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LAW AND LITERATURE: THE CONTEMPORARY IMAGE OF THE LAWYER*

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“JUSTICE MUST NOT only be done, but should manifestly and undoubtedly be seen to be done.”¹ For the image of the law, like the image of any activity and its practitioners, has an influence upon its viability; a reciprocity exists between the law and the society ordered by the law, other than that described in statute and decision. The determinants of a public image, whether of law or religion, education, politics, medicine, business or marriage, art or poetry, are difficult to define; and the weight of any element among them defies measurement in precise terms. One element, however, can be examined for the direction of its influence upon the public image of law and lawyers, though its weight, probably more than negligible, cannot be empirically evaluated. That is, the portrait offered in literature often has a compelling, affecting, and evocative force; and if various literary works are more often encountered than are lawyers and the courts, it may be reasonably suspected that the former play a considerable part in the formation of the image. In short, what is “seen to be done” is seen through filters, naive or sophisticated, folk or fine, and if not the

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1. Lord Hewart, C.J., *Rex v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259. See also Denning, L.J., *Schooley v. Nye* [1950] 1 K.B. 335, 345. Accord: Atkin, L.J., *Shrager v. Basil Dighton Ltd.* [1924] 1 K.B. 274, 284: “Next to the tribunal being in fact impartial is the importance of its appearing so.”

abstraction "justice" then those hot after it or away from it and especially those who make it their business or who under its broad, inclusive blindfold pursue the next best thing, order, should be considered as they are so limned.

That the lawyer has not appeared in the best of possible lights whether literary or other, is something of a commonplace, especially to the lawyer who has perhaps ruminated over literary pieces generally considered among the classics. Not only is justice far from the concern of a sizeable proportion of the men of law — and the law itself — as they have often been pictured, but even minimal order in the most temporary of temporal situations has been outside their purview. In Chaucer's eye, and in Shakespeare's, few were above malfeasance of one degree or another; many were beneath contempt. "First lets kill all the lawyers."² In the seventeenth and eighteenth centuries the criticisms were unsparing. Jonson's Mosca relates the sentiments of his master (and perhaps his creator) as he encourages Voltore to buy a legacy:

I oft have heard him say how he admir'd
Men of your large profession, that could speak
To every cause, and things mere contraries,
Till they were hoarse again, yet all be law;
That, with most quick agility, could turn,
And return; make knots, and undo them;
Give forked counsel; take provoking gold
On either hand, and put it up; these men
He knew, would thrive with their humility.³

And Swift's denunciamento, with less economy but more venom, deepens the shadows in which walked the advocate; explaining the customs of irrational man to the consummately rational houyhnhnms, Gulliver offers an example of the lawyer's art:

If my Neighbor hath a mind to my *Cow*, he hires a Lawyer to prove that he ought to have my *Cow* from me. I must then hire another to defend my Right; it being against all Rules of *Law* that any Man should be allowed to speak for himself. Now in this Case, I who am the true Owner lie under two great Disadvantages. First, my Lawyer being practiced almost from his Cradle in defending Falshood; is quite out of his Element when he would be an Advocate for Justice, which as an Office unnatural, he always attempts with great Awkwardness, if not with Ill-will. The second Disadvantage is, that my Lawyer must proceed with great Caution; Or else he will be reprimanded by the Judges and

2. KING HENRY VI, Second Part, IV, 2.

3. VOLPONE, I, iii, 52-60.

abhorred by his Brethren, as one who would lessen the Practice of the Law. And therefore I have but two Methods to preserve my *Cow*. The first is, to gain over my Adversary's Lawyer with a double Fee; who will then betray his Client, by insinuating that he hath Justice on his Side. The second Way is for my Lawyer to make my Cause appear as unjust as he can; by allowing the *Cow* to belong to my Adversary; and this if it be skilfully done, will certainly bespeak the Favour of the Bench.

The judges "lie under such fatal Necessity of favouring Fraud, Perjury and Oppression," and rely on "all the Decisions formerly made against common Justice," which, "under the Name of *Precedents*, they produce as Authorities to justify the most iniquitous Opinions." Criminal cases are much more easily handled than are civil: "The Judge first sends to sound the Disposition of those in Power; after which he can easily hang or save the Criminal, strictly perserving all the Forms of Law." Bench and bar, of course, proceed in a "cant and jargon" that perpetuates the profession.⁴

It is small wonder that during the nineteenth century the lawyer found difficulty in gaining respectable recognition "in a society which had never regarded lawyers of any description with over-much favor. None of the commercial and technical professions thrown up by the Industrial Revolution had to overcome such prejudice or so many difficulties."⁵ The literary disparagement of the profession did not lessen out of a sympathy for the plight of lawyers. Lamb supposed that "Lawyers must have been children once," and Dickens' delineations of the law's delays and outright inequity, as well as the perfidy of lawyers, were to prove more popular in the public mind than the legal reforms they postdated, except to those actually involved in litigation. If Scott was pleased with the company of barristers and thought highly of them, their portrait is not sufficiently colorful in his work to brighten the profession's reputation against his successor's grimer estimate. *Jarndyce — vs. — Jarndyce*, from *Bleak House*, has become the classic "case" of jurisprudential absurdity: the trust is diminished by inflation and administrative costs, and finally is extinguished by the attempt at judicial remedy. Substantive justice cannot emerge — even if it is at all desired from any quarter — out of the morass of procedural niceties, the accretion of centuries, the darling of conservatives, the burden of humanity.⁶ Evidence rules and common law practice and procedure are similarly enshrined in *Bardwell v. Pickwick*,

4. SWIFT, *GULLIVER'S TRAVELS* 215-17 (Norton Critical Ed. 1961).

5. BIRKS, *GENTLEMEN OF THE LAW* 270 (1960).

6. Used as a classic example of what equity ought not become in SCOTT AND SIMPSON, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* 184 (1950).

and the lawyer struggling for public approbation through Law Society and parliamentary reform measures, and, more importantly, personal probity, could not and did not compete successfully with the anachronistic but compelling portrait of his profession as Dickens vitriolically presented it.⁷

Many of man's perennial conflicts escape altogether the recognition of the courts, fortunately, but many others are within at least the theoretical concern of the judicial process, whether litigation results or not. As populations burgeoned and urbanization proliferated and compounded in the last century, the very congestion of humanity made the incidence of conflict higher, and brought within the terms of party conflict those crises that in other ages had less of a public manifestation. At the same time the novel as a literary form came to maturity and social manners — or better, society — was its subject. It was perhaps inevitable that writers would turn to law, lawyers, and litigation for at least part of their material. After Scott and Dickens,⁸ Surtees,⁹ Trollope,¹⁰ Warren¹¹ and Thackeray¹² may come to mind as having focused on areas of experience or patterns of life touching, touched by, or existing through the law. In 1908, Wigmore published a list of some novels that in one way or another reflected the legal world; the vast majority of his titles were, of course, from the last century.¹³ And during the early years of this century, that fine scholar and humanist, Judge John Marshal Gest, published a series of articles, later collected as *The Lawyer in Literature*, in which he examined

7. Holdworth, *The Case of Bardwell v. Pickwick as an Historical Document*, 13 IOWA L. REV. 61, 61-62 (1927): "The reason why not only Pickwick, but also many of the novels of Dickens are of information to the antiquarian or the legal historian is to be found in the dates when they appeared, or the dates at which their scene was laid. Dickens was born in 1812 and the dates of his novels range from 1835 to 1870, so that in many cases the scene of these novels is laid before the era of the law reform of the nineteenth century had begun. Thus Pickwick set out on his travels in 1827 and the book was written in 1836. Hence, in Dickens' descriptions of the courts, the lawyers, and the law of his day we get an account of the many archaisms which still existed in the English law. That is one reason why so many of Dickens' books are useful to the legal historian. Another reason is this: Dickens had an extraordinary power of minute and accurate observation; and because of his early training he applied this law to the law and lawyers. At the age of twelve he visited his father who had been imprisoned for debt in the Marshalsea prison and this left an indelible impression on his mind. At the age of fifteen he was in the office of Charles Molloy, and was later in the office of Ellis and Blackmore. He was a reporter in the courts of Chancery and Doctor's Commons at the age of eighteen; and in 1899 he had been the victorious plaintiff in five chancery actions against certain publishers who had printed some of his books."

