

## ARTICLES

# LAW IS LAW AND ART IS ART AND SHALL THE TWO EVER MEET? — LAW AND LITERATURE: THE COMPARATIVE CREATIVE PROCESSES

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### I. SUMMARY

On a limited scope, this Article provides a reassessment of the “Law and Literature” movement<sup>1</sup> in legal academic discourse. On a much broader scope, the Article attempts to join the ongoing dialogue among authors who have written on jurisprudence and philosophy,<sup>2</sup> as well as on the esoteric field called “the philosophy of legal language.”<sup>3</sup> This dialogue has consisted of, inter alia, topics such as law and philosophy,<sup>4</sup> law and linguistics,<sup>5</sup> law and art,<sup>6</sup> rhetoric and legal interpretation,<sup>7</sup> or legal

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<sup>1</sup> JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). For a typical recapture of social issue debates arising out of literary text by Law and Literature legal scholars, see generally, James McBride, *Revisiting a Seminal Text of the Law & Literature Movement: A Girardian Reading of Herman Melville's Billy Budd, Sailor*, 3 MARGINS 285 (Fall 2003); HERMAN MELVILLE, *BILLY BUDD, SAILOR* 108 (Harrison Hayford & Merton M. Sealts, Jr. eds., Univ. Chicago Press 1962) (1924).

<sup>2</sup> See, e.g., Oliver Wendell Holmes, *The Path of Law*, 110 HARV. L. REV. 991 (1897); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. Clarendon Press Oxford 1994). See also Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987) (reviewing Dworkin's *Law's Empire*); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (N.Y.U. Press 1995); *RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE* (David S. Caudill & Steven Jay Gold eds., Humanities Press Int'l, Inc. 1995).

<sup>3</sup> See, e.g., *LAW AND LANGUAGE* (Frederick Schauer ed., NYU Press 1993); Frederick Schauer, *Interpretation Symposium: Philosophy of Language and Legal Interpretation*, 58 S. CAL. L. REV. 399 (1985). See also J.L. AUSTIN, *PERFORMATIVE/CONSTATIVE IN THE PHILOSOPHY OF LANGUAGE* (J. Searle ed., 1971); James Boyd White, *Thinking About Our Language*, 96 YALE L.J. 1960 (1986-87). The developing philosophical debate on legal language dates back to the philosophy of the late Ludwig Wittgenstein. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 2d ed. 1958). Wittgenstein intimated that all philosophical problems are ultimately problems of language. See also Dennis Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990) (relating Wittgenstein's pragmatism on the “following of rules” to legal interpretation and the viewing of law as a practice).

<sup>4</sup> See, e.g., Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994). Accord Timothy A.O. Endicott, *Vagueness in Law*, 3 LEGAL THEORY 37, 37-63 (1997); See Patterson, *supra* note 3.

<sup>5</sup> See, e.g., ZENO VENDLER, *LINGUISTICS AND THE A PRIORI*, in *LINGUISTICS IN PHILOSOPHY* (Cornell Univ. Press 1967). See also Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998) (presenting a linguistic approach to statutory interpretation).

<sup>6</sup> See, e.g., ADAM GEAREY, *LAW AND AESTHETICS* (John Gardner ed., Hart Publishing 2001); *LAW AND THE IMAGE – THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* (Costas Douzinas & Lynda Nead

*hermeneutics* — a school of legal scholarship said to be needed to improve the understanding of *law as interpretation*.<sup>8</sup> The "speaking to authors" or "joining the broader dialogue," however, is done solely to support my hypothesis regarding the interplay between law and literature, rather than to comment directly on arguments already raised by jurisprudence theorists or legal language philosophers.

In the following pages, I seek to establish the following *six* propositions:

1. As disciplines, law and the literary art share commonalities. For example, both disciplines depend and thrive on the artful use of language. Both disciplines can, and have, become effective tools for advocacy and social reform. Law can benefit from the craft of the literary art, and can borrow therefrom. Conversely, the drama of the law practice and notions of jurisprudence can, and have, become a rich source of material for the literary artist to explore human nature and society.

2. Yet, in my view, these two disciplines remain divergent and incompatible in *three* core aspects: (i) the mental process of creation and the utilization of facilities, (ii) the work product or output, and (iii) the *raison d'être* of law versus art. For example, the mental process and utilization of facilities inherent in law has little to offer the creation of art, and the two creative processes are antagonistic and hence should not intermingle or be treated as the same. In fact, the rationality and logic properties of law — the objective of rendering *certainty* to future outcomes that are *uncertain* in order to maintain order — will interfere with, and can even destroy, the creation of art.

3. Notwithstanding the incompatibility between law and the literary art, the two disciplines do meet in one domain: the use and study of rhetoric. It is in rhetoric that the craft of the literary art is exercised, and law can benefit from such craft. Rhetoric has been, and should always be, an essential part of lawyering. When used in the context of law, the art and craft of persuasion inherent in the study and use of rhetoric helps produce and stimulate social activism, which is undoubtedly an integral function of

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eds., Univ. Chicago Press 1999). See also Roger Berkowitz, *Riedrich Nietzsche, The Code of Manu, and The Art of Legislation*, 24 CARDOZO L. REV. 1131 (2003) (discussing artistic creation in the context of analyzing Nietzsche's art of legislation); J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on the 'Banjo Serenader' and 'The Lying Crowd of Jews'*, 20 CARDOZO L. REV. 1513 (1999) (discussing and comparing law and music); Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation*, 2004 CATO SUP. 69 (2004) (using various schools of the visual art to discuss constitutional theories).

<sup>7</sup> See, e.g., LAW'S STORIES – NARRATIVE AND RHETORIC IN LAW (Peter Brooks & Paul Gerwitz eds., Yale Univ. Press 1996); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (Clarendon Press Oxford 1984). See also, e.g., Patterson, *supra* note 3; Neil MacCormick, *Argumentation and Interpretation in Law*, 6-1 RATIO JURIS 16 (1993); Dworkin, *Interpretive Concepts, in LAW'S EMPIRE* (Harvard Univ. Press 1986); LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed., Clarendon Press London 1995); Delia B. Conti, *Narrative Theory and the Law: A Rhetorician's Invitation to the Legal Academy*, 39 DUQ. L. REV. 457 (2001).

<sup>8</sup> See, e.g., LAW, INTERPRETATION AND REALITY – ESSAYS IN EPISTEMOLOGY, HERMENEUTICS AND JURISPRUDENCE (Patrick Nerhot ed., Kluwer Academic Publishers 1990).

law. The art of persuasion and its natural product — social activism — help influence judicial officers and legislators, who are the principal and official drafters of legal language. In that sense, the elements and attributes of the literary art have their place in law.

4. Notwithstanding the obvious social utility of the literary craft when it is used as part of law, the creative process involved in each discipline remains antagonistic to each other. This notion should ring a note of caution for the responsible lawyer, drafter, and user of legal language. In this regard, the Law and Literature (L&L) movement of the past decades has not done justice to the scholarly discourse. Nor has it enhanced the understanding of practitioners in either field — law or art. (By practitioners, I mean those who must engage in the relevant creative process; I do not mean just the legal practitioners of the law profession.) The reason for this shortcoming is explained in my fifth proposition below.

5. Although scholars in the L&L movement recognize the differences and similarities between law and art, they all stand in the shoes of the readers and speak from the perspective of interpretation. They neglect the perspective of the artist, the nature of the artistic creative process, and the incompatibility inherent in legal creation versus artistic creation. This oversight is due, *inter alia*, to the fact that L&L scholars are all thinkers, lawyers, readers, even literary critics or connoisseurs of art, but they probably don't live their lives as creative artists. Missing from the debate is the voice of the serious creative artist who actively and on a daily basis becomes involved in the creation of art as the essence of existence. The L&L scholars should recognize and examine these two antagonistic creative processes because they add to the understanding of interpretation and help set constraints when law borrows the craft of the literary art for advocacy and persuasion.

6. Gradual changes and the expansion of legal scholarships in past decades have created new dimensions for the interplay between law and the literary art. The art of storytelling — the cornerstone of fables, folklores, mythologies, and fiction — is making its way into the “narrative” form of legal scholarships as this form emerges under great scrutiny, suspicion, and controversial debates. But in order to gain and retain acceptance, the “narrative” form must be done extremely well, with dignity, responsibility, and the kind of ethical constraint that typifies the role of a jurist.<sup>9</sup> At the same time, the narrative must be well-crafted to create the sense of “suspended disbelief” expected of the audience of the arts. This remains the most complex challenge for the “narrative” advocate and practitioner because the two antagonistic creative processes — law versus art — must somehow be reconciled and harmonized into a final product that represents the relative quest for truth (characteristic of law), rather than the freedom of imagination (characteristic of novelistic writing). Hence, the marriage between law and art in the “narrative” form is indeed a paradox. Nonetheless, the narrative legal writer must undertake this internally

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<sup>9</sup> Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93 (1997).

paradoxical challenge, because legal writing is not about what seems interesting to the free spirit of the writer. It is about examination, reexamination, thinking, rethinking, reforming, and re-reforming a societal structure via the use of rationality and balance, rather than the sensationalism of emotional appeal.

Consequently, in the decades to come, if the L&L movement is to flourish into a “renaissance” *tour de force*, it needs to focus on the study of the antagonistic creative processes that separate the lawyer from the literary artist, in such a way that concrete suggestions can be made to the future generation of legal writers who utilize the “narrative” form to present, explain, and interpret an exceedingly complex world inside, as well as outside, the judicial system and the ivory tower. More specifically, the L&L movement of the 21st century should act to lend credence, texture, suggestions, value and dignity to the narrative form as a new species of legal scholarship, and to harmonize and render systematic the understanding of, as well as the interplay between, law and the literary art.

My Article explores, explains, and advocates for the above six propositions.

## II. SOME INTRODUCTORY NOTIONS: ART, LAW, LANGUAGE, INTERPRETATION, AND THE CREATIVE PROCESS

In the Langdell Library of Harvard Law School, hidden and separate from the somber and monotonous rows of hard-bound U.S. Reports, there lies, inconspicuously on a bottom shelf, a modest book with a dull red cover. The thin, compact volume lists some one hundred and twenty written works that were once censored or banned due to their contents. Among the reasons given for censorship were the “cheapening of female virtues” and societal standards of decency. The list includes a number of literary giants: Leo Tolstoy, Vladimir Nabokov, Charles Baudelaire, Guillaume Appollinaire, James Joyce, Jean Jacques Rousseau, Honoré de Balzac, Gustave Flaubert, William Faulkner, D. H. Lawrence, Henry Miller, and our own contemporary, Toni Morrison.<sup>10</sup>

The list of banned books illustrates one concrete consequence of *text interpretation*. Interpretation necessarily includes, and is tempered by, the emotional reaction of readers based on their existing system of beliefs.<sup>11</sup> If it were not for the interpretation made by the authority, there would not be any issue or necessity for censorship or ban. The authority construed the text to constitute some threat of destruction to existing norms. One cannot help but ask: What transpires in the interpretation of text that can exude such fear of harm and attribute such power to words? What is involved in

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<sup>10</sup> See DAWN B. SOVA, BANNED BOOKS: LITERATURE SUPPRESSED ON SEXUAL GROUNDS (Ken Wachsberger ed., Facts On File, Inc. 1998).

<sup>11</sup> See DONALD DAVIDSON, *Belief and the Basis of Meaning*, in INQUIRIES INTO TRUTH AND INTERPRETATION 141-54, 183-98, 245-64 (Clarendon Press Oxford 1984); Donald Davidson, *A Nice Derangement of Epitaphs*, reprinted in TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 433-446 (Ernest LePore ed., Basil Blackwell Ltd. 1984).

the artistic creative process that prompts artists to stretch limits, blind themselves against moral norms, and explore or articulate social and political taboos at tremendous risk?

The list also strikes a note of discordance between law and art, portraying literary artists as breakers of norms and defiants of culture — those exhibitionists who disrobe the human soul and lay bare its nakedness. On the other hand, law is seen as the gloved hand: that well-groomed, uniform-clad social agent who suppresses artistic expressions and molds human conduct. Artists are deviants; lawyers, conformists, and judges speak the voice that dictates behavior. At the same time, the United Nations Universal Declaration of Human Rights (UDHR)<sup>12</sup> speaks of freedom and liberty for all humankind, by declaring the unequivocal space the state must preserve as inviolate for the universal human (the UDHR's concept of right universalizes what a human *can* do, and what the state *cannot* do). So, where is the declaration and invite of freedom? Law or art?

In the 1970s, James Boyd White's *The Legal Imagination* appeared to mark the birth of the Law and Literature (L&L) movement,<sup>13</sup> initiating, perhaps, the scholarly debate on the divergence, analogies, and similarities between the two disciplines. Concurrently, there has been a breed of lawyers-turned-novelists, of which Harvard Law School supplied its share of the species (Richard Henry Dana, James Russell Lowell, Henry James, Owen Wister, Arthur Train, Archibald MacLeish, Scott Turow, J. Osborne, James Alan McPherson). But long before these phenomena, Cardozo's *Law and Literature*<sup>14</sup> had already analyzed the literary properties of judicial opinions, and Wigmore had already declared that lawyers should learn from great literary works to understand human nature.<sup>15</sup> The interplay between law and literature in Anglo-Saxon society has historical roots dating back to depictions of the legal system by Shakespeare and Dickens.

This “coming together” of law and literature reminds me of the cliché saying, “*Tous les chemins se mènent a Rome*” (all routes lead to Roma). I think of words, or *language*, as one such “Roma capital” for the two disciplines — the meeting point of law and the literary art.<sup>16</sup> Language and the author's function become the common domain for law and art.<sup>17</sup> In

<sup>12</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948).

<sup>13</sup> JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (Little Brown & Company 1973). Other distinguished contributors to the movement are Richard A. Posner and Richard Weisberg. See, e.g., RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (Harvard Univ. Press 1988); RICHARD POSNER, *LAW AND LITERATURE* (1998); Richard A. Posner, *Law And Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (Columbia Univ. Press 1992).

<sup>14</sup> BENJAMIN N. CARDOZO, *Law and Literature*, in *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 3 (1931).

<sup>15</sup> JOHN WIGMORE, *INTRODUCTION TO JOHN MARSHALL GEST, LAWYERS IN LITERATURE* vii (1913).

<sup>16</sup> I distinguish between “visual art” (where a medium like paint/canvas becomes the tool of expression), “performing art” (where the artist's body and physical facilities become the tool of expression), and “literary art” (where words become the tool of expression). Although the tools are different, in the purest form of artistic creation, they should all serve the same function.

