

International Journal of Law in Context

<http://journals.cambridge.org/IJC>

Additional services for *International Journal of Law in Context*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



Socio-legal studies and the humanities – law, interdisciplinarity and integrity

Melanie L. Williams

International Journal of Law in Context / Volume 5 / Issue 03 / September 2009, pp 243 - 261

DOI: 10.1017/S1744552309990103, Published online: 19 November 2009

Link to this article: http://journals.cambridge.org/abstract_S1744552309990103

How to cite this article:

Melanie L. Williams (2009). Socio-legal studies and the humanities – law, interdisciplinarity and integrity. *International Journal of Law in Context*, 5, pp 243-261 doi:10.1017/S1744552309990103

Request Permissions : [Click here](#)

Socio-legal studies and the humanities – law, interdisciplinarity and integrity

Melanie L. Williams
University of Exeter

Abstract

This paper was delivered as a plenary lecture, designed to respond to the one-day special conference focus upon links between socio-legal studies and the humanities.¹ The paper focuses in particular upon the relationship between law and the humanities. It may be argued that the role of empirically sourced socio-legal research is well accepted, given its tangible utility in terms of producing hard data which can inform and transform policy perspectives. However, scholarly speculation about the relationship between law and the humanities ranges from the indulgent to the hostile. In particular, legal scholars aligning themselves as ‘black letter’ commentators express strong opinions about such links, suggesting that scholarship purporting to establish links between the two fields is essentially spurious, bearing in mind the purposive role of law as a problem-solving mechanism. The paper sets out to challenge such assertions, indicating the natural connections between the two fields and the philosophical necessity of continued interaction, given the fact that certain aspects of human experience and nature cannot be plumbed by doctrine or empiricism or even by combinations of the two. Law must be understood to stand at the nexus of human experience, in a relationship of integrity, where the word is understood to mean both morally principled and culturally integrated. In particular, the development of human qualities, of character and moral sensibility informing normative values – and, ultimately, engagement with the world of law – is a process of subtle cultural as well as psychological significance, and may benefit from interrogation deriving from the wider fields of human discourse.

1 Introduction

As someone interested in the intersections between different disciplines, especially in terms of their normative significance, I do not need to be persuaded of the natural and essential links between socio-legal studies and the humanities. Law’s need for textual interrogation, its foundations in rights and responsibilities, liberties and duties, all bear witness to such links. In the medical world as well as the legal world, there is increasing interest in the intersections between medicine, science, social science and the humanities and this throws up intriguing possibilities not just for the practice of medicine, but for scholars working in the field of medical law and ethics. My own work in the field of ‘law and literature’ deals most naturally with moral questions thrown up and shared by the two fields, and whilst this does not usually highlight the ‘socio-legal’ in a purely *quantitative* sense, it must be sensitive to the interplay between the actual and aspirational aspects of social and legal phenomena. ‘Critical legal’, ‘post-modern’, sociolinguistic and straightforward enlightened sceptical modes of scholarship all increasingly identify philosophical and historical rationales for cutting across conventional disciplinary boundaries. Where legal scholars question such relationships, this may

1 SLSA Socio-Legal Studies and the Humanities Conference, at the Institute of Advanced Legal Studies, London, 5 November 2008.

anyway tell us more about their own particular relationship to scholarship and to the world, than anything intrinsic to the law itself.²

Scholarship concerned with critiquing the idea or practices of law should be a dynamic process;³ clearly, this signals a profound journey and not simply an etymological enquiry, leading to questions concerning the ‘identity’ of law and the ‘integrity’⁴ of law as well as the ‘role’ of legal study. The question of law’s identity, at times betraying anxiety as to law’s ‘place’ within the scholarly disciplines, continues to exercise the minds of many and is sometimes pursued in reductive fashion. In retrieving the approaches voiced by Judge Learned Hand and by Oliver Wendell Holmes, Balkin and Levinson⁵ note the assumption on the part of the former ‘that the study of law is either part of or is strongly connected to the humanities’ whilst for Wendell Holmes in 1897, ‘the man of the future is the man of statistics and the master of economics’. Balkin and Levinson conclude that ‘inevitably, lawyers, judges and legal scholars are drawn to use what they borrow from the humanities or the social sciences as means of producing authority’ but doubt the integrity of such borrowings, noting that:

‘even though law repeatedly invokes history, the historical world perceived by most lawyers is quite different from that perceived by most professional historians. Historians are far less likely to draw confident conclusions from complicated and multi-layered historical materials, which often feature conflicting accounts and have the potential to support multiple interpretations.’⁶

This rather jaded view of the capacity of lawyers to draw upon the humanities with discrimination may say more about instances of rhetorical incontinence on the part of legal advocates than a thoughtful recognition of the contact between evidence and ontology. Moving on to consider the current perspective upon ‘law and literature’ scholarship, Balkin and Levinson note that:

‘Contemporary law and literature scholars now offer the humanities as an antidote to, or an escape from, a legal world which, they believe, has become all too technocratic and divorced from any human values save economic efficiency. Does this mean that the humanities have been thoroughly routed by the forces of social science and rational actor methodologies, so that they no longer play a significant role in the legal academy or the legal profession? Certainly not. The influence of the humanities will be filtered through law’s professionalism and prescriptivism, and hemmed in by law’s institutional constraints; yet the law will always maintain a genuine if uneasy relationship with the humanities as long as it remains a thoroughly rhetorical enterprise.’⁷

2 As Nigel Simmonds explains in his essay ‘Law as a Moral Idea’ (Simmonds, 2005), debates about the nature of ‘law’, of what ‘law’ is, often reflect apparently opposed visions, from the ‘mundane’ view of law on the one hand, to the ‘aspirational’ view on the other, yet such visions are best viewed according to a concept of law ‘as structured by an abstract archetype to which all actual instances of law approximate in varying degrees’ – recognising that even in our everyday, mundane legal practices, the ‘aspirational’ vision of law remains latent (even if that vision is, for whatever reason, best described as ‘morally neutral’).

3 Simmonds explains (Ibid. pp. 70–71): ‘Analytical jurists tend to construe older writings on the philosophy of law as the embodiment of confusions that have now been dispelled, and they exhibit, in consequence, a striking lack of interest in the history of that subject. In this way they severely impoverish the intellectual resources that they have at their disposal . . . the notion of ‘law’ is not one that simply *describes* certain independent practices; rather, it is a concept that plays a role *within* the relevant practices . . . our enterprise lies solidly within the tradition of philosophical reflection upon the *logos*: reflection, that is, upon the world as it becomes clear to us in our speaking of it.’

4 Noting that the word ‘integrity’ can denote adherence to a moral code, *or* the state of being whole, complete and undivided, *or* the state of being whole in the sense of unimpaired.

5 Balkin and Levinson (2006).

6 Ibid. p. 180.

7 Ibid. p. 186.

Whilst such caution towards the ‘influence’ of such studies is understandable, it betrays a particular view of law – as the source of a rigorous ‘filtration’ system – and of law and literature studies as therapeutic but antic. By contrast, Shulamit Almog foresees the impact of the digital age upon legal judgment as potentially so distorting that law and literature studies – in particular the critique of narrative – will be necessary to inform the fragmenting and dehumanising onslaught of technology:

‘*Dysnarrativa* is a neurological disorder that damages the ability to tell stories and understand them. Accumulated experience shows that this disorder fatally disrupts the sense of self and other ... the [digital age] may have an impact on law ... the constant exposure to an ever-growing flood of digital images, sounds, sights and experiences interrupts the ability to focus attention on a structured story and to situate it within a wider context of human knowledge and experience ... narratives in courts may become much shorter, faster, clip-oriented, heavily augmented with visual images, and may be subjected to sophisticated audio and visual editing.’⁸

Even if a more circumspect view of such interdisciplinary studies is held, one may posit that they can be undertaken in a range of ways and may generate wholly new critical insights upon ideas core to jurisprudence.

