Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury

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COMMENTS

LESSONS IN LAW FROM LITERATURE: A LOOK AT THE MOVEMENT AND A PEER AT HER JURY*

The law and literature movement emerged, in part, as a response to the widely proclaimed inadequacies of current legal education, as well as to the perceived limitations in legal analysis. The law and literature movement is at the cutting edge of contemporary legal thought. The presentation over the last decade of several symposia devoted solely to law and literature, the introduction of courses on the subject at a number of law schools, and the considerable space devoted to commentary on the subject by law reviews and law and literature movement comparable in significance to the law and economics movement. West, Economic Man and Literary Woman: One Contrast, 39 Mercer L. Rev. 867 (1988). West observes the dichotomy between the fictitious legal character that she refers to as “literary woman,” whose vision of human nature contrasts sharply with that of “economic man.” Id. While “economic man” is invariably and infallibly the “rational maximizer of his own utility,” in both the cognitive and motivational sense, “literary woman” has inexorable empathetic capacity, enabling her to make “intersubjective comparisons of utility.” Id. at 872. It is within this defining trait that her contribution to the study and practice of law promises to be great. See also White, Law and Literature: “No Manifesto”, 39 Mercer L. Rev. 739 (1988) (recognizing the movement in spite of the fact that it is neither political nor uniformly understood by its diverse proponents).


3. The following universities are among those with a current course offering in law and literature: Boston College Law School; The Catholic University of America, Columbus School of Law; Duke University, School of Law; Florida State University, College of Law; Georgia State University, School of Law; Loyola University of Chicago, School of Law; New York University, School of Law; University of California-Berkeley, School of Law; University of
journals established for the purpose of exploring law and literature all testify to the movement's growing importance.\textsuperscript{4}

Indeed, distinguished legal scholars have been enticed by the provocative appeal of this growing field. At least six books have been published on law and literature since 1984.\textsuperscript{5} One well-known legal scholar expresses serious doubts regarding the direction the movement has taken, and seems to advocate restricting the use of literature in the study of law in favor of a reassertion of the already familiar economics approach to the law.\textsuperscript{6} However,

\begin{footnotesize}
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\item See, e.g., \textsc{Yale J. L. \& Humanities; Cardozo Stud. L. \& Literature}.
\item In his book, Judge Posner accuses proponents of the field of distorting literature and literary theory in order to create an artificial relevance to the law. See R. Posner, \textit{ supra} note 1, at 13. Judge Posner argues, for example, that law as portrayed in great works is not "lawyer's law." \textit{Id.} at 15. While it provides a metaphorical framework for transmitting the author's ideas about enduring principles, it does not depend upon the lawyer's professional knowledge; therefore, it has no point of peculiar interest for the lawyer. \textit{Id.}

Posner also attacks the attempt some legal scholars have made to transpose, with some alteration, the established techniques of literary criticism for use in statutory and constitutional interpretation. \textit{Id.} at 17. He asserts that both the purpose and the form of literary text are so unlike those of statutes and constitutions that the borrowing of literary techniques for legal analysis is a dangerous occupation. \textit{Id.} He further undermines the movement with his assertion that a lawyer or judge can gain a "valuable supplementary perspective" on the law by stressing the antipodal distinctions between law and literature inasmuch as "the ability to make distinctions is as important to knowledge as the ability to make connections." \textit{Id.} at 353.

Although Posner finds promise in the law and literature movement as a tool for teaching lawyers rhetorical techniques such as precision and style in the craft of writing, he quickly reminds the reader that these lessons can be extracted from the study of alternate fields related to communications and language theory, thereby minimizing the particular contribution of literature to law. \textit{Id.} at 356; see also Posner, \textit{Law and Literature: A Relation Reargued}, 72 \textit{Va. L. Rev.} 1351 (1986); cf. Fish, \textit{Don't Know Much About the Middle Ages: Posner on Law and Literature}, 97 \textit{Yale L.J.} 777, 779 (1988) [hereinafter Fish, \textit{Don't Know Much About the Middle Ages}]. In responding to Posner, \textit{Law and Literature: A Relation Reargued}, Fish agrees with Posner's basic assertion that the study of literature does little to illuminate the interpretation of statutes and constitutions. Fish strongly disagrees, however, with Judge Posner's reasoning. \textit{Id.} at 777. He accuses Posner of attempting to do little more than secure the authority of economics, Posner's own area of scholarship, in legal education. \textit{Id.} at 788-93. Specifically, Fish rejects Posner's distinction between legal text, which requires an understanding of original intent, and literary text for which an unconstrained interpretation is tolerable; nor does he accept the consequences of assuming that distinction exists. Fish states that "interpretation cannot proceed independent of intention, [and] that intentions are themselves interpretively produced and therefore cannot serve... as a check on interpretive activity." \textit{Id.} at 779. While
\end{enumerate}
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many other voices herald the emergence of this movement as an innovative and compelling perspective on law and legal education.\textsuperscript{7}

To many unacquainted with the movement, law and literature seem almost mutually exclusive enterprises. Certainly, a legal work and a literary work are at once distinguishable. Legal scholars have not yet fully explored or resolved the issues arising from the distinct characteristics of legal and literary works that they face when attempting to integrate literature and lit-

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\textsuperscript{7} See, e.g., White, \textit{What Can a Lawyer Learn from Literature?} (Book Review), 102 \textit{Harv. L. Rev.} 2014 (1989) (reviewing R. Posner, \textit{Law and Literature: A Misunderstood Relation} (1988)). White finds that everything Posner posits in his book is fundamentally misguided because it rests on a conception of language (and by extension law and literature) which is scientific, even mechanistic. Posner’s view, writes White, “denies the special character of literary discourse,” \textit{id.} at 2016, which is not propositional, but experiential and performative; not language-free, but language-bound and language-centered; not reducible to other terms — especially not to logical outline or analysis — but expressing their meanings through their form; not bound by the rule of noncontradiction but eager to embrace competing or opposing strains of thought; not purely intellectual, but affective and constitutive, and in this sense integrative, both of the composer and of the audience, indeed in a sense of the culture in which they work. Texts of this sort are not coercive of their reader, but invitacional: they offer an experience, not a message, and an experience that will not merely add to one’s stock of information but change one’s way of seeing and being, of talking and acting. \textit{Id.} at 2018. According to White, Posner’s scientific disposition blinds him to the reality of other languages and language itself, and makes him oblivious to the most important possibilities of literary texts for lawyers — namely, teaching them how to rethink, critique and reform their own “habits of mind and language” by reading textual expression as “a form of cultural, ethical, and political action, as constitutive of community and character.” \textit{Id.} at 2023-24. Literature stimulates “our capacity to imagine other people. . . as they inhabit different universes of meaning, different spheres of language.” \textit{Id.} at 2036.

Posner, White asserts, explores only “how far our habitual scientific — or ‘scientific’ — methods of talk (and especially the language of economics) can extend over discourses, and texts, written on quite different premises.” \textit{Id.} at 2029. Posner fails to “reflect the movement, the sense of opposition and paradox, that typically gives humanistic texts their particular value, which is, among other things, to confound the very part of us that wants to think in propositions, arguments, and forced conclusions.” \textit{Id.} at 2036-37; \textit{see also} West, \textit{supra} note 1.
erary techniques into the pool of legal materials and tools. Exponents of the movement utilize the very qualities of literature, such as its experiential character, that cause skeptics to challenge the wisdom of incorporating literature into the study of law. The movement's range and dimensions shift dynamically as the scholars dispute the relevance of legal insight which literature can uniquely generate and literature's potential for altering established authoritative frameworks for legal interpretation.

The diversity of viewpoints on the role of literature in the practice and study of law attests to the richness of literature as a source for legal discussion. This Comment briefly surveys several concepts that have come into focus in the field of law and literature. It then discusses the identified concepts' potential for further development and use in legal discourse. Next, this Comment examines a selected piece of literature for its relevance to legal education. This Comment concludes by inviting the reader to participate in this current discussion and to formulate his or her own conceptions about the interdisciplinary utility of literature to law.

I. LITERATURE'S ROLE IN DISCERNING A MORAL VISION OF LAW

A. "Masks of the Law"

Few challenge the general utility of humanistic discourse to the contemporary student or practitioner of law.8 This utility derives from the fact that the law, by its very nature, does not exist as an autonomous enterprise.9 Legal disputes and problems may involve or concern virtually every facet of human existence. Hence, legal thinkers naturally should continue to augment and reformulate their understanding of the human condition and of society in an effort to achieve a more inclusive perspective.

The poverty of legal education stems from the fact that, with rare exception, authoritative legal text in the form of cases, statutes, and rules form the sole foundation for the law student's instruction. At best, only incidental reference is made to the rich cultural context in which the law operates. Furthermore, the great majority of cases that law students encounter are appellate-level decisions which are devoid of factual issues. This factor contributes to the disconnection of legal study from the cultural environment. To fill the void between traditional law school curriculum and the richness of actual legal situations, legal education has taken an increasingly interdis-

ciplinary turn in recent years. For instance, lawyers found that economics and the other social sciences complement legal education. However, the social sciences do not provide the guiding principles necessary to wrestle adequately the frequent moral questions or cross-cultural dilemmas that arise in the context of the law. Just as the law refers to the social sciences for relevant sociological data and theory, so too, it must maintain open dialogue with the disciplines, such as literature, which help inform and enliven the inquiry challenging and directing the moral basis of the law. Without the continual reaffirmation, or reformulation when necessary, of the moral values that direct the law, the citizens become slaves to the law, rather than the sovereigns of it, and the law prematurely thwarts the evolution toward the ideal of perfect justice.

Formal legal text alone cannot adequately assist the legal thinker who inquires into the moral basis of the law. Official codifications of "moral principles," such as the American Bar Association (ABA) Canons of Professional Ethics, the ABA Model Code of Professional Responsibility, and the ABA Model Rules of Professional Conduct, fail to inspire an adequate appreciation of legal ethics and do not impart an understanding of justice. Statutes and judicial opinions can provide an historical record of the moral principles endorsed by legislatures and judges, but an external gauge is needed to evaluate these endorsements.


17. True justice, as it is used in this Comment, is the goal of the legal system. It includes the notions of equality and dignity of all human beings, as well as proportionate reciprocity or fairness. It is predicated upon the opportunity for full participation of each member of society in the legal system and a public moral commitment to truth. See generally D. Granfield, *The Inner Experience of the Law: A Jurisprudence of Subjectivity* at 85-126 (1988). David Granfield is a Professor in the Columbus School of Law at the Catholic University of America, specializing in Criminal Law and Jurisprudence.
In a democracy, the moral values reflected in the law ideally should comport with the moral values of the community on whose behalf, and by whose mandate, the state exercises power and authority. The political process provides the forum for competing partisan interests and faces the constant siege of an unmanageable plurality of those interests. A paradox results because the cross-fire of interests shatters public discourse capable of articulating an underlying public moral vision of law. Literature, and art in general, on the other hand, rises above partisan interests and brings into public discourse insight as to the moral commitment of the whole community. Furthermore, literature expresses the moral experience of the community from a perspective that incorporates the integral existential experience of individuals. Because literature communicates moral insights within the context of a story about particular people, it can bring to public attention the particular plight of the politically enfeebled, marginalized, and neglected segments of society. In this way, literature at once speaks for the many and for the few. Yet, until recently literature remained excluded from legal education and discussion.