<sup>17</sup> Piyel Halder, *Literature Within the Law*, 32 *NEW FORMATIONS* 183 (1997).

language, the artist and the lawyer meet, where they are greeted by the philosopher, who raises questions such as whether the normative rules of language should be imported substantively into law beyond grammar and syntax,<sup>18</sup> or whether law inherits the indeterminacy of language and hence the open-endedness of interpretation.<sup>19</sup> But just because they can all find and share Roma, does this mean that they can be friends? In some ways, yes. (In fact, they have borrowed crafts, techniques, and material from each other.) In other ways, I suggest no. This is because in the process of creating their work products, lawyers and philosophers travel courses that are different and even counter-productive to the creative process of the artist — whose journey can also do havoc to law and philosophy when applied there.

Another “Roma capital” exists for law and literature. It is in (i) the domain of the reader or interpreter of text — the receiving end of the work product; and in (ii) the task of advocacy or persuasion — that which will influence and shape the end result, produce consequences, impact and prompt the reader or interpreter to action, or induce a change of belief. As law professor Wetlauffer points out, *rhetoric* is the art (as per Aristotle) or craft (as per Plato) of *persuasion*, which has been treated as synonymous with lawyering.<sup>20</sup> Here, I agree with Richard Posner, the judge and law professor whose book, *Law and Literature*, brought the L&L movement into focus.<sup>21</sup> Posner thinks that the study of literature has very little to contribute to the interpretation of constitutions and statutes. Yet, it can contribute to the understanding, improvement, shaping, and hence, interpretation of judicial opinions. But just because the study of literature can be relevant in the shaping of judicial opinions, does it mean the creative process is the same for judges, who write opinions, as it is for literary artists, who write fiction? I submit, no. I would even venture to say, absolutely not, because these two creative processes are mutually exclusive and antagonistic to each other.

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<sup>18</sup> See generally KENT GREENWALT, *LAW AND OBJECTIVITY* (Oxford Univ. Press 1992).

<sup>19</sup> See, e.g., Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467 (1967) (examining legal indeterminacy via the use of language and meaning of Rule 11 and the qualified immunity doctrine). See also LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 7.

<sup>20</sup> Gerald Wetlauffer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545 (1990). Wetlauffer teaches law at the University of Iowa, known as the nation's best training ground for creative writers. The University of Iowa initiated the Project on the Rhetoric of Inquiry. See also THE REPUBLIC OF PLATO (A.D. Lindsey trans., 1950) (In the allegory of the cave, Socrates used light and dark to discuss the physical and the intellectual. Fiction was used to develop an argument, and storytelling was used to create one of the best known stories of classical philosophy).

<sup>21</sup> Interestingly, Posner wrote not only about law and literature, but also law and economics. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2003); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981). As Wetlauffer correctly points out, Posner's work was from the perspective of the reader of literature. See Wetlauffer, *supra* note 20, at 1564 n.50. Posner did not compare literature to law from the standpoint of the creator, although he recognized some differences in the creative processes between law and art. See generally, RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*, *supra* note 13; RICHARD POSNER, *LAW AND LITERATURE*, *supra* note 13.

### III. DEFINITION AND CONCEPTUAL FRAMEWORK

But before I can defend my hypothesis, I must first do what I believe my modest and embryonic understanding of analytical philosophy has taught me to do: engage in the raising and asking of questions and the setting of parameters. According to Moravcsik, analytical philosophy is the raising of questions within a discourse.<sup>22</sup> *Knowledge?* What is meant by knowledge? *Art?* What is meant by art? And the same inquiry can be raised for law or rhetoric. Outside the context of philosophy, and within the narrow, mundane, yet systematic focus of a lawyer, this means the listing of defined terms and the setting forth of a common understanding of key concepts that underlie the construct of my hypothesis.<sup>23</sup>

#### A. LAW, THE RHETORIC OF LAW, AND THE PARAMETERS OF LEGAL DECISION MAKING

Law in this Article refers to the legal system as a whole (and not just the legal profession, the practice of law, legal authority/precedents, legal concepts, or legal documents). Law is viewed by Wetlaufer as a "serious business . . . conducted on a field of 'pain or death.'"<sup>24</sup> Thinking like lawyers, therefore, is important to the legal pedagogue, as the process may reinforce the legitimacy and dignity of the legal system itself. So, argues Wetlaufer, the rhetoric often chosen for the law profession is the anti-rhetoric!<sup>25</sup>

On the other hand, the text that matters to law often encompasses more than just legal precedents. Quite often, in the congested court docket, the winning brief provides the roadmap of legal authorities and supplies the persuasion force for the judicial opinion to sustain appellate review and to aid public understanding. Judges (as human beings with passion, emotions and prejudices, living in a multi-faceted society), also read and hear other things besides legal precedents. They listen to the voices of social movements, and bring their total experience and beliefs into the bench — a "synthetic" model of judicial decision-making confirmed by the pragmatist school of thought in language philosophy. According to Holmes, the life of law has not been logic; it has been experience.<sup>26</sup> The Anglo-American legal

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<sup>22</sup> See Julius M. Moravcsik, *Art and "Art,"* in MIDWEST STUDIES IN PHILOSOPHY VOL. XVI: PHILOSOPHY AND THE ARTS 302 (Peter French, Theodore Uehling, Jr. & Howard Wettstein eds., Univ. of Notre Dame Press 1991).

<sup>23</sup> Definitions may be the beginning point for the drafter of a complex commercial contract, which often includes a "definition of terms" section, and even for an appellate lawyer handling a complex litigation and a massive record (an appellate brief may also contain "defined terms.") Definitions, however, are of little concern to the artist, who leaves the job of defining and labeling her vision to readers. According to Barthes, the "death" of the author is the "birth" of the reader; the "evaporation" of meaning as textual matters are interpreted: "*A text's unity lies not in its origin but in its destination.*" ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142-148 (Stephen Heath trans., 1977).

<sup>24</sup> See Wetlaufer, *supra* note 20, at 1545 (quoting Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986)).

<sup>25</sup> See *id.*

<sup>26</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1982) (1963); Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

system allows room for the judge's "synthetic" decision-making — under various legal standards of appellate review, the discretion of trial judges is not reviewable in the absence of abuse. In such a sacred zone of judicial discretion, judges can bring their notion of morality into decision-making: Moral judgment can place constraint upon legal interpretation and a moral end can be part of law itself.<sup>27</sup> Accordingly, social activism, the rhetoric of language, and the emotional enticement of ideals, can all legitimately be injected, directly as well as indirectly, into legal decision-making.

#### B. "ART," "ART," AND "ART"

Proponents of the L&L movement advocate the incorporation of certain attributes of the literary art into law,<sup>28</sup> concluding that art and law overlap at least minimally through the use of rhetoric. The argument, while sound in practice, can be criticized as intellectually sloppy, because it marginalizes the distinction between *art* and *craft* in the use of language. The distinction, however, is far from clear, because (as in the case of a dancer inseparable from her dance) both *art* and *craft* manifest themselves in the same medium: *words*. Further, when something is so well-crafted or done, and delivered with so much finesse, aesthetic style, and distinction, it becomes an art. Hence, we have in our daily lives, for example, all kinds of *art* (*lowercase*) from the art of French cooking or the art of ballroom dancing, to the art of conversation or discourse.<sup>29</sup>

It is possible, therefore, to have *the art of law*, independent of the rhetoric use of language, and hence to achieve aesthetic beauty in judicial opinions without compromising the purpose and function of law. (Wetlaufer illustrates this point in his "anti-rhetoric" theory by identifying the restrained *rhetoric of law*, which can be broadened and abstracted into the *art of law*, rather than the pure, commonly labeled "rhetorical" style, which includes, but is not limited to, the colorful, action-packed, or emotion-based language borrowed from the literary art.)<sup>30</sup> According to Wetlaufer, the art of law is the skilled and respectable exercise of constraint, or the dignity created by the anti-rhetoric.<sup>31</sup> Further, one often looks to the constraint of law for a sense of order, and order has been associated with aesthetics since Socrates' time. So, the *order of law* can be the aesthetic beauty in law.

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<sup>27</sup> See DWORKIN, *supra* note 7, at 45-86, 176-224; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); HART, *supra* note 2, at 124-53; Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

<sup>28</sup> Art can also be an institution or a practice, just like law or medicine, although society does not officially license artists. The privileges and recognition bestowed — the name recognition and label-fixing that render prestige and acceptance in the artistic circle — all set constraints and institutionalize art. See Moravcsik, *supra* note 22. The institutionalized meaning of art is not part of this Article.

<sup>29</sup> Accord Roger Berkowitz, *Riedrich Nietzsche, the Code of Manu, and the Art of Legislation*, 24 CARDOZO L. REV. 1131 (2003) (discussing artistic creation in the context of analyzing Nietzsche's art of legislation); Alfred C. Aman, Jr., *Celebrating Law and the Arts*, 2 GREEN BAG 2D 129 (1999) (comparing lawyers to artists by referring to the craft of law: "Lawyers, like artists, must have the techniques of their craft well in hand, but the goal is not technique for technique's sake...").

<sup>30</sup> See Wetlaufer, *supra* note 20.

<sup>31</sup> See Wetlaufer, *supra* note 20.



But the art found in *any craft well done* is a narrow, yet more popular and concrete notion of art as the term is used in ordinary language. Such art should be distinguished from the art expressed in the specific work products of creative artists — that direct "rare vision" and manifestation of beauty (which often expresses not only the artist's vision and her internal struggle, but is also universalized into the human quest for beauty). The art of Van Gogh, Mozart, or Baudelaire falls under the latter category. For the purpose of this Article, this universal notion or expression of the human quest for beauty is manifested in the specific end product of a creative artist, called *Art* (capitalized).

### C. VARIOUS MEANINGS OF RHETORIC AND ITS RELATIONSHIP TO "STYLE"

In the study of rhetoric, several authors associate *rhetoric* with *style*.<sup>32</sup> When rhetoric is well done, one can even call it *the art of style*. According to Professor Richard Lanham, rhetoric is not arts, but "copies of arts," or the "quasi-arts."<sup>33</sup> Lanham thus sees rhetoric as a departure from truth or seriousness, and considers his *rhetorical man* an actor, with "drama as his reality public."<sup>34</sup> The *Homo Rhetoricus* is trained not in reality, but in the manipulation of reality. An ease, a playful quality, a notion of pleasure, and sentimentalism are attached to Lanham's *rhetoric ideal of life*. (This concept is equivalent to the cliché characterization that the true artist is perpetually a child!)

*Style* suggests *form* instead of *substance*. In his "law and literature" analysis, Posner, likewise, acknowledges the difference between *literary form* and *literary meaning*, which in his view often are inseparable in the use of language.<sup>35</sup> When style is so exquisitely and expertly done, it can become the aesthetics — the very beauty that elevates an act into an art. Rhetoric, therefore, should fall under the *narrower* meaning of art (lowercase), as in the notion of a *craft exquisitely well done*. One can thus view rhetoric as referring to the *craft* of literature as opposed to Art itself (as in the creation of Art in Baudelaire's or Emily Dickinson's poetry).

More specifically, in the view of the rhetoric researcher, style can be purpose-oriented and purpose-driven. For example, Wetlaufer speaks of

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<sup>32</sup> See RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION, *supra* note 13, at 270-81. Accord Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733 (2004) (discussing craft and rhetoric). See also WILLEM J. WITTEVEEN, *Cicero Tells a Story On Narration and Rhetorical Reflection*, in LAW AND LITERATURE PERSPECTIVES (Bruce Rockwood ed., Peter Lang Publishing 1996); Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 LEGAL WRITING J. LEGAL WRITING INST. 113 (1996); Michael Frost, *Introduction to Classic Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (1999); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994); Linda Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483 (2003) (discussing classic rhetoric and exploring styles and substantive aspects of rhetoric as applied to legal reasoning, legal writing, and legal interpretation).

<sup>33</sup> RICHARD A. LANHAM, THE MOTIVES OF ELOQUENCE: LITERARY RHETORIC IN THE RENAISSANCE 1-35 (1976).

<sup>34</sup> *Id.* at 4.

<sup>35</sup> See generally Posner, *Law and Literature: A Relation Reargued*, *supra* note 13.

rhetoric as being “discipline-specific.”<sup>36</sup> One such species of rhetoric is the *rhetoric of law*. (He goes on to discuss the rhetoric of law teaching, and the rhetoric of friendship or client courtship when law is treated as a business enterprise by practitioners.) Wetlaufer thus envisions rhetoric in a broad, generic sense, referring to the style of language or presentation, or any craft well done to suit a purpose, thereby acknowledging the many species of rhetoric.<sup>37</sup> I construe Wetlaufer’s theory of rhetoric as a deconstruction and a discipline-dependent reclassification of rhetoric.

With respect to the use of language, the analysis is even more complex, because beyond the issue of *art* and *craft*, we also have the conventions of linguistics, semantics, and compliance with all types of *interpretandum-interpretans* transformation rules (*interpretandum* is the text that constitutes the object of interpretation; *interpretans* is the interpreter’s paraphrastic statement of that text’s meaning),<sup>38</sup> as well as the philosopher Donald Davidson’s notion of “literal meaning” (Davidson advocates that any text will have a “literal meaning” based purely on semantics, that is independent of context).<sup>39</sup> Accordingly, when L&L proponents advocate the use of rhetoric in law, unless they suggest an open-endedness to the search for truth (as some philosophers do), they are, in effect, only advocating the borrowing of a literary craft for the drafting and usage of legal language.

At the same time, Lanham suggests in his *rhetorical ideal* that rhetoric can go beyond the use of Language, and can become a way of life, an attitude, a *modus operandi*.<sup>40</sup> In law, rhetoric can also be used in the total performance of advocacy, not just in words. When used to study rhetoric on such a broader dimension, the L&L movement may potentially implicate and open the door to the restructuring or rethinking of jurisprudence beyond the handling of text.

As part of background-building, I next want to explain the existing scholarly debate regarding the place of the literary art and language philosophy in law, which may set the tone for a rethinking of jurisprudence — the possibility, or emergence, of a substantively “aesthetic approach to law or jurisprudence.”

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<sup>36</sup> See Wetlaufer, *supra* note 20, at 1548-1550.

<sup>37</sup> *Id.*

<sup>38</sup> Scott Brewer, Note, *Figuring the Law: Holism and Tropological Inference in Legal Interpretation*, 97 YALE L.J. 823 (1988).

<sup>39</sup> See Donald Davidson, *A Nice Derangement of Epitaphs*, *supra* note 11, at 434-36.

<sup>40</sup> See LANHAM, *supra* note 33. Accord KENNETH BURKE, *A RHETORIC OF MOTIVES* (1960) (the theory of dramatism establishes man as a symbol-using creature); WALTER R. FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION* 5 (1987) (extending Burke’s premise that man is fundamentally a symbol-using creature; arguing that man’s dramatic nature makes him a storytelling animal beyond the use of symbols).

