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A Legacy of Expression: Dave Frohnmayer and the Humanities in Oregon

Introduction	677
I. The Fate of the Humanities	678
II. Humanities and the Law	680
III. An Example of Law and Literature	682
A. Humanism	684
B. Hermeneutics.....	685
C. Narrative.....	687
IV. Legal Narrative by Example: Garrett Epps <i>Peyote vs. the State: Religious Freedom on Trial</i>	689
V. Dave Frohnmayer, <i>Smith</i> , and Humanistic Inquiry	691
Concluding Thoughts: Power, Faith, and the Law	696

INTRODUCTION

In his prologue to *Peyote vs. the State: Religious Freedom on Trial*, law professor Garrett Epps describes the legal, as well as human, impact of *Employment Division v. Smith*, the precedent-shattering religious freedom case argued by Oregon Attorney General Dave Frohnmayer in 1990.¹ Professor Epps points out that the case was

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¹ GARRETT EPPS, *PEYOTE VS. THE STATE: RELIGIOUS FREEDOM ON TRIAL* 1–6 (2009).

double-edged, and Dave knew it.² As attorney general, he had attempted to repair the state's relationship with the Native American tribes of the Northwest, and now he was arguing a case before the U.S. Supreme Court that would have the effect of restricting tribal religious practices.³ He knew, as well, that the “anger and dismay the decision would provoke[] would become in a way the meaning of [his] career.”⁴ “Nothing he had done, nothing he would do,” Professor Epps adds, “would loom larger in the memory of history than this day's work.”⁵

The case illustrated the complexities of First Amendment jurisprudence, where freedom of expression, free exercise of religion, and Establishment Clause doctrine intertwine, resulting in seemingly unavoidable contradictions. It is certainly *not* a case addressing the role of the humanities in American culture. Or is it? In this Article, I will argue that a case like *Smith*, where spiritual beliefs are front and center, and where reflection on fundamental issues of human meaning are paramount, shows that the law is *always* a form of humanistic inquiry. In particular, I focus on Dave's 2011 remarkable address at the annual banquet of the *California Law Review* to underscore his awareness of the humanistic core of legal study and practice.

I

THE FATE OF THE HUMANITIES

For at least a decade, and with increasing frequency, we have been hearing that the humanities are “in crisis.” As higher education (along with all of human culture, it would seem) moves ever deeper into the digital age, traditional models of self-reflexive humanistic inquiry are giving way to algorithmic practices that show remarkable accuracy at predicting human behavior, environmental trends, economic outcomes, and even the nature of human desire itself. Cognitive neuroscience has staked significant claims in fields as diverse as consumer behavior and religion. It is hard to argue with many of the successes of algorithmic prediction—a fact that has rendered those interested in inquiries into human agency and freedom seem more and more wistful. According to a 2015 special issue of *College Literature*, the humanities are like an image retreating in the rear view mirror of a speeding car—“social, economic, and technological forces, whether exploited by unthinking

² *Id.* at 5.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

administrators and legislators or simply running to their own logical conclusion, seem to diminish or even to render superfluous humanistic modes of inquiry.”⁶ The most cursory scan of *The Chronicle of Higher Education* or *The New York Times* will find comments like the following, penned by a Ph.D. candidate in history at Vanderbilt University: “What if . . . humanities education . . . no longer has a significant role to play in American life?”⁷

One of the recurrent problems in any discussion of the humanities is that few people can give a definition of the term—the field is too broad, too porous, and too amorphous to be pinned down in any coherent sense. In such cases, it is often best to start with a simple proffer: the humanities are any activity associated with the study of the human condition. Implicit in that project is an inquiry into the nature of “the human” itself: What does it mean to be human?⁸ This implies self-reflection, a good dose of doubt, and perhaps even some skepticism. We can probably agree with Sitze, Sarat, and Wolfson in their essay, *The Humanities in Question*, that:

Few self-identified humanists would disagree with the premise that “the humanities” serves as a name for a set of inquiries characterized by their commitment to self-questioning and self-critique. According to this understanding, which claims to find its roots in the Socratic maxim that “the unexamined life is not worth living for a human

⁶ Adam Sitze et al., *The Humanities in Question*, 42 C. LITERATURE 191, 191 (2015).

⁷ Alexander I. Jacobs, *The Humanities at the End of the World*, CHRON. HIGHER EDUC., Oct. 2, 2015, at B4.

⁸ See, for instance, the statement by William Adams, Chair of the National Endowment for the Humanities:

People who engage in a profound way with a broad range of disciplines—including, and in some cases especially, with the humanities—are preparing to engage the challenges of life. They are creative and flexible thinkers; they acquire the habits of mind needed to find solutions to important problems; they can even appreciate the value of making mistakes and changing their minds. I am convinced that this kind of study is not merely defensible but critical to our national welfare.

Office of the Chairman, NAT’L ENDOWMENT FOR HUMAN., <http://www.neh.gov/about/chairman> (last visited Apr. 18, 2016).

Or, see the following from the Stanford Humanities Center:

The humanities can be described as the study of how people process and document the human experience. Since humans have been able, we have used philosophy, literature, religion, art, music, history and language to understand and record our world. These modes of expression have become some of the subjects that traditionally fall under the humanities umbrella. Knowledge of these records of human experience gives us the opportunity to feel a sense of connection to those who have come before us, as well as to our contemporaries.

What Are the Humanities?, STAN. HUMAN. CTR., <http://shc.stanford.edu/what-are-the-humanities> (last visited Apr. 18, 2016).

being,” the humanities allow self-examination to give life lasting shape and structure, to give meaning and value to the life of the free citizen, and as such to humanize life itself.⁹

The language of the last sentence above is telling: providing life with shape, structure, meaning, value, and freedom; the cultivation of citizenship; and the humanization of life itself. This sounds a lot like a solid program for legal study and, beyond that, a professional legal life—maybe even the good life.

