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Coming of Age Some More: “Law and Literature” Beyond The Cradle

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Abstract

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Richard Weisberg*

Two dates mark the renewal of Law and Literature studies in the 20th century. Not the inception, mind you, of that interrelation, but its rebirth. In fact, the linkage of law to the various disciplines of literature takes us way back to Cicero and the Bible and was a matter of common wisdom to 12th century Icelandic saga writers, French medieval courtly poets, Shakespeare and Blackstone. Only revolutions in law and the legal academy during the 19th century had (for separate reasons) tended to weaken the bond, although fiction writers held fast to the interrelation, as any reader of Balzac, Dickens, Dostoevski or Melville quickly realizes. Lawyers, on the other hand, needed to be reminded, as the century began, of what they had otherwise always known: law is both inextricably bound to the literary culture in which it is practiced and significantly enriched by that unavoidable bond.

The sources of this renewal were two of the great men of early 20th century law, whose credentials commanded instant respect for anything they said. Thus, when John Wigmore stated in 1908 that "every lawyer must be acquainted" with the many fictional works dealing with the law, he was positing a truism that he felt had to be emphasized to an increasingly specialized, technical and powerful profession. Wigmore insisted that it was a lawyer's

special professional duty to be familiar with those features of his profession which have been taken up into general thought and literature.¹

* Professor of Law, Benjamin N. Cardozo Law School, Yeshiva University, B.A., Brandeis University, 1965; Ph.D. (French and Comparative Literature), Cornell University, 1970; J.D., Columbia University, 1974; Assistant Professor of French and Comparative Literature, University of Chicago (1971-75).

The author would like to thank Professor Michael Richmond and other members of the Nova Law School Faculty for their extremely helpful comments about an earlier version of this paper, which he gave at a faculty workshop in February, 1988.

1. See Weisberg, *Wigmore's "Legal Novels" Revisited: New Resources for the Expansive Lawyer*, 71 NW. U.L. REV. 17 (1976) (quoting Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26, 27 (1922), reprinted with corrections from

His carefully chosen words, implying that a malpractice claim might be brought against an ignorant — if technically adept — lawyer, are beginning to make sense to us again, but they hold far less intuitive appeal than they did to Wigmore's turn of the century practitioner. And Wigmore felt it necessary to provide even that well-read audience with a list of his 100 favorite "legal novels."²

By the time Benjamin N. Cardozo wrote his 1925 essay entitled "Law and Literature,"³ skepticism about Wigmore's axiom constrained the great jurist to begin on an apologetic note:

I am told at times by friends that a judicial opinion has no business to be literature. . . . A commoner attitude with lawyers is one, not of active opposition, but of amused or cynical indifference.⁴

What for Wigmore was an occasion to remind his audience of an eternal link between two literate fields became for Cardozo a place to file a brief for the "very idea" of law and literature. No professional instinct in the direction of literacy had survived that 20 year period. Lawyers fully cognizant of the daily contribution of language, style, form and rhetoric to their work preferred now to claim indifference to their sister discipline. Cardozo's essay, with its identification of five kinds of judicial style, gently reminded his audience that a lawyer's work inevitably involves communication and that, as for judges:

The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and an-tithesis, or the terseness and tang of the proverb, and the maxim. Neglect the help of these allies, and it may never win its way.⁵

Beyond style, however, Cardozo was suggesting throughout his famous

Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908)).

2. Wigmore's list of suggested one hundred legal novels is reprinted, *id.*, 71 NW. U. L. REV. at 25.

3. B. CARDOZO, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339 (M. Hall ed. 1947), reprinted from YALE REV. 699 (1924-25), which subsequently became the title essay in B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* (1931) [hereinafter *Law and Literature*]]. For a discussion of Cardozo's piece, see Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979).

4. B. CARDOZO, *Law and Literature*, 339 SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (M. Hall 1975).

5. *Id.* at 342.

essays on the judicial process that judges and lawyers must reach into their deepest selves to perform well many aspects of their craft. Literature, vital because it both teaches and exemplifies superb professional communication, also must be read because — in the absence of such models — that deepest self will be a shell. Again, as to the judge:

Many are the times . . . when there are no legislative pronouncements to give direction to a judge's reading of the book of life and manners. At those times, he must put himself as best he can within the hearts and minds of others, and frame his estimate of values by the truth as thus revealed. Objective tests may fail him, or may be so confused as to bewilder. He must then look within himself.⁶

How far our own legal culture has come from that of Wigmore and Cardozo! Although only six decades old, Cardozo's words seem to have something otherworldly about them. Many questions remain: Is it ever the judge's business to put himself in the hearts and minds of others? Even if we aspire to notions such as "values" and "truth" these days, are they to be found in such intuitive realms? Do "objective tests" ever fail, if not those that derive from "neutral principles" of doctrine or statutory interpretation, then at least those provided by the demand curve, by the models of economic efficiency?