Legal practitioners and law students alike have shared the lament over a perceived deficiency in legal education and legal analysis. Current established methods of legal analysis, informed as they are by the dominant legal culture and isolated from the wealth of vision expressed in other great humanistic disciplines such as literature, contribute to the stagnation of the law.

Since the middle of this century, the law's inability to meet human needs and to preserve human dignity has prompted growing dissatisfaction. This dissatisfaction is likely a significant contributor to the disillusionment of large numbers of practicing attorneys reported to be leaving the profession in search of more morally gratifying labor. One Ninth Circuit judge uses the metaphor "masks of the Law" to refer to the stony legal abstractions which deny the full moral participation of the legal subject and which he implies are ultimately and fundamentally inhuman. The law can shed the

18. Id. at 28-36.

19. See Brand, How Can We Know the Dancer from the Dance? (Book Review), 57 GEO. WASH. L. REV. 1018, 1028 n.60 (1989) ("[a]s many people are now abandoning the law annually - roughly 40,000 -as entering it") (quoting Margolick, Alienated Lawyers Seeking - and Getting - Counsel in Making the Transition to Other Careers, N.Y. Times, Feb. 10, 1989, at B7, col. 1); Anshaw, supra note 12 (noting a general "hunger" for humanistic disciplines among current law school students, as contrasted to the common image of the law school "yuppie" in search for the $60,000 starting salary).


21. Id. at 36. Commenting on the "mask" metaphor, David Granfield writes:
mask only when it is fundamentally animated by the evolving moral vision of the whole community and when it protects the dignity of all members of that community. Literature uniquely articulates the public moral vision and registers the concrete experiences of the individuals who might otherwise be discounted. Literature, thus, could help to transform the legal mask into a living face.

B. The Face of Literature

Some forms of expression convey direct human experience and illuminate the nuances of daily existence. Ultimately, these devices generate a conception of the commonality of all human beings and thereby contribute to a conception of true justice. Literature is such a vehicle. The experiential

The mask accurately and dramatically symbolizes the abstract, mechanical, and theoretical approach to persons, which the law so easily and so often adopts. . . . Without [responding to the subjectivity of others] there is no love, and, without love, the law congeals into a deadly formalism.

The turn to the subject has begun to prompt thinkers to look outside their abstract domains at the concrete data of human life.

Id. 22. See, e.g., Schoeck, supra note 10. Schoeck states "some forms of art are especially structured or equipped to present antitheses, renderings of opposing values or positions; and these artistic forms have been especially attracted to the law and attractive for dealing with legal problems." Id. at 53. The author goes on to present numerous examples of drama, the novel, the detective story, and the poem, which deal with the multiplicity of human experience with the law, and which Schoeck suggests would be well worth the lawyer's reading. Id. at 53-56. See also Daube, Greek Forerunners of Simenon, 68 CALIF. L. REV. 301 (1980); Gewirtz, Aeschylus' Law, 101 HARV. L. REV. 1043 (1988); Koffler, Capital in Hell: Dante's Lesson on Usury, 32 RUTGERS L. REV. 608 (1979); Luban, Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato, 54 TENN. L. REV. 279 (1987); Miller, Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland, 28 AM. J. LEGAL HIST. 95 (1984); Weisburg, How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With An Application to Justice Rehnquist, 57 N.Y.U. L. REV. 1 (1982); West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 HARV. L. REV. 384 (1985). But cf. R. Posner, supra note 1. Judge Posner devotes more than 50% of his text to a treatment of literature on legal themes, but neglects to discuss the body of literature that is wholly unrelated to law. The narrowly focused treatment suggests that Judge Posner does not see the relevance to legal education of literature that is not about law. See White, supra note 7. Judge Posner's first section, 'Literature on Legal Themes,' assumes, as its title suggests, that literature is a form of discourse that has a subject about which it speaks and upon which it offers information or opinion. But this is not how literature works: not by offering us findings, as though it were a kind of social or natural science, but by engaging the mind in certain ways, and transforming it. To do this in ways that help the lawyer it need not be on 'legal themes' at all. The interesting question is not what the 'field' of literature has to teach the 'law,' but what meaning and value a literary education can have for the person who is learning and practicing law — a question that can have no programmatic or automatic answer, but depends on the response of the individual mind.

Id. at 2028 (footnotes omitted).
quality of literary texts makes literature a more effective tool for developing conceptions of justice, and articulating a public morality, than either the empirical social sciences or analytic philosophy. The value of law lies not in abstractions, but in its capacity to respond to extrinsic realities. The law and literature movement reveals a frustration with the narrow language of the social sciences and analytic philosophy — disciplines which tend to lead us further away from the extrinsic realities and deeper into the abstract. While these disciplines will always remain highly useful to law, they do not provide a direct encounter with the concrete experience of daily living which literature uniquely achieves, particularly through its narrative form.

Literature offers the reader the opportunity to experience intimately another human being whose perspective may not be familiar. This experience is not restatable or reducible to mere fact which can augment the body of social science data. The reader of a novel is a creative participant in the inner experience of the protagonist, gaining intimate knowledge about the protagonist's history, joys, frustrations, agonies, reasons, and irrationalities. In this way, literature allows the reader to perceive, perhaps as never before, a transcendant sense of the common bonds of all human beings. The story's universal message unfurls within the context of the particular story and thereafter is transferable to the particular events of other stories or life situations. By reading literature, the lawyer can learn to recognize the familiar human needs, hopes, and hurts in the unfamiliar situations of the people.

23. For an attempt to bring the private moral debate into public discourse through the use of social science, see R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER, & S. TIPTON, HABITS OF THE HEART (1986).

24. See A. MACINTYRE, AFTER VIRTUE (2d ed. 1984) (hypothesizing that grave fragmentation characterizes the language of morality today, and that current analytical philosophy will not restore moral order because analytical philosophy essentially only describes the language of morality which has itself become void of moral substance).

25. Commenting on the relative usefulness of abstractions and insights drawn from the experiences of life, Bernard Lonergan writes: "Add abstraction to abstraction and one never reaches more than a heap of abstractions. But add insight to insight and one moves to mastery of all the eventualities and complications of a concrete situation." B. LONERGAN, A THIRD COLLECTION: PAPERS BY BERNARD J. F. LONERGAN, S.J. 104 (F. Crowe, S.J., ed. 1985) [hereinafter B. LONERGAN].

26. See White, supra note 7, at 2015 n.3, 2026; see also Weisburg, supra note 22.

27. See White, Law as Language: Reading Law and Reading Literature, 60 TEX. L. REV. 415, 420 & n.7 (1982). "It is indeed something of a critical truism that the meaning of a literary work is not in its message but in the experience it offers its reader." Id. at 420.

28. See id. at 433; White, supra note 7, at 2019.

29. Shaffer, infra note 30, at 880-82; see also White, supra note 7, at 2019-20.
he represents. Reading literature can also increase the lawyer's sensitivity for legal ethics.30

Justice requires that the law adequately respond to all classes of individuals that it purports to represent. As a precondition to this unitary response, lawyers must understand the differing perspectives of all classes of persons. Lawyers’ own ingrained biases and the law’s infusion with the prevailing world view circumscribe interpretive judgment and thereby impede understanding. An insight into justice can only be gained, and then implemented, if class biases are set aside.31 Reading literature will help the lawyer to recognize those prejudices to which, as social beings, we are all susceptible and which we are inclined to dismiss or may fail to discern at all.32 In leading the reader beyond the horizons of limited personal experience, literature provides essential education for anyone assuming public responsibility to make decisions that will profoundly impact on the lives of others.

Where literature exposes the realities of an historically underrepresented or unrepresented class of persons, such as women, minorities, or the handicapped, the importance of reading literature for lawyers becomes particularly acute. Literature vividly communicates the voices of these classes,
which traditionally have been muffled or co-opted by the legal system.\textsuperscript{33} Literature can awaken lawyers to the possibilities of otherwise suppressed legal alternatives which might suggest more inclusive solutions to the pressing legal problems of the underrepresented.

The law rests upon assumptions about the fundamental nature of human experience which reflect the perspective of the dominant legal culture, but these assumptions are neither adequate nor universally agreed upon.\textsuperscript{34} For

\begin{itemize}
\item \textsuperscript{33} For examples of literature exposing the minority experience and voicing the cry of the dispossessed, consider the following writings of African American authors from the antibellum period: W. Wells Brown, \textit{Cotel} (1853) (written by an ex-slave about the problems of the fugitive slave in southern states, likening their experience to refugees from foreign lands); F. J. Webb, \textit{The Garies and their Friends} (1857) (detailing the African American experience in Philadelphia); H. E. Wilson, \textit{Our Nig; or Sketches from the Life of a Free Black} (1859) (an African American woman who was an indentured servant in New England explores the hypocrisy of purported legal reform advocates). Examples of similar writings about the African American experience during the early 20th century include: C. W. Chesnutt, \textit{The Colonel's Dream} (1905) (explores the caste system in the south); C. W. Chesnutt, \textit{The Marrow of Tradition} (1901) (regarding a famous race riot and the emergence of a caste system under a segregationist state constitution); R. Ellison, \textit{The Invisible Man} (1947) (likening the personal experience of an African American man to a "disembodied voice"); R. Wright, \textit{Native Son} (1940) (a study of the racially prejudiced workings of the criminal justice system based upon an actual trial in Chicago). For literature emerging out of the Civil Rights Movement of the 1960's, consider: J. Baldwin, \textit{Blues for Mister Charlie} (1964) (a play exploring race relations in the south); J. E. Wideman, \textit{Reuben} (1987) (an African American lawyer in Pittsburgh reveals the conditions of African Americans today). Utopian novels voicing the feminist perspective include: L. Waisbrooker, \textit{A Sex Revolution} (1893) (19th century feminist challenges war, church, and state); A. Walker, \textit{Meridian} (1976) (explores the African American feminist's perspective of the Civil Rights movement). For a unique literary critique of the criminal trial process of the early 1900's, see H. Fast, \textit{The Passion of Sacco and Vanzetti} (1953) (based on the actual murder trial in the early 1920's of two Italian-American anarchists). For examples of English authors, consider E. Robins, \textit{The Convert} (1907); V. Woolf, \textit{A Room of One's Own} (1929). For literary accounts of the alienation of the handicapped, see J. R. Cocke, M.D., \textit{Blind Leaders of the Blind: The Romance of a Blind Lawyer} (1896); M. J. Ward, \textit{The Snake Pit} (1946) (life inside a mental institution during the early 20th Century). For literature reflecting the realities of dysfunctional families, consider M. Barre, \textit{The Case Against the Andersons} (1983) (a teenage girl sues her parents for denial of proper emotional care); E. Bunker, \textit{Little Boy Blue} (1981) (how criminal justice institutions actually foster juvenile delinquency); J. Guest, \textit{Second Heaven} (1982) (about a custody battle in a broken home). For a general anthology of the literature of social protest, see U. Sinclair, \textit{The Cry For Justice} (1963).
\item \textsuperscript{34} See, e.g., West, \textit{Jurisprudence and Gender}, 55 U. Chi. L. Rev. 1 (1988). The author provides a matrix for understanding the basic differences between the dominant legal theory, which is sometimes regarded as a masculine jurisprudence, and feminist legal theory or a feminist jurisprudence. The basic differences are roughly as follows:

Liberal legalism, the dominant legal theory, asserts that persons value autonomy and the separation of the individual from others. Because of this separation, and the fact that each autonomous person pursues his or her own ends in a world of limited resources, each person fears conflict with the other as well as the specter of annihilation by the other. The law is
example, some feminists assert that the rule of law reflects the dominant masculine culture of equality, rights, and distance from others, and under-values the feminine values of intimacy, nurturance, and care. According to such feminists, the law, as the creation of the dominant masculine culture, is disproportionately unresponsive to the subjective experiences of women, ignoring women's reasoning and insight, and is thereby oppressive.