#### IV. THE DEFENSE OF ART IN LAW: POSSIBILITY OF AN “AESTHETIC” APPROACH TO LAW

##### A. RHETORIC, THE SHAPING OF JUDICIAL OPINION, AND THE ELEMENT OF TRUTH

In Posner’s view, both judicial opinions and literature belong to rhetoric communication.<sup>41</sup> (This classification, as I will explore later, understates the artistic creative process. For example, the creation of literature involves more than just the manipulation of style or figures of speech. It also involves, for example, an emotional honesty and a selection of sense-memory impression or recollection that goes much deeper than the manifestation of a purpose-driven style.) Nonetheless, Posner’s oversimplified classification does reduce the overlap between law and art to the core zone of rhetoric. Posner complains that lawyers and political scientists do not study style enough, and posits that style should play a more organic role in judicial drafting, beyond ornament. According to Posner, the artistic use of visual or tactile imagery in the literary art is of tremendous help to lawyers when they strive to drive home a point in legal argument.<sup>42</sup> Modern judicial writing can incorporate the artifactual quality of the literary art. Principles of literary criticism can be used to achieve aesthetic integrity in judicial opinions, to understand their nature and contents, and hopefully to reduce the number of poorly drafted opinions. (Although Posner embraces the eloquence of Holmes, he does not explain what constitutes a poorly drafted opinion that may be improved by the literary craft of rhetoric.)<sup>43</sup>

Wetlaufer, on the other hand, is concerned that the plasticity of indeterminate text, which is characteristic of artistic language, may disserve law, and suggests that this literary style may predispose lawyers to become ineffective readers of legal text.<sup>44</sup> Further, rhetoric commitments may interfere with the single-minded pursuit of truth or the even-handed, detached application of law that should govern courtroom behaviors. Wetlaufer, however, implicitly acknowledges that the search for truth requires the type of openness that calls decision-makers away from closure, into the direction of complexity, contingency, and uncertainty, all of which are characteristics of an “aesthetic approach” toward law.<sup>45</sup> Lawyers and judges should serve law itself, whereupon justice becomes the client. Without exposure to the power of rhetoric, lawyers and judges tend to accept the legitimacy of the existing system and the righteousness of existing solutions, allowing the status quo, rather than the pursuit of justice, to become their client or constituent. Their predisposition not to dance with words can deny them the multiplicity of perspectives, and make them ill-equipped to inspire people or to transform conditions (as compared to, for

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<sup>41</sup> See Posner, *supra* note 13, at 1375-88.

<sup>42</sup> *Id.* at 1390.

<sup>43</sup> *Id.* at 1379-85.

<sup>44</sup> See Wetlaufer, *supra* note 20, at 1591.

<sup>45</sup> See *id.*

example, Martin Luther King, Jr.'s speech, which has helped transform a nation and, since then, has continued to resonate).

Posner stops at style and does not reexamine the search for truth fundamental to law. In contrast, Wetlaufer, hints at the possibility of rethinking jurisprudence in analyzing the rhetoric of law.<sup>46</sup> I read in Wetlaufer an implicit challenge to lawyers' commitment to the rhetoric of law — specifically their dignified, consistent denial of rhetoric. This “anti-rhetoric” commitment predisposes them toward the direction of closure, coercion, rationality, and the rigid ascertainment of one true meaning of text that shuts out the relationship between law and “compassion, reciprocity, . . . community . . . truth . . . and possibility of justice.”<sup>47</sup> Similarly, Holmes's “anti-logic theory” resonates with this complex multiplicity of law and legal decision-making, pointing out the significant role that the “inarticulate” and “intuitive” play in judges' discernment of law.<sup>48</sup>

The pragmatist language philosopher also hints at the possibility that rhetoric can be more than just style or form. Rhetorical declarations can have their own meaning or truth, even in the Davidsonian “literal meaning.” Admitting the dramatic quality of rhetoric, Lanham nonetheless sees the rhetorical ideal as integral to us (rather than as a mere constructed phoniness for the sake of discussion). He sees the struggle between our two selves: We cannot be free of our *rhetorical self*, as the rhetorical self is part of the *central self* that balances our *social self* and makes our social life amusing and tolerable. The rhetorical ideal allows for a revision of truth, or a creation of a new reality.<sup>49</sup> As such, rhetoric has the capacity of becoming the substantive truth to the performer as well as the recipient, and no longer just a question of form or style. When used in law, rhetoric has the potential of creating legal reality.<sup>50</sup> As Lanham suggests, what people cannot get in their daily life, they get elsewhere. For example, it can be obtained in a rhetorical reality where ornament can be more honest than plainness, and rhetoric sincerity is possible when “we become maximally self-conscious about the artifice which rules us.”<sup>51</sup> Language has the property of “rich resources for play,” and style is the essential ability to draw connections when constructing reality — the fundamental components of life.<sup>52</sup>

On the other hand, because emotions, feelings, and sentiments are intangible, they cannot be verified empirically the way we can ascertain that snow is white and coal is black. Hence, the rhetoric style can become,

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<sup>46</sup> See *id.*

<sup>47</sup> *Id.* at 1597.

<sup>48</sup> See HOLMES, THE COMMON LAW *supra* note 26, at 5 (“The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men. . .”).

<sup>49</sup> See LANHAM, *supra* note 33, at 28 (“From serious premises, all rhetorical language is suspect; from a rhetorical point of view: transparent language seems dishonest, false to the world.”).

<sup>50</sup> See David M. Zlotnick, *The Buddha's Parable and Legal Rhetoric*, 58 WASH. & LEE L. REV. 957 (2001) (using Buddhism's concept of relative truths to rethink constructed legal reality in jurisprudence).

<sup>51</sup> See Lanham, *supra* note 33, at 31.

<sup>52</sup> *Id.*; KENNETH BURKE, THE PHILOSOPHY OF LITERARY FORM 139-67 (2d ed. 1967) (1941).

as Lanham and Burke suggest, the way to construct the reality of the “heart” elements such as emotions or sentiments.<sup>53</sup> In the Western Shakespearean culture, a man in love may repeat that *Juliet is the sun*. In a Buddhist culture, an Eastern poet sees his lover's face as the only reality and the rest of the world as an illusion that fades away. (A Buddhist, the poet tends to see his world through filmy eyes, with fog covering all four corners of Earth and only dissolving when his lover's face comes into focus before the lens of his blurred eyes. The Buddhist culture views life as an illusion such that enlightenment means stepping out of such fog!) Standing an ocean apart, both men seem to describe the same truth: the depth of their emotion toward an object of love. Both draw connections to construct a reality that is real to them and true to their feelings, but there is no way to verify their declarations empirically, and so, under the Davidsonian standard of “literal meaning,” the poetic truth may fail.<sup>54</sup>

Legal language may resist rhetoric, but the law is also the profession of rhetoric.<sup>55</sup> Wetlaufer suggests that the particular rhetoric embraced by the law operates through the systematic denial that rhetoric is being used, and this “rhetorical” denial is purposely made to build credibility.<sup>56</sup> Wetlaufer’s *rhetoric of law*, therefore, is the contrast *in form* to other dramatic, novelistic, or poetic rhetoric that may characterize the creative arts. If this is so, shouldn’t we watch out for potential falsehood, not in rhetoric, but in the *denial of rhetoric*? Isn’t this an affirmation of Lanham’s theory that ornament (in his example of a woman wearing makeup to draw attention to her eyes) may be more honest than plainness (i.e., a woman without makeup whose eyes are not looked to)? I think that seeing the multiplicity and relativity of truths asserted in law rather than a “literal” approach focusing solely on empirical validation is in effect a rethinking of jurisprudence.

#### B. SOCIAL ACTIVISM AND THE ELEMENT OF PERSUASION

Persuasion and advocacy are also the business of law. In social activism, an advocate can describe empirically that 1000 men have been killed (empirically verifiable), and/or he can express, or add, his passion for justice and his outrage at brutality by way of rhetoric (non-verifiable). Is the latter less truthful or having less realism than the former, simply because it deals with his *honestly* felt intensity of emotion? Isn’t it disheartening to think of Martin Luther King, Jr.’s speech as merely a clever tool of persuasion, a style of enticing support, and a less than truthful rendition of his aspiration, passion, and desire for a better world? These are dimensions of the intangible that cannot otherwise be expressed without the freedom afforded by emotion-driven rhetoric.<sup>57</sup> The creative literature embraces the depiction of human emotions as dimensions of truth that

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<sup>53</sup> See *id.*

<sup>54</sup> See Davidson, *supra* note 39.

<sup>55</sup> See Wetlaufer, *supra* note 20, at 1554.

<sup>56</sup> *Id.*, at 1555.

<sup>57</sup> *Id.*

should also be told in law. The recognition that there is something inherently truthful about the fictitious world of literature and the creation of art, even if it is the result of the striking of fantasy, gives room for *substantive* rhetoric — not just a matter of style — to aid and promote social activism in the law. *The fear and suspicion of rhetoric should not be directed at the truths about the intangible it portrays, but rather at the purpose for which rhetoric is employed.*

Accordingly, to serve the multi-dimensional search for truth, great judges should be prepared to meet the indeterminate nature of language expressed through the power of rhetoric. Great judges are often great rhetoricians.<sup>58</sup> But what value does the open texture of artistic language add to the system of law? Posner raises the question, but he does not thoroughly defend the benefit of literature to law beyond the offering of rhetorical devices.<sup>59</sup> He recognizes, as does Wetlaufer, that “rhetoric is important in law because many legal questions cannot be resolved by logical or empirical demonstration.”<sup>60</sup> Rhetoric, therefore, helps create social reform. (For example, Posner points out that 85 years after the *Lochner* decision, the Supreme Court concluded that the case was wrongly decided. The Holmes dissent, which became the core for such change of view, according to Posner, was a memorable rhetoric masterpiece that challenged the legitimacy of the status quo; otherwise, it would have been forgotten.)<sup>61</sup> The striving for immortality in art and its examination of the relativity of truth may just coincide with the ultimate objectives of law, and to the extent rhetoric helps nurture these goals, its value should outweigh any fear regarding possible prejudice, sensationalism, or deviation from truth. Democratic disbursement of ideas will balance out and minimize those risks.

### C. LANGUAGE INTERPRETATION THEORIES

Certain language interpretation theories, when applied to law, can enrich the legal advocate’s role and ability to communicate. For example, although both Fish’s anti-formalism and Davidson’s “passing theory” of interpretation confirm the incompatibility between law and art (these theories are explored immediately below), these theories also point to the overlapping, interdependent zone of interpretation that exists in both law and art. Specifically, an “aesthetic approach” to legal interpretation may change the outlook toward the function of persuasion in the law, and hence may strengthen the role of social activism in the law.

Fish, for example, does away with the “literal meaning” of language, advising us to go down the “anti-formalist road” and in effect abandon the

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<sup>58</sup> See RICHARD A. POSNER, *Law and Literature: A Relation Reargued* 72 VA. L. REV. 61, 81 (1986), reprinted in LAW AND LITERATURE: TEXT AND THEORY 61, 81 (Lenora Ledwon ed., Garland 1996) (“[S]ome great judges are distinguished rhetoricians.”).

<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.* at 1383.

<sup>61</sup> For an overview of Supreme Court rhetoric, see Beverly Wall, *Supreme Court Rhetoric: Explorations in the Culture of Argument and the Language of the Law* (April 13, 1992) (unpublished Ph.D. dissertation, University of North Carolina at Greensboro).

rigidity of author's intention, because "intention themselves can be known only interpretively, the meanings that follow . . . will always be vulnerable to the challenge of an alternative specification."<sup>62</sup> The effect of persuasion, according to Fish, will help accomplish the interpretation of the drafter's intent — that means intent must be interpretively established through the effect of persuasion. In the process of interpretation, literal meaning will be replaced with context (or what Fish calls the "interpretive communities.")<sup>63</sup> Thus, Fish prefers the boundless implications in interpretation, which coincide with the richness, open texture, and contextual nature perceived in artistic language. The anti-formalistic road does away with the rigid expectation of finite, clear meanings, or the standard of pure rationality often found in the general discourse of law. The preference for *irrationality* — the state of being subject to persuasion — opens the gateway to artistic language interpretation and enables the rendering of an "aesthetic approach" to law, where the only constraint to interpretation is that set by the *contextual* nature of language.

Likewise, despite his heavy semantic orientation, Davidson's *A Nice Derangement of Epitaphs*<sup>64</sup> seems to refute the existence of the "first" meaning of language -- one that is systematic, shared, and governed by learned conventions or regularities, easily jumping out "first" at the reader.<sup>65</sup> Instead, Davidson hypothesizes the following: The interpreter brings into the conversation a prior theory based on his belief of what the speaker intends to say.<sup>66</sup> But during the conversation, he adjusts and alters his theory to deal with new evidence or the unknown (including Sheridan's Malapropism -- the ludicrous blunders of language that may paradoxically spice up the conversation and invite originality).<sup>67</sup> There, the interpreter uses the "*passing theory*" to interpret meaning, which does not always correspond to his linguistic competence, but is derived from his past experience in communication.<sup>68</sup> If communicators' "passing theories" coincide, there is common understanding.<sup>69</sup> (The Davidsonian "passing theory" is consistent with his "*principle of charity*" and, of necessity, must be *ad hoc*. Simply stated, in Davidson's "principle of charity," the reader charitably ennoble the author by assuming that no detail of the message is mindless, accidental, or simply the result of a mistake or an oversight — generously interpreting the text to give the author the best of intent. Davidson's "principle of charity" enables the ultimate end of perfect communication — the social utility of preserving meaningful interaction or the "good order" of our world. His "principle of charity" hypothesizes a

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<sup>62</sup> STANLEY E. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 1-33 (1989); STANLEY E. FISH, IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 303-21, 356-71 (1980).

<sup>63</sup> See, e.g., FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES, *supra* note 62, at 303.

<sup>64</sup> DONALD DAVIDSON, *A Nice Derangement of Epitaphs*, in TRUTHS AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 433-45 (Ernest LePore ed., 1986).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 441.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 442.

<sup>69</sup> See *id.*

rational communicator, just as the law presumes the existence of a "reasonable person." Davidson concludes that communication is possible because of the parties' linguistic ability to converge on a "passing theory" from time to time to enable speech transactions. There are no strict rules that dictate this ability, which derives from wit, luck, wisdom, and rules of thumb from private knowledge, enabling the interpreter to cope with and absorb new data and new situations. Davidson advises us that this renewal ability is not solely based on rigid shared conventions or a well-defined shared structure that the interpreter can acquire and then apply. This may explain why varied and individualized interpretations of literature are possible, as the individualized possibilities are indeterminate. If Davidson is correct, then it is this ad hoc, unique linguistic ability based on fluid prior experience that enables readers to grasp, appreciate, and form interpretations of artistic originality when the author dances with language.<sup>70</sup>

#### D. THE "CHAIN NOVEL"/"CHAIN OF LAW" THEORY

Philosophers have also attempted to analogize literary critique techniques to legal interpretation. For example, Dworkin believes that when faced with two competing interpretations of literary text, the literary reader chooses the one that makes the work better to him.<sup>71</sup> Dworkin feels a judge should do the same with statutes and constitutions. (Here, Dworkin obviously has adopted Davidson's "principle of charity.") In examining literary and legal interpretation, Dworkin devises the "aesthetic hypothesis" (applicable to art) and the comparable "political hypothesis" (applicable to law).

