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WHY LAW NEEDS THE HUMANITIES: JUDGING FROM EXPERIENCE¹

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ABSTRACT: This paper reproduces the “Introduction” of the book *Judging from Experience: Law, Praxis, Humanities*. The aim is to publicize to academic readers the content and the main ideas of this instigating work.

KEYWORDS: Law and Literature; Law and Humanities; interdisciplinary; legal practice.

HINTERLAND

The voyage that this book is a reflection of started in the late 1970s when I was studying for an MA in English and American literature. In those days, the teaching staff at Utrecht University, the Netherlands, consisted of a mix of staunch defenders of New Criticism and early adepts of narratology, post-colonialism and deconstruction, a combination that often left us students baffled as we oscillated between memorising metaphysical poetry and excavating texts for hidden, ideological meanings. These methodologies generated in me an acute interest in what people do to and with language. When I began my legal education, I was driven by the idea that law is what people do to one another by means of language. But disappointment awaited. Rule-oriented courses were the main staple.

¹ Anamorphosis is grateful for this one-time permission of Edinburgh University Press to publish the “Introduction” of Jeanne Gaakeer’s new book: *Judging from Experience. Law, Praxis, Humanities*. Edinburgh: Edinburgh University Press, 2019 (<https://edinburghuniversitypress.com/book-judging-from-experience.html>). The formatting of the original publication was maintained (Editor’s note).

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Where were the people to whom the rules applied? What did it mean to apply a rule? What did one actually do when one said one did? What view on language was there behind the notion of rule application? No answers were given, simply because such questions did not matter much. However, when I took courses in legal philosophy and the history of ideas of law – revealingly called, as they still are today, *metajuridica* – I understood that the reflective methodology of the humanities had its place in law.

This formative moment caused a shift in my academic focus. While searching for a dissertation topic, I came across Richard Posner's *Law and Literature*³. The book came as a double shock. The very idea of a bond existing between law and literature was immensely consoling, yet Posner's elaboration seemed restrictive. It reduced the importance of a literary turn of mind for legal practice. As I continued my parallel education in law and literature, I experienced that in the humanities departments the topic met with suspicion. I was, more or less, hounded out as a traitor to the humanities, for we all knew that law had absolutely nothing to do with the postmodern study of literature, did we not? Fortunately, Erasmus School of Law offered me the opportunity to pursue my goal. In the works of James Boyd White and Richard Weisberg, the revitalisation of the two early twentieth-century challenges provoked by John Wigmore and Benjamin Cardozo⁴ was both aspirational and critical in nature. To me at least, these two lenses with which to view contemporary law and literature differed in degree rather than in kind. White's thesis on the homology of law and literature resonated⁵, given the earlier unity of law and literature in the European context. And so did his approach to the connection between two disciplines as an integrated product of translation. Weisberg's emphasis on an ethical view with respect to the enterprise of law and literature added to its importance⁶.

³ R. A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, MA: Harvard University Press, 1988 [rev. eds 1998 and 2009]).

⁴ J. H. Wigmore, 'A list of legal novels', 2 *Illinois Law Review*, 1908, pp. 574–93; 'A list of one hundred legal novels', 17 *Illinois Law Review*, 1922, pp. 26–41. B. N. Cardozo, 'Law and literature', *Yale Review*, 1925, pp. 489–507.

⁵ J. B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), p. xii.

⁶ R. H. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven: Yale University Press, 1984).

When I began to serve as a judge, this occasioned another shift in my thought. Only then did I realise fully the potential of what the fields of *Law and Literature*, or, more broadly, *Law and the Humanities*, have to offer: namely, the reminder that success in practising law depends to a large extent on developing one's imagination, while constantly remaining alert to the pitfalls of our linguistic usages in relation to our own private and professional biases when we read and write the narratives in and of law. This is one of the ideas animating this book.