I need not tell this audience that the stuff of the legal self these days does not come from world literature. When, as I phrased it to a group of judges recently, the jurist seeks his or her "self on the shelf" in order to decide hard cases⁷ — and for Cardozo, any case could be a hard one — there is often little there to guide and impel. No wonder that the social sciences have so effectively replaced the humanities in the lawyer's panoply of sources. We do not have the wherewithal assumed by Wigmore, and pleaded for by Cardozo. We, like Judge Robert Bork, come to law full of "mish-mosh," and we emerge with the new religions of Chicago economics, positivistic data-gathering, or pseudo-scientific interpretive theories such as originalism or, for that matter, textual nihilism.⁸

Yet lawyers and judges continue, late in the 20th century, to be faced with complex questions requiring inner wisdom, a sense of one's own hard-fought values, a sense of truth, a sense, finally, beyond that

6. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 55-56 (1928)).

7. See Weisberg, *The Self on the Shelf*, forthcoming in *CARDOZO L. REV.*

8. See Weisberg, *Text Into Theory: A Literary Approach to the Constitution*, 20 *GA. L. REV.* 939 (1986).

taught by the social sciences. We have learned that economics teaches us much but that it never claimed to teach us about the way humans really think, feel or, in fact, behave. Into the late 20th century void rushes any theory purporting to be "objective," yet no theory is objective, and no mind not open to the magnificent spontaneity and the horrible suffering of the human condition can ever excel in our time-honored craft. We must be open to learn and apply, not to memorize and apply. We must seek to implement, at every point on our professional spectrum, a reflected sense of human experiences, our own and indeed those described in imaginative literature. Literature teaches us what social science cannot, because literature is the best source (outside of ourselves) of sense and sensibility.

Something of this program must have propelled a small group of scholars, working during the 1970's in relative isolation one from the other, to pick up the discarded interrelation. They thought, like Wigmore, that the lessons of literature — and not those of the social sciences — were vital to lawyers.⁹ If it was unclear that such knowledge necessarily would affect everything the lawyer did professionally, it was surely predictable that the absence of such literary skills as writing, reading, and rhetoric would destroy the lawyer's potential. Finally, they wondered if their students — for the group consisted mostly of legal academics — would have any notion of the self on which to rely during the inevitable Cardozo-esque moments of professional uncertainty.

When J. Allen Smith wrote, in 1977, of "The Coming Renaissance in Law and Literature," few in the academy understood what he was suggesting. "We cannot move society," he observed, "without some ordered structure and the means for people to develop it. The sources of law are variable; in our time, it is literature that will unite us in law."¹⁰

The prophecy seemed untenable; like Jonah at Ninevah, like Cardozo's friends when he reminded them that law is basically poetry, most readers of Smith's words ran in the other direction.

With only a few notable exceptions on the level of scholarship in the 1970's, legal academics were proving to be a "fiction-averse" lot. If the small group of scholars received encouragement at all, it was from three sources outside the law schools: literature departments (which craved legal insights about certain texts and which were seeking wider

9. See J. Allen Smith, *Law and Humanities: A Preface*, 29 *RUTGERS L. REV.* 273 (1976). Professor Smith's article serves as a preface to *Law and Literature: A Symposium*, 29 *RUTGERS L. REV.* (1976).

10. 7 *U. Md. L. F.* 84, 92 (1977).

audiences); the National Endowment for the Humanities; and the universe of practicing lawyers, from whose masses those could always be found who loved to read and who knew that reading well meant practicing well. Legal academics of all stripes were seeking interdisciplinary avenues, but the notion of beginning with literature was wholly antipathetic. Either because literature was viewed as too closely linked to law to risk law's disintegration by exploring the avenue too fully, or because no one "serious" was reading fiction in the 1970's, or because the exotic metalanguages of the social sciences seemed more attractive, if not more potentially fruitful, academic lawyers showed no interest in literature.

I recall attending, in 1975, a weekly reading group of most of the Stanford Law School faculty. The subject was *A Clockwork Orange*, Anthony Burgess's frightening look into the criminal justice system of the undistant future. Several younger faculty members expressed literal outrage that a work of fiction had been chosen, as opposed to the common run of legal history, biography, economic theory or — at one extreme of tolerance — Rawlsian jurisprudence. There was, among this group of bright lawyers, absolutely no affect in the direction of the imaginative, the intuitive and the irrational, even when the subject matter of the creative work clearly interested the given audience.¹¹

The 20th century renewal of law and literature had apparently been stillborn after the eloquent birthing cries of Wigmore and Cardozo. The small group in the 1970's produced a number of articles tentatively exploring the interrelation, but its sole book length achievement, published in 1973, was James Boyd White's *The Legal Imagination*. This work was not widely appreciated until the mid-to-late 1980's, when it was finally published in paper and employed widely in the law school classroom. But White's excellent materials were largely in the service of the Wigmore-Cardozo claim: a lawyer lacking rhetorical craft, a vibrant intuitive imagination and a keen sense of how the world views law and its ethics, will be a figurative, even maybe a literal, bankrupt. If the claim seemed radical — or, more precisely, exogenous — it was again because literature had been excised from the legal academic canon.

