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Literary Lawyer, The

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The Literary Lawyer

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Humanistic interest in the various connections between the fields of "law" and "literature" was rekindled in law schools in the mid-seventies, eventually coalescing in a modern "law and literature" interdisciplinary "movement," or enterprise, complete with its own journals, courses, seminars, symposia, advanced degree programs, and of course major "practitioners" and theorists, many of whom hold joint appointments in the law schools and English departments of their home universities. Surely by this point—twenty some years into this renaissance—it now makes some sense to speak of the "law and literature" movement as a recognizable discipline, or sub-specialty, within both the literature and legal academies. The movement has, so to speak, come of age. Given this maturity, it is initially somewhat surprising, and even disturbing, to note that it is as hard now as it was twenty years ago to say anything about what the discipline's defining questions, much less answers or lines of analysis, might be. Indeed, it has become common place, within the law and literature movement, to insist, in the words of James Boyd White, that the movement has "no agenda"—that it is entirely too diffuse, and too pluralistic, and that its practitioners are simply too idiosyncratic to discern in the movement any unifying thread or threads of analysis, and furthermore, that it would be entirely anti-humanistic and opposed to the spirit of the movement to impose one. While there may be common analytic ground in this movement, it would be contrary to the spirit of the enterprise, and even contrary, paradoxically, to the common analytic ground itself, to say what that ground might be. On this view, the law and literature movement lacks, most simply, a *point*. There's no common direction to the movement, and certainly no shared ethical valence. Reflecting, perhaps, the diffuse nature of the two enterprises it cojoins—law and literature—and even more so the postmodern and anti-essentialist premises that have captured the imagination of so many practitioners in both fields—law and literature scholars have resisted almost above all else any attempt to suggest a skeletal framework for their collected work.

This essay will to some degree work against this pluralistic and anti-essentialist grain. My purpose in these comments is to describe two general projects within the law and literature movement, each of which might be described as wedded to a particular conception of the movement's "point." First,

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I will argue that White's protestations to the contrary notwithstanding, for many law and literature scholars including notably White himself, the law and literature movement does indeed have an agenda, and that agenda is to construct a conception of law and of the "good lawyer" that is, generally, humanistic and literary, rather than *either* autonomously professional or tied to scientific or economic ideals. We might call this project, this agenda, and this claimed "point" of the movement, the construction of the ideal literary lawyer. The good lawyering to which we should aspire, on this view, and the aspiration for which we should instill in students, is importantly informed not by economics, but by literary and humanistic inquiry. At least for White, the "point" of the law and literature movement, like the point of legal scholarship and pedagogy more generally, is to figure out what it means to "do" law, and to figure out how we might do it better. The answer given, both by White and the scores of teacher-scholars who follow his lead, is that study of the humanities must inform that analysis.

For others engaged in law and literature teaching and scholarship, however, the "point" of this movement simply cannot be captured by the normative, Whitean project briefly described above. Rather for a good number of practitioners, the movement's "point," if it has one, is almost exactly the opposite; it is to provide a humanistic basis for legal *criticism*, rather than a humanistic basis for good legal practice. What law and literature scholarship provides and should seek to provide, according to these scholars, is a humanistic or literary basis from which to *criticize*, rather than bolster, law and legal authority. Thus, while the "point" of the movement, at least according to White, is to provide a humanistic account of good lawyering, its fair to say that the counter-point is to provide a humanistic account of good legal criticism. We might call this second project the Critical Project: the articulation of a basis—generally in the humanities—from which we might criticize law.

In these comments, I want to first describe and then criticize each of these projects, and the ethical argument about law and lawyering either explicit or implicit in each. I will then comment briefly on the shared ground of inquiry—agenda is not too strong a word—which, I hope I can show, these two seemingly contradictory projects jointly inhabit.

I. THE CONSTRUCTION OF THE LITERARY LAWYER

Let me start with the construction of the literary lawyer. Again, my claim is that the unacknowledged agenda of many of the writers and teachers in the law and literature movement, is to construct, as an ideal type, a conception of the "good lawyer," both in the craft and moral sense of the word "good," who has a literary center rather than either a purely professional or economic sensibility. Although by this point a sizeable community of law and literature teachers view this as their primary mission, it has been James Boyd White, of Michigan Law

School, more than any other, who has devoted the better part of his scholarly career to this end, and has had some measure of success in achieving it, and it will accordingly be his understanding of the literary lawyer which I will examine here.[1] Central to White's jurisprudential perspective is the deep and foundational conviction that the language of law *can be* (and often is) the cultured language of community, of civility, of nobility, and of social justice—or, to borrow from the language of the title of his latest book, that law at its best can be an "*Act of Hope*."[2] To understand the law as an "act of hope," is to understand it as a part of our canonical culture, and to understand law as a part of culture, in turn, requires a fundamental reorientation of our conception of law, of legal language, and even of ourselves. To put it in a nutshell, or a slogan, the law, for White, is an *art*. It is not politics, and it is not social science.[3] The lawyer, White has argued again and again, and in a number of fora, is an artist,[4] and should learn to think as such.

It is important to point out that this conception of the lawyer-as-artist, or, as I will call him, the "literary lawyer," is hardly without historical precedent. As Robert Ferguson argues in his masterful treatment of the subject, this ideal conception of law as a part of high culture, and of the good lawyer as engaged in the production of culture, was eminently familiar to the eighteenth and early nineteenth century elite "man of letters."[5] If Ferguson's historical account is correct, then it seems clear that the eighteenth-nineteenth century "man of letters"—who Ferguson calls the "lawyer-writer"—was at least an important historical analog of the ideal type of lawyering White is laboring to construct. Like White, the eighteenth century "lawyer-writer," according to Ferguson's account, *also* viewed the seamless web of law and culture as expressive of an ethical and aesthetic ideal—law at its best is continuous with culture at its best. Culture had legal authority, and legal authority was a part of culture, and *both* expressed the ideals and foundations of a civic republican faith in the possibility of a well led life within a society governed by the Rule of Law. For the eighteenth century lawyer-writer as for White, the products of high culture accordingly could and should be used to illuminate just resolutions to legal inquiries, and, just as importantly, the products of law—the products of the "legal imagination"—are

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1. JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW AND POLITICS (1994) [hereinafter ACTS OF HOPE]; JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990) [hereinafter JUSTICE AS TRANSLATION]; JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (abr. ed. 1985) [hereinafter LEGAL IMAGINATION]; James Boyd White, *Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373 (1988) [hereinafter *Cultural Criticism*].

2. ACTS OF HOPE, *supra* note 1.

3. LEGAL IMAGINATION, *supra* note 1, at xiv; James Boyd White, *Law and Economics: Two Cultures in Tension*, 54 TENN. L. REV. 161, 202 (1986) [hereinafter *Two Cultures*].

4. LEGAL IMAGINATION, *supra* note 1, at xxiv-xxv.

5. ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984).

themselves literary, and should be understood, studied, and produced as such. To put the point jurisprudentially, "law," for the lawyer-writer, *included* the cultural canon: Aristotle's Politics, the Bible, Cicero's writings and Shakespeare's histories, no less than Blackstone and Coke, were legal authorities, whose dicta could and should be viewed not just as rhetorical flourishes, but as legally dispositive: the literary and legal canon, so to speak, were seamless.

