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4. Law and Literature versus Law as Literature: Dissenting Opinions

[...]

What, then, is Law and Literature? With its focus on literary and historical experiences of trial and imprisonment, this volume belongs to the growing body of interdisciplinary scholarship now known as Law and Literature. In this section of the introduction we aim to give a brief overview of literature-and-law studies. Since the 1970s¹ interest in the nexus of literature and law has rapidly increased as is evidenced by the two interdisciplinary journals that are now devoted to the subject (the *Yale Journal of Law and the Humanities* and *Cardozo Studies in Law and Literature*).

¹ Rockwood cites the widespread notice of James Boyd White's *The Legal Imagination* (1973) as the beginning of the movement (1998: 1)

Currently more law schools offer courses on this subject than do not (Ward 1995: 206, fn 3). Yet unambiguously defining law-and-literature scholarship is no straightforward task. To begin with, whether one should call studies of the kind performed in this volume "law *and* literature" or "law *as* literature" (or critical legal studies) is a contested point of debate, one that relates to the dissenting opinions about what this discipline is and what its aims ought to be.

Overviews of literature-and-law studies often describe it as a battleground where competing theories about the relationship between literature and law are fought out:²

Legal scholarship has been marked by ambivalence about what benefits literature promises the study of law. The two opposing views essentially reflect an ancient struggle within the legal profession between law as humanism and law as science. To one faction, which believes in the synergy of law and literature, law is romantic in ideology, more like poetry, an act of persuasion, a cultural practice of justification using language, ritual, drama, and legitimating ideology. The other group, which assumes that nothing could be more remote from law's theory and practice than poetry and literature, sees law as a science of reason and analysis, of coercive and imperative commands (expressed as clearly as possible), or organized coercion, a system operated by lawyers who, at best, resemble scientists and engineers. (Kornstein 1994: 5).

The battle to define literature's significance to law may reflect the adversarial nature of Anglo-American law itself. As Martin Kayman points out in his essay on *Caleb Williams* in this volume, English and American trial procedure admits only one narrative truth about the issue at hand which is determined with the verdict at the end of the trial: it is either the prosecutor's or the defendant's version of what happened that becomes fixed with the verdict as the one and only truth. However, what wins in the courtroom is often not the truth but the story that was told best, using persuasive rhetoric. This is the lesson that Caleb learns from Mr. Forester as does anyone who witnesses the sometimes blatantly partial machinations of the legal system close at hand.³

In what follows we would like to play a discursive game in which counter-arguments will be presented in the manner of the courtroom. Let us ask readers to take on the role of jury members. We request that they decide on the conundrum of how to name (and how to understand) the studies on literature and law undertaken in this volume within a larger context. The prosecutor will argue that studying Law and Literature has only an additive value: the disciplines in themselves remain discrete. The counsel for the defense, by contrast, will attest that literature and law are fundamentally interactive disciplines that cannot be pursued in isolation from one another. You Ladies and Gentlemen of the jury will have to determine which of our two attorneys presents a more compelling theory about the case at hand.

² Cf. Dolin (1999: 2-10), Grey (1991: 1-9), Rockwood (1998: 1-6), Ward (1995: 4-27), Thomas (1991: 524-31), and Weisberg (1992: x-xiv).

³ For an extended analysis of how juries arrive at verdicts based on their trying out competing narratives and choosing the one that 'fits' best, see Cotterill's linguistic analysis of the O. J. Simpson trial (2003: 221-26.).

Two oppositional parties approach the bar in this hypothetical trial. A leading proponent of the law-*and*-literature movement, Professor and Judge Richard A. Posner takes on the prosecutor's role. A political conservative, Posner in his opening statement will argue that the separation between the disciplines of law and literature, which became solidified in the eighteenth and nineteenth centuries, must remain intact. Whereas law effects difficult, potentially painful decisions, literature reflects on law only metaphorically. In this case, law "*and Literature*" gives a title to the type of scholarship pursued in Posner's bestselling book on the subject (1998 [1988]).⁴ "And" is meant in the sense of literature's being ancillary to the serious and often tricky business of law and litigation; literature supplements law in the pre-Derridean sense.

Given the virulence with which Posner describes his opponents' poor thinking, any number of scholars – not few of them lawyers themselves – might apply for the job of defending literature's integral relation to law.⁵ Counsel for the defense in our imaginary courtroom is Richard Weisberg, who will argue for a law *as* literature interpretation of the Law and Literature movement. Weisberg holds advanced degrees in both law and literature studies and was responsible for founding Cardozo's interdisciplinary journal. He is therefore eminently qualified for the job of defending the view that law is inherently integrated with literature. Weisberg's *Poethics and Other Strategies of Law and Literature* (1992) presents a "guidebook to Law and Literature theory and practice" (x) that is directly intended to contradict the dismissive attitude towards literature propounded by Posner and others. Indeed, *Poethics* concludes with the statement: "law and literature, for all their disparities, are one" (1992: 252).