When as academic jurists we turn to the humanities to further our interdisciplinary legal projects, I therefore suggest that we reconsider the alliance of theory and practice in law and jurisprudence, lest we run the risk of legal practice remaining unresponsive to interdisciplinary studies, and of students of law dismissing 'Law and' courses as irrelevant for the development of their professional skills. In short, in developing interdisciplinary scholarship, we should not create new academic ghettos. It is only through law in practice that we can learn to speak of justice. This is why the *quid-iuris* question at the heart of legal doctrine and jurisprudence traditionally conceived remains crucial when it comes to investigating the possibilities of the contribution of the humanities on the methodological plane. On the one hand, this speaks for attention to how legal and social relations are established by means of our discourse on legal meaning and justice. On the other hand, it ties in with the subject of the methodology of the legal perception of the case at hand. This is important to note, because the view of law as a normative set of propositions that are 'out there' in an unadulterated form, ready for our application, unfortunately remains in need of refutation. Because jurists are obviously trained for the purpose of doing law, the humanistic study of law should be a *praxis*, a merger of reflection with action. Academic research can then also have an impact of the kind desired so highly by its leadership.

This brings me to another issue. I often perceive that my academic colleagues in law and the humanities from common law countries have misconceptions about civil law legal reasoning. It is supposedly a mere syllogistic, deductive rule application, moving from abstract, codified legal norms to the decision in a specific case, all in contradistinction to common law reasoning. The expectation raised by such a conception of rule

application seems to be that of an unproblematic existence and use of abstract norms. That notion is oversimplified, to say the least. If we start categorising what is to count as knowledge in the field of law, and begin from the premise that law is a domain of rules only, this simplification can lead to the marginalisation of interdisciplinary ventures based on it. Furthermore, it creates a false opposition between common law and civil law thought on the act of judging – adjudication being the most prominent feature of the intertwinement of theory and practice; namely, it proclaims for civil law jurisdictions a formalist hermeneutics. That is to say, one of ‘outside-in’ legal reasoning, as Ronald Dworkin called it, from the abstract to the concrete, rather than ‘inside-out’ reasoning, with a focus on the judicial effort of connecting the facts of the case to the legal norms⁷.

I suggest that it is on the plane sketched above that the humanities can, firstly, help elucidate the problems connected to this type of misunderstanding, and, secondly, contribute to their possible solution. That is why I turn to philosophical hermeneutics, especially as developed by the French philosopher Paul Ricoeur. I aim to draw a blueprint of what the humanities can contribute to the realm of *praxis* by bringing to the fore the resources that can contribute to the judge’s development of her professional quality of *phronèsis*: namely, practical wisdom. The view behind my enterprise is that, despite their differences, most legal systems share core values such as judicial impartiality, consistency and integrity, which, not incidentally, are considered virtues in the Aristotelian sense. Methodological reflections on the determination of the facts of a case, the judicial justification of deliberative choices made, and the way in which law establishes relations between people are therefore shared tasks.

A PRAGMATIC APPROACH

Since the days of Quintilian, law students have been taught to argue both sides of the case, the method of the *controversiae*. My perhaps not so humble proposal therefore is to cherish the old legal adages of interpretation *diversi sed non adversi* (different, but not contrary)⁸ and

⁷ R. Dworkin, *Justice in Robes* (Cambridge, MA and London: Belknap Press, 2006), p. 54.

⁸ The term ‘different, but not contrary’, or its equivalent *diversum sed non contrarium* (‘different, but not conflicting’) was used in medieval law and theology to show that texts

eadem sed aliter (the same, but differently) to help *Law and Literature* continue to thrive worldwide. *Law and Literature* offers wonderful opportunities for a methodology that can renew the legal pedagogy of close reading and sharing a text, responding to it with the generosity of an open mind, and engaging in dialogue with those whose perspectives are informed by other notions and experiences. In Europe as well, the humanistic study of law has regained momentum. This inspires me to return to various aspects of text, language, and narrative discussed in *Law and Literature*, in order to investigate new possibilities for contributions to legal practice.

My views are obviously informed and influenced by the context of my legal education, and my work as an academic and a judge in a European civil law system, and within it, the field of criminal law. However, I do not intend to promote forms of parochialism along the lines of continent. Being the nomad that I am, I hope that it is not professional arrogance that compels me to opt for a focus on the judicial perspective⁹. The pragmatic reason for doing so – the ancient Greek word *πραγματικός* referring to one skilled in law – is why not try to turn to profit what one thinks one knows? Books on the act of judging are not seldom written by academics with no actual, visceral experience of the sublime, or rather the terrible, responsibility of the judge: namely, what it means to have a fellow human being right in front of you across the bench, and being the one assigned the duty to decide about his or her fate.