As Churchill said of Americans, so it might have been said of legal academia's leap into interdisciplinary work in the 1970's: they went

11. Today, Stanford's faculty includes several scholars who are helping to invigorate the interrelation. See, e.g., Robert Weisberg's interdisciplinary paper, *The Law-Literature Enterprise*, forthcoming at 1 YALE J. ON LAW & THE HUMANITIES.

from barbarity to decadence without once having touched civilization. Our forthright move from doctrine or even neorealism into extra-disciplinary sources deliberately left behind the nearest and dearest of them all: the various disciplines of literary discourse.

If the metaphors of childbirth and renaissance have pervaded my description of 20th century law and literature studies so far, they have been used to prepare for the chronologies I wish to emphasize more fully here: the cradle years of the law and literature movement and those we are experiencing now, which I characterize as the adolescent period. My purpose is to describe a progression, to exemplify in some detail one result of that progression, and to set out a program for the movement's maturing years. We begin with the fledgling years.

From a series of special sessions sponsored not by the American Association of Law Schools (AALS), but instead by the Modern Language Association (MLA) (1976-78), and from early bibliographical, comparative and text-oriented articles and chapters on law and literature, there arose by 1980 a still small community of a score or so of scholars. The painful but convincing pushes of the Wigmore-Cardozo-White triad had produced an identifiable fledgling: a discourse — if not yet a "field" — around which lawyers could group, with varying degrees of receptivity and interest.

Three events and an institute proved the tangibility of the fledgling legal subject matter in the early 1980's: a 1980 AALS "Law and Humanities" session on "Narrative Aspects of Judicial Opinions",¹² a 1982 Texas Law Review, full-number symposium called "Law and Literature,"¹³ and a 1982 essay, published in a distinguished volume by the MLA, also called "Law and Literature."¹⁴ The latter reflected in its theoretical premises the work of the Law and Humanities Institute (LHI), a group formed specifically to study and further the various inter-relations of law and literature. Since 1982, LHI has sponsored six Law and Literature conferences. Taken as a whole, these symposia covered the known territories across which the fledgling was likely to crawl: in-depth exploration of normative legal concepts ("Terror"),¹⁵

12. Later reprinted in part as Weisberg, *How Judges Speak: Some Lessons on Adjudication* in BILLY BUDD, SAILOR with an Application to Justice Rehnquist, 57 N.Y.U. L. REV. 1 (1982).

13. See generally 60 TEX. L. REV. 3 (1982).

14. Barricelli and Weisberg, *Law and Literature*, in GIBALDI & BARRICELLI, *THE INTERRELATIONS OF LITERATURE* 150-75 (1982).

15. *Terror in the Modern Age: The Vision of Literature, the Response of Law*, 5 HUM. RTS. Q. 109 (1983).

depictions of law in single authors (Faulkner,¹⁶ Dickens¹⁷) or even texts ("Billy Budd"),¹⁸ the inquiry into hermeneutics ("The Constitution and Human Values"),¹⁹ and the pedagogy of the new subject matter.²⁰

As with most babies, Law and Literature attracted attention for its sometimes unabashed and unstructured energy, and also for the pure joy of dealing with something new and promising. Indeed, if I had to give a one-word explanation for the viability of the fledgling earlier in this decade, it would be the "fun" factor.

I say this because, when most of us who thought we were doing something quite serious described our work and our classes to colleagues, the invariable response was "Oh, that must be fun." They were right, of course, and perhaps no other rationale was necessary at that stage. Students, even law students, showed the normal human inclination to enjoy other people's babies and the courses were well attended; meanwhile, one could write and talk about Sophocles, Shakespeare, Scott, Trollope, Camus, and Kafka, or about "how judges mean" as examined in John Marshall, Holmes, Douglas or Rehnquist. To be able to do this and be paid as a law professor might have been reward enough to some, for the fledgling had its cake and ate it, too. But almost everyone doing the work thought it went further than fun, and gradually onlookers took the bait.

Analysis of literature, if seriously and scientifically accomplished, entails nuances of legal significance unavailable from other jurisprudential sources. As just one example of this, for I believe it typifies the development of the discourse during the 1980's, I will consider in some detail the image of the lawyer in 19th and 20th century fiction. In a merely preliminary — indeed, in a "fun" way, this body of imaginative

16. *The Law and Southern Literature*, 4 MISS. C. L. REV. 165 (1984).

