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The True Story: Response to Five Essayists

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RESPONSE

THE TRUE STORY: RESPONSE TO FIVE ESSAYISTS

*Richard Weisberg**

Several of the writers on *Poethics*[1] have generously suggested that I respond to their thoughts about the book. No reviewer has objected to the idea. I might have abstained were it not for the passion with which each of their essays has been penned. Whether they agree or disagree with me—or, better still, whether they launch into whole new areas of exploration—these writers merit our careful readings.

Almost twenty years ago, when I left the teaching of literature for the practice of law, the breadth and depth of these responses to a field called "Law and Literature" would have been unthinkable. I recall a trip to Stanford Law School in 1975, during which a friend invited me to a weekly reading group often attended by members of that faculty. Since we were collaborating on a piece about Law and Literature,[2] my friend was especially pleased that someone in that evening's group had recommended Burgess's *A Clockwork Orange*,[3] a story depicting "horror show" innovative technologies in a futuristic criminal justice system. I happily attended but was surprised to see the assembled faculty's genuine annoyance that fiction had taken its place with the usual readings in political science, judicial biography, economic theory, or—at a tolerated extreme—Rawlsian jurisprudence.

Now, as perhaps Dan Lowenstein's article best conveys here, the law reviews have been deemed a suitable venue for literary criticism of originality and length.[4] Moreover, Robert Weisberg's characteristi-

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1 RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992).

2 Richard Weisberg & Richard Danzig, *Reading List on Law and Literature*, HUMAN. Apr. 1977, at 6.

3 ANTHONY BURGESS, A CLOCKWORK ORANGE (1962).

4 I disagree with many, but have been enlightened by some, of Professor Lowenstein's suggestions about specific stories. Space restrictions make this an unsuitable forum for a full response, but I must offer a brief rejoinder to his assertion about my interpretation of *The*

cally incisive essay is proof prima facie that Stanford Law School has somewhat softened its disdain for the literary disciplines.[5] Stories have recaptured the imagination of lawyers. Now, too, Serge Gavronsky shows us that literary critics and theorists want to learn what legal reasoning and rhetoric are all about, and discover how the mundane workings of the law affect their world and even their areas of specialization.[6]

Merchant of Venice. *See* Daniel H. Lowenstein, *The Failure of the Act: Conceptions of Law in* The Merchant of Venice, Bleak House, Les Misérables, *and Richard Weisberg's* Poethics, 15 CARDOZO L. REV. 1139, 1161 n.95, 1172 n.145 (1994). When Professor Lowenstein asserts that it is "plainly wrong" to suggest that Antonio is a mediator between Shylock and Bassanio, I fear he may have failed to grasp the structure of mediation that I posit. *See* POETHICS, *supra* note 1, at 96-97.

To support his contention, Professor Lowenstein perhaps takes too literally my structuring words, "originally unengaged," and implies that a mediator in my sense of the term must have been completely disinterested prior to the mediating act. Lowenstein, *supra*, at 1161 n.95. Of course, Antonio has been involved in Bassanio's fate for quite some time, and this is a significant feature of both their relationship and the problem I find in mediated transactions. Mediation robs Bassanio, the more directly engaged party, of his sense of responsibility to the transaction, for it is Antonio who will ultimately pay the price if things go wrong. True, Antonio makes the suggestion that Bassanio find a lender whose liquid capital can assist the youth to win Portia's hand. But this need of Bassanio's, and nothing Antonio directly requires, brings about both the loan and the unhappy ensuing dilemma. Antonio stands as surety—one of the law's enduring structures of mediation—for his spendthrift friend. Even after the agony of the trial that is brought about by his urge to mediate, Antonio tries again. In fact, Antonio can't stop himself from mediating for Bassanio—but according to my reading, Portia ironically cuts down his silly idea that Bassanio's marriage vows, like his debts, can be mediated by third-party suretyships. *See* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 5, sc. 1 (Penguin Books 1987).

Does the text offer scant evidence of Portia's growing distaste for Antonio? Lowenstein, *supra*, at 1172 n.145. Even the lines he cites, particularly in act 5, sc. 1, ll. 136-41, show Portia's uncharacteristically blunt and discourteous tone to Antonio, her husband's friend whose visit to Belmont she welcomes so sparingly. In terms of the dramatic situation as a whole, Portia's abruptness is fully understandable. She is still waiting to consummate her marriage and spend time alone with her new husband; she has observed Antonio's rivalry with her for Bassanio's affections in open court; she realizes by now that he has provoked Bassanio to give his wedding ring away to the "legal scholar" who won the day for him at trial. Why would she deal kindly with Antonio? Earlier than this, Portia displays antipathy for the merchant. In a crucial line Lowenstein omits, Portia speaks at the trial about the distribution of half Shylock's wealth—a distribution Antonio might otherwise feel he can administer. "Ay, for the state, not for Antonio." SHAKESPEARE, *supra*, at act 4, sc. 1, l. 372. From this point on, Portia's disaffection for Antonio becomes increasingly overt. It is true that Portia gives Antonio the ring to hand to Bassanio, and it is true that she reveals that the merchant's wealth has been inexplicably recovered, *see* SHAKESPEARE, *supra*, at act 5, sc. 1, but these acts strike me as being Antonio's "last hurrah" on Belmont and in Portia's circle. While some may differ with this interpretation, the text and the dynamic situation among the principal characters combine to offer considerably more than "scant" evidence of Portia's antipathy to the man who would still be Bassanio's manager.

[5] *See* Robert Weisberg, *Reading* Poethics, 15 CARDOZO L. REV. 1103 (1994) (book review).