Literature can prepare the lawyer to respond to diverse perspectives, such as those of feminists, by stimulating open dialogue about where the law structured around a concept of “rights” which protect one's autonomy and prevent one's annihilation. Liberal legalism most strongly advances the masculine perspective.

Critical legal theory also sees the individual as autonomous, but rather than celebrating that autonomy, it views the individual as existing in a state of existential grief and longing for communion with others. The greatest fear is isolation, not annihilation. Although the critical legal studies movement attacks the established "masculine" legal institutions as exploitive, see R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986), critical legal studies provides the second prong of the masculine perspective.

By striking contrast, an assertion that women have an existential connection to others, rather than a separation, underlies feminist legal theory. This dichotomy accounts for the sharply contrasting world view of men and women. Pregnancy illustrates the paradigmatic experience of physical connection. “Radical” and "cultural" feminists diverge only in their accounts of the subjective experience of that connectedness. The cultural feminist sees women valuing intimacy, nurturance, and developing an ethic of care, while dreading separation from others. The natural proclivity for intimacy should not be confused with the critical legalist’s longing for connection. Connection is a natural state for women; men surreptitiously seek connection to overcome their natural isolation.

While the cultural feminist celebrates the ethic of care, the radical feminist characterizes connection to others as intrusive and intrusive and longs for individuation and deliverance from that state. This should not be confused with liberal legalism’s assertion of self-autonomy. The threat to the individual’s autonomy arises in the context of competition over mutually desired ends. The threat to individuation, a more subtle concept, arises when an individual’s formulation of self-purpose is frustrated or prematurely abandoned in order to assist the necessities of other people.

The antipodal perspectives of men and women account for their differing moral voices. Men develop a morality that respects equality, rights, and freedom. This is the moral code reflected in the law, creating, as the feminist sees it, a patriarchy. Women develop a morality of nurturance and care that endures despite patriarchy’s hostility to it.

For an explanation of the formation of a moral framework in little boys and girls, see C. GILLIGAN, IN A DIFFERENT VOICE (1982) (distinguishing the emergence of an “ethic of rights” in boys and an “ethic of care” in girls). Id. at 164.

35. West, supra note 34.

36. Id.

37. Some legal critics believe that the legal system is designed to eradicate perspectives that diverge from the dominant culture and consequently will never have the capacity to respond to or harmonize these divergent perspectives. See, e.g., Scales, The Emergence of a Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373 (1986). According to Professor Scales:

Male and female perceptions of value are not shared, and are perhaps not even perceptible to each other. In our current genderized realm, therefore, the ‘rights-based’ and ‘care-based’ ethics cannot be blended. Patriarchal psychology sees value as differently distributed between men and women: Men are rational, women are
is unjust and unreflective of a publicly shared commitment to value, and how it can be adjusted to mirror a unified moral vision.

II. READING LAW AS LITERATURE: LEGAL APPLICATIONS OF LITERARY INTERPRETATION

A. Law as Interpretation

Language, specifically text, is central to both literature and law. Not surprisingly, many legal critics have begun to explore the possibility of borrowing established literary hermeneutic techniques to provide insight to legal text. The deconstructionist school of literary interpretation currently holds influence among some legal critics. These critics assert that the

not. Feminist psychology suggests different conceptions of value: Women are entirely rational, but society cannot accommodate them because the male standard has defined into oblivion any version of rationality but its own. Paradigmatic male values, like objectivity, are defined as exclusive, identified by their presumed opposites. Those values cannot be content with multiplicity; they create the other and then devour it. Objectivity ignores context; reason is the opposite of emotion; rights preclude care. As long as the ruling ideology is a function of this dichotomization, incorporationism threatens to be mere co-optation, a more subtle version of female invisibility.

Id. at 1383 (footnotes omitted).


a) Traditional method, which focuses on the author's intent and asserts that a unitary, ascertainable meaning is implanted in the text by the author.

b) Structuralism, which asserts that meaning can be derived more from the structure of the text than from the author's intent.

c) Poststructuralism, which asserts that the meaning of a text is not unitary and is a product of the interaction of reader and text.

Id.

In addition, some scholars have identified a fourth category, deconstruction, which asserts that meaning can be discerned as much by what is absent or repressed in the text as by what is present. For further discussion of the deconstructionist school, see infra note 39.


Jacques Derrida, the French philosopher who proposed the philosophical practice of deconstruction with regard to textual interpretation, developed his theory in several writings. Balkin identifies them as J. DERRIDA, DISSEMINATION (B. Johnson trans. 1981); J. DERRIDA, MARGINS OF PHILOSOPHY (1982); J. DERRIDA, OF GRAMMATOLOGY (1976); J. DERRIDA, POSITIONS (1981); J. DERRIDA, SPURS (1979); J. DERRIDA, SPEECH AND PHENOMENA (1973); J.
methods of deconstructionism assist an understanding of how the rule of law defines and constricts human beings, so that the critic may better evaluate the law in terms of true justice. Notwithstanding controversies, legal critics have applied two deconstructive practices to legal texts: the liberation of the text from the author and the inversion of the hierarchies. Both interpretive techniques possess indisputable value.

1. The Liberation of the Text from the Author

The liberation of the text from the author questions the assumption that interpretation should hinge on the preservation of an inherent meaning placed in the text by the author. Courts of law often assert that correct interpretation of a given case or statute must reflect the author's intent and that insufficient attention to that intent will render the construction unauthoritative. The liberation of the text from the author challenges the way judges and lawyers rely on the intent of the drafters of opinions or statutes to legitimize a given interpretation. The deconstructionist notes that the most important meaning in a text does not necessarily coincide with the author’s intent. To the contrary, the deconstructionist asserts that the originally unintended meanings that are assigned to the text by subsequent readers affirm the special quality of text and language in general, and are therefore equally as important as the author’s intent.

Recognizing that language is essentially the use of abstract symbols to convey ideas, the deconstructionist asserts that intersubjective meaning is only possible if those symbols have a public interpretation divorced from,


For examples of legal critics who generally affirm the use of literary interpretive techniques in legal criticism, see generally Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527 (1982), stating: “[M]any more theories of interpretation have been defended in literature than in law, and these include theories that challenge the flat distinction between description and evaluation that has enfeebled legal theory.” Id. at 530. See also R. Dworkin, How Law is Like Literature, in A Matter of Principle 146 (1985) (developing the metaphor of law as a chain novel); Garet, Comparative Normative Hermeneutics: Scripture, Literature, Constitution, 58 S. Cal. L. Rev. 37 (1985); Interpretation Symposium, 58 S. Cal. L. Rev. (1985); Symposium: Law and Literature, 60 Tex. L. Rev. 373 (1982). But cf. R. Posner, supra note 1, at 209-68 (for a discussion of Judge Posner’s views on the law and literature movement, see supra note 6).

40. Balkin, supra note 39, at 746.
41. See generally Balkin, supra note 39, at 772-85.
42. Id. at 772-73 and 773 n.87.
43. Id. at 777-78.
44. Id. at 778-79.
and not necessarily identical to, the intent of the author.\textsuperscript{45} This unique characteristic liberates language to operate within unforeseen contexts. Meaning becomes context-relative rather than bound by the author's intent.\textsuperscript{46} According to the deconstructionist, therefore, original intent does not provide a sufficient basis for interpretation. The weight given to original intent in assessing the meaning in text must be complemented by an acknowledgment of the present reader's role in the interpretive process.\textsuperscript{47} In law, this places great import on each successive judge's interpretation.

2. \textit{The Inversion of the Hierarchies}

In the alternative method, the inversion of the hierarchies, the critic identifies hierarchical oppositions in the law, such as the rule versus the exception, the present versus the absent, the apparent versus the inferred.\textsuperscript{48} The critic then temporarily reverses the relationship of privilege, not in order to replace established norms, but as an investigative technique to dissect and evaluate the law, without the interference of habitual modes of categorization and bias.\textsuperscript{49} In this way, the critic can demonstrate how each term of the opposition depends on the other and therefore neither term can be primary or dominant.\textsuperscript{50}

The deconstructionist demonstrates that established legal concepts result from the prioritization of one concept over an equally plausible, inherent opposite.\textsuperscript{51} By exposing this relationship between opposites in the legal system through deconstruction, "we are brought to an entirely different vision of moral and legal obligation."\textsuperscript{52} The rule of law reflects the privileging of a particular social theory or interpretation of human nature which defines the public moral vision and the common good.\textsuperscript{53} Laws privilege certain aspects of our human nature over others.\textsuperscript{54} The deconstructionist legal critic shows

\begin{itemize}
\item \textsuperscript{45} Id. at 779-80.
\item \textsuperscript{46} Id. at 780-81.
\item \textsuperscript{47} Jacques Derrida calls the relationship of mutual dependence between oppositions, such as a textual interpretation bound by author's intent and one freed from author's intent, the "differance." Deconstructionism does not favor one interpretation over the other, but rather serves only to reveal that the interpretation privileged or dominant is incomplete without its minority or non-dominant counterpart. \textit{See generally} Balkin, \textit{supra} note 39, at 751-55, 780.
\item \textsuperscript{48} Id. at 746-47.
\item \textsuperscript{49} Id.; \textit{see also} id. at 748-51 (providing three illustrations of this deconstructive technique).
\item \textsuperscript{50} Id. at 751.
\item \textsuperscript{51} Id. at 754.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id. at 762.
\item \textsuperscript{54} Id.
\end{itemize}
how the moral vision reflected in the law neglects or suppresses an equally defensible countervision and that the two visions are mutually dependent.\textsuperscript{55}

Thus, the deconstructive technique provides a useful tool to advocates of legal reform. For example, some feminists assert that men and women have distinct approaches to moral and legal dilemmas.\textsuperscript{56} Such feminists contend that while men value rights, autonomy, and separation, women value relationships and connections.\textsuperscript{57} These feminists seek to reveal the failure of the dominant legal culture to reflect a complete and universally accepted conception of fundamental human values. Feminists further assert that the rule of law fails to recognize the values that flow from the unique experience of women. Specifically, some feminists observe that while the rule of law protects against the danger of annihilation\textsuperscript{58} and the threat of physical harm (dangers which are attendant to autonomy—a masculine value), it does not fully acknowledge the threat to individuation\textsuperscript{59} (a danger which is attendant to intimacy—a feminine value).\textsuperscript{60}

3. An Application of the Deconstructionist Technique to Law

The criminal law concerning rape\textsuperscript{61} provides a ready example of the privileging of one perspective over another and can be used to demonstrate

\textsuperscript{55} Id. at 762-63.
\textsuperscript{56} See West, supra note 34.
\textsuperscript{57} Id.
\textsuperscript{58} Robin West uses the term “annihilation” to describe “the official harm of liberal theory.” In a state of autonomy or separateness from others, human beings are naturally aggressive and likely to frustrate each other’s pursuit of individual ends. In an extreme case, competition in a world of limited resources and opportunities could ultimately cause one person to kill the other. West, supra note 34, at 7-9. This Comment adopts West’s use of the term “annihilation” to indicate any interference with a person’s pursuit of personal objectives, up to and including physical annihilation, imposed by another person who desires the same objective.

