The Cultural Milieu of Law

Michael L. Richmond*
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Abstract

More than any other two disciplines, law and literature depend for their very existence on the word.
Although senior faculty will ultimately review your progress as an academician, they have no rational stake in your failure. These individuals have invested years in teaching, scholarship, and service and once were junior faculty themselves. They received assistance in achieving their goals, and it is time for them to return that favor.19

My favorite picture in our law school’s catalog is a photograph of the faculty football team in uniform. The faculty is indeed a team, and each of us contributes to its success or failure. Despite this overriding mutuality of purpose, you must recognize that institutional values can differ from your goals. This is particularly likely to be a problem for anyone straying too far from the “appropriate” balance between teaching, scholarship, and service. Straying generally involves using teaching or service as an excuse for minimizing the time spent on scholarship. If you fall into this category, determine why that is the case before you fall victim to its consequences.20

C. Go Home While You Still Have One

Read on only if you are as bad a workaholic as I am. This is the do as I say, not as I do section.

At your initial interview you said that practice was interfering with your family life, and that the pressure of being in the office twelve hours a day, six or seven days a week was not worth the lofty salary you received. Why, then, do I find you at the law school working those same hours? Break the “office as home” habit now and buy a home computer.21 Better yet, find a hobby that suits your personality and has nothing whatsoever to do with the law. I hear tennis is in vogue, and I may try it someday, but right now I have to clarify a few more insights on the Super Mario Brothers screen.

competitors?


20. I cannot emphasize too strongly Professor Bye’s comments: “[S]uch a decision casts a huge burden on the decision. The burden is to face the decision and make sure that it is the product of reason and not the result of slothful avoidance of conscious decisionmaking.” Bye, Legal Scholarship, Legal Realism and the Law Teacher’s Intellectual Schizophrenia, 13 Nova L. Rev. 9 (1988).

21. Once I get my laptop, I’ll even be able to break the habit of driver.

Richmond: The Cultural Milieu of Law

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“[M]odern literature during the years prior to and including the Second World War reveals a strongly self-critical interest in verbal falsification.”22

“Words, words, words! I’m so sick of words!”23

“But my words like silent raindrops fell,
And echoed in the well of silence.”24

More than any other two disciplines, law and literature depend for their very existence on the word.25 Most of those involved in legal education acknowledge, whether tacitly or otherwise, the close relationship between law and literature. They realize also the inevitable intertwining of law and history. The development of common and statutory laws has not existed in a vacuum, but rather has symptomatized the overall historical and cultural events in force at the time courts decide cases.26 Legal academics confidently assume that those involved in the study and practice of the law have a common heritage of cultural experience

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5. The history of institutions is no mean aid to the understanding of their nature. Especially is it useful with regard to the anomalies and lack of symmetry in an actual system which renders its substance hard to classify and difficult to remember. It helps to distinguish those parts of the Law which correspond to modern ideas from those which are survivals of an earlier age.

which can enrich and clarify legal analysis. For the intra-collegial discussions of faculty members, this assumption has at best waning vitality; for the interactions of faculty with students, this assumption is erroneous. To the contrary, today's law students — and as a result, new members of the profession — have distressingly weak backgrounds in literature and history. This paper proposes that law professors to some degree have contributed to the problem by ignoring literature and history in their own research. It urges that they pay greater attention both in their research and in their teaching to the cultural milieu in which the law must operate.

We can best recognize the underlying reason for the lack in law students of cultural awareness which spans literature, the arts, history, and even government by examining the deterioration in educational approaches to literature. Between Wigmore's list of novels with which lawyers should be conversant and that of Weisberg lies a cavern of complacent years, a time in which we either took for granted or rejected as irrelevant the role of literature in the world of law. Today, however, we have moved sadly beyond the world of "Why Johnny Can't Read" to a new and even more troubling world of "Why

6. Professor Anthony Chase has argued, not without reason, that lawyers should properly glean lessons from the "popular culture" represented by film, television, and mass-market novels. See Chase, Toward a Legal Theory of Popular Culture, 1986 Wis. L. Rev. 527; Chase, Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys, 1986 A.B.F. Res. J. 281. The study of materials reflecting our contemporary culture does not suggest the lack of need to return to more enduring works in the humanities. By the same token, the emphasis in this article on study of topics in the traditional humanities does not suggest a rejection of study of "popular culture." Rather, the two complement each other. Today's popular materials may well become tomorrow's great literature. Dickens, after all, wrote for the masses as did Shakespeare.