[6] *See* Serge Gavronsky, Book Review, Poethics: And Other Strategies of Law and Literature, 15 CARDOZO L. REV. 1127 (1994).

With Pandora's Box having been opened, more surprises leap out. Milner Ball[7] seizes the implicit inquiry of Law and Literature, epistemology itself and the competition among religions for the foundational allegiance of society's leaders. For, as L.H. LaRue's crystalline synthesis of the field states: "Lawyers and judges are the official storytellers of our culture, and so at one level, novelists and lawyers are competitors."[8] If this is true, these dominant narrative players are likely to engage, either overtly or considerately, our generation's most passionate conflicts.

We no longer struggle to prove the primacy of stories, but rather to indicate *which* stories are worthy of our attention, or, in the spirit of our own empowered imaginations, *which* stories we want to tell and retell. The story I want to tell here, having been so privileged by the five people whose accounts I have just read with such pleasure, goes something like this:

> All lives move through a series of stories. The child relishes them; the adult often dislikes them, but the mature disdain for "fiction" is just another story we like to tell to make ourselves seem more important. We might choose as a daily practice the reading of the *New York Times*, or we might leaf through the Bible. We may want to read the prose of judges or rest content with the works of E.L. Doctorow or even John Grisham. The CBS Evening News conveys a ritualized narrative to us that will "get through" only if it appeals to many parts of our imaginative sensitivities; to that extent it is not dissimilar to L.A. Law or the Billy Graham Crusade.
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> We should not resent the explicit efforts of people like Joe McGinnis[9] to blur the lines between "fact" and "fiction," because in general that line cannot be found apart from the willingness of audiences to establish it. It all depends on which stories you choose, and which you manage to reject.
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> Much later in life, like Prospero,[10] we grasp that stories are all we have and that we are fully responsible for those with which we have filled our lives. But, by then we have become too old to dominate an island, and instead people tend to tell us their own stories in hopes of making us feel better.
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> Some of us are also storytellers and as storytellers, we know how to construct passages that appeal to people. Their tolerance

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[7] *See* Milner S. Ball, Poethics, *Christian, Jews, Law*, 15 CARDOZO L. REV. 1069 (1994) (book review).

[8] L.H. LaRue, *The Problem of Theory in* Poethics, 15 CARDOZO L. REV. 1093 (1994) (book review).

[9] *See* JOE MCGINNIS, THE LAST BROTHER (1993) (book about Edward M. Kennedy).

[10] *See* WILLIAM SHAKESPEARE, THE TEMPEST.

> for our technique, coupled with our sense of ethical constraint, are all that keep us from conflating what they want to hear with what we know is really the case.
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> Of course, there is a time for incredible stories and for the fictions that people gladly pass around as the dominant truth of their lives. Our own century started with some very tall tales (Teddy Roosevelt's, for example) and then moved through various structuring myths (Marxism, Fascism), not all of which (Freudianism) have been completely rejected. Now that I think about it, for 2000 years, Western "culture" has lived under a strange, but compelling, narrative.
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> Yet there are times when the story should be different, times in which audiences ask for better from their storytellers, times in which people do not tolerate as many diversions, and simply want to know what is happening. At those times, some storytellers offer their audience more than diversion or comfort; they want their narratives to have the feel of truth to them.
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> In such an epoch, and once we realize that our lives are bound up in stories, we want to believe that what we hear—and what we go on to tell—are finally in harmony with what is really there to see, hear, taste, touch, and feel. Telling such a tale is hard and rarely repays our first dozen renderings of it, but we have got to make the effort.

The tale I have told is intended to temper the impatience of fine thinkers like Robert Weisberg, who objects to my "sentimentalism" in calling for a linkage of sound and sense;[11] or L.H. LaRue, who joins Weisberg in questioning whether "reading good literature will cause one to become good."[12] The times call for stories to be told with a feel for the audience, but also for the truth, as I have just tried to define that elusive concept. I have no problem fighting for a canon that includes such works and excludes others. I cannot agree, however, with the contention that "literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, [and] the insoluble."[13] These abstractions have been characteristic of postmodern *criticism*; but as I have tried to show elsewhere, they do not really describe postmodern stories.[14] Instead, tales that superficially deal mostly with law and lawyers appeal with

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11 Robert Weisberg, *supra* note 5, at 1109.

12 LaRue, *supra* note 8, at 1098.

13 Robert Weisberg, *supra* note 5, at 1106 (citing Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1564 (1990)).

14 *See* Richard Weisberg, *Law in and as Literature: Self-Generated Meaning in the "Procedural Novel," in* THE COMPARATIVE PERSPECTIVE ON LITERATURE: APPROACHES TO THEORY AND PRACTICE 224-33 (Clayton Koelb & Susan Noakes eds., Cornell Univ. Press 1988).

remarkable consistency to the audience's ultimate belief in truth—in a right answer. What Robert Weisberg finds unappealing in *Poethics* is any such "sentimentality," any such notion of the story or the storyteller. I understand his miff, and I deeply respect it, but I have never found in the fiction that interests me the complexity that I find in critical storytelling. Even where I myself have seemed most complex, for example, in dealing with *Billy Budd*,[15] I have done so in an attempt to show that sometimes stories need to tell simple truths in nonstraightforward ways. Melville was trying to correct an audience that had understood the world for too long according to the Gospels (i.e., the "News from the Mediterranean"[16]). Somewhat like the Cardozo who wrote *Hynes*[17]—and I will never apologize for my ongoing fascination with that opinion—Melville had to reverse the longstanding assumptions of his audience and to remind them that the earlier precedents were distorted and indeed overly complex.