II HUMANITIES AND THE LAW

The idea that law can not only benefit from regular interaction with the humanities, but that the law is also a distinct *form* of humanistic inquiry may seem a tad idealistic, and thus it is likely to evoke raised eyebrows, a fatigued sigh, or perhaps a shrug. Law and the humanities? Haven’t we been down this road before? One remembers such moments as the law and literature movement (the 1980s), critical legal studies (the 1980s and 1990s), and “deconstruction and the law” (somewhere in a universe long ago). The latter in particular seems more and more like a youthful phase that the legal community tarried with until it moved on to more serious business. Depending upon your interlocutor, law is a social science, a behavioral science, a hybrid of the human sciences, a partner with economics, or a project in political science or government. All of these make quick sense to those in the profession; law is not a branch of the humanities. Jack Balkin and Sanford Levinson, in *Law and the Humanities: An Uneasy Relationship*, use the friendship and correspondence between Oliver Wendell Holmes and Learned Hand to underscore this last point.¹⁰ Hand endorsed study of the great books as the best preparation for legal study and practice; Holmes argued that law was a “business,” where “‘people . . . pay lawyers to argue for them’ and ‘predict . . . the incidence of public force through the instrumentality of the courts.’”¹¹ Balkin and Levinson explain further:

⁹ Sitze et al., *supra* note 6, at 192 (citations omitted).

¹⁰ See generally Jack M. Balkin & Sanford Levinson, *Law & the Humanities: An Uneasy Relationship*, DAEDALUS, Spring 2006, at 105.

¹¹ *Id.* at 106 (quoting Oliver Wendell Holmes, *The Path of the Law After One Hundred Years*, HARV. L. REV. 991, 991 (1997) (transcribing Oliver Wendell Holmes, Jr., Justice, Massachusetts Supreme Court, Address at the Dedication of a New Hall at Boston University School of Law (Jan. 8, 1897))).

Holmes and Hand were friends—but they clearly disagreed over the substance of legal studies. While Hand in 1930 advocated the study of the humanities, Holmes advocated the study of the social sciences, particularly economics. Hand evoked Shakespeare and Milton; Holmes’s imagined alternative to black-letter law was statistics. Where Hand welcomed the edifying influence of moral philosophy, Holmes strove to make law more scientific and even industrial, discarding all forms of humanist sentimentality.¹²

Balkin and Levinson conclude that the relationship of law to the humanities is tenuous, and that today’s law student is “more likely to be acquainted with Ronald Coase’s Theory of the Firm than with Plato’s Theory of Forms.”¹³ Interestingly, they also seem to assume that a definition of the humanities needs little elaboration; instead, they turn to a discussion of the nature of the study and practice of law.¹⁴ Is the canon of legal materials in use today sufficient to become a good lawyer?¹⁵ Is law a distinct discipline? Is it a science? Or is it a hybrid of many disciplines, more akin to a style, mood, or art?¹⁶ The professionalization of legal training is only a little over a century old,¹⁷ and debates about the “essence” of the law—its inner nature, if you will—are akin to 1920’s debates about the essence and autonomy of the then-young cinema: Was cinema a form of theater? Dance? Photography? Music? Ultimately, the debate lost energy as the cinematic sphere matured, to the point that a “film” was clearly a distinct art form that did not need to genuflect before the world of the stage.

Perhaps the best way to consider these questions—and the best way to get to the hidden premise of my claims here—is to turn to literature, the paradigmatic case of the humanities, as well one of law’s closest kin. To be more specific, we might say the field of literary *narrative*, since it is still rather rare to see judicial opinions in free verse. Both law and literature are, according to many commentators, “rhetorical through and through,”¹⁸ suggesting that the construction of an

¹² *Id.*

¹³ *Id.* The footnote accompanying this excerpt is illuminating, too, pointing out that the most heavily cited article by legal academics up to 2006 was indeed Coase’s *The Problem of Social Cost*. *Id.* at 106 n.7 (discussing R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).

¹⁴ *See id.* at 112–13.

¹⁵ *Id.* at 107.

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.* at 113.

impregnable palisade between the two fields may be neither necessary, nor wise, nor, as I will argue, possible.

The rhetorical basis of law is so well established that it generates truisms. We have all heard the locution “any first-year law student knows (fill in the blank),” a phrase that indicates that some levels of disciplinary sophistication and insight are so basic as to be natural to the field. This suggests that there *are* core components of legal reason and legal practice; at the same time, this *is* a rhetorical device. Once again, I will cite Balkin and Levinson:

The work that practicing lawyers do today has much in common with the lessons of classical rhetoric taught centuries ago in the great humanist academies of Ancient Greece and Rome. It is no accident that Chaim Perleman, the coauthor of *The New Rhetoric*, a classic in the field first published in 1969, was also a legal theorist, or that Stanley Fish, the well-known literary critic, has more recently taken delight in studying, and manipulating, the rhetorical tropes of contemporary American legal theory.¹⁹

III

AN EXAMPLE OF LAW AND LITERATURE

Almost certainly, the progenitor of the field of law and literature is James Boyd White, a law professor at the University of Michigan, whose work since the 1973 publication of *The Legal Imagination*²⁰ has explored the ethical, narrative, stylistic, and moral issues embedded in both disciplines. Other signature moments were the creation of the *Cardozo Studies of Law and Literature* in 1989;²¹ the *Yale Journal of Law and the Humanities* in 1989;²² Richard Weisberg’s *Poethics* in 1992;²³ the work of Robert Cover, particularly his 1986 essay, *Violence and the Word*;²⁴ Seventh Circuit Judge Richard Posner’s *Literature and the Law: A Misunderstood Relation*;²⁵ and the work of the seemingly

¹⁹ *Id.* at 113.

