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Notes from the Editorial Advisory Board

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Citation	Janet E. Halley, Notes from the Editorial Advisory Board, 10 Yale J.L. & Human. 389 (1996).
Accessed	February 16, 2015 6:40:01 PM EST
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(Article begins on next page)

5-8-2013

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Recommended Citation

Halley, Janet E. (1998) "Notes from the Editorial Advisory Board," *Yale Journal of Law & the Humanities*: Vol. 10: Iss. 2, Article 6.
Available at: <http://digitalcommons.law.yale.edu/yjlh/vol10/iss2/6>

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Notes from the Editorial Advisory Board

Janet E. Halley*

My classmates Jim Tourtelott, Joe Sommer, and Eva Saks invented the *Yale Journal of Law & the Humanities* at a Mexican restaurant one night in the fall of 1987. When they announced their idea to me the next day, my first thought was: “Great, now there can be a place to publish the things I want to write.” How greedy, and (to say the same thing in a different way) how abject! My reaction reflects not a sense of marginality or deviance (both of these always being tinged with an adventurous self-confidence that was quite absent from my attitude at that moment), but rather a sense of isolation. I could not have had this bland reaction to the proposed oasis unless I had accepted it as a given that my most urgent projects on the Law and Humanities borderline were mine alone. But the idea of the *Journal* swept through the law school and various graduate departments on a wave of excitement. Clearly I had not been alone and would not be able to imagine myself as isolated again.

The particular sociability of the *Journal* in its early days says something important, I think, about the Law and Humanities project more generally. The overt things are somewhat indicative. We strove to introduce some of the virtues of humanities academic styles into legal publishing. Law students and graduate students in the humanities were equally credited members of the editorial team. We decided to accept articles on the basis of peer review, to break the invasive editorial habits inculcated by the standard law reviews in favor of respecting our contributors as responsible authors, and to flip the standard law reviews’ emphasis on citation over analysis. Rejecting a humanities trend toward coterie journals, we decided to keep the *Journal* open to every approach to Law and Humanities work and every political sensibility (and thus *not* to adopt a title like the *Yale Journal of Law & Literature* or the *Yale Journal of Law & Culture*).¹ Some of the things we did were not inflected by either

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1. These decisions were all unequivocally good ones, though I am not sure how many of

academic point of origin. We kicked off the *Journal* with a panel at the Modern Language Association meeting in New Orleans convening Jeff Nunokawa, Carol Rose, and Patricia Williams to discuss new approaches to property. We disagreed, angrily sometimes, about whether the work of this or that scholar in our chosen domain was fabulous or tedious. We had amazing parties.

A more subtle, but more important part of the early life of the *Journal* was the strange chemistry between law students and graduate students. Law students specialize in nothing, decide what to study with almost no interference from their faculty (a virtually riskless arrangement because their real choices are so narrow), and don't really know where they want to end up working. Graduate students are writing something big and specialized, are mentored and supervised sometimes to the point of domination (possibly because the choices across which they are being professionalized are amazingly broad), and know exactly the kind of job they want. Graduate students rarely work together on anything, almost never think of themselves as problem-solvers, and are apt to say "the law" as if it were a *thing* you could be inside or outside of. Law students are irretrievably gregarious, love to show off their ability to get things done, and (at Yale at least) have a million ways of problematizing, particularizing, and historicizing "the law."

I have taught several interdisciplinary seminars at Stanford Law School and have noticed that these differences can produce the most exhilarating shifts in readability if things go well, and the most narcissistic, self-protective scrambles for turf and authority if they don't. Things went well in the first months of the *Journal's* life. Repeatedly the editors approached the differences between them with respect, curiosity, deference, and a hope that some of the virtues might be catching. Every time we did so, the euphoria that became characteristic of the *Journal* was renewed.

I graduated from law school before the *Journal* published a single line. My group solicited the first issue, but continuing students saw the first manuscripts into print. Looking back, I think that the extraordinary social moment that set the *Journal* in motion requires some explanation. First, why was it so unexpectedly capacitating for so many people? And second, why was it so euphoric? What does the sociability of those first months of the *Journal* suggest about the Law and Humanities project today?

them have been consistently workable. We probably made some bad decisions too; I forget what they were, though I am sure editors after the inaugural year can identify them precisely.

