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Law as Frolic: Law and Literature in A Frolic of His Own

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LAW AS FROLIC: LAW AND LITERATURE IN A *FROLIC OF HIS OWN*

Larry M. Wertheim[†]

I.	THE STORY OF A <i>FROLIC OF HIS OWN</i>	424
II.	LAW IN A <i>FROLIC OF HIS OWN</i>	429
	A. <i>Szyrk v. Village of Tantamount</i>	429
	1. <i>Serra v. U.S. General Services Administration</i>	429
	2. <i>Szyrk v. Village of Tantamount</i>	431
	3. <i>Visual Artists Rights Act of 1990</i>	431
	B. <i>Crease v. Erebus Entertainment, Inc.</i>	434
	1. "King For A Day"	434
	2. <i>Once at Antietam</i>	436
	3. <i>The Blood in the Red White and Blue</i>	437
	4. <i>Crease v. Erebus Entertainment, Inc.</i>	437
	5. <i>Subsequent History of Crease v. Erebus</i>	443
III.	THE LAWYERS IN A <i>FROLIC OF HIS OWN</i>	445
IV.	LEGAL THEMES IN A <i>FROLIC OF HIS OWN</i>	448
	A. <i>Law and Justice</i>	448
	B. <i>Law and Order</i>	449
	C. <i>Law and Language</i>	451
	D. <i>Law and Frolic</i>	453
V.	CONCLUSION	455

William Gaddis's recently published novel, *A Frolic of His Own* [hereinafter *Frolic*],¹ is a tour de force in the confluence of law and literature.² Like his earlier novel, *JR*,³ which won

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1. WILLIAM GADDIS, *A FROLIC OF HIS OWN* (1994) [hereinafter GADDIS, *FROLIC*].

2. For general overviews of law and literature studies, see RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992). For a short introduction to the field of law and literature, see Larry M. Wertheim, *Law and Literature: Literature as Law/Law as Literature*, 49 *BENCH & BAR OF MINNESOTA*, Oct. 1992, at 16-20.

3. WILLIAM GADDIS, *JR* (1975) [hereinafter GADDIS, *JR*]. Gaddis is also the author of *THE RECOGNITIONS* (1955) [hereinafter GADDIS, *THE RECOGNITIONS*] and

the 1976 National Book Award,⁴ Gaddis's latest novel won the 1994 National Book Award for fiction.⁵ The widely-acclaimed⁶ *Frolic* is a comic, modernist work which, more than virtually any other serious novel, treats law, lawyers, and judges in exacting detail.⁷ The novel depicts a series of loosely-related fictional civil lawsuits involving, among other issues, copyright, artistic rights, and torts.⁸ The novel contains the texts of pleadings, deposition transcripts, jury instructions, and several court decisions (including citations to real cases),⁹ all fictional but highly realistic (and satiric).¹⁰ In addition, *Frolic* is replete with clients and their lawyers laboring with the strategies and intricacies of the law and the legal process.¹¹ Like Charles Dickens's novels (to which it pays homage),¹² *Frolic* portrays the

CARPENTER'S GOTHIC (1985) [hereinafter GADDIS, CARPENTER'S GOTHIC].

4. William Gass, *The Author in Hiding On William Gaddis*, L.A. TIMES, Mar. 28, 1993, at 1.

5. Carlin Romano, *Gaddis' "A Frolic of His Own" Wins National Book Award*, PHIL. ENQUIRER, Nov. 17, 1994, at 6. *Frolic* was nominated for a 1994 National Book Critics Circle Award. *Book Critics Nominate 25 for Prizes*, N.Y. TIMES, Jan. 23, 1995, at B2.

6. *Frolic* was featured on the front page of the *New York Times Book Review*. Robert Towers, *No Justice, Only the Law*, N.Y. TIMES BOOK REV., Jan. 9, 1994, at 1. In addition, *Frolic* was selected by the editors of the *New York Times Book Review* as one of the "Best Books of 1994." *Editor's Choice*, N.Y. TIMES BOOK REV., Dec. 4, 1994, at 3. *Frolic* also received generally favorable reviews in other serious periodicals. See, e.g., Michiko Kakutani, *A Novel's Plot: A Plot to Steal a Plot*, N.Y. TIMES, Jan. 4, 1994, at B2; Sven Birkerts, *Down by Law*, THE NEW REPUBLIC, Feb. 7, 1994, at 27-30; Steven Moore, *Reading the Riot Act*, THE NATION, Apr. 25, 1994, at 569-71; Jonathan Raban, *At Home in Babel*, THE N. Y. REV. OF BOOKS, Feb. 17, 1994, at 3-5.

7. See, e.g., CHARLES DICKENS, BLEAK HOUSE (The New Oxford Illustrated Dickens 1948)(1853) [hereinafter DICKENS, BLEAK HOUSE]; CHARLES DICKENS, GREAT EXPECTATIONS (Heritage Press 1939)(1861)[hereinafter DICKENS, GREAT EXPECTATIONS]; CHARLES DICKENS, THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB (Robert L. Patten ed., Penguin Books 1966)(1836-37)[hereinafter DICKENS, PICKWICK PAPERS]; HERMAN MELVILLE, BILLY BUDD AND OTHER STORIES (John Lehmann Ltd. 1951)(1924)[hereinafter MELVILLE, BILLY BUDD].

8. See, e.g., GADDIS, FROLIC, *supra* note 1, at 32, 285, 399, 426.

9. See, e.g., *id.* at 32 (citing *Olson v. Pederson*, 206 Minn. 415, 288 N.W. 856 (1939)).

10. See generally GADDIS, FROLIC, *supra* note 1. Unlike the current popular works dealing with legal fiction, however, there are no trial scenes, dramatic or otherwise in *Frolic*. See, e.g., Moore, *supra* note 6, at 570.

11. See generally GADDIS, FROLIC, *supra* note 1, for examples of the strategies and intricacies of the legal process.

12. *Id.* at 526-27.

manner in which law possesses those who come into contact with it.¹³

This review essay will be divided into four parts. Part I will provide a brief exposition of the plot of the novel by reference to the myriad of lawsuits at issue. While this will not provide a complete overview of the novel, it will introduce the major characters and the significant litigation which forms the storyline of *Frolic*.

Part II of this essay will address the substantive legal issues raised by the two major pieces of litigation which form the narrative of the novel. Although these are fictional cases, they can be read to illustrate real legal problems.¹⁴

Part III of this article will deal with the depiction of lawyers in *Frolic*. Unlike most other serious legal novels,¹⁵ lawyers are not always portrayed as dark and avarice, but, in at least one case as good and humane.¹⁶

Part IV of this article will address the role litigation plays in the society and individual lives portrayed in *Frolic*. Among the themes evident in *Frolic* are the conflict between heavenly justice and earthly laws,¹⁷ the use of litigation as a means of obtaining societal respect,¹⁸ and law as a vehicle for imposing order on an unruly universe.¹⁹ While many of these themes have been presented in other works which form the law and literature

13. See, e.g., *id.* at 53-55 (demonstrating the extent to which Oscar, *Frolic's* main character, is consumed with the lawsuit which involves the theft of his play).

14. See, e.g., *id.* at 399 (depicting a fictional legal case involving the common legal issue of copyright infringement). The device of crafting fictional cases to illustrate genuine legal issues was most prominently done in Lon Fuller's *The Case of the Speluncean Explorers*, a fictional case dealing with the doctrines of necessity and self-defense. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949), reprinted in *THE WORLD OF LAW: THE LAW AS LITERATURE* 635 (Ephraim London ed., 1960) and Lon L. Fuller, *The Case of the Speluncean Explorers*, in *MASTERPIECES OF LEGAL FICTION* 833 (Maximillian Koessler ed., 1964). Fuller's work was altered, retold and analyzed in LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 8 (1987). In effect, Fuller's story and the cases in *Frolic* present extended hypotheticals which allow for consideration of real legal issues in contexts which have not yet (or may never) arise.

15. See, e.g., DICKENS, *BLEAK HOUSE*, *supra* note 7.

16. See, e.g., GADDIS, *FROLIC*, *supra* note 1, at 577 (discussing some of the positive characteristics of Harry, a lawyer, and the brother-in-law of *Frolic's* main character, Oscar).

17. See *id.* at 291 (discussing the relationship between unforeseeable acts of God and negligence).

18. *Id.* at 11.

19. *Id.* at 293.

canon,²⁰ *Frolic* is unique. The thicket of litigation which is the framework upon which the novel is constructed is denser than any previous work.²¹ *Frolic* combines comic exaggeration with exacting verisimilitude of the legal process and legal jargon.²² Finally, this commentary will attempt to examine some of the insights that *Frolic* can provide on matters of substantive law and the place of law and literature in American culture.

I. THE STORY OF A *FROLIC OF HIS OWN*

Frolic is not the first expression by William Gaddis of an interest in law.²³ He once told an interviewer that had he not become a writer of fiction, he would have chosen the field of law.²⁴ Nor is *Frolic* the first novel by Gaddis to make use of lawyers, lawsuits and the law.²⁵ His earlier novel, *JR*, involved several lawyers as minor characters and mention was made of various matters of litigation, including inheritance, divorce, stockholder derivative suits, and corporate acquisitions.²⁶ In addition, various characters in *JR* spoke to the use of legal means to achieve immoral ends.²⁷ Nevertheless, *JR* centered on finance and business; the law and matters of politics and

20. See generally, DICKENS, BLEAK HOUSE, *supra* note 7; DICKENS, PICKWICK PAPERS, *supra* note 7.

21. See, e.g., DICKENS, BLEAK HOUSE, *supra* note 7; DICKENS, PICKWICK PAPERS, *supra* note 7.

22. See, e.g., GADDIS, *FROLIC*, *supra* note 1, at 177-79. At this point, however, some caveats are necessary. *Frolic*, like Gaddis's earlier works, is written in a highly modernistic style. The lengthy (almost 600 page) novel contains no chapter or other section breaks. The text, other than the purely legal portions, is largely made up of conversations (indicated by a dash and no quotation marks) without attribution to identified characters, intermixed with snatches of overheard television programs and commercials. All the typical narrative devices which assist a reader are largely absent. As a result, *Frolic* is difficult to read. Even the legal opinions tend to ramble on to create a satiric effect. See, e.g., *Id.* at 406. While a serious novel, *Frolic* contains large amounts of comic and farcical material. See, e.g., *id.* at 39. Thus, it is not a legal treatise. In summarizing plot developments and legal rulings, this article runs the risk of over-formalizing what is a sprawling novel of black comedy.

23. See generally GADDIS, *JR*, *supra* note 3; GADDIS, CARPENTER'S GOTHIC, *supra* note 3.

24. STEVEN MOORE, WILLIAM GADDIS 142 (1989).

25. See generally GADDIS, *JR*, *supra* note 3; GADDIS, CARPENTER'S GOTHIC, *supra* note 3.

26. See generally GADDIS, *JR*, *supra* note 3.

27. *Id.* at 470, 678.

public relations were simply part of the financial empire depicted in the novel.²⁸

Frolic, however, is a novel almost entirely about law, lawsuits, and lawyers.²⁹ In fact, the plot can largely be retold as a series of lawsuits and contemplated lawsuits.

