law as an exemplification of the thesis not only that thresholds and boundaries have disappeared but also that there has been a species of more unsettling flight. A generation in exile perhaps. Consider the geographic dispersion as a metaphor for disciplinary displacement, a movement to the margins of cartograph and curriculum alike. This can be read as a species of taking a break, on the model of a couple having some time apart, or as divorce in a jurisdiction that still requires cause and so leaves the couple married but separated. Put it another way, and one can observe that the critics are not relating either to England or to law very much any longer. As Samuel puts it, there is little on offer in the common law schools to excite the intellect. He has a favourite example: three students leave for university to study sociology, cinema, and law.³⁵ The first two get an education that includes a significant dimension of theory, the law student does not. The cinema student will graduate with an understanding of film technique, of director's styles, and of theoretical schools and

35 Samuel, op. cit. (2008), n. 12, p. 311. For further discussion, see Samuel, op. cit. (Part 1), n. 29, pp. 105–10.

approaches, and will be able to distinguish hermeneutics, structuralism, deconstruction, and functionalism. The law student will graduate with none of that or at least with only the very loosest of senses of the methodology of law – it is like a chain novel, it is what officials do, it is commands or rules – and almost no conception of the long-term history of the discipline, of the *mos Britannicus* as expounded briefly here. They graduate with the narrowest of conceptions of system and law, akin for all essential purposes to the blinkered world of faith that confines the graduating student in theology. Except that the theology student knows that God moves in mysterious ways, that the choir invisible cannot be seen, and so has been taught to address ‘what is not’ and has no being through faith and prayer. So perhaps Samuel’s example of the cinema student is a better guide, closer to my interests anyway, and the disjunction can be clarified somewhat. The film student learns film criticism, the schools of cinematic thought – and the history is here genuinely not that long-lived, be it in England or abroad – as well as the oeuvre of great directors, national and international. Further, however, and this is surely crucial, the student of film learns how to make a film, how to produce images, how to assemble, cut, fade and frame, track and pan, build a scene, a flashback, a montage. Law students are not so well served. They learn about the schools in jurisprudence, should they elect it, and they read some of the sages of common law, the great judges, the mavericks and innovators, but that is not systematic, does not come with method or diachronic engagement. Worse, the making of law, the production of norms, the commercial and political assembling of bodies of judgment, patterns of normative development, the grids within which genres of precedent are constructed are never the object of critical theoretical examination. The law student is not simply not taught to examine the process of legal production and reproduction of doctrine as a social form but they are positively dissuaded from engaging with the authorship of judgments, the directorial capacities of judges, the assemblage and scenography of decision.

Stay with this separation for a moment. It has two sides. The distance between critic and discipline mirrors that between theory and law. The law curriculum may not study or provide insight into theory, but then the theorists in the end or in exile offer no real reading of law. David Campbell made the point well in a necessarily satirical piece in which he pointed out that when social theory descended upon law in the 80s, the theorists were unimpeded by any knowledge of law. Not a clue, he points out, as to the substantive rules and practices that they were demolishing, revising, deriding, summoning and sentencing en masse.³⁶ Samuel makes a version

36 D. Campbell, ‘The Limits of Concept Formation in Legal Science’ (2000) 9 *Social and Legal Studies* 439, especially at 441:

In studying law as it were internally, in the sense of being able to reason as a lawyer, and especially to handle the sources of the law, one immediately gains the advantage so often lost in general social theory, of tending to know what one is talking about.

of the same point at a more abstract level but quite explicitly: 'If, then, escape is on the agenda, perhaps law schools should start by looking in much more diachronic depth at the construction of their discipline'.³⁷ Then, of course, Samuel himself escapes, at least to some degree, by addressing civilian concepts and Roman discourses on method, the *mos Gallicus* and not the *mos Britannicus* which the English indeed, and ironically enough, always deemed to be much older than the law of the Romans, and the Venetians and the Greeks as well. Veritably antique, an archaism one could legitimately say. But that oblivion, or perceptual defence, or simple insouciance of course reflects as much the critic's resistance to law, the preconceptions of the theorist, the academic projections of practice and precedent. What I have argued, and fully aware that Samuel is exceptional in his erudition, exemplary in his knowledge of the detail of English private law, is that it has a history of discourses on method, a rich diachronic patterning. While this may well gain significant benefits from comparison to and revision by way of civil law – these too were its roots – there is a necessary intermediary stage, a thing or two to be learned both as to resistance to theory and as to substantive curriculum and common use from the deep history, the sense of tradition, of the *methodus* – mode and rhythm – of custom and practice, of the long past of common law.