Under Dworkin's "aesthetic hypothesis," a reader interprets artistic work to arrive at the best work of art. In Dworkin's view, when applied to law, the study of literary interpretation may be helpful or necessary to arrive at the best legal analysis, and to accord the legal text the best moral result regardless of what the original intent might have been.<sup>72</sup> Intent of the drafter, according to Dworkin, is often an artificial construct by the interpreter. Here, Posner bluntly criticizes Dworkin's blanket assumption that literary interpretation should apply to law across the board, accusing Dworkin of changing legislators into the "unacknowledged poets of the world."<sup>73</sup> Constitutions and statutes, according to Posner, should have determinate meaning. Posner regards the Davidsonian "principle of charity" as the "hypothesis of total coherence," which ennoble the author by assuming that no detail of the artistic work is accidental or should constitute a mistake or oversight. Posner concludes that our legislators do not rise to the level of literary geniuses and should not be so ennobled.<sup>74</sup>

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<sup>70</sup> See *id.*

<sup>71</sup> See RONALD DWORKIN, *How Law is Like Literature*, in *LAW AND LITERATURE: TEXT AND THEORY* 29, 32, 34 (Leona Ledwon ed., 1996).

<sup>72</sup> *Id.* at 40-41.

<sup>73</sup> See POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION*, *supra* note 32, at 218.

<sup>74</sup> *Id.*



Dworkin, nonetheless, views theory of art and theory of interpretation as reciprocal, and hence his "*aesthetic hypothesis*" is dependent upon artistic theories. For example, literary work must be critiqued in relation to its literary genre. The restraint placed upon the "*aesthetic hypothesis*," reasons Dworkin, should be the coherence and integrity for the piece of art, or its theoretical character.<sup>75</sup> The literary theory may be the product of critics, but the artist also envisions a tacit theory for her work; otherwise, she would not have created it a certain way. But in the final analysis, literary interpretation should be detached and independent of authors. "A genuinely created world must be independent of its creator."<sup>76</sup>

Because of his view toward the role of artistic theory in interpretation, Dworkin envisions a scenario where the artist interprets while creating, and the critic creates while interpreting. Using the model of "group chain writing" for the creation of a novel, Dworkin devises the "chain of law" theory for legal interpretation. He analogizes the role of the legal interpreter to that of a "chain artist" who must write the next chapter of a novel, based on a previous chapter already written by someone else, during which process she must interpret and create at the same time.<sup>77</sup> The artist has given up her freedom of devising from scratch and is bound by the "precedential" effect of the previous chapter. Yet she must somehow individualize such effect to her invention, which must follow the general scheme. According to Dworkin, this framework explains how difficult cases are decided in law—a continued application of principles to varied sets of facts. In Dworkin's view, interpretation of law must also reflect value in political terms to arrive at the *best* principle or policy. Doctrinal history serves as constraint for the "fit" of legal decisions. The integrity and coherence of the system of law — how much of the prior law should dictate results — will also help set boundaries. The interpreter will try to fit his decision within the doctrinal history, but may also turn to his own political theory for interpretation and creation. Hence, under Dworkin's "*political hypothesis*," the *best* interpretation depends on the judge's total system of beliefs, based on both history and ideals. Legal interpretation, therefore, is political, yet individualized. This "*political hypothesis*," which allows for skepticism in law, governs legal decision-making and renders the process analogous to literary interpretation.<sup>78</sup>

Fish attacks the validity of Dworkin's "chain enterprise." He rejects Dworkin's notion that the very first writer in the chain has already given up her freedom by committing to the "chain." According to Fish, the writer is both freed and restrained by the choices she has made. Thus, Fish affirms the "author's function" — it is the author who renders credibility to the work and affects its interpretation as well as its acceptance.<sup>79</sup> Fish also

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<sup>75</sup> See generally Dworkin, *supra* note 71.

<sup>76</sup> BARTHES, , *supra* note 23, at 142-47. See also DWORKIN, *supra* note 7, at 45-86, 176-224; MICHEL FOUCAULT, *What is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141-60 (Josue V. Harari ed., 1979).

<sup>77</sup> See Dworkin, *supra* note 71, at 39.

<sup>78</sup> See *id.* at 44-46.

<sup>79</sup> See generally FOUCAULT, *supra* note 76, at 141-60.

refutes Dworkin's idea that the drafter's intention is private property.<sup>80</sup> Rather, in Fish's view, intention constitutes the form of conventional behavior made possible by the general structure of the enterprise itself. Reading and rereading cannot be independent of the author.<sup>81</sup> Since interpreting and assigning intention are simultaneous, when applied in the legal context, Fish's theory of interpretation would place heavy emphasis on precedence and the rule-of-law system, and necessitates the deciphering of the drafter's original intent. Fish's theory is inapposite to the literary art, where, as the creative text is received, the experience of interpretation is tailored to the particular reader and becomes personalized, and the author often disappears.<sup>82</sup>

I have just summarized some of the scholarly and philosophical debates regarding language interpretation that overlays both law and art, for the purpose of landscaping the background for my hypothesis. In my view, neither Fish nor Dworkin adds much insight into the interplay or divergence between law and art in terms of the creative processes. Dworkin "borrows" a literary model to discuss law, and Fish criticizes the model chosen.

The model borrowed is indeed a simplistic one. In reality, the "chain" novel is a method often adopted by commercial groups, most likely in Hollywood, in order to meet the time and concept demand of the film industry. One can criticize it as the mass production assembly line of entertainment products. It hardly represents the norm, or the mental processes of serious, thoughtful, and creative writers in the "mainstream literary" genre. These writers may work in writers' groups, only for the purpose of obtaining input to open new paths and sharpen the craft, but not to co-write. The job of a creative writer has often been characterized as a lonely, isolated internal journey (Dworkin recognizes this but still resorts to the popular model of "chain" writing.)<sup>83</sup> Further, Dworkin's "literary theory" constraint is artificial and applies only to the written work of the professional critics. Literary interpretation and appreciation is often a personal experience. The individual reader, who is not a literary critic writing for the New York Times, quite often silently brings into the process of interpretation her beliefs, desires, sense of self, and sense of the world, and projects herself onto the work. At times, she may not even care which theory or genre characterizes the work she is enjoying.

## V. THE INCOMPATIBILITY BETWEEN LAW AND ART

Having said that an "aesthetic approach" to law will stimulate rethinking of jurisprudence by causing us to ponder upon our own fixation

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<sup>80</sup> See generally Stanley Fish, *Working on the Chain Gang*, 60 TEX. L. REV. 551 (1982).

<sup>81</sup> See STANLEY E. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES*, *supra* note 62, at 1-33; FISH, *IS THERE A TEXT IN THIS CLASS: THE AUTHORITY OF INTERPRETIVE COMMUNITIES*, *supra* note 62, at 303-21, 356-71.

<sup>82</sup> See BARTHES, *supra* note 23, at 142-47.

<sup>83</sup> See Ronald A. Dworkin, "Natural" Law Revisited, 334 U. FLA. L. REV. 165 (1982); RONALD DWORIN, *supra* note 58; DWORIN, *Interpretive Concepts*, in *LAW'S EMPIRE*, *supra* note 7.

with the empirical, one-dimensional truth, and having concluded that rhetoric is helpful to persuasion and social activism that are part of law, I must nonetheless stress the issue of constraint. This is due to the fact that overall, law and art remain distinctively incompatible. The cross-disciplinary travel, therefore, must be tempered with caution and the constant awareness of disingenuous possibilities occasioned by the L&L movement itself (which will be explored later). I will not attempt to articulate what the rules of constraint should be, as that will be outside of the contemplated scope of this Article. Here, I will focus instead on identifying the properties of art versus law that justify the need for constraint.

#### A. TWO DISTINCTIVE AND ANTAGONISTIC CREATIVE PROCESSES

Neither Davidson (a semanticist) nor Fish (a pragmatist) grasps the principle element of serious artistic creation — the traveling of the sensual/sensory path by someone who experiences, and is not just an observer. This is because both Fish and Davidson are men of rationality, although their theories may arguably reject a learned structure or rational approach toward interpretation (i.e., the ad hoc "passing theory" of Davidson and the anti-formalist road of Fish). As philosophers, they are accustomed to rationalizing and generalizing in order to articulate their respective theories. Likewise, Welauffer's description of rhetoric commitments in law is the living proof of his rational approach to law—a brilliant cerebral product that illustrates the very principle of clarity, directness, and consistency, which he views as characteristics of the rhetoric of law.<sup>84</sup>

But unlike law or philosophy, creative literature is not about arriving at theories or a generalized conceptualization. In fact, in literary training, generalization and conceptualization are bad habits that interfere with good creative writing. "Show, not tell" is the motto of creative artists, and to that I must add: "show by way of the senses and images, not by explaining or narrating summarized facts." For example, the literary artist does not state he is terribly depressed; instead, he describes how he cannot get out of bed in the morning, how he raises a revolver to his temple, how he holds the weapon, and how the coldness of the metal feels to his skin. The literary art is a journey of sensual particularity, constructed through the spontaneous, moment-to-moment, sense-memory impression or recollection of the human experience, fully and freely utilizing, among other things, image and thought association (as well as stream of consciousness).<sup>85</sup> The common observation that artistic writing is action-packed and utilizes action verbs is just the natural result of the sense- and image-induced state

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<sup>84</sup> See Welauffer, *supra* note 20, at 1551, 1588.

<sup>85</sup> "Sense-memory recollection" is an acting method championed by the actress Uta Hagen for theater training. See UTA HAGEN WITH HASKEL FRANKEL, *RESPECT FOR ACTING* 52-59 (1973). Similarly, Pulitzer winner Robert Olen Butler, Professor of Creative Writing at Florida State University, advocates a moment-to-moment, subconsciously driven rendering of sense-memory recollection and sublimation as an approach to fiction writing. Author's interview with Robert Olen Butler, Professor of Creative Writing, Fla. State Univ., in Lake Charles, La. (1998).

of mind and vision, whereupon the artist's eyes see movements and travel with the fluidity of scenes.<sup>86</sup> To journey the sensual/sensory path, the literary artist must submerge herself in her subconsciousness and allow her senses, vision, and emotions to lead her. The destination is often a surprise. The rational mind is abandoned. Emotions, visions, and senses take over. The mind only stays to synthesize for the purpose of utilizing language and constructing sentences, and even so sentences are often spoken through characters or narrators in their mood, state of mind, culture, and perspective, as characters take on lives of their own separate from the creator-artist. The reality created is analogous to Lanham's "rhetorical ideal," and characters are often described as "living outside" the author during the creative process.<sup>87</sup>

My hypothesis above is not entirely without support from the existing literature. Although the L&L scholars and philosophers have not focused concretely and specifically on the antagonistic creative processes between law and art, they have recognized the uniqueness of spontaneity and the subconsciously driven nature of artistic creation, which together segregate art from law. For example, as an avid reader, Posner recognizes the subconscious impulses of the creative literature. He acknowledges that literature is prompted by emotion, not by knowledge, and that the great part of literary creation occurs unconsciously — invention often results in "an unconscious blur," and painstaking revisions often do not follow a conscious plan.<sup>88</sup> Quite frequently, Posner points out, the author cannot explain why she did what she did.<sup>89</sup>

Dworkin acknowledges, too, the spontaneous and boundless nature of artistic creation. The meaning and nature of artistic works are not fixed, and that is the characteristic of art.<sup>90</sup> The artist's submergence into the subconscious mind has also appeared in Davidson's work, and is encompassed in a phenomenon called "James Joyce refining himself out of existence." Although Davidson recognizes the spontaneity and bypassing of rationality that artists like Joyce embrace, Davidson (being the philosopher) tries to rationalize it within his semantic theory. He observes that "James Joyce's conception of artistic freedom required that he not be the slave of settled meanings, . . . established styles and tastes . . ." <sup>91</sup> The artistic bypassing may also apply to grammar and spelling. The semanticist in Davidson cannot stand this, so he rationalizes that the writer (unlike a painter) cannot ignore what his readers already know or assume about the

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<sup>86</sup> JAMES BOYD WHITE, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in LAW AND LITERATURE TEXT AND THEORY, (Lenora Ledwon ed., Garland 1996).

<sup>87</sup> An extreme example of this segregation between author and imagined characters is typified in the classic short story, *La Horla*, by the French "king" of short stories, Guy de Maupassant. In *La Horla*, a man's imagination becomes his reality — an entity that is born out of his internal journey and descending into madness. See GUY DE MAUPASSANT, *La Horla*, in THE NECKLACE AND OTHER SHORT STORIES (Foachin Neugroshel trans., Dover Publications 2003).

<sup>88</sup> See POSNER, *supra* note 58, at 69-71.

<sup>89</sup> *Id.*

<sup>90</sup> See DWORKIN, *supra* note 7, at 45-86, 176-224.

<sup>91</sup> DONALD DAVIDSON, *James Joyce and Humpty Dumpty*, in PHILOSOPHY AND THE ARTS 1, 4 (Peter French, Theodore Uehling & Howard Wettstein eds., 1991); DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 141-54, 183-98, 245-64 (1984); DAVIDSON, *supra* note 11, at 433-45.

words he uses, concluding that Joyce has not "refined himself out of existence," but rather, by the "violent originality" of his language, has simply "shifted the burden of understanding and insight onto his bemused readers." The creative energy is thus forced upon the reader by the writer's abrupt and original use of language. By engaging his reader, the author appears invisible, and the interpreter becomes involved in the creative task — a recreation of the original creation! According to Davidson, Joyce only doubles his distance from the reader. He does not really "refine himself out of existence."<sup>92</sup>

Lanham likewise recognizes the difference in the creative processes of the two disciplines. Quoting Buffon, he describes a method of writing in which:

[Y]ou (the writer) possess your subject fully, reflect upon it sufficiently to see clearly the order of your thoughts, to put them in a continuous order of which each point represents a single idea. And once you have taken up your pen, it must follow from point to point without wandering . . . It is this that makes a style rigorous, lends it unity, paces it and this alone will render it exact and simple, balanced and clear.<sup>93</sup>

This kind of methodical writing is more indicative of the type of rationality and logic that predominates legal work products, akin to Wetlaufer's "rhetoric of law." Having described this type of rational writing, in defense of his "rhetorical ideal," Lanham then poses the question, "Who writes this way?"<sup>94</sup> He points to a different kind of writing in which the writer "depends on the suggestive powers of language," "surrender[s] [herself] to language," and "shuttle[s] continually between a nominalist universe and a realistic one."<sup>95</sup> Lanham's distinction and description of his "rhetoric reality" — where intuition becomes the new form of objectivity and opaqueness may substitute for clarity, outlines the periphery of the divergence between law and art.