17. LHI's latest symposium, which took place on August 4-7, 1988, in Santa Cruz, California, was on the topic, "Dickens and the Law." At the time this article was going to the press, plans for the publication of the symposium had not yet been completed.

18. Symposium on BILLY BUDD, SAILOR, held at Washington & Lee Law School, Oct. 1987, publication forthcoming.

19. Symposium, 20 GA. L. REV. 811 (1986).

20. Symposium, New York City, Nov. 1985 (pedagogical approaches, bibliographies and syllabuses on file with LHI, 545 Madison Avenue, New York, NY 10017).

Also explored at smaller gatherings of the Institute were matters of legal and judicial style and writing technique and the increasingly important and threatening private law incursions upon works of the creative imagination, of which *Bindrim v. Mitchell* and the now current *Falwell v. Hustler* are recent examples.

literature seems to convey an unremittingly satiric, almost caricatured, vision of law:

Dickens: the law is a ass - a idiot.²¹

He cross-examined his very wine when he had nothing else in hand.²²

Keats: I would classify lawyers among the natural history of monsters;²³

Sandburg: Why does a hearsehorse snicker when a lawyer cashes in.²⁴

When the lawyers are thru, what is there left? Can a mouse nibble at it and find enough to fasten a tooth in?²⁵

And we recall the portrait of Camus' crucifix-brandishing examining magistrate in *The Stranger*; or of Kafka's magistrate in *The Trial*, whose dusty law books, when opened, reveal only pornographic images; or of Faulkner's shady and manipulative lawyer in *Sanctuary*; or of John Barth's nihilistic Todd Andrews in *The Floating Opera*; or of the lawyers who almost destroy the innocent Yakov Bok in Bernard Malamud's *The Fixer*.

Even the more benign descriptions of lawyers in modern fiction often manage to be implicitly derogatory. Thus, George Eliot, in *Felix Holt, Radical*, describes a civil defendant's reliance on his attorneys as follows:

... he would not have been disgraced, if, on a valid legal claim being urged, he had got his lawyers to fight it out for him on the chance of eluding the claim by some adroit technical management.²⁶

And the Spanish poet, Lopez de Ayala, put it this way:

If you want to observe how lawyers behave,

21. C. DICKENS, OLIVER TWIST ch. 51 at 520 (Dodd, Mead & Co. 1941).

22. C. DICKENS, GREAT EXPECTATIONS ch. 29 at 263 (Signet 1980).

23. See for this and other cited phrases, Weisberg, *Materials on Law and Literature* 17 (on file at Columbia Law Library).

24. C. Sandburg, "Smoke and Steel" (Harcourt, Brace, & Jovanovich 1920).

25. See *supra* note 23.

26. G. ELIOT, FELIX HOLT, RADICAL (1866).

Despite much learning, they make plenty of mistakes,
As their most ardent love is of money,
They have forgotten their souls, which give them few pangs.²⁷

Dickens sums up with this memorable phrase:

The one great principle of the English law is, to make business for itself.²⁸

Such words show through a perceptively articulate medium what lawyers need to know about their social image, the part of their craft, as Wigmore put it, that has been "taken up" into the wider culture.²⁹

Now, the "fun" element for lawyers here may not be immediately apparent, given the universally pejorative tone of these texts. Yet lawyers seem to recall and discuss these negative phrases and portraits with delight, indeed citing them with far greater frequency than do the profession's external critics. An explanation for this peculiar professional masochism lies beyond the purview of this paper (although not necessarily of the field I am discussing). Suffice to observe that I have never found a doctor trumpeting out loud or placing on the walls of his office, as lawyers do, anything about his calling that vaguely resembles Shakespeare's oft-cited and oft-displayed suggestion: "The first thing we do/Let's kill all the lawyers."³⁰

Beyond the masochistic "fun," however, lies a multitude of more serious questions for the legal analyst. Indeed, if the economist has contributed much by using that field's wisdom to discuss legal norms, the literary critic strives to move the law through more sophisticated analyses of fiction.³¹ Thus, as the field grew, the interdisciplinarian sought from a variety of law-related works a more structural notion of the lawyer's perceived place in society. Was the larger volume of fictional texts saying something useful (not simply malicious) about the profession? Properly understood, could conclusions derived from this data be incorporated into many aspects of the lawyer's training, practice, juris-

27. *Palace Rhymes: Concerning Lawyers* in I RESNICK & PASMANTIER, AN ANTHOLOGY OF SPANISH LITERATURE IN ENGLISH TRANSLATION 37 (1958).