10. R. Flesch, WHY JOHNNY CAN'T READ — AND WHAT YOU CAN DO ABOUT IT (1955). Flesch published later editions in 1966 and 1986. The book spawned a host of imitations and lampoons, not the least of which was a 1981 Frank Zappa song enti-

1988]

M. Richmond

Doesn't Johnny Give a Damn About Reading?"

Twenty-five years ago, professors of law could have assumed their students had read a sampling of basic novels. Crime and Punishment, Bleak House, Les Misérables and a host of others all formed the fundamental building blocks of survey courses in literature at the college level, and law students almost certainly had the exposure to these survey courses. In such an era, the profession took for granted the basic educational underpinnings of its members, believing with more than a small degree of justification that those who had advanced in their education to the post-baccalaureate level would share a common background of certain basic knowledge.

The movement toward academic freedom begun in colleges in the late 1960's spread rapidly downward to high schools and, fueled by an impetus to abandon liberal studies in favor of more "relevant" courses, all but destroyed the concept of a broadly-based educational experience. A curriculum earlier centered around a planned structure of

[https://nsuworks.nova.edu/nlr/vol13/iss1/9]
which can enrich and clarify legal analysis. For the intra-collegial discussions of faculty members, this assumption has at best waning vitality; for the interactions of faculty with students, this assumption is erroneous. To the contrary, today’s law students — and as a result, new members of the profession — have distressingly weak backgrounds in literature and history. This paper proposes that law professors to some degree have contributed to the problem by ignoring literature and history in their own research. It urges that they pay greater attention both in their research and in their teaching to the cultural milieu in which the law must operate.

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8. Wigmore, A List of One Hundred Legal Novels, 17 Ill. L. Rev. 26 (1922).


11. F. Dostoyevsky, Crime and Punishment (1866). Ironically, Wigmore did not include this book in his list of 100 legal novels.

12. C. Dickens, Bleak House (1853).


14. [If] undesirable result [of emphasizing teaching in science and mathematics] was a decline in our concern for the general education of our students. Balance in the curriculum was not encouraged, and we do not have it today. It is not surprising that most students, and a good many teachers, are badly confused about just what is relevant in education. Relevance is not simply a matter of responding to the pressing national problems of the moment, and sure enough relevance is more than the need to cater to each transient whim of the students.

Kimball, A Case for Teaching the Humanities in the High Schools, Nat’l Ass’n Sec. Sch. Principals Bull., Apr. 1976, at 31, 34. Teachers may, however, be tempted to cater to students’ fleeting and superficial interest because the unappealing alternatives range “from massive boredom to active hostility and disruption.” Kitchener, A Rage for Disorder, 24 The USE of ENGLISH 103, 111 (1973).

Professor Kimball further notes that the problem created by overemphasizing mathematics and sciences worsened due to “our traditional preoccupation with the utilitarian, the materialistic, the practical.” Kimball at 35. See also and generally, A. Bloom, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS (1987); E. Hirsch, CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987). Professor Richard Huber, president of the Association of American Law Schools, also has noted this problem.
required courses had aimed at producing a graduate with a "well-rounded" education. Curricular upheaval rejected this approach in favor of one permitting the student free choice to elect courses from the panoply of those offered by the institution. To left to their own devices, students elected those courses offering either ready insight into the social condition or those courses which would assist them in obtaining employment upon graduation. Still surviving the conflagration, but badly scarred, education in the humanities now took a distant second

[Critics see higher education as committed to relevance in the worst sense, that of learning for the present. The traditional liberal arts are substantially discarded in the interest of vocationalism. The result is a student body that lacks the type of general cultural background that makes civic communication possible.