Frolic begins in the hospital bed of Oscar Crease, who is recovering from injuries suffered as a result of an automobile mishap.³⁰ Oscar's car had a broken ignition switch and until the replacement switch arrived, Oscar would start the car by "hot-wiring" it.³¹ The last time he tried this, he started the car while standing in front of it (since there was a puddle beside it) and when the car started, it slipped from park into drive, injuring Oscar.³² Oscar brings suit against himself as the owner of the car, and his insurance carrier.³³ While the insurer would normally pursue the driver in a case such as this, here there was no driver.³⁴ Ultimately, then, Oscar sues himself, and the car is named as a defendant.³⁵ Oscar also brings a products liability action against the car maker, Sosumi ("So sue me") Motors.³⁶

We meet Oscar's girlfriend, Lily, who is involved in protracted litigation over her divorce.³⁷ The litigation is complicated when Lily discharges her first attorney and finds that her second attorney, who is Oscar's lawyer on the car accident, is unable to proceed because her first attorney has claimed a retaining lien on the files for non-payment of fees.³⁸

We next come across Oscar's father, Virginia Federal District Judge Thomas Crease, who is hearing a case involving a

28. See generally GADDIS, JR, *supra* note 3.

29. See generally Michael Dirda, *Caught in the Web of Words*, WASH. POST, Jan. 23, 1994, at x01; David Streitfeld, *Gaddis' Frolic Wins Book Award - Nonfiction Prize to Sherwin Nuland*, WASH. POST, Nov. 17, 1994, at d01.

30. GADDIS, FROLIC, *supra* note 1, at 11-17.

31. *Id.* at 18.

32. *Id.*

33. *Id.* at 544-47.

34. *Id.* at 18-19.

35. GADDIS, FROLIC, *supra* note 1, at 546 (citing *Brown v. Quinn*, 68 S.E.2d 326, 329 (Ky. 1951) (holding that an automobile may be named as a party defendant in an automobile accident lawsuit)).

36. GADDIS, FROLIC, *supra* note 1, at 538.

37. *Id.* at 25-26. Separately, Lily is suing over faulty breast implants. *Id.* at 571.

38. *Id.* at 25. Many states have outlawed such retaining liens. See, e.g., MINN. STAT. § 481.14 (1994).

dog trapped in a well-known, metal sculpture called *Cyclone Seven*.³⁹ The sculpture is 24 feet high, 74 feet in circumference, and weighs 24 tons.⁴⁰ According to the sculptor, the work is site-specific since the village of Tantamount, where it is located, "epitomiz[es] that unique American environment of moral torpor and spiritual vacuity"⁴¹ required for *Cyclone Seven*. The sculptor brings an action to prevent the fire department from dismembering *Cyclone Seven* to remove the dog, and in *Szyrk v. Village of Tantamount* Judge Crease renders a decision in favor of the sculptor.⁴²

Further lawsuits arise out of *Cyclone Seven*. The summary judgment decision of Judge Crease in *Szyrk v. Village of Tantamount* is reversed on appeal on the grounds of disputed issues of material fact.⁴³ Before the trapped dog can be removed by the village of Tantamount, however, the dog is killed by lightning.⁴⁴ James B., a small boy who owns the dog, sues the village and the jury finds in favor of the boy.⁴⁵ In *James B., Infant v. Village of Tantamount*,⁴⁶ the court, quoting extensively from Holmes's *The Common Law*,⁴⁷ and caselaw,⁴⁸ grants a judgment notwithstanding the verdict to the defendant on the grounds that the proximate cause of the injury was an act of God.⁴⁹

39. GADDIS, FROLIC, *supra* note 1, at 30-40.

40. *Id.* at 35.

41. *Id.* at 37. As discussed more fully *infra* in notes 91-102 and accompanying text, *Cyclone Seven* made a previous appearance in Gaddis's *JR. GADDIS, JR., supra* note 3, at 671-72, 685.

42. GADDIS, FROLIC, *supra* note 1, at 30-40. As discussed *infra* in note 69, this case was originally published separately prior to publication of *Frolic*. It was also reprinted in *LEGAL FICTIONS: SHORT STORIES ABOUT LAWYERS AND THE LAW* 265-76 (Jay Wishinograd ed., 1992).

43. GADDIS, FROLIC, *supra* note 1, at 113.

44. *Id.* at 286.

45. *Id.* at 281-82.

46. *Id.* at 285-93.

47. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881).

48. GADDIS, FROLIC, *supra* note 1, at 287-88 (citing *Knauer v. Louisville*, 45 S.W. 510 (Ky. 1898); *Wilcox v. Butt's Drug Stores, Inc.*, 35 P.2d 978 (N.M. 1934); *Helsel v. Fletcher*, 225 P. 514 (Okla. 1924); *Green v. Leckington*, 236 P.2d 335 (Or. 1951); *McCallister v. Sappingfield*, 144 P. 432 (Or. 1914); *Moses v. Southern Pac. R. Co.*, 23 P. 498 (Or. 1890).

49. See GADDIS, FROLIC, *supra* note 1, at 291-92. The delay in removing the dog was apparently caused by the village's lack of the requisite demolition permit which normally "would be issued by and to itself." *Id.* at 291. The plaintiff claimed that the delay was due to a conspiracy headed by a village board member, Mel Kandinopoulos,

Ironically, the sculptor and the village later reverse legal positions. The sculptor claims that he has the right to dispose of the work under the First Amendment, and the village defends retention of *Cyclone Seven* since it has become a valuable tourist attraction.⁵⁰ Several other suits are brought over the right to commercially exploit the deceased dog, Spot.⁵¹

Oscar, a junior college history teacher, is the author of an unproduced Civil War play called *Once at Antietam*, which is based on themes from Plato and others, as well as on the Civil War experiences of Oscar's grandfather and fictional Supreme Court Justice Thomas Crease, who is the father of fictional District Court Judge Crease.⁵² Oscar comes home from the hospital to discover that Hollywood is distributing a sex and violence-filled blockbuster movie titled *The Blood in the Red White and Blue* which bears certain similarities in plot and character to his unproduced play.⁵³ Oscar commences a copyright infringement action against the producers and director of the movie, *Crease v. Erebus Entertainment, Inc.* [hereinafter *Crease*].⁵⁴ Separately, Oscar is sued by the estate of Eugene O'Neill for copyright infringement of O'Neill's *Mourning Becomes Electra*,⁵⁵ some of the themes of which Oscar has used in his play *Once at Antietam*.⁵⁶

owner of the expanding Mel's Kandy Kitchen, which served out-of-town tourists viewing *Cyclone Seven*. *Id.* The court rejected this claim based upon principles of common law immunity. *Id.*

50. *Id.* at 348, 392-93, 496.

51. *Id.* at 114, 235-36.

52. *Id.* at 50.

53. *Id.* at 49-50, 94-112 (purporting that *The Blood in the Red White and Blue* and *Once at Antietam* both involve young men torn by divided loyalties created by the Civil War).

54. See GADDIS, FROLIC, *supra* note 1, at 399-416. "Erebus Productions" made a brief appearance in Gaddis's earlier novel *JR*. GADDIS, JR, *supra* note 3, at 471, 540, 550, 554, 568, 574. In Greek mythology, "Erebus" is the "dark region of the underworld through which the dead must pass before they reach Hades." AMERICAN HERITAGE DICTIONARY 623 (3d ed. 1992). In *JR*, there is also a reference to an unpublished play which is referred to as "undigested Plato." GADDIS, JR, *supra* note 3, at 282. Separately, another filmmaker sues the producer/director of *The Blood in the Red White and Blue* over the producer/director's use in a prior film of controversial footage depicting human mutilation with a sledgehammer (which turns out *not* to have been done with special effects). GADDIS, FROLIC, *supra* note 1, at 17, 87, 183-84. Also, in the earlier *JR*, a Western novel by the name of *The Blood in the Red White and Blue* is mentioned. GADDIS, JR, *supra* note 3, at 516, 694.

55. EUGENE O'NEILL, *MOURNING BECOMES ELECTRA* (Horace Liveright ed., 1931).

56. GADDIS, FROLIC, *supra* note 1, at 210-12, 447, 580.

We also meet Oscar's stepsister, Christina Lutz, who is the only major character not involved in litigation.⁵⁷ Christina is married to Harry Lutz, a lawyer who is defending Pepsico, Inc. in a \$700 million lawsuit instituted by the Episcopal Church.⁵⁸ The Church claimed that the name of Pepsico's product infringed on and defamed its trademark.⁵⁹

Christina's college girlfriend, the wealthy Trish, is suing an animal rights activist for spilling catsup on her fur coat.⁶⁰ In addition, Trish, who is pregnant and eventually has an abortion, is suing her hospital for "foetal endangerment."⁶¹ At the same time, she is defending a lawsuit filed by the father of the child claiming parental rights and damages due to the abortion.⁶²

Reverend Elton Ude is sued by the parents of a child who is drowned in the Pee Dee River during a baptism.⁶³ The trial, *Frickert v. Ude*,⁶⁴ is held before Federal Judge Crease, who rejects both a claim of assumption of risk by the decedent and a claim of consent by the father.⁶⁵ Based upon the decedent's past and prospective earnings, Judge Crease goes on to direct a verdict in favor of the plaintiff in the amount of \$18.76, the cost of the boy's newly-purchased baptismal clothing, plus \$1 in punitive damages.⁶⁶

57. *Id.* at 11.

58. *Id.* at 578.

59. *See id.* at 578-80. The Church alleged that Pepsico deliberately contrived an obvious and infringing anagram of Episcopal (Pepsi-Cola is an anagram of Episcopal) hoping to profit from some subliminal confusion in the minds of the consumer public. *Id.* at 579. As a result, the Church alleges, Pepsico's worldwide bottling franchises and marketing skills increased in value. *Id.* In essence, the Church argues that Pepsico exploited the Church's historical success in proselytizing its "spiritual wares" which the Church had refined down through the centuries, and, in so doing, Pepsico defamed the venerable image of the Church. *Id.* Separately, Harry becomes the defendant in an automobile case. *Id.* at 379, 579.

60. *Id.* at 238.

61. GADDIS, FROLIC, *supra* note 1, at 43. Trish decided to sue the hospital for foetal endangerment after she had an amniocentesis performed there. *Id.*

62. *Id.* at 43, 237-39, 349, 357-58.

63. A "Judge Ude" is also referred to in *JR. GADDIS, JR.*, *supra* note 3, at 648. In Gaddis's *Carpenter's Gothic*, a significant subplot involves the Reverend Ude drowning one of his parishioners during a baptism. GADDIS, *CARPENTER'S GOTHIC*, *supra* note 3, at 47-48, 78-79.

64. GADDIS, FROLIC, *supra* note 1, at 426-32.

65. *Id.* "[The father's] scurrilous testimony and profane demeanor throughout the trial leave no doubt that consent to his son's baptism, had he known of it, must have been the last thing in what we may arguably call his mind." *Id.* at 432.

