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Literature and the Law

Thomas Morawetz

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Introduction

Why "Literature and the Law"?

It is natural to think that a course on law and literature is an interesting but optional adjunct to a legal education. To the contrary, I believe it is a valuable and essential element in learning about law. Such courses are proliferating in American law schools and in the literature and legal studies programs of American universities as well.

What makes law and literature courses essential? One is tempted to see them as pleasant diversions, a chance to put aside for a few hours the tax regulations or the Uniform Commercial Code. Faculty members are inclined to see them as irrelevant to their main mission of training practitioners, neither particularly helpful nor harmful. But I believe these attitudes reflect fundamental misunderstandings.

What is a legal education? This question is at once easy and diabolically hard. A legal education turns untrained students into potential lawyers. That's the easy part. But the hard part lies in identifying the characteristics, and not just the skills, that lawyers should have and in deciding how they can be cultivated.

The dark suspicion that lies at the core of jokes about lawyers — and the unjoking mistrust of lawyers as well — is that legal education corrupts those who undergo it, that it dulls one's conscience, dilutes one's sense of principle, and even compromises one's humanity. That is a dire accusation, one that covers a Pandora's box of misgivings about law and lawyers, both plausible and implausible. But one claim that I have always found convincing is that legal education can erode individuality.

What does that mean? Students come to law school with baggage, both literally and figuratively. Each student has a unique personal history, various kinds of knowledge and ignorance, and a collection of social, political, and moral attitudes and opinions. Many of them draw from their first encounters in law classes the conclusion that personal perspectives and values are to be laid aside. Prior successes and prior self-definitions are, they decide, largely irrelevant to the kind of professionalism they are at pains to acquire. The chameleonic ability to identify with any side of any disagreement (and specifically with one's *client's* side, whatever it happens

to be) takes precedence over personal conviction and belief. Not every student hears this message the same way, and certainly not every student succumbs to it—but no student will fail to recognize it as part of the induction process.

A student's diminished concern for her own individuality will affect the way she sees others as individuals. It is easy to identify a client only in terms of her legal needs and goals, to define a fellow lawyer by his legal role. Plaintiffs, defendants, judges, rapists, victims, shareholders, trustees—all these terms refer to legal abstractions and to real persons at the same time. The ultimate success of the lawyer may depend on the care she takes to avoid reducing the player to the role he plays in the game.

The most important job, the *essential* job that law and literature courses play is to refocus legal education on the inescapable truth that law is about individuals—their needs, goals, vulnerabilities, and unique characters. The attorney or judge who understands herself as an individual with a special history, trajectory, and set of values is, to that extent, a better attorney or judge. The lawyer who reads statutes and judicial decisions with an eye toward their effects on the interests of individuals is, to that extent, a perceptive interpreter. And the practitioner who sees his client as more than a disgruntled stockholder, or party to a divorce, or defaulting debtor is likely, to that extent, to offer better representation.

Literature—all literature—is at once about individuals and about generalizable bits of experience. Captain Ahab, Hamlet, and Elizabeth Bennett are individuals and they are also symbols. However much or little we see ourselves in them, we extend our experience and our sense of human nature by participating in their lives. Literature is *overtly* about individuals and about their commonalities. Law *covertly* has the same two dimensions. Literature can be the vital corrective in a legal education that allows us to see all of law's facets.

Skills and Insights

Legal writing is rarely held up as a model of transparency; "legalese" is rarely a term of praise. But there are exceptions. Justices Oliver Wendell Holmes, Benjamin Cardozo, and Robert H. Jackson are respected as models of lucid prose. But the fact that their expressive powers are held as exemplary testifies to our normally low expectations about the writing of judges and lawyers.

For the most part, the virtues of good writing and good legal writing coincide. Clarity, immediacy, and lack of ambiguity are essential qualities of good writing in general, and good writing by lawyers in particular. But law students and legal practitioners, along with critics of legal writing, sometimes think otherwise. They are taught to believe that law requires an arsenal of technical terms whose complexity is penetrable only by

specialists. They come to believe that wills and contracts, statutes and judicial opinions, court papers and research memoranda must all be written in a special style in which direct, clear, active, and efficient expression is at best a secondary virtue.

