



Law & Humanities

William R. Terpening, Anderson Terpening PLLC

9 January 2012

Why learn this?

- Self-mentoring. Strength from filling in the legal gaps ourselves.
- Trial work: novel approach & perspective. More creative, more informed.
- Clients: compassion and insight. What do they have to tell us & what do we need to do for them beyond litigating their cases?

CAST OF CHARACTERS.

- Opposing counsel & judges: see what they see.
- “Work-life balance” and stress mgmt: a better and more realistic solution than the mythical “working less and spending more time with family.”

Why learn this?

👉 LITERATURE AND PHILOSOPHY BREED SKEPTICISM.

- 👉 Good lawyers take nothing @ face value: not even their lives, or the legal system and what motivates it.
- 👉 Unexamined life not with living.
- 👉 There's a reason, historically, why fascist and other authoritarian or top-down regimes "purge" the lawyers, artists, and writers first.
 - 👉 First and last guard against tyranny and injustice.
 - 👉 Lawyers are losing sight of this important historical role as they become too focused on law as money making proposition.

Answers...

- ☞ ... to the large and small questions that the “law” cannot answer.
 - ☞ “Large” picture questions e.g.: What is justice? What is my career for?
 - ☞ “Smaller” picture or “practical” questions: How can I make juries better understand and care about my case?
 - ☞ Or be a more dynamic legal writer?
 - ☞ Or read statutes and cases “closely”.
 - ☞ Or relate to my client better?

A resource for the larger questions

- EXAMPLE: How many of us got into this profession because of some notion - more or less, vague or specific - about wanting to serve “justice”?
- (Hint: Think back to your application essay.)
- If our profession is devoted to promoting “justice,” shouldn’t we have a very specific idea of what it is?

What is Justice?

☞ “The United States wins its point whenever justice is done its citizens in the courts.”

☞ *Brady v. Maryland* (1963).

☞ Justice is something the law discusses a great deal, but never has occasion to define.

☞ Law is merely tool for effecting justice.

☞ Need for reference to other sources to assess a more comprehensive concept like “justice”.

“Justice”

- ☞ Ambiguous, organic, dynamic.
- ☞ Is “justice” different for different people? Cultures?
 - ☞ (Even for different people and cultures within our own system.)
- ☞ Does “justice” change over time?
 - ☞ (Even over the course of our own careers.)

“Justice”

- ☞ The concept, like many lesser concepts that define our profession, is subject to being co-opted and hijacked for political or other reasons, as it has been historically.
 - ☞ You’ll even hear your opponent “spin” it in closing argument.
- ☞ It is dangerous for lawyers not to know what justice is, because so much of what we do should be geared towards protecting it.
- ☞ How can we make the definition less vague?
- ☞ What resources can we look to? How can we get to the bottom of it?

Resources: 20th C. Approach

☞ Cases.

☞ Statutes.

☞ Treatises.

☞ Other documents that are “within” or “of” our “legal system.”

☞ As central as there is, *there is more*, and it would leave your thinking incomplete to ignore the rest. Be exhaustive.

☞ *Curiosity and tenacity are the defining traits of a great lawyer.*

L & H View

- ✧ Intrinsic law (cases, etc.) is obviously a critical basis.
- ✧ But can struggle with the larger picture. Be disjointed.
- ✧ Closed universe: perceived as not informed by, or informing outside “real” world it underpins.
- ✧ Can miss perspective of history, culture, “human” reality, etc.
- ✧ Subject to mis- appropriation.

Course Touchstone: West View

“We come to law, many of us, to explore justice; furthermore, and more basically, we define our lives by this virtue. What we find when we get there is no consensus on what legal justice might mean or require. That alone, of course, is hardly cause for alarm. What is alarming, however, is that we find not only a lack of consensus but also that there is virtually no debate. There is no tradition, no shared fabric, no mosaic, no family of competing understandings, of what the virtue that for many of us seemingly defines our professional lives might entail. This prompts ennui, resignation, and, in our students, a cynicism we deplore but have no clue how to address in a way that does not expose our own...

West Ctd.

... Justice... has always been a defining object of study of the humanities, and justice, we should remind ourselves, has always in some sense been the object or point of law and adjudication both. It is entirely natural to turn to the former to enlighten the latter. We need to rid ourselves of the twenty-five year optimistic belief that we can find in our deepest legal structures themselves a full understanding of the demands of justice, and we need to rid ourselves of the dreary belief that we can in our quest for profit find all we need to know to understand the nature of the good. But we also need to shed the stultifying skeptical and Holmesian claim that the question of justice is unbroachable, and the urge to answer it childish. The Law and Literature Movement, as I understand it, is definitively committed to the exploration of humanistic meanings of justice."

Citation.