66. *Id.*

II. LAW IN A FROLIC OF HIS OWN

A. *Szyrk v. Village of Tantamount*

1. *Serra v. U.S. General Services Administration*⁶⁷

Despite being intended primarily for satiric effect,⁶⁸ *Szyrk* raises unresolved issues of much current interest in the recently emerging field of artistic rights. There is no actual reported decision which addresses precisely the same legal issues raised in the *Szyrk* case. However, *Serra v. U.S. General Services Administration*⁶⁹ arose in a factual context similar to that of *Szyrk*.⁷⁰

Serra involved a lawsuit by the creator of a sculpture entitled *Tilted Arc*, which consisted of an arc of steel 120 feet long.⁷¹ The sculpture was located on the Federal Plaza at Foley Square

67. 847 F.2d 1045 (2d Cir. 1988).

68. GADDIS, FROLIC, *supra* note 1, at 40. The *Szyrk* court referred to the village's efforts to remove the dog from the sculpture as an:

invasion and . . . subsequent attempt at reconstitution at the hands of those assembled for such purposes in the form of members of the local Fire Department, whose training and talents such as they may be must be found to lie elsewhere, much in the manner of that obituary upon our finest poet of the century wherein one of his purest lines was reconstituted as "I do not think they will sing to me" by a journalist trained to eliminate on sight the superfluous "that."

Id. at 40. The unnamed poet to whom the court is referring is T.S. Eliot, whose line was "I do not think *that* they will sing to me" from "The Love Song of J. Alfred Prufrock." T.S. ELIOT, COLLECTED POEMS AND PLAYS 1909-1950 7 (Harcourt, Brace & World 1952) (emphasis added).

69. 847 F.2d 1045 (2d Cir. 1988). For a general description of this case see Eric M. Brooks, *Tilted Justice: Site Specific Art and Moral Rights After U.S. Adherence to the Berne Convention*, 77 CAL. L. REV. 1431 (1989). Although *Frolic* was not published until 1994, the text of *Szyrk v. Village of Tantamount* was originally published in 1987. William Gaddis, *Szyrk v. Village of Tantamount et al. in the United States District Court, Southern District of Virginia, No. 105-87*, THE NEW YORKER, Oct. 12, 1987, at 44-50. The dispute over the removal of *Tilted Arc* arose in 1985. See Calvin Tomkins, *Tilted Arc*, THE NEW YORKER, May 20, 1985, at 95-101. However, this is not a case of art imitating life, but rather more a case of life imitating art. Gaddis initially created a previous *Cyclone Seven* in his 1975 work *JR* where the sculpture, located on Long Island (in the Southern District of New York), had a child trapped inside it and was the subject of an injunction to prevent its destruction. GADDIS, JR, *supra* note 3, at 671-72. In *Frolic*, another site-specific *Cyclone Seven* located in Virginia (perhaps to avoid the *Serra* precedent) entrapped a dog instead of a child. GADDIS, FROLIC, *supra* note 1, at 30-40.

70. *Serra*, 847 F.2d at 1046-48. In *Serra*, the court held that removal of government owned artwork from federal property does not violate the artist's free expression and due process rights. *Id.* at 1051-52.

71. *Id.* at 1047.

in lower Manhattan.⁷² The creator sought to enjoin the government's removal of the allegedly "site-specific" work.⁷³ After its installation, the sculpture became the object of intense public criticism from local residents and federal employees who complained about the sculpture's unappealing aesthetic qualities and its obstruction of the plaza's previously open space.⁷⁴

In *Serra*, the federal district court and, on appeal, the Second Circuit Court of Appeals, dismissed the sculptor's lawsuit which claimed that removal would deny him his First Amendment right to freedom of expression and his Fifth Amendment right to due process protection.⁷⁵ The Second Circuit ruled that even if the ordered removal by the General Services Administration was based upon the sculpture's lack of aesthetic appeal, rather than its obstruction of open space, it did not constitute a violation of the plaintiff's constitutional rights.⁷⁶ The court of appeals' ruling on the First Amendment claim was based on the ground that the government was the speaker⁷⁷ since it owned the plaza and the sculpture.⁷⁸ The court reasoned that even if Serra did have First Amendment rights in the sculpture, there was no constitutional violation because *Tilted Arc* had already been erected for six years and, according to the court of appeals, the First Amendment does not protect the right to continue speaking forever.⁷⁹ The court held that the artist was free to express his views through means other than

72. *Id.*

73. *Id.* According to *Serra*, a site-specific sculpture is "one which is conceived and created in relation to the particular conditions of a specific site." *Id.* The work "is meaningful only when displayed in the particular location for which it is created; such works are not intended to be displayed in more than one place." *Id.*

74. *Id.*; see also Deborah Caulfield and John Voland, *Morning Report - Art*, L.A. TIMES, Dec. 17, 1987, Calendar Section at 2; William Wilson, *The Matter of Serra's 'Arc' de Trauma*, L.A. TIMES, June 30, 1985, Calendar Section at 80; Christine Temin, *ICA Brings Public Art out in the Open*, BOSTON GLOBE, Apr. 24, 1994, at B1.

75. *Serra v. U.S. Gen. Serv. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988).

76. *Id.* at 1051.

77. *Id.* at 1048-49 (discussing that although the First Amendment protects the expression of private speakers, nothing forbids the government from restricting expression when the speaker is the government or its agents).

78. *Id.*

79. *Id.* at 1050. The First Amendment protects private expression from government control. *Id.* at 1048. Nothing in the amendment itself, however, addresses how long one's right lasts. "Congress shall make no law . . . abridging the freedom of speech" U.S. CONST. amend. I.

obstructing the federal plaza, despite the site-specific nature of his work.⁸⁰

2. *Szyrk v. Village of Tantamount*

The *Szyrk* decision centers on the concern over an artist's rights.⁸¹ Specifically, the court addresses the issue of "whether, following such a deliberate invasion for whatever purpose however merciful in intent, the work can be restored to its original look in keeping with the artist's unique talents and accomplishment or will suffer irreparable harm therefrom."⁸² This seems a clear allusion to the doctrine of *droit moral*,⁸³ or the moral rights of the artist in his work.

3. *Visual Artists Rights Act of 1990*

The United States has recently adopted a version of *droit moral* under the provisions of the Visual Artists Rights Act of 1990 [hereinafter "VARA"].⁸⁴ VARA provides that the author of a work of visual art, such as a sculpture, has the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation and any intentional distortion, mutilation, or modification of that work is a violation of that right."⁸⁵ In addition, a visual artist has the right "to prevent any destruction

80. *Serra*, 847 F.2d at 1050. A similar argument could presumably be made to ban a particular writer's prior works on the theory that he or she had already possessed a period of free expression and could always go out and write new works.

81. GADDIS, FROLIC, *supra* note 1, at 39-40. Harry Lutz suggests at one point that *Szyrk* might raise a claim based upon the First Amendment. *Id.* at 114. The *Szyrk* decision, which grants injunctive relief to the creator of *Cyclone Seven*, is not premised on any constitutional claims. *Id.* at 39-40. In fact, it is not very explicit as to its own rationale. *Id.* *Szyrk* rejects various counterclaims, such as attractive nuisance and defamation. *Id.* at 33, 38.

82. *Id.* at 39.

83. See Jeff C. Schneider, *Recently Enacted Federal Legislation Providing Moral Rights to Visual Artists: A Critical Analysis*, 43 FLA. L. REV. 101 (1991). Specific moral rights include "the right to create, the right of disclosure, the right to withdraw, the right to claim authorship, and the right to preserve the work from any alterations, mutilations, or modifications." *Id.* at 103.

84. Visual Artist Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in Title 17 U.S.C. §§ 101, 106A, 113, 301, 411(a), 412, 501(a), and 506); see also Schneider, *supra* note 83; Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990).

85. 17 U.S.C. § 106A(a)(3)(A) (1992).

of a work of recognized stature."⁸⁶ As applied to the facts of *Szyrk*, the federal law appears to be a real basis to enjoin the efforts of the local authorities to cut the structure in order to release the trapped dog.⁸⁷

The interesting issue not explicitly addressed by VARA, but raised by the *Szyrk* case, is whether there are limitations on the moral rights granted by VARA to prevent modification, mutilation, or destruction of a creative work.⁸⁸ On its face, the right of the visual artist to prevent prejudicial mutilation, modification, and, in the case of "a work of recognized stature," destruction of the work appears absolute.⁸⁹ Does the exercise of that right override the slow death of a trapped family dog? The teaching of the *Szyrk* case is that the artist's moral right does so in that case.⁹⁰ However, does *droit moral* override the life of a human being?

In Gaddis's earlier novel, *JR*, a similar *Cyclone Seven* sculpture made an appearance in Long Island, New York and had trapped inside it a "brave little fourth grader."⁹¹ Must the life of an innocent, albeit trespassing, animal or human be sacrificed on the altar of artistic rights? In *JR*, attorneys for a group

86. *Id.* at § 106A(a)(3)(B).

87. One federal district court has relied on VARA to temporarily restrain and later temporarily enjoin a proposed alteration of sculptures in the lobby of an office building. *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994) (temporary restraining order); 861 F. Supp. 303 (S.D.N.Y. 1994) (temporary injunction).

88. See *supra* note 83 and accompanying text. At a later point the sculptor *Szyrk* sought to remove *Cyclone Seven* over the objections of the village of Tantamount. See *supra* note 68. There is no provision in VARA which would give an artist the right to withdraw a work once sold to another party. See generally 17 U.S.C. §§ 100-18 (1992). It has been held that an artist-actor cannot withdraw a film of his work, even though the film injured his reputation due to its inferior quality. *Republic Pictures Corp. v. Rogers*, 213 F.2d 662 (9th Cir. 1954). In addition, under 17 U.S.C. § 109 (limiting property owners' exclusive rights), the owner of a particular copy lawfully made has the unqualified right to display that copy publicly to viewers present at the place where the copy is located. *Id.* Even in France, the right of an artist to withdraw a work previously released to the public is limited to instances in which a publishing contract existed. *Schneider*, *supra* note 83, at 109. Thus, it seems unlikely that *Szyrk* would prevail on a lawsuit seeking to withdraw the work from the public.

89. 17 U.S.C. §§ 100-118.

90. GADDIS, FROLIC, *supra* note 1, at 30-40 (granting *Szyrk*'s preliminary injunction to prevent the fire department from destroying *Cyclone Seven* to free Spot, the trapped dog).