Firmly rooted as I still am in the notion of law as text, and of language as the profession's software, I look for fundamental commonalities of law and literature. The double premise of this book is that law as an academic discipline belongs to the humanities, given its development since the rediscovery of the Justinian Code that is characterised by a language-oriented, philosophical-hermeneutical perspective, and that, as a consequence, jurists necessarily combine the theoretical and the practical. Practice turns to theory for justification of new arguments, and input from practice is necessary to move doctrinal debates forward. Because

on a subject and their various interpretations need not be in conflict. See G. R. Evans, *Law and Theology in the Middle Ages* (London: Routledge, 2002).

⁹ An honorary title bestowed on me by Greta Olson ('De-Americanizing law-and-literature narratives: opening up the story', 22 *Law & Literature*, 2010, pp. 338–64, p. 340).

hermeneutics is not merely a methodology for interpretation, but rather a philosophical view for a broad mode of inquiry into text and human action, the art of doing law in concrete cases always requires attention to the reciprocal relation between fact and norm.

Given this interaction, the primary object of interpretation is always a combination of the narrative(s) of the facts and the relevant propositions of law. This necessitates attention to the effects of the narrative construction of the facts on the interpretation and application of the legal norm, substantive or procedural, both for scholarly reflection and for legal practice. One way to look at the importance of narrative for law is that the picture of reality that law orders at the moment it tells its tale resembles the literary rendering of a particular moment – how a world is captured in words. Therefore, narrative construction matters, and we should ask in which way does it steer the reader towards interpretation. Equally important is that in each casuistic account of the facts the theoretical knowledge of legal doctrine is necessarily confronted with the narrative knowledge of literature¹⁰. That makes *Law and Literature* essential for legal practice. It also suggests that jurists should bear in mind the influence of their own interpretive frameworks and unconscious choices or preferences with regard to both facts and norms. To the skeptics whom I hope to convince, I say that the ‘and’ of *Law and Literature* does not imply a methodologically dangerous liaison of dissimilar disciplines, but a fundamental relatedness.

Another reason to turn to philosophical hermeneutics is that in legal theory as well as in interdisciplinary legal studies the debate continues on whether law is part of the social sciences or firmly rooted in the humanities. Any stand we take here is important when it comes to discussing the future of such broader fields as *Law and the Humanities* or *Law and Culture* and their critical functions. My point is that it will simply not do for law to lump together the empirically inclined ‘Law ands’ with the language-based varieties. I conceive jurisprudence to be contextual knowledge of law. This requires the ability to enter imaginatively into any given situation. As a practical skill of knowing what a situation amounts to, and what it requires

¹⁰ R. Foqué and A. C. ’t Hart, *Instrumentaliteit en rechtsbescherming* (Arnhem: Gouda Quint, 1990), p. 369.

in terms of judicial action, it benefits from what the humanities have to offer by way of insight into different aspects of humanity. That is another idea animating this book.

THE ROADMAP

This book is divided into three parts. Part I takes as its overarching topic the enchantment of knowledge in law. Chapter 1 discusses Gustave Flaubert's eponymous clerks *Bouvard and Pécuchet* to illustrate the result of a process of differentiation of knowledge culminating in the positivist thought of the nineteenth century. It serves as the blueprint for the book as a whole. Chapters 2 and 3 take the return road to the 'nooks and crannies' – as the epigraph to this book calls them – of the language of law, not out of nostalgia for the halcyon days of the unity of law and the humanities, but to show what brought us where we are now. Chapter 2 offers a short overview of the processes of differentiation in law and jurisprudence – from the unity brought about by the rediscovery of the *Corpus Iuris Civilis* in the eleventh century to the rise of national legal systems culminating in the nineteenth century, and from law as an autonomous discipline to 'Law ands' in the twentieth century – in order to provide a small map of the territory from a historical, European perspective. Chapter 3 discusses the limits of language in relation to questions of determinism and volition, and asks what the nineteenth-century epistemological and methodological debate on the disciplinary character of the humanities – the *Erklären-Verstehen* controversy – means for contemporary interdisciplinary legal studies. Discussions of Robert Musil's novel *The Man without Qualities* and the Dutch poet Gerrit Achterberg's *Acid* poems in Chapters 4 and 5 illuminate how the theoretical considerations of Chapters 1 to 3 have literary counterparts.