First, it appears that the constituency of the *Journal*—amorphous, to be sure, but populous—was dispersed, impassioned, and already in place. Like the explosively well-attended conference sponsored by the “Working Group on Law, Culture, and the Humanities” at Georgetown Law School this spring, the *Journal*’s birth revealed that an unexpectedly large number of legal scholars had *already decided* that they could not do what they needed to do using that would-be legal-academic hegemon, law and economics. The remarkable interest sparked by the *Journal* and the Georgetown conference on the humanities side of the fence is a similar indication that an unforeseeably large number of scholars there have *already decided* that they cannot pursue their distinctive disciplinary undertakings without coming to grips with “the law,” not as a reified Sublime Command, but as a dazzlingly complex array of social, cultural, linguistic, and normative practices.

Second, it appears that the Law and Humanities project holds out the promise of undoing a division induced by an academic structure that splits law schools off from their universities as quasi-autonomous professional schools. This division makes people miserable, I think, because it underwrites a theory/practice distinction that is both mistaken and intensely destructive. In the name of this distinction, humanities scholars disdain practical problems and the normative *agon* of working within currently binding constraints. In its name, legal scholars sneer at scholarly inquiries that take arcane training to pursue and that produce writing that is “hard to read.” The first months of the *Yale Journal of Law & the Humanities* were exhilarating, I think, precisely to the extent that the editors simply suspended these poisonous interactions.

Those early editors opened the door to scholarship that keeps theory and practice simultaneously in play. The *Journal* has published this work consistently over its first decade, and I am certain it has “incentivized”—that is, emboldened people to write—important work that other publications have actually printed. At its best, this work is both socially, historically, institutionally, and normatively entangled and intellectually self-conscious, skeptical, speculative, and exploratory. The door stands open, and I am thankful to ten years of editors for continuing to hold it ajar.

Hendrik Hartog*

It is almost exactly ten years since I was called and asked if I had any work I wanted to submit for possible publication in a new journal. By odd coincidence I did, and seven months later *Mrs. Packard on Dependency* appeared in Volume 1, Issue 1.¹ The editors with whom I spoke claimed they were not regular-law-review editor types. They promised a light and respectful editing. And they kept their word. I remember only one cut on which they insisted. I had described Elizabeth Packard as an “Indianapolis” of nineteenth-century legal culture, by which I meant to place her as a “site” of importance only for the roads (of thought and practice and identity) that flowed through her. But I think one of the editors was from Indianapolis and thought the characterization a bit disrespectful (of Indianapolis, not of Elizabeth Packard).

Now, a new generation of editors wants me to wax weighty on the meaning of the past decade. And again I am compliant. But I don't have a clue where to begin. What does it signify that the *Yale Journal of Law & the Humanities* has come so quickly to play such a large place in the little world of scholarship that I inhabit? What explains the *Journal's* emergence: Our hunger? (The “our” of course refers to those of us who self-identify as Law and Humanities types.) The genius of successive editors? (Of course.) Or is it just one more example of the colonizing power of core institutions of American legal education? Perhaps we should understand this legal-humanistic enterprise as akin to a third-rate colony of the British raj: important not for material reasons (not India in other words), but to maintain the impression that the sun never sets on the British Empire.

It does seem to me that something interesting has happened over the past twenty years or so to the self-consciousness of those of us committed to the Law and Humanities project. Not important, maybe, because nothing about us ever is that, but interesting nonetheless. And the success of the *Yale Journal*, as well as the meeting in Washington, D.C. in March of this year of the first annual conference on Law, Culture, and the Humanities, may demarcate dimensions of that change.

That is, once upon a time, to be us meant to know ourselves as sociologically marginal. There was a core. There was a periphery. We

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1. Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J.L. & HUMAN. 79 (1988).

were part of the second, never the first. The point is not modesty. In our dark moments, when we wrestled with our grandiosity, we imagined that what we did was of earth-shaking importance. Those of us who were legal historians, for example, knew that Maitland and Hurst and E.P. Thompson (and and and) had set for us models of imagination and grandeur that revealed the triviality of the puffed-up claims, the petty enterprise, of those who inhabited the core of academic law. But we also knew, knew deeply, knew as a fundamental core of our being, that those at the core, in the metropole, would never know their own emptiness and that we would never be taken seriously. By them. Who were never us. They might patronize us, by hiring us, for reasons that had to do with a residual need to appear academically respectable within a university. But they would never understand what we did. Or, so we believed. They had their way of being, and of knowing law; we had ours. Theirs was coherent, effective, boring, and powerful. Ours was tentative, exploratory, and powerless. But also fun. In our separateness, we might establish community (I went to my first legal history conference to discover the odd but shared pleasures of marginality), but it was always a deviant community.