2 Law, social science and the humanities – thundering theology or tinkering with engines . . .

Speculation about the vulnerabilities of law continues to generate hypotheses as to its place. In summer 2008, two articles appeared in the *Cambridge Law Journal* which set out to explore the relation of law to other disciplines and both connect to notions of ‘integrity’ in different ways. The first, ‘Is Law Really a Social Science? A view from comparative law’,⁹ explores the basis of the decision by Jean-Michel Berthelot not to include a study of law in his *Epistemologie des sciences sociales*.¹⁰ Samuel points out that what constitutes a social science in France is somewhat different from the position in the United Kingdom:

‘for the English do not tend to treat disciplines such as history and philosophy as social science subjects; they are usually regarded as falling within the humanities. This distinction is of course of great importance and raises of itself fundamental discipline issues.’¹¹

Indeed, I hope to suggest that locating history and/or philosophy as purely social science subjects is *as* insupportable as characterising law itself and legal scholarship according to similarly narrow identifiers. Berthelot’s justification for *excluding* law (and political science) from the social sciences is based, we are told, upon his belief that law is:

‘preoccupied with normative judgments and not with human interaction and behaviour as such. The object is a body of norms and not humans as an interacting social reality.’¹²

I would suggest that this is to some extent a false dichotomy,¹³ in that there needs to be a constant interaction between the two forms of thinking, between the physical, (‘verifiable’ as far as

8 Almog (2007, pp. 777 ff).

9 Samuel (2008).

10 Berthelot (2001), quoted in Samuel.

11 Samuel (2008, p. 289).

12 Ibid.

13 As signalled by the similarly ‘oppositional’ bind identified by Simmonds – see fn 2.

empiricism allows) ‘social reality’ to which the law must relate, and the metaphysically textured ‘norms’ of law interrogating and responding to that reality. Samuel remarks¹⁴ that law’s quest to be accorded the status of a ‘science’ may have contributed to the notion that it is a ‘knowledge discipline . . . isolated from social reality . . . which has nothing to contribute, epistemologically speaking, to our knowledge of the world as an empirical phenomenon’. Although Samuel qualifies the statement by conceding that law ‘certainly does take account of fact and how it does this is an aspect that needs particular attention’, he confirms the view of law as a system ‘which has as its object only itself’. This seems an extraordinary vision of law. Even at the most basic level, surely it can be argued that the historical and anthropological ‘trail’ created by the legal process – the cases it validates or valorises, the legislative pathway, the ‘norms’ it upholds through different periods and cultural applications – is capable of providing a *wealth* of information about ourselves, when viewed not merely as a monolithic source of unquestioned authority, but as a pragmatically driven but nevertheless idiosyncratic expression of human creativity and mores. Samuel himself reminds us that the roots of law were somewhat tenuous – quoting Ullman he notes that:

‘medieval jurisprudence was forced to elucidate some basic principles about society and was thus led to consider topics which, under modern conditions, would be dealt with, not by lawyers, but by the sociologist. Jurists, it would seem, once did the work of sociologists; not only did they fashion the modern research methods but they equally provided a *grille de lecture* for understanding early modern European society.’¹⁵

This clearly points up the extent to which early jurists were obliged to build a foundation of assumptions as to social ‘realities’ (which must also have incorporated evaluations of individual human ‘realities’), and in so doing, even bearing in mind the orientations given by ecclesiastical conclusions on the provenance of the ‘natural’, adopted a degree of licence as to the currency of ‘known’ characteristics. Law as a phenomenon, whether one classes this as a ‘social science’ or ‘humanities’ enquiry, thus provides a touchstone as to the development of philosophies, attitudes and beliefs, with the intriguing additional peculiarity that these can be ‘visited’ upon individuals and social groups in a most powerful form. As Samuel (and Berthelot) points out, this results in the creation of a ‘governing paradigm’ – a vision of the world, imprinting upon its subjects and carrying certain dichotomies, such as that between nature and culture, and so on.

Samuel builds his argument to press home a particular conclusion – that whatever the justifications for an ‘inward-looking’ black-letter life for the law (‘a narrow theology’) and for the consequently unreflective nature of its ‘authority paradigm’, *comparative* legal analysis must be understood to require an interdisciplinary and social scientific complexion. Whilst, in Samuel’s terms,¹⁶ the law graduate may continue to resemble a narrowly educated *theology* graduate, the narrow product of an unreflective authority paradigm, the *comparative* legal scholar in his view must move outside this orbit. As Samuel concludes:

‘The comparative lawyer operates, or should operate, from the perspective of an enquiry paradigm. She is engaging with persons and things (and often actions) at one and the same time as legal constructs and as economic, political, social (including cultural) and psychological constructs. This is why comparative legal studies deserves to qualify as a social science.’¹⁷

14 Samuel (2008, p. 295).

15 Ibid. p. 297.

16 Ibid. p. 311.

17 Ibid. pp. 320–21.

The example indicates the very difficulty with which we are engaged – believing that an ‘enquiry paradigm’ concerned with ‘persons and things’ and with ‘economic, political, social (including cultural) and psychological constructs’ makes the quest *by definition* one of social science, or only relevant to comparative legal studies is a narrow view indeed. *Any* human activity or enquiry premised upon beliefs about the qualities of ‘human nature’ – as all these must be – will contain metaphysical, normative and plain ‘prejudicial’ and ‘subjective’ assumptions as well as scientifically supported, empirically verifiable ones.

Nevertheless, individual scholars have differing views as to their location relative to the humanities and social sciences and the question of where law in particular is located in relation to the humanities and social sciences will receive different answers. The very history of legal theory, with its divisions between, inter alia, positivists and natural lawyers, signals a tendency towards entrenched views of the location and identity of the law as well as of its antecedents. More generally too, academic lawyers hold sharply opposed views as to what ‘counts’ as relevant legal research, positioning differing scholarship on, or outside, a perceived periphery, and this is in part reflected in recent debates as to the role of research funding bodies and state interests in the utility of research.¹⁸ In an article entitled ‘Is Law a Humanity (or is it more like Engineering)?’ Howarth asks:

‘Is Law one of the humanities? Or is it, rather, a social science? Or is it neither of these? Or both? This is not only a question of definition. It has much in common with a political question: it combines a conflict about resources, a party struggle, an ideological contest, and a crisis of identity. The conflict about resources arises from the fact that jobs and grants can turn on such questions . . . it is often unclear whether law counts officially as a social science or as one of the humanities or as neither.’¹⁹

In 2004, Howarth notes that the (then) Arts and Humanities Research Board terms of reference made no reference to law, but to ‘systems of thought and belief of human beings, both past and present’, thereby not entirely clarifying their view of this potential lacuna, although these terms are today more inclusive. Howarth goes on to illustrate the locus of the struggle as it manifests in the United States – as one between the ‘law and economics’ and ‘law and literature’ factions, as Howarth characterises them, the ‘roundheads’ and ‘cavaliers’ of the law schools.²⁰

Howarth also aligns²¹ these arguments as essentially ‘rightist’ and ‘leftist’, as well as an opposition between ‘*technical experts*’ and ‘*cultural critics*’, concluding, however, that both hold in common a view of their role as *challengers* to the academic ‘*mainstream*’ of black-letter legal doctrine and pedestrian readings of case reports and legislation.

Howarth’s discussion revolves around a main assertion that, ‘in reality, most lawyers are far more like engineers’. Both law and economics and law and literature movements, he says, ‘tend to miss the point that the main task of lawyers, like that of engineers, is to design devices and structures for specific clients, whether contracts for business clients or statutes for legislators’. Noting that ‘economics cannot inform lawyers how to write a comprehensible and coherent set of rules to

18 See, for example, Gilbert (2008); Berube (2003); Shepherd (2007).

19 Howarth (2004, p. 9).

20 Ibid. p. 10: ‘calculating, hardhearted but rigorous economists versus passionate, sensitive but abstruse literary theorists. The former tend to deny that law is a humanity (Posner, 1986: 1392: “I myself do not think law is a humanity. It is a technique of government”); the latter tend to say that it is (White, 1990: 91: “The law is . . . at its heart an interpretive and compositional – and in this sense a radically literary – activity”). Posner’s comments, however contemptuously, do illustrate some aspects of the respective camps.