\textsuperscript{59} Robin West describes the “unofficial” harm of a state of connectedness or intimacy with others as the threat to “individuation.” She writes that connection, as a natural state for women, “invites invasion into the physical integrity of [women’s] bodies, and intrusion into the existential integrity of [women’s] lives.” West, supra note 34, at 15. This Comment adopts the use of the term “threat to individuation” to indicate any threat by another of occupying or displacing a person’s own ends, but not in the same sense of displacement that occurs in a competitive state. A threat to individuation occurs when one person’s end subsumes another’s because of a pressing urgency, such as a child’s total dependence on its caretaker. In other words, a threat to individuation is a threat to rob one of a personally-defined end, rather than to compete for a mutually desired end.

\textsuperscript{60} West, supra note 34, at 58-59.

the deconstructionist technique. Some feminist legal critics characterize the legal response to rape as denying, in practice, criminal sanction unless the rape occurs in the context of some other physical harm indicating that the victim faced a plausible threat of annihilation. Therefore, a rape that does not display evidence of a determinable harm goes virtually unpunished, prejudicially affecting women, who overwhelmingly comprise the majority of rape victims. These feminists contend that the law, in practice if not in theory, does not adequately respond to victims who do not freely consent to sexual intercourse, but who are coerced into submission by husbands, acquaintances, or dates — circumstances where the law presumes consent.

Feminist legal critics assert that a woman's perspective regarding force differs radically from that of a man. A woman may experience the threat of force in terms of invasion whether or not her attacker brutally beats her, and long before "she has established to the satisfaction of a court of law that she has 'really' not consented." Many rape victims react to the terror of sexual assault by freezing and complying with their attacker's demands. This choice not to resist, made by the victim under extreme duress, may reduce the risk of further injury to the victim, but it also weakens the victim's ability to prove the crime of rape when a de facto requirement of physical force exists. Feminists argue, therefore, that legal doctrines or legal

Actual force or intimidation evidences lack of consent. People v. LaSalle, 103 Cal. App. 3d 139, 162 Cal. Rptr. 816 (1980); State v. Schuster, 282 S.W.2d 553 (Mo. 1955); see also Smith v. State, 161 Ga. 421, 131 S.E. 163 (1925) (mental incapacity); CAL. PENAL CODE § 261 (West 1988) (fraud); IDAHO CODE § 18-6101.5 (1977) (insensibility).


63. West, supra note 34, at 59.

64. Note, supra note 62, at 401 & n.15.

65. See West, supra note 34, at 59; see also Note, supra note 62, at 402 n.24 (discussing the marital exemption in rape law, which most jurisdictions continue to enforce); Comment, For Better or for Worse: Marital Rape, 15 N. KY. L. REV. 611 (1988).


67. Id.


69. Id.; see also Note, supra note 62, at 402 & n.22 ("Although force is not an actual element of the crime, the evidence must show that force was used to accomplish sexual intercourse in order to prove that the woman did not consent." (quoting R. PERKINS & R. BOYCE, CRIMINAL LAW 211 (3d ed. 1982)).
practices that privilege the masculine perspective and subordinate the feminine perspective, as does rape law, should be exposed as incomplete.\textsuperscript{70}

The feminist could employ deconstructionism to achieve this exposure by asserting that rape law, which in practice generally punishes a rape only when combined with another act of physical brutality, does not protect women from rape at all. The fact that rape often occurs under circumstances that lack physical force demonstrates this failure in the law.\textsuperscript{71} Therefore, rape law, as applied, does not serve to protect women from the harm to individuation which rape threatens, but rather acts to protect the autonomy of human beings and to punish behavior that threatens annihilation.\textsuperscript{72}

Having identified the privileged perspective, the feminist would proceed to posit that rape, unlike most forms of assault and battery, is not fundamentally a threat of annihilation, but is rather a threat to individuation.\textsuperscript{73} The threat to individuation fundamentally characterizes rape and therefore justifies the view that rape law should be grounded in an underlying right to protect one's individuation. This position reflects distinctively feminine values and fears.\textsuperscript{74} In applying deconstructionist theory in the rape context, individuation becomes temporarily privileged over autonomy, thereby ensuring that rape will be recognizable in instances where no outward manifestations of brutality occur. By uncovering a dimension of rape that the law fails to address adequately, the feminist brings to public consciousness the incompleteness of the established approach to rape and generates new insight into the crime. In addition, the feminist legal critic has suggested a different "vi-

\textsuperscript{70} Scheppelle, \textit{supra} note 62, at 1102-03, in her review of Estrich's book, \textit{Real Rape}, points out that although there has been some move to reform the wording of rape statutes in order to shift the focus from the victim (which resulted in painful interrogations of the victim about her sexual reputation) to the defendant, courts have not entirely relinquished a distrust of women who claim rape. \textit{See also} Note, \textit{supra} note 62; Note, \textit{The Victim in a Forcible Rape Case: A Feminist View}, 11 AM. CRIM. L. REV. 335 (1973). For cases that demonstrate past distrust of women's accounts of rape, see Gordon v. State, 32 Ala. App. 398, 400, 26 So. 2d 419, 421 (1946) (finding implied consent by the victim because she had been drinking); People v. DeFrates, 33 Ill. 2d 190, 196, 210 N.E.2d 467, 470 (1965) (dismissing a rape charge as an expression of the woman's guilty conscience). For examples of efforts to reform rape law, see People v. Barnes, 42 Cal. 3d 284, 228 Cal. Rptr. 228, 721 P.2d 110 (1986) (clarifying the 1980 Amendment to section 261 of the California Penal Code, which omitted the requirement of physical resistance); State v. Gray, 497 S.W.2d 545, 548 (Mo. Ct. App. 1973) (omitting physical resistance where the victim fears physical violence).

\textsuperscript{71} \textit{See, e.g.}, Barnes, 42 Cal. 3d 284, 228 Cal. Rptr. 228, 721 P.2d 110 (the victim showed substantial fear but exchanged kisses with her attacker).

\textsuperscript{72} \textit{See generally} West, \textit{supra} note 34, at 58-61.

\textsuperscript{73} \textit{Id.} at 60-61.

\textsuperscript{74} \textit{Id.}
sion of moral and legal obligation." The deconstructionist technique has assisted the feminist legal critic to bring to the fore suppressed possibilities.

In the rape example, incorporating the new insight into legal practice raises problems of proof that could limit the law's ability to accede to the feminine perspective. Nevertheless, the literary technique has maintained a channel of open dialogue and inquiry into the moral values that direct the law.

B. Law as Imperative

The law and literature movement proposes that the science of textual interpretation has interdisciplinary utility and that it is worthwhile to explore the congruous elements of literary and legal hermeneutics because the former is likely to illuminate the latter. However, the concomitant difficulties that limit the analogue of law and literature must also be considered.

Literary critics are divided about the general nature of textual interpretation. The disagreement centers on whether interpretation is, by nature, purely objective, purely subjective, or has elements of both. The objective interpretivists believe that meaning lodges in the text itself.

At the opposite pole

75. Balkin, supra note 39, at 754. For another good example of legal deconstruction, see Balkin's discussion of contractual obligations. Id. at 767-72.

76. This is part of a more general trend, sometimes called "the linguistic turn," according to which a priority is given to interpretation over abstract theory in addressing questions of philosophy, theology and law. See H. Godamer, Truth and Method (1975); H. Godamer, Philosophical Hermeneutics 25 (1976) (where the author writes of the "universality of hermeneutic reflection" based on "the universality of human linguisticity as a limitless medium"). Ronald Dworkin's attempt to articulate an understanding of "law as integrity" presents a major recent example of this trend in legal scholarship. See R. Dworkin, Law's Empire 176-224 (1986).

77. See, e.g., infra notes 78, 79, 81.


79. Id. at 206. See, e.g., Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527 (1982). Dworkin states that in order to distinguish interpreting a text from changing it, the identity of the text must be preserved through the concept of a "canonical text." Id. at 531. Dworkin states that "all the words must be taken account of and none may be changed to make 'it' a putatively better work." Id. Both the literary and legal analyst engage in discovering the "best" reading of this canonical text, but the written word severely constrains their activity.

Id. Strictly speaking, the meaning these analysts assign cannot be said to be determinate in the sense that there can be only one objective interpretation; nor, however, can the interpretation be wholly subjective inasmuch as it is a link in the chain of institutional history. Institutional rules and principles shape interpretation. Id. at 542-43. Normative theories (both in art and in law) will inform a judgment about which interpretation is "best." In literature, such a judgment will depend primarily on how broadly the reader conceives the purpose and function of
stands the subjectivist view that texts are void of any fixed meaning and fluctuate according to each individual reader's response. The pure subjectivist view, therefore, could present endless possibilities of meaning, with one reader's interpretative response superimposed over an equally defensible alternative response, followed by another's inversion of it and counter-inversion ad infinitum, leading potentially to nihilism. As the rape example

art. Id. at 532. In law, the interpretation will depend on a broad legal philosophy or political theory. Id. at 545. The convictions about the function and value of either art or law will "tutor and constrain" the interpretation. Id. To address the fact that any one person's interpretation will encounter opposition, a "useful conception of interpretation must contain a doctrine of mistake." Id. at 544. See also Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 744-45 (1982) (arguing that "disciplining rules," derived from the specific institutional context, whether legal or literary, serve to clarify ambiguities in the text by severely limiting the interpreter's subjectivity). These disciplining rules provide the basis by which to make an interpretive judgment, thereby rendering the interpretive process objective. White, supra note 27 (arguing that one may establish a meaning that is virtually objective, even if not in the absolute sense). But cf. Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982) (claiming that Dworkin falls into the very fallacies of both pure objectivism and pure subjectivism which he attempted to impugn). Id. at 552; see also Fish, Fish v. Fiss, supra note 6, at 1328 (claiming Fiss' theory of disciplining rules untenable because "rules . . . do not stand in an independent relationship to a field of action on which they can simply be imposed . . . they make sense only in reference to the very regularities they are thought to bring about."). Because rules themselves require an interpretive fore notion, they cannot constrain interpretation. Id. at 1332; Levinson, Law as Literature, 60 TEX. L. REV. 373, 401 (1982) (asserting that Fiss' position is fundamentally flawed because the "united interpretive community" which is implicitly necessary to support Fiss' theory "simply does not exist"); cf. Fish, infra note 81.