²⁰ JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (abr. ed. 1985) (1973).

²¹ The *Cardozo Studies of Law and Literature* was a periodical published by Cardozo School of Law from 1989 to 2001. Since 2002, Routledge has published the successor-periodical, *Law & Literature*, in partnership with the Cardozo School of Law. For access to full volumes of the periodical, see *Law & Literature*, TAYLOR FRANCIS ONLINE, <http://www.tandfonline.com/loi/rlal20#.VxalERIrKCQ> (last visited Apr. 19, 2016).

²² See *About Us*, YALE J.L. & HUMAN., <https://www.law.yale.edu/student-life/student-journals-and-publications/yale-journal-law-humanities> (last visited Apr. 19, 2016).

²³ RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992).

²⁴ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

²⁵ RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

indefatigable and always provocative professor of literature, humanities, and law, Stanley Fish.²⁶

In 2005, Professor Julie Stone Peters of Columbia University, herself the holder of a Ph.D. in comparative literature as well as a J.D., published an essay in *PMLA*, the flagship journal of the Modern Language Association of America, reflecting in the over thirty-year history of the law and literature movement, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*.²⁷ She uses the events at a colloquium of law and literature professors at a “great and august university” (as she puts it) in the mid-1990s to describe the history of the law and literature movement and of the expectations and disappointments of the different parties in the humanities and legal disciplines.²⁸ The humanities professors at the colloquium were disappointed with the law professors, wondering why the law professors were not interested in “using law as that great tool of revolutionary power it had the potential to be.”²⁹ Alternatively, the law professors wondered how humanities professors thought of law in such reductive terms, as a “monolithic, hegemonic monster at the gates, rather than . . . boring, ornate, often funny, sometimes tragic, and more.”³⁰

Professor Peters’s comments highlighted the divisions and misgivings that each discipline had about the other, and about the future of the university in general: “[O]ne might understand the field of law and literature as the expression of more general anxieties about the nature and value of the organization of academic study into disciplines and about the function and meaning of the humanities and human sciences in the last quarter of the twentieth century.”³¹

Professor Peters outlines three distinct critical avenues employed in the law and literature movement, which she describes as morphing into

²⁶ E.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). Some additional central texts of the law and literature, or law and humanities movements include Robert Cover’s *Narrative, Violence, and the Law* and Robin West’s *Narrative, Authority, and Law*. ROBERT COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1992); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993). There are, of course, also scores of essays on the topic.

²⁷ See generally Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 *PMLA* 442 (2005).

²⁸ *Id.* at 442.

²⁹ *Id.* at 443.

³⁰ *Id.*

³¹ *Id.* at 444.

a still broader movement she calls, “law, culture, and the humanities.”³² These three approaches—humanistic, hermeneutic, and narrative—align with three distinct ways of considering the interdisciplinary crossover of law and the humanities.

A. Humanism

According to Peters, the humanist approach emphasizes a commitment to the “human” as an “ethical corrective to the scientific and technocratic visions of law that had dominated most of the twentieth century.”³³ Such an approach aims to inject a healthy dose of humanism into the field of legal study, reviving the repressed humanistic component in the law—the idea that law is not about “mechanistic rigor,” but a study of the “rich humanity” and humanistic concepts that are central to law, including “criminality, punishment, [and] justice.”³⁴ It seems important to add that this list could include questions about ethics, inquiries into human nature, and more.

In essence, the humanist approach is a bit like legal realism’s response to legal formalism, this time using literary narrative and its storytelling methods, along with metaphorical play, to create meaning. The humanist approach entails an inquiry into fundamental components of the human condition as told in narrative. This approach is the source of Richard Weisberg’s coining of the term “poethics,” where literature is used to fill what he perceived as an ethical void in overly formalistic legal education.³⁵ The humanist approach is also an approach akin to Garrett Epps’s study of *Smith*, to which I shall turn shortly.

There is much to support such humanist approaches, though it seems a bit unfair to the tradition of ethical commitment that is prominent among some major figures in American law. Is it really correct to suggest that the opinions of Justices William Brennan, William O. Douglas, and Thurgood Marshall lacked a profound ethical dimension? And what does this approach have to say about the idea, suggested by thinkers like Stanley Fish, Owen Fiss, and Ronald Dworkin, that the law is *always* telling a narrative, that it is *always* concerned with the ethical and humanistic dimensions of experience, and that it is neither dispassionate nor sterile in the face of competing human desires? As I

³² *Id.* at 451.

³³ *Id.* at 444.

³⁴ *Id.*

³⁵ WEISBERG, *supra* note 23, at 4–5.

will try to argue, even when the law *seems* to have pocketed its ethical compass, the sheer fact that it cannot avoid ethically significant issues reminds us that the humanistic can *never* be severed from the law. This, indeed, is one of the lessons of Dave Frohnmayer's actions in *Smith*.

B. Hermeneutics

In the most general sense, hermeneutics is concerned with interpretation. More precisely, hermeneutic theory focuses on the methodology by which truth and meaning are produced.³⁶ Early hermeneutic theory involved the exegesis of Biblical texts, an interpretive practice with obvious affinities to a broad spectrum of foundational texts.³⁷ Hence the attraction between hermeneutic theory in literature, theology, and constitutional interpretation, all of which address issues like original meaning, authorial intent, reader reception, and much more.