21 Ibid. pp. 10 ff.

promote the common understanding of a project', he moves, in his critique, to the concerns as he sees them, with law and literature.²²

It should be noted that 'law and literature' is such a broad church – infiltrating issues across the whole spectrum of legal subjects and utilising hugely variable methodologies – that generalist assumptions as to the potential value of such studies are questionable. It must be recognised, too, that the work of pressure groups and NGOs often has more impact and influence upon an unjust practice or legal norm than practitioners or academic lawyers working in the same field, and therefore the argument about 'legal structures' and 'current expectations' is already weakened.

Nevertheless, Howarth here is misunderstanding what it is that law-and-literature scholars believe they do. I doubt that many toil under the illusion that tomorrow the Court of Appeal is going to refer – or defer – to Ward or Aristodemou, Weisberg or Manderson²³ (or Williams). Writings about the lessons for equity in *The Merchant of Venice*,²⁴ the literary hints of 'legal' atrocities at the time of Vichy France,²⁵ of the legal issues in Angela Carter's *Bloody Chambers*,²⁶ or those in *Tess of the d'Urbervilles*²⁷ – all these are clearly likely to be regarded as somewhat peripheral to the everyday work of the courts. (It is, of course, true that judges sometimes resort to literary references to illustrate or emphasise a point, but one can understand that there are good reasons for recognising the need for restraint in this regard.) Many law and literature scholars do not work with any expectation of being cited as a source of authority for the courts, but, like many *philosophers*, identify an issue which is poorly addressed in life and in current legal scholarship and practice and believe that an interdisciplinary or interstitial enquiry opens or challenges the debate on that topic more effectively than convention allows. In purely intellectual terms it is absolutely legitimate and justifiable to try to approach a problem – be it essentially a 'practical' (engineering) or theoretical issue – by exploring lateral as well as linear sources of discourse. (I would add that 'law and literature' is probably an 'easy' target insofar as it is still very much a new pretender to a little throne in the academy and, as with any field associated with 'critical legal studies', is likely to be regarded in some quarters as an upstart pretender.) The vast majority of writings on jurisprudence or legal history or any number of more 'mainstream' subjects are also unlikely to ever attract the attentions of the courtroom. Indeed, when one comes to think of it, practice is likely to give greater attention to the brief entries in the *New Law Journal* and *The Conveyancer and Property Lawyer* than, say, to the *Journal of Law and Society*, *The Cambridge Law Journal*, the *Modern Law Review*, the *Oxford Journal of Legal Studies* or the *Criminal Law Review*, providing extensive case-study or wonderfully apposite doctrinal articles, *may*, as we all appreciate, attract judicial notice. Yet one can appreciate that an argument about the direct applicability of different sources to the 'engineering

22 Howarth: 'Law and literature has similar problems. It underestimates the importance for lawyers of making *structures* that work in the society we live in. Proponents claim that literary or other artistic creations can reveal social possibilities that might otherwise remain unimagined and unused (Ward, 1995: 3–28). It is certainly true that thinking about literature or art can serve as a source of inspiration for new ideas in any field. But there is an engineering limit to innovation for legal structures and devices. Even if lawyers or judges use literature or literary theory to see through the social and political relations inherent in the language of the law, and see that there are other possibilities, a legal device or structure that depends on language at odds with current social practice will achieve little. That is not to say that some pressing or even crossing of boundaries can never work, but it is to say that there are limits in how far legal structures can stray from current expectations.'

23 Referring here to the law-and-literature scholars Ian Ward, Maria Aristodemou, Richard Weisberg and Desmond Manderson.

24 See, for example, the excellent article by Stephen Cohen examining the historical tensions latent to the development of equity and the common law: Cohen (1994).

25 Weisberg (1996).

26 See Aristodemou (1999).

27 See Williams (1999a).

problems' of the law holds the possibility of dismissing a great deal more scholarship than just that indicated by the 'law and literature' fold. Howarth continues:

'Law and literature also tends to claim that the creative and imaginative aspects of law bring it close to literature (White, 1989, p. 2023). But the engineering analogy shows that creativity and imagination are not confined to art ... it is important to distinguish between language employed in solving problems and language used to reveal what the world is like (Habermas, 1987, pp. 207–9) ... of course, one can, if one wants to, read a commercial contract as a world-revealing text or interpret a painting or a piece of music as an answer to a legal problem. To do so, however, involves not liberation from narrow readings of a text, but a refusal to engage with a form of life.'²⁸

Howarth's strong note of irony in referring to non-mechanical analyses of commercial contract as instances of critique of contract as 'world-revealing text', followed by the suggestion that those who attempt such engagements in preference to mechanical, 'engineering' analyses are 'refusing to engage with a form of life' is revealing – it betrays a degree of contempt, suggesting that no one in their right mind would ever look at the commercial contract as a world-revealing text – and also assuming that persons undertaking such critiques are inured or hostile to the wonders of the machine. But this does not follow – interdisciplinary scholars would, I think, appreciate not only the necessity of the practical in life but also its ingenuity. In addition, though I personally would not tend to jump to the commercial contract as the most beguiling source of the 'world-revealing', I have no doubt that analyses of such texts could reveal some very interesting aspects of the world (as the critical commentary on Contract Law²⁹ developed by Sally Wheeler and Jo Shaw, for example, surely demonstrates). Above and beyond the purely purposive goals of the format, 'even' commercial contracts are artefacts which make certain assumptions about power and legality, assumptions which may reveal much about our view of the world and the role of the law within it. Notable, however, is Howarth's choice of the commercial contract as the example best serving the thrust of his argument, since the 'human element' is likely to be somewhat hidden in such texts. Perhaps it is also a question of how one interprets 'world-revealing'. Though it would seem that Howarth uses the term in a revelation of barely concealed irony, once one moves towards examples of law-making where the 'human element' is more evident, the prognostications of the law can indeed be 'world-revealing'. In the halting and sometimes erroneous presumptions erected as to the ingredients of 'nature', with sometimes tragic consequences for the individual 'human', law may create injustice.³⁰ Howarth's engineering analogy is indeed a workable illustration for his own purposes, but cannot capture the rich scholarly possibilities created by the artefact that is law. And his allusion to engineering suffers from one further limitation – for it carries the implication that engines are always fit for purpose.³¹

28 Howarth (2004, p. 14).

29 Wheeler and Shaw (1994).

30 In particular, the aspects of doctrine dealing with objective and subjective tests, with reasonableness, or notions of responsibility or of mental status generally.

31 As Howarth himself points out (2004, p. 16): 'Physical devices can fail for different reasons. One possible reason is error relating to the underlying science, for example that the maker did not understand mechanics and made a miscalculation. The legal equivalent would be that the lawyer did not understand how the users of the device were likely to behave – a mistake deriving from an incomplete grasp of human behaviour ... An engineering device can also fail because of mistakes relating to the design of the device – where the created relationships are incomplete or contradictory. A social device can fail in this way because the rules the lawyer chose do not fit together. A contract with contradictory provisions, a constitution without rules allocating decision-making power about obvious issues, or which is impossible to amend, a company that automatically collapses as soon as someone new invests in it, all these are defective social devices where the problem is not how people react to it but the design itself ... there are thus three types of error lawyers need to avoid; errors due to lack of understanding of what people will do with the legal device or structure; errors due to bad design; and errors caused by unintended use of legally invalid materials.'