Huber, President's Message: Values, Commitment and our Students, AALS Newsfl., June 1988 at 1, 2.

Law school student bodies suffer greatly by the lower standards and curtailed curricula in undergraduate programs. Indeed, undergraduate programs often ignore the very skills essential to pursuing a legal education and to entering the legal profession. "[Students are seldom called on to write anything longer than a phrase or sentence and] almost never have an opportunity to speak at length." Hoekstra, History is A Ass- A Idiot: A Meditation, 15 ENG. ENCR. 82 (1983).

15. The lack of interdisciplinary training in the humanities does not affect merely law schools, but all disciplines in the humanities which must draw on each other. Consider this anecdote from a 1974 article written by a professor of English. I had a student in my graduate course at NYU this past semester who became interested in Christina Rossetti's poetry and read in it, or thought she found in it, some connections to the poetry of Sylvia Plath. Unfortunately, with a good deal of passionate intensity and an apparently genuine interest, this student had not had an undergraduate training that had given her either the critical tools or the broad historical context within which to draw a connection between what for her were apparently two fragments studied in an intellectual vacuum. We had failed to provide her with what she needed most—a sense of totality.

Schaefer, Hopes and Fears and Dopes and Liars, 42 ASSN. DEPT. ENG. BULL. 21, 22 (1974).


16. Legal education, too, examined its required courses in two studies sponsored by the Council on Legal Education for Professional Responsibility: E. Gee & D. Jackson, Following the Leader: the Unexamined Consensus in Law School Curriculum (1975) and D. Jackson & E. Gee, Bread and Butter: Electives in American Legal Education (1975). The latter study concluded that law "students tend to choose those courses that are included on bar examinations in any event." Id. at 73. Thus, the experience among law students revealed that pragmatic considerations prevailed over aesthetic or philosophic: "The 'bread and butter' courses are first in the 'shopping basket.'" Id.

place to the more "relevant" sciences and more theoretical branches of social sciences. 17

Isolated in their professional schools, law professors remained blissfully ignorant of trends in other education. The profession as a whole, concerned with a legal system straining to accommodate itself to societal needs which expanded on a daily basis, paid even less attention to the curricular upheaval from grade school through college. Accordingly, the fundamental premise underlying Wigmore's list of novels—that lawyers should have read many if not most of the books—no longer bore even the slightest similarity to reality. Speaking of escape through the sewers of Paris elicited no appreciable reaction from young lawyers of the late 1970's, although their counterparts who entered the profession only ten years earlier would immediately have pictured Jean Valjean fleeing in panic through the rats and offal.

Legal scholars ignored the humanities in their writings, primarily as they saw little relevance in the humanities to their view of the function of the law. As Professor Clark Byse notes, the era of legal realism pressed a time when scholars treated the law as an instrument of

17. An allied explanation for the decline in serious study of the humanities at the high school level lies in the changing student body. One commentator lists three factors which have combined to produce a student population less capable of coping with more significant cultural issues: the lack of jobs for people below the age of sixteen, the higher minimum age at which students may terminate their basic educational careers imposed by state legislatures, and the effectiveness of the campaign to prevent students from dropping out. Taken together, these factors have resulted in a body of unmotivated, disinterested students who sit in school merely to wait out the time until they can try to join the job force. In an effort to reach these students, high schools have had to change their curricula and as a result many advanced courses in the humanities have gone by the wayside. Dorrell, The Nineteenth Century Novel in the 1970 Secondary School (From Pip to Portnoy), 56 BULL. KAN. ASSN. TEACHERS OF ENG. 1, 2-3 (1970) (available as ERIC Document No. 059217).

Yet another possible cause for current disinterest among students toward education is that the "[y]oung people are conscious, as no generation before them has had to be, that they may literally have no future." Kitzhaber, supra note 14, at 103.

