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AALS Section on Law and Humanities
“Excavating and Integrating Law and Humanities in the Core Curriculum”
2012 AALS Annual Meeting - January 4–8, 2012 - Washington, D.C.

Law School for Poets

Melissa Murray*

INTRODUCTION

Like many who attend law school, I was an undergraduate history major. The humanities, my college pre-professional advisor assured me, were ideal preparation for the rigors of law school. I believed the hype. Three years later, on my first day of Contracts, my blind faith in the inherent compatibility of the humanities and legal education was rewarded with a sinking feeling that would, in time, give way to nausea. I had been duped. I had envisioned exuberant discussions led by a pipe-smoking, tweed-jacketed professor about the great moments in the history of contract law. Instead, the class began with the professor (sans pipe and tweed jacket) scrawling the Coase Theorem on the chalkboard. There were numbers. I felt the bile rising in my throat.

Although I learned to deal with the numbers, I could not help feeling that something was missing from the experience. Where was the social and historical context that could illuminate these doctrines? As we marched methodically through the substance of each course, we never stopped to dwell on the connections that linked cases that were thematically distinct, but connected contextually and chronologically.

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* Professor of Law, University of California-Berkeley, School of Law. Many thanks to Joshua Hill and Rose Villazor for their helpful comments. Musetta Durkee and the staff of the *California Law Review* provided excellent editorial assistance. This foreword is dedicated to Laura Kalman, who helped me recover my inner humanist.

Though it would have been easy to submit to this standard law school pedagogy, I did not swallow my misgivings and fall in line. I did not go gently into that good night! I became a law professor, and I vowed to find a way to reach my fellow poets, artists, and historians.

As it happens, I am not the only humanities refugee in the legal academy. Indeed, many fellow travelers are, like me, a member of the Association of American Law Schools' Section on Law and Humanities. This year, as the section considered the topic for its annual program, we members were reminded of the challenges that law schools currently face. At a time of economic uncertainty, many schools have foregone courses that draw heavily on a humanistic perspective in favor of more traditional bread-and-butter courses. After all, when students are struggling to find employment, it is hard to make the case for specialized seminars on "law and ____," or even survey courses like Law and Literature or American Legal History.

But what if there did not have to be a trade-off between the "law and ____" courses and those deemed more marketable? What if we could reconcile a more humanistic pedagogy with the bread-and-butter courses that are standard law school fare? Of course, many of us were already trying to do this in our courses. The question was how were we doing this, and what approaches were proving successful for us and for our students?

With that in mind, the section organized its program for the 2012 AALS annual meeting around the theme of *Excavating Law and Humanities in the Core Curriculum*. On January 6, 2012, six legal scholars from a variety of doctrinal areas explained their methods for infusing the law school curriculum with a more humanistic pedagogy. Those in attendance learned a great deal from these presentations—so much so that the section wanted to share this important work with an even broader audience. Happily, the editors of the *California Law Review* agreed and this symposium on law and humanities pedagogy was born.

The panel and symposium have prompted me to think about the way in which the humanities enrich my own teaching. Though I use a variety of cultural and literary references in my Family Law class, I find that my Criminal Law class best reflects my views about how to integrate the humanities into a core law school course.

Like many other criminal law professors, I often begin the course with a discussion of *Regina v. Dudley and Stephens*.¹ The facts of the case are familiar. Shipwrecked and set adrift at sea in a small raft without food, fresh water, or signs of rescue, Dudley, Stephens, Brooks, and Parker struggled to survive.² After twenty-eight days at sea, Dudley and Stephens hatched a plan.³ The pair murdered Parker, who was weak and near death, and they feasted on

1. 14 Q.B.D. 273 (Eng. 1884).

2. *Id.* at 273–74.

3. *Id.* at 274.

his flesh and blood, which sustained them long enough to allow them to be rescued.⁴ Once safe at home in England, Dudley and Stephens were indicted for Parker's murder.⁵

The case always prompts a spirited discussion of the various rationales for punishment. Was the court correct to sentence Dudley and Stephens to death for their act? Should the criminal law apply in circumstances that are more like a state of nature than a civilized society? Why did Queen Victoria intervene to commute the men's sentences to six months' imprisonment, sparing their lives?

In thinking about these broad questions, I show my students an image of a painting that I first saw almost fifteen years ago in a college art history course: Théodore Géricault's *The Raft of the Medusa*.⁶ Controversial from its first showing at the 1819 Paris Salon,⁷ the painting depicts the aftermath of the wreck of the French naval frigate *Medusa*, which ran aground off the coast of Africa on July 5, 1816. Set adrift on a hastily constructed raft, the 147 French seamen struggled to survive in intolerable conditions. All but 15 died before they could be rescued. And in the days before their rescue, the surviving 15 succumbed to cannibalism and madness. The event became an international scandal.