And there was lots of evidence out there to confirm us in our commitment to our marginality. One example only: In 1976 I went to the law-teaching recruiting convention. At every law school interview but one, some well-intentioned faculty member asked, with genuine confusion and friendliness: Why would you want to teach something like legal history?

But the point is not that we were right. The point is that our beliefs were constitutive of who we were: the other, not them. When we entered their space, we did so adopting a variety of stances that affirmed our separate identities. I know I thought of myself as a missionary at various times, as a counter-irritant, as a presence that might provide protection (cover) for those few students who might wish to know themselves as “us.” But there were more moments when I struggled with myself about who I was. Was I what I was (not them) only because I was inadequate, unable to achieve a core identity? Not smart enough, lacking in cleverness, missing something?

Much has happened. Much has changed. The ordinary methods of law study, the techniques of the core, today include chunks of economics and history and political theory and literary analysis, not to mention feminist theory and critical race theory. It may be, as a result, that the core ain't what it used to be, that the core has lost some disciplinary power. Perhaps, though I remain skeptical. But for my purposes here, the more important point is that we, whoever “we” are, no longer have an identity defined by our antinomic relationship

with the core of legal study. Everyone is fascinated by law today (including lots of humanistic scholars who have never entered a law school), and disciplinary barriers no longer work the way they once did. There are now people throughout the university who want to talk with us, work with us, play with us. We still have a deep commitment to our marginality. But it is now a marginality indistinguishable from the marginality that is the common lot, the ordinary experience, of academics and scholars. It is no longer what it once was.

And that raises for me a final set of questions. That is, without that sense of core and periphery, of power and powerlessness, of bad and good, can we construct a sense of community for ourselves? Can we know ourselves as engaged in a common pursuit? Or are we today just a bunch of individuals located in a variety of academic settings, all of whom have wildly varying interests in an unsettled and undomesticated subject called the law (a subject traditional law study long struggled to contain)? Is our only source of collective identity the happenstance that all of us might conceivably write something that might appear in the *Yale Journal of Law & the Humanities*?

Richard Weisberg*

I am pleased indeed to participate in this tenth anniversary issue. The field of Law and the Humanities—and, more specifically, Law and Literature—continues to produce remarkable work. Some of that work appears in this *Journal* on a regular basis; some appears in *Cardozo Studies in Law and Literature*, which also celebrates its tenth birthday this year. (In yet another tenth anniversary event, the second edition of his *Law and Literature*, Judge Richard Posner graciously salutes the vibrancy and endurance of these two journals,¹ while then replicating his unconvincing and especially unlitery attacks on the field more generally.)

In the brief time and space allotted me for remarks here, I wish to flag only one change in Law and Literature notions during these ten years. I believe that the false dichotomy between “theory” and “text”—sometimes stated as between law-as- and law-in-literature—has, fortunately, broken down. The narrative has been revealed as the source of the theory. We are reading stories now or at least thinking of the ways stories are told; we are less interested in name-dropping and in making sure that the Law and Literature enterprise has the mark of the latest French theoretician.

I am serious in naming a hypothetical national origin for this theoretician because I believe that there is abroad in the land a post-postmodernism, one that has become skeptical of the absurd nonreferentiality and obscurantist jargon of some postmodernist thinkers, however marvelous and funny may otherwise be their approach to language. The focal move is toward the specificity of history, and the most talked-about event (hitherto avoided by both the methods and the aims of most postmodernists) is the Holocaust. In a newly emerging discourse, partly originated by Law and Literature thinkers² and by storytellers like Camus and filmmakers like Alain Resnais and Louis Malle, the sad events of Vichy France have been foregrounded. The Vichy model, unlike that of the Third Reich, to which admirable postmodernists like Geoffrey Hartman had previously directed their concern, indicates that complexity of discourse and a kind of deconstructive flexibility with the egalitarian metanarrative

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1. See RICHARD A. POSNER, *LAW AND LITERATURE* at vii (rev. ed. 1998).