Howarth indicates thereby that corrections to the mechanism may be achieved by pure ‘tinkering’, though it should be pointed out that ‘errors due to bad design’ could, on a ‘design theory’, go to small details or to absolute fundamentals. Again, though, Howarth assumes that ‘engineering-type’ lawyers have a monopoly upon achieving insights into such errors and that ‘non-engineering’ types have little or nothing to contribute (and again, one wonders where a calculus of scholarly utility on this front would leave a great number of academic writings exiled from the different fields in law, especially the speculative and more philosophically textured contributions). Nevertheless, this leads Howarth inexorably towards his *denouement*:

‘If law stands in relation to other studies of human behaviour as engineering stands to the Sciences, the question we began with becomes one of the precise place of the Humanities in that relationship . . . the idiosyncrasy dealt with in literature and history, although it cannot safely teach parallels, or “lessons”, can at least open the lawyer to a fuller range of the possibilities of human behaviour.

. . . law as an academic discipline does, then, have an intimate relationship with at least a subset of the Humanities, namely those that deal with the practical and the normative – especially moral and political philosophy. That connection does potentially provide a route for other humanities to find their way into law, since moral and political philosophy often find inspiration and illustration in history and literature.’³²

I do not intend to provide a word-for-word critique of these statements; suffice to say that ‘the idiosyncrasy dealt with in literature and history’ can *indeed* in my view safely teach parallels or ‘lessons’ as well as opening the lawyer to a ‘fuller range of the possibilities of human behaviour’ – apart from the qualification, I would entirely agree that such approaches could open the lawyer to such possibilities. Indeed, such possibilities could well prove to be the conduit for greatly enriched juristic capabilities, perhaps even sometimes ‘world-revealing’ in their impact. According to Howarth then, the humanities may be allowed a somewhat grudging route into the law, though he concludes:

‘Examples drawn from literature or history are themselves of no account in any normative question. What matters is the process of linking the examples with what it was right or wrong to do . . . [one] can use the study of law as an intellectual playground, as a place to continue the study of other things – economics, literature, history, critical theory. *Such activity is largely harmless, but has little to do with what lawyers do and why people want legal education. But it is not entirely harmless if the noise from the playground starts to interfere with those who are trying to work.*’³³

And there we have it – the apparently measured and even-handed critique of the relationship of law to the humanities ends in a dismissal of so much ‘noise from the playground’ (actually playing perfectly into the deepest recesses of my personal neuroses, thank you, Mr Howarth).

It seems to me that Howarth wants to have it both ways in this essay – to demonstrate a critical sensitivity to all the possible permutations of social science and humanities jurisprudence, at the same time putting scholarship which is, in his view, overly inclined towards interdisciplinary incontinence, firmly in its place. Since he has hedged the essay about with sufficient caveats to answer any objection that he might not have taken account of this or that argument, it seems difficult to challenge him. Nevertheless, one can discern certain rhetorical drives and semiotic stances in the apparently neutral assay of the social science/humanities nexus. Most notably, perhaps, the work of such ‘cavalier’ scholars is characterised as ‘noise from the playground’ which ‘should not be allowed to distract’ those engaged in ‘serious work’ whilst the central premise – that

32 Ibid. pp. 17–22.

33 Ibid. p. 22 (italics added).

law is ‘more like’ engineering than either the humanities or social sciences (but of the two, closer to social sciences) – conveys the firm image of a mechanical system, a practical engine, distancing itself from the indulgent fripperies of mere abstract reflection. One suspects that perhaps similar arguments could be raised where philosophy meets pure mathematics, and no doubt such views may be characterised as spurious too.³⁴

The clear semiotic message in raising the image of the machine in this way is to drive home the point that such work at the disciplinary and interdisciplinary boundaries of discrete cognate practice has little or no *utility*. It is true that, when one writes an article about, for example, the questions of rape and seduction in *Tess of the d’Urbervilles*,³⁵ the piece is unlikely to be consulted as a source of practical wisdom in a Court of Appeal – neither the format nor the conduit (perhaps a special collection, or interdisciplinary journal) suggest themselves as sources of authority for the immediate and pragmatic purposes of a contemporary case. Such work tends to be oblique, bringing together the skeins of thought, the connectedness of cognate strands traditionally treated as separate. Rich and infinitely varied, but also vulnerable to the strange byways of intellectual prejudice and predilection, the realms of human thought and discipline are cultural as well as intellectual artefacts, which will not yield their full range of potential insights when examined in a relentlessly linear fashion. In pursuing the issues around rape and seduction raised by Hardy’s *Tess*, for example, subtle insights are discoverable. The heavily charged polemic around the sexual implications of the book, including the terms ‘rape’ and ‘seduction’, prevalent in the press at the time and still discoverable in debate and decisions concerned with the respective responsibility of principal legal subjects (that is, victim and perpetrator, or participants, depending upon the characterisation of the facts), is no coincidence, but reflects complex semiotic pathways obtaining between the two words. ‘Seduction’ is these days an old-fashioned word, hardly used but generally understood as somewhere between a voluntary enjoyment of illicit intimacy and a less voluntary enticement into less than voluntary activity. Yet researching issues prevalent at the time of the production of *Tess*, one discovers that seduction, as well as rape, was a crime in some states as well as a civil wrong in others (including England and Wales) well into the twentieth century. Yet (and this will be no surprise to the feminists amongst us), the basis of the offence of seduction arose from the damage done, not to the woman at the heart of the offence, but to her father, as the proprietor and keeper of a valuable property interest now diminished or rendered worthless – indeed one case gave rise to references to flowers and weeds. An American case comment by Edgerton (1929–1930) concluded that:

‘the defendant’s unauthorised interference with the plaintiff’s interests was not negligent, but intentional; and it is commonly recognised, both by the law and by public opinion, that the risk even of exceedingly unlikely consequences of an unauthorised and intentional interference should fall on the perpetrator rather than the sufferer. *If A tramples the valuable plants in B’s garden, it is no defense that he reasonably mistook them for weeds.*’ (pp. 233–34)

Of course, ‘blame’ might attach to the woman herself for allowing such despoliation to occur, and in the alternative, the despoliation may be more violently intrusive than the property model suggests. Thus, upon examination, the apparent distinctions between the words ‘rape’ and ‘seduction’ become less defined, and indeed the ‘Derridean’ insight about the third term lurking within a semiotic play

34 See, for example, discussion with the mathematician Franklin (1995), where he notes that: ‘Philosophy and mathematics are the two great armchair disciplines, and it is time there was a rapprochement between the two. Unfortunately, at the moment cold war conditions apply. Philosophers often want to ‘use’ mathematics somehow, but forget that if you want to pontificate about x, you need to know something about x. On the other side, mathematicians typically talk garbage when they’re asked philosophical questions. The New Zealand philosopher, Alan Musgrave, said in this connection, “fish are good at swimming, but poor at hydrodynamics”, and that exactly describes mathematicians who dabble a bit in philosophy in their spare time.’

35 Williams (1999b). The discussion which follows refers in part to this study.

between binary oppositions well made. Simply, examination of case-law and discourse surrounding the history of ‘rape’ and ‘seduction’ reveal the extent of the unacknowledged and latent violence attaching to the location of women as *diminished*, as persons *only just*, forever struggling to be visible in the sea of masculine paradigms³⁶ – which, when one considers the fate of *Tess*, is the essence of her story. So yes, the courtroom might not rush to examine debates over *Tess* when presented with a case of rape, but sensitivity to the vast semiotic and linguistic antecedents of the words beyond their apparently unproblematic definition in law might contribute to understanding the still prevalent issues around the management and *interpretation* of the crime of rape – the appalling reporting rates of victims, the easy manipulation of their vulnerability, the continuing debates over sexual history evidence, the ethical dubiety of strategies of defence counsel, the low conviction rates. Examination of the issues raised by *Tess* also adds clarity and power to current debates, still not entirely resolved, around the normative status of female victims-turned-perpetrators, of ‘battered women who kill’. Again, researchers might not turn primarily to a critique of *Tess* when constructing their arguments about culpability or the lack thereof; nevertheless, the text brings together social documentary and philosophical reflection upon the dilemma of manipulation and female impotence and the road to violence, of great power for jurisprudential reflection. Simply, the text puts a powerful case for the possibility of an essentially ‘good’ person who is driven absolutely beyond reasonable tolerance into extreme and fatal action yet in the eyes of the law may seem ‘guilty’. Demonstrating premeditation and sufficient apparent lucidity to be responsible for the action, such a perpetrator is nevertheless propelled by powerful facts, material to the agent but not to the world, and is subject to *annihilating* cultural currents – of class and gender – invisible in the eyes of the law. Current doctrinal debates concerned with the reform of the issue of provocation in particular have reached tentative and belated conclusions which nevertheless may gain explanatory power from the cogency and authenticity of this vision, born as it was from a carefully developed blending of social enquiry and empathy. Arguably therefore, remaining alert to the messages available from the humanities and arts as well as the findings of social science, is necessary to understanding the ‘wholeness’ of law, of the integrity of law – its integration – in its subtle connections with the world of life in all its richness.