The Raft of the Medusa enriches the discussion of *Dudley and Stephens* on two levels. It provides students with a visceral (and visual) account of the experience of being lost at sea that makes the circumstances of the case less abstract and theoretical and more immediate. But the painting does more than simply depict the harsh reality of a shipwreck. It also helps to contextualize the case and the court's deliberations.

Though more than fifty years separated the events of the *Medusa* from those of *Dudley and Stephens*, the painting makes clear the incredible dangers associated with nineteenth-century sea travel. Shipwreck was always a possibility, and with it the unrelenting temptation to do the unimaginable in order to survive. With this context in mind, it is easier for my students to articulate answers to the questions the case prompts: Was the killing of Parker murder or a necessary act of survival? If it was murder, was punishment in order? And if so, how much?

More importantly, the painting, and the events that inspired it, helps to place *Dudley and Stephens* in context. The reality of nineteenth-century sea travel meant that *all* sailors theoretically faced the same circumstances in which Dudley and Stephens found themselves. Accordingly, the *real* danger, in the court's mind, was not the possibility of shipwreck, but the possibility that when

shipwrecked, sailors would succumb to temptation and resort to murder and cannibalism in order to survive.

4. *Id.*

5. *Id.* at 275.

6. Théodore Géricault, *Le Radeau de la Méduse* (1819).

7. Klaus Berger & Diane Chalmers Johnson, *Art as Confrontation: The Black Man in the Work of Géricault*, 10 MASS. REV. 308 (1969) (discussing reactions to the painting).

The Raft of the Medusa is a visual testament to this impulse—an impulse that the court believes must be suppressed. And it is not simply that the instinct for survival at all costs must be suppressed, it is that it must be *supplanted* by something more noble—a sense of duty, obligation, and national pride. Chief Judge Lord Coleridge’s words are instructive on this point:

To preserve one’s life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man’s duty not to live, but to die. . . . [T]hese duties impose on men the moral necessity, not of the preservations but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink as indeed, they have not shrunk.⁸

At this point, I juxtapose the tale of the *Medusa* with that of the *H.M.S. Birkenhead*.⁹ In 1852, the *Birkenhead*, an English vessel, became shipwrecked off the coast of South Africa. With more passengers than serviceable lifeboats, the ship’s crew insisted that women and children board the lifeboats first. In the end, only 193 of the 643 passengers survived, but the crew’s sense of duty and chivalry established the basic protocol of prioritizing women and children in an evacuation at sea and inspired Rudyard Kipling’s poem “Soldier an’ Sailor Too,”¹⁰ which recounts incredible bravery in the face of hopeless circumstances.

The juxtaposition of these two historical events, and the literary and artistic works they inspired, focuses students on the political milieu of *Dudley and Stephens*—something that is difficult to glean from the text of the opinion alone. In its exhortation of duty and sacrifice, the Queen’s Bench was not simply articulating a professional standard for sailors; it was making a statement about what it meant to be Englishmen in the world order. Dudley and Stephens had succumbed to temptation, just as the French sailors aboard the *Medusa* had done years earlier. Perhaps their actions were understandable in the larger scheme of things, but they were decidedly *un-English* and not cognizable to the Court as a justifiable act. Killing and eating a fellow sailor in order to survive was perhaps understandable for the Frenchmen aboard the *Medusa*. But when faced with

8. *Dudley & Stephens*, 14 Q.B.D. at 287.

9. See generally Douglas W. Phillips, *THE BIRKENHEAD DRILL* (2004) (discussing the events).

10. Rudyard Kipling, *Soldier an’ Sailor Too*, in *THE COLLECTED VERSE OF RUDYARD KIPLING* 305, 305–07 (Doubleday 1910). The poem refers directly to the *Birkenhead*:

To take your chance in the thick of a rush, with firing all about,
Is nothing so bad when you’ve cover to ’and, an’ leave an’ likin’ to shout;
But to stand an’ be still to the Birken’ead drill
is a damn tough bullet to chew,
An’ they done it, the Jollies—’Er Majesty’s Jollies—
soldier an’ sailor too!
Their work was done when it ’adn’t begun; they was younger nor me an’ you;
Their choice it was plain between drownin’ in ’eaps
an’ bein’ mopped by the screw,
So they stood an’ was still to the Birken’ead drill, soldier an’ sailor too!

Id.

such a choice, a true English sailor, like the men of the *Birkenhead*, would do his duty and give his life rather than succumb to such temptation.