Wetlaufer also sets out the premises that separate law from art. Judicial opinions emphasize the rule of law, and seek closure and dispute resolution. Literature, on the other hand, invites open texture, presents multiple voices, and appeals to contingency, emotions and imagination. In legal writing, the goal is to render black or white that which is gray. Literary writing, on the other hand, is the pursuit of a vision, wherever it leads.<sup>96</sup> Wetlaufer also leads us to the divergence that exists in scholarship, pedagogy, and critical studies between the two disciplines.<sup>97</sup> Unlike legal scholarship, literary scholarship does not seek to identify one true meaning, one objective truth, or a right answer. Arguments in literary scholarship are usually less

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<sup>92</sup> See Davidson, *James Joyce and Humpty Dumpty*, *supra* note 91, at 10-12.

<sup>93</sup> LANHAM, *supra* note 33, at 23.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See Wetlaufer, *supra* note 20.

<sup>97</sup> See generally Wetlaufer, *supra* note 20.

coercive, less linear, and less exertive of step-by-step control over readers and audience.<sup>98</sup>

Law is cerebral. Art is sensory. Law tells. Art shows. Law rationalizes. Art feels. Law renders definitude. Art explores infinity. The characterizations can go on and they may not be new. Artists are trained to get in touch with their senses and show them in language. Lawyers are trained to be rational and to will or pattern logic into language. "The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is the language of logic . . . . The logical method and form flatter that longing for certainty and for repose which is in every human mind . . . ."<sup>99</sup>

The key differences, therefore, lie principally in the creative processes. However, the L&L movement of the past decades might have skipped the incompatibility in order to make law and literature into a "happy couple,"<sup>100</sup> or at least "an odd couple" with reconcilable differences!

The overlapping zone between law and art is possible, as identified by the L&L movement, only because the artist must use language to put her audience in fictive time and place and achieve what is known in the performing arts as a sense of suspended disbelief, where "success . . . is measured by the faithfulness of the imitation."<sup>101</sup> The same test of believability exists in the literary art. This explains why rhetoric, when applied to law, is often characterized as the ethical appeal of truth -- the advocate who persuades must win the audience's confidence in her commitment and conviction, in the truth of her speech, and in the sense of personal identification with the ills or threat of harm she seeks to eradicate. While the goals may be shared, lawyers who are rhetoricians get there by consciously arranging their discourse, a task that involves logic, rationality, planning, and conceptualization. The artist, on the other hand, gets there by surrendering to the impulses of the senses. The difference in the path traveled is too fundamental to envision a happy marriage between the two. The lawyer's path to successful persuasion is more like an accomplished mission, a purpose set and achieved. In contrast, the artist's path to persuasion — the attainment of believability in the great art — is natural and spontaneous like a discovery. Art then becomes as broad as an attitude, a way of living and working, an existence, a manner of traveling, and an approach to creation that sets it far apart from structured legal thinking and writing that can be planned and shaped ahead of its own birth.

Those who advocate an interdisciplinary approach to art and law often resort to the observation that the two disciplines should naturally intertwine

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<sup>98</sup> For example, Wetlauffer describes the traditional Kingsfieldian or D'Amatoian legal pedagogue's viewpoint as follows: Legal education should mean assault of the mind, exposing the students' sloppy ways of thinking and lazy mental attitude, capitalizing on their mental and psychological insecurity, the humiliation of not knowing the answer, and their anti-pleasure experiences. Wetlauffer calls this method of law teaching the "pedagogy of assault" *See id.* at 1578-79.

<sup>99</sup> Holmes, *supra* note 26, at 465-66.

<sup>100</sup> THE HAPPY COUPLE: LAW AND LITERATURE (J. Neville Turner & Pamela Williams eds., 1994).

<sup>101</sup> LANHAM, *supra* note 33, at 1, 18.

because the human mind does not work in concrete departmentalization. Decision-making and information-processing are based on both emotions and logic, and hence, the creative processes between law and art can be shared. In the absence of scientific empirical studies that follow and record the human mind as it creates legal products versus artistic products, as a proposition, this argument seems to mix separate issues and concepts, consisting of overgeneralization, assumptions, and misapplication of logical reasoning, as diagramed below:

*Proposition:* Human = Emotions + Logic (where the Human represents the Creative Process)

*Assume:* Emotions = Art

*Assume:* Law = Logic

*Therefore,* Human = Art + Law

*Therefore,* Creative Process = Art + Law

*Therefore,* Creative Process of Art = Creative Process of Law →  
Erroneous Conclusion

James Boyd White makes an effort to bring law and art together in what he calls the “poetics of law,” showing the striking similarity between the ways the disciplines are taught.<sup>102</sup> Here he is talking about critical studies (the receiving end of art) and not creative writing (the origination of art). He, however, forgets that the gift of art cannot be taught. Only the craft of art and certain disciplines or exercises relating thereto can be drilled. Law, on the other hand, is all learned behavior, although certain lawyering talents, of course, like any other skills, depend on natural inclination and God-given gift.

White also points out that the reading of both poetry and legal opinions is done for conceptualization, external association and contrast, acknowledgment of inconsistency and tension, openness to ambiguity and uncertainty, and characterization of value and merits or demerits.<sup>103</sup> These are properties of the type of commitment to multiple voices and anti-bureaucratic reading that ultimately lead to the ascertaining of aesthetic value and truth. By naming these properties, White likens poems to judicial opinions, and legal thinking to the literary experience.<sup>104</sup> Assuming that all of these common properties could empirically be proven, they are stated from the recipient's standpoint (i.e., the *interpretive process*), not the originator's standpoint (i.e., the *creative process*). It is important to segregate and deconstruct the two processes. After all, an understanding of the creative process as an independent segment in the human experience will undoubtedly assist in the formulation of interpretation theories necessary to both art and law.

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<sup>102</sup> See WHITE, *supra* note 86, at 5.

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Id.* at 6-7.

More importantly, the concepts and ideas articulated by White describe the human mind consciously at work — from concretization to abstraction. They do not, and cannot be used to describe the artistic creation at the subconscious level.<sup>105</sup> Great art derives from the subconscious pursuit of a deeply felt vision to explore the complexity of life and of humans. The pursuits of judges and lawyers are not left to the subconscious mind, despite the obvious presence of intuitive judgment. Legal thinking and legal products are guided by the rational deliberation of techniques and goals. They are neither *ad lib*, *ad hoc*, nor spontaneous.

White's ultimate objective is to advocate that lawyers read law like literature, looking for contextual relation between text and culture, between speaker and audience. He is a pragmatist who does not believe in radical interpretation or literal meaning. Instead, he views language as uncertain, remade, and continuous. He does touch upon a common ground of law and art: what he terms as the "many-voicedness" that occurs in the integration of thought and feeling—the total common experience.<sup>106</sup>

#### B. THE DIFFERENCE IN OUTPUT OR WORK PRODUCT

Lanham's "opaqueness" observed in artistic language does not mean an abandonment of elaborate, vivid particularity. (It simply means, *inter alia*, the possibilities of multiple realities).<sup>107</sup> Because of the need for particularity and believability, the artist's use of language must be particularized in spontaneous response to her sensual/sensory path, which brings us to the following important distinction between artistic output and legal output. Legal language is mapped out in a scheme of arguments and logic, in accordance with Wetlaufer's rhetoric of law, while artistic language *is* moment to moment. The best way to illustrate this is by discussing specific examples. Obviously a novel is different from a court opinion, so in the comparison, we will disregard substance. But let us focus on the properties that account for the differences in output.

Posner cites the *Lochner* dissent<sup>108</sup> as a masterpiece of rhetoric and an illustration of how art could be incorporated into law for purposes of persuasion. In Posner's view, the *Lochner* dissent is closer to the free style of art than the legal restraint of law and probably would have received a low grade in law school at the turn of the 20<sup>th</sup> century. It was not logically organized, nor thoroughly researched. It did not follow the standard methodology of legal reasoning which usually entails the sharp identification of issues, scrupulous treatment of precedents, or tracing of the majority opinion or factual record. However, none of these perceived flaws affect the dissent's power of persuasion.<sup>109</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 17.

<sup>107</sup> *See* Lanham, *supra* note 33.

<sup>108</sup> *Lochner* vs. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

<sup>109</sup> POSNER, *supra* note 58, at 77-82.



Yet, under close scrutiny, the *Lochner* dissent is not at all a statement of art, but at best an illustration of the *art of law* (using the terminologies and definitional concepts that I set forth under Part II of this Article). To begin, its author, Oliver Wendell Holmes, states a generalization: "This case is decided upon an economic theory which a large part of the country does not entertain."<sup>110</sup> The statement, as Posner points out, exudes confidence and serenity, immediately drawing readers' attention by putting them on the defense, and building suspense by invoking their curiosity. Ethical appeal, the plain style, the simple man's style are all rhetorical tools — the artifice of sophisticated intellectuals who seek to persuade or Wetlaufer's rhetoric of law discussed earlier. Yet, Justice Holmes's beginning sentence is precisely what artists would avoid — the generalization of a concept devoid of sense-memory recollection. Even with all of its strong points, Holmes's opening sentence is not, and cannot be based on the senses.

Let us compare it with the opening of Nabokov's famous-infamous *Lolita*, which consists of pure deliberate exploration of the senses, images, and emotions, all in a moment-to-moment rendition: "Lolita, light of my life, fire of my loins. My sin, my soul. Lo-lee-ta: the tip of the tongue taking a trip of three steps down the palate to tap, at three, on the teeth. Lo. Lee. Ta."<sup>111</sup> The writing of Holmes is intellectual deliciousness, while Nabokov's prose is sensual. Setting aside the obvious incompatibility in the subject matter addressed, the generalization of Holmes's rhetoric versus Nabokov's deliberate, elaborate exploration of the senses, sound, and vision are irreconcilable and require different states of mind as well as different preparation. For law, the preparation is rationalization and organization. For art, it is subconscious submergence. At best, law may borrow from art its appeal to emotions and playfulness with language achieved as a *craft* consciously applied. But law cannot, and should not, borrow the creative process from which springs the beauty that makes a piece of writing the literary art.

A likely place where art and law can meet is the statement of facts in lawyers' briefs. Teachers of courtroom and appellate advocacy stress the need for the statement of facts to be persuasive, advising lawyers to use innovative narratives, and to cast facts in the best light for their position, although they must trace the "neutral" factual record. But even there, in the freer format of the statement of facts, the moment-to-moment nature of art cannot dictate the style for the factual summary demanded by law.

Returning to Holmes, even with all its rhetorical power and conscious disregard of conventional legal writing principles, the *Lochner* dissent did not exhibit the moment-to-moment approach found in the following passage from Albert Camus' *L'Etrangère*. Here, Camus depicts a senseless murder on a sun-drenched Algerian beach, the site of a tragedy that he describes as "the nakedness of man faced with the absurd."<sup>112</sup>

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<sup>110</sup> *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

<sup>111</sup> VLADIMIR NABOKOV, *LOLITA* 9 (NY Penguin 1996).

<sup>112</sup> I have chosen Camus's "*L'Etrangère*" because of its heavy philosophical and moral orientation (exploring issues of choices, coincidences, and the human conditions in the background of a criminal

[T]he Arab drew his knife and held it up to me in the sun. The light shot off the steel and it was like a long flashing blade cutting at my forehead. At the same instant the sweat in my eyebrows dripped down over my eyelids all at once and covered them with a warm, thick film. My eyes were blinded behind the curtain of tears and salt. All I could feel were the cymbals of sunlight crashing on my forehead and, indistinctly, the dazzling spear flying up from the knife in front of me. The scorching blade slashed at my eyelashes and stabbed at my stinging eyes. That's when everything begin to reel. The sea carried up a thick, fiery breath. It seemed to me as if the sky split open from one end to the other to rain down fire. My whole being tensed and I squeezed my hand around the revolver. The trigger gave; I felt the smooth underside of the butt; and there, in that noise, sharp and deafening at the same time, is where it all started. I shook off the sweat and sun. I knew that I had shattered the harmony of the day, the exceptional silence of a beach where I'd been happy. Then I fired four more times at the motionless body where the bullets lodged without leaving a trace. And it was like knocking four quick times on the door of unhappiness.<sup>113</sup>

Such a *moment-to-moment* rendition of facts, focusing on senses and imageries, has not been characteristic of the factual description that typically makes its way into a statement of fact in a brief. The inherent constraint of law consciously disregards and discards the moment-to-moment description and concentrates, instead, on *thrift* and *emphasis*.

Holmes, however, was known to be more daring with the aesthetic aspect of his legal writing. In one of his speeches, he spoke of "a ragbag full of general principles — a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures."<sup>114</sup> Here he was employing the craft of a creative artist by bringing particularized images to life. But art is more than just the creation of imageries. Where desired, the imageries connect to reactive emotions, pushed to the limit, explicit or implied, leading to exploration of dimensions not readily verifiable by science such as dream sequences and even the unproven — an adventure the law may not be willing to embrace. The imaginative and creative forces of legal argument, no matter how brilliant, simply are curtailed and cannot be allowed to surpass the logical structure of thoughts built on empirical truths; otherwise, the system of regulated conduct breaks down. Art expands dimensions of imagination by following impulses. Law restricts them to rationality and literal reality.

The difference between art and law is not one of fiction versus non-fiction. The following passage of creative non-fiction writing, illustrates the connection of images to reactive emotions laid bare, even if

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justice system). On its face, this orientation seems to lend the work more readily to law. Yet, as Camus's passage illustrates, similarities in contents and subject matter are totally irrelevant to the incompatibility in the mental products.

<sup>113</sup> ALBERT CAMUS, *ESTRANGER*, (Matthew Ward trans., First Vintage International Edition 1989).

