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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

TOM CAMPBELL
Series Editor
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Introduction

Towards Humanistic Jurisprudence

Martha Nussbaum – classicist, philosopher, political theorist, feminist and public intellectual – has impacted a wide swath of legal scholarship on a number of jurisprudential and doctrinal issues, and spanning several substantive fields. For example, her voluminous and interdisciplinary writing on the coherence of our emotions (see, for example, Nussbaum, 1990, 1995, 2004) has deepened our understanding of how mercy and sympathy inform – or distort – our judgments of culpability in criminal law (see, for example, Bandes, Chapter 7 in this volume; Gray, Chapter 8 in this volume), of how our disgust at our own animalistic nature can pervert our quest for full equality in our anti-discrimination law, how our capacity for empathy can aid judges as they go about their work of understanding the particular circumstances of the litigants that come before them and whether, and how, punishment should be enhanced or mitigated on the basis of the personal narratives of victims and defendants respectively. Her wide-ranging scholarship on the content and importance of our human capabilities (Nussbaum, 2000, 2011) sometimes in collaboration with her colleague Amartya Sen (Nussbaum and Sen, 1988, 1993), has substantially changed the way we deliberate over the role of both human and constitutional rights in political life, whether and how we should accord greater educational and employment opportunities to our co-citizens with disabilities (see Stein, Chapter 1 in this volume; Malhotra, Chapter 2 in this volume), and what justice might require of sovereign states worldwide with respect to their poorest citizens (West, Chapter 5 in this volume; Nussbaum, 2007), as well as what it might require of all of us in our dealings with sentient non-humans (Satz, Chapter 4 in this volume), among much else. Her writing on the importance of individual autonomy, particularly in those areas where its protection might come at the cost of the substantive equality of others, has deepened our understanding of that contested value, and hence of the constitutional provisions that protect it as well as the due limits that might sensibly be placed upon it (Nussbaum, 2008). Her work on the centrality of both individual and societal flourishing to the aspirations of law has changed the way we think about the nature of adjudication and legal justice (Nussbaum, 1995) and her work on the challenges women face in developing countries has deepened our appreciation of both the circumstances of disempowered individuals in cultures different from our own and the universality of some of our deepest aspirations for law and civic society (Nussbaum, 1999, 2000). Our substantive law in an impressive number of fields, including, among others, criminal law, education law, disabilities law, human rights law, constitutional law, international law, animal rights, law pertaining to sexuality and gender, and the legal scholarship surrounding and impacting that law, all bear the mark of Martha Nussbaum's prodigious interdisciplinary and humanistic inquiries, as the essays in this volume attest.

Beneath this list of particular areas of influence, however, all of which are explored in the essays that follow, one can discern two deeper and cross-cutting currents of Nussbaumian influence on contemporary legal scholarship, each of which I will address sequentially in