18. "For it is certain that the lawyer must, like other men, for his pastime and mental ease, abandon himself now and then to the thrill of fiction." Wigmore, supra note 8, at 27.


20. Gray cautions that the lessons of history may detract from the practical end of the law. "But the historical method has its disadvantages; it begets literary rather than practical study; it hinders the grasping of the Law of the present time as a whole." Gray, supra note 3, at 131.
required courses had aimed at producing a graduate with a "well-rounded" education. Curricular upheaval rejected this approach in favor of one permitting the student free choice to elect courses from the panoply of those offered by the institution. Left to their own devices, students elected those courses offering either ready insight into the social condition or those courses which would assist them in obtaining employment upon graduation. Still surviving the conflagration, but badly scarred, education in the humanities now took a distant second

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social change. By focusing on methodology of judging rather than rule of law, the realists created an atmosphere in which the law became a mere tool, subject to manipulation. As a result, rather than accepting the law as a reflection of the mores of the society, the legal reformers of the 1970's attempted to use the law as a tool to fashion society into an image more to their liking. In so doing, they necessarily relegated historical considerations to the most minor of roles. It mattered little what forces drove the law to its present state when one accepted that in order to serve as an instrument of change the law itself could not remain static. Existing law had to change to achieve a specific result, and the resulting goal-orientation did not require any consideration of how the law arrived at its present state.

The orientation of the reformers carried through to the present day in the writings of those espousing the Critical Legal Studies movement and in the writings of the legal feminists, among others. For the most part, legal scholarship had rejected that view of the law which required use of a historical, philosophical, or literary approach. As the law existed to serve political goals, its development in relation to its surrounding society was irrelevant. Only the manner in which the law could change to achieve the desirable effect in society mattered.

Accordingly, contemporary legal writing tended to adopt the nihilistic point of view of the reformers — a view which discarded the social forces which shaped the law in favor of one which envisioned the law as the shaper of society. The adoption of the "law-qua-instrumentality" approach also meant the rejection of more traditional methods which stressed the effect of the various evolutionary forces which had shaped the law. As these forces for the most part formed the focus of studies


24. Byrne suggests that the legal scholar should adopt a specific methodology for writing. This selection "will have a major effect on the professional life of the individual concerned" and "the teacher's individual interests, background and values rather than the current zeitgeist should govern the decision." Byrne, supra note 21, at 21. However, selection of a particular approach need not carry through all of a professor's writings. Indeed, wedding oneself to a school of writing necessarily means rejection of other attractive alternatives and can lead one to ignore the impact of significant developments occurring outside of the limited boundaries of the circle chosen. Eclecticism — a willingness to expand one's choices beyond a single approach — should govern the academic who seeks to study the total course of the law. Dean Gail Richmond speaks of her proficiency at "Super Mario Brothers." However, she has gained this only at the expense of ignoring the equally enjoyable "Legend of Zelda." Richmond, Advice to the Uninformed, 13 Nova L. Rev. 79 (1988).

25. One can point to any of a number of outstanding works noting the distressing state into which legal writing had fallen. One text urging lucid prose in drafting legal documents is Reed Dickerson's landmark work, THE FUNDAMENTALS OF LEGAL DRAFTING (1965), prepared under the auspices of the American Bar Foundation. The foreword to Dickerson's work, by the Foundation's administrator, E. Blythe Stassner, noted that: "Legal drafting is like the weather: often talked about, but seldom reformed. Many lawyers seem only dimly aware that the profession is falling far short of its potential." Id. at xi. More recently, one can point to David Mellinkoff's highly regarded LEGAL WRITING: SENSE AND NONSENSE (1982) and Richard Wydick's practical guide, PLAIN ENGLISH FOR LAWYERS (2d ed., 1985), originally published at 66 Calif. L. Rev. 727 (1978).