<sup>114</sup> OLIVER WENDELL HOLMES, JR., *The Use of Law Schools*, in *COLLECTED LEGAL PAPERS* 35, 42 (1920).

they appear irrational or suggestive of fantasia. Again, the moment-to-moment rendition of facts observed below is unfit for the summarized and expository style of a legal brief (unless the lawyer is quoting to challenge the mental capacity of a subject):

I could not forget those big blooms of whitish, ivory petals, large enough to fill up a porcelain winter melon soup bowl that could feed five adults. My aunt would place the blue and white translucent bowl out on the mossy porch to collect rainwater. She would pick a fresh bloom, severing it from its grainy, long stem with a pair of scissors. I could still hear the tiny, shrieking sound of the blades, opening and closing in the midair. She would put the bloom inside the bowl and place it on the rosewood table that faced the ancestral altar. The scent filled up the room, lingering upon white lace curtains and alongside the edges of dark furniture that shone with lemon juice. Every day, my aunt squeezed lemon on the wood and polished it with a damp cloth, so I could smell lemon in the air, along with the sweet scent of the fresh, white bloom. I always thought the dark furniture looked so sad behind those closed shutters, sorrowful and stern like the pair of eyes of my dead mandarin grandfather, staring from his black and white picture down to the porcelain bowl where the flower floated. I imagined the flower would turn into a woman's face, smooth and white, with painted brows like two slanting ink strokes. Like a faint stream of smoke, she curled herself out of the bowl and materialized into my mother, with all that long, black hair floating behind her back. She wore white silk pajamas, the soft fabric reminding me of the velvety, light, smooth texture of the white bloom petals. Her naked feet, rosy and slender, raised above the floor as she floated through the darkroom. She walked around me, circling me with the shadows of her arms. And then my dead grandfather, too, would come alive, walking out of his black-and-white frame to place his dehydrated, freckled hand on my forehead, the long, curled fingernails dragging across my temples like the touch of a dry bamboo branch. And I would faint.

I avoided the altar room by spending my days in the front yard, at times drunk in the sweet smell of those white blooms. I called them my "wild magnolias." At the sound of the wind, they fell onto the damp ground, and I picked them up and placed them in a bamboo basket. I had a little shovel, and tried to replant those blooms into a flower bed that followed the half-moon shape of my bedroom window, directly underneath it. I dug and placed their stems in the soft soil. When I saw earthworms, I would throw the shovel and run back to the house, crying into my palms. I did not like seeing those reddish brown creatures,

shaped like chopsticks, yet moving underneath the ground, mixed in with the soft soil and crawling through the cracks between my fingers. I did not want to see my shovel stabbing them and cutting them in half, each half still convulsing as though grasping for life. My tears flowed because I saw them living and dying. I held my hands together and in the middle of my palms, I saw a clear little pond. In it I could see shadows of the reddish creatures wiggling in despair. Even in death, they still moved, at least for a few minutes.

I cried into the pond of my palms because I knew with my shovel, I had killed them.<sup>115</sup>

The common belief that good legal writing can be transferred to creative writing and vice versa is a misconception. The more one writes eloquently in accordance with the rationalized arrangement of thoughts to produce the expository narratives and argumentative discourses required in the law, the less one becomes accustomed to the instinctive, moment-to-moment response to free flowing sense-memory impression or recollection necessary for artistic creation. Fundamental writing crafts are transferred and shared across disciplines, but only at a superficial level, including elements such as the fluency of expressions, the mastery of linguistic and semantic rules or propositions, word choices, and metaphors, etc. But the creative journey is so different for the two disciplines that a full and consistent engagement in law can incapacitate art, despite the common skills with language. The analytical and logical properties of legal thinking can condition the artist, interfering and blocking her sensory path or subconscious submergence. When the interference is maximized, it becomes a force of destruction.

### C. THE *RAISON D'ETRE* OF LAW VERSUS ART

Artists seldom set moral boundaries for their vision. For example, because of the sensory pursuit, literary writers often wander into the domain of human sexuality and the torment of the soul, including moral ambivalence, in order to explore deeper dimensions of human truths. This is not necessarily done as a crusade, protest, or in the hope of sending any kind of moral statement to society. Instead, it may just be the natural next step of the path inside the senses and the resulting self-questioning and testing as the artist gets into her art. The tension between society and the artist's inner quest manifests itself in the development of First Amendment case law, ranging from issues of privacy to the control of obscenity, where the standard of law can very well be based on "seeing," and not on "telling."<sup>116</sup>

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<sup>115</sup> Anonymous, *The Coffins of Cinnamon*, unpublished manuscript, on file with author.

<sup>116</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring) ("I know it [pornography] when I see it, and the motion picture involved in this case is not that.").

Posner agrees that art does not always preach nor aim to make readers into better persons, recognizing, therefore, the dubious issue of morals in art.<sup>117</sup> For example, descriptions of Satan can borderline on blasphemy, and artists are frequently drawn to the political extremes, stretching and challenging norms, not necessarily because they want to preach, but simply because of the artistic urge to pursue visions endlessly. A sense of amorality can attach to artistic creation. Artists want admiration of their self-expression and audience involvement in the reality of their vision, but a moral end is not necessarily the *raison d'etre* of art. As overused as it has been, the phrase "*L'Art pour L'Art*" (art for the sake of art) still has significance in the realm of the creative field, serving to defend the amorality of art.<sup>118</sup> In contrast, the concept of justice is clearly at the core of law. For example, Dworkin is adamant that politics is at the heart of law.<sup>119</sup> With his advancement of the *aesthetic hypothesis-political hypothesis* dichotomy, Dworkin frowns upon the intentionalists, criticizing them for narrowing interpretation by restraining it to the author's intention (a possible rival against his "aesthetic hypothesis").<sup>120</sup> Applying this to law means that Dworkin would belittle the importance of legislative intent. Posner appears offended by Dworkin's suggestion that literary interpretation can work for constitutional or legislative interpretation. In expressing his displeasure, Posner contributes to the contrast between law and art by comparing legislative interpretation to literary critiques. Too many differences exist between the *raison d'etre* of literature and the enactment of legislation to permit fruitful analogies or disciplinary crossing to broaden interpretation.<sup>121</sup> Considering the incompatibility in the creative processes and output discussed above, I wholeheartedly agree with Posner.

To illustrate, Posner contrasts the deciphering of the drafter's intention in constitutional interpretation against the reading of a political or social intention into a poem by Yeats.<sup>122</sup> The same contrast can be made in reading a patriotic motive into Chopin's *Mazurka* or *Valse Polonaise* for the purposes of enjoying Chopin; neither Yeats nor Chopin created his art with the intention to dictate principles or provide authoritarian guidance to anyone. Nor do we read Yeats or listen to Chopin to find political messages. On the other hand, the framers of the Constitution wrote words

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<sup>117</sup> See Posner, *supra* note 13; Posner, *supra* note 21.

<sup>118</sup> Existentialist philosopher Jean-Paul Sartre suggests, however, that pure aesthetic is not an adequate test for good literature. "[N]obody can suppose for a moment that it is possible to write a good novel in praise of anti-Semitism . . . I'd like to know a single good novel whose express purpose was to serve oppression, a single good novel which has been written against Jews, negroes [sic], workers, or colonial people." JEAN-PAUL SARTRE, *WHAT IS LITERATURE?* 64, n.1 (Bernard Frechtman trans., Philosophical Library 1949) (1948). Thus, the morally vicious cannot be aesthetically great.

<sup>119</sup> Dworkin raises the inquiry whether politics should be part of art or literature interpretation. See RONALD DWORKIN, *A Matter of Principle* (1985), reprinted in *How Law is like Literature*, in *LAW AND LITERATURE: TEXT AND THEORY*, *supra* note 71, at 29, 45. Fish says that it is not, concluding that art, politics, and law unite in philosophy. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERATURE AND LEGAL STUDIES* (Duke Univ. Press 1989), reprinted in *Working on the Chain Gang: Interpretation in Law and Literature*, in *LAW AND LITERATURE: TEXT AND THEORY* 47 (Lenora Ledwon ed., Garland 1996).

<sup>120</sup> See Dworkin, *supra* note 71, at 36-39.

<sup>121</sup> See RICHARD POSNER, *LAW AND LITERATURE* 218-19 (1998).

<sup>122</sup> See Posner, *supra* note 58, at 1363.

for reasons of asserting authority and guidance to society, and if we read the Constitution, it is with a specific purpose that stands vastly apart from the aesthetic experience. In literary appreciation, the author disappears. Trying to "dig" the author's intentions out of the creative work may or may not enhance our appreciation of it. In fact, when we interpret literature, we are constructing our own view or projection of our reaction to it. But in the legal context, conscious incorporation of readers' projections may wreak havoc upon the system of law, in addition to the artificial and irresponsible nature of the effort. For example, substituting the judge's mind for the legislator's intent has farther-reaching implications than imprinting the interpretation of the literary critic upon a poem. Contrary to the legal decision-maker, the literary critic is not following precedents. The literary critic's interpretation can be a new product of creativity that stands on its own in the literary discourse.

Artists are not necessarily theorists who want to form normative or prescriptive authority for life. In art, the author is frequently "demoted" to a mythical function.<sup>123</sup> Readers are not concerned about the author as a regulator of conduct, but instead, individualize their experience independent of the author's voice. The voice of law, on the other hand, commands obedience and disregards individual preferences, creating either an invisible "reasonable man" who exemplifies proper conduct in tort, or an "imaginary bad man" who considers the legal consequences of his actions.<sup>124</sup> The world of law is one of authority and hierarchy, which in Walt Whitman's view, is the antithesis of democracy.<sup>125</sup> At the same time, the ultimate rewards of law versus those of art are also vastly different. The general voice of law is oriented toward specific application and vindication, whereas the value or immortality of art lies in its popularity or universality, i.e., its capability of meaning different things to different people.

#### D. THE POTENTIALLY MISLEADING NATURE OF THE L& L MOVEMENT OF THE PAST DECADES

To the extent the L&L movement casts judicial opinions and legal writing as a literary experience, it can be misleading and create the risk that the literary artistic creative process will be misunderstood. This misunderstanding can predispose legal drafters to disregard the constraint of law, enable lawyers to belittle the restraining nature of the legal process, and distract them, not only from the purpose of closure in dispute resolution, but also in the development of precedents for future application in a common law system. In judicial drafting, it may mean the unnecessary creation of dicta that confuse future litigants and undermine the doctrines of justiciability or case-in-controversy. The L&L movement thus brings risks, as well as benefits, into the law. To understand the risks, it is worthwhile to explore several observations about the movement.

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<sup>123</sup> See Barthes, *supra* note 23, at 142-47. See also Michel Foucault, *supra* note 76, at 141-60.

<sup>124</sup> See Holmes, *supra* note 7.

<sup>125</sup> See WALT WHITMAN, Preface to the 1855 edition of *Leaves of Grass*, COMPLETE POETRY AND COLLECTED PROSE 17-18(3d prtg. 1982); Wetlaufer, *supra* note 20, at 1597 n.166.

First, L&L proponents recognize the "incidental nature" of the movement. Posner agrees that the movement resulted from the displacement of students and teachers of the humanities into law, the decline in the job market for the humanities, and the increase in law school enrollment and size of law faculties. Proponents of the movement have included students of literature who turn to law school and end up teaching courses in law and literature as law professors.<sup>126</sup> Posner also attributes the movement to the trend of "deconstructing" literature, resulting in doubt expressed against the objectivity of law.<sup>127</sup> Efforts to "deconstruct" legal language occasion the opportunity to view legal text as literary text, resulting in the discovery of "a reciprocal relationship" between the two.<sup>128</sup> But again, this result represents the perspective of the critic, interpreter, or reader—not the creator.

Second, emphasis is misplaced regarding the interplay between law and literature. One culprit was the phenomenon of "Law in Literature" (the sources of which include *Antigone* and *The Merchant of Venice*, as well as the frequent treatment of legal and jurisprudence themes in fiction, including John Grisham's commercial popular novels).<sup>129</sup> Posner also mentions two other phenomena that tie law to fiction in society, and which he correctly excludes from his L&L comparative analysis: the "occasional fiction writing by lawyers designed to illuminate real legal problems,"<sup>130</sup> or the description of legal events by fiction writers. But mutual illumination is not the primary objective of law or art. This, Posner readily agrees to.<sup>131</sup> If one really wants to know about law, one does not seek out a novel on lawyers. If one really wants to know about immortal aesthetic value that survives the Darwinian test of time, one does not seek judicial opinions, which in essence, are resolutions of time-sensitive disputes. "Law in Literature," or vice versa, does not at all compare the creative processes. (The L&L movement started by James Boyd White is said to consist of two strands: *Law in Literature* advocates the "Great Books" approach, whereupon lawyers are encouraged to study legal subjects and legal issues in the classics of Western literature. *Law as Literature* uses the theoretical practices of literary criticism as a medium to analyze legal texts and explore the rhetorical style of law.<sup>132</sup> Neither strand speaks to the comparative creative processes between law and art.)

Third, it is true that law influences art, and *vice versa*, but those influences do not mean the two disciplines commingle. Any discipline can

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<sup>126</sup> See TERE E. FOSTER, *But is it Law? Using Literature to Penetrate Societal Representations of Women*, in BEYOND PORTIA: WOMEN, LAW AND LITERATURE IN THE UNITED STATES 310 (1997).

<sup>127</sup> See Posner, *supra* note 13; Posner, *supra* note 21.

<sup>128</sup> See ELIZABETH TOBIN, *Imagining the Mother's Text: Toni Morrison's Beloved and Contemporary Law*, in BEYOND PORTIA: WOMEN, LAW, AND LITERATURE IN THE UNITED STATES, *supra* note 126, at 142.

<sup>129</sup> See PETER ROBSON, *Images of Law in the Fiction of John Grisham*, in TALL STORIES? READING LAW AND LITERATURE 201 (John Morison & Christine Bell eds., 1996).

<sup>130</sup> HILDE HEIN, *Law and Order in Art and Law*, in LAW AND LITERATURE PERSPECTIVES, *supra* note 32, at 109; POSNER, *supra* note 58, at 1354.

<sup>131</sup> See Posner, *supra* note 13; Posner, *supra* note 21.

<sup>132</sup> See HEIN, *supra* note 130; GARY MINDA, *POSTMODERN LEGAL MOVEMENTS – LAW AND JURISPRUDENCE AT CENTURY'S END* 149 (N.Y. Univ. Press 1995).

influence another discipline, as the total knowledge about the human experience is by its nature interdisciplinary. Hilde Hein explains the impact of law on art when the U.S. Supreme Court was asked to define "parody" in connection with copyright disputes.<sup>133</sup> In such a case, a court was asked to instigate or adopt an aesthetic notion and to give it a social and legal texture. Conversely, Hein speaks of how literary concepts such as "point of view, framing, emphasis, elliptical reference, and allusion by omission" have their place in both art and law.<sup>134</sup> But again, these are tools of craft, only demonstrating what one can do with language. These narrative and rhetorical techniques do not shed light on the creative process itself. Lastly, Hein points out how artistic works such as *Uncle Tom's Cabin* and *The Jungle* influenced the shaping of law.<sup>135</sup> This may confirm the social value of artistic works -- there is something inherent in the creative literature that invites readers to participate in the responsibility of historical judgment and to view the creative literature as a force for institutional and social reform.<sup>136</sup> Posner calls this the "literary indictment of legal injustice," whereupon literature picks up where law falls apart or creates gaps or deficiencies.<sup>137</sup> So, law and literature may ultimately serve humans the same way, but this is not to say that the process of creating *Uncle Tom's Cabin* was the same as, or analogous to, Cardozo's opinions.