the two major parts of this introductory essay. The first is disciplinary and methodological. Over a career spanning five decades, Nussbaum has argued with passion, great erudition and considerable flair that both relatively narrow doctrinal legal questions as well as larger jurisprudential questions should be answered, at least in part, by recourse to the insights and methods of the humanities. If we wish to know, for example, whether either (or both) a 'victim impact statement' intended to garner disgust on the part of a jury for a particular defendant's crime or an 'anti-sympathy instruction' designed to discourage jurors from indulging in sympathy for a defendant's difficult circumstances, should be admissible or encouraged in a criminal trial, we would be wise to consider the teachings of classical philosophers as well as contemporary psychologists on the moral wisdom that may be conveyed – or blocked – by sympathetic engagement with the suffering of others, or what Nussbaum has long called 'love's knowledge' (1990; Kahan and Nussbaum, 1996). If, to take another example, we need to resolve whether animus towards homosexual acts constitutes a constitutional reason for legislating against gay sex, gay love or gay marriage, we should consider the views of both contemporary and classical political philosophers on the questionable role that disgust often plays in legislating against various crimes against morals (Nussbaum, 2004, 2010a). If we need to know, simply as a matter of policy, how much of our precious shared resources should be devoted to equalizing the educational attainment and opportunities accorded our disabled co-citizens, we would do well to consider, Nussbaum has shown, the writings on human flourishing emanating from various scholars in the humanities from our cultural canon, including Aristotle, John Stuart Mill and Karl Marx, no less than contemporary social scientists and economists, such as, notably, her colleague and frequent collaborator Amartya Sen (Nussbaum, 2006). To take a more local example, if we wish to better understand the importance of individual autonomy to a well-led life, particularly where protecting that value might create spheres of non-interference that adversely impact the equality of others, we should consult the teachings of J.S. Mill, John Rawls and Susan Okin, no less than the writings of the Federalists or the US Constitution's drafters (Nussbaum, 2000, 2008). Likewise, she has insisted, our deepest jurisprudential questions – questions concerning the nature and methods of adjudication, the content of our human and legal rights, the relationship of law to both critical morality and politics, and, perhaps most important, as Ronald Dworkin would pose the issue, the *point* of law, or of some field of it – all implicate the recurring inquiries which for two millennia have been at the heart of the various disciplines that have come to comprise the humanities: questions concerning the meaning of justice, the fragility of goodness, the nature of the knowledge we glean through reason and experience, but also through love, compassion and sympathy, and, most fundamentally, what it means to lead a flourishing human life (Nussbaum, 1995, 2010b, 2011, 2013a). This list – of both doctrinal and jurisprudential questions that Nussbaum has either demonstrated or argued would benefit from humanistic inquiry – could, in fact, be vastly extended, as the essays in this volume will show. In sum, Nussbaum has firmly but graciously insisted, throughout her engagement with law, that neither the tools of traditional legal scholarship alone, nor those tools supplemented by a dollop of methods borrowed from the social sciences, as is our current practice, can answer either jurisprudential or doctrinal questions. Rather, insights gleaned from a study of the humanities best fills law's gaps. The study of law, at its best, and for just that reason, should be understood as, at least in part, a branch of the humanities.

An introduction to the impact of Martha Nussbaum's life and writing on legal scholarship, then, should begin just there, with an account of Martha Nussbaum's attempt, partly by dint of her own example but also through argument and advocacy, to reshape legal scholarship – and hence reshape our law – in such a way as to invite the insights and the methods of the various disciplines of the humanities: primarily philosophy, but also the classics and literature. For reasons I will outline in the first section of this introduction, if successful, that attempt is nothing less than paradigm-shifting; re-centring the disciplines of the humanities in the academic study of law would profoundly reshape legal scholarship. For well over a hundred and fifty years, since the beginning of the modern law school, legal scholarship in the United States (and to an even greater degree in other parts of the world) has methodologically eschewed almost all reliance on the traditional fields of the humanities, opting instead for a method of inquiry that looks either formalistically only at legal materials for the answers to legal and jurisprudential questions or, over the last four decades, to legal materials supplemented by some modest use of the methods of the social sciences. Against this backdrop of the studied *avoidance* of humanistic inquiry in the legal academy, Nussbaum's insistence that legal study *must* centre on the humanities, if heeded, would fundamentally reorient both method and perspective within legal studies, and possibly in law itself. But further, it is also that ambition – to transform the study of law into a branch of the humanities – that shapes her more particular doctrinal and jurisprudential contributions to legal studies. The shift in our thinking on the role of emotions in law, our still begrudging but increasingly firm grasp of the role of narrativity in adjudication and scholarship both, our deepening understanding of the centrality of human capabilities to the content of human rights, constitutional rights and sovereign responsibilities all, our various debates concerning the nature of the common good to the promotion of which legal systems should aspire, and our liberal and feminist insistence on the importance of women's well-being worldwide to the health and vitality of our endangered planet, as well as to the quality of our justice, all are presaged in Nussbaum's writings, and her arguments for all of these positions are uniformly steeped in humanistic as well as legalistic methods. Many of these questions, and the more particular ones they imply, can of course be posed as either purely doctrinal or jurisprudential questions, or from the vantage point of the social sciences, or from some combination of the two: how does cognitive bias, itself partly a product of human emotion, affect jurors' judgment? Does human rights law – largely a product of treaties – require liberal states, or all states, to provide a flourishing life for their citizens? Does the US Constitution permit or require states to allow juries to hear victim impact statements or 'anti-sympathy instructions'? Do such instructions, or statements, have any measurable effect on the deterrence function of the criminal law? All of these questions, though, may also be posed from the vantage of the humanities, and likely should be so posed, and it is to Nussbaum's credit, largely, that we can now see this clearly.