Against this background, Part II turns to *iuris prudentia*, insightful knowledge of law. It provides the building blocks for a humanistic model for doing law. Chapter 6 elaborates on the importance of practical knowledge, *phronèsis*, when it comes to combining facts and norms. On the basis of the works of Aristotle and Ricoeur, it discusses the distinction between theoretical and practical knowledge, and offers an analysis of *phronèsis* as the disposition that takes its deliberations from the circumstances of things.

As such, it forms the basis for a proposal to incorporate philosophical hermeneutics in law, both in theory and in practice. Chapter 7 addresses the uses of metaphor in law. It asks in what way does metaphor help spark new meaning, and in what way can it hold us captive and make us fall into the trap of cognitive dissonance, confirmation bias and belief perseverance. Chapter 8 asks after the requirements of judicial narrative intelligence. It introduces the topic of empathy, and analyses the way in which mimesis as re-presentation of human action works in law and in literature. Finally, it connects these topics to a right discrimination of the equitable. Pat Barker's *Regeneration* illustrates the argument by connecting the topic of voice to (in)justice. The interconnections of law and narrative are the topic of Chapters 9 and 10. They consider the possibility of a legal narratology and the form(s) it could take, firstly by focusing on the topics of probability, coherence, and plot in law and literature and, secondly, by turning to the implications of a narratological approach for criminal law in practice. John Coetzee's *Disgrace* exemplifies the issues that Chapter 10 raises.

Part III deals with what Benjamin Cardozo called the perplexities of judges that become the scholar's opportunity, again a connection of theory and practice in law. With Ian McEwan's *The Children Act*, Chapter 11 returns to the topic of empathy. Because narratives can trigger empathic and emotional responses in various ways, it asks what the cognitive turn in narratology means for the judge who deals with the emotions and narratives of others. By way of conclusion as to why *Law and Literature* matters deeply for legal practice, Part III also goes to 'the suburbs', as the epigraph has it, and to the dystopic effects of technology unbridled by just law. Chapter 12 focuses on DNA biotechnology by means of a reading of Michel Houellebecq's *Atomised*, combined with Martin Heidegger's view on technology. Finally, in Chapter 13, issues of privacy and freedom in connection with the consequences of artificial and ambient intelligence in law are raised by turning to Juli Zeh's *The Method*. Both chapters ask how new technologies affect the constitution of the human self, and consider what influences an instrumental use of technology can have on selfhood, on legal personhood, and on our ability to narrate ourselves, in law and elsewhere.

While in one sense this book reflects my parallel education and career, partisan as that may be, at the same time it hopes to offer some food for thought for a continued discussion on interdisciplinary research, and guidance for judicial self-reflection, or at least suggestions for wonderful reading. Mine is not a grand theory of law and literature, but an attempt – an essay as Montaigne used the term – to show that their combined study in *Law and Literature* is best viewed as the intertwined snakes portrayed on Hermes's caduceus, symbolic of the negotiation of meaning: in concord. At the end of this prefatory chapter, this would probably be the place to offer, in truly juridical fashion, a few disclaimers on terminology or on what lies beyond the scope of this book – and that is a great deal. One trigger warning suffices: this book offers perhaps an idealistic view that policy-oriented jurists find hard to swallow. But since Aristotle advised us to start 'by wondering that things are as they are'¹¹, they, as well as my other readers, who I hope will prove to be the Maecenases of this book, have to find out for themselves.

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¹¹ Aristotle (trans. W. D. Ross), *Metaphysics* (Oxford: Oxford University Press, 1958) 16, 983a14–15.

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Original language: English

Received: 15 Mar. 2019

Accepted: 20 Mar. 2019