Literary hermeneutics is outlined most powerfully in the work of philosopher Hans-Georg Gadamer, who points out that all fields of inquiry are the product of a complex interaction of reader, text, and history, creating what Gadamer calls a “fusion of horizons.”³⁸ Gadamer tells us that all understanding involves seeing a text as a complex historical, epistemological, and even ontological entity.³⁹ Any quest for pristine foundationalist authority *mis*understands the dialectical, living nature of the text as something akin to an “event,” as a dynamic phenomenon that changes through time in relation to those who receive

³⁶ See David E. Linge, *Editor's Introduction* to HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* xi (David E. Linge ed. & trans., 1976). (“[Philosophical hermeneutics] seeks to throw light on the fundamental conditions . . . of understanding in all its modes, scientific and nonscientific alike . . .”).

³⁷ *Id.* at xii.

³⁸ HANS-GEORG GADAMER, *TRUTH AND METHOD* 299–306 (Joel Weinsheimer & Donald G. Marshall trans., Bloomsbury Academic 2d rev. ed. 2004) (1975). Gadamer describes an active relation between history and the present as “effective-history,” which includes the claim that historical understanding is a “fusion of horizons” that *effects* historical consciousness. *Id.* In his words:

There is no more an isolated horizon of the present . . . than there are historical horizons *Rather, understanding is always the fusion of these horizons supposedly existing by themselves.* . . . Every encounter with tradition that takes place within historical consciousness involves the experience of a tension between the text and the present. . . . In the process of understanding, a real fusing of horizons occurs

Id. at 306–07.

³⁹ *Id.* at 291.

it (or, read, interpret, or construe it).⁴⁰ As Peters puts it, “[t]hus, the ‘hermeneutic turn’ in law was at once an attack on foundationalist interpretation, with its reactionary consequences, and a reconstructive enterprise—an attempt to shore up the stability of law against its ruin.”⁴¹

It seems a bit extreme to argue that law was buttressing itself “against its ruin” by invoking hermeneutic models, but the approach was attractive in light of academic trends during the 1980s. Peters points out that hermeneutics provided a response to the relativistic ethics of postmodern and deconstructive practices then in vogue, which threatened principles of objectivity, procedural, and ethical certainty that are central to the law.⁴² To be a lawyer, according to this model, is to be someone who works to get things *right* once in a while, to be someone who can feel good at the end of the day, and feel *relatively* certain that her practice was ethically correct in some larger sense.⁴³ Postmodern critiques of power and power structures raised significant and important questions about this assumption by showing that latent systems of power and discursive organization are implicit in all modes of understanding, thus undermining the freedom and agency of the practicing lawyer, from the smallest one-person firm to the largest administrative conglomerate.

It is not terribly difficult to see how this model would apply in practical reality. Discursive forms (one might call them descriptive terms, or even just plain “words”) do more than describe the world: they classify, differentiate, and even create the objects in the world. The vast proliferation of new legal terms and theories in the field of intellectual property following the advent of digital technology is just one case in point. As Marshall Leaffer puts it in his *Understanding Copyright Law*, the 1976 Copyright Act, when enacted, was considered a model of thoughtful and progressive legal construction, yet was significantly underpowered in relation to the forces that the digital

⁴⁰ See generally *id.*

⁴¹ Peters, *supra* note 24, at 446.

⁴² *Id.* at 447.

⁴³ RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 318 (1979). Rorty argues for what might be called a “modest” and “conversational” notion of truth and ethical rightness, going so far as to point out that many of our ethical and epistemological problems are the result of positing a “sure” answer to inquiry. See *id.* Rorty characterizes hermeneutics in the following way: “Hermeneutics sees the relations between various discourses as those of strands in a possible conversation, a conversation which presupposes no disciplinary matrix which unites the speakers, but where the hope of agreement is never lost so long as the conversation lasts.” *Id.*

revolution began to release within a decade.⁴⁴ An even simpler example may indicate the relationship between discursive forms (descriptors) and the world: the idea of a “controlled substance.” How does, for example, a peyote button turn into, or even better, “morph” into, a legal object? Michel Foucault’s life work aimed to show how what we *say* is also what we *see*. His masterpiece, *Les Mots et Les Choses* (best translated as *Words and Things*, not *The Order of Things*, as is normally the case) explores how western conceptions of law and subjectivity shifted dramatically after the Renaissance.⁴⁵ The concept of religion is a case in point. The word “religion” not only describes a condition or object, but creates it as well, as is suggested in the Supreme Court’s decision in *United States v. Seeger* in 1965, which defined religious belief as “[a] sincere and meaningful belief which occupies” a place “in the life of its possessor.”⁴⁶ Justice Clark goes on to offer the following reflections:

Few would quarrel, we think, with the proposition that in no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgment and retribution. . . . There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss. . . . But we hasten to emphasize that while the “truth” of a belief is not open to question, there remains the significant question whether it is “truly held.” This is the threshold question of sincerity which must be resolved in every case.⁴⁷

C. Narrative

Peters describes the third prong of the literature and law movement as the “narrative” model, which she claims is “best-suited to join the legal vision of the truth of literature to the literary vision of the reality of law.”⁴⁸ Beginning in the late 1980s, and closely associated with feminist scholarship that attempted to recover the repressed voices of women, the narrative model also sought to extend those voices beyond

⁴⁴ See MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 9–11 (4th ed. 2005).

⁴⁵ See generally *Preface* to MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES viii, xv–xxiv (Vintage Books ed., Random House 1994) (1966).

⁴⁶ *United States v. Seeger*, 380 U.S. 163, 176 (1965).