Dudley and Stephens is one of my favorite cases to teach in Criminal Law, and it is not simply because the facts are so compelling and grotesque. It is because it lends itself so well to a law and humanities perspective. These background materials—a painting, a poem—are so foreign to law, but yet they provide an historical and political context that makes the legal outcome in *Dudley and Stephens* more cognizable and comprehensible to my students.

And happily, my students seem to agree. For many, the case comes at a point in the semester when they are overwhelmed with the law and are casting about for something more familiar. The appeal to the humanities seems to do the trick, inviting interesting comments and questions from the former historians, artists, and poets who might have been questioning their decision to come to law school. More importantly, as David Sklansky notes, the humanistic turn reminds us that the distance between law and the humanities is not as vast as we might imagine. It reminds us that the study and practice of law is, at its core, a humanistic endeavor.

For this reason alone, I think the humanities are a fruitful vein to mine in legal pedagogy. But as the contributions to this symposium make clear, there is much more to be gained from integrating the humanities into the law school curriculum than the satisfaction of our students (though this is certainly important!). As Bret Asbury and Zahr Said's contributions suggest, the integration of the humanities into the core curriculum can help build the skill of—and appreciation for—close reading of legal materials. The parsing of language is a critical tool for lawyers, yet it is not one that is particularly well served by the Langdellian case method. However, wedding the traditional case method with a pedagogical approach that is attentive to language, syntax, and sentence structure can shed light on the work of courts, while fostering students' abilities to think and read critically.

Importantly, the humanities can also help students to be more attentive to their roles as lawyers and members of a professional community. As Natasha Martin describes, juxtaposing standard professional responsibility fare like the model rules with literary and cinematic depictions of lawyers can help students “try on” different lawyerly hats to find the one that best fits them and the ethical standards of the profession best.

In addition to building lawyerly skills and an understanding of the professional obligations of lawyers, the humanities can provide an important backdrop for understanding substantive legal concepts. Lenora Ledwon's contribution, *Guilt, Greed, and Furniture*, alerts us to the way in which a close reading of a film can help explain difficult, but important, legal concepts. As she details, Mel Brooks's film *The Twelve Chairs* serves as a vehicle for analyzing the dying declaration exception to the hearsay rules in Evidence. As Ledwon makes clear, the humanities can help crystallize concepts that, through case law alone, might be confusing or unclear.

All of the contributions to the symposium attest to the value of a humanistic approach for building skills and teaching substantive concepts. Equally important, they also suggest the way in which a more humanistic pedagogy can help foster student engagement with the material and the course as a whole. I would love to be a fly on the wall of Rose Villazor's property class when Margaret Radin's theory of property and personhood is elaborated by way of J.K. Rowling's tale of Dobby the House Elf. As Villazor makes clear, the use of popular fiction—or even popular culture—does not reflect a “dumbing down” of the classroom. Instead, it suggests that we might meet students on terrain that is more familiar to them in our efforts to introduce them to less familiar legal concepts.

Equally important, the humanities can help destabilize and challenge broadly-held assumptions that undergird the law. Carol Sanger's approach to teaching incest prohibitions in Family Law is instructive on this point. As Sanger concedes, most law students readily accept law's prohibition of marriage and intimate relationships between individuals who are related to one another. But though these prohibitions are deeply embedded in American legal culture, they were not always so fixed and they may be at odds with prevailing customs in other societies. The humanities can play an important role in highlighting these disjunctions. Sanger's coverage of incest prohibitions includes a discussion of the nineteenth-century British merchant class, which used “cousin marriage” as a vehicle for consolidating capital within families and building wealth, as well as excerpts from Jeffrey Eugenides's novel, *Middlesex*, which features a relationship between siblings. These texts, she contends, help disrupt the “naturalness” of incest prohibitions, and force students to think critically about whether and how familial endogamy might serve particular social and human needs.

Of course, the use of the humanities in legal pedagogy is not without its pitfalls. As Ariela Gross reminds us, we are lawyers in the business of training lawyers. Tilting too far in the direction of the humanities can be unsettling and discomfiting for students, undermining the effort to use the humanities to better illuminate legal concepts. Instead, Gross suggests a more modest—and perhaps more attainable—approach for integrating the humanities into the law school curriculum. She cautions us to be choosy about where and how we incorporate the humanities, and to think seriously about how the humanities can best serve the teaching of law—as a side dish, rather than the main course. In the end, Gross and the other symposium authors remind us that law school need not be a bloodless march through the morass of legal doctrine. The use of the humanities can provide legal pedagogy with important context, nuance, and color. And in so doing, can help sate the poet in all of us.