- ❖ Robin West, *Toward Humanistic Theories of Legal Justice*, 10 *Cardozo Stud. L. & Literature* 147 (Winter 1998).

Course Overview: Definitions

☞ **hu·man·i·ties:** (3) *plural* : the branches of learning (as philosophy, arts, or languages) that investigate **human constructs and concerns** as opposed to natural processes (as in physics or chemistry) and social relations (as in anthropology or economics). (Webster).

☞ More broadly: humanities are academic disciplines that study the **human condition**.

☞ **law:** (1) a binding custom or practice of a community : a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority (2) : the whole body of such customs, practices, or rules. (Webster).

☞ More broadly: law can be defined as the customs, practices, rules, and systems that govern the human condition. One type of human construct.

Definitions > Meaning Making

- ❖ Therefore, humanities can be viewed as a vast backdrop in front of which law can be contextualized.
- ❖ Connects the disparate pieces of law.
- ❖ Law as a **tool** for solving specific instances of problems that humanities state and address on a more universal, abstract, and broadly applicable basis.

Humanities ----->

Law -> Psychology

Sociology /
Economics /

(id problem)

(meaning making systems)

Why View Law As Merely One Meaning-Making System?

- ☞ I offer this not to create insecurity about law, but to suggest a benefit of **thinking about law as just a competing system of meaning/ authority- making:**
- ☞ Exposes weak areas where law can be improved.
- ☞ In particular, if we assume incorrectly that law/ legal process arrives at conclusions that are **objectively correct** and that everyone should “just automatically accept” those conclusions...
- ☞ ...law can fail in its purpose of creating meaning/ authority that is accepted by as many people as possible. →

Illustration: Lack of Buy In

- ☞ Most people generally accept our legal system as an acceptable tool for reaching “justice” – but some do not.
- ☞ That is when crimes against our system occur.
- ☞ Exposes subjectivity of a system we have designed to seem “objective”.
- ☞ Camus’ notion that universe is nonsensical, and that we simply do the best we can to develop systems (law and art) to make sense.
- ☞ It is a failing when our legal system declines to consider that it is just a prevailing meaning-making system.

Summary

- ☞ Camus by focusing us on world's lack of inherent meaning and need to create art to construct that meaning, has focused us on parallel role of law.
- ☞ In this fashion, literature has brought us back to law from a new vantage point.
- ☞ Offers new insights from literature, even when the literature may not expressly discuss law.

☞ ***

Course Overview: Agenda.

- Humanities constitute a collective discipline that offers the broader view of law and its purpose:
 - What basic needs does law exist to deal with?
 - What do we expect the law and lawyers to be and accomplish?
 - In general: Since law and humanities are directed towards understanding and organizing (giving meaning to) the human condition, what can the latter offer to help us better execute the former?

Literature.

- ☞ Texts like *Billy Budd* and *The Stranger*, and everything else we will study, **fill in gaps that judicial opinions cannot.**
- ☞ Overarching, timeless view of legal concepts like justice.
- ☞ Explanation of why we have law, how it affects clients, us.
- ☞ Illustration of “morality” concepts that drive legal concepts and law.
- ☞ Expose areas where we can improve our legal system to make it more effective at accomplishing justice (e.g., address alienation/accessibility; speed of process; etc.).

Literature.

- ☞ Key to intellectual perspective and self-reliance in legal career.
- ☞ The quicker you can get to a place where you distinguish yourself by being a decision-maker/ make your own judgment calls - and not dependent older lawyers/ boss/ partner to make wise decisions and tell you what to do with your cases, clients and career - the more successful you will be early on.
- ☞ Lit./ humanities offer a broad universe of advice that gives you perspective and insight to get there - perspective and insight that many lawyers with three times as much experience as you lack.

Bottom Line

- 👁️ The best lawyers are “omnivores.”
 - 👁️ Search broadly for answers, information, insight, ideas.
 - 👁️ Cases, statutes, and treatises are insufficient because they lack the “glue,” the common sense insights, the larger picture, and the human perspective.* But I’m not telling you to look for the law in literature, or that the treatises and cases are not the core & starting point.
 - 👁️ Wise counselor and litigator always looks for novel insight everywhere: “extrinsic” sources and learn to focus on facts.
 - 👁️ We are paid and trusted to be persistent, wise, creative, and diligent -> humanities = applied knowledge storehouse.

Approach. @ least 3 angles.

- ☞ (1) What lawyers have to say about the law and our legacy (paper mentors).
- ☞ (2) How laypeople envision us, and why that should matter (+/- aspirations).
- ☞ (3) The extrinsic edge: learning to search for creative angles and legal knowledge everywhere (writing, client, trial skills).

Course Overview: Structure.

👁️ First: Overview of the discipline.

👁️ Law and Humanities/ Law and Literature are closely interrelated emerging fields within the law (or within other humanistic disciplines, depending on perspective - but we approach from inside the law).