Pedagogically, this jurisprudential view in turn entailed a rigorous and rigorously literary and philosophical education. The elite lawyer-apprentice, in a course of study that by today's standards is truly off the charts and over-the-wall in terms of its rigor, demands, breadth, and depth, was expected to master the classics, the Bible, great literature, several languages both living and dead, philosophy, and the physical sciences, as part of a general renaissance education that *constituted*—not just complemented—his study of law. The elite, well-trained lawyer viewed the literary and cultural canon as a part of the foundation—the bedrock—of the social order he celebrated and served. To answer deep questions of law, then, *required* recourse to insights gleaned from the culture's literary and philosophical traditions. The man of law was the man of letters, and the man of letters was the man of law. White's project, against this historical backdrop, might best be understood as a "resurrection." White is in essence attempting to resurrect for the modern sensibility an ideal of what it means to be a good lawyer—both in the craft and moral sense—that was once familiar but which has now become not only antiquated, but foreign.

Before turning to White's attempted revitalization of this eighteenth and nineteenth century republican legal ideal, however, it is worth asking why the revitalization is necessary. For, make no mistake about it, the lawyer-writer ideal of the eighteenth century is gone. A quick contrast with his interdisciplinary cousin, the lawyer-economist, should bring the point into focus. It is often—perhaps routinely—claimed that the contemporary lawyer must have at least minimal exposure to, if not competency in, the interdisciplinary tools and accomplishments of "law and economics." Virtually all law students, for example, at virtually all law schools, will receive, most likely in the very first semester of law school, some exposure to the logic and impact of the Coase theorem, economic arguments for and against strict liability, the economic understanding of the negligence system, and economic explanations for the primacy of the expectancy interest in contracts, to list just a few examples. All law students will be advised, at some point in their legal career, that it would behoove them to supplement this exposure with more sustained training in economic tools of analysis. Most "top-tier" law schools have at least one, and usually more than one, professionally trained economist on the staff. Any school that does not is seeking to acquire one, and all law schools strongly encourage their faculty to acquire basic training in at least microeconomics. If these indicia are any guide, then it is certainly fair to say that the late twentieth century lawyer does at least

aspire to be the "man of economics," or the "man of science," just as Oliver Wendell Holmes, writing at the turn of the century, predicted he would.[6]

By contrast, no such claims are ever made regarding law and literature studies. Students are not advised that training in literary skills or some amount of familiarity with the literary canon is professionally *necessary*; at most, they are *told* that it may help them cultivate habits of mind and heart that may enrich their legal career;[7] and what they hear, if course evaluations are any guide, is that "law and literature" is a refreshing and fun course precisely *because* it is "non-legal" and of virtually no professional use whatsoever.[8] Surely by any objective standard, "law and literature" is a marginal movement, which, although healthy, is viewed by everyone but its practitioners as voicing peripheral concerns to the overall pedagogical and scholarly missions of the legal academy. The late twentieth century lawyer may be and may even typically aspire to be the "man of economics" Holmes urged him to become. He by no means is, nor does he aspire to be, a "man of literature."

What became of the lawyer-writer of the eighteenth and nineteenth century? Where did he go? How did such a dominant figure become so thoroughly marginalized? What happened? Ferguson provides in his book a persuasive history of the material and political pressures on this republican, pre-classical ideal of lawyering exerted by the forces of pluralism, the demands for specialization, and the industrial revolution in the latter half of the last century. In an important work that I will discuss in more detail below, Brook Thomas adds another piece to the puzzle, arguing that the "constellation of law and letters" described by Ferguson gave way in the antebellum period of American history to a literary sensibility which defined itself in *opposition* to law—an opposition understood in both aesthetic and political terms. Narrative authors of the "American renaissance," according to Thomas, viewed themselves as critics of, not celebrants of, and certainly not participants in, the legal order. That renaissance, then, spelled the end of the lawyer-writer. The writer defined himself *against*, rather than in alignment with, the lawyer's distinctive mentality.

I have no reason to doubt that Ferguson's and Thomas's accounts are accurate as far as they go, but they are also clearly incomplete. They explain why the literary writer turned his back on *law*, but they do not explain, at least to my satisfaction, why the lawyer turned his back on literature. For that part of the picture, I submit, we must look not to the history of American literature, but to the history of American *jurisprudence*, and specifically to two jurisprudential developments within American law schools at the turn of the century: first, the rise of legal for-

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6. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

7. *See generally* Elizabeth V. Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 671-72 (1995).

8. My own course evaluations and student surveys in law and literature seminars, at least, consistently repeat this theme.

malism as the dominant doctrinal lens through which both law and lawyering should be viewed, and then the rise of legal realism as its antithesis. Neither realism nor formalism—the two jurisprudential views of law that competed against each other for dominance at the first part of this century—were compatible with the peculiar jurisprudential perspective of the civic republican lawyer-writer. As first formalism and then realism came to prominence, the literary lawyer had to give way. Let me explain why.

Chronologically and logically, we should begin with the formalists. Christopher Langdell's overriding ambition, and at least for a limited time his great success, was to establish both the *completeness* and the *autonomy* of legal authority, and to imply from those attributes of law a particular understanding of what it means to be a legal professional. Any legal question, according to Langdell, could be answered by recourse to the universe of *law*—where that universe is taken to include common law cases, their deciding propositions and fair inferences which could be derived from them. There is simply no need, Langdell insisted, for the lawyer, assuming he is properly trained, to refer to anything other than purely legal materials. The general propositions discernible in the great common law cases are of sufficient number, subtlety, and reach to resolve any conceivable future legal conundrum. The lawyer familiar with his library-laboratory and well versed in the fundamentals of legal reasoning can answer all legal questions, and importantly, can do so without recourse to high culture.[9]

Although it is customary these days to contrast Langdellian formalism with the legal realism it eventually had to combat,[10] for Langdell, his original target was not so much the realists—with their insistence on the incompleteness of law and their embrace of the social sciences as providing a means by which law might be improved—as the pre-classical, republican lawyer writer so aptly portrayed by Ferguson. What was at stake in Langdell's dispute with the literary lawyer was as much a matter of professional pride as a matter of jurisprudential definition. The lawyer's claim to be a "learned professional," Langdell insisted, was in no way dependent upon his mastery of the literary or philosophical canon. Rather, the learning at the heart of law could be and should be viewed as *entirely* legal and professional: the common law cases themselves are subtle, complex, philosophically intriguing, rich, and sufficiently "grand" to generate answers in particular future cases.[11] There is no need, Langdell argued, and given the growing complexity and breadth of the law, there is no time, to master the cultural products of the centuries in addition to contract, tort, and criminal law. A well-trained lawyer knows the law—the law is complete and autonomous. He need not learn the classics as well.

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9. *See generally* Tom Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).
10. *See generally* Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).
11. *See* Grey, *supra* note 9, at 24.

If this account of formalism is correct, it is important to stress, however, that there was shared ground occupied by the formalists and the lawyer-writers. *Both* viewed the law as, essentially, *complete*. Where they disagreed was in their definition of what constituted law. The lawyer-writer, like the formalist, viewed the law as a closed and complete system of norms which could and did provide the means for just resolutions of societal conflicts. Although they disagreed over what "law" included, they both viewed law as expressive of foundational principles worthy of celebration and sufficiently rich to ensure both a just and an orderly society. They both viewed the lawyer as the guardian, the exemplar, and the articulator of that order, and they were both, for that reason, rested on a profoundly conservative vision of the purpose and reach of law.

The legal realist, in a history familiar to virtually all lawyers, came upon the scene at the turn of the century and famously dissented from the view, shared by the lawyer-writer and the legal formalist, that "law," rather grandly conceived (as per the lawyer-writer) or narrowly conceived (as urged by the Langdellian formalist) could resolve societal disputes. Rather, the realist argued, the openness of norms, and perhaps of language itself, assured a degree of indeterminacy, and the existence of an infinite number of "gaps" in legal reasoning and legal authority. Those gaps had to be filled in, and what they were to be filled in *with*, according to the realist, was the moral and political inclinations of the judge, informed by and guided by, at best, the wise tutelage of the emerging social sciences. By guiding moral judgment with science, rather than law, the judge could participate in the grand progressive project of moving society toward an improved ideal. Law, for the realists, should be understood *neither* as a closed universe of legal norms fully expressive of every fundamental legal idea necessary for the resolution of all disputes, *nor* as a conjunction of law and letters expressive of grand political and civic ideals. Law should be understood as a tool, to be used by well intended judges attentive to the constraints and lessons of the sciences, in a quest toward the end of an improved and happier society.