91. GADDIS, JR, *supra* note 3, at 671. There was apparently a series of four *Cyclone Seven* sculptures. GADDIS, FROLIC, *supra* note 1, at 33.

calling itself the Modern Allies of Mandible Art or MAMA⁹² bring a lawsuit seeking an injunction against the planned mutilation of the sculpture to remove the boy.⁹³ Specifically, MAMA's lawsuit, in language similar to that of *Szyrk's*, seeks an injunction against the

willful destruction of a unique metaphor of man's relation to the universe, stating its contention that altering the massive work in the smallest detail would permanently destroy the arbitrary arrangement of force and line that pushes *Cyclone Seven* beyond conventional limits of beauty to celebrate in the virile and aggressive terms of raw freedom the triumphant dignity of man.⁹⁴

Given the apparent absolute nature of the moral right under VARA to prevent mutilation and destruction, since *Cyclone Seven* was apparently a work of "recognized stature,"⁹⁵ the federal law would appear to require that a trapped child not be rescued if it required mutilation, modification, or destruction of the work.⁹⁶

This reflects the sort of overly-technical reasoning found in Shylock's unsuccessful attempted enforcement of his "pound of flesh" bond in "The Merchant of Venice."⁹⁷ The death of a child in defense of *droit moral* seems abhorrent. Yet, one cannot rely on an argument that the right of animal (or human) life must take precedence over property rights. The essence of *droit moral* is that it is the personal right of the artist, whose personality is reflected by and inheres in the creative work, and it is an expression of the artist's soul.⁹⁸ In fact, as noted above, the defense of *droit moral* in the case of *Cyclone Seven* in *JR* is phrased

92. An obvious satire of the Museum of Modern Art (MOMA).

93. GADDIS, JR, *supra* note 3, at 671.

94. *Id.* at 672. Although *JR* does not describe the ultimate outcome of that litigation, the court in *Szyrk* briefly refers to the prior incident involving the little boy and notes that "a proffered ten dollar bill brought him forth little the worse." GADDIS, FROLIC, *supra* note 1, at 33.

95. In *JR*, the sculpture is described as "one of the most outstanding contemporary sculptural comments on mass space." GADDIS, JR, *supra* note 3, at 672.

96. See generally 17 U.S.C. §§ 100-18.

97. In the course of analyzing whether the plaintiff would have an adequate remedy at law against the trapped dog, the *Szyrk* court notes that "as in the question posed by the Merchant of Venice [by Shylock in response to Antonio's initial request for a loan] 'Hath a dog money?' the answer must be that it does not." GADDIS, FROLIC, *supra* note 1, at 32; see also WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3.

98. Brooks, *supra* note 69, at 1434-35.

as a defense of “a unique metaphor of man’s relation to the universe”⁹⁹ and “the dignity of man.”¹⁰⁰ Yet, the defense of *Cyclone Seven* can also be viewed as the triumph of the business of art over life.¹⁰¹ The moral rights of integrity seem to require a balancing test of some sort. Thus, while it may be justifiable to sacrifice a dog to *droit moral*, sacrifice of a child is not. Similarly, limitations on moral rights against mutilation or destruction might be justified by the doctrine of necessity.¹⁰² Nevertheless, *Frolic* does alert us to both the wisdom of *droit moral* and the inherent need for limitations on such rights.

B. *Crease v. Erebus Entertainment, Inc.*

1. “King For A Day”

The fictional copyright infringement case of *Crease v. Erebus Entertainment, Inc.* is apparently based upon Art Buchwald’s lawsuit against Paramount Pictures for breach of contract arising out of the movie *Coming to America* starring Eddie Murphy.¹⁰³ The real-life *Buchwald v. Paramount Pictures Corporation*,¹⁰⁴

99. GADDIS, JR, *supra* note 3, at 672.

100. *Id.*

101. GREGORY COMNES, THE ETHICS OF INDETERMINACY IN THE NOVELS OF WILLIAM GADDIS 120 (1994).

102. The doctrine of necessity “makes otherwise unlawful acts lawful out of (1) self-preservation; (2) obedience; (3) an act of God, or of a stranger.” BLACK’S LAW DICTIONARY 1030 (6th ed. 1990).

103. Such similarity was noted in the review of *Frolic* in the *New York Times*. Kakutani, *supra* note 6 at B2. *Crease’s* resemblance to *Buchwald* provides some irony in view of the fact that *Crease* itself is a case of copyright infringement claiming that another author copied *Crease’s* play. Nevertheless, *Buchwald*, a case that engendered much popular interest, is in the public domain. However, merely because a subject matter is in the public domain, whether it be a lawsuit or a Civil War battle, does not necessarily mean that all treatments of the subject matter are free from claims of infringement. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980) (stating in dicta that while “the scope of copyright in historical accounts is narrow indeed” it does embrace “the author’s original expression of particular facts and theories already in the public domain”); see *infra* notes 153-54, 160-63 and accompanying text.

104. No. C 706093, 1990 WL 357611 (Cal. Super. Ct. 1990). The trial court’s three decisions in the *Buchwald* case have not been officially published. However, they do appear as Appendices A, B, and C in PIERCE O’DONNELL & DENNIS MCDUGAL, FATAL SUBTRACTION: THE INSIDE STORY OF *BUCHWALD V. PARAMOUNT* 528-60 (1992), a journalistic account of the *Buchwald* case. The *Buchwald* case has been the subject of some scholarly commentary. See Jordan H. Leibman, *Review Essay: Fatal Subtraction: The Inside Story of Buchwald v. Paramount*, 31 AMER. BUS. L.J. 535 (1993); Adam J. Marcus, *Buchwald v. Paramount Pictures Corp. and the Future of Net Profit*, 9 CARDOZO ARTS &

unlike *Crease*, did not involve the issue of copyright infringement.¹⁰⁵ *Buchwald* involved a dispute concerning a contract in which humorist Art Buchwald sold all rights to an eight-page screenplay to Paramount.¹⁰⁶ The agreement obligated Paramount to compensate Buchwald if it made a motion picture based upon Buchwald's screenplay.¹⁰⁷

Buchwald's screenplay, entitled "King for a Day,"¹⁰⁸ involved an arrogant African king who, while on an official visit to the United States, ends up destitute in the Washington, D.C. ghetto.¹⁰⁹ Paramount later abandoned a movie based specifically upon Buchwald's screenplay but did make a motion picture starring Eddie Murphy entitled *Coming to America*.¹¹⁰ In *Coming to America*, a pampered African prince, played by Murphy, comes to the United States to find an independent woman to marry.¹¹¹ The prince finds himself impoverished in New York City, discovers his true love, marries her, and returns to Africa.¹¹²

In *Buchwald*, the trial court rendered three separate opinions.¹¹³ In its first opinion, the California court held that *Coming to America* was based on "King for a Day" within the meaning of the contract language.¹¹⁴ *Buchwald's* second opinion dealt with the provisions of a contract between Alain Bernheim, a friend of Buchwald who was to produce "King for a Day," and Paramount, that limited Bernheim's compensation to contractually-defined "net profits."¹¹⁵ In that opinion, the trial court held that certain provisions of the net profits formula, which defined net profits in such a way so that even hugely

ENTER. L.J. 545 (1991).

105. *Buchwald*, 1990 WL 357611, at *6 (stating that the case is primarily a breach of contract case between Buchwald and Paramount).

106. *Id.* at *1.

107. *Id.*

108. Buchwald's screenplay was inspired by a state visit by the Shah of Iran. O'DONNELL, *supra* note 104, at 528.

109. *Id.* at 537.

110. *Buchwald*, 1990 WL 357611 at *11.

111. *Id.* at *10.

112. See O'DONNELL, *supra* note 104, at 537. Buchwald was given no screenwriting credit for the film, although its star, Murphy, shared the credits.

113. *Id.* at 528-60.

114. *Id.* at 535-40. In that decision, the court also rejected Paramount's contentions that "King for a Day" was not original. The court rejected Paramount's contention that Buchwald's work itself was based upon a movie made in the 1950's by Charlie Chaplin entitled *A King in New York*. *Id.* at 540.

115. *Id.* at 541-55.

successful films seldom made any net profits, were unconscionable and unenforceable.¹¹⁶ In its third and final opinion, the court determined that the appropriate compensation payable by Paramount to Bernheim and Buchwald was \$750,000 and \$150,000, respectively.¹¹⁷

2. *Once at Antietam*

Oscar's unproduced play *Once at Antietam*, lengthy portions of which are reproduced in *Frolic*,¹¹⁸ is itself a piece of historical fiction.¹¹⁹ The play focuses on the supposedly true story of Oscar's grandfather Thomas Crease (Federal Judge Thomas Crease's father), a Civil War veteran and later United States Supreme Court Justice, who bears certain resemblances to the real Justice Oliver Wendell Holmes with whom he supposedly served on the Supreme Court.¹²⁰ Like the real Justice Holmes, who served in the Union Army and was injured at the battles of Ball's Bluff and Antietam,¹²¹ the fictitious Thomas Crease served in the Confederate Army and was injured at the battle of Ball's Bluff.¹²² Upon returning home to North Carolina, Thomas Crease arranged for a substitute to take his place in the Confederate Army.¹²³ Crease then went to Pennsylvania to take over a coal mine which he had inherited.¹²⁴ In the North, he similarly arranged for a substitute to take his place in the Union Army. Eventually, the two substitutes met and died at the battle of Antietam.¹²⁵ Oscar's play uses this historical

116. *Id.* As an epigram, O'Donnell quotes from playwright David Mamet's *Speed-the-Plow*, in which a Hollywood producer quips that there are "two things which are always true The first one is: there is no net And I forget the second one" O'DONNELL, *supra* note 104, at xi (quoting DAVID MAMET, *SPEED-THE-PLOW* 33 (1987)); see also Marcus, *supra* note 104, at 545 (also quoting Mamet as an epigram).

117. O'DONNELL, *supra* note 104, at 555-60.

118. GADDIS, *FROLIC*, *supra* note 1, at 62-176.

119. *Id.* at 50, 400-01.

120. *Id.* at 401-03. Crease, a North Carolina resident during the Civil War, fought in the battle at Ball's Bluff. *Id.*

121. See LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 113-22, 130-33 (1991).

122. GADDIS, *FROLIC*, *supra* note 1, at 400.

123. *Id.*

124. *Id.* Crease inherited the mine holdings from his estranged uncle. *Id.* at 401.

125. While there are actual Justices who bear some similarities, there is no real-world equivalent to the fictional Supreme Court Justice Thomas Crease. Chief Justice Edward Douglass White, was a Southerner (albeit from Louisiana), but, like Holmes and unlike Justice Crease, he saw combat and was seriously wounded in the Civil War.

background to tell a broad, rather didactic philosophical story, borrowing themes from several literary and philosophical sources, including Plato's *The Republic*¹²⁶ and Eugene O'Neill's *Mourning Becomes Electra*.¹²⁷

3. *The Blood in the Red White and Blue*

At one time, Oscar may have submitted his play to an agent, Jonathan Livingston Siegal.¹²⁸ Since then Siegal, who changed his name to Constantine Kiester, went on to become a world-famous movie producer and director, and made the Civil War epic *The Blood in the Red White and Blue*.¹²⁹ The movie basically follows the historical facts of Justice Crease and resembles Oscar's play, except that it substitutes massive doses of sex and violence for philosophical dialogues.¹³⁰

4. *Crease v. Erebus Entertainment, Inc.*

Oscar sues Erebus Entertainment, Inc., Constantine Kiester and others involved in the making of *The Blood in the Red White and Blue* for copyright infringement and other causes of action.¹³¹ Kiester answers the complaint, denying the plaintiff's claims and serves interrogatories.¹³² Oscar's deposi-

See BAKER, *supra* note 121, at 359, 438-39; 3 LEON FRIEDMAN & FRED L. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1636 (1978). Justice Henry Billing Brown hired a substitute to do his part in the war, but he was from Michigan and was the author of the unplatonic *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding segregation). BAKER, *supra* note 121, at 359, 385-86; 2 FRIEDMAN & ISRAEL, *supra*, at 1554. Thomas Crease was a North Carolina resident at the time of the Civil War and was slightly wounded as a private in the Confederate Army. GADDIS, FROLIC, *supra* note 1, at 400.