80. West, supra note 78, at 244.

81. See, e.g., Fish, Interpretation and the Pluralist Vision, 60 TEX. L. REV. 495 (1982) (arguing that interpretation is as evasive as there are differing points of view). No principle holds precedence over any other perspective by virtue of its own enduring value because "[t]here are no principles above interest, only principled interests." Id. at 498. The dominance of one interest or interpretive perspective over another results simply from the strength of persuasion. If a particular interpretation ever achieves general acceptance, it is not because of its general disinterested rationality but because "an act of persuasion has been so successful that the rationality it urges has been generally accepted." Id. No interpretation exists outside the context of someone's perspective, therefore, no interpretation is enduring. Neither literary text nor legal text can be detached from its readers and "turn[ed] . . . into the kind of text that speaks to all men in all circumstances." Id. at 503. There is no finality to interpretation, but meaning can be constructed by readers acting within the context of a moment in history, from a particular perspective. Id.; see Levinson, supra note 79, at 377 (asserting that written text, and words in general, have no absolute and constant referents and that meaning derives only from the exchange between reader and text and is therefore unstable); see also S. FISH, IS THERE A TEXT IN THIS CLASS? 327 (1980) (stating, "[i]nterpretation is not the art of constructing but the art of constructing"); Fish, Don't Know Much About the Middle Ages, supra note 6; Fish, Fish v. Fiss, supra note 6; Fish, supra note 79; West, supra note 78 at 206 & n.10. Levinson differs from Fish in that while Fish believes that privileging of perspectives is a matter of persuasion, Levinson conceives of a language that transcends all perspectives, but which is presently unavailable. See Fish, supra note 81; cf. Graff, "Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405 (1982); see
above shows, when taken to an extreme, the unresolvable deconstructionist insights could yield a cataclysm of subjectivity.

The interpretation controversy raises a serious question concerning the extent to which literary criticism is adaptable to legal criticism. In whatever manner the objectivist/subjectivist controversy is resolved in literary criticism, in law there are special constraints on interpretation. One federal circuit judge and commentator on the law and literature movement recently observed:

Law presupposes a degree of uniformity that would be otiose in cultural affairs. For a literary critic to propose a startling new reading of a work of literature is harmless, and often healthy. But if every lawyer and judge felt free to imprint his own personal reading on any statute, chaos would threaten.82

The constraints on interpretation in the legal context derive from the nature of adjudication and the consequences of interpretation within the adjudicatory process.83 If an ascertainable, positive meaning exists within legal text itself, then the interpretive activity lends the adjudicative process the power of rational persuasion.84 "Obedience to an authoritative legal text" solves the problem of unrestrained personal or partisan political power because judges would be compelled by reason to render the objectively determinate interpretation of the law at issue.85 Adjudication becomes an act of "civil obedience,"86 curtailing flexibility and moral maturation in the development of the law.

To justify the morality of the legal text, and accordingly, adjudicatory power, the modern objectivist supplements the interpretation of legal text with society's conventional morality.87 The modern objectivist asserts that adjudication "by virtue of its substantive supplementation and its procedural

82. R. POSNER, supra note 1, at 242.
83. See West, supra note 78, at 206-07.
84. Id. at 206.
85. Id. at 212 (emphasis omitted).
86. Id. at 213.
87. Id. at 215.

[O]bjectivists have rejected an identification of the 'text' to be obeyed with either original intent or literal meaning, and have carved out instead a third alternative: the 'text' (including the constitutional text) which can morally purify judicial power, and the interpretation of which constitutes the core of adjudication, must embrace society's conventional morality. This position might be called 'supplementalism'.

Id.
discipline . . . is a morally justified practice.” The manifest problem with this objectivist interpretation construct is that it ties the morality of adjudication to the contemporary strain of moral relativism, guaranteeing neither true morality nor true justice. The privileging phenomenon of deconstructionism could reveal the incompleteness of this approach. The conscious justification of evil and oppressive practices in the law at various points in history, have devastated, in turn, women, the unborn, the poor, African Americans and Hispanics, Native Ameri-

88. Id. at 217.
89. See, e.g., id. at 219-44 (West uses a piece of literature, Mark Twain's *Pudd'n Head Wilson*, to illustrate the folly of the objective interpretive strategy in legal analysis).
90. The notion that women are naturally subordinate to men prevailed frequently in American legal history. Prior to the mid-19th century, the common law ranked the married woman as "something better than [her husband's] dog, a little dearer than his horse." See Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1044-70 (1972). Women were barred from entering the legal profession. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall) 130 (1873) (affirming denial of application for a license to practice law based solely on the fact that the applicant was female); see also *In re Lockwood*, 154 U.S. 116 (1894) (holding that a woman is not a "person" within the meaning of a state attorney licensing statute). Equal protection and due process challenges made in the 20th century also have reflected the Court's "benign preference" for women based on women's presumed inherent inferiority. See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a state statute that restricted the number of hours women could work in certain establishments); see also *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a state statute that provided women with the right, but not the duty, to serve on juries); *overruled. Taylor v. Louisiana*, 419 U.S. 522 (1975); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a state statute that allowed women to work as waitresses, but not bartenders); *supra* notes 62, 65, 70.
91. See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (invalidating those sections of a state ordinance that required parental consent, informed consent, a 24-hour waiting period, and "humane and sanitary" disposal of fetal body parts); *Roe v. Wade*, 410 U.S. 113 (1973) (creating a right of privacy that virtually granted a pregnant woman the unconditional right to abortion, and holding that a human fetus is not a "person" within the meaning of the Constitution).
93. Even after the passage of the thirteenth amendment, U.S. CONST. amend XIII, African Americans endured lingering effects from the evils of slavery. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding a state welfare program that disproportionately assisted White beneficiaries over African American and Hispanic beneficiaries); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (constitutionally validating racial segregation under a "separate but
cans, the handicapped, and children. This list testifies to the fallacy of moral relativism with its pernicious legal sequel.

Similarly, the subjective approach to legal interpretation becomes problematic when extended logically to the adjudicative process. If a text lacks all determinacy, interpretation necessarily becomes irrational and subjective. It follows then that adjudication, likewise, becomes irrational and subjective and “is really an act of [political] power rather than an act of understanding.” Unlike the objectivist, who sees interpretation as a constraint on legal power, the subjectivist views interpretation as the cause of unrestrained, coercive power. The subjectivist understands all acts of interpretation as rank assertions of political power. Therefore, a subjective interpretivist can find “no ‘real’ basis for moral criticism of law any more than... a ‘real’ basis for adjudication.” Ultimately, the subjectivist must conclude that his own critique of the law is an exercise in vanity because he cannot credibly propose a set of values that “ought” to supplant the ones already in place. Thus, from the subjectivists’ view, the politically empowered determine the values reflected in the law, and the law, in turn, is

equal” theory); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (confirming the position of the African American slave as mere property by holding that the Missouri Compromise deprived slave owners of their property without due process).

94. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (sometimes referred to as the Indians’ Dred Scott decision, sustaining an allotment act against the claim that the allotment process violated a solemn treaty and due process of law); see generally C. Wilkinson, American Indians, Time, and the Law (1987).

95. The handicapped have faced segregation and degradation throughout history. Institutions have been erected to warehouse the retarded for life, A. Moore, The Feeble-Minded in New York 11 (1911); retarded children were denied education, see, e.g., Pennsylvania Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294-95 (E.D. Pa. 1972); and state statutes have denied mentally handicapped persons citizenship, Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss. Laws 288, 294. States have also enacted compulsory eugenic sterilization laws. J. Landman, Human Sterilization 302-03 (1932); see also City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (upholding a zoning ordinance that excluded group homes for the mentally retarded from the community); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, (1978) (majority opinion of Powell, J.); Buck v. Bell, 274 U.S. 200 (1927) (upholding a state statute that permitted sterilization of state supported mentally handicapped persons who have an inheritable form of insanity or imbecility). Justice Holmes’ regrettable but infamous decision stated, “[t]hree generations of imbeciles are enough.” Id. at 207.


97. West, supra note 78, at 206-07.

98. Id. at 244.

99. Id.

100. Id. at 247.

101. Id.

102. Id. at 253.
critiqued on its success or failure in reflecting those values. The subjectivists contend that criticism based on values derived from alternate visions are politically enfeebled, while criticisms based on a vision of true human nature are absurd inasmuch as the subjectivist denies any ultimate, immutable truth.  

In reality, adjudication extends beyond mere interpretation because the law carries legal sanction. A judge wields power with the force of the state behind it. Therefore, a judge’s interpretation becomes an imperative. Literary critics, however, wield no such authoritative power. Literary criticism is pure interpretation without an imperative. In this sense, judicial action is profoundly different from literary criticism.

The consequences of the imperative element of the law help explain why judges are less likely to give legal text a free interpretation that is not firmly based in prior history or legislative intent, instead adhering generally to the principle of stare decisis. The consequences of textual interpretation in the legal context also explain the vigor with which contending sides in the interpretivist/non-interpretivist debate defend their positions with regard to constitutional hermeneutics. In short, lawyers and judges seek to support

103. Id. at 252.
104. Id. at 277; see also R. Posner, supra note 1, at 240-43.
105. West, supra note 78, at 257.
106. Id.; see generally R. Posner, supra note 1, at 211-68.
107. "Interpretivists" (also known as "intentionalists") hold the view that judges are bound to what is clearly implicit in the words of the Constitution. "Non-interpretivists" (referred to alternately as "non-intentionalists" or the "value-oriented" school of constitutional interpretation) hold the view that judges should incorporate societal consensus on changing fundamental values in their interpretation of the Constitution. For examples of affirmations of the non-interpretivist view, see M. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); Grey, "Do We Have an Unwritten Constitution?" 27 STAN. L. REV. 703 (1975); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 39 STAN. L. REV. 343 (1978). For examples of the interpretivist position, see R. Berger, GOVERNMENT BY JUDICIARY (1977); Linde, Judges, Critics and the Realist Tradition, 82 YALE L.J. 227 (1972); Monaghan, Of "Liberty" and "Property": 62 CORNELL L.J. 405 (1977). Judge Robert Bork is described alternately as an interpretivist (intentionalist), Bork, Original Intent: The Only Legitimate Basis for Constitutional Decision Making, 26 JUDGES J. 12, 13-16 (Summer 1987); Bork, The Constitution, Original Intent, and Economic Rights, 23 SAN DIEGO L. REV. 823 (1986); R. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF
their interpretations of law with authoritative precedent and legislative (or authors') intent because law operates as a command.\textsuperscript{108} Literary critics need not be constrained either by an author's intent or authoritative precedent, because the literary critic commands no legally sanctioned authority, and the literary critic's work is compelling only to the extent that his or her peers respect the degree of scholarship reflected. Continuity with past interpretations bears little relation to the literary critic's influence, yet a novel literary angle can create an instant flurry of interest in the literary sphere. Legal interpretation, however, impacts the lives of the community in either an oppressive or liberating way, causing some legal scholars to declare themselves intentionalists\textsuperscript{109} when reading law, and subjective interpretivists when reading literature.\textsuperscript{110}

Thus, important distinctions delimit the uses of literary critical techniques in legal interpretation, and help to formulate the special hermeneutic character of law. The student of law should not infer, however, that the tools of literary criticism do not greatly serve the legal profession. The insights drawn from applying literary theory to legal analysis can raise significant questions for legal scholars and students. The questions themselves will suggest the direction needed to be taken to achieve just legal solutions.