LECTIO MIXTA, OR BY WAY OF CONCLUSION

The common plea of the critics of common law is not in any sense hostile to the argument that foreign sources, external theories, and civilian rules be taken seriously. Nor is there any argument as to the importance of method and the priority of history. Indeed, if exile and exodus have a predominant purpose, it is that of retooling, that precisely of learning those things that were missing from the legal curriculum. The more burning question – and my sense is that Geoffrey Samuel is already on his way to the channel tunnel train, leaving the white cliffs of Dover behind, as it were, for a richer foreign soil – is whether the excursion into the foreign disciplines ever leads to a return to law, to common law, to little England. The critics have a tendency to go native, to find a greater interest or cause, in short, to abandon law for administration, philosophy, film, Aix en Provence, China or the antipodes, as the case may be. Put it like this, the discourse on method is a precursor, a prolegomenon, because one studies method in relation to a practice and if the practice has evaporated, then method becomes an internal discourse, a study of methodology in general and not in any particular at all. Even interdisciplinary studies have to specify which disciplines they are not, and so engage with topics, and invent themes that fall between, below or outside the norm.

37 Samuel, op. cit. (2008), n. 12, p. 315.

The first thing to say is that the recourse to the interdisciplinary at least expresses a desire, a willingness to account for the lacunae of law, an effort at self-reflection and a critical disciplinary self-awareness. Without some sense of the place of law within the disciplines, the before the law of the legal institution, to borrow from Kafka, there is no discipline at all. Just practice, professional guild conceit, the dust of records, the residue of archaisms, the esoterica of filing clerks and their judicial progeny. So the first step, materialist and historicist in its detail, is that of giving pause for thought. The interdisciplinary simply means the creation of a space, an institutional site for exchange, conversation, ratiocination, intellection, call it what you will, within which humanistic encounter knowledge can be shared and preconceptions questioned or explained. It sounds deceptively simple but such spaces are generally not available in law, where the community of lawyers tend to advocate rather than interrelate, and where closure dominates the discursive form. The seminar rooms, corridors, alcoves of law school are not so hospitable socially, neither are they open epistemically, disinclined as they tend to be to dialogue, nor in any obvious sense conversant either with the method of law or of other disciplines. Too often we meet the figure whom Doderidge nicely terms the legal temerist, the professor in a blind rush to judgment, intent only on proving his point, his worth and so conforming rather too easily to the almost comical persona of the 'authority paradigm', the dogmatist who cannot stay to explain in any sustained way why she thinks that philosophy, theory, hermeneutics, literature or deconstruction or some imagined spectre bearing that name should be banished, branded, destroyed. As if their opinion somehow carried an unreal and unreasoned weight. Which, of course, is the problem with the authority paradigm.

The interdisciplinary paradigm, by contrast, opens up to the logic of chance, the chaos of thought, and the transformations of events. What is at issue, in other words, is a space of intellection, in publishing terms diverse fora of exchange, in pedagogic contexts mobile sites of interdisciplinary interaction. A coming face to face with other disciplines. Sounds easy, but it gets hard. Who will pay for that? Who will supervise, mediate, attend, and care for these critical but subversive, radical but secretive moments and occasions? Does coming back mean going underground? Or worse, being ridiculed, ignored, derided, in short, envied and dismissed, feared and discounted? Why such a price to pay and who in the end are now the guardians of academic law who dare to impose their views, their prejudices against the free play of thought? Put it like this, take an example indeed from the philosophy of science, the simplest of lessons, the hardest to hear, it is chance, humour, accident, and luck that have led to the greatest discoveries, the paradigm-changing events within the Western tradition.³⁸ Give it a go,

38 This, of course, was the central thesis of Paul Feyerabend: P. Feyerabend, *Against Method* (1976).

take off from some seemingly incidental or marginal, paradigm-defying instance, and see where it goes. That is the lesson that Feyerabend expounded, and we can find the same in the elegant historicism of Carlo Ginsberg: it is precisely the marginal, the unnoticed or overlooked elements in a painting that betray its veracity and allow the apprehension of forgery.³⁹ It is the Morellian method, a Freudian development which again allows us to note that there is much to be learned, and not just about the madness of Judge Schreber, from the psychoanalytic school. That is a personal observation as well. If the critics who spend endless hours elaborating Freud, Lacan, Jung, Legendre, or indeed Adam Philips or Darian Leader, spent just a fraction of that time devoted to theory in addressing their own analysis, in practising what they preach, their interdisciplinarity would be immeasurably improved. But they tend not to, which suggests that the flip side of the authority paradigm, blind self-confidence, is narcissistic fury, a drive to exteriorize the pain within, a projection of the wound.