8. See GEST, *THE LAWYER IN LITERATURE* 1-112 (1913).

9. Gutteridge, *The Law and Lawyers of Jorrocks*, 8 CAMB. L.J. 161 (1943).

10. WINDOLPH, *REFLECTIONS OF THE LAW IN LITERATURE* 11 (1956).

11. Watt, *Samuel Warren*, 30 JURID. REV. 85 (1918).

12. Silliman, *Thackery and the Law*, 18 CAS. AND COM. 423 (1912).

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

some notable British and continental novelists who treated to a greater or lesser degree the lives, problems, practices and institutions of law and lawyers.¹⁴ His account of the image of his subjects in the dramatic terms of certain novels was limited, however, both in scope and technique; most noticeably absent was the law and the lawyer in American literature. Both literary and legal scholarship would have benefited had the Judge turned to his native literature.

Because Dickens "did not kill the Chancery snake, but only jumped on it after it was dead,"¹⁵ because Scott and Stevenson wrote largely of remote legal systems and because the nineteenth century was the nineteenth, the caustic or comic or even vaguely sympathetic accounts of law and lawyers in literature of that century are often treated as fictional entertainment (which they are) without any more relevance than historians can find in them (which is not inconsiderable).¹⁶ The question of their influence upon what might be called the political acceptance of the rule of law is regarded as mooted by the diminishing returns of time. And in a stately waltz with such an attitude goes the perennial exhortation, often by gracefully literate members of the Royal Bench, to the lawyer to indulge himself in what, after all, should be the "equipment of the lawyer."¹⁷ Whether the same aloofness can be displayed toward literature since Wigmore catalogued and categorized the more obvious "legal" novels is doubtful, however, since the image of the law and the encounter with the law coincide. Wigmore was more than a cataloguer when he urged the lawyer "because of his special professional duty to familiarize himself with *those features of his profession which have been taken up into general thought and literature.*" The literary dimensions of the image of the lawyer — the "features of his profession" — as they have emerged since Wigmore refined his list from 382 titles to 100 in 1922,¹⁸ can be considered worth the especial attention of the lawyer in his professional capacity as they are part of the context in which he carries on his craft or sullen art.

Some attempts have recently been made to focus the attention of the lawyer upon his fictional counterpart who is emerging in the contemporary context in which the lawyer is practicing. William H. Davenport, a professor of English who directed a course in legal literature at the University of Southern California, has published a

14. See *supra*, note 8.

15. *Ibid.* at 30.

16. See *supra*, note 7.

17. Birkett, *Law and Literature: The Equipment of the Lawyer*, 36 A.B.A.J. 891 (1950).

18. Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26, 28 (1922).

bibliography and supplement of readings that note prominently the recent fiction centering on lawyers or legal problems;¹⁹ A. P. Blaustein, who is much concerned about the public stance of lawyers, has edited a collection of short stories;²⁰ and Judge Harold Medina has selected and introduced a passel of Authur Train's stories.²¹ Specifically concerned with the portraiture of his colleagues in very recently published novels, Edward J. Bander, at the time the Librarian for the Court of Appeals in Boston, has attacked a handful of writers for "the arbitrary, pretentious, impossible manner in which they portrary the law and its servants," the "cumulative effect" of which "has been agonizing to the poor conscientious day-to-day practitioner." The "subliminal vilification of the law and lawyers by present-day novelists" dismays him mightily, almost as much as does the fact that they sell well.²² In short, the lawyer is exhorted to an awareness of his uncommissioned and even undesired public relations portrait.

Bander's dismay is, interestingly, prompted chiefly by the prevalence of sexual promiscuity on the part of the fictional lawyers of, among others, Cozzens (*By Love Possessed*), R. P. Powell (*The Philadelphian*), Louis Auchincloss (*The Great World and Timothy Colt*), Mankiewicz (*Trial*), and O'Hara (*10 North Frederick*). Only Travers (*Anatomy of a Murder*) escapes on this account since at least his hero never involves his women in "a non-legal posture" (the phrase defeats Bander's complaint that the book is "tedious with wisecracks"), though rape and murder sustain the plot, in his judgment. The aims of the literary characters, as lawyers, their professional commitment and competence, and the legal order in which they exist and color or further by their role — all are largely ignored. Only Mankiewicz' professor, duped by Communists, and Cozzens' Tuttle, touching the trust funds, are singled out for attention on grounds other than promiscuity. Bander wishes on other professions the fictionists' mordant eye, since he (rightly) observes that laciviousness and greed are not the special and exclusive property of lawyers.

What remains unexplored, however, is the degree to which the law and its servants are vilified as an institution and a professional group of a society. If the lawyer as lecherous man is given prominence, this in itself will have little weight for a public that, as Bander admits, has come to expect of all men that they be troubled by the imperious

19. Davenport, *Readings in Legal Literature*, 41 A.B.A.J. 939 (1955); *Readings in Legal Literature: A Bibliographical Supplement*, 43 A.B.A.J. 813 (1957). See also: *A Course in Literature for Law Students*, 6 J.L. Ed. 569, 573 (1954).

20. *FICTION GOES TO COURT* (1954).

21. *MR. TUTT AT HIS BEST* (1961).

22. Bander, *Some Legal Fiction: Woe Unto You, Novelists!* 45 A.B.A.J. 925 (1959).

demands of the flesh. The fictional representation of men succumbing to those demands may or may not be literarily valuable, but the presence of such material in itself hardly subsumes the interest or the impact of the text as a literary or a social document.²³ It might then be profitable to explore some of the modern fiction that has made an impact upon the public with specific regard to the lineaments of the profession of law and the legal order that it projects, directly and indirectly, overtly and covertly. Certainly the novels of Cozzens and Travers are especially deserving of analysis, since they long enjoyed a handsome reception from the public; and mention too should be made of Gardner's ubiquitous hero of a thousand legal battles, as well as of that embodiment of the Yankee archetype, Mr. Tutt, who entertained the readers of one of America's most popular magazines. The primary levels of literary enterprise of any pretention are represented in such a selection, and the probability is increased that the configurations of the public image of the law and the lawyer as literature (under a fairly loose definition) reveals them will be encountered.²⁴

Cozzens has for many years been familiar to lawyers for his 1942 novel, *The Just and Unjust*, a book which rather quickly was recognized as a valuable aid to the neophyte law student and so gained a place on a list of recommended readings prepared by the Harvard Law Faculty.²⁵ All the reasons for the inclusion of that novel are no longer discoverable perhaps, but reviewers in and out of law journals were especially impressed by the degree of "realism" afforded by the novel's scenes of courtroom drama.²⁶ Indeed, the virtues of the work were presumably epitomized in the close correspondence of the murder trial of the unjust and a Pennsylvania County (Bucks) Court proceeding. There is, of course, much truth in such a view of the book. The authenticity of details in scene and procedure are marked, and the dramatic excitement inherent in a struggle between intelligent men over a question of great importance — the life or death of the defendants — is conveyed successfully over the course of the novel.

23. See FIEDLER, *LOVE AND DEATH IN THE AMERICAN NOVEL* (1960), for his observations on the relation of the novel and sexual love; it is, in Fiedler's estimation, a weakness of fiction in America that adult passion is almost never encountered; but cf. FULLER, *MAN IN MODERN FICTION* 32-44 (1958).

24. Faulkner certainly represents another level, but his novels and stories presenting the lawyer Stevens are not his most significant work, nor have they had the popularity of those pieces of fiction to be considered here.

25. Note, 58 HARV. L. REV. 589 (1945). This piece bears the title: "A List of Books For Prospective Law Students Now in Service Prepared by a Committee of the Faculty of Harvard Law School."

26. *Ibid.* at 593: "The best account in fiction of the daily life of ordinary lawyers. It tells what really happens in office-work and trials." See also: Davenport, *A Course in Literature for Law Students*, 6 J.L. Ed. 569, 573 (1954).