From a different direction, Dan Lowenstein joins Robert Weisberg and LaRue in wondering why stories provide the best medium for undergirding people's sense of how they want to direct their lives—of how, in my terms, they want to tell their own stories.[18] Lowenstein reminds us that we often disagree about the meaning of stories. And "if the viewpoint that can be extracted from fiction . . . can be expressed adequately as a generalization, . . . what need do we have for the underlying fiction?"[19] Robert Weisberg understands better than does Lowenstein the unique force of storytelling, but wonders why the social sciences, or more generally "abstract deductive thinking" such as he finds in Holmes, may not at least equally produce a "rhetoric of powerful moral enlightenment."[20] He finds me edging too close to James Boyd White and rightly understands me to be criticizing White's notion of storytelling for its own sake.[21]

These three interlocutors will not accept my view that the reading of selected stories would have strengthened the reasoning behind *Brown*[22] or *Roe*[23] or, for that matter, would increase the chance of having a legal community more sensitive to both the powerless and to

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15 HERMAN MELVILLE, BILLY BUDD, SAILOR (Harrison Hayford & Merton M. Sealts, Jr. eds., Univ. Chi. Press 1962).

16 *Id.* at 130.

17 Hynes v. New York Cent. R.R., 231 N.Y. 229 (1921).

18 Lowenstein, *supra* note 4, at 1241-42.

19 *Id.*

20 Robert Weisberg, *supra* note 5, at 1110.

21 *Id.* at 1110, 1112. Professor Ball's assessment of my "rivalry" with White is surprisingly ahistorical and simply incorrect. Ball, *supra* note 7, at 1084.

22 Brown v. Board of Educ., 347 U.S. 483 (1954).

23 Roe v. Wade, 410 U.S. 113 (1973).

those who just do not tell "our kinds of stories." I respond with three questions. First, could Cardozo have written *Buck v. Bell*?[24] Perhaps there are limits to deductive reasoning influenced by fields that programmatically deny the importance of stories. Second, is there still a fear of directness abroad in law schools? I can see Robert Weisberg frown every time *Poethics* asserts what he calls "pedantic banalities" derived from otherwise "perfectly decent readings of a few legal novels."[25] Yet, even if complexity is the standard of excellence, I hope that in describing to lawyers "manipulative communication"[26] or "self-interested rhetoric,"[27] I have added paragraphs to their professional stories that a law school education rarely coerces. These "ethical homilies"[28] have tended, at least in my pedagogical experience, to awaken people to certain realities of their career paths that may be utterly ignored by other current interdisciplinary methodologies.

Third, and most important, I would ask these critics whether language precedes understanding and action. Might it not be the reverse? James Boyd White's is a system "fully privileging language."[29] Mine is not. I agree that our mature actions ultimately derive from a set of understandings, but these are less purely rational formulations than they are the result of what we have experienced up to the moment of action—Cardozo's "trained intuition."[30] In my view, we often aspire to break free from the icy constraints of what we deem "appropriate," but our training entraps us. We may never gain the confidence to express our fully realized nature, or to tell the full story of ourselves. Yet our denial—as the Vichy legal community's failure to protest racial laws vividly exemplifies[31]—is itself a narrative, one that will always surface when the chips are down.

For many legal professionals, the dominant narrative is in fact an antinarrative, the rejection of anything so simple as a story to guide behavior. So it is with Holmes and Brandeis, but not Cardozo. So it is with Posner (unless you think of microeconomic theory as the most simplistic of fictions currently afloat), but not with Noonan.[32] The

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24 274 U.S. 200 (1927).

25 Robert Weisberg, *supra* note 5, at 1116.

26 WEISBERG, *supra* note 1, at 38.

27 *Id.*

28 Robert Weisberg, *supra* note 5, at 1118.

29 *Id.* at 1112.

30 Cardozo took this central concept in his thinking from Pound. *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 93 (Yale Univ. Press 1924).

31 For more on this linkage, see text *infra* p. 1262 (final paragraph).

32 *See, e.g.*, JOHN T. NOONAN, JR., BRIBES (1984).

antinarrativists are only telling their own story.

I claim that the stories people finally heed become dominant parts of the equation from which they derive the instinct to act in certain ways. But, unlike White—at least as I understand him—I do not see stories as fungible entities distinguishable perhaps only by their relative complexity, whose merit for us is largely to induce us to tell new stories of our own, almost without regard for content. On the contrary, my enduring fondness for Cardozo (*pace* Weisberg), or Dickens, or Toni Morrison, lies in their works' substance, which could only be evoked through their chosen styles. If we ask people to read stories, it is because of their unique power to convey the good. But this is not true of all stories! A program that encourages the reading of certain stories in order to heighten the informed intuition of decision makers may be unfashionable (although apparently less and less so), but not necessarily sentimental.

Milner Ball seems to fathom the subversiveness of what for Robert Weisberg is the most backward-looking and "dismaying"[33] plank of the poethical program: calling things by their real names in a story-telling way. For Professor Ball, I would guess, there is nothing "sentimental" in an allegiance to stories like *Hynes*,[34] or *The Fixer*,[35] or *The Book of Daniel*.[36] For the Christian storyteller, a certain kind of Jewish narrative is as problematic as it is for the postmodernist.[37] This is why the simplest of stories, those involving a clear villain, a joyful innocent, and an intelligent adjudicator, had to be told with all the digressive strategizing we find in *Billy Budd*. The moral world is topsy-turvy, but for the storyteller this presents a challenge, not an unalterable truth.

Professor Ball is one of our most textured and remarkable legal thinkers. He understands that, as inevitably as stories aspire to music, Law and Literature aspires to theology. I am pleased to extend the discourse with him, although I do not believe quite as much as he in the power of discourse or of "witnessing." Words have too often, and too recently, been used to deceive. Witnesses have been able to watch atrocities occur, perhaps a bit less troubled because they had a concept like "witnessing" with which to console themselves.