Let me be explicit about the last point because it is a little close to the bone, and sometimes attracts criticism. I don't want the assessors, who will of course remain faceless and nameless, the bureaucratically co-opted legal academics, lacking any real training in or sense of method, taking me to task, lowering my ranking, denying me international recognition. I suspect that Professor Samuel could also beneficially attend to the point. So the argument is that the refusal of the theorist and critic to engage with law gets replicated in the inability of the expositors of psychoanalytic theory to address their own analysis. You could say that this is the madness of law but in fact, viewed historically, it is simply the desertion of the casuistic function of legal analysis, an opting out of one of the principal jurisdictions annexed to common law, that of the courts of conscience and their theological rules governing what happens in the soul. We use a different jargon now but our subject as lawyers is still in large measure the subject, the legal person and its actions, single and several, and because of this some understanding of persons, of subject formation, of interactive and communicative patterns and the critical skills by which to reflect upon them might well come in practically useful as well as theoretically important. Just consider for a moment the maxim that 'motive is not consideration' and think of it as an oratorical definition, as denial in Freudian terms, which it clearly is, and perhaps the picture becomes a hint clearer. We are constantly at the edge of our knowledge, on the boundary between law and desire, dealing with symptoms of historical repression, judicial evasion, social and economic exploitation. We are also, however, and the critics have tended to forget this, the product of those very same forces. They are in us as well as outside us. It is easier, let's put it as lightly as this, to treat their external manifestations rather than address their internal hold.

39 C. Ginsberg, *Myths, Emblems, Clues* (1990).

There is perhaps, and this is my final point, a misapprehension that interdisciplinary studies could somehow resolve or move beyond the conflicts, the clashes of schools and other *prises de positions* that characterize common law educational institutions. I am not suggesting that at all. Interdisciplinary studies, and here I will resort again to the desirability of indiscipline, of simply opening a juncture, reserving a room, making a time or appointment for entering into the other discipline. In common law, which has no very strong tradition of disciplinary self-reflection – and much of this paper has been about recollecting forgotten pathways, lost treatises, dormant patterns – the value of the interdisciplinary is both practical and theoretical. At the practical level (let's start with that, it is ever popular in legal circles, however spurious – who after all is going to read this?), the early common lawyers were not entirely without insight. Samuel ignores them at his epistemic peril. They said that where law deals with a subject matter that is studied by another discipline – agronomics, economics, architecture, engineering, boatbuilding, medicine, linguistics, sociology, literature or one of the arts – then it is not without logic to seek advice from, become interested in, and learn from those other disciplines. A lawyer needs a little disciplinary bricolage, an open mind, skill in inquiry as opposed to imposition.

The theoretical point is that theory should listen. We can learn here from the Roman concept of *lectio mixta* associated with humanist legal reforms of the early modern era. The *lectio mixta* was a reading that attended to competing claims or norms, for example, the diverse proposals that could be drawn from poetry, literature, and law with respect to a given dispute. The *lectio mixta* proposed reading all of those sources, attending to their diversity, treating them as equal and then, if necessary, after interdisciplinary deliberation, deciding in response to all three. It is an oxymoronic procedure in rhetorical argot but that sounds rather strange. The argument is simply and again that the subject matter of dispute, say contract provisions, requires attending to who made the agreement, in what context, and when. Contract lawyers are full of concepts of intention, of words as 'messengers of men's minds' and interdisciplinarity simply suggests taking those messengers and messages seriously. What is written is representative rather than definitive, plural in meaning rather than singular, and so a properly theoretical approach will address the sociology of the subjects, the economics of the exchange, the political institutions and ethical forces that were at play. That is simple and yet scholarly hermeneutics. There are levels to the text and the scholar draws those out and gives them air. That is the just thing to do. And by the same token, if we are dealing with an international contract, a treaty, then as Carty expounds it, the very same questions, addressed best through the apprehension of history – knowing what one is talking about is never a harm – as also through the literature of diplomacy and political theory together, suggest that critical scholarship inform itself fully of the relations of power, the history of groups, the minorities and the majorities, the narratives of war, annexation, and suppression that motivate and put the treaty into play.

It is the beauty of theory that it does not require decision but, rather, and only, argument, knowledge, and insight brought to bear as invention and intervention. The social responsibility of the legal theorist, the interdisciplinary scholar mooted here, is that of actually doing the work of theory, by which I mean coming to know their subject and having the courage to intervene, to speak to it. That requires pushing past the cliques and coteries, the exclusions and bumpings that the academy with all its wealth of self-generated insignificance is so fond of purveying. Preferring knowledge to fashion, thought to repetition, indiscipline to imposition, are the virtues of the interdisciplinary, of inquiry over authority. If, as Agamben suggests, we exist still within a legal administration, a normative order that is predominantly choral and liturgical, as much propelled by acclamation as cerebation, then it is also an act of courage, a moment of indiscipline, to take the 'sciences liberall' seriously, to try to come to know.