👁️ Our goal is a practical one (not merely “academic”): We want to actively harvest humanistic sources for legal skills and perspective.

👁️ However, helpful to start with the more “academic” step of defining the discipline.

Course Overview: Structure.

Overview of the discipline:

Who are the major players (critics, academics)?

How is it defined?

Difference and similarities between law/ lit. and law/ humanities.

Limitations on what humanities can offer us as we think about law.

Limitations on law as a system for solving conflict and related problem - benefits of using other systems and information.

Overview – *How* do we draw legal insight from literature?

Second: Acquiring the skill set to do the work.

Once we have a theoretical underpinning framed out, we need to talk, as a practical matter, about how we will look to literature and other branches of humanities to obtain information and skills for our lawyering and understanding of law and its function.

Substitute “law” for “Exchange” in Traffic.

What does Bartleby help us think through?

Recommended: Powers, *Hamlet's Blackberry*.

How does Lit. help us develop legal perspective & skills?

- ☞ Third: Analyzing fictional literature for purposes of developing legal perspective and skills.
 - ☞ “Close reading”
 - ☞ English major toolbox.
 - ☞ Student backgrounds will determine how much review is necessary.
- ☞ Attempted to highlight some of the “law and literature” classics, which you will hear about in passing over course of your career.
 - ☞ Kafka, Camus, Melville. Start now.

Course Overview: Structure.

- ☞ We will explore litigation “reality” from “embellished” non-fiction.
- ☞ Learn how media shapes the reality of our cases - helps us deal with media and shape our message.
- ☞ Illustration: *Saxon/ “South Park Madam”* case I litigated a few years ago: “hooker lawyer.”
- ☞ Sense of how lawyers, clients, and problems are perceived.
- ☞ Help tell case “story” to jury, judges, opposing counsel, and back to client.
- ☞ Self- contained and more universal.

Overview: Lawyer as “public intellectual”

- Fourth area of inquiry: Lawyer as “public intellectual” serving the “bigger cause.”
- Definition of “public intellectual”: E. Said.
 - Duty: Lawyers have always been first and last line of defense against tyranny/ anarchy/ the mob.
 - Current and historical role of lawyers is not “mouthpiece” mercenary, a mechanical technician who blindly serves whoever pays.
 - What makes a lawyer different is commitment to larger causes, such as justice system in general, or more specific causes.

Course Overview: Structure.

- ☞ Cause- focused lawyer shares critical similarities with “public intellectual.”
 - ☞ Outspoken advocate.
 - ☞ Thoughtful engagement with society and resistance to oppression.
- ☞ Differences:
 - ☞ Representative role, legal ethics (privilege/ confidentiality, duty of loyalty), and career/ financial considerations harness ability to speak (or, at minimum, control contents).

Course Overview: Structure.

- 👁 Notwithstanding differences between definition of public intellectual and practicing attorney, **what can we learn from the similarities about realizing the highest aspirations of our calling and legacy as attorneys?**
- 👁 What practices can we benefit from adopting from the public intellectual?
- 👁 How can we apply “public intellectual” self- definition theory to better serve our clients, causes, justice system, and society?

Overview – Legal/ political philosophy.

- 👁 Fifth: Lessons from legal/ political philosophers.
 - 👁 In terms of applying humanities to law, history provides strong examples of lawyers and social/ political leaders who applied lessons of humanities (literature, philosophy) to their legal practice or political affairs.
 - 👁 More commonly and more expressly done in certain historical periods.
 - 👁 Cicero and Plato as models for how we can benefit from same sources today.
 - 👁 Note overlap between philosophers and public intellectuals.

“storytelling”

-
-
- ☞ Sixth: Use creative literary resources to improve written and oral advocacy (and other legal work).
 - ☞ Trial as drama/ storytelling/ **narrative**/ dramatic conflict.
 - ☞ Role of human emotions, plot and other doctrinal/ formulaic fictional elements.
 - ☞ Legal writing: storytelling/incorporation of other element - Legal audiences (judges, juries, clients) are conditioned to desire and respond to fictional formulaic elements.
 - ☞ Apply analytical perspective and practical knowledge we have gained from surveying extrinsic literary sources and apply them to *creation of legal* product.

Overview – close reading skills

- Seventh: Taking the interpretive skills we have developed over the preceding seven sections and focus them *back* on reading *legal texts* (judicial opinions, statutes, briefs, etc.).
- Traditionally, we tend to read legal texts differently from literary ones.
- Some good reasons for this: efficiency; scanning for key parts like issue, rule, holding.
- Some bad: fall into pattern; blind to nuance and bigger picture; less effective style.

☞ Coverage of syllabus.

☞ Baby contingency during late January or early February.

☞ Will Tweet/ try to TWEN if I need to miss a class because my wife is in labor.