An unsavory bunch have, so one of their number confesses, committed a kidnap-murder of another unsavory character, and, following a mixture of coincidences and inevitabilities, two are brought to trial while a third testifies for the state. Almost immediately a contrast is struck between the backgrounds of the defendants and those of the officers of the court (Judge, prosecutors, defense counsel), a contrast orchestrated by the very physical settings of the novel. The defendants, like the victim (a dope peddler), are outlanders from the teeming and corrupt metropolis; they have spent their not lengthy lives on the make, creating their unimpressive values as they went, grasping at the main chance, which is never much, in a pattern of animal cunning liberally adulterated by human stupidity. They have no family, no roots, no respectability, and though the specific charges of the indictment are the guides to the realities sought by the court contest, the gravity of the charges and the atmosphere of the novel are weighted by rules other than those of evidence. The court, beginning with the abstraction presented on the docket and moving through careful procedures and safeguards to an ultimate declaration of another abstraction (guilty or not guilty), is entertaining an action the *dramatis personae* of which are foreign in every respect but one: their presence is a command performance through the statutory provision giving Quarter Sessions jurisdiction over the felony committed within the county; moreover, the felony is uncommon in the court, a decade having passed since the last murder trial. The violent and the seamy are equally strange and discomfiting in the setting marked by the symbols of age, stability, and repose.

Unlike the defendants and victim, the officers of the court are members of the establishment; some have long family histories in the semi-rural area, while others, though newer arrivals, have accepted and married into the standards of decorum and value of the older families. It would not be literally correct to denominate the "just" as the white, Anglo-Saxon, Protestant ascendancy, but it would be sufficiently accurate. Abner Coates, the central figure in the novel, is son and grandson of county judges who have presided where he now prosecutes as Assistant District Attorney. Only recently out of Harvard Law (where he was classmate with his lifelong friend, the defense counsel, Harry Wurts), he is beginning his community service that presumably will someday be performed on the Bench before which he now argues. Club, church, school, and a network of social and blood lines define him (and, more or less, the other officers of the court) — and set him off starkly from those whom he prosecutes, much more

starkly than does the aisle between prosecution and defense tables. But as he shares in a measure the responsibility of the District Attorney, he must by his professional commitment come to an understanding of those intrusions upon the peace of the community and of the institutions whereby the peace is preserved or restored; and the attempt to reach that understanding obliges him to evaluate, however uncertainly, the estate of manhood or maturity and to grow into it. The conflict within the young man is that within the young man of any community, aboriginal or "advanced": initiation into full adult status involves the acceptance of forms, the inhibition of certain impulses, the quiescence of certain doubts, the grasp of complex and sometimes conflicting aspects of reality in a framework of what is at least nominally a rational order. And if the society into which the youth fully enters as adult is to be preserved, the reconciliation between youthful dreams and mature evaluation of circumstances must be achieved with neither too violent a rupture from the adolescent hopes nor too shocking a revelation of disparity between raw fact and the rationale that presumes to explain the fact.

Abner Coates, witnessing the ritual re-enactment of a threat to the ordered world he has always known — a re-enactment *sans* the violence that does at least momentarily shatter the society by nullifying its aims for one member, the victim of the crime — is thrown upon his resources of family and community training to assimilate, even in the abstracted form in which the court allows it, the horror that crime is. And with the details of the kidnap-murder there is also revealed a constellation of other abuses to man: a confession has allegedly been beaten out of one defendant by the FBI. The confession, which would restore more quickly the order of the community, is therefore desirable evidence, an approach to truth and rationality; but it is at the same time paradoxically undesirable, for the conditions under which it was obtained by an organization standing for the rational order of society might prejudice a jury and defeat the purposes of the ritual. Hence, while truth is sought, the whole truth of a situation contains an affective force disturbing to the repose that the rational consideration of truth seeks. Meanwhile a high school teacher admits voyeurism in a summary proceeding from which truth is partially and deliberately excluded.

Reason strains the reasonable order on other respects: the District Attorney is anxious for success in this case, not only because he is convinced of the prosecution's construct, but also because his personal advancement may depend on it; and Abner in turn is due for promotion if his chief leaves vacant the office. But as the possibly alogical

jury can be prejudiced by some kinds of testimony and thus within the framework of reason conclude with something other than a logical formulation, so the officer who is to marshal the materials that will lead such people to a logical conclusion is himself subject to them in their role as electors. Members of the establishment in Bucks County in 1939 (as in 1961) are Republicans; indeed, Republicanism is (within the novel at least) synonymous with a decent income, a decent club, decent relatives, and decent membership in a church (or, if the term is not redundant, a decent church). But there enters a dark presence upon all this decency — the county chairman, whose job, unappreciated by young Coates, is to select the candidates for office that will symbolize full membership in the establishment. The master of initiation ceremonies must know the temper of the tribe, what it will and will not accept, and who will accept membership in the right spirit. For Coates, this is the intrusion of the all too human element in the abstract construct he has latently formed of justice, competence, decency, and deserts, and hence he rebels. Unfortunately for the romance of rationalism, the chairman does not expect the candidate to sign secret protocols immunizing road contractors who cheat on concrete quality, overcharge the treasurer, and contribute to the party from the unearned surplus; in ironical fact, the chairman is willing to accept a doubtfully reasonable choice by Coates for Assistant District Attorney.

The crisis of the conflict is reached when Abner, his contacts with complex experience enlarged, enriches his life with an acceptance of the irreducible tension that marks successful civilization. Cozzens doles out the embarrassments to the dream of reason in a pattern that culminates with the absurd verdict of guilty of second-degree murder for the two defendants — a verdict that is the apparent negation of the logic of the evidence and is an abomination to judges and prosecutors; and a further irony compounds this since the state's witness, who, it was hoped, would aid the return to order and in turn be rewarded by a more lenient sentence after his own trial, is now left in the regrettably unambiguous position of the publicly confessed accomplice to a capital crime. It is an unreasonable verdict, but reason can justify it, or consider it in such terms that the fact will not display too egregious an instance of unconformity. Abner's father, the old Judge now debilitated by physical infirmity but still capable of commanding community respect and allegiance, offers the explanation: the rule of law (like the existence of an aristocracy) is to a degree dependent on popular acquiescence. The jury is a buffer between the official embodiment of the rule and the masses ruled; and it absorbs

discontent — or rather unfocuses it and reflects it back upon the discontented — and hence leaves unperturbed the rule. All that is required for the successful continuation ad infinitum of the rule of law by the logical, and hence fit, is the ability (which is a sign of fitness) to recognize the need and inevitability of the illogical manifestation at intervals. This is the frailty of man, the human condition; and those who rise above it do so by recognizing and tolerating it, for that is the sine qua non of management and the quintessence of reason.

The lesson of initiation to the elite is precisely that the elite direct the great unwashed through the troubles that their temporary (drink-induced) or permanent (congenital or natural) unreasonableness invariably create. The sign of election is not necessarily freedom from the passions that debilitate, but at least the common sense and perspective to avoid the infirmities when the tribe is in conclave assembled. For the uninitiated are largely incapable of either grasping the mysteries or of tolerating a marked deviation from the proprieties by those who presumably have grasped them. Cozzens pictures the unwashed through the eyes of the elite, of course, and hence there is a built-in preference, or, from the other side, pejorativeness, in the image of those who are not called to the Bar; yet there is more than that, there is a positive cumulative emphasis on the stupidity of the vast majority of men. Indeed, the “analogical matrix”²⁷ of the account of those who must come to the lawyers can perhaps best be summed up in the term “boneheadedness.” Folly, only slightly adulterated by faint and indirect intuitions of justice or kindness, is the enduring characteristic of mankind — folly, selfishness, and sometimes, or oftentimes, viciousness; only a few select are free from a natural disposition (intellectual and moral) to misconstrue, distort, or destroy, and the folly of those few would be to fail to see the weakness of others.