At the moment, I will try to contribute only one element to this ongoing discourse. Professor Ball draws a distinction between Chris-

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33 Robert Weisberg, *supra* note 5, at 1109.

34 Hynes v. New York Cent. R.R., 231 N.Y. 229 (1921).

35 BERNARD MALAMUD, THE FIXER (1966).

36 E.L. DOCTOROW, THE BOOK OF DANIEL (1971).

37 I do not consider this to be a paradox. *See* Ball, *supra* note 7, at 1075 n.31.

tianity at its "core" and Christendom as practiced.[38] Many other thinkers, most of them Christian, have relied on this distinction. Nietzsche, generally impatient with prevalent dualities, including the dissociation of sound and sense (something he blamed on Flaubert, a writer he detested),[39] saw little difference between the two. Professor Ball cites Kierkegaard, who tells us that "[t]he change from paganism is this: that everything has remained unchanged, but has assumed the predicate 'Christian.' Christendom is 'so far from being what it calls itself that the lives of most men are, Christianly understood, too spiritless even to be called in a strictly Christian sense sin.' "[40]

Let us begin with my assertion that stories have a hold on us throughout our lives. Part of the story of Christianity is the duality expressed by Kierkegaard and invoked by Ball; but another view of religion would find such a sentiment bizarre. Can anything call itself a religion that has in fact changed nothing? If most Christians still act like pagans, does this not inevitably warn us about the story they have brought into their lives without having had their lives change? Perhaps it is a pagan story at heart.

Or perhaps it is a story whose essence is its own failure to make the world, or almost anyone in it, better. If so, I know of no other religion that relies so heavily on a notion of failure. Or even failure's more attractive cousin, "sin." Perhaps the story of Christianity is that it induces moral failure, or sin, in its adherents. However this plays out, the dichotomy between Christianity and Christendom does not strike me as an adequate exegesis. Christendom is that which Christianity's story has produced. *Ecce homo.*

This dialogue deserves much more elaboration, and Professor Ball surely is in a position to develop the discourse. Whatever he may do or say, it will only helpfully guide our narrative. For my purposes here, his invitation and the dichotomy he cites lead me to Serge Gavronsky's impassioned defense of the French. During about a dozen years of studying the Vichy régime, I have heard from hundreds of French people attempting to defend their own actions, or those of their compatriots, during the dark years of 1940 to 1944. But rarely, in the face of the facts, have I sensed such fervor as I perceive

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[38] *Id.* at 1071.

[39] *See, e.g.*, FRIEDRICH NIETZSCHE, *Wir Antipoden*, *in* DER FALL WAGNER (6 *Werke* 44-5) (1968). I am encouraged that Professor Ball has an open mind about Nietzschean readings of Christianity as well as Christendom. I am delighted, given the contentiousness of the subject, that both Professor LaRue, *supra* note 8, at 1096 n.8, and Professor Weisberg, *supra* note 5, at 1118, have been alert to my "thoughts out of fashion" about Nietzsche.

[40] Ball, *supra* note 7, at 1072 nn.15-16 (citing SOREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH (Walter Lowrie trans., 1956)).

in Professor Gavronsky's essay.[41]

Perhaps above all, Professor Gavronsky wants to assert that "[o]pposition [by the French] to the Nazis and to Pétain's *État Français* never flagged."[42] This is Gavronsky's "Vichy Story," a tale that has been told across French dinner tables for fifty years. He cites a number of individual acts of courage, particularly by the literary community, and surely there were many. He cites the activities of French émigrés, like Boris Mirkine-Guetzévitch, who had fled to New York City and eventually taught at the New School for Social Research.[43] He cites the Protestant village of Chambon, which protected Jews.[44]

On lawyers, the group I discuss almost exclusively, he cites his mother's own case: Warned by a colleague to flee occupied France, she arrived in Vichy, where she received equivocal advice, but chose to leave with her family "as soon as possible."[45] He cites the outstanding work of Serge Klarsfeld, less for any scientific findings than for an informal assertion that "Jewish lawyers in France had been protected by their colleagues and only arrested by the Germans in August 1941."[46] He claims that "as of the earliest policies enacted by the Nazis, concentration camps were established for Jews."[47] Consistent with the story told by Vichy apologists for decades, he asserts that proportionately fewer Jews were deported from French soil than from many other European countries.[48] He asks me for "facts" to support my "assumption—and it remains only that—that more French Jews died *because* of 'an excess of French zeal,' [and] that these deaths were somehow above and beyond what the Nazis would have done themselves."[49]

Some of what Professor Gavronsky challenges in the Vichy essays of *Poethics* admittedly remains to be elaborated in the book-length study of Vichy law I am now in the process of completing.

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41 *See generally* Gavronsky, *supra* note 6.

42 *Id.* at 1132.

43 *Id.*.

44 *Id.* at 1133.

45 *Id.* at 1135 n.24.

46 *Id.*

47 *Id.* at 1129.

48 *Id.* at 1137 n.27. For a recent evocation of this ancient claim, in a very surprising place, see Abraham Brumberg, *Nuances of Evil*, TIKKUN, May-June 1992, at 23. I responded to Brumberg in Richard Weisberg, *Cartesian Lawyers and the Unspeakable: The Case of Vichy France*, TIKKUN, Sept.-Oct. 1992, at 46. Even the French, in the main, have stopped congratulating themselves for their efforts to save the Jews during the War. This is because the number of French Jews who survived does not reckon with the relative power their compatriots had to save thousands more.