⁴⁷ *Id.* at 174–75, 184.

⁴⁸ Peters, *supra* note 24, at 446.

the sometimes insular dimensions of literature and cultural studies departments.⁴⁹ Two features characterize this approach. First, the disclosure, through critical reading and listening, of the implicit master narratives of the law (the unstated ideological subtext, if you will).⁵⁰ This first step *identifies* the subterranean or unconscious drives behind the law's power.⁵¹ The second feature involves cultivating and listening to the stories of those left behind or subjugated to the law.⁵² This movement, alternately called "narrative jurisprudence" or "legal storytelling" claims both psychotherapeutic and political virtues: Narrative ameliorates the condition of the speaker by giving voice to repressed suffering; at the same time, the disclosure of such stories reminds the law of its political duty—the betterment of the human condition.⁵³ Robin West makes this point explicit in her 1993 work, *Narrative, Authority, and Law*.⁵⁴ She notes that we must ask ourselves whether "the laws we enact . . . serve our best understanding of our *true* human needs, our true human aspirations, or our true social and individual potential, as gleaned from the stories we tell about ourselves and each other."⁵⁵

In the end, Peters tells us, the essential components of the law and literature project, and by extension, all humanistic legal study, can be reduced to three goals: (1) ethical authenticity, (2) ontological certainty, and (3) narrative honesty.⁵⁶ While I am not certain of the possibility of ontological certainty in any field of human endeavor, ethical authenticity and narrative honesty seem within our reach. Indeed, as I have suggested before, they constitute the crux of the humanistic in the law, and illustrate the fact that humanistic inquiry *cannot* be severed from either the study or the practice of law. The reflective nature of humanistic inquiry is built into the legal field; it cannot be excised. And, today, the legal narrative movement captures this element of the humanistic more than any other, creating a larger constellation that might be called "law, culture, and the humanities."

⁴⁹ See *id.* at 446–47.

⁵⁰ *Id.* at 147.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ WEST, *supra* note 26, at 7.

⁵⁵ *Id.* (emphasis added).

⁵⁶ Peters, *supra* note 27, at 450.

IV

LEGAL NARRATIVE BY EXAMPLE: GARRETT EPPS *PEYOTE VS. THE STATE: RELIGIOUS FREEDOM ON TRIAL*

Above all, what is particularly significant in Epps' telling of the SMITH decision is its reminder that the law is a human institution. Law is built or constructed by human beings acting individually and collectively to meet society's needs. The law so constructed then determines the course of others' lives in the future.⁵⁷

A powerful example of legal storytelling and legal narrative as a point of intersection between law and the humanities can be found in Professor Garrett Epps's 2009 account of what is arguably the most famous case in Dave's legal career, *Unemployment Division v. Smith*. Epps's description of the events that led to and followed the decision is poignant, compassionate, and humane. It evokes a style of history writing—and this *is*, indeed, a case of U.S. history unfolding, not just a Supreme Court decision—associated with figures like Howard Zinn in *A People's History of the United States*,⁵⁸ as well as Peter Irons in *A People's History of the Supreme Court*.⁵⁹ But it also tells the story of the peyote cases from an intimate perspective, emphasizing the unlikely intersection of Al Smith and Dave Frohnmayer before the bench of the U.S. Supreme Court. Insofar as a practice (peyote use for sacramental purposes) collides with a principle (legal exemption from criminalized activity for religious reasons), we have the stuff of authentic populist drama. Epps's narrative goes still further: it weaves the complex fabrics of Oregon politics; the tragedy of the Frohnmayer family's struggle with Fanconi anemia; the personal struggles and renewal of Al Smith and Galen Black, the two principle litigants in the case; and the oddly changing opinions of the U.S. Supreme Court. Epps's study reads like a mystery novel, and there, indeed, *are* essential mysteries at the core of this case, some dramatic and some sacred—a point to which I will return later.

The facts of *Smith* are lore in Oregon and, indeed, throughout the world.⁶⁰ Al Smith was a recovering alcoholic and member of the

⁵⁷ Susan E. Grogan, *Peyote vs. the State: Religious Freedom on Trial*, 19 LAW & POL. BOOK REV. 578, 579 (2007) (book review).

⁵⁸ HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT* (2005).

⁵⁹ PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* (rev. ed. 2006).

⁶⁰ In an illustration of the law's cross-disciplinary interests, a survey of reviews of *Peyote vs. the State: Religious Freedom on Trial* turns up international sites and sources, like the U.K.-based Psychedelic Press, Thrillers Book Publishing, and more. See, e.g.,

Klamath tribe who had gone through repeated detribalizing and assimilating practices at the hands of U.S. government agencies.⁶¹ He was also a member of the Native American Church, a relatively loose confederation of Native denominations that made use of peyote in its sacraments.⁶² Smith worked at ADAPT⁶³ as a drug and alcohol counselor along with Galen Black (himself not a Native American), another recovering alcoholic turned counselor, whom Epps describes as “an American original, a spiritual seeker who is also a genuine rolling stone.”⁶⁴ In the fall of 1983 and 1984, both Black and Smith participated in a supervised spiritual ritual that included ingesting peyote.⁶⁵ Both were fired from their jobs as counselors, and both were denied unemployment benefits for “willful violation of the standards of behavior” stemming from their violation of an abstinence-only policy at ADAPT.⁶⁶