3 Law and the humanities – integrity, law and human affect: the example of ‘shame’

The second paper in the July 2008 issue of the *Cambridge Law Journal* – ‘Legal Humanism and Law-as-integrity’ by Mark Walters³⁷ – sets out to explore the antecedents of the Dworkinian notion of ‘law as integrity’ – of a system of law ‘working itself pure’ as judicial decisions honour the need to balance certainty with sufficient sensitivity to the nuances of the individual case. Like Samuel, Walters points out the centrality of the role of *history* in any understanding of the law and thus demonstrates the humanities orientation not just of the notion of integrity, traced via the early humanists, but of any meaningful understanding of fundamental concepts generally. Incidentally, in excavating the early humanist critiques of law, Walters – more directly than Samuel – indicates the extent to which early legal humanists realised the necessity of re-evaluating that ‘floor’ of workaday assumptions about human nature underpinning the whole system:

‘As the common law became a system of “case law”, traditional accounts of its theoretical foundations – the view of the common law as a set of immemorial customs based on a set of immutable natural laws – were no longer sufficient, and scepticism emerged about its rationality.’³⁸

36 See, for example, Temkin (2002); Stewart *et al.* (1996).

37 Walters (2008).

38 *Ibid.* p. 357.

It might be said that such processes of re-examination must bear striking connections with scholarly enquiries of the present time – from modern legal and political theory about the relationship between normative and positivist ideas, to semiotics, linguistics and post-modernism.³⁹ Walters goes on to explain the conceptual contrasts and inheritances of Dworkin's Hercules, noting that:

[the] process of justificatory ascent and descent is not unlike Dworkin's reflective equilibrium . . . The common law humanists thought, and Dworkin does not, that natural reason, a metaphysical truth about right and wrong, informed legal reasoning at its most abstract levels . . . The political philosophy of humanism . . . was republicanism . . . In contrast, law-as-integrity is, first and foremost, a *liberal* theory of legalism . . . Analytical jurisprudence . . . is apolitical in part because it is ahistorical . . . If Dworkin's jurisprudence really is to be, as he wants it to be, a legal theory within a particular normative political theory, then it must be a legal theory with a history . . . Hercules comes from a long line of legal humanists.⁴⁰

The implication of this contrast – between apolitical and ahistorical analysis and historically aware, normative theory – clearly favours the ascendancy of a humanist perspective. Such debate as to the locus of law as an academic discipline in the pantheon of university deities has a long history; although Blackstone lectured in law at Oxford from 1753, for subsequent decades law was not regarded as a serious academic discipline, but rather a workaday acquisition of skills, creating artificers in the law. This ambivalence towards the status and identity of university legal education is still discoverable at times, reflecting the view that law suffers from an impurity of spirit, both in terms of ontological and epistemological origin. For law cannot claim the *direct* antecedents of history, of literature, of philosophy and did not originate as a result of a quest to discover the plangent truths of the past or the aesthetic truths of the text.

Sometimes caricatured as a parasitic profession, the contribution of the law to society is nevertheless crucial and omnipresent and this root in practical usage is perfectly noble. One of the great attractions of a law degree is the fact that not only does it deal with authentic social and political issues, but that it does so through the lens of a discipline which must attempt to provide practical responses to those issues, responses which can be *utilised* – the fact of the utility of the law is a very great inheritance. As with any academic discipline linked to vocational practice, the link may create exacting though positive intellectual pathways and demands. As any jobbing artisan or 'juriculturalist' will know, the utility of an instrument depends upon its remaining honed to purpose, and the necessity of recalling a practical locus is key to retaining that functionality.

It may be argued that there are few people qualified to pronounce upon utility and functionality, especially amongst academics, but this would be to accept a narrow view of the field. Without paying attention to the messages – deriving from culture, history, philosophy – law (and society) runs the risk of staggering somewhat helplessly through the challenges of human behaviour, with little hope of 'working itself pure'.⁴¹ For, if law is truly to retain its integrity as a conscientious social mechanism, it must be open to the scrutiny of any number of intellectual enquiries.

We have come some way from the days when disciplines delighted in asserting their own epistemological purity as a sign of their legitimacy and authority. The new drive for interdisciplinarity recognises the extent to which those cognate divides are to an extent anthropological artefacts; scholarly excellence need not be diluted by intellectual diversity. For the law,

39 Ibid. p. 359: In an effort to integrate theoretical and practical reasoning, greater emphasis was placed upon methods of reasoning – such as the use of context, examples, metaphors, and analogies – that previously fell within the province of rhetoric.

40 Ibid. pp. 372–75.

41 A central theme in Dworkin (1988) is the notion of law 'working itself pure' and is connected to his discussion of 'law as integrity'. It is to this thesis that Walters refers.

acknowledgement of its relation to the humanities as well as to the social sciences is simply a recognition of its roots in the deep questions and mysteries of human being, as well as of the commitment to explore and chart such questions. It is also true that broadly philosophical or cultural commentary may not form a first port of call for those wishing to explore questions in law. Nevertheless, in pure intellectual terms, such commentary may prove extremely germane to the fundamental questions underlying legal theory and practice, especially at the intersection between law and normative judgment. Consider, for example, the normative role of the apperception that is the experience of shame. Current cultural communities around the world exhibit vastly different interpretations of the notion of shame. In Western popular culture, for example, the erotic association between sex and violence has, over recent decades, become increasingly normalised, with such normalisation permitting the diminution of consciousness of shame. The issue is dramatised and anatomised in the text of *Crash* by J. G. Ballard (Ballard, 1995); the textual critique of the phenomenon providing a serious commentary upon this fundamental cultural, moral, anthropological and physiological phenomenon, significant to notions of human nature and relevant to law. Thus (as indicated hereafter) a ‘literary’ discussion may add to the philosophical, social-scientific and socio-legal perspectives contributing insights.