126. *E.g.*, GADDIS, FROLIC, *supra* note 1, at 112, 216-18, 402.

127. GADDIS, FROLIC, *supra* note 1 at 210-12. The idea of a Civil War soldier killing an enemy soldier who turns out to be himself, which is alluded to in Oscar's play, is also found in O'Neill. See O'NEILL, *supra* note 55, at 142.

128. GADDIS, FROLIC, *supra* note 1, at 50. Oscar also mailed a copy of the play to himself in a sealed envelope. *Id.* at 98. Such a procedure is recommended to establish the date of authorship of the protected work in relationship to the allegedly infringing work. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01[A], at 13-8 (1994) [hereinafter NIMMER].

129. GADDIS, FROLIC, *supra* note 1, at 49-50.

130. *Id.* at 51, 54. In the movie the horrors of war are overglorified and counterposed by sex. See *id.* at 177-78.

131. *Id.* at 177-78. The case, *Crease v. Erebus Entertainment, Inc.*, was filed with the fictional U.S. District Court, Southern District of New York, on September 30, 1990. *Id.* at 177.

132. See *id.* at 179-80.

tion is taken, resulting in a fifty-page transcript reproduced in *Frolic*.¹³³ During the deposition, Oscar acknowledges that certain themes in his play were adopted from the works of Plato, Eugene O'Neill, and Shakespeare.¹³⁴ However, he debates with defense counsel over whether he is claiming protection of the expressions in his play or protection of the ideas.¹³⁵ The defendants then move for summary judgment against the plaintiff which the court grants.¹³⁶ However, the court of appeals reverses and finds in Oscar's favor, granting an injunction, damages, and an accounting.¹³⁷

The issues raised in the court of appeals' decision in *Crease* are basically twofold: (1) to what extent can a work claim copyright protection when it is itself taken, in part, from historical events or prior literary and philosophical works; and (2) how close to the first work does the second work need to be to constitute infringement? In other words, what is protected expression as opposed to unprotected ideas?¹³⁸ In addressing these issues, the court of appeals in *Crease* relies upon and quotes extensively (sometimes without attribution) from two well-known actual decisions of the Second Circuit Court of Appeals from the 1930's, written by Judge Learned Hand: *Nichols*

133. GADDIS, FROLIC, *supra* note 1, at 185-234. The deposition contained in the text of *Frolic* is a portrayal of the nuts and bolts of civil litigation which is both realistic and absurd at the same time. A few of the particulars of the transcript can be briefly summarized: Counsel for plaintiff continually makes objections to defendant counsel's questions on the grounds of the form of the question, as permitted by Rule 31 of the *Federal Rules of Civil Procedure*. *Id.* at 187. For example, Oscar is asked his name and the occupation providing his primary source of income. *Id.* Plaintiff's counsel objects to the form of the question on the grounds that there are two questions and that the second question improperly assumed that he held a job which provided his primary income. *Id.* at 187-88; *see also* FED. R. CIV. P. 31. In addition, when asked to "read" a particular exhibit, instead of reading the document to himself, Oscar reads the text of the document aloud into the record. GADDIS, FROLIC, *supra* note 1, at 196, 209. Finally, after an agreement is reached to reconvene the deposition at 1:00 p.m., the transcript discloses that the afternoon session does not actually begin until 1:50 p.m. *Id.* at 205.

134. GADDIS, FROLIC, *supra* note 1, at 200-22.

135. *Id.* at 193, 212, 223-25.

136. *Id.* at 400.

137. *See id.* at 415-16. The plaintiff was also awarded attorney's fees, with the amount set by the district court on remand. *Id.* at 416.

138. *See id.* at 405-06.

*v. Universal Pictures Corporation*¹³⁹ and *Sheldon v. Metro-Goldwyn Pictures Corporation* (“*Sheldon I*”).¹⁴⁰

Nichols involves a claim of copyright infringement by the author of the play *Abie's Irish Rose* against the producers of the film *The Cohens and The Kellys*.¹⁴¹ In one work, a Jewish boy falls in love with and marries an Irish girl.¹⁴² In the other, an Irish boy falls in love with and marries a Jewish girl.¹⁴³ In each work the Jewish and Irish fathers quarrel, a grandchild is born, and there is an eventual reconciliation.¹⁴⁴ In *Nichols*, Judge Hand concluded that while proof of infringement did not require literal appropriation of the text or a specific scene, there were too many differences between the two works to find infringement.¹⁴⁵ In the course of the opinion Judge Hand announced his “abstraction test”:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.¹⁴⁶

As Judge Hand concluded, “A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.”¹⁴⁷

139. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). *Nichols, Sheldon I*, *infra* note 140, and other Learned Hand copyright decisions are discussed in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, 315-28 (1994).

140. 81 F.2d 49 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936).

141. *Nichols*, 45 F.2d at 120.

142. *Id.*

143. *Id.*

144. *Id.* at 122.

145. *Id.* at 121-22.

146. *Nichols*, 45 F.2d at 121. While *Frolic* quotes from other portions of *Nichols*, it does not quote Judge Hand's now famous “abstraction test.” See GADDIS, *FROLIC*, *supra* note 1, at 407-08; see also NIMMER, *supra* note 128, at § 13.03[A][1][a] (1994).

147. *Nichols*, 45 F.2d at 122.

The second Learned Hand case, *Sheldon I*, involved a suit by the author of the copyrighted play *Dishonored Lady* to enjoin the performance of the movie *Letty Lynton*.¹⁴⁸ Both works arose out of an actual 19th Century criminal trial in Scotland involving the acquittal of a wanton young girl.¹⁴⁹ The girl poisoned a prior lover who stood in the way of marriage to a more suitable match.¹⁵⁰ In *Sheldon I*, the plaintiff had written a copyrighted play which generally adopted the story of the trial but made substantial revisions to the plot and the characters.¹⁵¹ The defendant's movie contained numerous plot elements, scenes, and characters identical to that of plaintiff's, although it also contained elements from a novel written contemporaneously with the play.¹⁵² In *Sheldon I*, the Second Circuit Court of Appeals rejected the defense that the plaintiff's work was based, in large part, on works in the public domain and concluded that to the extent that it was itself original, it would be the basis for an infringement action.¹⁵³ As Judge Learned Hand remarked:

Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.¹⁵⁴

Sheldon I concluded that while there were substantial elements of the movie not to be found in the play, substantial parts were used in the play.¹⁵⁵ As a result, the *Sheldon I* court held that unless nothing short of taking literal dialogue was the standard, there was infringement.¹⁵⁶

In the course of quoting *Nichols*, *Sheldon I*, and other cases,¹⁵⁷ the fictional court of appeals in *Crease* finds in favor

148. *Sheldon I*, 81 F.2d at 49.

149. *Id.*

150. *Id.* at 49-50.

151. *Id.* at 50.

152. *Id.* at 52.

153. *Sheldon I*, 81 F.2d at 54.

154. *Id.* (quoted in GADDIS, FROLIC, *supra* note 1 at 412).

155. *Id.* at 56.

156. *Id.* at 55-56 (quoted in GADDIS, FROLIC, *supra* note 1 at 412).

157. Among the other cases cited in *Crease* is *Murray v. National Broadcasting Co.*, 671 F. Supp. 236 (S.D.N.Y. 1987), *aff'd* 844 F.2d 988 (2d Cir. 1988) (involving a claim under New York law for NBC's misappropriation of an employee's idea for a television

of the plaintiff.¹⁵⁸ Despite the claims of the defendants that no one could copyright the Civil War, the Battle of Antietam, or Oscar's grandfather,¹⁵⁹ and that *Once at Antietam* borrowed from prior works, the court held that it was still capable of being protected from infringement.¹⁶⁰ The court relied, to a significant extent, on the fact that the materials in the public domain were found in obscure old newspapers which would not have been known to the defendant without the existence of plaintiff's play.¹⁶¹ As the *Sheldon I* court noted:

If the copyrighted work is therefore original, the public demesne is important only on the issue of infringement; that is, so far as it may break the force of the inference to be drawn from likenesses between the work and the putative piracy. If the defendant has had access to other material which would have served him as well, his disclaimer becomes more plausible.¹⁶²

Thus, *Crease* reminds us that even though a work uses themes or dialogue from a prior work, or even documented history, it is not necessarily left un-protected from infringement under copyright law.¹⁶³

One of the latest decisions by the United States Supreme Court on the issue of copyright, *Feist Publications, Inc. v. Rural Telephone Services Co.*,¹⁶⁴ provides further support for this view.

series about a middle class black family which allegedly became "The Cosby Show"). While the *Crease* decision quotes extensively from both the opinions and a dissent in *Murray*, the *Murray* case was not a copyright case and was decided largely on the issue of novelty. GADDIS, FROLIC, *supra* note 1, at 407, 412-13; see also *Murray v. Nat'l Broadcasting Co.*, 844 F.2d 988, 995-97 (2d Cir. 1988). As indicated by the quote about Keats from *Sheldon I*, copyright law requires only originality, not novelty.

158. GADDIS, FROLIC, *supra* note 1, at 415-16.

159. See *id.* at 17, 109.

160. *Id.* at 413-15.

161. *Id.* at 414.

162. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d at 49, 54. This language from *Sheldon I* is not quoted in *Crease*.

163. Cf. GADDIS, FROLIC, *supra* note 1, at 399-416. Of course, if the prior work is itself protected by copyright, the author of the subject work may himself or herself be subject to claims of infringement. Oscar found himself a defendant in an infringement suit by the estate of Eugene O'Neill for Oscar's use of themes and dialogue from *Mourning Becomes Electra* in *Once at Antietam*. *Id.* at 219-20. *Frolic* does not describe the outcome of that litigation. Ironically, O'Neill's *Mourning Becomes Electra* is itself an unabashed retelling of Aeschylus's *The Oresteia* and is set (like *Once at Antietam*) during the Civil War era. See AESCHYLUS, *THE ORESTEIA* 3 (Robert Fagles trans., 1975) (n.d.).

164. 499 U.S. 340 (1991).