That is nonsense. Of course, learning law involves learning crucial terms in each field, e.g., learning the role of consideration and mutual agreement in contract, fault and negligence in torts, *mens rea* and *actus reus* in criminal law. But each term can and should be explainable in an accessible way. The success of a legal text as a means of communication will often depend on its transparency.

The lesson that clear, expressive, and potent communication is achieved in much the same way inside and outside law can be learned effectively by immersing oneself in literature. Fictions and essays, at their best, show how language can be controlled and manipulated to convey meaning and how varied and supple the tools of language are. Reading literature dispels the myth that effective legal writing involves stripping one's prose of style. Language, whether in legal or other contexts, is hardly ever most effective when it is formal and mechanistic. (Of course, certain kinds of documents — wills, contracts, trust agreements, incorporation papers — are exceptions when their only role is to formalize an agreement.) It is not a fault for judicial opinions, legal briefs, or academic articles to reflect the distinctive intelligence and voice of their author.

Lawyers are often required to reconstruct events as stories and present convincing narratives. Works of fiction can show them how that's done. Any client has goals and interests that the lawyer must identify; in doing so, the lawyer must see how his interventions can play a role in the story of the client's life. If litigation is involved, particularly criminal litigation, the lawyer must juggle various stories — the one he reconstructs from available evidence, the one he elicits from witnesses (favorable and adverse), and the one that he conveys to the jury or judge and tries to make his audience believe. The situation at hand may be kaleidoscopic; there may be many truths within one reality with different ways of assigning motives and responsibility.

Every lawyer must wrestle with the problem of truth in narrative. She must ask whether the circumstances of the case can be told honestly in different ways, from different points of view. She must consider at what point she finds herself telling stories that she does not believe. Every litigator struggles with the relationship between the story most favorable to her client and the version that good sense and experience tell her is most plausible. And every jury member, every judge, and every observer of trials and other adjudications struggles with the question of what stories to believe.

Literature — reading it, writing it, interpreting and analyzing it — is the domain of narrative. Every writer, not only of fiction, but of history and biography, is consumed daily with finding and conveying truths in human experience. Reading any narrative precipitates many questions that lawyers in their roles as storytellers must ask. What is the writer's point of view

and how did he choose it? What kinds of impressions and truths is the writer trying to convey? Are there alternative ways of looking at these events? Do we have access to the ways in which the actors see themselves?

Values and Choices

Legal positivists pay a great deal of attention to the separateness of questions about the content of law (what the law *is*) and evaluations and criticisms of the content of law (what the law *ought to be*). So much of a law student's time is focused on assimilating what the law is that normative questions about the law's merits and the merits of policies supporting it can be shortchanged. Moreover, a lawyer can easily rationalize *never* addressing such values and norms. One is taught that an important part of lawyering is suspending judgment. Lawyers are trained to see and articulate the conflicting sides of an issue. They are trained as well to put aside their own normative judgments to adopt and promote the interests of clients.

This is something of a paradoxical posture toward values. In their roles as judges or legislators — or even simply as citizens — lawyers are expected to be the conscience of society. Jokes about lawyers are especially harsh insofar as they show lawyers shirking or betraying that role. The paradox can be expressed in terms of serving justice: can one be neutral, ready to take on all causes and interests, and be on the side of justice as well? Too often, law students say that the implicit (or even the explicit) message of legal pedagogy is that the first of these alternatives is dominant and that they learn to put aside their values as distractions and as private matters.

A major point of literature is to wake one's conscience and stir one's sense of justice. Almost any situation worth writing about is morally and psychologically complex. Characters in fiction, like persons in life, may not know what they want, and, when they do know, may often find it beyond their grasp. Their wants and needs will be at odds with the wants and needs of other persons. And, as we as readers enter these situations and conflicts, we sympathize with and support some characters and distance ourselves from others. We wonder what it is about the world, society, persons, and institutions that creates these predicaments, and we think about how we would change things if we could.

Some commentators on law and literature have assumed that the most relevant fictions involve exemplars of moral goodness. That view is too narrow. Literature opens up for us the dimension of values, norms, and feelings, but it does not necessarily tell us how to respond. Plato was openly afraid of the power of literature and its power to seduce and control our attitudes. Ironically, totalitarian governments have often taken the same position, not because literature necessarily inspires good persons to oppose bad governments, but rather because it frees the moral imagination and licenses us to form our own opinions and goals.