Like others in the L&L movement, Hein advocates an "aesthetic order" to law. She goes as far as to state that poetry should be a positive model for law, without explaining how this is to be accomplished.<sup>138</sup> As an example, she notes the use of rhetoric in a question raised by feminists in the context of examining anti-date rape law -- "which part of NO is it that you don't understand?"<sup>139</sup> Again, Hein's "aesthetic order" refers solely to the use of language by highly skilled and inventive practitioners of craft. The creation of the literary art requires much more than a conscious exercise of language skills and cleverness. It requires expression of the genuine timbre of emotions and a sensual and sentimental outlook toward the recording of the human experience, both of which are absent or excised from legal language.

Fourth, over the past few decades, a parallel and convenient relationship has existed between the L&L movement and other scholarly trends (e.g., the deconstruction movement) as well as other social developments in America. For example, the L&L movement has afforded feminists the opportunity to reexamine gender relations from a historical background<sup>140</sup> or in the contemporary context,<sup>141</sup> while combining their

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<sup>133</sup> See HEIN, *supra* note 95, at 118.

<sup>134</sup> *Id.*

<sup>135</sup> See HEIN, *supra* note 130.

<sup>136</sup> See Posner, *supra* note 58; Brook Thomas, *Cross Examination of Law and Literature* (Cambridge Univ. Press 1987). See also HEIN, *supra* note 130.

<sup>137</sup> See Posner, *supra* note 13; Posner, *supra* note 21.

<sup>138</sup> See HEIN, *supra* note 130, at 119.

<sup>139</sup> *Id.* at 122.

<sup>140</sup> See Lynne Marie DeCicco, *Women and Lawyers in the Mid-19<sup>th</sup> Century English Novel*, in 25 STUDIES IN BRITISH LITERATURE (Edwin Mellen Press 1996). For a broader perspective of rethinking feminist jurisprudence based on theories of language beyond the contours of the L&L movement, see



love of literature with their love of law.<sup>142</sup> On the other hand, the excitement of feminists over the prospect of using art innovatively to improve feminist legal education and to enhance understanding of issues such as motherhood and child abuse is an implicit recognition of the existing "emotionless" nature and status of law.<sup>143</sup>

Fifth, how law and art meet in the commercial world of entertainment is a case of human nature: our love, taste and flare for the sensational, the unusual, the profane, and the absurd. Authors who surveyed historical legal development note that the fascination with sex and violence narrated in the law was documented as early as the 18th century — passages from 18th century court transcripts were at times oddly reminiscent of novels.<sup>144</sup> One author called these coincidences the "fictions of law,"<sup>145</sup> a title that paradoxically combines two mutually exclusive concepts.<sup>146</sup> The commercialization of law has blurred the line between the legal and literary experience for an unknowing consumer public, while the television era and the growth of the entertainment industry have increasingly intensified the public's interest in the sensational. Trials have become a source of audience fascination, and law can be as notoriously exciting as action novels, veiling the mundane nature of the majority of the practice. The fascination has transcended national boundaries — the world has always held certain curiosity for affluent America's criminal justice system and its various social issues such as race or gender conflicts, which have become the topic of artistic treatment even internationally since the 1950s and 1960s.<sup>147</sup>

Last, as Posner recognizes, the players of the law are competent professionals, eloquent and skilled in language and orator performances, but are not necessarily the geniuses of literature.<sup>148</sup> Art, in its truest sense, is not a field for the mediocre; nor does it offer a comfort zone for the well-trained. Infusing the standard of one into the other can easily result in unintended disingenuousness. The L&L movement has the potential either to hurt or to help the public image of lawyers and the profession as they are portrayed in more popularized art or entertainment avenues. In summary, the L&L movement should aim to perfect *the art of law* by incorporating the *craft of art into law*, rather than undertaking the incongruent task of reconciling and balancing the incompatible creative processes of art and law.

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Bruce A. Arrigo, *Rethinking the Language of Law, Justice, and Community: Postmodern Feminist Jurisprudence*, in RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE 88, (David S. Caudill & Steven Jay Gold eds., Humanities Press 1995).

<sup>141</sup> See TOBIN, *supra* note 128, at 140.

<sup>142</sup> See BEYOND PORTIA: WOMEN, LAW AND LITERATURE IN THE UNITED STATES, *supra* note 126.

<sup>143</sup> See MELISSA HARRISON, *A Time of Passionate Learning, Using Feminism, Law, and Literature to Create a Learning Community*, in BEYOND PORTIA, *supra* note 126, at 327.

<sup>144</sup> See BETH SWAN, FICTIONS OF LAW: AN INVESTIGATION OF THE LAW IN 18<sup>TH</sup> CENTURY ENGLISH FICTION 13 (1997).

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> One example was Sartre's "*Le Putain Respectueuse*," which has been criticized as a poor attempt by an outsider-philosopher to depict America and its racial relations in stereotypic terms. See JEAN PAUL SARTRE, *The Respectful Prostitute*, in NO EXIT AND THREE OTHER PLAYS 249 (L. Abel trans., Vintage Books 1949).

<sup>148</sup> See Posner, *supra* note 13; Posner, *supra* note 21.

## VI. THE CHALLENGE OF THE “PARADOX”: ART AND CRAFT IN “NARRATIVE” LEGAL SCHOLARSHIP AND “PERSONAL STATEMENT” ADVOCACY

The incompatibility between law and art, especially in their respective creative processes, makes any combination thereof a true paradox. Overcoming the paradox becomes the internal challenge for those who wish to combine the two disciplines. In my view, those challengers take on a “double life.”

There emerges in legal scholarship and advocacy the proper place where such paradoxical challenge must be undertaken. The past decades have witnessed certain innovative additions to traditional legal scholarship, one of which is the experimental “narrative” form, which includes both real-life stories, fictionalized stories, and personal statements based on the author’s experience, similar to *creative nonfiction* in the literary art.<sup>149</sup> The “*how it was for me*” style injected into legal writing such “personal” things as authors’ “narratives,” “anecdotes,” “perspectives,” and “feelings.” In the case of the truly brave, this personalized approach has even made its way into these challengers’ lectures and classroom teaching, all at the great risk of rejection and alienation.<sup>150</sup> Some of the recognized heroes and heroines of the “narrative” movement include Patricia Williams, Catharine MacKinnon, Martha Fineman, Mari Matsuda, Derrick Bell, and Richard Delgado. For purposes of this Article, “storytelling” and “narratives” are used interchangeably to include all of these newer forms of legal discourse.<sup>151</sup>

For example, Professor Joyce A. Hughes describes herself in print as the “first Black woman to be a tenure-track law professor at *any* white law school.”<sup>152</sup> She elaborates on her family history: her father was the “first Black professor golfer to reside in Minnesota”; her mother was the “first Black girl to attend Minnesota Girl State” and the “first Black, male or female, to be on a Minnesota television news broadcast.”<sup>153</sup> She then discusses her experience of being interviewed at the Dorsey Whitney law firm in Minnesota.<sup>154</sup> Her personal story ends with the personal message of rhetoric and inspiration when she states that the P.S. to her remarks stands for “Perseverance and Self-Assessment” and “Personal Success.”<sup>155</sup> In

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<sup>149</sup> See, e.g., Jean Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87 (1998) (commenting on female law professors’ papers written in narrative tradition as a lead, in order to relate author’s own story).

<sup>150</sup> See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1988). According to Delgado, “professors who teach in nonstandard fashion sometimes evoke strong reactions of rejection from their students.” *Id.* at 2412 n.7 (citing Derrick Bell, *The Price and Pain of Racial Perspective*, STAN. L. SCH. J. May 9, 1986, at 3.) The same risk exists with legal scholarship.

<sup>151</sup> See, e.g., Shauna Van Praagh, *Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education*, 2 COLUM. J. GENDER & L. 111 (1992) (discussing the narrative and storytelling movements in legal writing and teaching).

<sup>152</sup> Joyce A. Hughes, *Black and Female in Law*, 5 RUTGERS RACE & L. REV. 105, 107 (2003). The author uses the uppercase/lowercase style to refer to ethnic identity.

<sup>153</sup> *Id.* at 105, n.1-2.

<sup>154</sup> See *id.* at 111.

<sup>155</sup> *Id.* at 115.

another example, the narrative form enabled readers of legal writing to personalize and identify with the painful experience of a trailblazer, one of the first female law professors in the ladder and culture of legal academia.<sup>156</sup> There, the narrative form uniquely authenticated what the author describes as her “greatest gain” — “a feeling of validation,” which supported her conclusion that “women and minorities did not succeed by accident.”<sup>157</sup> Likewise, Susan Estrich begins her *Yale Law Review* article with her personal story of being a rape victim.<sup>158</sup> William Eskridge, an openly gay male law professor, readily acknowledges the value of telling stories within the traditional mode, as well as the “rupturing” of societal status quo.<sup>159</sup> Patricia Williams wrote books of stories based on her life experience as a black woman who is a “victim,” “observer,” and “collaborator” of discrimination.<sup>160</sup> The pioneer storytellers have embraced the narrative form as the equivalent of eyewitness testimony without the formality of an oath. To them, the pages of law reviews turn into an authentic courtroom performance without the anxiety or contradiction of cross-examination. Storytelling has also reaffirmed the place of rhetoric communication in the law.<sup>161</sup>

The injection of storytelling techniques into legal scholarship has enabled important historical documentation and written debates within the legal community, especially for race and gender relations. Examples include the “Latino story” at Harvard Law School, in which students, over several years, attempted to campaign for the hiring and retention of “Third World” or “colored” law professors.<sup>162</sup> The Harvard story instigated a limited trend of other “stories out of law school” or “stories in law school”, which advocate the power of storytelling in legal education.<sup>163</sup> As such, storytelling has also been associated with, typecast as, and limited to the struggle for gender, racial and other so-called “subversive group” reform in the law and within legal academia. Cast in a more general light, storytelling has been viewed as part of a larger intellectual movement expressing deep dissatisfaction with, and rebelling against, the rigid abstraction of legal scholarship.<sup>164</sup> The tenet of the L&L movement is incorporated to support the argument that emotions, empathy, and human stories should be woven into the tapestry of legal scholarship.

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<sup>156</sup> See Ellen K. Solender, *The Story of A Self-Effacing Feminist Law Professor*, 4 AM. U. J. GENDER SOC. POL’Y & L. 249 (1995) Ellen Solender was Professor Emerita of Law at Southern Methodist University at the time her article was published.

<sup>157</sup> *Id.* at 263.

<sup>158</sup> See Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

<sup>159</sup> See William Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

<sup>160</sup> See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG* (1995).

<sup>161</sup> See Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988); Conti, *supra* note 7.

<sup>162</sup> See Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51 (2002).

<sup>163</sup> See, e.g., Van Praagh, *supra* note 151; Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of Brown v. Voss*, 16 CARDOZO L. REV. 1445 (1995).

<sup>164</sup> See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?* 87 MICH. L. REV. 2099 (1989).

In any event, over time, the narration of personal accounts and storytelling have helped to legitimize and popularize the use of the “first pronoun” in legal discourse, even in cases where the author has not fully utilized the “narrative” or “personalized experience” style and form. Examples can be seen in articles dealing with the interrelation between law and American pop culture,<sup>165</sup> and other pieces suggesting new positions advanced by the writers, beyond the traditional analysis and review of case law. Overall, when the realism of the “first and third pronouns” is used in storytelling, such literary craft enables legal scholarship to take on the voice of literary protagonists, rather than the traditionally restrained tone and style of a Ph.D. thesis.

More specifically, the narrative form has been associated with feminist methods,<sup>166</sup> primarily because feminist accounts describing rapes, battered women, and other stories by and about women are most effectively told in narratives.<sup>167</sup> Further, right or wrong, feminist jurisprudence may tend to regard the traditional voice of law as the male voice, and hence, feminist narratives serve the purpose of injecting a different voice into legal scholarship.<sup>168</sup> In race relations, the narrative form has been referred to as “the voice of color.”<sup>169</sup> The underlying notion is that women and people of color — the “oppressed” — should be able to write in a different voice because of differences in perspectives that cannot be readily comprehended by the mainstream, unless the experience is personalized.<sup>170</sup> More recently, the narrative form has also become a forum for scholarship by Asian American writers, a group that stereotypically has remained less vocal. The narrative form illuminates the Asian American story, attracting writers who have broken out of their “silent minority” shell,<sup>171</sup> and who have successfully combated the cultural stereotype that Asian Americans resist the publicity of personal experience and prefer the communal spirit, thereby avoiding outsiders’ attention to the individual self. Richard Delgado calls this trend the “legal stories” of the “outgroups,” (referring to their existence outside of the mainstream voice, which is described as the “ingroup”). In Delgado’s words, the trend creates a “counter-reality” to

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<sup>165</sup> See, e.g., Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 49 (2000) (discussing the portrayal of lawyers in films).

<sup>166</sup> See Carrie Mendel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go to Law School*, 38 J. LEGAL EDUC. 61, 62 (1988); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 810-11 (1993).

<sup>167</sup> See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (examining feminist narrative scholarship as distinctive form of critical legal discourse).

<sup>168</sup> See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

<sup>169</sup> See, e.g., Alex M. Johnson, *Defending the Use of Narrative and Giving Context to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 804, 806-07 (1994) (criticizing Professors Farber and Sherry’s attempts to evaluate Narratives and Critical Race Theory legal scholarships against conventional standards).

<sup>170</sup> See Farber & Sherry, *supra* note 166, at 809-10.

<sup>171</sup> See, e.g., Robert S. Chang, *Toward an Asian American Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1 (1994); Anthony S. Chen, *Beyond Modernism and Postmodernism: Working Notes Towards an Asian American Legal Scholarship*, 4 ASIAN L.J. 97 (1997).