This paper does not suggest that students who have taken the trouble to elect courses in the humanities at the college level have as a result gained greater writing skills. As long ago as 1975, over one quarter of the colleges in the United States had abandoned courses in composition as a requirement in their English curriculum. ["Most college teachers don't enjoy teaching writing, though most of us at the college level think it's too bad that writing isn't being taught more widely in the high school, since students are coming to college not able to write as well as they should." Gerber, Dialogue, 47 Ass'n Depts. Eng. Bull. 21, 23 (1975).]

Students really do not know how to write when they enter college. Undergraduate schools which abandoned the English composition requirement for their freshmen made a dangerous mistake. ["Freshman English!" was supposed to teach [students entering college] to think critically about what they read, to write intelligently, to follow an argument, develop an exposition, to have something important to say.] Douglas, Whatever Happened to Freshman English?, 37 Edu. F. 271, 274 (1973) (emphasis added).
in the humanities, legal scholarship tended to ignore them. The paper studying the history or evolution of the law became increasingly rare; the paper comparing the law and the humanities gave way to the paper comparing the law and the utilitarian social sciences.

Some judges and professors saw the problems created by the lack of literary knowledge, but most interpreted them instead as a decrease in the ability of law students and lawyers to write. Poor writing, however, merely symptomatized the underlying lack of exposure to good literature. One can readily teach a child the basic positions of ballet, but the child will learn the grace and beauty of dance only through years of observing the ballet and dedicated applied practice. The lack of basic skills in grammar and spelling exhibited by law students

opponents occurring outside of the limited boundaries of the circle chosen. Eclecticism — a willingness to expand one's choices beyond a single approach — should govern the academic who seeks to study the total course of the law. Dean Gall Richmond speaks of her proficiency at "Super Mario Brothers." However, she has gained this only at the expense of ignoring the equally enjoyable "Legend of Zelda." Richmond, Advice to the Untrained, 13 Nova L. Rev. 79 (1988).

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masked the fact they had read so very little. 86

Even so, a few isolated cases sprang up to dot the landscape of this wasteland of hollow men. 87 James Boyd White published his visionary and, by contemporaries, vastly underappreciated *The Legal Imagination*, calling it "a study of what lawyers and judges do with words." 88 White called on his readers to view lawyers not as social scientists, but as literary people, as writers, as artists. 89 White realized the need for lawyers to reidentify themselves with the esthetic. Perhaps because it came in 1973, his message fell on ears deadened by the clamor of the "relevant." In the decade from 1965 through 1974, fewer than ten articles and monographs appeared dealing generally with law and literature (as opposed to an additional handful of studies of specific authors). 90 From 1975 through 1979, however, an awareness seemed to come about in professional publications that lawyers needed to pay more attention to things literary. Sparked perhaps by a renewed interest in the works of Melville (six articles appeared during this five year period alone), 91 fourteen additional articles or monographs dealing generally with law and literature found their way into print. 92 Since 1980, over fifty articles and monographs have appeared. 93

The resurgence of interest in the intertwining of law and literature is chronicled elsewhere in this volume. 94 Professor Weisberg refers to the current period as the "adolescent period" of this field of interdisci-

26. Of course, complaints about student writing in law schools did not begin in the 1960's. Prosser had groused about the weak writing skills of his students over twenty years earlier. *Prosser, English As She Is Wrote*, 7 J. LEGAL EDUC. 155 (1954), reprinted from 28 ENGL. J. 38 (1939). Bear in mind, however, that Prosser's comments came after reading examination papers written by law students admitted pursuant to an open admissions policy in an era when law schools did not require undergraduate degrees as prerequisites to admission. *Id. at 161.*

27. With all due apologies to Thomas Stearns Eliot.


29. "I want you to begin this course, then, by trying to imagine as fully as possible how it might be said that law is not a science — at least not the 'social science' some would call it — but an art. And this course is directed to you as an artist." *Id.* at xxxiv-v.


31. *Id.* at 434.

32. *Id.*

33. *This data comes from a search of the data base available on the "Legaltrac" computer system.*


35. *Id. at 119.*


39. *Id.* at 49-51.