Feist involved the copying of telephone listings from a rival directory.¹⁶⁵ The Supreme Court noted:

The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.¹⁶⁶

Although the *Feist* court ultimately found that there was no copyright infringement,¹⁶⁷ it defined the essential element of an infringement claim as “ownership of a valid copyright”¹⁶⁸ and the “copying of constituent elements of the work that are original.”¹⁶⁹ Thus, *Feist* reiterates the teaching of *Crease*, which stated that even a mixed work containing materials from the public domain will be protected from infringement as to the portions of the work that are original.¹⁷⁰

Notwithstanding the affirmation of copyright law presented in *Crease*, *Frollic* raises questions regarding the wisdom of copyright law itself. The very nature of copyright infringement actions, like many other civil actions, tends to foster conduct inimicable to the very purpose of copyright law. One of the primary purposes of copyright law is to encourage artistic expression which, in the absence of a copyright law, would not occur.¹⁷¹ Yet, after commencing *Crease*, Oscar is discouraged from having his unproduced, but now famous, play produced by a famous English director because it would reduce his recoverable damages.¹⁷²

There is more irony in the fact that what really upset Oscar about *The Blood in the Red White and Blue* and engendered the lawsuit was not the fact that the movie copied his play, but that it bowdlerized what he saw were the great and eternal themes in

165. *Id.* at 342.

166. *Id.* at 348.

167. *Id.* at 363.

168. *Id.* at 363-64.

169. *Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 363-64 (1991).

170. See GADDIS, FROLIC, *supra* note 1, at 414.

171. See 1 NIMMER, *supra* note 128, §§ 2.01[A], [B], 1.08[C][1] (1994).

172. See GADDIS, FROLIC, *supra* note 1, at 259-60. Oscar is also torn between his desire to enjoin the offending movie and the fact that the injunction will prevent the movie from generating the profits which will compensate him. See *id.* at 438.

Once at Antietam and substituted sex and gore.¹⁷³ Thus, the real harm in Oscar's eyes was not that he was plagiarized, but that it was done so poorly.¹⁷⁴ Then, to add irony to irony, Oscar's play itself constitutes a popularization of themes from Plato and Eugene O'Neill which, as Oscar explains in his deposition, was done in order to make those sources more accessible and because that is what artists do by way of homage.¹⁷⁵ As Harry Lutz explains to Oscar, "Section 8 of Article 2 [the constitutional basis for the copyright laws], . . . there's your constitutional right to protect a piece of junk, see that's what these cases are mostly all of them about, protecting one piece of junk against another piece of junk and there's your precedents."¹⁷⁶ Thus, copyright law, as found in *Frolic*, tends either to discourage artistic expression or encourage and protect the sort of expression that, from a critical perspective, ought not to be encouraged.¹⁷⁷

5. *Subsequent History of Crease v. Erebus*

As in *Buchwald*,¹⁷⁸ the court of appeals in *Crease* found that the motion picture producers were legally responsible to the

173. See *id.* at 53. The right of an author to demand preservation of his or her plot and the main features of his or her characters from changes which alter the nature of the work or the author's basic message has sometimes been considered a part of the moral right of respect. Damich, *supra* note 84, at 949-50. VARA does not protect such a moral right and, in any event, literary works are generally excluded from the definition of protected visual arts under VARA. 17 U.S.C. § 101 (1992).

174. GADDIS, FROLIC, *supra* note 1, at 53-54. Oscar states that rather than portraying *The Blood in the Red White and Blue* authentically, the movie is a "ninety million dollar glorification of the horrors of war." *Id.* at 54.

175. *Id.* at 219-20, 227. In Gaddis's earlier novel *The Recognitions*, a character (appropriately) named Recktall Brown, whose only sense of writing is to disguise his plagiaries, states that a good piece of writing could be altered and can be claimed by a new author. GADDIS, THE RECOGNITIONS, *supra* note 3, at 374. It might be noted that the initial critical reaction to the lengthy portions of *Once at Antietam* included in *Frolic* is that the play, whether intended or not, is largely a poor piece of work. Kakutani, *supra* note 6; Towers, *supra* note 6, at 22; Birkerts, *supra* note 6, at 30; Raban, *supra* note 6, at 4.

176. GADDIS, FROLIC, *supra* note 1, at 260. Harry's statement accurately recognizes the principle announced by the real Justice Holmes that the artistic merit of a particular work is not a factor in determining copyrightability. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

177. *Id.*

178. No. C 706083, 1990 WL 357611 (Cal. Super. Ct. 1990).

original author.¹⁷⁹ Also like *Buchwald*, however, the favorable decision in *Crease* turns out to be a pyrrhic victory.¹⁸⁰ In *Crease*, the injunction is subsequently lifted¹⁸¹ and a master¹⁸² awards the plaintiff twenty percent of the net profits of the motion picture.¹⁸³ The master's award is premised on the idea that while the movie producers may have stolen Oscar's play, they did not steal all of the play.¹⁸⁴ Much of the play was taken from the public domain and, therefore, the net profits must be allocated.¹⁸⁵ Ultimately, the master in *Crease* determines that the motion picture, which had gross receipts of \$370 million, had a net loss of \$18 million.¹⁸⁶ In effect, due to the studio's creative accounting, Oscar will recover twenty percent of nothing, or as he is told, "a fifth of minus eighteen million . . . you'd owe them three and a half million dollars."¹⁸⁷

179. GADDIS, FROLIC, *supra* note 1, at 415-16. The court stated that anyone may use all works in the public domain as sources for compositions, but they are not free to borrow the composition of someone else. *Id.*

180. *Id.* at 454. Even though Oscar won his case, he received no actual monetary damages, merely the satisfaction of winning. *Id.* at 456.

181. *Id.* at 449.

182. *Black's Law Dictionary* defines master as "[o]ne having authority; one who rules, directs, instructs, or superintends . . ." BLACK'S LAW DICTIONARY 975 (6th ed. 1990).

183. GADDIS, FROLIC, *supra* note 1, at 454.

184. *Id.* at 454-55.

185. *Id.* at 453-58. In *Sheldon v. Metro-Goldwyn Pictures Corp.* ("*Sheldon I*"), 309 U.S. 390 (1940), *aff'g* 106 F.2d 45 (2d Cir. 1939), the Supreme Court held that where only a portion of the defendant's work was attributable to the plaintiff's work, the plaintiff is only entitled to that portion of the profits. *Sheldon II*, 309 U.S. at 408-09. Interestingly — and perhaps not coincidentally — not only is the *Sheldon I* case heavily relied upon by the court in *Crease*, but Judge Learned Hand, on behalf of the *Sheldon II* court, like the *Crease* court, also approved an allocation of twenty percent of the profits. *Sheldon II*, 309 U.S. at 51.

186. GADDIS, FROLIC, *supra* note 1, at 533-34. Like *Coming to America*, where costs were greater than normal due to the fact that director John Landis and star Eddie Murphy both took substantial gross profit participation shares, in *The Blood in the Red White and Blue*, the director and the stars took \$33 million off the top. O'DONNELL, *supra* note 104, at 559 n.6; GADDIS, FROLIC, *supra* note 1, at 455. Also, Paramount Pictures maintained that *Coming to America*, which had earned over \$160 million in gross revenues, had an \$18 million deficit. Marcus, *supra* note 104, at 559.

187. GADDIS, FROLIC, *supra* note 1, at 534-35. The novel suggests the possibility, never realized, that the court might grant Oscar an award in lieu of damages so as to provide a *Buchwald*-like result of a modest monetary award. *Id.* at 455, 489. The Copyright Act does allow, under some circumstances, an award of statutory, or "in lieu," damages for willful infringement up to \$100,000. 17 U.S.C. § 504(c)(2) (1992). However, with certain exceptions, registration of the work prior to the infringement (something Oscar apparently did not do) is a condition precedent to the right to recover statutory damages. 17 U.S.C. § 412 (1992).

Thus, *Frolic* contains much substantive law.¹⁸⁸ But for the fact that they are purely a creation of the mind of William Gaddis, *Szyrk* and *Crease* would be the sort of judicial opinions which might be discussed as serious propositions of the law in a law review such as this.

III. THE LAWYERS IN A FROLIC OF HIS OWN

With very few exceptions,¹⁸⁹ serious fiction has portrayed lawyers in an exceedingly negative light.¹⁹⁰ For example, in the novels of Charles Dickens, lawyers are at best careerists, at worst purely evil, and the only good lawyers are the characters who give up either the law or their life.¹⁹¹ In fact, Richard Weisberg, in his book *Poethics and Other Strategies of Law and Literature*, argues that “literary lawyers” have six “remarkably consistent characteristics”:¹⁹² verbal manipulation, apartness, distrustfulness, professional ethical relativism, frugality and bachelorhood, and passivity.¹⁹³ One need not subscribe to Weisberg’s formalistic character analysis to recognize that in the world of law and literature, a good man¹⁹⁴ is hard to find.¹⁹⁵

To a great extent, *Frolic* carries on the traditional portrayal of venal lawyers. In the novel, lawyers are repeatedly referred to as a “self regulating conspiracy” that only looks out for its own

188. See *supra* part II A (describing the *Szyrk* case); *supra* part II B (describing the *Crease* case).

189. The character of Portia in *The Merchant of Venice*, for instance, portrays a merciful judge intent on fairness. At one point she says, “[b]ut mercy is above this sceptered sway, It is enthroned in the hearts of kings, It is an attribute to God himself; And earthly power doth then show likest God’s When mercy seasons justice.” SHAKESPEARE, *supra* note 97, at act 4, sc. 1.

190. See, e.g., DICKENS, *BLEAK HOUSE*, *supra* note 7; see also DICKENS, *PICKWICK PAPERS*, *supra* note 7.

191. Larry M. Wertheim, *Law, Literature and Morality in the Novels of Charles Dickens*, 20 WM. MITCHELL L. REV. 111, 140-41 (1994).

192. WEISBERG, *supra* note 2, at 54.

193. *Id.* at 54-55.

194. Portia from Shakespeare’s *The Merchant of Venice* is the only female acting in the role of a lawyer or judge who immediately comes to mind. SHAKESPEARE, *supra* note 97, at act 4. Yet, Portia is not a lawyer and only masquerades as a judge while disguised as a man. *Id.* Even then, Portia is not without her critics. See, e.g., DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE’S LEGAL APPEAL* 66 n.3 (1994) (summarizing two commentaries representing “[t]he minority view of Portia as being one whose judgment seems . . . to be a triumph of vengeance in the guise of justice”).