49 Gavronsky, *supra* note 6, at 1135-36.

But, to me, much of his response seems to fly in the face of already-presented data. Some of his arguments seem like a last-gasp attempt to preserve a notion of honorable French behavior—an endeavor both understandable in one like himself, who himself was victimized by Vichy, but whose life remains bound up with France and its culture. To this degree, Gavronsky's defensive tone,[50] and the shifting base of his comparative data[51] signal that the old myth of French "universal resistance" remains impervious to the truth. As I said earlier, "[a]ll lives move through a series of stories."

Given the importance and longevity of the Vichy myth, it is worth responding to it in greater detail than I would otherwise prefer for this kind of essay. Somewhat in reverse order of his argument, I first challenge Gavronsky's half-truth that Vichy saved more Jewish lives than it sacrificed.[52] He claims that many other countries in Europe fared worse,[53] and in this he is occasionally mathematically correct. But by now we know that the operative question is not "[w]hat percentage of Jews survived in each country?" Instead, the question is, "given the relative autonomy, or lack of same, of the indigenous government, did it do its best to minimize Jewish suffering?" Along these lines, to compare France with almost any other country defeated by Hitler is absurd. France was given its own government, staffed not by martinets, but instead by people of all political persuasions. For example, Joseph Barthélemy, a renowned prewar liberal professor of constitutional law, was the régime's second and most influential Minister of Justice.[54] Barthélemy was joined by many "enlightened" and seemingly unexceptionable lawyers in pouring fuel on the Vichy racial fires.[55] In addition, as a whole, the French legal community fully participated in the authorship and implementation of the laws against the Jews.[56] Admittedly, Vichy's authority extended only to a certain region and was substantially undercut when the Germans overran most of that territory in November 1942. But by then, almost all of the damage wrought by *autonomous* Vichy legislation had been

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50 For example, the accusation of "circular reasoning" seems incongruous given the great deal of factual information buttressing my claims. *Id.* at 1129.

51 *See, e.g., id.* at 1132 (where Gavronsky criticizes the behavior of the United States government, which from time to time favored Vichy interests).

52 *Id.* at 1137 n.27.

53 *Id.*

54 JOSEPH-BARTHÉLEMY, MINISTRE DE LA JUSTICE: VICHY 1941-43 (1989).

55 Indeed, Pierre Laval, Vichy's most significant political leader (later executed for collaboration), was a lawyer by training and in pre-War practice.

56 The first and most damaging statutes defining race and establishing concentration camps on French soil, were the handiwork of Raphäel Alibert, a highly competent lawyer. *See, e.g.*, MOULIN DE LABARTHÈTE, LE TEMPS DES ILLUSIONS 115 (1946).

accomplished during the crucial early months of the Vichy experiment, while the Germans themselves were watching with increased amazement and pragmatic delight. The conquerors utilized Vichy zealousness to diminish sharply their own manpower requirements on race and even to substitute Vichy law for their own in the Occupied Zone. All of this is already discussed in *Poethics*,[57] in addition to being a truism of recent accounts of Vichy law.[58]

Given the leash extended by the Germans to the French government on matters of race, particularly in the formative years of French racial policy, it is no surprise that a lawyer and true hero of the French resistance, Philippe Serre, said to me more than once, "Les Allemands n'auraient pas insisté sur le racisme si les Français avaient refusé."[59] After all, fascist Italy, despite the presence of racial laws on its books, desisted from persecuting its Jewish population. But unlike fascist Italy, and long before any actual pressure was put on it, France launched into racism with fervor. France used its own traditional legal institutions both to promulgate the laws[60] and to interpret and implement them.[61]

Meanwhile, we are learning about other conquered countries that indigenous populations with far less autonomy than the French performed miraculous acts, sometimes under the very noses of the Germans. Hence the Danes, a group not mentioned by Gavronsky, saved 7500 of their 7800 Jews by sending them on small boats to Sweden. Recent indications are that although this behavior was known to the German occupiers, they did not prevent it, in large part because they simply did not have the manpower to interfere with a concerted plan of resistance.[62] And since the German in charge—Werner

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57 *See* WEISBERG, *supra* note 1.

58 *See, e.g.*, CLAUDE SINGER, VICHY, L'UNIVERSITÉ ET LES JUIFS 76 (1992).

59 Interview with Philippe Serre, in Paris (Dec. 21, 1988), *printed in* Richard Weisberg, *France: From Vichy to Carpentras*, WALL ST. J., Oct. 12-13, 1990, op. ed. page, col. 3 (int'l ed.). My translation: "The Germans would not have insisted on a racial policy if the French had refused." *See also* Richard Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371, 1375 (1991).

60 These laws were written by French cabinet ministers, with "advice" from the French *conseil d'État*, a procedure formally "legitimized" in most minds by the infamous act of the retiring French Parliament on July 10, 1940.

61 On July 10, 1940, the French Parliament, by an overwhelming vote of 569-80 (Philippe Serre being one of the minority, *see supra* note 59), suspended its own operations and gave Marshal Pétain full legislative powers. *See* DOMINIQUE RÉMY, LES LOIS DE VICHY 31-36 (1992).

62 *See, e.g.*, Henry Kamm, *Danes Commemorate Rescue of Jews From Nazis*, N.Y. TIMES, Sept. 28, 1993, at A3; *see also* Leo Goldberger, *Nazi Understaffing Helped Danish Jews*, N.Y. TIMES, Oct. 11, 1993, at A16 (Letter to the Editor) (citing Tatiana Berenstein's findings on the

Best—had just come from duties in France,[63] it is fair to assume, based on his decision not to interfere with the Danish rescue, that he would have had even less recourse against a similar French program of resistance to racism. The Nazis simply did not have the manpower to dictate racial outcomes in every defeated country. Nor could they stop a determined population from hiding its Jews. In France, as I reported in *Poethics*, so thoroughgoing was the autonomous French approach to the Jews,[64] that the Nazis consistently were able to *reduce* their manpower requirements for racial persecution.