Of course, shame is a culturally nuanced sensibility, with complex interactions between individual and community which may be exploited for good or ill – as right-feeling, sensitising consciousness or a repressive, political tool, capable of deployment across a wide range of phenomena, from the politics of public discourse to that of private life; of cultural, sexual or textual being. Feelings of shame may be experienced by individuals and by communities, and the implications of each may have practical as well as philosophical implications, implications relevant to the philosophy and implementation of law. Philosophers recognise that there is both a distinction and a relationship between the concepts of ‘shame’ and ‘guilt’. Shame, it is believed, ‘focuses upon the self, whilst guilt is focused upon specific actions or behaviour.’⁴² The anthropologist Ruth Benedict,⁴³ writing in the 1940s, hypothesised that cultures could fall into one of two types – being either ‘shame’ cultures or ‘guilt’ cultures – with Asian cultures such as Japan typifying ‘shame’ cultures whilst Western cultures exemplified ‘guilt’ cultures. Though such division may be viewed as somewhat simplistic, it may well indicate some fundamental social and cultural as well as innately human elements to the emotions. Martha Nussbaum, writing in 2006,⁴⁴ cites some conceptual ambiguities residing in the jurisprudence of shame. She notes an implicit conflict in the desire positively to cultivate a sense of shame in offenders when the pursuit of dignity is becoming recognised as desirable for all and the cultivation of shame would arguably exclude offenders from this ambition. Such opposition, between shame and dignity, may in any event be misplaced. Tarnopolsky,⁴⁵ for example, looks at the way shame may be used politically to oppress individuals belonging to disapproved groups, and

42 This distinction is widely accepted, at least in Western philosophy. See, for example, Morgan (2008 pp. 45 ff).

43 Benedict (1954[1946]). The classification continues to be discussed within the discipline; see Young (2005).

44 Nussbaum (2006, p. 15) notes: ‘The theoretical debate about shaming penalties becomes all the more difficult to figure out when we consider the theoretical basis for a wide range of legal practices that currently protect citizens from shame: laws protecting personal privacy, for example, and the new laws promoting a dignified education for disabled children. Typically, these practices are defended on liberal grounds, with appeal to the idea, typical of classical liberalism, that each individual citizen deserves a life with as much dignity and self-respect as can be provided, taking into account the fair claims of others. Are these ideas inconsistent with the use of shame in punishment as some theorists believe?’.

45 Tarnopolsky (2004, p. 479). See also Ireland (1995). Ireland carefully tracks conservative and radical left political philosophy and recognises that the pursuit of individualist appetites is poorly supported by left-leaning politics and that the preservation of a healthy tension between individual and community interests must draw upon lessons from conservative conceptions of individual and community as well as from more liberal models. He suggests (at p. 208), ‘One of the problems with some contemporary “critical” legal scholarship [is that it] propounds a new neutrality which favours no particular politics. The new, “radical”,

warns against too-ready assumptions about the relationship between individual freedoms and community integrity and the healthy division between the private and the public. She advocates the cultivation of ‘respectful shaming’, allowing for the preservation of dignity, and follows Socrates, for whom shame was integral to ethics and ‘quite literally practices a politics of shame in his relentless questioning of his fellow Athenians in an attempt to make them more reflective about their collective “others”’. Though the word ‘shame’ is never mentioned, Wayne Morrison clearly signals a call to something akin to such a collective instinct for this reflective shame in his study of the intellectual incoherence that founds modern criminology.⁴⁶ Michael Morgan goes further, producing an entire treatise entitled ‘Shame’,⁴⁷ which sets out to examine the emotion of shame psychologically and philosophically. The essential theme of Morgan’s text is the assertion that a sense of shame should be present, and certainly cultivated, in all of us, in order to motivate communities to rise up against global atrocities: ‘We should and can I believe, feel shame about living in a world where genocide is always possible and where its prevention is continually negotiable.’⁴⁸ It may be suggested that the overall thesis is flawed in advancing the idea that the cultivation of shame can be a motivating force. I would argue that, amongst right-thinking people, though in despair at the capacity of humanity for iniquity, it is *indignation* which truly motivates; shame – were it even appropriate in such circumstances – would be a paralysing affect. Moreover, this suspicion – that shame creates stasis rather than impetus – is borne out by empirical study. In their 2009 study of the perception of shame amongst sexual offenders, Marshall, Marshall, Serran and O’Brien explain:

‘Shame involves a negative self-appraisal of one’s global sense of self. People who respond with shame to a behaviour they have enacted, which they judge to be unacceptable or which they believe others consider repugnant, typically also feel powerless, helpless and worthless. Shame (i.e. “I am a bad person”), unfortunately results in the person feeling unable to stop the bad behaviour that generated the emotion. As a result, people experiencing shame believe there is no point in entering treatment to correct their behaviour because they have an unchangeable bad character. Guilt, on the other hand, involves a negative appraisal of a specific action. In this case the person makes a distinction between himself/herself as a whole being and the particular action of concern.’⁴⁹

Proeve and Howells⁵⁰ admit that some offenders do not experience shame *or* guilt, but that, for those who do, proneness to shame correlated positively with anxiety and depression whilst proneness to guilt did not, and note research indicating that shame ‘inhibits empathy, as its associated focus on self-worth and fear of contempt . . . dulls the capacity to experience other emotions’. McAlinden (2005) adds that one must distinguish between ‘disintegrative shaming’ (characterising the traditional retributive framework of justice, with a stigmatising effect and little effort made to forgive, acknowledge or accept offenders back into society) and ‘reintegrative shaming’, where careful

postmodern liberalism which has emerged . . . ends up advocating individual choice while denying that any collective political choices have to be, or can be, made’ and concludes that ‘we need to take responsibility for the way society is ordered’. Though ‘shame’ is in the title of his essay, Ireland never specifically endorses shame as a strategic quality to be used in this ordering; nevertheless he is clearly touching upon the topography connecting the life of the emotions with the jurisprudence and politics of cultural values.

46 Morrison (2006).

47 Morgan (2008).

48 Ibid. p. 27.

49 Marshall *et al.*, (2009, p. 219).

50 Proeve and Howells (2002) (quotation cites Roys (1997)).

management can allow offenders to leave their offending past and picture themselves and their future positively. McAlinden notes that orthodox approaches to such offenders are likely to fail:

‘It has been demonstrated that a further unwanted consequence of disintegrative shaming is that sexual-offending behaviour may be increased if the offender feels socially isolated. Reintegrative shaming schemes could have the double benefit of protecting children from abuse and the offender from vigilante attack.’⁵¹

Clearly, the issue of shame is complex and the ‘instinctive’ reactions of legal process may not be the most constructive. Though some points may be debateable, the necessity of examining the issue from philosophical and humanities-informed perspectives *as well as* empirical, social science ones, is indisputable. Indeed, the questions still latent to both forms of enquiry suggest that our understanding of such matters is still at a very early stage indeed, and that not only do we run the risk of visiting punishments or judgments misaligned with the emotional landscape of the offence, but of perpetuating wrongful conduct by such misalignment – the very outcome our system hopes to avoid. With its implication of crude quantification and draughtsmanship, the ‘engineering’ solution would be likely to oversimplify the matter, and indeed, insofar as such mechanistic visionaries may already have shaped policy to a substantial degree, may have contributed to some of the problems inherent to the jurisprudence of such questions.

As already indicated, current debate on social norms may pause to consider the modern perspectives of J. G. Ballard as a commentator upon the unfolding mystery of human being in relation to the notion of shame and obscenity: the issue of shame may be relevant to the shaping of individual and collective values at the very root of social practices and literature, as well as psychology, anthropology and the like; may explore the nuances of such practices. My own work in law and literature has led me to consider Ballard’s work in conjunction with the philosophical–historical scholarship of the philosopher Bernard Williams on the concept of shame.⁵² (Such discussions are sometimes discoverable in law commission papers and committee deliberations – coincidentally, it was Bernard Williams who chaired the Williams Committee on Obscenity and Film Censorship⁵³ – though understandably are not continuously consulted in the pragmatic constraints that form the judicial process.) In 1973, J. G. Ballard published his novel *Crash*, providing graphic narrative of public fascination with disaster, including erotic detail which could be viewed as pornographic.⁵⁴ In this text, Ballard imagines a world where sex and violence are combined in consumer culture, a culture where shame has ceased to have a place. This theme is explored in my 2005 essay ‘Savage or Citizen? The *Crash* of the Moral Mirror’, which I will quote as explanatory background:

‘The great classical philosophers dealt with the profound questions of human existence which have not, despite appearances, altered in essence. In particular, they recognised that questions of

51 McAlinden (2005, p. 388).

52 Williams, B. (1994).

53 *Report of the Committee on Obscenity and Film Censorship* (Cmnd 7772, 1979) (Williams Committee Report).