2. See, e.g., GEOFFREY HARTMAN, *THE LONGEST SHADOW* 73-74 (1996) (referring to RICHARD WEISBERG, *Legal Rhetoric Under Stress: The Example of Vichy*, in *POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE* 143 (1992) [hereinafter *POETHICS*]).

of French constitutionalism contributed more than did simplistic or idealistic rhetoric to the doing of evil during the Holocaust. Stories, it might be said, particularly Camus's *The Fall*,³ laid down a more appropriate postmodernist strategy of speaking and reading than we find, say, in Derrida.

Our discourse, to put it simply, is becoming more historical, more specific, more ethical. Law and Literature is a "naming" interdisciplinary, not one largely designed to reify the everywhere otherwise situated discourse of antifoundationalism. Yet the stakes for our culture and our beliefs are far greater than have been apparent in the postmodernist turn. And this is because an emphasis on text rather than theory—on naming rather than unnamng—coerces choices. What kind of law do we want, and based on what kinds of values? What lessons, some of them potentially specific, will we learn from the sad event that marks the end—Camus's *Fall*—of the ensconced narratives of European culture? To what alternative models might we now turn?

Law and Literature, partly through an empirically demonstrable move in the recent year or two to religion, will be the primary force in formulating a discussion of these millennial issues. (Perhaps this is why I understood him—where perhaps in the past I have not⁴—when James Boyd White recently agreed to write "about religion" even though he was hardly an expert on it—who is?—and admitted "the enormous difficulty of talking about religion in the language of the law."⁵) Here again, stories, not all of them Biblical, will anticipate theory.

For me, the question will be a hermeneutic one: Which value system or systems will likely lead to just ways of reading and doing the law, and which ones will not? My sources will be not only the narratives of the tragic history of what has passed for law during our century in places like Vichy, Nazi Germany, the Soviet Union, and South Africa, among other places; but also the marvelous iconoclasm of Nietzsche and the brilliant postwar accounts of Günter Grass. But these are my sources. Law and Literature eschews enforcing simple answers or directed bibliographies on its practitioners.

It is freedom within such a challenging and aspirational structure of discourse that keeps Law and Literature alive and well. May this

3. ALBERT CAMUS, *THE FALL* (Justin O'Brien trans., Vintage Books 1956) (1956).

4. See RICHARD WEISBERG, *Notes on Three Works by James Boyd White*, in *POETHICS*, *supra* note 2, at 224.

5. James Boyd White, *Talking About Religion in the Language of the Law: Impossible but Necessary*, 81 *MARQ. L. REV.* 177, 177 (1998).

Journal continue to play a key role in the growth of our still-fledgling but demonstrably precious organism.

James Boyd White*

The tenth anniversary of this *Journal* is an occasion not only for celebrating its remarkable achievements, but also for thinking again about the nature and premises of the work it reflects. One way to begin might be with its two central terms, “law” and “humanities” (or the obvious alternative to the second, “literature”).

“Law” is a term we lawyers think we understand clearly enough, but those who are not trained as we are puzzle a good deal over the word, and not without reason. Does it mean a set of rules, a set of authoritative texts, certain modes of interpretation, a forum for the resolution of conflicts, a way of carrying on disputes, a set of techniques of argument or analysis, a cluster of institutions in the world, the instrument for the expression of political power, or what? The law is all of the above and more, we say: At its center, it is a set of intellectual and social practices, defined and taught by a community of lawyers, professors, and judges. It is in this sense like a language. And these practices, like those of any language, are in the process of their own revision, which means that what the lawyer learns is not only certain modes of thought and expression, but ways of plying them to particular situations, appropriating them to his or her own mind, and in the process transforming them. This is what we teach and what we learn; it is because it is so complex and uncertain, so alive and full of surprise, that law is so interesting, and it is for the same reason that it has the power, endurance, and value that it does as a social and ethical institution.

When I studied law, perhaps more than is the case now, legal practices were seen as discrete, with an ethical and aesthetic significance of their own. The law was not “autonomous,” in the sense of existing independently from every other cultural form, but it did have a distinctive identity and role, and we knew it could not simply be collapsed into other forces, genres, or practices. As an activity that transforms the material of life into another form, with a different kind of meaning, it has the essential characteristics of an art.