Accounts have varied as to the number of Jews who were sent "to the East" from French soil.[65] The accepted current figure is approximately 75,000. Whatever the proportion of this number to the population of Jews on French soil throughout the war, and however this compares to losses in other countries, the analysis rises and falls not on mathematics, but on *degrees of legal and political autonomy*. The French were at the very top among countries left to chart their own course.

There is no answer beyond assertive prose to the findings set out in *Poethics* (and elsewhere) as to racial definition itself, that the French outdid the Nazi models, bringing under the umbrella definition of "Jew" more people than the Nazis required or than Nazi law so defined.[66] Not only the definitional scope, but also the punitive means were devised by the French. Thus, Professor Gavronsky, having implied early in his essay that the Germans initiated concentration camps on French soil,[67] wisely backtracks later in his paper.[68] In

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Danish rescue and German awareness of it in No. 2 RAMBAM (1993)); Anthony Lewis, *The Rescue of the Danish Jews*, N.Y. TIMES, Oct. 5, 1993, at B7.

63 *See, e.g.*, MICHAEL R. MARRUS & ROBERT O. PAXTON, VICHY FRANCE AND THE JEWS 218 (1981).

64 WEISBERG, *supra* note 1, at 152 & n.77.

65 *Id.* at 144 & n.44.

66 *See, e.g.*, MARRUS & PAXTON, *supra* note 63, at 205, 232, 263. Even during Vichy, the government realized that their own laws and regulations were "more severe than the German measures," at least as to some issues of definition and scope. *See, e.g.*, internal memos of 1942-43 relating to whether the sect Karaites were Jewish under French law; they were not under German law. Archives Nationales, AN AJ 38 #148.

Contemporary comparative analysts, like Joseph Haennig of the Parisian bar, stipulated that German racial laws and cases were often more "liberal" to the Jews than was French jurisprudence. *See* RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 1-2, app. (1984). *See also* Michèle Cointet, Le Conseil national de Vichy 960 (1984) (unpublished doctoral thesis, (Paris X), on file with author) (citing the memorandum of a Vichy minister, René Gillouin, to exactly this effect); *See also* MARRUS & PAXTON, *supra* note 63, at 85, 205. The Nazis themselves quickly told each other that as to "Who is a Jew?," with "the French definition being broader, it will now serve as a basis in all doubtful cases." WEISBERG, *supra* note 1, at 151.

67 Gavronsky, *supra* note 6, at 1129.

fact, the French, by legislation as early as October 4, 1940 (several months after their defeat and long before the Nazis were ready to think about the subject), legally mandated concentration camps in Vichy for stateless Jews.[69] Over the period of the war, at least 3000 Jews perished in Vichy's own, atrocious camps.[70] Later, the French police and the French bureaucracy largely controlled the camps set up in the occupied zone—most notably Drancy and Compiègne, from which tens of thousands of Jews were deported. Many of the latter were arrested by French police, with little or no German assistance.[71] This chapter of the Vichy story is terribly sad, but only a dying myth can still manage to contest its substance.

This leads us to Professor Gavronsky's hopeful assertion that French lawyers protected their Jewish colleagues. Although in *Poethics* I do not stress the relationship of Vichy law to its own Jewish practitioners, an entire chapter of my book-length project is devoted to the subject. The tale is dismal. True, the early arrests of French Jewish lawyers conducted in Paris were mostly by the Germans for political purposes. It is also true that most of these lawyers were later released and sent home, only to be re-arrested by the French police, which by then was fully dominant in the arrest process. Surely there were private acts of collegial warning, like the one that happily saved the Gavronsky family. But the full portrait is chilling. It includes the mass elimination—under Vichy law—of all Jewish magistrates and lesser court officials, firings carried out despite a real need for their expertise during that especially litigious four-year period. It also chronicles: the establishment of a *numerus clausus* (or quota) at the bar and in the law schools, an entirely French idea; the eventual deportation and death of the mere handful of Parisian lawyers whom French regulations had permitted to remain at bar; and the nitpicking of French courts and agencies throughout the country in determining which private lawyers should be permitted to practice and how that question was made to interrelate to the sophistries of Vichy racial definition, etc.

If, unlike the Belgian bar[72] (which was under tighter constraints,

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68 *Id.* at 1133-34 & n.21.

69 For the statute, see RÉMY, *supra* note 61, at 91. The Vichy term was "camps spéciaux." And this was quite some time before Wahnsee.

70 *See* MARRUS & PAXTON, *supra* note 63, at 176.

71 *See, e.g.*, the poignant account of MAURICE RAJSFUS, JEUDI NOIR (1988). Rajsfus (then 14) and his family were arrested by French police. *See also* DORIS BENSIMON, LES GRANDES RAFLES 11-12 (1987).