Abner Coates must come to the towering wisdom that reason's ultimate apotheosis is that reason is seldom encountered, and then only in a few. His desire for a logical ordering of humanity's endeavors may be commendable, but his expectation is not. There is a difference between theory and practice, both the District Attorney and experience tell him, and he cannot have things his own way, rational and orderly, as long as his “own terms” do not include a settled conviction of the refractoriness of most of that disagreeable species, homo sapiens; and the paradox of the truth is in the irony of the name. Hence when Abner recites to his father his father's own maxim, *Ex factor oritur*

27. MARK SCHORER, *Fiction and the “Analogical Matrix”* CRITIQUE AND ESSAYS ON MODERN FICTION, 1920-51, 83-98 (Ed. Aldridge 1952). Schorer borrowed the phrase from Scott Buchanan, and employs it to examine three nineteenth century novelists; the term and the concept are helpful here, however.

jus, he is already beginning to understand that keeping the facts straight means manipulating them: he has on that very day had to abuse the sensibilities of one of his own witnesses so that the defense in the murder trial would not create successfully an impression that the witness was an expert on something closely related to the expertise for which he was called to testify for the state in the first place; and he has been obliged to commit what might be called "misprison of misdemeanor" in dealing with an incompetent Justice of the Peace, thus at once defeating the desirable end of levering the squire out of office, abusing the District Attorney's trust, and more and worse, justifying the means by the end. But in all this he is approaching what his father, in the closing words of the novel, calls the duty of the elite, to do the "impossible." Abner's habit of analysis of every gesture and statement remains, presumably, with him, and that is his virtue and warrant as a member of the elite; but he is perhaps less inclined to formulate his analyses in terms of the disjunctive propositions, so much the habit of the rationalist more aware of Lord Hardwicke's aphorism about law and certainty (which Cozzens uses as an epigraph to the novel) than of Justice Holmes' reservations on law and logic. Abner has by the novel's end come to terms with the County Chairman, whom he formerly regarded with semi-polite contempt because he had no authority or justification "in law." And he has received a lecture and a lesson from one of the oldest members of the Bar, who reminds him that in the name of common sense the rigid formalities are sometimes transcended or subverted.

Interestingly, it is lawyers who transcend the law in the interests of common sense; the untrained, like the farmer turned Justice of the Peace, whom Abner saves from his incompetence, are liable or even likely to go creating havoc in their attempt to circumvent the formalities. The "impossible" is to be achieved by the elite; for them the faults and follies as well as the formalities will be minimized: ". . . I can say that I'm glad I spent my life in the law," his father tells Abner; ". . . there are disappointments; there are things that seem stupid, or not right. But they don't matter much. It's the stronghold of what reason men ever get around to using. You ought to be proud to hold it. A man can defend himself there." The lawyer recognizes the stupidity of mankind, comments on it freely, at least among his colleagues, and even obliges others to unwillingly assume a posture of stupidity or incompetence, as the coroner is forced to do in the testimony about the cause of death in the murder trial. Too, Abner can recall "certain professors," "men of great learning and wisdom" who

"none the less sought and enjoyed the poor and mean sport of traducing the stupid." Though they are professors of law, they are other than lawyers managing the affairs of a working world, and hence, it would seem, their cocksureness was explained by their remoteness from life. The remarks of the defense counsel Harry Wurts that prompt the recollection of the professors might seem to place, in Abner's estimation, his colleague outside the pale; and indeed Harry skirts the edge of the establishment, almost, because his tactics are "cheap" in the eyes of the District Attorney, becoming one of the unwashed who has deliberately defiled himself. Harry has been, however, introduced to the mysteries, and manipulates the unreasonable by his own reason until it fits a pattern he and the other lawyers can tolerate; he at least seeks the approbation of the "just" and in that escapes the censure Abner silently delivers on the "shyster" Servadai who deliberately seeks by reason the unreasonable end of avoiding justice. Servadai is the renegade, as well as the "foreigner," the intelligent man corrupted, the lawyer who ignores the ideals of the profession, who seeks not the "impossible" — the fusion under tension of the real and the ideal — but rather the possible — the further corruption of frail man. In short, the subversion of the law by lawyers is acceptable as it is in the interests of transcending by and for common sense the formalities of law; the subversion that has only the subversion or gross pecuniary rewards as its end is contemptible and not really of the law.

To declare, after Virgil, *Sunt lacrymae rerum*, is but the first — or the last — step in constructing a philosophy; it is hardly a philosophy itself, and it can be no more than a pedantic form of such pieces of cracker-barrel homiletics as "Life is one damn thing after another," or "If something bad can happen, it will," or "Things will get worse before they get better." Cozzens, of course, is not creating a philosophy but is recreating an experience, dramatically, that both embodies and reveals an attitude toward experience, a particular and even peculiar vision of experience. The novel is a linguistic construct with various conformities to its referant, or non-conformities, and it is possible to disparage Cozzens' attitude, to disagree with certain observations of his characters, and even to find fault with his law (though that is perhaps the least impeachable aspect of the novel) without thereby condemning the novel *per se*. The broad pattern of attitudes through Cozzens' work may seem pessimistic or even cynical to some, and certainly undeserving of the dignified title of philosophy. But the attitudes are mature in so far as they are dramatically presented: the pseudo-life portrait that his novels present have a valuable correspondence in and

to the society he observes, however thin or "shrill" some of his obiter dicta about society may be when he speaks outside of the novel.²⁸ The novelist has presented a compelling drama of the role of the lawyer in his professional milieu, of the tangled skein of society that endures because some — the lawyers — without expecting much do what can be done to enable man to escape some of the more serious consequences of his passions or to avoid the action consequent upon passion or to correct the situations that the frailty of man will bring to pass. The lawyer broods over the New Jerusalem and recognizes it as no better than the Old; but he has a very limited notion of his messianic role, for he will not die in sorrow nor live in joy nor preach to its reformation, but, aware of limitations and inevitable if unforeseeable entanglements and of his partial frailty (only relatively less than the rest of mankind's), he will rise to the day's job of work of preservation of the modest level of civilization the community has, not crying himself, whatever are the tears of things, because men don't.

John Ward makes the point, persuasively, that Cozzens is not interested in the lawyer as such, but in the professional man who, better than others, realizes the disparity between the ideal and the actual.²⁹ But in the two novels following *The Just and the Unjust* the lawyer figures large, and as Coates had to realize the separation of theory and practice and come to assume a responsible attitude by assuming responsibility, and thus achieve manhood and preserve society, so the lawyers of *Guard of Honor* and *By Love Possessed* come to reaffirm the truth they had earlier known of the limitations of hope and will and reason, and go on to reinstitute the modest order and sanity that the passions of frail man have disturbed; and it is the law, and the lawyer's training and experience, that are the instrumentalities for the restoration. It would not be unreasonable, then, to infer that for Cozzens the lawyer and the law are preeminently the professional and the profession that makes sense, in however modest a degree, out of life. The lawyer and the law make the human condition as bearable as it can be made — or ought to be made for that matter, since some other agencies, such as the Catholic Church, may make life bearable at the expense of human dignity, as Judge Coates puts it in *The Just and the Unjust* and Mrs. Pratt exemplifies it in *By Love Possessed*.³⁰

28. Ward, *James Gould Cozzens and the Condition of Modern Man*, 27 THE AMERICAN SCHOLAR 92, 98 (1957-58).

29. *Ibid.* 94-95.

30. For a somewhat different perspective see: McKernan, *Profile of an Aristocrat: James Gould Cozzens*, 186 THE CATHOLIC WORLD 114 (1957); Finn, *Cozzens Dispossessed*, 68 COMMONWEAL 11 (1958).

The Pulitzer Prize Novel *Guard of Honor* (1948) exemplifies this position especially in that the setting is a military base, rather than the courtroom, and the problems emerge and are categorized and manipulated in terms other than those used in litigation. The fabric of life on a military base, despite the stereotype, is not unlike that elsewhere, especially as Cozzens portrays it; there is no simplified table of organization, no single and infallible source of wisdom, no absence of the rub or clash of interests or personalities, no exclusion of the passions and frailties of man — and no utter assurance that from a set of facts or actions or hopes will spring a definite, calculable consequence. The actors are military men of the ostensible military establishment; but the setting is wartime, and the officer class has been augmented by the presence of men from all sorts of callings or accidental occupations. Hence the unity of purpose in the society and its aristocracy-by-happenstance is artificial, superimposed rather than integral and organic. The military code, the officer tradition, even the elan of war cannot themselves serve sufficiently to order such a society or keep it from its centrifugal diffusion. The exacerbations of a history of racial discord, the importunings of sexual desire, the jealousies of the ambitious and the resentments of the incompetent, all these confront and threaten the explicit purpose of the base. The professional military man has too limited a vision, too short a perspective, to accomplish the accommodation of forces; his competence is not with the enmeshes of society but with one of its gestures.