Let me make a three way comparison. Like the formalist, the lawyer-writer viewed the law as essentially complete—as gap-free. Like the legal realist, the lawyer-writer insisted that the Langdellian formal conception of law was inadequate: legal norms taken from purely and narrowly understood "legal materials" were insufficient to the task of justice or even dispute resolution. But these family resemblances left the lawyer-writer fundamentally incompatible with both its realist and formalist siblings. To begin with the realists: although the lawyer-writer agreed that "legal materials" alone were insufficient to resolve disputes, in every other respect realism was as poisonous to the ambitions of the lawyer writer as it proved to be to formalism. The realist's insistence on law as a forward looking tool for social improvement through discretionary judicial decision-making was utterly antithetical to the lawyer-writer's conceptual view of the legal universe. For the lawyer-writer, the law, properly understood, expressed pre-existing philosophical and even aesthetic ideals.

On the other hand, although the lawyer-writer shared with the formalist a commitment to law's *completeness*, unlike the formalist, the lawyer-writer viewed law as essentially continuous with and inclusive of, rather than autonomous from, culture. The formalist's insistence on an autonomous, specialized, and technical, rather than literary or cultural, view of the professional was, then, as contrary to the lawyer-writer's world view as it was to the realist's.

It is in precisely this jurisprudential sense, then, that the competing conceptions of law espoused by formalism and realism, respectively, simply left no room for the lawyer-writer: between the realist's insistence on the law's incompleteness, and the formalist's insistence on the law's *autonomy*, the lawyer-writer's world view was simply "shut out." As formalism and then realism rose to prominence, the focus of debate shifted away from the dispute between the formalists and the lawyer-writer—the boundary between law and culture—to the quite different dispute between the formalist and the realist—the boundary between law and informed judgments of policy. The distinctive view of law held by the lawyer-writer—as both complete, continuous with, and expressive of cultural and aesthetic, as well as political ideals—did indeed, at least for a good part of this century, simply whither away.

White's project, then, understood against the backdrop of this history, is to revitalize the eighteenth century lawyer-writer and re-tool him for the demands of the late twentieth century. If we keep this history in mind, the project does not seem quite the nostalgic pipe-dream that it might otherwise. For it is clear that realism and formalism no longer dominate, in yin-yang fashion, the legal imagination. Landellian formalism is for all practical purposes dead, and in a story that is too great a diversion for these purposes, realism has devolved into mutually unappealing and warring camps: critical legal studies on the political left and law and economics on the political right. The "center"—in which professional ideals have always been crafted—is wide open. There is jurisprudential room, now, as there previously had not been, for White's revitalized literary lawyer.

To be sure, there are important differences. White brings to his project a decidedly twentieth century commitment to social equality, a twentieth century critical and progressive eye, and—most important—a twentieth century sensitivity to the magnitude of the injustice wrecked upon our society by virtue of our history of slavery, racism, and discrimination,[12] unshared by his eighteenth century counterpart. Unlike his elitist, albeit "republican" eighteenth century

12. For further discourse on this viewpoint, see White's discussion on Huck Finn in LEGAL IMAGINATION, *supra* note 1, at 19, and his discussion of Lincoln's Second Inaugural Address in ACTS OF HOPE, *supra* note 1, at 294-302. Compare these writings with his reading of Mandela's *Speech from the Dock* in ACTS OF HOPE, *supra* note 1, at 278-94. It is no coincidence that White's area of legal specialization is the law of slavery, and race relations more generally. The institution of slavery, and the laws that constructed it, strike at the heart of the ethical and aesthetic sensibility he aims to instill in the lawyering process: a deep and equal respect for the uniqueness of each individual, and a willingness to attend to the "stories" of all.

ancestor, White is liberal, progressive, and egalitarian in politics and spirit both. But nevertheless, the common ground White and his idealized "literary lawyer," share with the eighteenth and nineteenth century "man of letters" is striking. Most important, both White and his ideal lawyer share with their pre-classical era predecessor a particular jurisprudential perspective, and it is a jurisprudential perspective which is at odds with *both* the legal realism and the legal formalism which have competed for dominance within the legal academy during the century that saw the end of the "man of letters." Thus, White is deeply skeptical of the formalist claim that law either can or should be viewed as self-sufficient: that it needs recourse to no other field for its own completion. But he is equally skeptical of the realist claim that the language of economics, or the language of social science, should be employed to "fill in the gaps," so as to point us to justice.[13] Like the eighteenth century man of letters—and really *only* like the eighteenth century man of letters—White is convinced that the part of law which cannot be or should not be understood positivistically can only be grasped through an understanding of its cultural, and more specifically literary, foundation and potential.[14] Like the man of letters, White aims to both "fill in the interstitial gaps" and fulfill the moral ambitions of law by recourse to a discriminating understanding of our cultural heritage.[15]

We might describe this Whitean project—the resurrection of the eighteenth century "lawyer-writer," or, more simply, the construction of the modern literary lawyer—programmatically in this way. White's attempted construction of the literary lawyer seeks to reinvigorate a vision of law that first, situates law, or embeds it, within the *humanities*—rather than within politics, and rather than within the social sciences—and then analyzes and uses law accordingly. It follows that a full understanding of a legal question, a legal dilemma, or a legal text requires a humanistic analysis, just as a full understanding of law requires a general knowledge of the culture from which the law emerged. It also follows that the *production* of a legal text—whether it be a case opinion, a contract, or a statute—is, potentially, a contribution to that culture and an expression of the author's literary sensitivity, and to be done well accordingly requires the marshaling and use of humanistic and literary skills. Pedagogically, an understanding of, and therefore the teaching and learning of, both canonical literature and the skills necessary to read it critically, are necessary to the learning of law, because literature is itself a part of law, and law is itself a part of literature. Law is indeed an expression of power, but it is also an expression of a literary sensibility, and while the lawyer is inescapably political to whatever degree or amount of power she wields, she is also inescapably artistic. Her training should

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13. *See Two Cultures*, *supra* note 3, at 201.
14. ACTS OF HOPE, *supra* note 1, at 182-83.
15. For his clearest statement of this claim, see *Cultural Criticism*, *supra* note 1, at 1378.

reflect that inevitability, so that when she uses the literary language of law, she will use it well.[16]

Let me pose three objections which might be raised against this Whitean project of renewal. The first objection has been most often voiced by feminist and minority scholars, and might better be described as a wariness, or suspicion, about the project, rather than an analytic objection to its logic. The suspicion stems, in turn, from a deep distrust of the literary "canon" that informs the view of law held by the cultural or literary lawyer, and more functionally, of the means by which some works but not others become canonized. For whom, exactly, does the "man of letters" speak? From which parts of "culture" does the cultural heritage of law emerge? To take an example, White has written eloquently on the literary properties of the phrase "We the People"[17] from the Constitution's preamble. Angela Harris asks, in response, who the "we" in the phrase "we the people," precisely, represents.[18] In the same vein, Judy Resnick and Carolyn Heilbrun, in an article on the intersections of law, literature, and feminism, question the worth of supplementing, or interpreting, the legal canon, with its notorious exclusions of outsider voices, with the equally exclusionary literary canon.[19] Susan Mann puts forward a similar critique, in a thorough and thoughtful piece on the legal and literary canon in the *Stanford Law Review*.[20] Richard Delgado and Jean Stefancic voice the same complaint, both about the canon, and the modern literary lawyer's explication of it, in their critical essay, "*Norms and Narratives: Can Judges Avoid Serious Moral Error?*"[21] The "man of letters," all of these critics argue, was elitist and exclusionary to the core, and both impulses were an integral part of his insistent reliance on the cultural canon as a source of quasi-legal authority. It is not clear that the resurrection of that part of his vision which seems worth salvaging can be reconciled with our twentieth century democratic and egalitarian ambitions.