The second cross-cutting current of influence underlying the doctrinal shifts occasioned by Nussbaum's writing is theoretical and jurisprudential. Nussbaum's interdisciplinary writings on the nature of justice, on the complex relation between reason and emotions, on the role of narrative and narrativity in the construction of knowledge, and on the meaning and content of human flourishing have yielded, I will argue in the second section below, a distinct and highly original 'normative jurisprudence' – by which I mean a jurisprudential understanding of the law that defines and accounts for the law we have by reference to its moral ambitions, that articulates law's moral aspirations and that provides a baseline for moral criticism of the

law that falls short. What I will call Nussbaumian 'humanistic jurisprudence' accomplishes all three of these definitional tasks and, as such, constitutes a major and long overdue contribution to our existing family of jurisprudential theories. As I will try to show below, the moral lodestar of Nussbaum's humanistic jurisprudence, whether it is employed as a way of explicating existing law, as a mode of criticizing it or as a way to reconstruct it, is humanity itself. The core insight is that the jurisprudential 'point' of law, to again use Dworkin's helpful coinage, is not utility, efficiency or wealth, as has been argued by modern economic theories of jurisprudence, but nor is it rationality, consistency, integrity or principle, as argued by contemporary Kantians. It is, rather, human flourishing. Law, no less than politics, should and must serve humanity, meaning it must contribute to the creation of a civil and lawful society that increases the possibility that individuals will lead flourishing lives. To do so, it must respect and accord due regard to our collective quest for joint gains in utility and efficiency in our transactions, our societal craving for institutional and state consistency and integrity, and our individual thirst for autonomy. But these are all constitutive of what must be the overarching goal of legal systems, and the jurisprudence that underlies them, everywhere. That goal of law – its point – is flourishing human lives.

So, this introduction will assess these two currents of Nussbaumian influence on legal scholarship, and indeed on the legal academy quite generally. The first section assesses the significance of Nussbaum's attempt to effectuate a marriage of legal studies with the humanities. I begin with a discussion of *why* the relationship between legal studies and the humanities over the last century and a half – since the beginning of the modern law school – has been so fraught. I then turn to a description of Nussbaum's (and others') attempt to unite them, and the implications of that effort.

The second section provides a skeletal outline of 'humanistic jurisprudence', as developed in Nussbaum's writings. At the core of humanistic jurisprudence is Nussbaum's distinctive understanding of the nature of the legal justice that she believes should guide law-making and adjudication both – a conception of justice which I will call, following her lead, 'poetic' (Nussbaum, 1995). That conception of justice in turn entails four further claims: first, a political and moral claim that our distinctively human capabilities – our capability for human life itself, for emotional and physical health, for intimacy, play and interaction with our natural environment, for security against assault and for control over our political and material worlds – rather than welfare, equality, liberty or utility, are the best measure of the very fragile goodness that is or ought to be law's goal (Nussbaum, 2000, 2011); second, an explicit acknowledgement and study of the role played by emotions in the development of positive law and adjudication both (Nussbaum, 1990, 1995); third, a graceful insistence, in the face of a good deal of bone-headed opposition to the contrary, on the centrality of narrativity, and hence literature, to our thinking about moral issues, and therefore the centrality of literature and narrative to adjudication and the capacity for judgment that is at its core (Nussbaum, 1995); and, lastly, the eloquent and indeed near-timeless claim that if we aim with law to promote the flourishing of all human beings, we must include women in that set, an inclusion which might well change our understanding of the nature of human flourishing and the content of the state's duties to promote it (Nussbaum, 1999, 2000). The second part of this introduction gives brief accounts of each of the first three of these claims, while referencing the fourth throughout, tying them to the aspiration of poetic justice that is at their core. Throughout the second section, I briefly distinguish humanistic jurisprudence, as well as some of its central