Colonel Ross, however, has a lifetime behind him of dealing with the intransigent and incalculable; his competence is of the order of Judge Coates', and he is himself a judge. Over the last three days of a week he holds together the necessary if artificial society of the Air Base, bringing reason to bear, the wisdom that experience has taught, and the specific talents of the lawyer and judge. It perhaps is an overstatement to say he alone holds the base together; a confluence of chance and intention from a variety of sources is involved; but it is Ross' disposition of what it is in his power to dispose that is decisive. His is the reasonableness and common sense that recognizes limitations and frustrations and knows that they are the matter of life and not simply the matter with life. His anger is like that of Marty Bunting, the District Attorney of *The Just and the Unjust*, a sign of frailty but also a sign that the frailty is about to succumb to reason. Reason is not assured triumph, but success is not to be measured by conclusive ends or unadulterated joys; reasonableness is the recognition of an ideal of order and the impossi-

bility of it, the thoughtful manipulation of forces and the accommodation of that which is beyond manipulation. The paradox of maturity painfully achieved by Abner Coates is the once more proved property of Ross: reason is the recognition that reason is not the sum of man and cannot be but must be pursued though it cannot be attained. The race for the prize struck Abner Coates as a bit of fraud, since only one can win and the rest race in vain; but the race is called for the elderly as well as for the schoolboy ("no bets are off" as Judge Coates tells Abner, in another context, but one applicable to *Guard of Honor*) and if the prize is of another order and the conditions different the race must still be run, with the desire but without the hope of winning. Realism is not the denial of purpose and effort because the race cannot be won by all; it is running hard with the knowledge of the impossibility of complete success. Judge Ross brings the lawyer's competence and training to bear in keeping the business of the base going: the Executive Officer is incapable of giving detailed attention to his work, so Ross must do it for him; and that is running the race, even if walking is the nearest thing to running. The day's work must be done, and whether love or hate or stupidity would bray loudly for the sun to stop, it will not. The lawyer achieves the "impossible" of watching the sun go down with a willingness to get up the next day, just as the sun will; he has not resolved the ills of man, he has devoted his intelligence and training to keeping them from renting the fabric of life so thoroughly that nothing recognizable is left but naked man.

Trial advocacy, the function that has given the barrister esteem of a higher sort than his perhaps better trained fellow lawyer, the solicitor, attracts the public eye more easily than does the routine of counseling and negotiating on the myriad matters that make up the day's work.³¹ So a paradox is discovered in the choice of subjects on which Cozzens chooses to focus: the image of competence working without dramatics and with a contempt for melodrama is fashioned invariably with materials inherently dramatic and bordering on the melodramatic. If the greatest art conceals art, then Cozzens ranks rather high among artists of language, for he submerges the raw, unfinished, melodramatic aspects of his material to allow the signifi-

31. BIRKS, *GENTLEMEN OF THE LAW* 3 (1960): "[The barrister] must . . . spend the first year of his professional life as the pupil of an experienced member of his profession. . . . As the newly admitted solicitor is turned loose on the public at large, these examinations are far more searching than the barrister's." LERNER, *AMERICA AS A CIVILIZATION* 433 (1957): "The dramatic expression of the government monopoly of force is the criminal law. From the most sordid and banal cases of most routine pickpocketing and prostitution in the police courts to the most sensational murder cases, the criminal law gives to the lives of bored and lonely Americans some filip of distraction."

cance of his characters' actions to emerge dramatically, and that significance or thematic meaning is a denial of the romance of life as other than a fiction. Flamboyance, a la Harry Wurts in cross examination or Abner Coates in a moral pose that is to strike Harry into sobriety, is distasteful: but the flamboyant must appear to be distasteful, or a tract and not a novel is the result. Ross does the impossible of achieving the possible after passions have disrupted the community in a situation made dramatic by the distillation of the melodramatic.

The process is found again in *By Love Possessed*, wherein the fusion of a style and a set of interrelated subjects produces another avatar of the lawyer doing the mending and refurbishing and modest incrementing of the civilization. Fornication, alleged rape, suicide, betrayal, and fraud are part of this fictive world, as was murder, violence, and voyeurism part of *The Just and the Unjust*. But these elements are not subsumptive of interest; they are part and not the whole of the recreated experience of the novel. The day's work is done in repairing, or letting alone if repair is only a species of more melodramatic violence, the results of flamboyance, exuberance, anger, lust, hate, greed, stupidity, sentimentality, or even mis-directed good will. Cozzens has taken the chance of eschewing the minimal stylistic flare of the previous two novels and the ready-made theatric scene of the court-room, but his drama nevertheless compels and enforces the portrait of the lawyer and the law as the establishment preserving the minimal cohesion of values.

Arthur Winner, Jr., (in whose name is found the first irony of the novel) is caught by time and place and actions of others and of his own desire "in a disturbance of self-questioning, in the vagueness of regretful uncertainty." His partner Julius Penrose, crippled in body but quick in mind (Swiftian, indeed, were the pun permissible), provides a catalyst to the ruminations Winner endures or entertains upon the trap that is the life dominated by "capital F Feeling" wherein the lusts and imbecilities and the calculated cruelties conspire against reason. Winner has had his hopes dashed in all respects; a son blazed a path of violence and disregard, making a shambles of the pattern for him that a father consciously or unconsciously projected; one wife, who did not sufficiently absorb his attention or his passion, has died; and he has been an adulterer with Penrose's wife, and has not successfully kept it from Penrose. Belief in the efficacy of religion has eroded, but he has been asked to become senior warden of his church. His secretary's brother is accused of rape by one girl and of fornication and bastardy by another — and is both innocent and guilty at once of both matters — a combination of calamities that prompts the

secretary to commit suicide. And finally the senior partner of the firm of Tuttle, Winner, and Penrose, the ancient and respected Noah Tuttle, is discovered by the junior partners to have juggled trust funds. There is no escape, no retreat; in the corner of the garden is the snake whose head can be neatly severed for an ultimate final, conclusive victory, but the external world of nature is not the human nature of Winner or the people of Brocton.

Winner must accept the clotted, convoluted character of experience and experience's actors, including himself, and make what he can of them without indulging in a dream of perfection. A life as a lawyer has given him the equipment necessary for minimizing the chaos of passion; an eye used to the deceits that truth enjoys, a faculty for analysis of motives, and a competence at organizing disparate facts; all that is required is a patience with limitations, one's own as well as others, and the law and the lawyer have that too. Winner and Penrose decide to leave undisclosed the manipulations of Tuttle; perhaps in time the accounts will settle up, and in any event only further destruction can result from disclosure.³² It is not, however, the connivance of those who seek to negate justice; nor is Tuttle's manipulations of accounts for his own monetary gain. Rather, it is the agreement of the men of reason to acquiesce in an appearance of stability instead of insisting on a course of logic that will make the real more intolerable; after all, Tuttle acted out of a sentimental regard for society that faced financial ruin when he first began to shift funds, and hence — though Tuttle's regard could be equated with self-love — the mature judgment must accommodate the peccadilloes and tolerate the aberrances that have a stabilizing effect. Men must work and not weep over a past of faulty historical imagination or a future of an over-active imagination.