The root of this complaint might be put this way. "Supplementing" the legal canon with the literary, and the legal sensibility with a literary one, might very

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16. LEGAL IMAGINATION, *supra* note 1.

17. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 240 (1984).

18. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory, in* REPRESENTING WOMEN: LAW LITERATURE AND FEMINISM 106, 107 (Susan S. Heinzelman & Zipproah B. Wiseman, eds., 1994).

In a similar vein, Taunya Banks, who teaches constitutional law at University of Maryland Law School, has her entire class come to the front of the room on the first day. Then she tells all the women and people of color to sit down. Then she tells everyone who does not own any real property to sit down. Then she informs the class that the two or three students still standing will write a Constitution for the class beginning with the ringing declaration "We the People."

19. Judith Resnick & Carolyn Heilbrun, *Convergences: Law, Literature, and Feminism*, 99 YALE L. J. 1913 (1990).

20. Susan Mann, Note, *The Universe and the Library: A Critique of James Boyd White as Writer and Reader*, 41 STAN. L. REV. 959 (1989).

21. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?* 69 TEX. L. REV. 1929 (1991).

well cure the law of its anti-humanist penchant for stilted, deadened, wooden prose—a style that kills.[22] It might also push the law's interpreters toward more "humanistic" understandings of the law's commands. But whether it can cure the law or the society law governs of its xenophobic intolerance of difference depends entirely on the content of the "canon," and on the "liberality" of the literary sensibility, and on both scores, history does not provide reasons for optimism. Outsider's voices have historically been censored from the language of literature and high culture at least as relentlessly as they have been banned from the language and courts of law. Supplementing the one with the other might leave both bigger and richer, but supplementation alone will not leave either law or literature more inclusionary. The misrepresentations of outsiders in law will only be magnified, should law turn to literature for guidance or inspiration, by the misrepresentations in literature and other forms of high culture. Law and literature may indeed come from a common cultural root, but that is the essence of the problem, not the solution. That shared commonality is an obstacle to overcome in the quest for true equality, not an overlooked reason for wedding the two.

To this criticism, White has responded with characteristic grace. "We the People," he argues, is a promise of inclusion, and its meaning transcends the particular, contingent limitations of the promisor.[23] That potential for *transcendence* is in the nature of language, and because it is in the nature of language, it is also in the nature of law, and it is in the nature of literature.[24] It is why the specific intent of authors can never be the last word on the issue of meaning. It is why the law, with its genesis in conflict, compromise, and divisiveness, can be the vehicle for community, consensus, and peace. Language does not only *convey* promises. Language, by its nature, *is* a promise, and therefore, whatever we do with language has promissory potential, including our high-minded utterances—no matter how hypocritical or self-serving our intent. Language by its nature conveys a promise of the possibility of communal, shared understanding between speaker and listener. *That* promise, in turn, both presupposes and is constitutive of true and lasting communities. Those communities are, in turn, the wells of meaning, from which both law and literature spring. We cannot and should not blind ourselves to the potential for justice which the promise holds out, by insistently and perversely gazing only on the distance, often vast, between what was promised and what was delivered. The promise is what matters, and it is the promise which is, in turn, both grounded in, and ultimately only intelligible within, the meanings generated by our shared cultural artifacts, including law and literature both.

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22. Milner Ball examines this quality of legal prose in THE WORD AND THE LAW (1993).

23. *See* James Boyd White, *The Rhythms of Hope and Disappointment in the Language of Judging*, 70 ST. JOHN'S L. REV. 42 (1996).

24. ACTS OF HOPE, *supra* note 1, at ix-xii.

This is an elegant response, but it only partly satisfies. Even if we accept White's generous invitation to view law and literature in this promissory way, nevertheless, the *content* of the promise may be utterly compromised by its historical exclusionary genesis, no matter how broadly we read its present incarnation. Surely we now understand the Bill of Rights, for example, as protecting the rights of "all of us," and it may be true that we might "just as well" read the Bill of Rights generously as containing, under the layers of its exclusionary history, a promise that speaks to that inclusive potential. But it is simply not that easy to shed the *consequences* of our brutally exclusionary past: the *content* of our rights, even if not their presently democratized scope, bears the mark of our history. Who is to say what the content of those rights might have been, or might be, had they been *authored* by as broad and representative a community as the community whose actions they now regulate, and on whose behalf, per White, we should now read their meaning?[25] Similarly, and more generally, we might happily claim the Western canon as the shared cultural property of our entire community, in spite of its historical exclusionary impulses. But who is to say what the content of that canon might be, had it been so inclusive from the outset? Our "culture" is indeed compromised by (as well as in part "constituted by") its historical patterns of exclusion and inclusion, as is our law. With a more inclusive past, our law and literature both might be very different from their present incarnations, and given that we are *governed* by at least the former, whether or not the latter, that fact alone gives rise to a serious problem of justice. Blending "law" with a literary canon and heritage that suffers from the same flaw obviously does not cure the problem. Arguably, it magnifies it.

I will return to this objection, and possible responses to it, in a moment, but let me first point out two additional jurisprudential problems with White's otherwise extremely appealing attempt to reinvigorate, for modern sensibilities and toward modern progressive ends, the "promise" of the eighteenth century literary lawyer. Both problems stem from the literary lawyer's antipositivist jurisprudence. The legal world the literary lawyer inhabits is decidedly *not* the positivistic world of sanctions, fines, prison terms, and executions.[26] Law, to the literary lawyer, is not, or at least not only, a manifestation of political power. White, contrary to any number of critiques of his work,[27] has never pointedly *denied* that

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25. For attempts to answer the question, see Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

26. The point was classically made by Robert M. Cover in his essay *Violence and The Word*, 95 YALE L.J. 1601 (1986).

27. For criticism of White on this score, see Cover, *supra* note 26; David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985); Richard Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988); Robin West, *Communities, Texts and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988) [hereinafter *Reflections*]. White summarizes the criticism, and

law is power. What he has denied, and emphatically, is that law is *nothing but* power; what he has denied, to put it differently, is that the "rhetoric" that accompanies the power is nothing but obfuscation, masks, legitimation, or other forms of disingenuity. For White, the literary, verbal "else"—the *expression* of law's power through language—is what holds out the hope, and it is the essence of his antipositivistic jurisprudence to insist that we must study the language, as well as the politics, of law. To do so, White feels we must study the language humanistically and generously.

Nevertheless, although the anti-positivist invitation to focus on the ethics and aesthetics of the spoken legal word might humanize legal interpretation, and might push it in a more progressive direction, it is precisely the sort of invitation of which anyone interested in radical reforms of the law should be extremely cautious. The literary lawyer may well be an improvement over other modern ideal conceptions of a general, day-to-day professional legal *practice*. But even if it is, it may nevertheless *not* serve as a workable ideal for the goals or practices of the legal *reformer*. Rather, a realistic, hard-headed, Holmesian, "bad man" positivism may be the better jurisprudential sensibility of legal reformers, and for utterly pragmatic reasons. To understand what laws need to be changed, overruled, cast out, or uprooted, we need to understand, foremost, their political impact, not their cultural heritage. We need to know who is hurt, and by how much, by the effect of law on the lives of its subjects. Such an inquiry is not analytically *incompatible* with a humanistic study of law's promise, and of its cultural heritage, but it is most assuredly *different*. There is a difference, and an important one, between a conception of law as a branch of humanities, and therefore something to preserve as well as improve upon, and a conception of law as a branch of politics, and therefore something to use, reform, change, or challenge toward the end of improving people's lives. Holmes' positivistic insistence that to understand the law we should "wash it in cynical acid" and look at it from the point of view of the "bad man," if we wish to unsentimentally understand its true content, contains an important grain of truth for legal and social reformers, or anyone interested in achieving positive change through law. The invitation to read law as literature, and to read literature as a part of law, does sometimes enlighten, and can *itself* be an important engine for reform: it alerts us, minimally, to alternative ways of reading and using extant legal authority. Where the needed reform "goes to the root," however, it can also distract us from the task at hand.