72 *See* WEISBERG, *supra* note 1, at 170 & n.153. In France, there was no organized protest whatsoever against the régime's racial laws.

because there was no real autonomy in that country), the French bar more or less went along with the régime's severe restrictions on Jewish lawyers, it was because the sentiments there probably reflected the dominant view of Jacques Charpentier, the head of the Paris Bar Association, who opined after the war:

> At the Paris bar, there had always been a Jewish problem. A number of refugees had a conception of justice very different from our own. . . . Since 1940, a law excluded the sons of such refugees from the profession of law. For several prior years, this type of measure was strongly desired by the Paris bar. . . . Before the war, we were invaded by those recently naturalized, almost all of eastern origin, whose language was ridiculed by the Press, thus covering us with shame. They brought to the conduct of their practice the customs of their bazaars. In this respect, the Vichy policies comported with our own professional interests, but I only envisioned their application after the fact.[73]

No, the vast majority of French lawyers during Vichy pursued their own practice, insensitive if not approving of the fate of their Jewish colleagues. The bench was stripped of its Jewish talent. Lawyers were arrested, deported, and indiscriminately merged with their lay co-religionists. The happiest fate I know of any Jewish lawyer in France was that of a man I interviewed in Paris. He managed to hide his Jewish identity throughout the war and thus did not miss a single day of practice at the Palais de Justice. He also contended to me that he was not aware until our interview of how much law the French were creating about Jews during those very years.[74]

Professor Gavronsky, perhaps anxious to expand his analytical base, quite properly mentions the Protestant town of Chambon.[75] It is fitting that we be reminded of French resistance. But what the townsfolk in Chambon found "naturel" (obvious)—the protection of their fellow human beings from grotesque persecution—was replicated by few other Frenchmen, and especially not those who are the subject of my interests—lawyers. Professor Gavronsky also takes us to New York, where he reminds us of such admirable figures as Boris Mirkine-Guetzévitch, a Jew naturalized in 1933 and hence already at risk of losing his job under early Vichy legislation.[76] I know a bit

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[73] *Id.* at 170 & n.152.

[74] Interview with Maître Blanc, in Paris (Dec. 21, 1991).

[75] *See generally* PHILIP P. HALLIE, LEST INNOCENT BLOOD BE SHED: THE STORY OF THE VILLAGE OF LE CHAMBON AND HOW GOODNESS HAPPENED THERE (1979); *see also* Gavronsky, *supra* note 6, at 1133 n.14.

[76] *See* Law of 22 July, 1940, stripping citizenship from those naturalized during the 1930s, RÉMY, *supra* note 61, at 55, and the Law of 27 September, 1940, blocking employment for non-citizens. *Id.* at 83.

about this man, and it is unfortunate that an apologist for the French would cite such a case.

Mirkine-Guetzévitch was a professional colleague of Joseph Barthélemy, the dominant Vichy justice minister, on the journal *La revue d'Histoire constitutionnelle*, as well as at the French Institute for political and consitutional history.[77] Still in France at the time of his colleague's assumption of the cabinet post, Mirkine-Guetzévitch telegrammed the newly appointed justice minister as follows: "29 January, 1941. France resides its justice in its most eminent lawyer."[78] In a letter of the same day from Marseille, where Mirkine-Guetzévitch had taken temporary refuge from the persecution he felt all around him in Paris, he wrote: "At this moment you—garde des sceaux [another title for the Justice Minister]—this is the greatest guaranty of justice, of law."[79]

But people like Mirkine-Guetzévitch were to become badly disillusioned with the performance of their former colleague. While it is the subject of another chapter, Barthélemy's complex but consistent contribution to the promulgation and the toughening of France's racial legislation is by now sufficiently well known.[80] Indeed, it was Barthélemy who proposed the following explicitly racist addition to the new Vichy constitution that he was in charge of drafting: "La communauté française exige de ses membres une allégeance absolue. Elle n'admet pas, dans son sein et comme élément constitutif, une race qui se comporterait en communauté distincte ou résisterait à l'assimilation."[81] With friends in the legal profession like Joseph Barthélemy,[82] it was no wonder that decent people like the Mirkine-

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[77] He soon joined the faculty of the New School for Social Research in New York City.

[78] *See* BARTHÉLEMY, *supra* note 54, at 415; *see also* Archives Nationales AN 72 AJ 413 #9.

[79] BARTHÉLEMY, *supra* note 54, at 415.

[80] *See* WEISBERG, *supra* note 1, at 279 nn.53-61; *see also* BARTHÉLEMY, *supra* note 54 (Where in an otherwise apologetic context, no serious effort is made to absolve the justice minister from such acts as signing the basic Vichy racial law of June 2, 1941; establishing the infamous "special sections" that persecuted Jews, Communists, and other unpopular groups; participating in cabinet meetings that intensified the pressure on Jews; and otherwise propounding the belief that there was "a Jewish question" in France that needed resolution.).

[81] MICHÈLE COINTET-LABROUSSE, VICHY ET LE FASCISME 177 (1987) ("The French community requires from its members an absolute allegiance. It does not admit into itself as a constitutive part a race that behaves as a distinct community or resists assimilation.") (translation by author).

[82] For an incisive description of the way in which Barthélemy, and prewar humane liberals like him, let down those who felt he would bring such values to the justice ministry, see J. LUBETZKI, LA CONDITION DES JUIFS EN FRANCE SOUS L'OCCUPATION ALLEMANDE 15 (1947) ("Thus does a lawyer who, in numerous works, has defended the grand principles of law and liberty, justify measures that constitute the most abominable attacks on human dignity, liberty, and property.") (translation by author).

Guetzévitchs got out (as did the Gavronskys) as soon as possible.