Those who weep or rage are possessed by love; they would obliterate the present, the here-and-now, in favor of the interiority of their supposedly timeless selves. But there is a fatal error in that assumption of a significance of the self without regard for the conditions that bind it: regarding the self *sub specie aeternitatis* is to make, as Penrose puts it, a bet about something there is no verifiable human knowledge of, and hence to call the incalculable into human calculations. Cozzens' characters are of the eighteenth century in disposition, but without the hope of a heavenly city or of the perfectability of man; perhaps Montaigne offers a better prototype since he

32. Winner is of the mind that he and Penrose will be accessories after the fact by failing to reveal Tuttle's actions, and Penrose believes that they, or at least Winner, will be civilly liable. But see Gould, *By Love Possessed: A Review From a Legal Point of View*, 44 A.B.A.J. 731 (1958).

could even better accommodate the scurrilities and obscenities of experience within a view of man than could, say, Montesquieu or Swift or Franklin, and of course far better than the utopian *philosophes*. Montaigne would have appreciated the observation of Penrose that "An entrance is won to the heart; but to the head? Passion and reason, self-division's cause! . . . On people as people, I try never to pass judgment — we can seldom know what the real truth about them is. Yet on acts, acts of theirs, I see no reason to hesitate in passing judgment — this is good; this is bad; this is mean; this is kind. On such points, I'm competent, as every man is. Like the common law, we secular moralists aren't interested in the why; we observe the what." The only strange feature to the sixteenth century skeptic would have been the reference to the common law; that Cozzens has carried into the picture, for, as it has been built up out of accumulated need and experience, it has, for Cozzens and his fictional lawyers at least, a proper perspective on man, an attention to the present, and a long view about the insufficiency of the ordinary run of mankind. The "unlovely world-as-it-is" is best managed by those on bench and bar who know the futility of laboring over what might have been, and who know that what might be is liable to be unpleasant and so are cautious about prescription. If this leaves men like Judge Dealy or lawyer Penrose also sardonic, it does not necessarily result in contempt for endurance in the face of the strong probability of failure; and a milder attitude than the caustic mein of Penrose and Dealy is found in some lawyers, especially in Winner. But all are men of reason, attempting to strike the balance of stability against the destructive mystery of passion, and the law is the instrument they find most effective and properly flexible for such an undertaking. Again, the highest reason for the secular moralist is the recognition that reason is not all, but is all that can be counted on in a confrontation with the wild uninhibited propensities of the mass of mankind. It is a reasonableness somewhat removed from that of Paul, who observed: "I see another law in my members striving against the law of my mind;" and a concept of law even farther removed, since Cozzens finds no absolutes but those painfully shaky norms of the temporal order, the more precious and deserving of concern because they are shaky.

A composite portrait can be found through the Cozzens' novels of the law as the symbol of resilient temporal order, the flexible shape of desirable human interrelations; and the lawyer as the hierarch who mediates the process of shaping and who creates the shape. The law looks to the realities of complex, tormented man through the eyes of the lawyer and thereby finds its standards and calls or forces men to

them. The long perspective of the law is possible only in so far as the lawyer can have perspective, and he can have it only with age (forty years are needed for a man to become an adult, Arthur Winner suspects). The norms that the law sets or the conduct it inspires, enjoins, or requires are based on the cumulative experience of society as its rational members evaluate that experience; certainly no norms are found beyond the verifiable temporal need of society, and none are regarded as having a sanction other than their reasonableness. Law derived from either hope or revelation is wish-law, ultimately unfounded on nature and probably at variance with it. On the other hand the positive law, if it is not mindlessly arbitrary, will be fairly enduring, not because things do not change but because when they do there is no assurance it will be for the better, and a flexibility will be built in if the law is the instrument of lawyers rather than the ukases of those who have their eyes on a heavenly city. The law is the rational ordering of the irrational, turbulent, whining, confused, passionate hoards, the barbarians who are cajoled or forced into the better but not best of worlds.³³ If the "thrusts of fate" as well as the stupidities of man are within the ken of the reasonable man, then flexibility will be right and proper; and yet that flexibility will not be a mark of inadequacy of the law, a failure of the principle of equality before the law, but rather a sign of the shrewdness of the ministers and makers of the law. "The law, nothing but reason, took judicial notice of man's nature, of how far his conscience could guide him against his interest. For the sake of others, for his own sake, the law would not let him be led into temptation. In its wisdom, the law only aimed at certainty, could not, did not, really hope to hit there. This science, as inexact as medicine, must do its justice with the imprecision of wisdom, the pragmatism of a long, a mighty experience. Those balances were to weigh, not what was just in general, but what might be just between these actual adversaries." Such is Winner's final reaffirmation, a reflection of Judge Coates', and presumably it is Cozzens'.

Here attention should fall on the meaning of the image the novelist has skillfully developed through a style effectively and perhaps affectedly, suggesting the choked, clotted, interpenetrating, ramifying and reverting nature of experience. The terms "reason," "man's nature," "conscience," and "interest," as well as "wisdom" and "science," lead to considerations of a sort more abstract than the immediate, concrete experiences of the novel. Those abstractions for Cozzens may or may not be at a remove from the instant pattern of

33. OLIVECRONA, *LAW AS FACT* 136 (1939): "Men need taming in order to live peacefully together."

embodied idea, feeling and act that makes up his fiction, but for the reader they may well be the residue in memory's filtration of the particular, remaining after the details of rape, seduction, suicide and parodic religiosity have wasted; the individuality of the scene and its people may fade, but the symbolic content persevere. The implicit subsumption by "law" of the semantic radius of all terms referring to significant human endeavor, the highest levels of both physical and psychic experience, make Cozzens' cumulative image of the law extraordinarily impressive.

The crucial point in the affectiveness and effectiveness of Cozzens' projection of the law and the lawyer is not likely to be found in the acceptability of his conception of man as a closely circumscribed being, whose experiences, whether personal or public, can be framed and understood by legal phraseology or parallel analogies. It is presumably possible to agree with a von Hardenburg on the excellence of the revelations of the night, or with, say, D. H. Lawrence on the well-springs of valuable experience, and yet be impressed with the concentrated image Cozzens develops. That is, the careful structuring of the fiction, with the evident contemporaneity of his scenes and his idiom, the authenticity of his reportage, and the subtle way in which he suggests that while life and art are distinct, his portraits are not art but life itself, give his work vitality and an authority that quiet doubts about a disparity between his view and the readers' philosophic attitudes. The city that the writer disparages may be the ganglia of a greater complexity of experience than is offered in the parochial settings of Childerstown or Brocton; the sources of power and influence over the lives of people may be and are found in their widest forms elsewhere than in the practice of such a firm as Tuttle, Winner, and Penrose or of a District Attorney's office in a fifth class county; yet the novelist quiets those doubts by making his subjects paradigms of whatever else is encountered and wherever else it occurs. C. P. Snow's Lewis Eliot may have a wider range for activity and the exercise of power, and Camus' lawyer-narrator of *The Fall* may probe recesses of depravity that shade those Winner suffers, but of the three novelists it is Cozzens who makes the pattern of legal activity the conceptual framework for the experiences he deals with, and legal terminology the means of understanding them.

Cozzens' lawyers and the law that they live and administer are together, then, the custodians of value. The lawyer, like Winner, may be weak like other men, but is also stronger; his failings are not remedied by search into the mysteries of man but by a rational acceptance that failings will be encountered and mysteries observed, and

both can be overcome or supported or managed by the institutional power structure, the law. The exploration of the justification of the form the law has will lead in a circle back to the faculty that attempts the exploration — the reason of the lawyer. This is only a very short step from the conclusion that the lawyer has erected the law to preserve his cultural patterns and psychological disposition, that his reason rationalizes what is beyond reason, that the norm of human existence is what is done by him who controls the instrument of power. But that step is not taken. The theory of jurisprudential norms is subject to the same ironies that man is; as man does not reach certainty in the construction of his life, but at best a tolerable condition that permits his continuation in life, so he does not explain fully the source for sanctioning conduct.³⁴ Reason, too, is limited, and to be held suspect even as it is employed. Hence it appreciates the irrational yearnings of man, just as the law accommodates them, even as it refuses them honor. A cultural history, epitomized in the legal structure, has given the one standard for evaluation: the culture has a civilization that still survives to support it. Success is endurance, excellence is durability; and a working system ought not be tampered with radically. The lawyer keeps the system working.