The second problem with the anti-positivist invitation at the heart of so much of the law and literature movement is closely related. Whether or not the romantic notion, oft-repeated by White, that the "lawyer is essentially an artist" does an injustice to the ambition and self esteem of artists, it may well do a disservice to

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responds in ACTS OF HOPE, *supra* note 1, at 182.

lawyers. Lawyers, ideally, (like judges) aim toward justice, and they use law to do it.

Artists, for the most part, do not "aim for justice," gendered or otherwise, and neither does the art which is their product. Whatever might be the nature of justice, it is surely not fully captured by any particular *aesthetic* ideal,[28] and the suggestion that it is, seems to be simply a category mistake. Legal positivism, with its insistence on the difference between the political root of law and the idealistic ambitions of change, between the legal is and the moral ought, between our ethical ambitions and our legal compromises, between the power that we must contend with and the ideals we seek to realize, might be, perhaps ironically, precisely the jurisprudence which not only gives Caesar his due, but which best captures the virtues which define the moral lives of legal advocates for change.[29] The anti-positivistic literary lawyer runs the risk of distracting the lawyer not only from the political root of the law which surrounds her, but also of the particular ideal—justice—which remains her distinctive goal.

II. MARTHA NUSSBAUM'S PROJECT

To date, the most promising attempt to further the reconstructive project initiated by White's ground-breaking scholarship, and in a way that answers all three objections raised above, comes from a feminist, trained not in the law but in the classics and moral philosophy. The interdisciplinary and brilliant scholarship of Professor Martha Nussbaum is unquestionably one of the most sustained attempts to put forward a humanistic account of practical reasoning—including, importantly, legal reasoning—which shares White's ambitions to re-instill in legal decision-making a cultural familiarity with the teachings of the Western canon, and at the same time to do so in a way which will point us toward, rather than away from, a progressive understanding of community. Although Nussbaum's work *in law* is now only in its beginning stages, it is nevertheless worth briefly characterizing at least the direction that her on-going study of law and culture seems to be taking, before moving on to the second, and decidedly more critical, project within law and literature studies.

The work that Martha Nussbaum has already done on the nature of moral decision-making, as well as the work she promises to do in the future on more specific legal forms of judgment, shares both deep and surface similarities with that of James Boyd White. To fulfill ambitions of justice, Nussbaum argues, the judgments made in courts of law should be informed not only by legal precedent,

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28. White argues that justice is largely aesthetic in a number of works, but most persuasively in JUSTICE AS TRANSLATION, *supra* note 1.

29. This is a recurrent theme in defenses of legal positivism. *See, e.g.*, H.L.A. Hart, *The Demystification of the Law, in* ESSAYS ON BENTHAM 21 (1982); H.L.A. Hart, *Law and Morals, in* THE CONCEPT OF LAW 181 (1969).

but by the empathic knowledge we gain through the heart[30]—what she has called "*Love's Knowledge*"[31]—*and* by the learnings gleaned from a critical but sympathetic and engaged reading of our cultural heritage. They should be neither rigidly legalistic, as positivists urge, nor rigidly rationalist, as economists insist.[32] Nor should they be (nor must they be) mindlessly beholden to the arbitrarily held convictions of political dominant subgroups, as is claimed in different ways by various wings of the critical legal community.[33] Echoing White, and echoing the nineteenth century literary lawyer, they should be, and can be, in a word, *humanist*: they should bear the mark of immersion in our culture, and of a learned sensitivity toward the communities that have created that distinctive culture. Were they to be, Nussbaum goes on to argue, they would be not only progressive rather than regressive in political orientation, but would even be, surprisingly, *feminist*. When read generously, as they should be, our culture and its literary products, Nussbaum argues, counsel not only a message of equal respect for women, but even counsel forms of reasoning and judgment that resonate with modern descriptions of the feminine. The humanistic orientation at the heart of the literary lawyer would further, not hinder, feminist goals.

Nussbaum's project, in my view, is very likely one of the most heartening and inspiring, as well as inspired, projects on the legal academic horizon. If successful, her attempt to infuse legal and practical reasoning with both cultural knowledge and sympathetic listening, would indeed go a long way toward answering the spiritually deadening relativism which now plagues both the left and right wings of the legal academy.[34] If successful, her work might also demonstrate the potential for internal, progressive transformation within and inherent to a rich literary canon, in spite of its exclusionary history. But more to the point for these purposes, Nussbaum's project might also provide an answer to the two objections raised above to the "anti-positivism" in White's vision of the nature of law and lawyering. A rich, defensible, and noble conception of justice, Nussbaum might be taken to be arguing, simply *is* embedded in canonical culture, whatever might be the case of law. If wedded with law in the anti-positivist manner urged by both White and Nussbaum, and more broadly by the literary lawyer, it would point our *law*, and not just our ideals, in the direction of a just as well as beloved community. This is a project not only filled with ambition, but filled with *hope* and vision. There is no doubt but that it is vital work, and it is, I think, work which should be cheered by both the feminist and the law and literature communities.

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30. Martha Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993); Martha Nussbaum, *Skepticism About Practical Reason*, 107 HARV. L. REV. 714, 743 (1994) [hereinafter *Skepticism*].

31. MARTHA NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990).

32. *See Skepticism*, *supra* note 30, at 732.

33. *Id.* at 731.

34. *See id.* at 743-44.

Nevertheless, and without in any sense wishing to impede the project, it is worth registering a cautionary note. As Nussbaum herself clearly recognizes, she is invoking the Western canon, in a sense, against a mode of reasoning which is itself a product of that canon.[35] The anti-historical, super-rationalist, and super-relativist mind set that dominates the legal academy and which Nussbaum ambitiously, and entirely to her credit aims to dislodge, did not spring upon us from nowhere; it came from strands of authority firmly rooted in our cultural past. Before we employ the canon, and even the idea of a cultural canon, against the morally stunted relativism and rationalism in modern legal thought, we need to "root out the rot," and that itself may be no small task. If this feminist and feminized reconstruction of the Whitean project—the partial resurrection and then reconstruction of a feminine literary lawyer—is to succeed, however, it is necessarily work of some urgency. If we wish to *use* our cultural inheritance, and more specifically if we wish to use it in law, against the deadening impulse of relativism and more broadly toward the ends of a true community, we must first be willing to critically examine it, and we must be willing to examine it, among much else, for its profoundly misogynist underpinnings.

III. THE CRITICAL PROJECT: THE LITERARY CRITIQUE OF LAW AND LEGALISM

The critical project within the law and literature movement is in many ways the antithesis of the first. In fact, we might best characterize the critical project by *contrasting* it—rather than by comparing it—with White's modern revival of the eighteenth and nineteenth century literary lawyer. While White's artist-lawyer and the man of letters who was his forerunner use literary classics *for the most part* to *bolster* the law's authority, the twentieth century "law and literature scholars" engaged in the Critical Project are far more inclined to "use" literature in such a way *as to call into question* the law's moral authority. The critical law and literature scholar uses literature as a means to open law to criticism, rather than to shield it from criticism within the protective shroud of high culture, and to push for greater democratization, rather than greater elitism, in legal processes.