28. DICKENS, *BLEAK HOUSE* ch. 39 at 416 (Riverside Press 1956).

29. See *supra* note 1.

30. SHAKESPEARE, II HENRY VI, iv, 2.

31. See Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986). Here, and in other ways, too, I disagree with Richard Posner's conclusion that this fiction offers lawyers only about as much as it does the general reader.

prudential sense, and code of professional responsibility?

The first derivation from structural analysis disproved the common notion that fiction universally "cuts up" lawyers. Putting aside for a time deep structural inquiries into *L.A. Law*, *The Verdict*, *Presumed Innocent*, and other popular culture ventures, it is clear that "serious fiction," too, has some good words for some lawyers. The hitherto perceived model, which gave the avaricious lawyer credit only for overzealously protecting his client from justice, eventually yields to one that accommodates a host of "nice" fictional lawyers. But as quickly as we discover these lovable figures, who had ironically been ignored by literate lawyers in favor of the rogues and the villains, we perceive a peculiarity in the structure of their depiction. For, it turns out, these figures normally have one of three problems. They:

- a) have no law practice to speak of; or
- b) lose the cases on which they are working in the novel; or
- c) lose their lives by the end of the book.

Puddn'head Wilson, lately discussed to wonderful effect by Robin West in the *Tennessee Law Review*,³² stands as the best example of the first variation. Although the graduate of a fine eastern law school, Twain's protagonist has to wait twenty years for a client. Interestingly, he fails to attract clients because, in his first public conversation after arriving in the small Missouri town where he hopes to set out his shingle, he gains a reputation for simple-mindedness. People seem to want cleverness — wit of a crafty kind — from their lawyers, and Wilson's joke about killing half a dog if he owned that half fails to impress. Only an enduring interest in fingerprinting eventually positions him to lose his day-one nickname and earn some professional dollars.

Nice lawyers who get cases, but lose them, are legion. Twentieth century novels, particularly, fairly delight in them. Richard Wright's Max courageously defends Bigger Thomas in the 1942 novel, *Native Son*. Narratively and thematically, Max stands for something upright in the profession. But when he misconceives the jury's perspective, his client is lost. E. L. Doctorow's Ascher, in *The Book of Daniel*, bestows almost superhuman care upon his imprisoned clients' children, but his less-than-sterling defense arguably helps to make them orphans. Horace Benbow, in Faulkner's *Sanctuary*, genuinely cares for the people

32. R. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987).

around him, yet a strain of ineffectiveness in his personal relationships is transported into the courtroom. "The fundamental Benbowish failure" dooms his client Lee Goodwin when Horace ignores, to his detriment, the connivance of other lawyers and witnesses. Most poignant of all, perhaps, the sympathetic family man, Atticus Finch does not have the necessary savvy to prevent an all-white jury from convicting of rape his innocent black client, Tom Robinson.

Our last variation on the "good-guy lawyer" involves right-thinking and wholly positive lawyer figures who lose more than their cases. Robert Bolt's *A Man For All Seasons* powerfully presents the discrepancy between a lawyer's sense of justice and that of the surrounding society. Sir Thomas More refuses to compromise his vision — which he equates with law — and he dies. Similarly, Malamud's Bibikov, the sole lawyer to perceive Yakov Bok's innocence in *The Fixer*, dies for insisting that justice trumps pragmatism.

Strikingly, many of these fictional works are imaginative distillations of real-life cases.³³ In fact, as in fiction, many sympathetic and high-minded lawyers are defeated. But fiction seems to go further: it cannot and will not perceive personal merit as synonymous with legal or professional success.

Seen this way, "fun" becomes serious. The lawyer's rhetorical brilliance and procedural power are perceived by modern (not classical!) fiction-writers as disjoined from ethics and empathy. Where the latter exist, professional success is unlikely to occur. The Law and Literature theorist had much to do to seize the import of the data. Only a fool would ignore it, for surely the collective approach of society's most keen and careful observers must compete favorably with any other kind of jurisprudential data that lawyers normatively compile. But what follows from the observation?

Matters become even more complicated as one moves beyond the all-bad/all-good posture of some of these texts. In fact, mainstream fiction in the 19th and 20th centuries produces identifiable but highly mixed images of legal practitioners. We have already seen, implicitly at any rate, that poor performers can be excellent human beings; conversely, the most famous lawyers in fiction are impoverished human beings with impeccable professional records. And the very writers who most effectively caricature the lawyers among them also produce brilliant and subtle figures whose legal training redounds to their benefit

33. Doctorow's *THE BOOK OF DANIEL* is a fictional recreation of the Rosenberg trial. *THE FIXER* is taken from Beilis' trial in Czarist Russia.