Many of the law review articles on *Smith* express a bit of wonder at the fact that the situation escalated at all, particularly to the point of overturning fifty-year-old Supreme Court precedent, *Sherbert v. Verner*.⁶⁷ Epps attributes at least part of this to the impressive stubbornness and integrity of Al Smith (certainly a heroic figure in the saga), combined with the just-concluded struggle of the Office of the Oregon Attorney General with Rajneeshpuram, a religious group that had established itself in eastern Oregon, and had engaged in various activities aimed at ensuring its semi-autonomous status there—activities that ranged from the problematic to the illegal, including poisoning and germ warfare.⁶⁸ By the time this battle had ended, Rajneeshpuram had been disbanded, many of its leaders jailed, and some sense of order restored to the area surrounding Antelope, Oregon.⁶⁹

PSYPRESSUK, *Peyote vs. the State* by Garrett Epps, PSYCHEDELIC PRESS UK (Feb. 12, 2013), <http://psypressuk.com/2013/02/12/literary-review-peyote-vs-the-state-by-garrett-epps/>; *Peyote vs. the State: Religious Freedom on Trial*, THRILLERS BOOKS, <http://www.thrillersbooks.net/book/Peyote-vs-The-State/9780806140261/> (last visited Apr. 20, 2016).

⁶¹ EPPS, *supra* note 1, at 7–16.

⁶² *Id.* at 50, 57–59.

⁶³ *Id.* at 86. ADAPT refers to the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment. *Id.* at 84. It is both an in- and out-patient facility, based in Roseburg, Oregon. *Id.* at 85.

⁶⁴ *Id.* at 88.

⁶⁵ *Id.* at 91, 100.

⁶⁶ *Id.* at 96–100.

⁶⁷ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁶⁸ EPPS, *supra* note 1, at 79–81.

⁶⁹ *Id.* at 79.

This brings me back to the point I deferred earlier. Religious belief and practice are often a response to the dense materiality of the world—a materiality that can be rich, fertile, and lovely, but which can also be impoverishing, harsh, and even unthinkingly cruel. In *both* of the above cases—*Smith* and the attorney general opinion issued by Dave regarding Rajneeshpuram—the conflict between spiritual and secular life hastened into focus. Most importantly, no *strictly* procedural mechanism for resolving the conflict can be imagined. To think of law and religion is to think of the essence of human belief and practice. It is to think of the humanities—not as an addendum, but as central to the law.

V

DAVE FROHNMAYER, *SMITH*, AND HUMANISTIC INQUIRY

One of the most heart rending features of the *Smith* story is, of course, not about the case at all, but about the struggle of the Frohnmayer family with Fanconi anemia, a condition that would ultimately take the lives of two of Dave and Lynn’s daughters.⁷⁰ It is hard to even begin to imagine the nature of such loss, nor the strength required to fight against it so long and with such unmatched dignity and courage.

In addition, Dave was a political and academic force in Oregon: an attorney general, law school professor, dean, and university president.⁷¹ Each one of those jobs required immensely astute analytic and procedural skills, as well as highly developed political and negotiating talents. What one might *not* associate with such a vita would be a (stated or unstated) commitment, and “acting out of” the legacy of the humanities. What I have tried to express in my discussion of *Smith*, and of the situation of the humanities in legal study, is that law is *always* engaged with the humanities. Moreover, law is among the *most* closely aligned fields of study with the humanities, to the point that it is a *part* of the humanities. As much as literature? As much as dance? As much as philosophy? In many ways, yes. And, ironically, *Smith* points in this direction.

To illustrate my point—I will not try to prove it, but will merely offer it for heuristic purposes—I point to the remarks made by Dave at

⁷⁰ *Id.* at 30–31, 225–26.

⁷¹ Garrett Epps, *The Man Who Wrestled Death to a Draw*, ATLANTIC (Mar. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/03/the-man-who-wrestled-death-to-a-drw/387760/>.

the *California Law Review*'s banquet for "Alumnus of the Year" in 2011. In April of that year, the recently retired University of Oregon president was asked to speak about some of the lessons learned from his days as the *California Law Review*'s chief notes and comments editor during the 1966–67 academic year.⁷² Such events are often occasions for nostalgic reverie, but President Frohnmayer short-circuited that avenue from the start, when he pointed out that basking in "past glories" was a fool's charge:

[O]ne goes from "who's who" to "who's he?" very rapidly. Last summer, Lynn was a footstep behind me walking down the streets of Portland when we passed a couple, one of whom turned around and Lynn heard him say to his companion, "That used to be Dave Frohnmayer, I think."⁷³

First rule of humanistic inquiry? Irony. Things are always both more and less than they seem.

Dave went on to address a number of themes in that talk, all of which, ironically enough, could have doubled as a list of core concerns for a professor of the humanities. He started with a discussion of the social tumult and shifting nature of the law in the 1960s.⁷⁴ Historically an instrument of the status quo, the law became, he tells us, "an overtly creative instrument."⁷⁵ In light of the "incessant, ominous, and oppressive" reality of the Vietnam War and the draft, along with the full flowering of the civil rights movement, the law had by necessity, by historical circumstance, and perhaps by sheer momentum, become a powerful lever in forging a different world.⁷⁶ But Dave elaborated, commenting about creative forces and energies that would change the face of American law *and* culture, and not more than a few human lives, for this was the new culture of self-expression that had come to mark America.⁷⁷ And, one must add, Berkeley was certainly a locus for such expressive transformation and experimentation, which signaled the permanent closure to the "silent fifties." Dave put it this way (and with more than a little whimsy) when it came to drugs and their legal and extra-legal use in American culture:

⁷² See generally Dave Frohnmayer, *Remembrance and Renewal*, 3 CALIF. L. REV. CIR. 136 (2012) (extension of his remarks).

⁷³ *Id.* at 136–37.

⁷⁴ *Id.* at 137–38.

⁷⁵ *Id.* at 137.