In sharp contrast with White's clear pedagogical and professional ambitions, the major participants in law and literature's Critical Project have no interest in either creating or revitalizing an idealized form of lawyering, whether literary or not. Indeed, they have little interest in participating in any reconstruction of professional ideals. Rather, they are interested in participating in the very different—but equally central—*critical* goal of both the legal and non-legal academy: the criticism, from a non-legal perspective, of particular laws, areas of law, entire

35. *Id.*

historical legal eras,[36] jurisprudential theories, or most generally of the idea of the "Rule of Law" itself. What distinguishes these legal critics from others is simply their interest in literature as both a vehicle for this criticism, and a reflection of it.

Let me briefly describe three examples, and then offer some critical comments. First, Brook Thomas's important work, *Cross Examination of Law and Literature*,[37] briefly mentioned above, in many ways inaugurated the Critical Project. As noted, Thomas argues the historical claim that the great canonical writers of the antebellum period in American literature defined themselves and their art *in opposition to*, rather than as complementary of, the world of law, lawyers and legalism. In contrast to the earlier "man of law and letters" described by Ferguson, the great storytellers of the mid nineteenth century—Melville, Stowe, Cooper and Hawthorne—saw in the legal mind set a world view profoundly antitethetical to, and hostile to, their own humanistic and utopian urgings. What we see in the great writing of the time is a denunciation, not a celebration of and certainly not participation in the law and the ideals which inform the legal mind set. What we see is a criticism, both aesthetically and politically grounded, of the impulse toward order so exemplary of the legal imagination.

Thomas also argues, however, a less historical and more critical claim. What the writers of the time demonstrated in their fiction, Thomas suggests, is their commitment to a particular *thesis* about the nature of law and legal rhetoric, and it is a thesis to which Thomas is clearly committed as well. Furthermore, it is a claim about law which has been central to the critical legal studies now for at least the last two decades: to wit, that law, whatever else it does, through its rhetoric, legitimates hierarchical and harmful relations between relatively empowered and disempowered peoples, by drenching the consciousness of the former with tropes of entitlement and self-worth, and the consciousness of the latter with equally compelling and far more damaging beliefs in the necessity and desirability of their own oppression. Unlike the writings of critical legal scholars, however, Thomas uses American nineteenth century literature to illustrate the point. Those writers, Thomas argues, in varying degrees and with varying degrees of success, dramatized and fictionalized precisely the phenomenon of legitimation that the critical scholars and historians ascribe to the period; the characters envisioned were indeed constructed, largely through law, in precisely the manner suggested by the legitimation thesis. The fictional depictions found in those writers' works of employers and wage earners, for example, contract in ways that legitimated and then magnified the disparity of power between them, in ways that perfectly

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36. *See* Brook Thomas's masterful work on the law and literature of the antebellum era for what may be the best example to date of an attempt to criticize the law and ideology of a particular historical era through the medium of literary interpretation. BROOK THOMAS, CROSS EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE AND MELVILLE (1987).

37. *Id.*

illustrate the historical claims regarding the time period put forward in Morton Horwitz's classical critical treatment of the period, *The Transformations of American Law*. Thomas's work neatly vindicates the power and logic of the critical legal scholars' project within law and literature studies, and for that reason alone, I think, can fittingly be described as the seminal critical work of the modern law and literature renaissance. The point can be put formally in this way: if the critical scholars are right to argue that the legitimating power of law affects our consciousness of our own privilege and injury, and if literary scholars are right to suggest that literature is one means by which we can appreciate the consciousness of others, then literature does indeed give us a window to the oppressively legitimating and interpersonally "transformative" functions of law. Thomas's book, in effect, shows as well as argues the point.

While Thomas's narrative reconstructions depict a legal world of legal oppression and legitimation in the great literature of the middle of the last century, my second example of the Critical Project, Richard Weisberg's treatment of a number of canonical literary texts of the twentieth century in *Failure of the Word* paints an even darker, more ominous picture. In *The Failure of the Word*,[38] Weisberg argues not the critical "legitimation" thesis argued above, but rather, the neo-Nietzschien thesis that one of the most important, if neglected, contributions of modern western literature of *this* century has been its dramatization of the articulate, even verbose, but pathologically resentful and spiritually stunted "lawyer-protagonist." The lawyer-protagonist of modern western literature, Weisberg argues, is virtually *always* a moralistic and moralizing, psychologically twisted man, who uses and misuses the language of law as a weapon against an impulsive and stronger man of action[39] and toward the fulfillment of ends defined not by the grandeur of law but by his own neurotic and perverse personal ambitions. Through close readings of Melville's novella *Billy Budd Sailor*,[40] Albert Camus' *The Stranger*,[41] Dostoevski's *Brothers Karamazov*,[42] and any number of others, Weisberg has embellished this central claim: whatever its noble ambitions, precisely *because* it is so "wordy," law inevitably carries with it the potential for its own misuse toward the ends defined by the *ressentiment* of learned and academic but weak men. The result of Weisberg's labors has been a body of interpretive essays about literary lawyer-protagonists, and which consistently assert a view of law, of legal language, of authority, and of rhetoric that is the antithesis of that put forward by White. The verbal, pontificating lawyer, according to Weisberg, makes his linguistic "promises" with neither the intent nor the effect of enhancing social life or strengthening community. Rather,

38. RICHARD WEISBERG, THE FAILURE OF THE WORD (1994).
39. *Id.* at 1-19.
40. *Id.* at 131-76.
41. *Id.* at 114-29.
42. *Id.* at 65-81.

he often— albeit not inevitably—makes them toward the end, whether or not consciously realized, of overcoming the strength of natural action with the force of authoritative words; toward the end of defeating impulse and health with neurotic deception; toward the end of realizing, through the wordy forms of law, the neurotic personal ambitions formed of envy. If Weisberg's reading of literature is correct, and if the authors he interprets are saying something true about legalism, then the "promise" of liberal legalism—the governance of communities through the authority of impersonal law—is utterly compromised by—not embodied by—the inevitably twisted, envious, resentful, and wordy legal promises of the man of "law and letters."

How does Weisberg's critical Nietzschian insight about law and wordiness compare with other critical traditions within the legal academy? Perhaps surprisingly (perhaps not), the closest analogy, I think, is not the skeptical work of the critical legal studies movement, but rather, the work of at least some feminist critics of law and legalism. Although he has not himself written on it, Weisberg's central, defining, critical thesis does resonate with at least some feminist concerns. Feminists too, both in law and even more emphatically in literature, have been suspicious of the "wordiness" of contemporary, modernist authority—whether embodied in judges, priests, or fathers—and have struggled to unearth from history and family less patriarchal, as well as less "verbal" forms of power.[43] Feminists too have suspected that behind the apparent peace-seeking facade of the legalist's embrace of verbosity, lies a resentful, envious neurotic longing for power, and destructive hatred of natural forms of life. Most recently, to take just one provocative example, Professors J.C. Smith and Carla Ferstman have turned the misogynist Nietzsche to their own feminist ends, arguing that the entire patriarchal apparatus of male control of the female *is* largely the result of the attempt of men to use the power of the "word" to attain what they cannot naturally claim: possession of female sexuality and knowledge of their children's paternity.[44] There are obvious parallels which deserve greater exploration between this emerging neo-Nietzschien analysis of the verbosity of patriarchy, and Richard Weisberg's neo-Nietzschien analysis of the "wordiness" of legalism.