and renders them if not lovable, at least fascinating.³⁴ As I discuss elsewhere, Dickens' Mr. Jaggers and Faulkner's Gavin Stevens³⁵ stand as models for lawyers whose strengths and weaknesses are so typical of the age that they became the novelist's own porte-parole. Indeed, the literary artist's dramatic attraction to legal figures finally can be explained by an identity — rather than an opposition — of writer and lawyer. Their ties, particularly on the level of language, link them in ways that both lead to mixed feelings and enhance the importance of the literary portrait.³⁶ Warts and all, some successful fictional lawyers literally embody the value crisis of the age in which they live. All lawyers, to recall Wigmore, "must be acquainted with" these portraits.³⁷

Other literary texts, structurally grasped, influence our understanding of law in other profound respects. Instead of focusing on lawyers, such texts emphasize legal reasoning. They include Dostoevski's *Crime and Punishment* and *The Brothers Karamazov*, Melville's *Billy Budd, Sailor*, and Camus' *The Stranger*, among many others. These books, which I have elsewhere called "procedural novels," depict in considerable detail a single legal proceeding. Each develops from an "anterior position" — typically the first narration of a crime — to various recreations of the crime, this time narrated by prosecuting lawyers or lawyer figures, to a trial scene, providing a definitive narrative.³⁸ The original depiction, which I call the "anterior position," is invariably contradicted by the ensuing legalistic formulations of the event. As is never true in reality — where, classically, ten people will give you ten different versions of an event, casting into doubt whether there ever will be a "knowable" version of what happened — the anterior position is deliberately made available to the reader as he works through the full

34. See especially, Mr. Jaggers, Dickens's greatest lawyer, in GREAT EXPECTATIONS.

35. See Weisberg, *The Quest for Silence: Faulkner's Lawyers in a Comparative Setting*, 4 MISS. L. REV. 193, 200-02 (1984).

36. See generally, WEISBERG, *THE FAILURE OF THE WORD* (1984). The lawyer and novel-writer seemingly so different, in fact come together at precisely the defining point of both enterprises: the narrative ordering of an inchoate, pre-existing reality. Thus, the self-consciously law-related piece of narrative fiction is for lawyers, of optimal (not merely incidental, as it is for doctors, businesspeople or others it might describe) importance.

37. See *supra* note 1 and surrounding text.

38. See generally WEISBERG, *supra* note 36; see also Weisberg, *Law As and In Literature: Self-Generated Meanings in the "Procedural Novel"*, in THE COMPARATIVE PERSPECTIVE ON LITERATURE 224-33 (Koelb & Noakes eds. 1988).

text. It is as though the novelist implores the reader to grasp the anterior reality and to become increasingly skeptical of the errors made by the articulate lawyers in recreating it. Thus when, at his trial, Meursault is accused of not wanting to view his mother's body before her funeral (another prosecutorial mark against his amorality), the reader is invited to check that earlier part of the narrative, where he will discover that Meursault *had* asked to see the body. Only the self-interested (or neglectful) criminal investigation within the narrative has gradually distorted that reality. If the texts dealing with lawyers promote justice by insisting on a reunion of professional language and fully experienced life, the texts dealing with investigations rigorously assert the existence of a concept called "truth."

Thus, "Law and Literature," in its infancy, made certain claims on the attention span of a mature, somewhat bemused audience. Beguiled by the "fun" factor, that audience began to read some fiction for its observations about law and some law for its narrative and poetic qualities. Superficial conclusions were refined by more careful study, and the audience for these antics grew.

There then appeared a new distinctive mark on the youthful corpus of Law and Literature studies — "theory."³⁹ Since theory neither looked nor felt like fun, it helped the field to mature rapidly. By 1982, the fledgling had reached adolescence, carrying with it some of the pretensions but also some of the more clearly marked potential of the mature adult. I would characterize 1982-84 as the "theory years," embellished, enlivened and expanded through the vigorous presence of Stanley Fish,⁴⁰ Walter Benn Michaels,⁴¹ and other cross-disciplinary upstarts, some of them armed with agendas grounded in Heidegger, Derrida and (often with little comprehension) Friedrich Nietzsche.⁴² Legal academics now had to grapple with a real contender, albeit not yet fully grown, and also with their long-standing aversion to foreign words and phrases.

39. Meaning hermeneutics, the debate on how we realize textual meanings.

40. See, e.g., Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Fish v. Fiss, 36 STAN. L. REV. 1325 (1984).

41. See, e.g., Michaels, *Is There a Politics of Interpretation?*, THE POLITICS OF INTERPRETATION 337 (1983); for an earlier work, see Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 POETICS TODAY 23 (1979).

42. See, e.g., an otherwise fine and challenging piece by Levinson, *Law as Literature*, 60 TEX. L. REV. 385 (1982); my response to Levinson's version of Nietzsche is Weisberg, *Text Into Theory*, *supra* note 8, at 962-76.