⁷⁶ *Id.* at 137–38.

⁷⁷ *Id.* at 138.

The culture of self expression, whether it was through the understanding that drugs emerged from something other than pharmacies, to the invention of the birth control pill, which remarkably changed relationships between the genders—all these things were part of the cultural milieu of the times. The celebration of liberation was new, not fully examined, and in continuous evolution.⁷⁸

A number of his observations bear additional commentary here, in large part because they point to the ineluctable intersection of humanistic and legal inquiry. First, we might note the tongue-in-cheek reference to the emergence of drugs acquired from sources other than the corner drug stores immortalized in Norman Rockwell’s visions of early twentieth-century America. Second, Dave made reference to the liberating cultural practices that took root in late-fifties beatnik culture and openly flourished during the sixties—part of this was the result of the introduction of a medico-technical product, the birth control pill.⁷⁹

Most importantly, Dave invoked a central tenet of humanistic inquiry when he suggested, albeit in passing, the centrality of the “examined life” that we owe to Plato.⁸⁰ The celebration of liberation that he cited was indeed new, evolving, and not yet examined or fully understood.

The new world of self-exploration that Dave recalled was not without its cultural opponents. Within days of his arrival as part of the 1964 law school class at Berkeley, the university administration “banned the use of political tables” at an intersection abutting the main campus.⁸¹ Politically charged speech, it seemed, had its limits—an

⁷⁸ *Id.*

⁷⁹ The degree to which sixties “liberatory culture” was in fact liberating was the subject of a number of studies by Frankfurt School philosophy Herbert Marcuse, who fled Nazi persecution to settle at the University of San Diego. Bararella Fokos, *The Bourgeois Marxist*, SAN DIEGO READER (Aug. 23, 2007), <http://www.sandiegoreader.com/news/2007/aug/23/bourgeois-marxist/#>. Marcuse’s *One-Dimensional Man* and *Eros and Civilization* ask whether the freedoms of sixties’ consumer and hedonistic culture were in fact as “free” as we have come to believe. HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (1955); HERBERT MARCUSE, *ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964); *see also* CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979) (extending Marcuse’s skeptical analysis into the period of diminishing expectations that followed the nearly thirty-year post–World War II settlement and period of economic growth).

⁸⁰ Socrates’s famous maxim states, in double-negative form, that “the unexamined life is not worth living.” Sitze et al., *supra* note 6, at 192 (quoting PLATO, *THE APOLOGY OF SOCRATES* 38a (H.N. Fowler trans., 1953)). One might call this a form of obiter dicta, but it seems more than a mere aside; it feels like a tenet for the good life.

⁸¹ Frohnmayer, *supra* note 72, at 138.

assertion of administrative authority that would mark Attorney General Frohnmayer's most famous and contentious case some twenty-five years later, and raised the kind of difficult sociopolitical questions that are absolutely central to the law. His words are eloquent and prescient:

And before our eyes emerged the galvanizing and difficult events of the Free Speech Movement. It was important in the lives of all of us because it not only caused us to question, to wonder, to explore the extent to which the First Amendment applies to student life and public speaking, but also to reflect on the emergence of the applicability of the due process clause to public universities and for that matter to a whole reach of other public institutions. And finally we were forced by events to reflect on the use, utility, and propriety of civil disobedience as a technique for achieving social change.⁸²

Free speech, civil disobedience, and social change: What could be more central to the humanist project? All of these concerns, which harken to the work of figures like Emerson and Thoreau, are not mere accompaniments to inquiry and improvement of the human condition; they are not occasional addenda to the study and practice of law; they are essential and inalienable components of both kinds of practice, whether we care to admit it or not; and, finally, they call out for individual commitment in the legal world that evokes, said Dave, a "powerful subtext: the expectation of personal, social, and political involvement in the face of things that needed to be changed."⁸³

This is heady stuff; it was a heady time. As Garrett Epps pointed out in his study of *Smith*, however, the quotidian experience of a practicing lawyer, or a practicing attorney general, is less than glamorous: "Much of the work of any state attorney general's office involves reading and responding to meritless appeals It is tedious, stultifying work."⁸⁴ The study of law involves attention to minutiae, to seemingly insignificant details, and attention to historical precedent at a level that can exhaust even the most joyous obsessive. In his speech for the *California Law Review*, Dave told his audience that he and his colleagues were terrified at the thought of even one citation error, often jesting that they were working for the "*Cali Flaw Review*."⁸⁵

There is more to this point than mere jest, however. Cite checking may not be glamorous, but it shows respect for process and *history*—the latter, again, is a central component of humanist study. Dave

⁸² *Id.*

⁸³ *Id.*

⁸⁴ EPPS, *supra* note 1, at 142.

⁸⁵ Frohnmayer, *supra* note 72, at 140.

suggested that “cite checking technique is, or can be, a creative act, not simply a matter of validating forms of footnote expression.”⁸⁶ How is such a statement even conceivable, one wonders. The answer is not too hard when we reflect on what a citation does: cite checking is akin to historical inquiry, albeit in a distinctly legal form. It is a form of respect for *truth*, in a certain format, to be sure. But in an era when truth is often on the run, it is a point worth remembering. It also shows a concern with *authority*, a term whose potentially ironic or multivalent meaning might be played with once again. What if our notion of “authority” is not merely legal but internal, communitarian, and even spiritual? Is it not a good idea to understand that our claims to authority *matter*? What if legal inquiry is understood as a collective effort at cultural *understanding*, and of the generation of *meaning*?