claims, from our two most prominent theories of jurisprudence underlying contemporary legal scholarship: the wealth maximizing understanding of justice and law first put forward in the early 1980s by Richard Posner (1981), and the account of justice and jurisprudence centred on doctrinal integrity and historical continuity propounded around the same time by Ronald Dworkin (1977, 1986). Nussbaum's jurisprudence, I will argue, in short, is humanistic, rather than either economic or principled, and is superior to both for that reason.

The final section will briefly introduce each of the essays in this volume, with descriptions of the ways in which either Nussbaum's understanding of the inter-disciplinary nature of legal studies or her various contributions to a humanistic jurisprudence has affected the author's project, or both, and of how each represents, as a consequence, a Nussbaumian turning point in our understanding of the field of law under scrutiny.

The Profession of Law and the Disciplines of the Humanities: Unity, Divorce and Reconciliation

By the early 1970s, when Martha Nussbaum began writing on law, legal scholarship, as an enterprise, had almost entirely divorced itself from scholarship in the humanities, meaning not only the canonical works but also the contemporaneous scholarship exploring the meaning of those works, produced by colleagues in the various disciplines sharing the same university campuses as the law schools themselves: philosophy, literature, anthropology, political theory, cultural studies and even, although to a lesser degree, history.[1] By two-thirds of the way through the twentieth century, the implicit – and occasionally explicit – understanding of traditional legal scholars housed in law schools and doing something called 'legal scholarship', as a group, was that the various disciplines that make up the study of the humanities provided no or little guidance on the law scholar's basic questions, which were understood as 'doctrinal', and best resolved through the study of law alone.[2] Legal scholarship, through approximately the first three-quarters of the twentieth century, followed a particular form: what is the law of some particular contested area, and how might it be improved? To take some quick examples: what, exactly, does the 'consideration doctrine' require of would-be contractors, and what should it require? Will any bargain between the two of them suffice, or does it have to be a fair bargain? Is a 'formal' or 'just-for-show' bargain that is intended to signal seriousness of intent to be bound enough of a bargain to 'count', or does it have to be a 'real' bargain that constitutes both an actual and intended exchange of value? To take another example: in the USA, what, exactly, does the First Amendment's protection of speech cover, and why? Is it limited to political speech, or speech of presumptive value, or does it cover all speech? Does it cover conduct that clearly conveys symbolic meaning, or conduct that influences political debate? Does it cover flag burning? Hate speech? Obscenity? Defamation? Money? Campaign contributions? Or: what is a search, for purposes of the Fourth Amendment's prohibition on warrantless searches, and what should it be? Is the massive surveillance and data collection facilitated by the possession of a smart phone, the extent of which is now only

[1] For detailed accounts of the history of the split between the study of law and the study of humanities, see Ferguson (1984) and West (1996, 2013).

[2] For histories of this 'formalist' claim and the jurisprudence it grounds, or as it is sometimes called 'classical legal thought', see Grey (1983), Kronman (1993) and Rubin (2007).