Meanwhile, the emphasis from the earlier period upon literary texts somewhat abated. The discourse shifted to interpretive theory, and although the terms were new (reader response, deconstruction, indeterminacy, interpretive communities, thrown-ness), the issues were recognizably legal and required only sporadic additional reading of the new sources.

Some excellent traditional scholars began to toy with the field during this period, even though they had shown no interest hitherto. Thus, Owen Fiss (who is still worried that what he calls "nihilism" may prevail and that the law may be dead,⁴³ killed off by the twin threats of law and economics and schools of critical theory) creatively entered the fray with the notion of "disciplining rules" that would somehow constrain the judge and tell him how, if not what, to speak. Sanford Levinson, one of Fiss's "nihilists" — an epithet he accepted with gusto, proving that he was anything but nihilistic — was suggesting, with Paul Brest, that there are no constraints on the judge in, say, interpreting the Constitution, nothing at all within the text or even the practice not placed there situationally and as a matter of power by the judge herself.⁴⁴

This debate, of course, still goes on. It is furthered by Ronald Dworkin's association of law and literary criticism,⁴⁵ by distinguished responses to that approach,⁴⁶ by other recent contributions,⁴⁷ and by the legacy left to us by that eloquent voice since stilled forever, Robert Cover's.⁴⁸

But has the literary text disappeared, outgrown in the adolescent surge to power and prominence? Decidedly not. For, from 1984 to the present, six books have appeared on Law and Literature,⁴⁹ none of which devoted space explicitly to "theory" (although all were theoretic-

43. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

44. Levinson, *see supra* note 42.

45. *See generally* DWORKIN, *LAW'S EMPIRE* (1986).

46. Fish, *Working on the Chain Gang: Interpretation in the Law and Literature*, 60 TEX. L. REV. 551 (1982).

47. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

48. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

49. R. WEISBERG, *THE FAILURE OF THE WORD* (1984); J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); M. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985); J. WHITE, *HERCULES BOW* (1985); B. THOMAS, *CROSS EXAMINATIONS OF LAW AND LITERATURE* (1987); R. POSNER, *LAW AND LITERATURE* (1988).

cal) and all of which were centered upon the literary text itself as a way of learning about law. While it is not my job to "synthesize" six such idiosyncratic efforts, I would venture today to suggest that, in the field's late adolescence, text will re-emerge over theory, and the mature period will proceed to investigate the three major areas that have always held the most promise for the interrelation. These are not exactly the three proposed recently by Judge Richard Posner, although he being a quick study — with a long way to go, of course⁵⁰ — was close to the mark in identifying criticism, style and interpretation as those three major strands.

My suggestion, speaking from within, is to emphasize from now on the central place of the literary text — more than literary theory — in the debates regarding all three of those areas, not only criticism itself. Novels about law, as I have suggested, and particularly "procedural novels,"⁵¹ are the path to hermeneutic understanding. They show us how lawyers normatively distort pre-existing realities; but they also profess that there is such a pre-existing reality — there is such a text, standing fully apart from any interpreter of it. And they advise, through a return to text, ways of understanding the world that can only lead to a more just legal environment.

This movement from "text into theory," as I have elsewhere called it,⁵² also informs the part of our maturing field that centers around the craft of judicial writing.⁵³ Here I would recommend that we read and teach literary trial scenes that are replete with arguments, pleadings, and judicial pronouncements, as we attempt a renewed close study of narrative technique within the actual judicial opinion. Artists have, since Roman times, keenly observed and utilized legalistic techniques of rhetoric, argumentation, and poetic effect. Lawyers today, knowing less about these areas than at any given time since Cicero — including the so-called "Dark Ages" — might start with the trial scenes in *The Oresteia*, *The Merchant of Venice*, *St. Joan*, *Billy Budd*, and (for comic relief) *The Floating Opera*, to understand the technique that is (Posner to the contrary notwithstanding) law. A starting axiom on ad-

50. See Fish, *Don't Know Much About the Middle Ages*, 97 YALE L.J. 777 (1988).

51. See *supra* note 38 and accompanying text.

52. See Weisberg, *supra* note 8.

53. Judge Posner identifies stylistics as the sole lasting interdisciplinary contribution of law and literature. See, Posner, *supra* note 31. Yet style, divorced from the ethical issues addressed by law-related fiction, is barren, if not dangerous. Judge Posner does not yet seem to grasp this lesson from the literature he has begun to read closely.

versarial writing is provided by *The Floating Opera's* Todd Andrews: "Men, I think, are ever attracted to the bon mot rather than the mot juste, and judges, no less than other men, are often moved by considerations more aesthetic than judicial."⁵⁴

Beyond understanding the inevitable importance of aesthetics and rhetoric to judicial writing — and to writing for judges — a task of Law and Literature must also be to improve the breed of legal writers generally.⁵⁵ This cannot be left to legal writing programs, unless they are re-invigorated and re-financed. In a recent book on legal writing, I include a long list of literary texts;⁵⁶ my theory was and is that the reading of one novel a month will provide the adequately educated lawyer with models for clarity and color within her own professional writing. Experience tells me that these qualities are still appreciated, even by fellow lawyers, and certainly by the laity.