My last example of early writings within the critical or dissident wing of the law and literature movement is also, although this time more explicitly, driven by or influenced by feminist concerns. In *Legal Modernism*,[45] Professor David Luban puts forward an interpretation of Aeschylus's trilogy *The Oresteia*[46] which

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43. French feminism emphasizes this theme more than Anglo-American. *See, e.g.*, LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (Catherine Porter trans., 1985). For a good discussion and critique, see Judith Butler, *Variations on Sex and Gender: Beauvoir, Wittig and Foucault, in* FEMINISM AS CRITIQUE: ESSAYS ON THE POLITICS OF GENDER (Benhabib & Cornell eds., 1987).

44. J.C. SMITH & CARLA FERSTMAN, THE CASTRATION OF OEDIPUS: FEMINISM, PSYCHOANALYSIS, THE WILL TO POWER (1996).

45. DAVID LUBAN, LEGAL MODERNISM (1994).

46. AESCHYLUS, THE ORESTEIA (Richmond Lattimore trans., 1953) at 299-321; LUBAN, *supra* note 45.

owes much to feminist dramatizations of that work.[47] The *Oresteia*, of course, is widely read, and was probably intended to be read, as the first dramatization of the triumph of the idea of law, the Rule of Law, and legal process over the earlier and much more brutal and inefficient system of communal control known as private revenge.[48] On the other hand, it has *also* been widely read, at least by feminists, as a parable of the defeat of a political system of matriarchy by patriarchy: the revengers who are ultimately "driven underground" by the oracles of legalism are female, the crime which is the centerpiece of the famous trial is a matricide, and of course, the defendant is eventually acquitted, to name just three of the many references in the play that suggest gender warfare as a central, if not the central, concern. In his essay in *Legal Modernism*, David Luban deftly ties these two strands of interpretation together, and the result is a profoundly feminist critique of the very ideals that go to the heart of legalism. What Aeschylus suggests in *The Oresteia*, Luban argues, is that the triumph of law, legalism, and legal process simply *was* the world historic defeat of the female sex. Rather than glorifying the virtues of law, Luban suggests, Aeschylus smuggled into the "subtext" of his masterpiece a devastating critique, according to which law is and has been skewed from its inception against the interests of the weak—including the politically weaker class of women. The purported "neutrality" of legal process, as dramatized in *The Oresteia* and as reenacted daily in courtrooms, is simply a sham. Its goal is not justice, but civic order, or peace, the cost of which, almost necessarily, is a silencing of the voice, the rights, and the interests of women. Both in the trial depicted in *The Oresteia* as well as in modern courtrooms, Luban suggests, the cost of legalism's quest for civic peace is justice, and at the heart of that question, in turn, is its masculinist drive for dominance.[49]

What are the limitations of this Critical Project? Perhaps the most important criticism that has been lodged, to date, against the Critical Project tracks the problem noted above with the use of the literary canon toward the end of ennobling and enriching legal reasoning. The literary canon is for better or worse elitist and exclusionary *by definition*, and it should come as no great shock to note that the voices of women, minorities and outsiders have not been well represented within it. Criticism of law by recourse to insights drawn from the literary canon, as a consequence, might for that very reason be fairly tepid at best.[50] One cultural artifact is being critically pitted against another, but the two have more in common than what divides them. The literary canon will reflect the moral sensibilities of the same elite whose interests are reflected and served by law. Those moral

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47. LUBAN, *supra* note 45, at 318 n.135.

48. For a treatment of the Oresteia that explicates these themes for a legal audience, see Paul Gerwirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

49. LUBAN, *supra* note 45, at 306-21.

50. *See* Delgado & Stefancic, *supra* note 21, at 1929; Mann, *supra* note 20, at 959; Resnick & Heilbrun, *supra* note 19, at 1913.

sensibilities might, indeed, be in rebellion against the legal and political order of the day. But they are nevertheless the sensibilities of elites. The voices, experiences, and perspectives of outsiders will only rarely infiltrate, and a form of critique that depends upon the canon for its critical insights will reflect that limitation.

Let me give an example. It has become relatively commonplace, within the law and literature movement, to cite Twain's masterpiece *Huckleberry Finn*[51] as a critique, not only of the institution of slavery, but of the laws and legal sensibilities, as well as the positivistic, legalistic, and property rights-minded view of morality, that supported it.[52] But it also seems fair to say that *Huckleberry Finn* expresses the revolt of conscience against slavery which was experienced by and articulated by *whites*. Huck is a developed character, and a moral rebel, in the story; Jim, by contrast, is not. Rather, Jim is developed to precisely the degree necessary to constitute a dramatic contrast with Huck: he is a loyal friend (while Huck's loyalty waivers); he is a devoted family man (while Huck's family is dysfunctional) and he is, from the outset, a truly morally just and upright human being (while Huck must *become* moral through acts of rebellion). He is also, of course, a wronged victim by virtue of skin color, while Huck is not. But for all of these attributes, he is nevertheless a two dimensional character. The reader learns much of Huck's mind set and subjectivity, and little of Jim's. This is a story, in short, *about* a runaway slave; it is not a story *of* a runaway slave. It was not Twain's intent, nor his accomplishment, to provide the slave's perspective. This is Huck's story, not Jim's. While *Huckleberry Finn* conveys a powerful jurisprudential critique of slavery, it is a critique by and of a white man of conscience. It is not itself a slave narrative. Use of works such as *Huckleberry Finn* in the canon of literature critically employed against legalism highlights, rather than cures, the exclusionary history of the literary canon. We might usefully call this complaint—that even canonical literature which is squarely critical of extant legal institutions, such as *Huckleberry Finn*, will convey at best the critical perspective and the reservations of conscience experienced by the relatively powerful—the "outsider's lament."

How forceful is this objection? As critique, it seems obvious that the outsider's lament has force only to whatever degree the literary canon is itself resistant to change and supplementation from the voices of "outsiders." As the canon "opens up," we should expect to find critiques of law not only sympathetic to the plights of outsiders, such as Jim, but more specifically, critiques which speak with their voice and from their perspective. The canon may, of course, prove resistant to change. Indeed, there is an inevitable and much remarked upon tension between the idea of a "canon" and egalitarian, inclusive, democratic

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51. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).

52. *See* LEGAL IMAGINATION, *supra* note 1, at 209; *Reflections*, *supra* note 27, at 129.

ideals: as Bloom and others have pointed out, full inclusion defeats not only the idea of a "canon" but the idea of culture.[53] There is *also*, however, a less remarked upon but equally inevitable tension between the idea and ideal of excellence and a steadfast, frozen, *resistance* to change: a canon that cannot expand to include new entries as well as new standards of excellence is not only no longer canonical, it is also no longer a measure of excellence. To whatever degree the "canon" truly remains canonical, it *must be* open to amendment and change so as to include the works of those artists once considered "outsiders." And, to the degree that it is open, the force of the "outsider's lament" is to that degree weakened. As the force of the critique weakens, the case for outsider participation in, rather than criticism of, the "law and literature movement's" Critical Project becomes stronger.

There is, though, a deeper problem with the Critical Project, which inclusion of non-canonical or outsider literature ironically highlights. A contrast of *Huckleberry Finn* with Toni Morrison's masterpiece *Beloved*[54]—by now, surely no less "canonical" than Twain's novel—illustrates the point. Unlike Twain's Jim, Morrison's protagonist, the escaped slave Sethe, *is* fully developed: *Beloved* is indeed the story *of*, rather than about, a runaway slave, and in *Beloved* we do indeed confront many of Huck's moral dilemmas, but from the slave's perspective. And the contrast is stark. Sethe's utterly "outsider" world is indeed a very different, more vicious and more tragic world than even the world the rebellious Huck confronts. Including study of *Beloved* alongside study of *Huckleberry Finn* at least addresses the exclusionary objection—the outsider's lament—raised above.