“subvert the ingroup reality” typified by “scholarly, footnoted articles.”<sup>172</sup> The “counterstorytelling” by the “outgroup” supplements or counteracts the mainstream story. An “outgroup,” according to Delgado, is any group whose consciousness is other than that of the dominant one.<sup>173</sup> The counterstory is usually a negative one, told by outsiders who are viewed as the complainers — the dominant ingroup sees the glass as “half full,” while the ethnic minority outgroup sees the glass as “half empty.”<sup>174</sup>

Delgado argues that since the underdogs of today can be the pioneer reformers of tomorrow, at the point of status quo, they must be allowed to resort to innovation in order to initiate changes. Stories, parables, chronicles, and narratives are powerful means for destroying mindset — “the bundles of presuppositions . . . against a background of which legal and political discourse takes place.”<sup>175</sup> Delgado calls this phenomenon the “eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world . . . .”<sup>176</sup> These tools become our eyes and we can no longer take them off and examine them, because it means undoing ourselves. Other pioneer legal writers, such as Derrick Bell, view this new approach to legal writing as a way to “shatter complacency and challenge the status quo.”<sup>177</sup>

As early as 1989, Delgado had already stressed that in order to be effective, the storytelling approach of the outgroup had to be *non-coercive* and designed to “invite the reader to suspend judgment,” listen to the message, and then decide whether to welcome the writer’s version of truth as the real truth.<sup>178</sup> Narratives must be “insinuating, not frontal,” and should offer a contrast to the “coercive” discourse that characterizes traditional legal writing.<sup>179</sup> Here, I think that Delgado is obviously referring to the sense of “suspended belief” that measures the success of the creative arts—the audience watching a stage performance or a movie must be made to suspend their disbelief in order to get into the story and believe that it is real, at least during the performance. The goal of creating the audience’s suspended disbelief is the core climactic essence of the performing arts. Delgado thus recognizes and adopts the power of “willing suspension of disbelief”<sup>180</sup> as the standard for measuring effective narrative legal writing, equating the standard governing the new form of legal writing to the traditional standard applicable for the evaluation of the creative art. He goes on to conclude:

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<sup>172</sup> Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995); Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, *supra* note 150, at 2411-12.

<sup>173</sup> See Delgado, *supra* note 150, at 2412, n.8.

<sup>174</sup> See *id.* at 2412-13.

<sup>175</sup> *Id.* at 2413 (emphasis added).

<sup>176</sup> *Id.*

<sup>177</sup> Delgado, *Storytelling for Oppositionists*, *supra* note 150, at 2414.

<sup>178</sup> *Id.* at 2415.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at n.22 (citing David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. LEGAL EDUC. 3 (1990)).

Stories humanize us . . . Telling stories invests text with feeling, gives voice to those who were taught to hide their emotions. Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.

Stories are useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point, and test it against his or her own version of reality. This process is essential in a pluralist society like ours, and it is a practical necessity for underdogs: All movements for change must gain the support, or at least understanding, of the dominant groups, which is white.

Traditional legal writing purports to be neutral and dispassionately analytical, but too often it is not. In part, this is so because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points. . . . The supposedly objective point of view often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry.<sup>181</sup>

Delgado further notes, “[s]tories enable us to begin to reform thought structures by means of which we create our world...The task is akin to making a bed while still lying in it . . . .”<sup>182</sup> Finally he warns, “[t]here are dangers in storytelling, particularly for the first-time storyteller . . . the hearer of an unfamiliar counterstory may reject it, as well as the storyteller, precisely because the story unmasks hypocrisy and increases discomfort . . .”<sup>183</sup>

The danger indicated by Delgado presents a double burden. Unsuccessful storytelling means that both the story and the storyteller are rejected.<sup>184</sup> This danger is overcome if the advocate-writer can create a sense of suspended disbelief and empathy in her audience.<sup>185</sup> If the story is accepted, the storyteller or actor may get the Oscar for credibility as well. Accordingly, literary and dramatic or rhetoric skills, the exercise of craft, genuineness, and authenticity all become crucially important in the art of storytelling in the law. Readers of legal storytelling must believe and respect, no more and no less than a literary reader who is drawn into a novel and cannot put it down, submerging herself in the plot, identifying herself with certain characters, and interpreting text as it relates specifically

<sup>181</sup> Delgado, *supra* note 150, at 2440-41. *Accord* Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 146 (1985); Jeff Adams, *THE CONSPIRACY OF THE TEXT: THE PLACE OF NARRATIVE IN THE DEVELOPMENT OF THOUGHT* (Rom Harré ed., 1986); Patricia Meisol, *The Feminist Takes on the Fundamentals of Law*, L.A. TIMES, Oct. 7, 1988, at V8 (quoting West: “We need to flood the market with our own stories until we get [the] point across.”)

<sup>182</sup> Delgado, *supra* note 150, at 2439 n.83.

<sup>183</sup> *Id.* at 2440 n.87 (emphasis added).

<sup>184</sup> *Accord* Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1353 (2000) (“The problem is compounded by the disincentives to raise it; a common response is to shoot the messenger. Women who express concerns learn that they are ‘overreacting’ or exercising ‘bad judgment.’”).

<sup>185</sup> *See, e.g.,* Abrams, *supra* note 167, at 972 (“[F]eminist narrative scholars cannot rest contented with the ambivalence of their audience.”).

to her. The story serves as a bridge to those who share a similar vision, or as a means for inciting change among those who do not. Without the audience's suspended disbelief, the actor, the novelist and the "narrative" legal writer all fail. It is in this highly demanding and successful creation of the audience's suspended disbelief that law and art meet.

Put differently, in the process of communication and interpretation, the end result of persuasion must be accomplished via the creation of a change in the attitude and belief system of the message recipient. In a way, the storytelling must somehow fill a conscious or subconscious need and desire to know in the readers, no matter how unpopular, unfamiliar, or unexpected the story may seem to be. If the story told does not meet this emotional need or invoke this intellectual curiosity, the story will fall upon deaf ears and the task of advocacy will not be accomplished.

At the same time, the narrative must be restrained with a sense of mission and adherence to truth. For example, feminist narratives may contain certain aesthetic value and features like creative nonfiction, yet they cannot lose sight of the overall political agenda or their social objectives. As more literary techniques are employed in the writing of legal narratives and statement-of-fact advocacy, greater constraint must be exercised to preserve the analytical component of legal scholarship.<sup>186</sup> Storytelling must be accompanied with legal analysis and/or concrete suggestions for legal reform, and must be tested against standards of truthfulness and typicality. At the same time, the writer-advocate must be ready to challenge those standards and create new ones in order to change the status quo, and to abolish or rewrite unchallenged assumptions taken as justifications in themselves.<sup>187</sup> In Delgado's words, "the task is akin to making the bed while still lying in it."<sup>188</sup> But in the end, the aesthetic order of law must prevail as the total ambiance for written work, and the craft of fictional art must be tempered with the value of truth, because law reviews are not meant to be novels, no matter how heart-wrenching or beautifully created. Legal writing is, after all, about the relative search for truth and the mission of law. "Creative" legal writing is about new statements of intellectual honesty in stretching the limits of acceptability and normative formation. As suggested by Mary Coombs, at the end of the day, outsider scholarship is judged in its ability to advance the interests of the people of that discrete community.<sup>189</sup> It is "*art for that discrete society*" and not "*art for the sake of art.*"

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<sup>186</sup> See *id.* at 1016-17.

<sup>187</sup> See Farber & Sherry, *supra* note 166 (evaluating standards for assessing storytelling legal scholarship, including validity issues and truthfulness). *But see* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (challenging Farber and Sherry's views as accepting the status quo standards of truthfulness as valid, which is the very assumption the narrative form seeks to abandon). *Cf.* Johnson, *supra* note 169 (criticizing Farber and Sherry's attempts to evaluate Narratives in Critical Race Theory legal scholarships against conventional standards).

<sup>188</sup> Delgado, *supra* note 150, at 2439 n.83.

<sup>189</sup> See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 713 (1992) (noting that in judging quality of outsider scholarship, one must include the analytical component).

Where the narrative consists of personal experience, it should constitute and carry equal, if not more, weight than footnotes, due to the authenticity of the author's tale. It should also enhance credibility and add realism to both the argument and analysis that flow from the discussion. The value of the narrative form should be its truth value and, as such, should be a resource, not a liability, for the legal community as well as for social justice.<sup>190</sup> Nonetheless, just as in the case of the inherent suspicion bestowed upon rhetoric as a matter of dramatic style, the emotionalism and personal subjectivity of the author's perspective in the narrative form runs against Lanham's "anti-rhetoric" of law. Storytelling, therefore, has been considered a risky scholarly endeavor, at best constituting the type of anecdote that does not occupy a privileged or dignified place in the law.<sup>191</sup> One can argue that in its best form and intent, the narrative style should bring realism, vividness, and authenticity to legal scholarship and advocacy (except that storytelling in legal scholarship does not have the "sworn under oath" characteristics of witness testimony). The argument does not change the reality of today's legal academia: storytelling puts the writer under the "scrutiny of credibility" test, and the writer must overcome an inherent presumption of incompetence, intellectual laziness, and lack of neutrality in order to gain the respect of his or her peers — a burden perhaps equally serious, if not even more onerous than the penalty of perjury. To achieve the sense of suspended disbelief in the targeted audience, the legal writer must undo the paradox between law and art and bring them into harmony. She must become the performing artist who delivers her words onto the page, and dances with them, while believing in their authenticity and truth.

## VII. CONCLUSION AND A FINAL THOUGHT

In summary, the merging of law and art via the internal journey that produces the creative process is next to impossible, due to the striking differences in these two separate paths that can be antagonistic to each other. Yet, it is feasible to develop an "aesthetic approach" to law by elevating standards of persuasive techniques to the level expected of the creative arts — producing a sense of suspended disbelief in the audience without violating the truth and order-seeking mission of law — a combination of rhetoric and restraint, a reconciliation between flare and thrift. This "aesthetic approach" to law can only be achieved via the borrowing of craft or techniques, not by merging or altering the two internal mental creative processes. Where the craft is exercised so artfully, the spirit of art can become the spirit of law. This is the challenging future of the "narrative" form of scholarship and storytelling advocacy.

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<sup>190</sup> See Gary Chartier, Comment, *Righting Narrative: Robert Chang, Poststructuralism, and the Possibility of Critique*, 7 *ASIAN PAC. AM. L.J.* 105, 130 (2001).

<sup>191</sup> See Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 *GEO. L.J.* 251, 260 (1992) (observing that narratives in legal scholarship are like anecdotes told by talented journalists). See also David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 *IND. L.J.* 797 (1998) (providing an overview of anecdotal evidence and the consequences of narratives in the legislative arena as an empirical foundation for evaluating the "boom" of the narrative form in legal academia).



But even outside the realm of storytelling as advocacy, there is a need for lawyers and judges to better understand and master the craft of the literary art and language theories, without embarking upon the unrealistic and misplaced ambition of creating novels in law reviews, appellate briefs, or judicial opinions. The need exists because the current state of legal scholarship may call for improvement. The veteran jurist and prominent proponent of the L&L movement, Richard Posner, recently spoke sorrowfully and critically about the current status of legal scholarship.<sup>192</sup> The context for his lament was his disappointment with the current law review system — a system run by law students, not peer review, and motivated by law students' stylistic and formalistic concerns rather than by substantive legal expertise.<sup>193</sup> In such a system, observes Posner, the author frequently suffers through numerous rounds of students' stylistic revisions that make little sense and bear little relevance to the substantive quality of scholarship or the artful use of language.<sup>194</sup> “[T]oo many articles are too long, too dull, and too heavily annotated, and . . . many interdisciplinary articles are published that have no merit at all,” Posner complains.<sup>195</sup> Curiously, his exasperation directed at the law review system happens to reflect the increasing lack of “art and craft” in the creation of legal articles, especially in hybrid, interdisciplinary pieces. These pieces result from various “*Law and Something*” movements, in which Posner himself has ardently participated. The uncertainty in the future of narrative legal scholarship, coupled with the need for improvement in the quality of legal writing as a whole, should serve as an impetus for the rejuvenation of the L&L movement toward a fresher horizon.

In summary, judicial interpretation and decision-making, as well as legal writing and advocacy, should all rest on the total human experience.<sup>196</sup> If creative literature influences legal decision-making and legal writing, it will do so as part of the multi-forces of life that shape the judge's and the lawyer's minds and pens. Works falling under the L&L movement will always have a presence and a place in legal and interdisciplinary scholarly literature.<sup>197</sup> Yet, such an influence by virtue of the natural forces of society is not dominant enough to overcome the integral distinction in the creative processes between law and art; nor is the influence sufficient for lawyers to conclude that the muse of art has crept into the domain of law, leaving her distinctive footsteps and lending her creative process to judicial drafting and legislative interpretation. She can lend her *craft* to judicial opinions to a limited degree, as Holmes and Cardozo have done, but that's about all!

At the originating point, law and art stand vastly apart due to antagonistic creative processes. At the receiving end, in the process of

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<sup>192</sup> See Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS, Nov.-Dec. 2004, at 57.

<sup>193</sup> See *id.*

<sup>194</sup> See *id.* at 58.

<sup>195</sup> *Id.*

<sup>196</sup> See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

<sup>197</sup> See, e.g., PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000) (using law and literature to explore the place of confessions within Anglo-American criminology).

interpretation, an “aesthetic approach” may enrich the law and even occasion the rethinking of jurisprudence. In between the *creative process* at one end and the *interpretive process* at the other end, the element of persuasion will inject art into law, via the lending of craft, and only to the degree necessary to enable social activism by ardent advocates. The “narrative” form is but one form of legal scholarship and advocacy, and can become the future “meeting point” — the “Roma capital” — for law and art. To further this goal, expanded courses on law and literature should be part of the legal curriculum. When used, narratives and personalized accounts must be done well, with the distinguished craft of literature and the type of authenticity that can bring about a skeptical audience’s suspended disbelief.

But the most practical, day-to-day effect of my hypothesis regarding the law-art distinction is one point that I have not yet mentioned and want to use as the ending highlight for this Article. The effect of my hypothesis regarding the antagonistic nature of the “*law versus art*” creative processes should be most felt in the career orientation of future lawyers or artists or those lawyers who are still hoping for their first break in literature.<sup>198</sup> Law should not be the refuge for those who are not strong enough to take the risks of art. Just because rhetoric and social issues can straddle the two domains does not mean that great artists are practicing law, or that great jurists are writing literary novels. Just because *Crime and Punishment* adds to our knowledge of the legal system does not mean Dostoevsky has become a legal scholar, nor does it mean that James Madison is a novelist.<sup>199</sup>

Neither art nor law is a discipline in which one can dabble and hope to achieve greatness. Those who claim they are successfully combining both are reducing the pursuit to a hobby, or a means of making a living, no more ennobling, no less demeaning than writing a commercial murder thriller or running a restaurant. The incompatibility in the creative processes demands forceful choices and utmost devotion to one field to the exclusion of the other. Any illusion that Art is Art and Law is Law but the two can meet successfully in one life as “dual professions,” in most cases, is the mere consolation of one who is blessed with the skills and talent for dancing with words, but cannot make a commitment to a full-time artistic career nor take its consequences. To protect the sanctity and integrity of the sensual/sensory path to her art, which, under my hypothesis, is antagonistic to the generalization and rationalization of the lawyer's mind, even the most gentle artist would probably agree with Shakespeare: “*The first thing we do: Let's kill all the lawyers.*”<sup>200</sup>

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<sup>198</sup> I am not talking about another John Grisham here, but rather another John Steinbeck, who took on many blue-collar jobs before he received the Nobel Prize.

<sup>199</sup> Farber & Sherry, *supra* note 166, at 845.

<sup>200</sup> WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY VI* 100 (William Montgomery ed., Penguin Books 2000) (1967).