That last thought provides a bridge to the concept that unites all sub-genres of Law and Literature: "Rightness." Indeed, the three R's of Law and Literature — reading, 'riting and rightness — are woven seamlessly together. Better reading means better writing, and better writing provides clearer consent forms, consumer contracts, leases and other documents all too often thrust upon the unwary layman in deplorable conditions of needless ambiguity and deliberate obfuscation. But "rightness" here means rightness in the larger sense of understanding a part of the lawyer's role too much undervalued of late. Law and Literature, from its infancy, has posited as its major claim the notion that lawyers have the responsibility to explore constantly their own individual and professional values, to challenge them constantly and try to improve them, and to admit that those values exist and implicate almost everything that lawyers do.

Not all Law and Literature theorists agree on this, but then it would be surprising in a post-modernist world if the concept of "rightness" quickly engaged the imaginations of skeptical and highly pragmatic people, even those well informed about rhetoric and literature. To discuss values at all, and then to dare to suggest that some values are right and others wrong, some worth fighting for and others worth strenuously combatting — is all the more untimely. We are talking "virtue" here, and in an age honing a fine line between nihilism and

54. J. BARTH, *THE FLOATING OPERA*.

55. See, e.g., Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 364 (1987).

56. WEISBERG, *WHEN LAWYERS WRITE* (1987).

fundamentalism, virtue is often ignored.

Thus it has recently seemed to me that James Boyd White, a pioneer in the field, has moved far more towards rhetoric than rightness in his latest books. Their popularity is merited by so much of excellence within them, but perhaps also facilitated by the notion that the way lawyers talk to each other is more important — always more important — than *what* they are saying.

I disagree completely with White. As I pursue now a long-term project involving the way French lawyers talked during the debased Vichy regime of 1940-44, I become more convinced that we must evaluate our aims constantly, and not trust "dialogue" or "community" to immunize us from hard moral decisions. So runs a certain strain of analysis in the most recent number of the *Journal on Legal Education*.⁵⁷ In a piece called "Must Virtue Be Taught," in which literature plays only a small role, Professor Thomas Eisele suggests that it is time to re-integrate value awareness into the legal curriculum.⁵⁸

Later in the number, Roger Cramton suggests that law students be exposed to "some films and stories" in their Professional Responsibility classes. He recommends "The Verdict."⁵⁹ He might have thrown open the whole list of literary works touching on professional ethics. That list may prove to be the best medium for teaching virtue, far more engaging and true to life than working from the codes.

The idea, however, is decidedly not "touchy/feely" or soft, a description offered six years ago by Professor Walter Gellhorn in a piece (correctly, in my view) critical of a book by Dvorkin, Himmelstein and Lesnick.⁶⁰ The lawyer's virtue, as taught by literature, lies in the area linking human empathy — an availability to life, really — with a firm notion of communal justice. Such virtue would allow the lawyer to avoid the pitfalls uniquely portrayed in the fiction we structurally analyzed earlier: the successful, but ethically questionable lawyer with no wider vision of his craft than the zealous advocacy of his paying clients or, on the other hand, the too pliant and too passive lawyer who discerns the personal needs of others but fails to implement a just vision in the service of those needs.

Rightness — virtue — can be understood through literature. Peda-

57. See 37 J. LEG. EDUC. (1987).

58. Eisele, *Must Virtue Be Taught?*, 37 J. LEG. EDUC. 495, 504-5 (1987).

59. See Crampton, *Beyond the Ordinary Religion*, 37 J. LEG. EDUC. 509, 513 n.13 (1987).

60. Gellhorn, *Humanistic Perspective: A Critique*, 32 J. LEG. EDUC. 99 (1982).

gically, I am convinced that literature is a better medium for lawyers than is, say, moral philosophy, from which to learn about rightness. It delights as it instructs. It places the inquiry on virtue into a dynamic framework and allows the reader to reason inductively from the cases described to her own experience and thoughts. It emphasizes the inevitable place of the irrational in life and law, but it demonstrates a manner of harmonizing the intuitive and the logical sides of experience. Literature exemplifies as it teaches, finally, that language must be the medium, however imperfect and open to misunderstanding, for the establishment of a just communal vision. Striving always toward that vision, the lawyer finds herself empowered through this fiction — not debilitated — to move with appropriate toughness. Virtue on the page, teaches a text like *Billy Budd*, is meaningless; virtue, or its debasement, arises through the actions of people, and even through the words of lawyers.