40. *Cf. Jarvis, Why Law Professors Should Not Be Hessian-Trainers, 13 NOVA L. REV. 69 (1988)(author proposes that law students should receive only true academic training at law school and training in the trade of being a lawyer — Hessian training — after law school, from experienced lawyers).*

41. Sir Walter Scott stated: "A lawyer without history or literature is a mechanic, a mere mason; if he possesses some knowledge of these, he may venture to call himself an architect." W. Scott, GUY MANNERING (1815), cited in G. WILLIAMS, *LEARNING THE LAW* 226 (11th ed. 1982).*
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39. Id. at 49-51.
40. Cf. Jarvis, Why Law Professors Should Not Be Hessian-Trainers, 13 NOVA L. REV. 69 (1988)(author proposes that law students should receive only true academic training at law school and training in the trade of being a lawyer — Hessian training — after law school, from experienced lawyers).
41. Sir Walter Scott stated: "A lawyer without history or literature is a mechanic, a mere master; if he possesses some knowledge of these, he may venture to call himself an architect." W. Scott, GUY MANRERING (1815), cited in G. Williams, LEARNING THE LAW 226 (11th ed. 1982).
and writings.43 One hopes that legal scholarship — both that seen in the applied world of the law review and in the didactic world of the classroom — will continue to develop a focus around the humanities.44 This will represent at best only a beginning. Although a detailed treatment of the place of humanities in the law school curriculum lies beyond the scope of this discussion, legal education needs to incorporate some component which sets the law in its cultural milieu.

Ideally, law schools should consider incorporating into the first year curriculum a course attempting to survey briefly aspects of history and literature relevant to the development of the common law. Undeniably, developing the syllabus for such a course presents a formidable task. Adding such a course to the curriculum presents the classic question of what would law schools move or reject to make room for it. Whether to pursue such a course at all, just as whether to make it mandatory (and, if so, in which year of the law school curriculum it belongs), represent value judgments for individual law schools. At the same time, one can have little doubt that the need exists for strengthening the knowledge of our students of the world around them. The proper response to this need should at least form the basis for discussions among law faculties and in our legal journals.

The benefit to the individual student by adding such a course of study, as well as the probable detriment to the profession of failing to adequately educate law students, should lead legal educators into seeking some way of teaching underlying humanities in the law school context.44 Although law schools cannot hope to compensate for years of


44. *Scholarship* may also include songs. See *Law School Association Lyrics* (W. Proser ed. n.d.) (published by the Association of American Law Schools) (copy available in the office of the author). In fact, one law review article of significant substantive merit exists which the reader can actually sing to the tune of "The Old Oaken Bucket." Merrill, *Election (Undisclosed Agency) Revisited*, 34 NER L. REV. 613 (1955).


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The benefit to the individual student by adding such a course of study, as well as the probable detriment to the profession of failing to adequately educate law students, should goad legal educators into seeking some way of teaching underlying humanities in the law school context. Although law schools cannot hope to compensate for years of inadequate grounding in basics, they can bring students to an awareness of the richness of their surrounding culture. This will in turn instill in law students the desire to more fully explore their underdeveloped background in literature and history. In the final analysis, lawyers have a hunger to read and understand works from their allied disciplines in the humanities. White’s analysis continues to hold true — the law does not belong classed with social sciences, but rather with arts and letters. The common thread of language links them inextricably, one to the other, and to study the law without knowing its accompanying disciplines is to approach advocacy from an incomplete perspective. In teaching and studying the law, we cannot ignore the impact of those other disciplines which rely on the proper use of the word.

“They’re only words,
And words are all I have
To steal your heart away.”


44. Wigmore’s words, written in an era when television was twenty years from its invention and the impact of mass media could not have been imagined, nonetheless remain true today: a lawyer should be conversant with these novels “not merely because of his general duty as a cultivated man, but because of his special professional duty to be familiar with those features of his profession which have been taken up into general thought and literature.” (emphasis in original) Wigmore, supra n.8, at 28.