However—and herein lies the irony—one of the most striking features of Sethe's world is not only that it is so much more horrific than Huck's—or Jim's—but it is also considerably less *textual*, and even less verbal, than the world inhabited by Huck and his friend Jim.[55] To put it differently, Sethe's world, to which Morrison's *Beloved* gives us access, *is itself* less governed by ruling verbal canons from *any* community, and it is utterly ungoverned by the ruling canon—legal or literary—of the white world. Sethe's family, community, and friends communicate in many ways, but strikingly, they communicate in many more *non-verbal* ways than do Huck's. They communicate through dance. They communicate through signs and cues when gags prevent speech. They communicate through the marks left by whips on their backs. They communicate through ghosts and visions across the divide of death. Only at the end does a central character—Sethe's surviving daughter—learn to read, and hence take tentative steps toward joining the white world of governing canonical texts.[56]

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53. ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 185-216 (1988).
54. TONI MORRISON, BELOVED (1987).
55. I discuss this at length in *Reflections*, *supra* note 27.
56. MORRISON, *supra* note 54, at 239-75.

Until that point, the communities in *Beloved* are built not around textual consensus, but around direct and physical, or indirect and psychic, *interactions*—communal and life-sustaining interactions between the living and the dead; between mother and infant; and between man and woman, and oppressive and threatening interactions between master and slave, slave catcher and escaped slave, white and black. Among much else, what *Beloved* teaches is that the spirituality, the sense of self-hood, and the communities created through silent and silenced interactions—through dance, through laughter, through death, through birth, through sign and through touch—are as morally important, and constitutive, as the textually saturated pontificating "individuals" and communities created by a literary canon, whether critical or celebratory of the legalism with which it interacts. What *Beloved* teaches, again, among much else, is that we should attend to those non-textual and even non-verbal interactions and the communities they create, and not only to the texts we produce, if we want to understand and assess the moral quality of our governing institutions.

There is, then, contained in *Beloved*, a quite powerful critique of the Critical Project itself—which in essence simply advocates the use of one verbal construct (literature) to criticize yet another (law). Our moral foundation, *Beloved* teaches, emanates not only from the verbal lessons we inherit, but also from our profoundly non-verbal interactions, from birth to friendship, mothering, sexuality, touch, and death. One lesson of at least this canonical "outsider" work is that the use of verbal "canons" of *any* sort—outsider, insider, or in-between—gives short shrift to our non-verbal forms of interaction and the non-verbal communities they form. If that is right, then even the Critical Project arguably occasions a critical injustice of its own. It pits the lessons of one sort of verbal text—literature—against that of another—law. What is elided entirely are the lessons of our non-verbal interactions, whether oppressive, intimate, or liberatory, and the communities of oppression, intimacy, and liberation those interactions create.

Susan Glaspell's twentieth century novella, *A Jury of Her Peers*[57] gives rise to a similar dilemma. *A Jury of Her Peers* is about the spousal murder of a husband by an emotionally and possibly physically abused wife, as told through the eyes of two neighboring women from the larger community. The two women accompanied the prosecutor and sheriff to the farmhouse to investigate the crime, and eventually, while sitting in the guilty woman's kitchen, discover and then suppress incriminating evidence, deciding on their own that the murder was justified.[58] Although not by any means as great a work as *Beloved*, *A Jury of Her Peers* is nevertheless "canonical" at least within feminist communities: it is much taught, discussed, and criticized as a foundational text of twentieth century feminism. It is a natural candidate for *inclusion* in any canon of critical works on

57. SUSAN GLASPELL, A JURY OF HER PEERS (1949).
58. *Id.*

law. It is a story about political marginalization and domestic abuse, and it is unquestionably jurisprudential. It can readily ground a jurisprudential critique of law, and it does so squarely from the perspective of an outsider.

Yet, like *Beloved*, the actual message of *A Jury of Her Peers* uncomfortably undercuts even an expanded conception of the critical project. *A Jury of Her Peers* is about many things, but one thing it is about is silence, and silent protest. The wives who sit in judgment in that farmhouse kitchen of the clearly guilty farm wife, refuse to convey to the authorities the evidence they have uncovered of the wife's guilt. This is itself a crime of silence. The evidence they uncover and refuse to disclose is a strangled songbird—his song needlessly and cruelly silenced by the woman's husband, apparently in an act of rage which in turn prompted his own killing at the hands of his silent wife. The childless, friendless, isolated farmwife who committed the homicide had lived in a silent and emotionally dead world with a non-communicative and abusive husband, and she responded to her silent hell with a crime of silence—strangling her husband in the middle of his sleep. The wives who visit the farmhouse after the homicide fault themselves for their silent neglect of their neighbor's silent suffering. And all of this action takes place, of course, against the backdrop of a legal system which itself silences, by excluding the views, perspectives, and voices of women from juries in properly constituted courts of law.

To be sure, *A Jury of Her Peers* is clearly critical of all of this *silence.* Nevertheless, not only the homicide itself, but every other morally significant act in the novella is an act of silence, from the strangling of the bird, to the refusal to turn over the evidence. The *speech* in the story, in fact, stands in marked contrast: both the speech of the sheriff and prosecutor as they search the home, and much of the speech of the wives in the kitchen is pointedly banal. The norms to which they give expression are insipid. In this novella, as in *Beloved*, it is the acts of silence that form the communities that matter—communities of oppression, of solidarity, of loyalty, of life, and of death. It is the acts of silence, not the pontificating acts of verbosity, that constitute the contours of the lives for which the reader learns to care.

It is not, however, fatal to the critical project that the included voices of outsiders in a newly invigorated and more inclusive canon at least on occasion counsel greater attentiveness to actions and to silences, and to the communities thereby created, and a little less to "what we say." First, of course, it is in keeping with the "anti-wordiness" message of Weisberg's seminal contribution to the critical project. It is also in keeping with Robert Cover's eloquent plea that the "law and literature" movement heed the violence law *does*, and not only the principles it expresses.[59] Most important, though, it is in keeping with at least one goal (if not the only goal) of literature, whether canonical or not: to shed light not

59. Cover, *supra* note 26, at 1601.

on our subjective "texts," but on the quality of our internal lives. That outsider literature, like outsider jurisprudence, directs and enables us forcefully toward an examination of those lives, as much as possible unfiltered by the disorienting gauze of the dominant culture's defining texts, is a reflection of that literature's strength.

CONCLUSION

Let me return to the question I posed at the outset: Is there any shared agenda, or point, held in common by these two projects? Is there any rapprochement on the horizon between the literary lawyer and the literary legal critic? Is there any common ground between White's celebration of the communitarian promise of the legal and literary word, and Weisberg's denunciation of the resentment animating the pontificating lawyer? Between a view of the legal or literary word as an act of hope, and a view of the same word as an act of legitimation, hypocrisy, resentment, oppression, or injustice? In response to the last question, I think not—these views are incompatible. But it doesn't follow that law and literature have no common agenda. Rather, the agenda *is* to engage precisely this argument, and it is an argument squarely over the nature of literature and language—and hence over human nature—no less than over the nature of law. We are language using animals, and one thing that means is that we can create both rules of law and works of literature. But its not clear what, if anything, follows from that, ethically. Language facility alone, perhaps, guarantees neither that we will or will not be on the side of the angels. What we need to explore is our ability to turn language to good or evil. We need to explore the ways in which the promissory nature of language, including the language of law, can deepen our community bonds and bring us closer to defensible ideals, and the ways in which the use of language exacerbates and then obfuscates our seemingly insatiable appetite for domination and cruelty. It is the shared goal of the law and literature movement, to illuminate the role of language in *both* kinds of interactive communities, and it is the common agenda of that movement to do so, in part, through cross examinations not just of our legal and literary canon, but of our utterly non-canonical and even non-verbal interactive communities and natures as well.