C. Law as the Art of Rhetoric

On a separate plane apart from the interpretation controversy, literature has applications to the advocacy dimension of legal practice. Some lawyers have sifted literature for its lessons on rhetoric and found those lessons to be a professional asset.\textsuperscript{111} There is a nobility in legal advocacy. Legal advocacy need not conjure an image of the Sophists, but rather of Cicero. Precision and eloquence in language can help to shed the "masks" of inaccessible and stilted legal terminology. Lawyers should be percipient to rhetorical devices in order to hone their skills in the art of presentation, as well as to defend against corrupt practitioners. Clever and powerful deflective techniques in language can veil sophistic arguments. Legal issues can become confused within emotional appeals and elusive language. Critical probing of

\textsuperscript{108} West, \textit{supra} note 78, at 277.
\textsuperscript{109} \textit{Supra} note 107.
\textsuperscript{110} See, e.g., R. Posner, \textit{supra} note 1, at 218.
\textsuperscript{111} See, e.g., R. Posner, \textit{supra} note 1, at 269-316; cf. White, \textit{supra} note 7, at 2037-38.
Lessons In Law From Literature

judicial opinions, legal arguments, and political debates may be easily handi-
capped if the lawyer lacks the language sophistication needed to penetrate
deceptive language devices. Yet most law schools devote little time to devel-
oping the skills of written and oral legal advocacy.

To become a master of words and the structure and uses of language is the
lawyer’s professional responsibility, as it is the author’s passion. Literature
could provide the law professor with many memorable illustrations of clear
and persuasive language and could be an enormously effective teaching tool
for developing written and oral legal advocacy skills.

III. A JURY OF HER PEERS

A. A Literary Interpretation of the Story

A Jury of Her Peers, a short story written by Susan Glaspell in 1917,
presents a feminine perspective on the law replete with metaphor. Glaspell’s
story presents a conspicuous opportunity to examine the lessons in law that
a feminist writer urged in 1917 and to explore which lessons were well taken.

A Jury of Her Peers opens in the womanly setting of the kitchen of Martha
Hale, the story’s protagonist, on a cold March day. In the opening para-
graph, the reader can detect a hint of the gathering feminine rebellion
against the established order, symbolized by the “cut of the north wind,”
even if Martha herself is not fully cognizant of her own unarticulated long-
ings. The reader can also sense an imminent rebirth—spring approaching.

In the story, Martha finds herself hurriedly called away from her kitchen
duties to attend to an urgent situation that “was probably farther from ordi-
nary than anything that had ever happened in Dickson County.” The
masculine sounding “Dickson County” is a metaphor for the pervading mas-
culine legal culture. Martha’s abrupt departure from her “ordinary” rou-
tine, leaving the bread she was making unfinished, with “half the flour sifted
and half unsifted,” signals the subtle, but drastic break with the past and
the radical transformation of the women of Dickson County that is about to

112. Glaspell, A Jury of Her Peers, Every Week (1917), reprinted in The Best Short
113. The name has a Biblical reference. Martha is the Biblical figure who slavishly at-
tended to the household duties in obedience to social norms, while neglecting the full develop-
ment of her humanity. Luke 10:40-42 (The Jerusalem Bible). The reader will recognize the
relevance, not necessarily biblical, of the names of each of the story’s characters. In addition,
the reader should be sensitive to the significance of the form of address used in the story, as
when the author describes Mr. Hale alternately as Lewis and Mrs. Hale’s husband. Glaspell,
supra note 112, at 259.
114. Glaspell, supra note 112, at 256.
115. Id.
116. Id.
occur. The "half sifted," "half unsifted" flour is a metaphor for both the arrested self-development of the women under the established law and culture, and the deficient nature of the established law and culture itself. In either case, it is bread "all ready for mixing," waiting to be baked—or made whole and wholesome.

A few paragraphs later, Martha joins her husband along with Sheriff Peters, his wife, and Mr. Henderson, the county attorney, in a "big two-seated buggy." The buggy provides a metaphor for a society which has two essential components, male and female. Law and custom relegate the female component to the "back seat." They are traveling to the scene of the extraordinary event.

The author generously shades the story with the emerging feminine perspective. The story notes that Mrs. Peters, the sheriff's wife, was "small and thin and didn't have a strong voice." Because she is conspicuously bereft of personality and the descriptions of her are oddly conceptual, the reader could understand Mrs. Peters to personify the status of women under the law. Her small stature represents her stunted development as a fully responsible, self-realized, female adult. Her thinness represents how the legal system ignores, neglects, and fails to nurture her. The fact that her voice lacks vitality means that she lacks the political power to impact the legal system to which she is subject.

The story also states that Mrs. Peters, in fact, does not "look like a sheriff's wife," and is actually quite unlike the previous sheriff's wife, who was more robust. Mrs. Peters' faltering manner and her relation to the sheriff is a metaphor for the nascent self-awareness of the women of Dickson County and their relation to the law. The former sheriff's wife, and by analogy, her female contemporaries, "had a voice that somehow seemed to be backing up the law with every word." The seeming strength of the women of the past derived from the fact that they assumed their prescribed position within the dominant legal structure, and in doing so, their voices were swallowed by the thunder of the law. By contrast, the murmurous voices of the new women of Dickson County are weak next to the voice of legal authority. However, the new women are profoundly stronger than

117. Id.
118. Id.
119. Id.
120. Id. at 257.
121. Id.
122. Id.
123. Id.
124. Id. at 265-66. Note that the county attorney remarks, "[o]f course [the sheriff's wife] is one of us." Id.
their female predecessors in the sense that they have begun to reject the political and social dominance of men, in a radical departure from the past. Their voices do not merge with the powerful legal baritones, but hum a daring counterpoint.

The story, which was written before women's suffrage, reflects male institutions, such as the law, privileged with a distinctly masculine world vision, lacking channels for truly feminine participation and undermining the assertiveness of women. Many people contend that female exclusion continues to pervade society. A Jury of Her Peers was, in 1917, and to some extent remains, a mirror of the marginalized group experience of women.

The sheriff, Mr. Peters, personifies the dominant legal culture as a "heavy man with a big voice." Mr. Peters' stature suggests that he is well-nurtured, endorsed, and a thriving member of society. The fact that he speaks with a big voice represents his political empowerment, no doubt responsible for his vitality. He was "particularly genial with the law-abiding, as if to make it plain that he knew the difference between criminals and non-criminals." Mr. Peters, or the dominant legal culture that he represents, equates the law-abiding with the non-criminal and the non-law-abiding with the criminal.

The story carefully exacts the notion that a fully self-realized woman was an outsider to the legal system and masculine culture. Against the background of the era and the denial of the franchise to women, a woman's submission to the law was manifestly unfair. However, the protagonist of the story recognizes that if she does not submit to the law, she might be considered non-law-abiding, somehow criminal, with the "heavy" sanction of the law perched precariously above her. Mrs. Hale subconsciously experiences the appalling inequity of her legal status, which comes into her mind "with a stab," the painful realization that the law is perniciously intrusive and debilitating to women. The reader, empathizing with Mrs. Hale, temporarily assumes her feminine perspective. As a result, the story interacts with the reader in a profoundly unique way, compelling the reader's subordination of any personal parochial perspective or bias and promoting the reader's exploration of the perspective of the protagonist, in this case, Mrs. Hale.

In light of the women's acute sense of their vulnerability as political outsiders, and notwithstanding the realization that "they ought to be talking as

125. U.S. CONST. amend XIX (granting suffrage to women).
126. See, e.g., supra notes 34 and 37.
127. Glaspell, supra note 112, at 257.
128. Id.
129. Id.
well as the men,"\textsuperscript{130} or demanding to be heard in the political process, the women in the story remain reluctant to assert their feminine voice. The equation of the non-law-abiding with the criminal places Mrs. Hale, as an emerging self-realized woman, in an intuitively empathetic posture toward the criminal, or fellow outsider. Her sense of shared vulnerability makes Mrs. Hale uneasy at the sight of the scene of the crime, the Wright place. Upon approaching the Wright place, she does not "feel like talking,"\textsuperscript{131} or challenging the official interpretation of justice. On the other hand, the county attorney, talking and leaning "to one side of the buggy"\textsuperscript{132} under the symbolic imbalance of his one-sided perspective, is anxious to discover the evidence that would convict Minnie Foster, Mr. Wright's wife and the suspect in his murder. The male voice is ever regnant in the story; the female voice, ever discouraged in its longing to emerge.

The crime appears to have everything to do with an assertion of the feminine voice. When Martha Hale arrived at the door of the Wright's house, she "had a moment of feeling she could not cross that threshold . . . simply because she hadn't crossed it before."\textsuperscript{133} For Martha, crossing the threshold into Minnie Foster's house was a symbolic, irretrievable act of solidarity with Minnie, who had broken with the established order, albeit through a contemptible act of murder, leaving Minnie exposed to the hostility of the powerful.\textsuperscript{134} Martha projects how abysmally vulnerable she too could become with regard to societal pressure and even legal sanction if she stands in opposition to the established norm of masculine dominance.

The story illustrates how the law, lacking a mandate from the women of the community, coercively constrains them. Every act of law is an act of force against the women. Exclusion and vulnerability compel the women to unite in the hopes of emerging as politically empowered persons, and the women in the story find security in each other's company.\textsuperscript{135} The story en-

\begin{itemize}
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} The reader detects the hostility of the county attorney when he beckons the women, after crossing the threshold of Minnie Foster's door, to "[c]ome up to the fire, ladies," symbolically meaning step into the fire. \textit{Id.} at 258. Women, speaking in unison in the person of Mrs. Peters, however, are able to assert with trepidation, "'I'm not — cold,' " at last refusing to repress their uniquely feminine voice. \textit{Id.}
\item \textsuperscript{135} Examples of the women clinging to each other can be found throughout the story. \textit{See, e.g.}, "'I'm glad you came with me,' Mrs. Peters said nervously, as the two women were about to follow the men in through the kitchen door." \textit{Id.} at 257. "'You coming with me, Mrs. Hale?' she asked nervously." \textit{Id.} at 267. "'But I'm awful glad you came with me, Mrs. Hale. . . . It would be lonesome for me — sitting here alone.'" \textit{Id.} at 274. "'I guess before we're through with her she may have something more serious than preserves to worry about.'"
\end{itemize}
genders the belief that only by the women's combined voices can they have an impact on the established legal structure, and only then to the extent necessary to restore the quiet.\textsuperscript{136}

Martha, with a sense of the possibility of a uniquely feminine political identity, is acutely aware of how precious and tenuous that identity would be. The reader is left to imagine the lengths to which Martha would go in order to preserve that identity, propelled by the emerging realization of the history of female subjugation to men. Exclusion and subjugation of women has resulted either in alienation, which leads to dislocation within the legal system, or in accommodation to the male ethos, which leads to adoption of the male autonomy ideal in an effort to gain empowerment. At several points in the story, the women are tempted to embrace the autonomy ideal and to return the "fire" of their oppressors with "fire." The author uses fire symbolically as the weapon of the politically powerful to eliminate any incursions on their status as dominators.\textsuperscript{137} In the story, for instance, Mrs. Hale, turning from the stove, says pointedly that the "fire [is] not . . . much to brag of," and then more aggressively, "[t]he law is the law — and a bad stove is a bad stove. How'd you like to cook on this?"\textsuperscript{138} Later, when looking at the sheriff, "[h]er eyes felt like fire."\textsuperscript{139} Ultimately, the extreme position subconsciously entertained by Martha is self-defeating because it denies the truly interdependent nature of human beings. The author makes the point that no one class can afford to tailor the system narrowly to its singular perspective in a bid for dominance. The answer to patriarchy is not matriarchy, the story suggests, but the full participation of every member of society as a dignified and vital component.