195. FLANNERY O’CONNOR, *A GOOD MAN IS HARD TO FIND* (Frederick Asals ed., 1993).

interests.¹⁹⁶ Most of the individual lawyers are hard to like. For example, Jawaharlal (Jerry) Madhar Pai, attorney for Constantine Kiester in Oscar's copyright suit, insinuates himself with Oscar under the pretext of friendship. He later uses the information he obtains to Oscar's detriment.¹⁹⁷ Jack Preswig, formerly Oscar's personal injury lawyer, claims that he left the practice of law because of its venality.¹⁹⁸ However, in the very next instant, he asserts that he now represents Oscar because he smells a fee to be made.¹⁹⁹ A young associate at Harry Lutz's firm is capable of rhapsodizing at great length to Christina on the virtues and talents of "Harry," until she discovers that he doesn't know her Harry and is thinking of another lawyer named Harry.²⁰⁰ Even Oscar's bright, hardworking lawyer in the copyright case turns out to be a fraud who never went to law school and who leaves the practice in the middle of Oscar's case.²⁰¹

The one significant exception to these members of the "self regulating conspiracy"²⁰² is Christina's husband, Harry Lutz. Despite the fact that he is a senior partner at a prominent firm, Harry exhibits humility, understanding, and a reasonableness lacking in virtually every other character in the novel.²⁰³ Forever willing to listen to the complaints of his wife, Christina, and his step-brother-in-law, Oscar, Harry in many ways represents the best in the legal profession. Despite Oscar's hysteria over his lawsuits, Harry repeatedly counsels him not to expect

196. GADDIS, FROLIC, *supra* note 1, at 26, 44, 279, 284, 310, 316, 484, 527, 530, 536. In a relatively subtle addition to the storehouse of lawyer jokes, after a reference is made to the fact that a particular cause of action allows the recovery of "reasonable attorney fees," Christina remarks that "[i]f attorneys' fees were reasonable do you think [my husband] Harry would be driving around in a car like ours?" *Id.* at 183. In another context, a good lawyer is described as one who has "got the answer ready before he hears the question, takes short cuts, doesn't look back, [and] sets up the game himself as if he's the only player. He'd rather win than be right." *Id.* at 388.

197. *Id.* at 456. Jerry uses the knowledge that Sir John Nipples, "one of the biggest theatre directors around," is interested in Oscar's play to "destroy" Oscar's claim for damages arising from the alleged loss of "other commercial possibilities" which the play may have had. *Id.*

198. *Id.* at 565.

199. *Id.* at 565-68.

200. *Id.* at 577-82.

201. *Id.* at 306-07, 313.

202. *Id.* at 310.

203. *See, e.g., id.* at 54, 57.

unrealistic results and to consider compromise.²⁰⁴ Harry is capable of trenchant and self-critical thinking about law and the legal profession.²⁰⁵ Ultimately, Harry is the most well-rounded and likeable character in the novel. As Christina says when a crisis arises after Harry's untimely death, "I can't do a damn thing! When I could just pick up the phone and call Harry? He'd know what to do, he'd know exactly what to do."²⁰⁶ Overall, Harry Lutz represents a thoughtful and enlightened practitioner doing the best he can with an unwieldy system that is seemingly beyond anyone's control. If for nothing else, *Frolic* is notable for its favorable portrayal of at least one member of the legal profession.²⁰⁷

204. The defendants in Oscar's copyright suit are represented by a firm named Swyne & Dour (an allusion perhaps to the firm of Dodson & Fogg in Dickens's *The Pickwick Papers*). *Id.* at 185. However, Harry Lutz is also a partner of Swyne & Dour and he communicates with his step-brother-in-law Oscar about Oscar's lawsuit, even though Oscar is separately represented in the copyright lawsuit. *Id.* This may arguably violate the ethical prohibition against communications with a person represented by counsel, or the ethical prohibition against representation of a client adverse to another client. See MINN. RULES ON PROFESSIONAL CONDUCT Rules 4.2 and 1.7(a) (1993). According to the *Minnesota Rules on Professional Conduct*, Rule 1.10(a), a conflict under Rule 1.7 is imputed to all members of a firm. Thus, a conflict on the part of one lawyer at Swyne & Dour would be imputed to Harry. However, Rule 4.2 on communications with persons represented by counsel appears only to prohibit communications by a lawyer actually representing the adverse party. Since Harry does not himself represent the defendant in Oscar's lawsuit, there may be no violation of Rule 4.2. In addition, it appears that Oscar's own lawyer is aware of these communications and has consented to Harry's conduct so as to avoid a violation of Rule 4.2. With respect to Rule 1.7 on representing multiple clients with conflicts, it is questionable whether Harry's family-related conversations with Oscar regarding the lawsuit constitute representation of Oscar; certainly no fee is being charged. Therefore, there may not be a technical violation of the rules of professional responsibility. Nevertheless, this illustrates that what would otherwise be natural and kindly behavior in the context of family may, in the context of the law and the rules of professional ethics, be seen as questionable conduct.

205. GADDIS, FROLIC, *supra* note 1, at 59. Harry explains that bringing a lawsuit in the movie industry is very costly and that the lawyers will handle a case as long as there is money in it for them. *Id.*

206. *Id.* at 577.

207. Although the tale in *JR* is rather cryptic, lawyer Beaton, who is largely a hired-gun for his corporate client, eventually does accomplish one heroic and morally good, albeit professionally unethical and perhaps criminal deed. Beaton allows corporate villains to eat a poisonous mixture of drugs and cheese. MOORE, WILLIAM GADDIS, *supra* note 24, at 83-84, 86.

IV. LEGAL THEMES IN A *FROLIC OF HIS OWN*

A. *Law and Justice*

Aside from the discussion of substantive legal issues and the depiction of lawyers, *Frolic* also addresses the role of law and litigation in general.²⁰⁸ The first legal theme in *Frolic* is announced in the very first sentence in the book: "Justice?—You get justice in the next world, in this world you have the law."²⁰⁹ This theme of the conflict between eternal justice and the prosaic law is echoed in the references to Justice Oliver Wendell Holmes's distaste for the use of the concept of justice in controversies about the law.²¹⁰ Ultimately, Judge Crease pronounces on the role of heavenly justice in the courts of law in *James B. v. Tantamount*.²¹¹ In the course of finding that the dog's death was due to an act of God, the court declares:

With all respect due the parties, the jury, the God fearing community, and the common man of which it seems to have more than its share of over half this country's population planning an afterlife in the felicitous company of Jesus and even God himself, belief in God has neither bearing upon nor any relevance to these earthbound proceed-

208. GADDIS, *FROLIC*, *supra* note 1, at 11. The book opens with dialogue on the goals of litigants: "The ones showing up in court demanding justice, all they've got their eye on's that million dollar price tag." *Id.*

209. *Id.* (apparently spoken by Harry Lutz). Actually, this is less pejorative about "law" than Grant Gilmore's remark that, "[i]n Hell there will be nothing but law." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977). *Frolic* is not unique in the work of Gaddis in stating its major theme in the first line of the novel. In *JR*, whose theme is finance, the first line is "Money. . .?" GADDIS, JR, *supra* note 3, at 3.

210. GADDIS, *FROLIC*, *supra* note 1, at 110 (Holmes's supposed clash with Justice Crease), and 285 (Holmes's supposed clash with Learned Hand). In a famous response to a query from his secretary as to whether the Supreme Court's ruling upholding the conviction of Sacco and Vanzetti had done justice, the real Justice Holmes replied:

Don't be foolish, boy. We practice law, not "justice." There is no such thing as objective "justice," which is a subjective matter. A man might feel justified in stealing a loaf of bread to fill his belly; the baker might think it most just for the thief's hand to be chopped off, as in Victor Hugo's *Les Miserables*. The image of justice changes with the beholder's viewpoint, prejudice or social affiliation. But in order for society to function, the set of rules agreed on by the body politic must be observed—the law must be carried out.

BAKER, *supra* note 121, at 607-08.

211. GADDIS, *FROLIC*, *supra* note 1, at 285.

ings. In short, He may enjoy as much room in your hearts as you can afford Him, but God has no place in this court of law.²¹²

Nevertheless, for the most part, *Frolic* does not dwell on metaphysical issues of the relationship of law and justice. Rather, *Frolic* is most concerned with the role of law in the here and now.²¹³

B. Law and Order

Other significant themes in *Frolic* are also presented in the ensuing lines on the first page of the novel:

[Christina Lutz]—Well of course Oscar wants both [justice and law]. I mean the way he talks about order? . . . —that all he's looking for is some kind of order?

[Harry Lutz]—Make the trains run on time, that was the . . .

—I'm not talking about trains, Harry.

—I'm talking about fascism, that's where this compulsion for order ends up. The rest of it's opera.

—No but do you know what he really wants?

—The ones showing up in court demanding justice, all they've got their eye on's that million dollar price tag.

—It's not simply the money no, what they really want . . .

—It's the money, Christina, it's always the money. The rest of it's nothing but opera, now look.

—What they really want, your fascists, Oscar, everybody I mean what it's really all about? [. . .] that's just their way of trying to be taken seriously too—because the money's just a yardstick isn't it. It's the only common reference people have for making other people take them as seriously as they take themselves, I mean that's all they're really asking for isn't it? Think about it, Harry.²¹⁴

This debate presents two views. The first is that law and litigation only serve the purpose of fostering greed and repressive demands for order. The second view is that money is only

212. *Id.* at 293. For this statement, Judge Crease is subjected to an impeachment campaign. *Id.* Elsewhere, *Frolic* notes that suits involving God or the afterlife present problems of jurisdiction: "you could hardly bring your breach of contract suit against God naming him as an artificial person with his only begotten son as a necessary party now, could you?" *Id.* at 552-53; see also *id.* at 282 & 551.

213. See generally GADDIS, FROLIC, *supra* note 1.

214. *Id.* at 11. Later on, Christina seems to adopt Harry's view that it is only the money that matters to litigants. *Id.* at 422-23, 439.

symbolic of respect and that law serves a greater purpose and good, but that greater good does have to do with order.²¹⁵

According to Gaddis, at one time money and wealth served the function of preserving order and purpose in society, but no more. "Money's become the barometer of disorder. . . [Previously, at the time of *Once at Antietam*], money was the barometer of order."²¹⁶

Despite (or perhaps because of) Gaddis's (and Oscar's) role as an author, language and art do not preserve order either. Gaddis takes several intentional swipes at modern art and modern literary theory.²¹⁷ In his opinion in *Szyrk*, Judge Crease refers to a lay observer of *Cyclone Seven* as being "unprepared to discriminate between sharp steel teeth as sharp steel teeth, and sharp steel teeth as artistic expressions of sharp steel teeth."²¹⁸ Crease further claims that there is "a corresponding self referential confrontation of language with language and thereby, in reducing language itself to theory, rendering it a mere plaything."²¹⁹ Similarly, in a wrongful death action arising out of the collapse of another of his sculptures, *Szyrk* "den[ie]d] any intention of meaning to be construed in his sculptural works beyond the raw arrangement of their actual materials in which any meaning, if there were such, resided in this very meaninglessness hence the vacuous site specificity of *Cyclone Seven*."²²⁰ This lack of objectively verifiable criteria and a self-referential world view results in one being "haunted by the sense that 'reality may not exist at all except in the words in which it presents itself.'"²²¹

There are, however, suggestions in *Frolic* that law may be a means of avoiding the anarchy represented by modern literary theory.²²² In the novel, Gaddis refers to "the historic embrace

215. *Id.* at 11. Gaddis hypothesizes that money is not necessarily the only yardstick by which to measure perceptions of justice and order. *Id.*

216. *Id.* at 366. Gaddis's previous novel, *JR*, dealt with "free enterprise" and the successes of an eleven-year-old capitalist. See generally GADDIS, *JR*, *supra* note 3.