dimly understood by the buying public that consensually purchases and uses all those phones, a massive unconstitutional search of an unwitting public? What is 'income' for purposes of tax law? Does it cover in-kind compensation or non-commodified labour, such as housework? Should it? Some twentieth-century scholarship, of course, casts a broader and more explicitly jurisprudential net. What, again using Dworkin's formulation, is the *point* of an area of law? Do we have contract law to maximize the wealth that is the natural product of bargains that are actual exchanges of value, or do we have contract law to protect the reasonable expectations of people dealing with co-citizens that their mutual promises will be performed, or enforceable when not, thus strengthening not only societal wealth but also civic bonds? Is the point of a progressive tax system, the enhancement of revenue or is it redistribution of wealth? Is the Fourth Amendment there to protect us from the constable's occasional stumble, or from an overly intrusive state? Does the First Amendment aim to ensure a healthy, because widely informed, political dialogue or a healthy, because autonomous, individual life? All of these questions, both doctrinal and jurisprudential, can be posed in a backward- or forward-looking way, or both: what path has this piece of legal doctrine taken and what path should it take from here out? What are our ideals for it, again, either with respect to a particular field or legal question, or more generally? And, how should we – a purportedly self-governing democracy – construct those ideals? Should we do so by reference to what most of us want from law most of the time, revealed through our preferences, votes and the democratic horse trading (and money funnelling) at the heart of our politics, or should we do so by reference to the wisdom of judicial authorities from our past, whether those reflected in the common law or in our constitutional settlements? Finally, and more generally still, a few twentieth-century scholars pursued questions at the intersection of law and moral or political philosophy. What does justice require of law? How does, and how should, law promote the common good? However these questions were asked, though, and however they have been answered by legal scholars, with respect to both doctrine and jurisprudence, for most of the twentieth century they were most emphatically not answered by turning to the studies, disciplines, canonical works or scholarship in the various fields of studies collectively known as the humanities.

This near-universal, consistent and rarely remarked upon twentieth-century avoidance of the teaching of virtually all of the various branches of the humanities by legal scholars seeking to answer doctrinal and jurisprudential questions about law – the 'divorce' referenced above of the study of law and the study of humanities – has a *history*, the most important lesson of which, by far, is simply that it was not always thus. As Robert Ferguson has shown in his prize-winning study of the period, during what might be called the 'Jeffersonian era' of elite legal education – the late eighteenth century, running through the first third of the nineteenth – it was widely understood by the handful of lawyers who received such an education, that the study of law, at least by those elite would-be lawyers who might later claim the reins of governing the new republic, required not simply an 'apprenticeship' in a lawyer's office into the skills and mores of the practising lawyer, but also, and perhaps more importantly, an intense period of study of virtually the entire body of knowledge available to a 'man of letters', and for the straightforward reason that *law itself*, in such a republic, was regarded, at least by this elite, as implicating the entirety of human inquiry and knowledge (Ferguson, 1984, pp. 25–28). The would-be well-educated lawyer, then, during his training, was expected to absorb not just whatever positive law could be gleaned through a reading of Blackstone and the Law Reports, but likewise, the philosophical lessons of Cicero, Plato and Aristotle regarding the nature of

politics, the content of the natural law according to St Thomas Aquinas, the understanding of the human psyche to be found in Shakespeare and the poets, the moral lessons conveyed in the Bible and the scientific world-views of Isaac Newton and Galileo, as well as to achieve some mastery of both modern European and ancient languages (Ferguson, 1984, pp. 28–30). To be a leader of this emerging Shining Republic on the Hill, the lawyer-in-training during this Jeffersonian era, Ferguson shows, needed to understand positive law, but in order to do that he needed to be versed in the study of human nature, human and natural history, agricultural sciences, the laws of planetary motion, the teachings of the great philosophers and the wisdom of the poets. Ferguson describes the encyclopedic 'Jeffersonian' law school curriculum that developed to educate just such a lawyer:

> Thomas Jefferson's more famous lists of readings for law students were a practical demonstration of the science of law reaching toward every tie. Jefferson, like Kent, believed in the universal order law could provide. He divided legal study into units or 'resting places' under the four great systematizers of English law (Bracton, Coke, Matthew Bacon, and Blackstone), and he also found 'history, politics, ethics, physics, oratory, poetry, criticism, etc., as necessary as law to form an accomplished lawyer.' Jefferson's plans of study were virtual bibliographies of the Enlightenment, requiring fourteen hours of reading a day across a five-year period. His students read physical science, ethics, religion and natural law before eight each morning; law (in at least three languages) from eight to twelve; politics and history in the afternoon; and poetry, criticism, rhetoric, and oratory 'from Dark to Bed-time.'
>
> The law student's assigned task was nothing less than a practical omniscience in human knowledge. David Hoffman's *Course of Legal Study: Respectfully Addressed to the Students of Law in the United States* (1817) was the standard manual of its kind well into the 1830s; it covered six years of study and opened with *The Bible*, Cicero's *De Oficiis*, Seneca's *Morals*, Xenophon's *Memorabilia*, Aristotle's *Ethics*, and a long list of other readings in general literature and political philosophy. Hoffman expected his law student to seek 'that comprehension of expression peculiar to the poet,' and he insisted on the usual litany that 'every species of knowledge may prove necessary.' (1984, pp. 28–29)

Obviously, the Jeffersonian curriculum is worlds away from the required first year curriculum of the twentieth- and twenty-first-century law student, who reads contracts, torts, property and civil procedure cases, but nothing on politics of or by Cicero, Aristotle or Plato, nothing on natural law from Aquinas, nothing on law and the human psyche from Shakespeare or the poets, nothing on religion or morality from the Old or New Testament of the Bible or the Koran, nothing on the contractarian or utilitarian foundations of law from John Locke, Thomas Hobbes, David Hume, John Stuart Mill or Jeremy Bentham, and nothing from any of their modern or contemporary counterparts: John Rawls, John Finnis, Robert Nozick, Herman Melville, Karl Marx, Friedrich Hayek, Susan Okin or Thomas Piketty. The writings of these luminaries, whether from antiquity, from the last two hundred years or from our own time, are simply not understood by contemporary legal scholars or educators as sources of 'law'. The scholarship that emanated from law schools, at least at the three-quarter mark through the twentieth century, reflected the same avoidance: outside of ornamental citations and occasional humanistic forays, twentieth-century legal scholars stuck pretty resolutely to doctrinal sources when resolving doctrinal questions. In sum, it is clear from contemporary scholarly as well as pedagogical practice that what we might call the Jeffersonian curriculum, along with its distinctive jurisprudential understanding of the authority of law as blended with the authority of high culture, and hence of the *study* of law as seamlessly blended with the study of canonical cultural classics – what we would today call collectively 'the humanities'

– was lost, or cast aside, both in its particulars and more importantly in its aspirations, during this period. Thus, the twentieth-century divorce of law and humanities.

Why did this happen? According to historians of the era, the divorce of the study (and teaching) of law from the cultural canon dates, basically, from Christopher Langdell's late nineteenth-century invention of the modern law school and the 'case method' as the mechanism for instruction (Grey 1983; Ferguson, 1984; Kronman, 1993; Rubin, 2007). Langdell's signature accomplishment, as is widely acknowledged, was basically to place the study of law in a university-styled classroom, rather than a lawyer's office, using judicial cases as the vehicle for instruction. Less appreciated, though, his second objective, which was at least as fully realized if not more so, was to place those judicial cases, and those cases *alone*, at the heart of the lawyer's education, and hence at the heart of his professional identity – rather than *any* set of cultural, religious or philosophical texts. In this, he succeeded spectacularly. By the beginning of the twentieth century, judicial case law had become not just central to but the *entirety* of legal education. Hence, judicial case law became central to the meaning of law, rather than any seamless web of law and cultural authority, leading to the highly prized 'autonomy' of law from culture, philosophy, literature and religion. Legal scholarship became a staple of the law schools during the half century or so that followed Langdell's accomplishment, and scholarship simply followed the direction set by the pedagogy, eventually reflecting the same turn to adjudicated cases, and cases alone, as both the object and source of scholarly inquiry into law.