\textsuperscript{136} Women, African Americans, the poor, and the handicapped have asserted themselves with varying degrees of success in this manner. The Women's Suffrage Movement culminated with the passage of the nineteenth amendment, and the 1960's Civil Rights movement influenced major civil rights legislation, such as the Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975, 2000a-2000h (1982 & Supp. V 1987). Other attempts at inclusion in the political system, such as Jesse Jackson's Rainbow Coalition, have had a more modest impact.

\textsuperscript{137} See, e.g., supra note 134.

\textsuperscript{138} Glaspell, supra note 112, at 270. Mrs. Peters also comes close to succumbing to that very mentality when she remembers:

'When I was a girl . . . my kitten — there was a boy took a hatchet, and before my eyes — before I could get there —' She covered her face an instant. 'If they hadn't held me back I would have' — she caught herself, looked upstairs where footsteps were heard, and finished weakly — 'hurt him.'

\textit{Id.} at 277.

\textsuperscript{139} \textit{Id.} at 280.
The story establishes that Mrs. Wright, Minnie Foster, apparently murdered her husband, who embodied the oppressive male system and abused her. But the story alludes to the notion that Mr. Wright planted the seeds of his own destruction. "'He died of a rope round his neck,'" Minnie Foster says, but she is unable to recall how the rope had been placed around her husband's neck. Superficially, Minnie's memory lapse is explicable as the murderer's psychological denial reflex. But metaphorically, the rope was already in place. The story suggests that a system based on domination is ultimately not viable and causes its own inevitable demise. Mr. Wright, the embodiment of the dominant legal system, was at every moment more vulnerable than he could have imagined for all the bravado of masculine superiority.

Minnie Foster, too, fatally erred when she ultimately attempted to replace the oppression of her husband, and by analogy, of the dominant legal system, with her own debarring act of power. The consequence was spontaneous mutual annihilation. Minnie predicted her own self-defeat when she worried that "'when it turned so cold [the night of the murder] . . . the fire would go out and her jars might burst.'" The cold is reminiscent of the north wind of the new feminism. The fire represents the bi-level oppression of the masculine legal system and her husband, whom Minnie imagines she will annihilate, or cause to "go out."

Minnie, symbolized by her jars, intuits her own self-annihilation, or "bursting" as the ultimate consequence of her act. Minnie's final desperate act did not, after all, free her from oppression, but infected her with the same terminal perspective which positioned the rope around her husband's neck. In the story, Minnie's pet bird, which is closely identified with herself, is found dead with a broken neck, paralleling her husband's fate. In recounting how Minnie acted on the day Mr. Wright's body was discovered, Mr. Hale says, "'Well, I was surprised. She didn't ask me to come up to the stove, or to sit down, but just set there, not even lookin' at me.'" The "fire" of oppression, this time Minnie Foster's flame, was extinguished. Minnie Foster was as lifeless as her husband, metaphorically murdered by her husband in the act of killing her bird, and existentially self-excommuni-

\[\text{References}\]

140. Id. at 261.
141. Id. at 262.
142. Id. at 264.
143. The reader learns that Minnie used to sing before she became married. After her marriage, the songs of the bird recalled to her the memory of a happier time. Id. at 268, 273, 275, 277.
144. Id. at 276.
145. Id. at 261.
cated from human fellowship by succeeding her husband as dominator and annihilator.

The story indicates that the frustration of living under an oppressive legal system can provoke the oppressed to react in uncharacteristically violent ways. Years of oppression had perverted Minnie's true nature and weltered her gifts. In the atmosphere of the new feminism, which, as Minnie exemplifies, is capable of manifesting as gross a hostility toward men, Mrs. Hale becomes alarmed for the welfare of her son, fearing "that maybe [he] wasn't dressed warm enough — they hadn't any of them realized how that north wind did bite." Mr. Hale, too, catches the forewarning import of the event. Testifying about his discovery of Mr. Wright's body, he recounts, "'Well, my first thought was to get that rope off.' . . . He stopped, his face twitching," presumably with self-association.

Throughout the story, the author conveys the potential for bitter conflict between segments of society, such as men and women, who exist in relative political and social profound inequality within a legal system structured to deflect, rather than incorporate, collateral or minority viewpoints. The conflict is perceived, at first by the men, later by Minnie Foster, to involve "all or nothing" stakes with a "winner take all" meed. The dead man is the outward manifestation of the men's innermost horror—the image of their own possible annihilation. Just as Minnie reacted fiercely to the "de-feminizing" effect of persistent male domination, so lies the potential for men to obliterate irrationally the encroachment of alternate perspectives. The story portrays an ominous sense of male defensiveness in the following passage:

The men talked for a minute about what a good thing it was the sheriff had sent his deputy out that morning to make a fire for them, and then Sheriff Peters stepped back from the stove, unbuttoned his outer coat, and leaned his hands on the kitchen table in a way that seemed to mark the beginning of official business. 'Now, Mr. Hale,' he said in a sort of semi-official voice, 'before we move things about, you tell Mr. Henderson just what it was you saw when you came here yesterday morning.'

146. Id. at 259.
147. Id. at 262. Note also the county attorney's comment that "'[s]omebody should have been left here yesterday [the day of the murder],' [to which the sheriff replied,] 'Oh — yesterday,' . . . with a little gesture as of yesterday having been more than he could bear to think of." Id. at 258.
148. The Wright's house is the archetypal setting for the male/female struggle. It is a struggle which takes place in the mind and the house is symbolically set "down in a hollow" where "you don't see the road." Id. at 274.
149. Id. at 258. For further symbols of male suppression of the emerging feminism, notice how often the heavy footsteps of the men are heard above the women as the men investigate the upstairs of the Wright house. The footsteps are reminders to the women of the men's
The talking among the men indicates their political empowerment. The sheriff, relieved that his deputy prepared a fire, is as confident as a soldier with a fresh supply of ammunition. The sheriff assumes a threatening posture toward the women when he steps back from the stove, unbuttons his coat, and leans on the kitchen table, which is symbolic of the feminine realm. His official or adversarial attitude toward the women can be distinguished from his semi-official, or more friendly tone toward Mr. Hale. Ultimately, the sheriff is intent on moving things about or reestablishing the male dominance, which was upset by Minnie's defiant act.

_A Jury of Her Peers_ further explores the implications of the gender experience on perception. The story suggests that the county attorney's inquiry into the facts surrounding Mr. Wright's death had a masculine bias, and that his masculine perspective hindered his ability to recognize evidence, not only of Minnie Foster's guilt, but of her emotional desperation as well. The county attorney is not responsive to the signs of Minnie's desperation because, as a man, he has not experienced the derogation of political powerlessness, and his investigation reflects his limited experience. It is ultimately the women who, although they have not been invited to partake in the investigation, with little effort piece together the puzzle of incriminating evidence against Minnie, while the men are frustrated in their efforts. Ironically, Mr. Hale, after "rubbing his face after the fashion of a show man getting ready for a pleasantry [says] 'But would the women know a clue if they did come upon it?'" The women, upon discovering a bird cage with a wrenched door, and Minnie's pet bird dead, at once understand that the bird convicts Mr. Wright as much as it convicts Mrs. Wright. The women surmise that Mr. Wright killed his wife's pet in an act of extreme aggression against his wife. The cumulative effect of his lifelong abuse, culminating in the shocking killing of the bird, motivated Minnie Foster to kill her husband. The women fear, however, that the legal system would not be receptive to the signifi-

capacity to "trample" them and can be heard at critical points of the women's dialogue, just when they seem on the verge of fully asserting their feminine voice. See, e.g., _id._ at 277, discussed _supra_ note 138; see also _id._ at 269, 270-71, 279.

150. _See, e.g., id._ at 260. Mr. Hale, speaking to the attorney, says, "'I didn't know as what his wife wanted made much difference to John.'" The county attorney interrupts with, "'I do want to talk about that, but I'm anxious now to get along to just what happened when you got here.'" _Id._ at 260. Addressing the sheriff, Mrs. Hale says, "'But I don't think a place would be any the cheerfuler for John Wright's bein' in it.'" The sheriff responded, "'I'd like to talk to you about that a little later, Mrs. Hale... I'm anxious to get the lay of things upstairs [where the body was found] now.'" _Id._ at 265.

151. _Id._ at 275-76.

152. _Id._ at 266.

153. _Id._ at 275-76.
Lessons In Law From Literature

cance of their feminine insight. Thus, the women conceal the evidence.\textsuperscript{154} By doing so, the women admittedly impeded conventional justice.\textsuperscript{155} The women understand that without the evidence, Minnie Foster would likely go free, but they also surmise that with the evidence, Mr. Wright would not be exposed for emotionally destroying his wife. Only a jury of her peers could have understood the total import of the evidence, and inasmuch as the truly feminine insight was not officially relevant, true justice, which would have convicted both parties, was thwarted. A court of law could not have been any more just than the women of Dickson County.