54 Ballard (2008): ‘*Crash* would be a head-on charge into the arena, an open attack on all the conventional assumptions about our dislike of violence in general and sexual violence in particular. Human beings, I was sure, had far darker imaginations than we liked to believe. We were ruled by reason and self-interest, but only when it suited us, and much of the time we chose to be entertained by films, novels and comic strips that deployed horrific levels of cruelty and violence. In *Crash* I would openly propose a strong connection between sexuality and the car crash, a fusion largely driven by the cult of celebrity. It seemed obvious that the deaths of famous people in car crashes resonated far more deeply than their deaths in plane crashes or hotel fires.’ (*The Sunday Times*, 27 January 2008). The extract also refers to the car crash exhibition staged by Ballard at the New Arts Laboratory in London in 1970, which attracted outrage, and linked to his text.

individual freedom were intimately linked to those of moral, social and legal organisation. But making those insights work for us now is a challenge – indeed, there is a danger that moral philosophy, alongside its co-worker, law, may operate in a sealed unit of rationality far removed from the pressing subject matter of its discourse. Consider an essay entitled ‘Shame and Autonomy’ by Bernard Williams himself – the Chairman of the Committee on Censorship and Pornography. The very words examined therein – ‘shame’ and ‘guilt’ seem quaint and singularly irrelevant to the world of *Crash*. Williams’s critique of the minutiae of Homeric and Kantian notions of shame and guilt may seem otiose and obsolescent, a raindrop against a deluge. But Williams does point up concepts which, by their very deliberate impoverishment in *Crash* help to clarify the points Ballard pursues.⁵⁵

Asking himself ‘what is involved in shame itself’, Williams explains that shame derives from the notion of:

‘(aidos) – that of being seen, inappropriately, by the wrong condition. It is straightforwardly connected with nakedness, particularly in sexual connections . . . a further step is taken when the motive is fear of shame at what people will say about one’s actions . . . The reaction in Homer to someone who has done something that shame should have prevented is nemesis . . . These are shared sentiments with similar objects, and they serve to bind people together in a community of feeling.’⁵⁶

In our current world, exposure, whether as nakedness or shame at what people will say about one’s actions, are apparently irrelevant scruples; Ballard illustrates this in the world of *Crash*: the community works upon an entirely different logic, one of broken boundaries and endless experimentation where care of the other is subsumed by the pursuit of pleasure.⁵⁷ And that is Ballard’s point. His is not a canting exhortation against increased personal freedoms. Rather, it is a mirror to our present world, at risk of losing the distinction between empathy and voyeurism. We live in a surreal world where the obscene jostles with the mundane, where personal tragedy is another unit of consumption. Ballard describes a scene in *Crash* in which the narrator recounts:

‘I looked round at the crowd. A considerable number of children were present, many lifted on their parents’ shoulders to give them a better view . . . None of the spectators showed any signs of alarm. They looked down at the scene with the calm and studied interest of intelligent buyers at a leading bloodstock sale.’⁵⁸

This deadening community is quite clearly a crucible for the more stylised and specialised proclivities or activities of particular groups, and such groups – what Bernard Williams calls the community of feeling, in which shame would be a shared product – become a community of appetite. Shame and nemesis will be inverted – the root of indignation will lie in feeling shame. As Williams explains:

‘Even if shame and its motivations always involve in some way or other an idea of a gaze of another, it is important that for many of its operations the imagined gaze of an imagined other

55 Williams, M. (2005, pp. 96 ff.).

56 Williams, B. (1994, pp. 78–80).

57 This discussion derives from Ballard’s focus upon the forms of behaviour resulting in the most extreme harms to others. His juxtaposition of this with consumer culture reflects the potentially creeping normalisation of such harms.

58 Ballard (1995, p. 155).

will do . . . He might think that it was shameful to do it, not just to be seen doing it, and in that case an imagined watcher could be enough to trigger the reaction of shame.⁵⁹

Ballard's point is that, where the community becomes complicit in a harmful culture or practice, the entire ethical edifice loses power. Juxtaposing the cautious, classically sourced philosophy of Bernard Williams with the literature of J. G. Ballard, so exercised by the extremes of contemporary culture, takes the discussion beyond questions of the relationship between art and pornography and pornography and harm usually explored by the jurisprudence concerned with censorship. The novel provides clinically direct and explicit narrative which challenges the reader to confront the assumptions conventionally asserted concerning the *separation* of violence and the erotic.⁶⁰ For the figures in *Crash*, the immediate and extended 'community' of watchers and imagined watchers *endorse* the aberrant behaviour. This should be a concern for the law, in terms of understanding the growth of clearly 'deviant' communities, for whom tangible harm to others is a stimulus beyond conventional understanding, yet reflects disturbingly upon the culture shared by us all. The question is pressing for all society – especially in the age of the Internet – and for the law in particular, concerned with the broader role of legal and other institutions in relation to the freedom and regulation of the legal subject.

4 Conclusion

What this discussion points up, I hope (quite apart from the clear relevance of the fiction to present popular media diets), is the intimate relationship between concepts foundational to the law and to the humanities, and their relevance in turn to the explorations of the social sciences. No aspect of human being, whether it is concerned with legislative, political, socioeconomic, philosophical, historical or anthropological advances, can be understood in isolation. All human knowledge and experience – and that includes aesthetic 'knowledge' – provides a window upon the nature of humanity which can contribute to the forms of enquiry founded more clearly upon empirically sourced observation. Researchers of empirically based enquiries in the socio-legal spheres will appreciate the constant and intimately reflexive interaction that must occur between physical data and metaphysical assumptions; that findings resulting from data coordinates in relation to normative conclusions may be influenced by the subjective skew of initial question formation as well as that relating to outcomes; that knowledge is never absolute and human qualities in particular mysterious and mercurial. Neither 'narrow theology' nor dextrous engineering can respond to the full implications of law's influence. Foundational paradigms, indicated by Samuel as fundamental to the legal world, must be revisited constantly to ensure that presumption is not a mask for mere supposition where the human element is concerned. For Bernard Williams, this danger is signalled by reference to 'folk psychology'⁶¹ – a term which plays very closely into the notion of the 'paradigm' as the overall concept accepted by most people in an intellectual community.

Thus, in his essay 'Making sense of humanity'⁶² (in the book of the same name), Bernard Williams advances a view which (were it to consider law in particular) would object to an over-

59 Williams, B. (1994, p. 82).

60 The conceptual subtleties are somewhat lost once the novel is represented as film. Once the erotic potential in links between sex and violence is made visual, the reflective and critical commentary so crucial to the philosophy of the novel is lost – perhaps not surprisingly, therefore, the film *Crash*, directed by David Cronenberg and released in 1996, was subject to some regional censorship in the UK (noted in *The Sunday Times* article at fn 55). Ballard's 1969 text *The Atrocity Exhibition*, though subject of a trial under the Obscene Publications Act, is regarded by some as his finest work: see Moorcock (2009).