I know I am pushing the envelope a bit here (Cite checking as a noble and humanistic form of inquiry?), but I would like to suggest that the research drudgery of the law may be less melancholy and forlorn a practice than some may think, as Dave pointed out in his address, because the presumed division between the (lively) world of the humanities and the (somber) world of law is not so absolute as it may seem. Professor White has argued for forty years that legal education should include liberal or humanistic education, and that lawyers have much to learn from literature.⁸⁷ In his view, lawyers should learn from their own experience, and should “learn from one’s culture and contribute to it . . . accepting ambiguity and uncertainty as the condition of life.”⁸⁸ In *Law and the Humanities: An Introduction*, the editors tell us that Professor White has recognized fundamental *artistry*—not merely formal training—in the world of law:

White calls us to a vision of the lawyer as artist. It is a vision of art in which beauty and sublimity of thought and expression are not ends in themselves, but rather one of the best defenses we have against what White . . . calls the “empire of force.” We need to make sure that our speech is alive—that we mean what we say, say what we mean, and have something to say—so that our language, especially our legal language, does not become an empty instrument for the unrestrained exercise of power.⁸⁹

⁸⁶ *Id.* at 139.

⁸⁷ See generally WHITE, *supra* note 20.

⁸⁸ *Id.* at xv.

⁸⁹ Austin Sarat et al., *Introduction: On the Origins and Prospects of the Humanistic Study of Law*, in LAW AND THE HUMANITIES: AN INTRODUCTION 1, 4–5 (Austin Sarat et al. eds., 2010) (citing JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006)).

To underscore this point, the editors draw an analogy between law and religion that, again, has more than passing irony in the context of then Attorney General Frohnmayer's representation in *Smith*: "[A] reverence for law can be a form of faith, in the fullest sense," they tell us.⁹⁰ "Indeed, in the case of the United States in particular, the religious imaginary is more than vestigial; it is arguably at the core of the American cultural experience of the idea of the rule of law. . . . [It] has the trappings of a civic religion."⁹¹ This is not to suggest that law is merely an article of faith, but that its centrality to human experience is so fundamental as to possess an aura that approaches the sacred. While we can point to the statutes and decisions that make up the recorded body of the law, just as we can point to religious texts that tell the narrative of human experience in the face of the existentially uncertain world, we cannot point at law, nor the humanities, nor religion and casually say, "There it is." The fabric of law, like the fabrics of narrative and religious belief, are threaded too tightly to stand alone. Again, from *Law and the Humanities*:

[L]ife under the rule of law is more than an implied social contract; it is a structure of feeling, a way of being in the world, which reflects a rich, complex, and deeply embedded set of traditions and cultural practices, a way of being that law and humanities scholars seek to understand.⁹²

CONCLUDING THOUGHTS: POWER, FAITH, AND THE LAW

The intersections I have attempted to draw here come full circle in the last section of Dave's address on behalf of the *California Law Review*. As he brought his address to a close, he spoke of the disempowered, and of those unable to speak, before the oft-intimidating edifice of the law.⁹³ He returned again and again to questions of voice (what humanist scholars sometimes rather clumsily call "narrative efficacy") and power. Lawyers, he reminded us, are expected to use their talents in the civic arena on behalf of those who do not possess such skills.⁹⁴ Law, in this context, is an act of *translation*; it is an activity that crosses the boundaries of social, political, economic, and legal groupings; it is an act that makes the opaque decipherable; it is humanistic inquiry *and* practice combined.

⁹⁰ *Id.* at 16.

⁹¹ *Id.* at 16–17.

⁹² *Id.* at 17.

⁹³ Frohnmayer, *supra* note 72, at 142.

⁹⁴ *Id.*

“[W]e are supposed,” he said, “to understand what it is to represent someone who does not have a tongue, a voice, a pen (or a word processor). We speak for those who are powerless and for those, even if armed, who cannot effectively be heard.”⁹⁵

We have returned to the issues of narrative, voice, history, and the collective efforts at an understanding of the good life—or, at the very least, a better life. In his closing remarks, Dave spoke about the obligation that all lawyers have for service.⁹⁶ Just after finishing law school, he was appointed as pro bono counsel in a successful habeas corpus action on behalf of Guadalupe Hernandez, then imprisoned at San Quentin.⁹⁷ For the next eighteen months he represented a number of “otherwise powerless clients” and made a difference in their lives.⁹⁸ Dave, thus, returned to the idea of law as a “creative instrument” that can make a difference.

Powerlessness here invokes an array of issues: a lack of access, a lack of resources, and a lack of voice. Again, we see law as an act of humanistic intervention and translation. Dave ended with these lovely remarks. The law, and the lawyers who practice, should endeavor to

[m]ake things better; do not just follow the lazier or the faddish or the convenient. Second, to create a desire to seek and build communities of spirit, not just communities of interest. And third, to be builders with these tools: to embrace your challenges, unafraid of innovation, and eager to create anew.⁹⁹

This might well be a list of the essential features of humanistic inquiry: be alert to the seductiveness of fads by maintaining a thoughtful, critical eye; avoid the seductions of power that might be an element of participation in particular interests; innovate and create. Most importantly, for my purposes, Dave suggested that we build communities of *spirit*, the notion that there is more to the law than mere professional competence. Coming from the man that argued before the Supreme Court in *Unemployment Division v. Smith*, the idea that he would invoke a community of spirit shows once again the irony that is inherent in the law. Cultivation of the human spirit seems to trump all, as Dave reminded us. He reminded us, as well, that law is humanistic through and through—as was he.

⁹⁵ *Id.*

⁹⁶ *Id.* at 143–44.

⁹⁷ *Id.* at 143.

⁹⁸ *Id.* at 143–44.

⁹⁹ *Id.* at 144.