How about “humanities” or “literature”? I will begin with the second and perhaps more modest term, which presents difficulties comparable to “law.” The main danger of “literature” is that it seems to invoke a canon of high literature embodying a certain set of old-fashioned social and political views. But thinking of my own ex-

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perience when I was working on *The Legal Imagination*¹ more than twenty-five years ago, I did not think of the literature I invoked as a fixed set of texts, and certainly not one that taught a certain morality or politics. For me “literature” was really a set of questions, learned partly from my reading, partly from my teachers, questions one could bring to virtually any text. Some texts rewarded this kind of attention wonderfully, others much less so; the former were “literary,” but the difference was not much related to whether the particular text had been “canonized.” The questions that the word “literature” defined were practices, in this a bit like law; and their true object was not a set of sacred objects, but life itself: the world of language and expression and meaning in which we constantly live.

What I think of as literary questions were of two general sorts, which I will call “ethical” and “intellectual.” The first begins with the speaker: Who is speaking here, in what dramatic situation, in what tones of voice, to whom, and with what effect? Is this an admirable definition of self and other, one that the reader might wish to imitate or appropriate, or not? This kind of reading is a training of the ear, and its most important application is not to one’s reading, but to one’s own writing: Who am I here, using what tones of voice, speaking to whom, and with what effect? There are lots of negative possibilities against which to be on guard, and it is difficult to define positive ones.

The second set of questions has to do with the language used, its force and implication, and the kind of relation the speaker establishes with it. Do you simply replicate your forms of speech, speaking just as others do, or do you find a way to make them your own, and if so, do you do so in a good or a bad way? What are the forms or genres with which you work, and what are their significances? How do you give meaning to your terms, as they are used relative to each other? Here language becomes continuous with culture and the question arises how far one’s mind is made by its inheritance; how far—and how—it can remake it.

Speaking of my own experience, then, when I turned to “literature,” it was not to a public Western canon, but to a set of questions, a set of practices, which could be brought to any text. Hence the appearance, in my early book, of passages from Emily Post, Prison Rules, Fowler’s *Modern English Usage*, and so on. And in my view, the most important texts to which these questions were to be brought were those produced by the student, and by me, in class

1. JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

and in the rest of life. "Literature" is in the end not a matter of high culture, but of a certain kind of attention to human expressions.

"Humanities" is obviously a much broader term than "literature," and presents a different danger: that it will invoke a set of established disciplines, such as art history, classics, philosophy, music, architecture, and so on; and all as if they were entities that the law could somehow incorporate or in some unproblematic way learn from. There is a related risk that one will think that the academic fields are more real or important than the painting or architecture or music itself; the method more important than the material of study. Actually, the lawyer can and should direct attention both to the primary works of expression and to the ways of reading them that characterize different disciplines. With respect to the latter, the task is to establish relations between distinctive communities of discourse; with respect to the former, it is to find a way to talk about works whose expressive action has already been completed. As I have elsewhere argued, both tasks present a problem of translation, in facing which one must address the differences, in some sense unbridgeable differences, between languages, between forms of expression, and between cultures and selves.

On the other hand, there are unifying questions or themes running through the primary works and the disciplines too. Though I know this is a contested position, for me the key element that unites the humanities—it is at work in a pronounced way in "literature"—is a shared interest in meaning: the meaning of what we say, the meaning of our languages and what we do with them, the meaning of the relations we establish with each other through language. Of course we live in a material universe, but it is not self-interpreting or self-signifying, and neither is our social world. The question at the center of the humanities, then, is what this artifact or that—this poem or temple or sonata or novel or ritual or linguistic pattern—should be taken to mean. This is also the central question of law, beyond the immediate issue of rule or result: What does it mean that this happened, or that, or that we decide the case this way or that? That is the deepest question for the judge, and for the lawyer too, for it is at the center of his argument: "If you decide this way it will mean"

In both the law and the humanities we are constantly asking questions of meaning, yet without knowing fully what we are doing when we do so. It is with this question—what we are doing when we ask questions of meaning—that our future work might best concern itself, both in our writing and in our teaching.