As a result, from the beginnings of the modern law school through at least the early 1970s – when Nussbaum and a handful of other scholars began to re-open this consensus – the vast bulk of the legal scholarship that emanated from law schools was firmly committed to the project of exploring purely *legal* answers to purely *legal* questions, even where – especially where – the law itself was concededly uncertain. The legal scholar faced with what seemed to be an open legal question might have to look at adjacent legal fields, or he might have to more deeply probe the premises of the field from which his question arose. But either way, the law itself, as generally held by the twentieth-century Langdellian assumption, is sufficiently autonomous from other fields of discursive inquiry (as well as sufficiently just) that there is simply no need for recourse to any discipline outside of law for the legal resolution of the question posed. This is in large part what it meant, in the late nineteenth century and through much of the twentieth, to claim law as a 'learned profession': the claim was not that law required an education fit for a learned, Jeffersonian 'man of letters' but, rather, that 'legal learning' – and only legal learning – was sufficient, for the well-educated legal professional, to resolve legal doubt. Although the law school might be housed in the university – thus underscoring that *learning* and not just training is required for the profession of law – it is nevertheless *legal* learning that is required: the law school's discipline is academic but *separate* from the other disciplines the university housed. The discipline of law need not even overlap, much less be subsumed by, that of philosophy, theology, politics or history, all housed on the opposite side of the university's quad.

To be sure, and as every first year law student learns, there was a persistent countermovement, or dissenting tradition, throughout much of this period – from 1890 to 1940 or so – to these Langdellian and formalist claims on behalf of law's autonomy and completion, and the implications of both for legal scholarship. The self-proclaimed 'legal realists', a group of legal scholars and judges that rose to prominence in the early decades of the twentieth century, quite

famously dissented from the Langdellian view that law, and law alone, is sufficient to answer open legal questions, whether those questions are posed by a judge, a lawyer or a scholar (see generally Cohen and Cohen, 1979). Rather, the legal realists held (albeit for reasons that differed among them) that law itself is replete with gaps. In fact, according to some realist scholarship, virtually *every* significant legal question can be resolved in more than one way, if one sticks only to legal authorities as source material, simply by virtue of the method of the common law itself. If answering a legal question in a common law system requires essentially resorting to precedent, and that inquiry in turn requires us to decide that a present case is sufficiently 'like' an earlier case so as to be decided in the same way, then the determination of similarity – that this case is enough like that one so that it must be decided similarly – even just logically, *must* be guided by some non-legal criteria, otherwise the decision is captured by an endless and quite irrational, or mindless, regress. Once one recognizes this – that a system of law dependent upon the application of precedent to current cases through analogical reasoning cannot possibly be a closed system – then it becomes clear that at least judge-made common law is replete with gaps – is almost nothing but gaps – and that those gaps must be filled by *some* sort of non-legal judgment. It cannot be simply a deduction from rule to instance; the peculiar blend of inductive and deductive reason common to the analogical method of the common law will never be sufficient to answer a legal question. The formalist and Langdellian belief that it is, the realists claimed, was not only wrong-headed but it was so wrong-headed as to be ripe for ridicule: it is built on nothing more substantial than a childlike belief in the supposed solidity or naturalness of human rules,[3] or a counter-oedipal desire to endow legal authority with a benign but paternal certainty and wisdom it can't sustain (Frank and Gray, 1930), or simply a misguided quasi-mystical belief in 'transcendental nonsense' emanating from on high (Cohen, 1935). Rules just do not apply themselves, and therefore, the realists contended, the human application of rules to particulars requires judgment, the criteria for which must come from some source other than those rules themselves. Grown-up and relatively enlightened modern judges should recognize as much, and acknowledge their own considerable discretionary power, rather than reach for a mindless and in any case illusory external authority premised solely on a quest for consistency with past precedent.