The readings in this book raise all kinds of questions — about how lawyers should act; about how law firms shape and limit the lives of lawyers; about how lawyers function in their communities; about the social choices embodied in what the law allows, encourages, and forbids; about how we create institutions to judge others' conduct and punish; and about the place of law in the lives of everyone. And there are broader questions — about the symbolic role of law as a repository of shared goals, as a way of giving the camouflage of legitimacy to power, as the ultimate source of bureaucratic irrationality, or as the sum of our collective social wisdom; about the scope and meaning of free expression in our culture; and about how we find meaning in legal writings, how we agree and disagree when we construe the world of law, and how we deal with disagreement.

The ultimate irony is that some persons turn to law in the belief that it can substitute for personal choice. For them, law represents the settled values and norms of the culture; one can adopt the protective coloration of those norms in preference to struggling for a lifetime to discover and act upon one's own values. In fact, the implicit message of the materials offered here is that understanding law only makes the struggle more imperative and unavoidable.

Topics

This collection of topics and materials has seven chapters, seven distinct topics and sets of issues.

Chapter 1. Fiction's Window on Law and Lawyers

We begin in Chapter 1 by looking at lawyers and lawyering. Everyone, law students included, has opinions about them — about their skills and personalities, their characters and attitudes. We recognize the dangers of generalizing, but we generalize all the same. As one acquires a legal education, one finds some expectations and fears realized; in other ways, one is surprised. In some ways, law is the kind of practice (like medicine, like business, like a sport or a hobby) that only an insider can understand. A layperson can grasp what it is to be a lawyer if he has never been one no more easily than he can understand playing rugby or playing the violin if he has never done so. All the TV shows and novels in the world will not make one an insider. And a good part of what a lawyer learns is the anthropology of law firms and other attorneys' offices. And yet stories can be an excellent surrogate, raising questions that many lawyers often ignore.

In Chapter 1, we look at a series of recent stories about lawyers — who they are, what they do, and how they do it. We have a chance to look behind the stereotypes of the profession to consider what kinds of persons choose to become lawyers. How does legal training and legal practice change their expectations and character? What counts for success in law? What compromises are attorneys or judges likely to have to make? These stories, often

with a satiric bite, take us inside law's institutions and ask us to consider how they reflect the classes, hierarchies, and prejudices of society.

Chapter 2. The Meanings of Law

Chapter 2 casts a wider net. Law is more than the world of lawyers and judges. Countless things that we do every day are affected by the fact that we live within a legal system. Driving, buying and selling, what we say and how we say it are all matters that are shaped in one way or another by the existence of law. And, even if we take law and its effects for granted most of the time, we all have attitudes toward it.

Law can represent the vehicle that takes us from barbarity to civilization. It is the backbone of society, the framework that allows communities to function. It allows us to pursue our shared goals in harmony with others. Or it can represent coercive power, rules that constrain our freedom and autonomy and prevent us from achieving some of our goals and desires. In that sense, it stands for public constraints in what might otherwise be the domain of private choice.

Or law can simply stand for a collective attempt to create rational order in the face of the unpredictability and chaos of nature. It can reflect the will to control — through contracts, wills, criminal prohibitions, and countless other means — one's environment and one's relations with others. The political philosopher Hobbes concluded that, without law, we would have "war of all against all." Alternatively, law can be the ultimate vindication of irrationality, a thicket of arbitrary rules and hurdles. Law can be seen as moral, as the home of collective morality, or as the flimsy veil of legitimacy that covers amorality and violence.

Writers as diverse as Herman Melville and Franz Kafka have seen law as paradoxical. Their provocative stories and parables are among the best conversation-starters in literature. Critics, as well as general readers, have spun countless theories about them.

Attitudes to law are much affected by the political and historical circumstances of a particular culture. In Chapter 2, we will look at stories from places as diverse as pre-apartheid South Africa and post-World War II Italy. Each evokes a different set of circumstances and, in turn, a different attitude toward law and lawyers. Some deal with universal themes and experiences, others with historically particular ones.