Such a modest goal, so little removed from a parody of conservatism or a jurisprudence of stagnation, makes Cozzens' lawyers unlikely candidates for roles in the perennial American drama of success, a drama that aims at triumph unadulterated by skeptical reflection or the expectation of renewal. Irony may be everyone's lot, but it is not savored by everyone. The taste of victory will fade in time; it ought not in the mouth be sensed as wormwood. The popularity of ideological slogans³⁵ indicates a habit of mind uncongenial to the notion of limitation in the handling of controversies, and hence there is no little surprise in the long popular success of *By Love Possessed* (unless the careful rehearsal of an alleged rape explains it). On the other hand, those portraits of the lawyer that represent him in uncompromised victory, final and irreversible and, better, just, under every man's garden variety of jurisprudence, can be expected to nestle into public esteem quite easily. The lawyer-as-hero in a controlled context of human problems has recently been exploited without the subtleties of implication that Cozzens enjoys. Especially successful has been Judge Voelker of the Michigan Supreme Court in finding the formula for rescuing the lawyer from the latent suspicions of the

34. See POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (Yale Paperbound 1959).

35. See Irving Kristol, *Old Truths and the New Conservatism*, 47 YALE REVIEW 365-73 (1958). BELL, THE END OF IDEOLOGY 369-75 (1960).

popular mind³⁶ without violating the expectation that the hero will solve irrevocably a situation.

Travers' *Anatomy of a Murder* dissociates the law from the lawyer, the triumph from the complications, and the theme from any existential relevance. Centering on the trial of an Army officer charged with the murder of his wife's brutal rapist, *Anatomy* portrays the intricate manipulations of the materials of evidence by the defense attorney, Paul Biegler. In the tradition of the "gallus-snapping" country lawyer, Biegler practices in a rural area (the Upper Peninsula of Michigan) where the refinements of dress and expression are affectations rather than symbols of civilized attitudes. Having been chosen for the defense because the foremost criminal lawyer of the area is ill, Biegler, a one-time District Attorney now running for Congress, sees his function not in terms of the preservation of forms of society or even as a search for justice but as an opportunity to advance his personal cause. This suggests that once again the lawyer is emerging in the disparaging terms of the older tradition, earlier recapitulated; but Travers has avoided that by the materials of his trial.

The murder victim has committed a felony, one peculiarly odious and destructive of order. The murderer has at the very least a justification in folk-sentiment; the problem is to find a justification in law that will be sufficient to convince the jury that the killing has not destroyed the order postulated and upheld by the statutes. The former district attorney has a curiously difficult time in hitting on the mode of defense that can prevail: temporary insanity, coupled with the right of citizen arrest and the permissible possession of firearms by military personnel. The symbols of order and stability so attractive to Cozzens are almost deliberately disparaged by Travers, who focuses instead on the rough-hewn, latent good will of the jury-members for his source of consolation in the battle. The law is not a historically developed framework for the transmission of values and amenable, reasonable practices, but a number of individual statutes and decisions to be exploited for an individually determined, isolated end. And the lawyer is the entrepreneur of the endeavor, free-wheeling and irresponsible. The struggle of conscience is foreign, not because Biegler has no conscience but because his is so fashioned as to permit him to see his legal acts

36. See, for example, an article *Careers in the Law*, CHANGING TIMES, THE KIPLINGER MAGAZINE, August 1960, p. 42: "Besides, lawyers are thought to be immersed in pettifoggery. As one jurist puts it, the man in the street believes that 'lawyers are more astute for fees than justice and more absorbed with technicalities than with human concerns.'" See also Hand, *The Deficiencies of Trails to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926): "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death."

in isolation from a context of interrelated moral demands. Hence he can speculate about the dangers of questions that may lead to an admission of guilt of first degree murder, which of course would destroy a defense proposal. Expertise in the law is a combination of energy in research and shrewdness in the "lecture" and cross-examination. An associate, Parnell McCarthy, devoted to his profession, "the jealous mistress of the law," when sober, provides the research, while Biegler, who regrets he, like the rest of the bar, is "getting to be a fine, colorless, soft-shoe breed, something like a cross between a claims adjuster and an ulcerated public accountant," supplies the cleverness, the tactical deployment of evidence aiming at a desired conclusion, indifferently truth. The trial itself is akin to *Kriegspiel*, a form of semi-controlled manipulation of pieces, the ultimate potential of which is never disclosed except in the failure of a gambit. A jurisprudence of gamesmanship evidently constitutes the meaning of the "law" in Travers' book, and the lawyer is the gamester.

It is a lively and engaging game that the novelist plays, and Justice Voelker, a former District Attorney himself, has obviously parlayed the drama with authenticity of detail and an engaging sense of humor. But authentic detail and a comicality turning on contemporary inanities cannot rescue the work from its thinness of theme and its stereotypic characterization. Hollywood has provided him with a frame of reference for categorizing the action and actors he has created, and it is legitimate foil for contemporary satire. But Travers has been governed by that which he would mildly ridicule: he has created a script with all the limitations that he has subjected to abusive asides. His hero is a man of generally good will, fair intellect, passable stamina, and commonplace tastes. His triumph is different in degree but not in kind from that of the simplistic hero of American popular tradition: he has come up against odds and has overcome them; no complexity in human aspiration or disposition is involved and no reflection is offered on the subtler significance of either the crime or the effort of society to comprehend and neutralize the violence. Society is trying to "save face" Biegler observes, but the implications of this are exhausted in the saying. It is not the state that is the villain (the political position of the hero negates the possibility of that traditional feature) but the state's attorney, Claude Dancer, who is outfitted in the habiliments and gestures of traditional villainy. Biegler has turned back a not-awe-inspiring juggernaut much as the western hero upsets the foul designs of the territory's biggest ranch-hopper or the railroad speculator's agent. He is virile if middle-aged, given to outdoor sports, and competent within the needs of his vision. However, the cumula-

tive effect of his fictional passage is modestly insignificant; the image that lingers is of the law and its procedures as a grab bag of isolated items, and the lawyer its chief customer; what he draws out may transform the fact-finding process of the trial into a carnival rich in distractions. That Biegler finds the "surprises" of the practice of law one of its attractions is not in itself surprising; the element of surprise is one of the features of authenticity, but for the approach to the truth of a situation or conflict the aspect of surprise is a limitation lacking in attractiveness.³⁷ The introduction of doubt has its legitimate function, but doubt as a goal is curious and possibly it is a vicious limitation on a serious endeavor. The courtroom is for Travers' hero the central locus of colorful, vital activity, and yet the author has made this colorful precisely as a circus is. The legerdemain of the lawyer, pious asides notwithstanding, is his virtue; and if Biegler is in the tradition of the hero in some superficial respects, he has also the character of the hero of an inconsequential game. It is the difference between *Kriegspiel* and *Krieg*.

The concept of justice does not enter the considerations of Biegler, but its presence, however vague, distinguishes the central characters of two other lawyer-novelists from those of Travers. The late Arthur Train and the flourishing Earle Stanley Gardner have provided what are possibly the dominant popular prototypes of fictional lawyers. Train, an assistant District Attorney in New York, contributed, chiefly to the *Saturday Evening Post*, dozens of tales centering on Mr. Tutt, a lively if aging yankee lawyer adroit in moving both safely within and questionably without the law. Tall and spare, Ephraim Tutt calls to mind by speech and act the shrewd New England peddler whose mythical life Constance Rourke chronicled;³⁸ but he has been resurrected in the earlier twentieth century, educated, and given a special competence in the law. Maneuvering so freely that due process and the common law are effectually his personal implements — however authentic Train's details — Mr. Tutt works out a pattern of justice in the affairs of his clients and friends. Juries may be accidentally influenced³⁹ or intentionally misled⁴⁰; judges may be blackmailed⁴¹ or

37. Speaking of the trial courts Jerome Frank observed: "Absent there is the stratospheric hush. Such a courtroom is, as Wigmore notes, 'a place of . . . distracting episodes, and sensational surprises.' The drama there, full of interruptions, is turbulently conducted, punctuated by constant clashes between counsel and witnesses or between counsel." FRANK, *LAW AND THE MODERN MIND* xxvi (1949).