217. GADDIS, *FROLIC*, *supra* note 1, at 34-35, 38-39. Gaddis equates self referential art with Sir Arthur Eddington's famous step "on a swarm of flies," and finds that modern literary theory is particularly uncomplimentary to what many perceive as timeless classics. *Id.*

218. *Id.* at 34.

219. *Id.* at 34-35.

220. *Id.* at 280.

221. *Id.* at 30.

222. GADDIS, *FROLIC*, *supra* note 1, at 29.

of the civil law in its majestic effort to impose order upon? or is it rather to rescue order from the demeaning chaos of everyday life in this abrupt opportunity, as Christina has it, to be taken seriously before the world."²²³ Elsewhere, the reader is told that Harry Lutz's "interest in the law [was] inspired by a growing sense of injustice which he later ascribed to his reading of Dickens."²²⁴ Later, Harry "became increasingly disillusioned with the law as an instrument of justice and . . . [came] to regard it as a vehicle for imposing order on the unruly universe depicted by Dickens."²²⁵

C. *Law and Language*

Ultimately, law cannot achieve such hoped-for results due to the fact that one of the central insights of the law and literature movement is that law is only language and that law is subject to all the indeterminacies of language.²²⁶ At one point in the novel, Harry and Christina are discussing a lawsuit involving Christina's friend, Trish, and a cousin who is suing Trish over some diamond bracelets.²²⁷ A will described two pairs of bracelets: "a matching pair of diamond bracelets" and a far more valuable "pair of bracelets of matched diamonds."²²⁸ Christina, decrying the lawsuit, says to Harry:

— . . . it was only the wording, it was only a question of language.

—But, but damn it Christina that's what we're talking about! What do you think the law is, that's all it is, language.

—Legal language, I mean who can understand legal language but another lawyer, it's like a, I mean it's all a conspiracy, think about it Harry. It's a conspiracy.

—Of course it is, I don't have to think about it. Every profession is a conspiracy against the public, every profession protects itself with a language of its own . . . [I]t all evaporates into language confronted by language turning

223. *Id.*

224. *Id.* at 526. For more on law and literature in the works of Charles Dickens, see Wertheim, *supra* note 191.

225. GADDIS, FROLIC, *supra* note 1, at 527.

226. For a discussion of the issue of the indeterminacy of law and language in the context of Charles Dickens, see Wertheim *supra* note 191, at 141-50.

227. GADDIS, FROLIC, *supra* note 1, at 282-85.

228. *Id.* at 284.

language itself into theory till it's not about what it's about
it's only about itself turned into a mere plaything²²⁹

Near the end of the novel, Oscar summarizes this theme when he remarks "when you come down to it the law's only the language after all."²³⁰ Even the law's use of money is simply another use of language since, as Gaddis repeatedly reminds the reader, money is the "only language they [people] understand."²³¹ Thus, law cannot escape the indeterminacy of language itself and ultimately cannot provide a secure foundation.²³²

Therefore, according to Gaddis, modern-day American law is merely language and, in fact, law, and more specifically, litigation, has become virtually the only way we communicate.²³³ In *Frolic*, dialogue is never directly attributed to a character so the reader is often, at least initially, uncertain as to who is speaking or to whom.²³⁴ Moreover, even if the speaker and listener are identifiable, the communication is often interrupted by other unattributed dialogue, the author's narration, a telephone conversation, or the omnipresent television programs and commercials.²³⁵ The only way the characters can really ever communicate with the outside world is by litigation. Thus, Oscar communicates his frustration with his play and the infringing movie by suing.²³⁶ Sculptor Szyrk converses with the municipal authorities about the future of his art work by litigation.²³⁷ Even Christina's friend Trish and her lover deal with the issue of pregnancy by suing each other and the hospital.²³⁸ Litigation even provides the only communication between Oscar and his estranged father, Judge Crease, when the latter, unbeknownst to the former, ghostwrites the

229. *Id.* at 284-85.

230. *Id.* at 559.

231. *Id.* at 88, 422, 424.

232. GADDIS, *FROLIC*, *supra* note 1, at 282-85, 422, 424, 559; *see also* Wertheim, *supra* note 191, at 141-50.

233. GADDIS, *FROLIC*, *supra* note 1, at 422. Gaddis discusses how money and the quest for compensable damages becomes the only mode of communication litigants understand. *Id.*

234. *See generally* GADDIS, *FROLIC*, *supra* note 1.

235. *Id.*

236. *Id.* at 44-55, 399-416.

237. *Id.* at 36-40. Such communications continue even where the parties may reverse their legal positions in the course of the lawsuit. *Id.*

238. *Id.* at 238-39.

appellate brief which results in Oscar's successful decision before the court of appeals in *Crease*.²³⁹

D. *Law and Frolic*

In addition to serving as the medium of communication, litigation has another purpose as portrayed in *Frolic*. In a brief passage which helps explain the title of the novel, Oscar's stepsister Christina and her husband Harry discuss Oscar's copyright lawsuit and his fantasies of "who he thinks he is."²⁴⁰ Harry refers to Oscar's going off on "a frolic of his own"²⁴¹ in writing the play that no one asked him to write and "expect[ing] the world to roll out the carpet."²⁴² Christina asks about Harry's reference to "frolic" since Oscar seems deadly serious.²⁴³ Harry explains that the phrase refers to "cases of imputed negligence, the servant gets injured or injures somebody else on the job when he's not doing what he's hired for, not performing any duty owing to the master, voluntarily undertakes some activity outside the scope of his employment."²⁴⁴ Harry goes on to assert that Oscar's work on his play is not about its stated purpose of justice, but:

It's about resentment, . . . blaming those faceless ogres out there instead of looking inside at the ogres we don't want to see, don't dare see our own hand in it, who we really are, and if he wins? . . . —if who he thinks he is wins on this appeal? What you see in the headlines out of Washington every day isn't it? caught redhanded destroying evidence, obstructing justice, committing perjury off on

239. GADDIS, *FROLIC*, *supra* note 1, at 558-59.

240. *Id.* at 398.

241. *Id.*

242. *Id.*

243. *Id.*

244. GADDIS, *FROLIC*, *supra* note 1, at 398. Baron Parke first enunciated the rule that a master is not liable for the torts of a servant who is not on his master's business but is "going on a frolic of his own." *Joel v. Morrison*, 6 C. & P. 501, 503, 172 Eng. Rep. 1338, 1339 (1834). Elsewhere in the novel, in *Frickert v. Ude*, where a child drowned during a baptism, Judge Crease instructs the jury that Reverend Ude was "engaged on his master's business . . . and not, in the words of a later English jurist, 'going on a frolic of his own.'" GADDIS, *FROLIC*, *supra* note 1, at 429. Judge Crease goes on to conclude that the "master," i.e. God, is liable and "may not delegate responsibility for the servant's acts to him," particularly "where the instrument of imminent catastrophe is the master's to control as must the crest and current of the Pee Dee River have been." *Id.* at 429-30.

frolics of their own and when they get off on some technicality, everybody knows they're guilty but there's not enough there to prove it so they can proclaim they've been proved innocent, wrap themselves in the flag and they're heroes because now they believe it themselves, because the law has vindicated who they think they are like saying where would Christianity be today if Jesus had been given ten to twenty with time off for good behaviour, and if he wins [his lawsuit]? If Oscar wins and this whole cockeyed version of who he thinks he is is vindicated because that's what the law allows?²⁴⁵

In response, Christina asks, "isn't that really what the law is all about?" Oscar has gone off and done something no one asked him to do.²⁴⁶ He has "gone off on a frolic of his own. . . . Isn't that really what the artist is finally all about?"²⁴⁷

There are several interesting ideas here. Gaddis is suggesting that litigation is a frolic which takes us away from our real duties because law allows us to vindicate ourselves as "who [we] think [we] are" rather than who we really are.²⁴⁸ A frolic, or frivolous activity, is one which allows us to avoid seeing the ogres inside us who we really do not want to see.²⁴⁹ Thus, litigation serves the purpose of providing a mask, so as to help litigants avoid seeing the hard truths in life and allows them to engage in ultimately frivolous activities.

Yet, at the same time, as Christina points out, being an artist is also about going off on a frolic of one's own since art is inherently about going beyond the expected boundaries of work and life.²⁵⁰ At the end of Gaddis's *JR*, composer Edward Bast remarks on his prior artistic failures: "I've failed enough at other people's things I've done enough other people's damage from now on I'm just going to do my own, from now on I'm going to fail at my own" ²⁵¹

245. GADDIS, FROLIC, *supra* note 1, at 398-99.

246. *Id.* at 399.

247. *Id.*

248. *Id.* at 398.

249. Frolic means "to play wild pranks" or "to make merry." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 735 (2d ed. 1979).

250. GADDIS, FROLIC, *supra* note 1, at 397-98.

251. GADDIS, JR, *supra* note 3, at 718.

Art is about doing things not because one is expected to, but simply because one wants to for reasons which, to most others, appear to be totally frivolous. Yet, in the aggregate, we regard those frolics as beneficial to the human spirit. Perhaps, in some way, our propensity to engage in the seemingly endless and fruitless frolic of litigation is similarly beneficial to our condition. By linking litigation to art as both being activities by which we engage in frolics of our own, perhaps Gaddis is suggesting that law, despite all its faults and in addition to its role in ordering society and serving as a mechanism of communication, paradoxically also serves a liberating role similar to art. Such a connection between litigation and art may point the way to uncovering another aspect of the expanding relationship of law and literature.

V. CONCLUSION

Frolic is unique in the works that are studied in the field of law and literature. With its numerous invented judicial opinions, pleadings, and fictional deposition transcripts, *Frolic* creates an entire imagined world of law and lawsuits unlike anything found in any other novel.

Moreover, although the lawsuits and the fictional judicial opinions have a definite satiric bent, they also raise important and genuine legal issues and address them in a considered manner. *Szyrk* presents the issue of the limitations of artistic rights and the need to balance those rights against other individual and public rights.²⁵² Similarly, *Crease* provides an important lesson in the relationship of creativity, the public domain, and copyright law.²⁵³

Finally, *Frolic* presents several original assertions regarding the role of law and litigation in our society. The role and attraction of litigation as the singular means of a litigant's securing the respect of his or her fellow citizens is both commonsensical and profound. While the view of law as a means of societal control is not particularly novel, Gaddis's connection of that role to law's relationship to language is engaging and consistent with much current thought on the

252. GADDIS, *FROLIC*, *supra* note 1, at 30-40.

253. *Id.* at 399-416.

subject.²⁵⁴ Lastly, the linking of the tort law concept of “frolic” to the function of litigation itself is both amusing and insightful. *Frolic* may or may not turn out to be part of the canon of great modernist American literature.²⁵⁵ However, it certainly belongs in the canon of law and literature.²⁵⁶

254. See, e.g., WEISBERG, *supra* note 2.

255. Gaddis's first novel, *The Recognitions* (1955), has been included in noted critic Harold Bloom's recent prospective compilation of a modern canon. HAROLD BLOOM, *THE WESTERN CANON*, Appendix D, 564 (1994).

256. Elizabeth Villiers Gemmette has recently placed FROLIC in the “emerging Law and Literature Canon.” Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 686 (1995).