Chapter 3. Freedom and Crime

In Chapter 3, we consider directly the relation between law and the individual, between social order and personal autonomy. Criminal law deals with prohibitions. It tells us that certain kinds of conduct are so threatening to others and to general welfare that society, through law, must intervene. Individual freedom comes to an end.

Different societies make these determinations in different ways. All agree on certain prohibitions. Hardly anyone in any culture thinks that

homicide, theft, or rape is a private matter. But beyond these basic harms, there are many disagreements. A most effective way of raising the question of whether and when criminal law should intervene in persons' lives is through literature. Stories allow us to enter the world of addicts and of those whose lives are closely affected by them. How should law deal with drug addiction? We can get an intimate view of the experience of persons who are severely disabled or terminally ill and ask whether there is a public interest in keeping them alive and whether they can choose to die. Variations in child raising may also become a concern for law when questions about well-being are relevant, even though family life is traditionally a private matter.

In all these contexts, fiction opens doors and eyes. It also allows us to see how attitudes about the balance between public and private concerns have shifted over time, echoing other shifts in political and social attitudes. Abuse within families and euthanasia, for example, have only recently been recognized as matters for public concern.

Chapter 4. Criminal Minds

A different question about the limits of criminal law draws attention to the psychology of crime. Many criminal acts are aberrational, committed in a state of rage, frustration, or derangement. Criminals often have psychological problems; they may have odd, often sociopathic, ways of seeing the acts of others. In criminal law, we are driven to simplify. Legislators, the police, prosecutors, judges, and juries all need simple tests for culpability and guilt. The psychological inquiry is often limited to what the actor intended, what the actor knew, and/or whether reckless conduct was involved.

Common experience, reinforced by the endlessly rich sources of literature, shows how thin the legal picture of psychology—of thought, action, and feeling—really is. The stories in Chapter 4 compel us to look at the complexity of motive, intention, and conflicting feelings and to consider the role of unconscious desires, of habit, and of moral attitudes in potential conflict with law. We will look at the circumstances that lead persons to act harmfully and violently and at the conditions (depression, mental disease, multiple personality syndrome) that complicate and even elude common understanding. Can the law do a better job than it does of accommodating the various modes of human thought and action?

Chapter 5. Trial and Punishment

In Chapter 5, we look more deeply at problems of trial and punishment. It is sometimes said that a lawyer's exclusive responsibility is to her client and that the diligence owed to clients cannot be diluted by other goals or personal values. This principle can often lead to situations in which the

most effective strategy—at trial or in negotiations—involves serious social costs and moral consequences. It may be effective, for example, to defend a woman accused of masterminding a criminal conspiracy by drawing on the sexist cliché that women are weak and likely to be under the power of men. The cost of a successful defense may be to reinforce a damaging prejudice. A selection by the novelist, Ernest Gaines, shows us an analogous dilemma facing an attorney who is defending a black youth in the segregated South of the 1930s. Should lawyers be guided by more than the need for the most effective defense? What is society's interest in curtailing bias, and how is it relevant? More generally, how much of the litigator's role is to appeal to a jury's (or judge's) reason and understanding and how much of her role in fact involves triggering irrational beliefs, feelings, and emotions?

Chapter 5 covers questions about punishment as well as trial practice. If there is a general sense that society's interests require punishment to deter crime and reform offenders, there has never been agreement on what forms of punishment are acceptable or effective. It is easy to be seduced into confusing rehabilitation, the goal of turning the criminal into an autonomous person with respect for others, with the goal of enforcing conformity with the majority's values. Kafka's shocking story, *In the Penal Colony*, makes us face the rationality of our own procedures and modes of punishment. The challenge of punishment has, as we will see, inspired many writers to do their most thought-provoking work.

Chapter 6. Finding Meaning

In Chapter 6, we step back from fiction to examine the process of reading and interpreting fictional and legal writings. We will ask the elusive question of how it is that we find meaning in texts. That question, in turn, leads to the question of how we agree and disagree about meaning. Many, but hardly all, terms in legal texts can bear several interpretations. Consider the Constitutional prohibition on cruel and unusual punishment or the requirement of due process. Judges are likely to disagree about the meaning and application of such terms.