The Nazis are not solely responsible for the Shoah. As time passes, we are finding that mass destruction on such a level could only have happened with the active collaboration of tens of thousands of Europeans. Where even less autonomous communities put up resistance, the Germans tended to give in, not out of respect or high-mindedness, but simply because of insufficient manpower to identify, arrest, and deport all of Europe's Jewish populations.[83]

The French entered into the game of racial definition with zeal. So many of them became part of the game, and so many of the players were otherwise decent folks who would never have been thought of as "anti-Semitic" in any virulent sense. Therefore, we must delve further to fathom how and why at least 75,000 men, women, and children were sent from French soil to the death camps. Law is a part of that phenomenon.[84] The place of Vichy racial legislation throughout French legal practice from 1940-44 can only be described by one word: infusive. Within weeks of its defeat, France and its lawyers began to prepare racial legislation, to draw charts to figure out who was officially "Jewish," and to ask magistrates and administrative judges to bring more and more people under these definitions. Lawyers went on to represent landlords against Jewish families whose breadwinners had been arrested and sent "to the East," or to serve clients in cases integrating the racial laws into everyday contexts of property transfers, estates, corporate law, or car accidents involving "Jewish vehicles"; academic lawyers used their skills to rationalize the laws.[85] Even after D-Day, the work of busy legal professionals continued until finally there was liberation. Given these chapters of the Vichy story, I believe that the burden has shifted to people like Professor Gavronsky to justify their faith in the myth of the "honor" of these professionals.

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[83] *See, e.g., supra* note 62.

[84] So is literature, and Professor Gavronsky does not reckon with two of my major sources in implicating the literary community. *See* HERBERT R. LOTTMANN, THE LEFT BANK: WRITERS, ARTISTS, AND POLITICS FROM THE POPULAR FRONT TO THE COLD WAR 1127 n.18 (1982); GILLES RAGACHE & JEAN-ROBERT RAGACHE, LA VIE QUOTIDIENNE DES ÉCRIVAINS ET DES ARTISTES SOUS L'OCCUPATION 1940-1944 (1988).

[85] For a recent essay which is largely in accord with my perspective on Vichy in *Poethics*, and with which I am sure Professor Gavronsky is familiar, see Danièle Lochak, *La Doctrine sous Vichy, ou les Mésaventures du positivisme*, *in* LE STATUT DES JUIFS DE VICHY: DOCUMENTATION 121-50 (Serge Klarsfeld ed., 1990). Gavronsky cites to Klarsfeld's edition. *See* Gavronsky, *supra* note 6, at 1133 n.18. Where I disagree with Lochak is in her assertion that the rhetorical accommodation to Vichy law was the result of legal positivism. I believe that it reflected less an allegiance to texts as promulgated than an attitude towards professional discourse itself. *See* Richard Weisberg, *Autopoiesis and Positivism*, 13 CARDOZO L. REV. 1721, 1724 (1992).

Few lawyers knew of the actual destination of these Jewish victims. What they did know was that tenants were disappearing and not paying rent, landlords were suing for ejectment, and no one knew of their whereabouts. They did know that their colleagues at the bar were disappearing or wearing Jewish stars. They knew and participated in the "aryanization" of billions of francs of Jewish property. They knew that there was nothing in the aryanization laws that foresaw any return of that property. They knew of the hysterical propaganda (although their discourse was usually too polite to engage in it themselves) that was calling for the solution of the "filthy Jew who for a century has come from his native ghetto to settle in France."[86] Either they heard dreadful rumors, or they shut their ears to them. They read and commented on the Law of 4 October, 1940, which, by French authorship, created concentration camps for stateless Jews on French soil.[87] They wrote or applied the *numerus clausus*. They seemed to want to believe that a lot of talk about the "meaning" of the racial laws was better than attacking the laws at their heart.[88] They thought this even though some lawyers had protested and had not been punished.

I have come to believe that an inquiry into Vichy law will be well served by a Law and Literature methodology, with no preconceptions that might otherwise produce a story insufficient to the task. I believe that neither traditional anti-Semitism, nor German force, adequately explains the immersion of French lawyers and bureaucrats in the horrors of those years. We will finally have to look at the larger, longer-running "story," the myth under which not only France, but Europe more generally, went about its enterprise.

Thus, to split off the critique of Vichy law from the rest of *Poethics*, with both its aspirational and fundamentally iconoclastic sides, would be to expurgate chapters that may prove to be necessary to the full narrative. Robert Weisberg finally differs with me in seeing *Poethics* as a divided enterprise, but I continue to believe in the unity of its storyline. Cardozo's merger of just vision and professionally persuasive prose (Part One), which only persevered within him because of his lifelong choice of readings (Part Two), serves as a model to our community in our worthy quest to avoid repetition of Vichy

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86 For examples of such well publicized prose, *see* LA PROPAGANDE SOUS VICHY 1940-1944, at 100 (Gervereau ed., 1990).

87 Law of 4 October, 1940. RÉMY, *supra* note 61, at 91.

88 *See* Richard Weisberg, *Three Lessons From Law and Literature*, 27 LOY. L.A. L. REV. 285 (1993) (my recent analysis of the shifting discourse of law professor Jacques Maury, who, in 1940, first attacked the racial laws centrally, but gradually moved to discussions of "Who Is a Jew?" under those laws).

legal practice (Part Three). Our choice is set forth in poethical oppositions that Professor Weisberg somewhat oddly omits from his critique of my essay on judicial opinions. Ours will be the path of either *Hynes*[89] or *Osterlind*,[90] of *Palsgraf*[91] or *Hollaris*,[92] of *New York Times v. Sullivan*[93] or *Paul v. Davis*.[94]

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89 Hynes v. New York Cent. R.R., 231 N.Y. 229 (1921).

90 Osterlind v. Hill, 263 Mass. 73 (1928). *See* WEISBERG, *supra* note 1, at 12-14.

91 Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928).

92 Hollaris v. Jankowski, 315 Ill. App. 154 (1942). See WEISBERG, *supra* note 1, at 17-21.

93 376 U.S. 254 (1964).

94 424 U.S. 693 (1976). *See* Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in* Billy Budd, Sailor *With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).