B. A Legal Application of the Story

1. The Need to Make the Legal System More Inclusive

\textit{A Jury of Her Peers} is a reflection on the idea that institutions established by men and predominantly for men, such as the law, are deficient and even brutish without the feminine perspective. This story was a daring socio-political statement at the time it was written, before women enjoyed a political voice. Three years later, the nineteenth amendment was passed, granting women nationwide the right to vote and thus allowing the feminine perspective to impact more significantly the law. \textit{A Jury of Her Peers} provided a non-violent and articulate register of women's cry for inclusion and could have penetrated the walls of law schools, complementing a technical course on criminal procedure, and inviting prospective legal representatives to explore rationally the rights of women at a time when women, themselves, were not likely to be found in law school.\textsuperscript{156}

At the same time, \textit{A Jury of Her Peers} indicted the entire legal system, which, operating in a social context of white male predominance, tended to exclude other minority segments as well as women, and to foster competition rather than cooperation in the struggle for political empowerment. The story, therefore, could have provided a stimulating, if controversial, springboard for the critique of liberal legalism\textsuperscript{157} among law students of that time,

\begin{itemize}
  \item \textsuperscript{154} Id. at 281.
  \item \textsuperscript{155} Id. at 278 ("'It was an awful thing was done in this house that night, Mrs. Hale,' said the sheriff's wife. 'Killing a man while he slept — slipping a thing round his neck that choked the life out of him. . . . 'The law has got to punish crime, Mrs. Hale. . . . ").
  \item \textsuperscript{156} "Women were barred from attending law school at Harvard until 1950 and at Washington and Lee until as late as 1972." Goldberg, \textit{Then and Now: 75 Years of Change}, 76 A.B.A. J., Jan., 1990, at 56. It was not until 1972 that all accredited law schools accepted women. Fossum, \textit{Law and the Sexual Integration of Institutions: The Case of American Law Schools}, 7 ALSA FORUM 22 (1983). The first woman to graduate from law school was Charlotte Ray, who graduated from Howard Law School in 1873. D. RHODE, \textit{JUSTICE AND ORDER} 23 (1989).
  \item \textsuperscript{157} See West, supra note 34.
\end{itemize}
and could do so today. The deconstructionist technique could be applied, in
the interest of open dialogue, to various areas of law to locate where the
privileged perspective may be overbearing. The law student, not bound by
the author's intent, could develop underlying elements of literary works,
such as *A Jury of Her Peers*, of which the author was unaware, generating
new insight for the law in the 1990's. Only the most superficial reading of
Ms. Glaspell's story could fail to enlighten students beyond the mere recog-

2. The Terms of Inclusion

As the rape example above also illustrates, *A Jury of Her Peers* suggests
that the gender experience has pervasive implications in the legal system. In
this way, the story not only raises the question of female or minority inclu-
sion, but it also hints at the possible terms of that inclusion.159

In the story, subtle gender-based distinctions, correlative to the gender
experience, affect what evidence is deemed legally relevant, and what consti-
tutes criminality. The privileging of the dominant masculine perspective so
infected the investigative process, as to reject the feminine perspective, even
when an attempt to interject it is made by a man.160 The question for the
reader shifts from whether inclusion can be secured at all, to whether the
traditional norms of male institutions can accommodate the feminine per-

Empathy must crystallize into meaningful efforts to incorporate the
nondominant or undervalued perspective. Otherwise, participation by the

notes that the current debate over the political inclusion of women has shifted from whether
women should be included at all — to what that inclusion entails, and interprets Aeschylus'
trilogy of plays, the *Oresteia*, as raising the possibility that inclusion involves the transforma-
tion of traditional legal norms. *Id.* at 1054-55. Professor Gewirtz asserts:

In the play's scheme, the alternative to inclusion is the Furies marginalized —
remaining a roving band of vengeful females harassing the city and perpetuating
blood feuds, or becoming permanent exiles. There is no doubt that Aeschylus por-
trays the solution of inclusion as far better. The play's forces are harmonized and
resolved only when the female comes to be included — only when the male perspec-
tive and female perspective each secures a place of high honor, each contributing to
the social order.

For all the ritualized harmony, though, the question remains whether this is a
myth of gender reconciliation or really one of female subordination . . . [C]oercion
shapes the Furies' inclusion. The terms of inclusion are crafted by Athena, who has
just ruled against the Furies.

*Id.* at 1052-53 (footnote omitted).
160. See *supra* note 150 (where Mr. Hale's reference to Mr. Wright's indifference to his
wife's needs is ignored by the county attorney). See generally *supra* note 37.
underclass threatens to be mere co-option, sandbagging the momentum of social change with a misguided sense of inclusion. Thus, the legal dilemmas in accommodating difference among values and perspectives are squarely presented in the story. Engaging multiple perspectives, at the expense of ready solutions, if necessary, is critical for the lawyer. The law student could begin by reading literature, such as *A Jury of Her Peers*, which presents a challenge to traditional legal norms.

Today, women are no longer politically suppressed to the degree experienced by the author of *A Jury of Her Peers*. A woman sits on the bench of the highest court in the land, the United States Supreme Court, and women comprise approximately forty percent of law school enrollment. As women begin to occupy meaningful and influential positions in the legal system, the answer to the question posed by the story's county attorney remains relevant. “The county attorney was looking around the kitchen. ‘By the way,’ he said, ‘has anything been moved?’ He turned to the sheriff. ‘Are things just as you left them yesterday?’”

### IV. LITERATURE: THE MISSING DIMENSION IN LEGAL EDUCATION

*A Jury of Her Peers* is neither conventional material for students in law school, nor is it in any way authoritative. Nevertheless, the issues that the story raises could enrich the student's development as a legal thinker, adding missing dimensions to the law school syllabus. A legal thinker need only reject the most extreme objectivist/subjectivist postures developed above to affirm the value of literature for law and legal education. The application of legal and literary ideas to the present story shows that literature is valuable to law and legal education. Literature develops the lawyer's empathetic capacity by revealing the experiences and the perspectives of other people, thereby exposing parochial views and the institutions shaped in accordance with such views. In *A Jury of Her Peers*, the reader assumes the perspective of someone who is not equal under the law. In this way, the reader is likely to acquire the insight necessary to understand more intimately the particular experience of women under the legal system, as well as general claims of unequal representation. The reader is also asked to reconsider what makes a given act criminal and to treat as suspect legal practices and customs that disadvantage women, and by exten-

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161. In 1981, Sandra Day O'Connor became the first woman to serve as an Associate Justice of the Supreme Court of the United States.
sion, minorities. The lawyer, having read and assimilated this story, is therefore more likely to bring this insight into public policy discussions that could ultimately redound to lawmaking bodies. Thus, literature could inspire legal practitioners to pursue multiple perspectives and to challenge the self-perpetuating power framework when necessary to the pursuit of justice.

Literature could also help the lawyer understand the relation of several true accounts of the same event, colored by values and perspectives that are in conflict. Literature could broaden the scope of the legally relevant fact. For example, the county attorney's account of Mr. Wright's death differed substantially from Martha Hale's understanding, and neither rendition was integral in itself. Thus, literature could equip lawyers and judges to discern and incorporate the truth of events as they are experienced from diverse perspectives.

Literature could introduce the lawyer to moral alternatives which could then be integrated into authoritative discourse and institutional perspectives. It could provide the lawyer with the unofficial supplement to authoritative text. In *A Jury of Her Peers*, the reader confronts the moral alternatives posed by the masculine and feminine perspectives in the context of the vivid experience of the characters. Thus, literature could encourage moral discourse and legal responsiveness to enduring human values.

The legal advocate who is adept in the rhetorical arts could utilize the many illuminating analogues supplied by literature to assist a jury in comprehending the parties involved in the conflict. The tragedy of Minnie Foster could help explain the tragedy of a battered woman. In addition, literature could teach the legal advocate to avoid elusive language. Thus, literature could uniquely contribute to the law student's development of legal writing skills and oral advocacy, and could sensitize the lawyer to the relationship of language to truth and morality.

Both reading literature and reading law as literature can arm the lawyer with the knowledge and perception that justice demands. But this is only possible if the reader is emancipated from a unitary focus on positive, authoritative text and customary modes of perception. If the goal of the legal system is truly to reflect the enduring human values which proceed from all sectors of society, so as eventually to transform society from its present state to what it ought to be, the criticism of law must be predicated, not solely on what is, but also on what ought to be.\(^\text{164}\) Legal criticism should not be tied

\(^{164}\) West, *supra* note 78, at 278. The concept of law as encapsulating a common moral basis which will facilitate the transition from what society is, to what it ought to be, reflects the general form of a moral scheme which, if only by implication, recognizes a teleological view of human nature and society. Modern philosophy, some claim, has tended to deprive humanity of its *telos*, making ambiguous the role of moral discourse. *See* A. MACINTYRE, *supra* note
to authoritative legal text, but should be able to repudiate authoritative text when it fails to reflect living human ideals. Deconstruction and other interpretive devices used in literature can illuminate the lawyer's understanding of how the law interacts with society by unearthing hidden motivations or ramifications of official legal action. These insights inform the lawyer's moral and political decision-making, giving law the face of humanity.

If the use of literature in legal education precipitates the challenge to and disruption of some of the dominant legal practices and conceptual structures, such change will occur because lawyers have taken lessons from literature about how the law should operate in a rich, concrete, cultural context, and not in the realm of the abstract. The challenges will be posed because lawyers will have learned from literature to discern where legal theory does not comport with human experience and legal institutions have become intractable and tendentious. The challenges will be made by lawyers who have developed, from literature, an appreciation for eloquence in presentation and a sharpened awareness of the potentials of language usage. Lawyers who take lessons on law from literature will challenge the law to reflect the evolving moral vision of the community of men and women working together in political friendship.

V. CONCLUSION

The interplay of law and literature has entered modern legal discussion, gaining increasing influence over the past decade, and coming to be widely recognized as the law and literature movement. Some legal reformists have enthusiastically embraced the movement for the tools that it lends to the critique, and even dismantling, of law and legal institutions. More cautious legal thinkers have warned against an overextended application of literature and literary interpretive devices to law and legal institutions. A reasonable balance can be achieved whereby literature can be incorporated into the
study of law, making a unique and invaluable contribution to legal education, while deferring to the special attributes and purposes of legal text. Judging from the mounting quantity of recent scholarly commentary that recognizes a rich rapport between law and literature, it is time to take a look at the movement.

Three modes of using literature in legal study can be roughly categorized. First, literature provides a vehicle for articulating, and a source for discerning, a public commitment to a shared moral value system. As such, literature has particular relevance to law because ideally, the law is a codification of those values, but is not, in itself, the source for those values. Literature facilitates moral discourse, and in the legal context, would provide a means to evaluate existing law and practices against the evolving public moral vision. In addition, literature has often given voice to the underrepresented members of society by offering the reader a direct experiential encounter with the daily realities of marginalized people. Thus, literature, as exemplified by *A Jury of Her Peers*, could facilitate the inclusion of minority or undervalued perspectives in the legal process.

Second, literary method possesses highly developed and relevant techniques for textual interpretation, and some legal thinkers have experimented with its cross-application to legal text. For reasons stemming from the distinct functions of law and literature, this interdisciplinary approach has been a strongly controverted area of the law and literature movement. Controversy notwithstanding, the interdisciplinary application of literary interpretive techniques has initiated insightful and revelatory inquiries into law and legal structures.

Third, literature can tutor lawyers on the eloquence of language, fostering excellence in rhetoric. The role of lawyers and literary authors converge as society's communicators, and the common need for highly developed skill with the tools of language creates the possibility of a mutually enlightening relationship between the two fields.

Thus, broadly speaking, the law and literature movement has a triangular dimension. Literature offers law its substance, its interpretive devices, and its rhetorical excellence. Each point of congruence between law and literature provides a source of limitless possibilities and alone would justify the reference to literature in legal education.

Literature reflects knowledge about true human nature; law governs societal activity based upon a formulation of true human nature. Ideally, human action should comport with the fullness of human knowledge. It is natural, therefore, not strange, for lawyers to take lessons from literature.

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