Writers who study meaning warn us to avoid a cheap and easy relativism, whereby we argue simply that judges bring their own backgrounds, beliefs, values, and prejudices—and that therefore their disagreements are beyond resolution. In fact, disagreement is the start, not the end, of discourse. Judges bring to the table not only potentially different meanings; they also are parties to a process involving shared methods of analysis and debate. This process allows them to comprehend the reasons and motives behind interpretations other than those they favor. As a result, they can and will give each other reasons to change their minds. Sometimes they will succeed; often they won't.

In the last forty years, scholars in many fields have examined how readers of texts arrive at meaning and discuss it. Within law and literature, those who study judges and their methods of disagreeing among themselves and deciding cases have drawn suggestive analogies to literary analysis. Many articles and books on law and literature compare legal and literary interpretation—how we disagree, how we debate, and how, if at all, we arrive at consensus. This and related studies of meaning go by the Greek label of "hermeneutics." Chapter 6 is an introduction to the hermeneutics of law.

Chapter 7. The Law of Literature

Most of the materials in this book look at law, lawyers, and legal matters from the standpoint of literature. The last chapter, Chapter 7, turns this perspective on its head and looks at literature from the standpoint of law. Freedom of speech is guaranteed by the first amendment of the U.S. Constitution, and free expression has generally been held to be the essence of free speech. Two justifications are usually given for the guarantee of free expression. The narrower one is that free speech makes political progress and democratic rule more likely as agendas are tested in the marketplace of ideas. The more general justification is that, even if the marketplace of ideas works badly, the chance to express, share, and test ideas is an indispensable part of becoming a free and autonomous person.

Certain kinds of expression are said to be outside first amendment protection because they express unacceptable ideas or no ideas at all. Obscenity law has never had a secure footing. Some judges are comfortable putting obscene expressions outside the law because they have no ideational content; others acknowledge the presence of ideas but take on the role of determining which ideas are protected, which not. We will look at the extent to which obscenity can be defined, as well as the larger question of when, if ever, our government can or should be in the business of censoring ideas.

Some writers argue that the diffusion of ideas is significantly limited by the concentration of ownership of the media. By allowing this concentration, the government abets the process by which the marketplace of ideas is constrained. We will look at the merits of this argument and at suggestions that government, through law, take an active role to encourage a diversity of points of view and modes of expression.

The Scope of Law and Literature

The materials in this book show the breadth of law and literature and demonstrate the many ways we can ask and answer questions about law by using literature. It also investigates the law *of* literature, as well as the

second-order questions we might have about *how* law and literature are resources for understanding what meaning is.

These topics are just a beginning. We could also look at how literature has affected the course of law. How have our social attitudes to slavery, totalitarianism, exploitation of workers, protection of the environment, and countless other concerns, been changed by essays and fictions? How has literature shaped our political and social consciousness, and thus our law? We could also look at rhetorical devices in law and literature to see what makes language most effective in each domain. In fact, rhetoric has been a study that ties law to literature since the schools of ancient Greece.

However they are traversed, these materials should allow readers to ask again the general questions about law — its purposes, its demands, its limits, and its opportunities — that focused their attention on law in the first place. For non-law students they anticipate in a sophisticated way the subjects of law and its rigors and opportunities.

A Word on Materials and Structure

The materials in the first five chapters are primarily works of fiction. For the most part, they are short stories and occasionally chapters of novels. A few cases and articles are also included. In the last two chapters, articles and some case materials are central. Most of the materials are short; since they are packed with insights and nuances, they reward close attention and exhaustive discussion. Each of the first five chapters can very usefully be supplemented with one or more short novels or plays, and in each case I refer the reader to works that I consider exceptionally relevant (and I offer supporting introductions and discussion points).

I tend to steer away from the most familiar texts in law and literature, works that have been covered extensively elsewhere. *Billy Budd*, *Bleak House*, and *Crime and Punishment* are obvious examples. Their omission is not meant to slight the works or their importance. But the works are likely to be so familiar to teachers of the course that they can be slipped into the curriculum without substantial new guidance.

Each selection is preceded by a note that introduces the author and discusses the context of the piece. The discussion points that follow draw attention to historical context, legal aspects, psychological and anthropological underpinnings, or other dimensions that may trigger and deepen discussion. They are not intended to identify the "meaning" of the selection; in fact, a major purpose of this book is to dispel the notion that stories and cases simply have a single identifiable point. Debate and multiple points of view are to be expected and encouraged.