And what is it to which the deciding judge should turn, then, to fill the gap? If the tapestry of law itself is not sufficient to generate answers to open legal questions, to what source should judges, or scholars, turn? Perhaps to the Jeffersonian curriculum or, more generally, to the culture's authorities on the content of the justice to which law should aim? Well, no. For the most part, the answer the realists proffered to the question 'to what should the judge turn, if law itself does not suffice' was emphatically not the cultural canon of the humanities. Rather, and as argued in Justice Oliver Wendell Holmes' prescient and sweeping essay 'The Path of the Law', from the 1890s, a belief in Langdellian formalism – the completeness and autonomy of the law – as a way of answering legal questions would eventually give way, *not* to a re-engagement with the humanities, but rather, to a forward looking mastery of the social sciences (Holmes, 1997). Shared social utility is the value towards which law should be aimed (Holmes, 1997), and the judge who seeks to maximize it should be guided in his

[3] '[R]ules … are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all their importance, except as pretty playthings' (Llewellyn, 1930).

quest to do so not by whatever wisdom may be encoded in legal precedent, but rather by the light of reason informed by scientific inquiry into the content of the social good and how best to attain it. There is no worse reason to resolve a case in a particular way than that it was so resolved in the time of King Henry IV, Holmes opined, in one of his many broadsides against the twinned rules of precedent and *stare decisis* (1997, p. 1001). And what should replace that reliance on precedent, that mindless quest for consistency? In a word: science. The lawyer of the twentieth and twenty-first century, Holmes (1997) proclaimed, would be the man of the slide rule, rather than the man of Blackstone; the master of statistics and economics, rather than of the law reports. The legal realists, who followed him, followed his lead, applying to open legal questions the teachings and methods of the then-nascent social sciences.

Thus, while the early twentieth-century 'realists' and the turn-of-the-century 'formalists' disagreed on virtually everything *else* – they disagreed, that is, on the nature of law, the value of precedent, the role and meaning of the Constitution, the goodness of a laissez-faire economy, the necessity of social welfare nets and the viability of an administrative state – they reached precisely the same conclusion, albeit for very different reasons, on the irrelevance of the cultural canon of the humanities to adjudication and, therefore, the irrelevance of the study of the humanities to a proper and professional study of law. For the Langdellian formalists, the humanities and their discourses were *unnecessary*: law itself is a discourse that is rich, textured, complete and autonomous, and thus its own discipline. Law alone can provide answers to all legal questions. The point of law is to preserve the settled wisdom of the past, and the way to that is through respect for those legal institutions designed to do so: the rule of precedent, the common law itself, *stare decisis*, and the analogical reasoning that makes those past rules efficacious in the resolution of contemporary problems. The study of law should be admitted to the pantheon of learning – it is a 'learned profession' we are expounding – but the heart and content of that learning is *legal*, basically admitting of no other discipline. For their Holmesian legal-realist antagonists, these formalist claims on law's behalf on its completeness and autonomy were just foolish: law itself was decidedly not sufficient; law is riddled with gaps, and many, perhaps most or all, legal questions can only be answered by recourse to some body of knowledge, set of intuitions or source of learning outside the law books. But that body of knowledge, most (although not all) realists held, was decidedly not the canonical authorities of the Western humanist tradition. On this, they followed Holmes. It was, rather, the insights and the methods of the social sciences – the man of the slide rule: not the man of Blackstone, for sure, but also, implicitly, not the man of Aristotle, Plato, Cicero, Newton, Galileo, Shakespeare, J.S. Mill or the Bible either. The law, according to the realists, should be forward-looking in orientation and generally utilitarian in purpose and outlook: the goal should be to maximize the well-being of as many as possible. Law is a tool by which to do so, and the social sciences should guide the judge and lawyer's utility-maximizing legalistic hand when using that tool. The learned lawyer, judge and scholar, then, should master the then-nascent fields of the social sciences, and put his learning, as well as the law, towards that end. He should have no greater need, or motivation, to turn to the learning of the humanities than to Blackstone or the Law Reports. Where law needs supplementation, it should be the social sciences, not the humanities, which provide direction.

During the century that followed Holmes' great essay, formalists of various stripes continued to view law as a complete and autonomous system of norms with no need of completion from any source, while realists and their followers have seen the law as replete with gaps, but gaps