61 Williams, B. (1995, p. 84).

62 Ibid.

mechanistic model – the engineering model – of law’s tenuous relation to the humanities and endorse a slightly more intimate link between the humanities and the social sciences, questioning in particular the implication that empirical studies as science form the most practical and reliable source of wisdom. Williams insists upon the necessity for engagement between the paradigms, or ‘folk psychologies’, of science and the discourses of the humanities, referencing that deeply legalistic issue of ‘intention’ as a prime example of the difficulties:

‘The metaphysicians perhaps assume that there is a neutral item that cognitive science and ‘folk psychology’ are alike in the business of explaining, and that is behaviour. But to suppose that there could be an adequate sense of ‘behaviour’ that did not already involve concepts of ‘folk psychology’ – the idea of an intention, in particular – is to fall back into a basic error of behaviourism.’⁶³

For Williams, intellectual enquiry which fails to maintain an awareness of the constant interplay between science and the humanities cannot be a meaningful enquiry. Like Ballard, he sees that humanity must be understood as always subject to the vagaries of culture. Notice also that he refers to the ‘human sciences’ and not ‘social sciences’ as against ‘the humanities’:

‘the human sciences should essentially deploy notions of intention and meaning and . . . should flow into and out of studies such as history, philosophy, literary criticism and the history of art which are labelled ‘the humanities’ and perhaps are not called ‘sciences’ at all. If it is an ethological truth that human beings live under culture, and if that fact makes it intelligible that they should live with ideas of the past and with increasingly complex conceptions of the ideas that they themselves have, then it is no insult to the scientific spirit that a study of them should require an insight into those cultures, into their products, and into their real and imagined histories.’⁶⁴

Law is not merely a forensic exercise, but shares texts, languages and innate values drawn from the humanities. It also springs from the narratives and rhetorics of its ‘subjects’. Charged with the task of formulating responses to the problems thrown up by human being and existence, law must be alive to these insights. Concepts so integral to what it is to be ‘human’ continue to pose deep philosophical questions for the law, not resolvable by stripped machinery. Many of the great advances in modern law sprang from the apprehension of injustices not tangible to the law as it approximated to a ‘narrow theology’ or the engineer’s vice, but through the subtle subversions worked by the perspectives of those invisible to the law and its machines. The integrity of the law is an issue not just of conscience, of a quest for scrupulous practice in form and in substance, it is an issue of wholeness, of engagement with the world it seeks to know.

References

- ALMOG, Shulamit (2007) ‘Windows and “Windows”’: Reflections on Law and Literature in the Digital Age’, *University of Toronto Law Journal* 57: 755–80.
- ARISTODEMOU, Maria (1999) ‘Fantasies of Women as Law-Makers: Subversion or Evasion in Angela Carter’s *Bloody Chambers*’, in Michael Freeman and Andrew Lewis (eds) *Current Legal Issues 1999*, vol. 2. Oxford: Oxford University Press, 191–218.
- BALKIN, Jack M. and LEVINSON, Sanford. (2006) ‘Law and the Humanities: An Uneasy Relationship’, *Yale Journal of Law and the Humanities* 18: 155–87.

63 Ibid. p. 85.

64 Ibid. p. 86.

- BALLARD, J. G. (1995[1973]) *Crash*. London: Vintage [first published 1973, by Jonathan Cape].
- BALLARD, J. G. (2008) 'How J. G. Ballard came to write *Crash*', *The Sunday Times*, 27 January. Available at http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/books/book_extracts/article3241208.ece.
- BENEDICT, Ruth (1954[1946]) *The Chrysanthemum and the Sword: Patterns of Japanese Culture*. Rutland, VT/Tokyo: Charles E. Tuttle Co.
- BERUBE, Michael (2003) 'The Utility of the Arts and the Humanities', *Arts and Humanities in Higher Education* 2(1): 23–40.
- COHEN, Stephen (1994) "'The Quality of Mercy": Law, Equity and Ideology in *The Merchant of Venice*', *Mosaic* 27: 35–54.
- DWORKIN, Ronald (1988) *Law's Empire*. Cambridge, MA: Harvard University Press.
- EDGERTON, Henry W. (1929–1930) 'Seduction – Loss of Services Caused by Girl's Commitment as Incorrigible', *Illinois Law Review* 24: 232–36.
- FRANKLIN, James (1995) 'Philosophy, Mathematics and Structure', *Philosopher* 1(2): 31–38. Available at <http://web.maths.unsw.edu.au/~jim/interview.html>.
- GILBERT, Natasha (2008) 'Universities Face Arts and Humanities Funding Cuts', *The Guardian (Education supplement)*, 17 January. Available at www.guardian.co.uk/education/2008/jan/17/universityfunding.highereducation.
- HOWARTH, David (2004) 'Is Law a Humanity, or is it More Like Engineering?' *Arts and Humanities in Higher Education* 3(1): 9–28.
- IRELAND, Paddy (1995) 'Reflections on a Rampage through the Barriers of Shame: Law, Community and the New Conservatism', *Journal of Law and Society* 22(2): 189–211.
- MARSHALL, W. L., MARSHALL, L. E., SERRAN, G. A. and O'BRIEN, M. D. (2009) 'Self-esteem, Shame, Cognitive Distortions and Empathy in Sexual Offenders: Their Integration and Treatment Implications', *Psychology, Crime and Law* 15(2–3): 217–34.
- MCALINDEN, Anne-Marie (2005) 'The Use of "Shame" with Sexual Offenders', *British Journal of Criminology* 45: 373–94.
- MOORCOCK, Michael (2009) 'My Friend J. G. Ballard, the Homely Visionary', *The Times*, 25 April. Available at http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/books/article6160194.ece.
- MORGAN, Michael L. (2008). *On Shame: Thinking in Action*. New York and London: Routledge.
- MORRISON, Wayne (2006) *Criminology, Civilisation and the New World Order*. London: Routledge-Cavendish.
- NUSSBAUM, Martha (2006) *Hiding from Humanity: Disgust, Shame and the Law*. Princeton: Princeton University Press
- PROEVE, Michael and HOWELLS, Kevin (2002) 'Shame and Guilt in Child Sex Offenders', *International Journal of Offender Therapeutic and Comparative Criminology* 46: 657–67.
- SAMUEL, Geoffrey (2008) 'Is Law Really a Social Science? A View from Comparative Law', *Cambridge Law Journal* 67(2): 288–321.
- SHEPHERD, Jessica (2007) 'A Difficult Patch: Disagreements Over Research are Straining the Relationship Between the Treasury and Universities', *The Guardian*, 30 January. Available at www.guardian.co.uk/education/2007/jan/30/researchassessmentexercise.research.
- SIMMONDS, Nigel E. (2005) 'Law as a Moral Idea', *University of Toronto Law Journal* 55(1): 61–92.
- STEWART, Mary White, DOBBINS, Shirley and GATOWSKI, Sophia (1996), "'Real Rapes" and "Real Victims", the Shared Reliance on Common Cultural Definitions of Rape', *Feminist Legal Studies* IV(2): 159–77.
- TARNOPOLSKY, Christina (2004) 'Prudes, Perverts and Tyrants: Plato and the Contemporary Politics of Shame', *Political Theory* 32(4): 468–94.
- TEMKIN, Jennifer (2002) *Rape and the Legal Process*, 2nd edn. Oxford: Oxford University Press.
- WALTERS, Mark (2008) 'Legal Humanism and Law-as-integrity', *Cambridge Law Journal*, 67(2): 352–75.

- WEISBERG, Richard H. (1996) *Vichy Law and the Holocaust in France*. New York: New York University Press.
- WHEELER, Sally and SHAW, Jo (1994) *Contract Law, Cases, Materials and Commentary*. Oxford: Clarendon Press.
- WILLIAMS, Bernard (1994) 'Shame and Autonomy' in Bernard Williams, *Shame and Necessity*. Berkeley: University of California Press, 75–102.
- WILLIAMS, Bernard (1995) *Making Sense of Humanity*. Cambridge and New York: Cambridge University Press.
- WILLIAMS COMMITTEE (1979) *Report of the Committee on Obscenity and Film Censorship* (Cmnd 7772).
- WILLIAMS, Melanie (1999a) 'Tess of the d'Urbervilles and the Law of Provocation' in Michael Freeman and Andrew Lewis (eds) *Current Legal Issues*, vol. 2. Oxford: Oxford University Press, 167–90.
- WILLIAMS, Melanie (1999b) 'Is Alec a Rapist? – Connotations of "Rape" and "Seduction": A Reply to Professor John Sutherland', *Feminist Legal Studies* 7: 299–316.
- WILLIAMS, Melanie (2005) 'Savage or Citizen? The *Crash* of the Moral Mirror' in Melanie Williams (ed.) *Secrets and Laws*. London: UCL Press, 83–100.
- YOUNG, Virginia Held (2005) *Ruth Benedict*. Lincoln, NE: University of Nebraska Press.