38. ROURKE, *AMERICAN HUMOR: A STUDY OF THE NATIONAL CHARACTER* 18-36 (Anchor ed. 1953).

39. TRAIN, *The Human Element, MR. TUTT AT HIS BEST* 1-23 (1961).

40. "Mr. Tutt, Take the Stand!" *Ibid.*, 115-33.

41. *His Honor, The Judge, Ibid.*, 343-57.

litigants may be hounded by something approaching barratry⁴²; obscure points of procedure and rules of evidence may be dredged up⁴³ or outrageous but legal conduct perpetrated by him⁴⁴ — but in all instances Tutt seeks the morally acceptable and even desirable result. He stands free of the weaknesses of the law, omniscient to employ the very failings to his chosen ends. Judge Harold Medina in his introduction relates the long admiration he has had for Train's fictional character: ". . . he represents the ideal of what lawyers and those who are not lawyers think lawyers ought to do. Above all he has a sense of humor, and with it a tenderness and a kindness that go well with his profound knowledge of the law and his wily ways and stratagems."

The similarities of Mr. Tutt and Travers' Biegler are apparent of course. Both rove rather freely across the legal landscape, and each is capable of striking a pose or upsetting the decorum of the law. But Train has created a somewhat antiquated Robin Hood, sometimes sentimentally and naively, while Travers has settled for the hero *manque*, if with more verve and wit in the portrayal. Both implicitly deny the rather exalted role of law that Cozzens delineates, Travers by ridiculing the pretenses of form, Train by ignoring the heuristic qualities of the very tentativeness that Cozzens sees as a sign of maturity and realistic stability. In an imperfect world certainty is unlikely, all three would agree; but whereas Cozzens finds the law the symbol of the limited success man has had, Travers presents the law as an arena for personal triumph and Train presents it as something to be suddenly refashioned or adjusted if the good end demands it. It is interesting in this regard to note that Train once published an autobiography of Ephraim Tutt, which was greeted with some dismay in the law journal reviews; there was a tendency to consider Tutt a shyster.⁴⁵ The appeal Tutt had for the layman, however, was more nearly that which Judge Medina grasped, for the stories were perennially read with no registered outrage.

More famous than Tutt is the fictional lawyer pre-eminent, Gardner's Perry Mason. In sharp contrast to Tutt's Yankee lineaments and New York practice, Mason is as informal in manner as his city, Los Angeles, is. Gardner, more prolific under his proper and various pseudo-nyms than even the energetic Train, has parlayed a

42. *You're Another!* *Ibid.*, 303-23.

43. *The Meanest Man*, *Ibid.*, 134-61.

44. *Mr. Tutt Stages a Rodeo*, *Ibid.*, 324-42.

45. *Ibid.*, *Introduction*, xii, xiii.

character into an institution, an overriding public image. Mason, like Tutt, is hot after justice, and forms are no more of a barrier to him than they ought to be. He is perhaps a detective more than a lawyer, for his practice in criminal law is not defense so much as attack. The adage revered by defense counsel, that, after proposing a faulty alibi, the worst thing counsel can do for his client is to attempt to prosecute another party, apparently has little weight with Gardner, for Mason clears his client by trapping the guilty. The courtroom is the scene of the verbal gymnastics wherein the confession is extracted after a fatal slip on which the agile lawyer can pounce. In scores of such romances of dialectical derring-do, Gardner has forged the myth of the legal savior, the foremost candidate to succeed the western hero of the range. The values Mason espouses are as unarticulated as the plots are involved; all the intricacy leads to the last minute rescue of the hapless defendant. This is not to say that justice is nothing, but it is certainly an unexplored concept, a simple abstraction, in Gardner's novels, to which a mechanical application of the instant case is made. The law is simply the courtroom procedure, and, fortunately for Mason, the jurisdiction has sufficiently loose rules that he can employ the latitude required for his own success. Action is involved, but character is hardly complex. The theatrics of the confrontation of the guilty and the implacable attorney absorb the interest, while questions of meaning are mooted.

The American authors are not innocent, of course, of distortions, any more than they are of literary failings. Certainly Train, Gardner, and Travers in erecting substitutes for the Horatio Alger hero, or for the western individualist of our national mythological pantheon, have had the success possible to those who pander to but mediocre intelligence and taste; theirs are stereotypes whose projection incurs the expense of any meaningful insights, and in whom interest is confined almost solely to the question of their reflection of the profession of law. Wigmore considered Train a successor to Fielding, a judgment best understood as a form of fraternal courtesy, and one never elsewhere proposed;⁴⁶ and no one has suggested as much even in courtesy for Gardner or Travers. But the popularity of their fictional characters perhaps suggests something about their audience. Their lawyers escape the limitations of rule and bureaucracy, limitations that necessarily become more imposing as society becomes more complex or at least

46. Wigmore, *A List of One Hundred Legal Novels*, 17 *ILL. L. REV.* 26, 34 (1922).

more numerous. The cowboy,⁴⁷ the aviator,⁴⁸ and now the lawyer have appeared to symbolize the longed-for independence of the individual; the mythical figure has been the product of and productive of contradictions, but that has not destroyed his viability or the appetite for his appearance. The lawyer now enjoys something of a respite from the literary attacks formerly made upon him, a respite that may or may not last. He may find in popular literature his visage present because some of his activity is inescapably dramatic or can be made to appear so, but he may not appear an adequate symbol of a popular aspiration. Society, after all, will not follow Thoreau's advice to disestablish itself and any approach to reality in fiction will have to indicate the involvement of at least the criminal lawyer's efforts.

Cozzens may be indicating the way in which the lawyer will appear in more serious literature. His concern is with the texture of society and his lawyers knit society together and help preserve its values. He hypostatizes the law in one sense, giving it a role that no authoritarian ever even wildly hoped his edicts would have, that religionists hoped but knew their beliefs would not have, and that Arnold, in the decline of religious influence, asserted poetry should have. But since his law is neither the "brooding omnipresence in the sky," nor simply the corpus of positive guides to conduct, but a pragmatic, reasonably flexible, humanely administered attempt to solve difficulties and to reflect the needs of civilization, as they are determined by the lawyers, the men of reason, there is an ameliorating aspect to his law. It is unfortunate that Cozzens' men of reason, his elite, at times appear to be latter day incarnations of the elite defined by another lawyer, Ward McAllister, a century ago; that they are content with "supporting mysteries" rather than investigating them; that the power they control is the instrument of increasing the pathos of some lives, though Cozzens apparently regards that pathos as the inescapable tragedy of the human situation. His lawyers, are, however, questioners of some things if not of mysteries, they are "secular moralists" and not immoralists, they are aware of the irony of their own pretensions; and in fiction and fact they are both more reassuring and more attractive than messiahs for those who would rather preserve a situation chary of comfort than experiment. The law has its delays in Cozzens' work, but nothing in his fiction could match the delays of the law in fact. In all, his fiction represents a literary gain of immense

47. SMITH, *VIRGIN LAND* 99-125 (Vintage ed. 1957).

48. WARD, *The Meaning of Lindberg's Flight*, *STUDIES IN AMERICAN CULTURE* 27-40 (Ed. Kwiat and Turpie 1960).

proportions for the public image of the lawyer and the law, one corresponding to the image an eminent jurist recently proposed: "The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of the society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."⁴⁹

49. *Bartkus v. Illinois*, 79 S. Ct. 676, 680 (1959). Compare; Cozzens, *Notes on A Difficulty Of Law By One Unlearned in It*, 1 *BUCKS COUNTY LAW REPORTER* 302 (1952): "As an admiring lay observer, I have always considered that W.S. Gilbert's Lord Chancellor, when he declared that the law is the true embodiment of everything that's excellent, stated no more than the truth. If it has a single fault or flaw, I lay that to the unfortunate intrusion of the human element — a fallibility and unreasonableness of mankind that enters to disturb the law's own august order of right and reason. This, I think, the law itself feels. In its accumulated wisdom, work of the best minds for many centuries, the law moves — and not without resource and dexterity — to minimize the damage men can do its processes by being men."