When a trial begins, counsels must argue their version of the events which will be decided on during the course of the tribunal. Milner Ball has described this process as a form of competitive storytelling (1999: 216). The stories Posner and Weisberg will tell the jury about literature and law might well begin with their differing evaluations of an essay from 1925 by the Supreme Court Justice Benjamin N. Cardozo. In "Law and Literature" Cardozo classifies and evaluates six styles of legal argument, lauds the merit of selection in the presentation of evidence, and distinguishes, on the one hand, between the stylistics of dissenting and majority opinions, and, on the other, between arguments that are directed to the bar versus those aimed at the trial audience, the jury. These careful differentiations are intended as advice to "[y]oung men as they approach admission to the bar" (1947: 355) and are subsumed under Cardozo's general argument that substance and form are "fused into a unity" in legal prose (340). Showing his indebtedness to one of the founding fathers of literary theory, Cardozo cites master of style Henry James as his source for his belief in this unity.

⁴ As evidence for his argument, Posner reports that his *Law and Literature* (1998) is the most frequently assigned or recommended book of nonfiction in courses on law and literature in law schools (vii).

⁵ For instance, Robin West might volunteer to lead the counsel for the defense. Posner characterizes this scholar's work as a deluded example of the legal academic left; her readings of Kafka are, according to him, notable for their "peculiarity" (1998: 193) and "perversity" (188). Posner also throws many brickbats against the supposed didacticism of James Boyd White, whose work will be summarized below.

Posner interprets Cardozo quite critically. Subscribing to a theory of law called the law and economics movement (1998: 301), which asserts the values of efficacy and "cost-benefit" (182) and employs mathematical equations to understand how law works, Posner evaluates Cardozo's judicial and nonjudicial "literary" style as rhetorically successful but at the same time a patent threat to the workings of the hard reasoning of law.⁶ Cardozo's affection for metaphor has, according to Posner, a dangerous tendency to "muddy" and confuse legal reasoning (279), which he thinks ought to strive to be as scientific as possible. The division between legal and literary text and language is reified by Posner's argument. By contrast, Weisberg lauds Cardozo for recognizing early on that literature is the primary teacher of legal argument. Reacting to the traditional opinion that words are a "holding" place or vessel for substance, Cardozo postulates the inseparability of words and their meanings (Weisberg 1992: 6-7): hence writing judicial decisions is a creative act that relies on, and cannot be separated from, questions of form and persuasion. From the basis of this premise, Weisberg moves on to an argument about what literature may teach us about law: by giving the disempowered a voice, literature shows – in a way that other discourses cannot – how the law often stigmatizes those who are perceived as different by a specific society, whether they are citizens of color, women, or homosexuals. Taking a position often argued in critical legal studies, Weisberg asserts that law and lawyers take their pay from institutions that, while perceiving themselves as impartial, work to uphold power structures that put those considered different at a disadvantage (41).

The term critical legal studies (or CLS) has been introduced to the courtroom, and we now need to pause in our trial proceedings to explain it. Arising during the late seventies, CLS was intended to challenge acceptance of the power relationships that inform the practice of law in society. With its roots in Vietnam anti-war protest and the Civil Rights Movement, CLS has gone on to spawn feminist legal theory and critical race theory and maintains a clearly political and critical agenda.⁷ CLS argues, for example, that the outcome of legal contests does not derive from impartial laws but is the result of a process of interpretation which is influenced by prejudicial social practices. A typical example of the politics of this movement is Harvard Law Professor Duncan Kennedy's monograph from 1983 *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, which argues that legal

⁶ For two critiques of Posner's economics-inspired understanding of law with its quantifiable notion of justice, see Dimock (1996: 140-45) and Nussbaum, particularly in her reading of the character Gradgrind from Dickens's *Hard Times* (1995)

⁷ Thomas characterizes the movement as follows: "Interested in the social implications of the law, many members of the critical legal-studies movement recognize the limitations of a reflection theory, which explains the law as a mirror of society's existing power structure. [...] Although the law's ability to maintain order by peacefully resolving conflict is often seen as its most positive function, the critical legal-studies movement reminds us of the extent to which the rhetoric of the law helps to maintain order at the price of disguising or denying the conflicts produced by the existing order, thereby helping to legitimate that order" (1987: 4). For a history of the development of CLS in Europe and an examination of its focused politics of resistance, see the introduction to Douzinas et al. (1994: 1-3); as well as Goodrich (1990).

education has ideological foundations and that law schools acculturate lawyers-to-be into practices of subordination.⁸ CLS' dual emphasis on hierarchical power relations and the indeterminacy of legal interpretation has given rise to several kinds of scholarship. Applying critical theory to legal texts, Alan Hyde, for instance, explores how bodies are constructed by law and legal discourse as "property" or "different," as raced, sexed or disabled, and shows how these constructions have social consequences (1997: 261). In critical race theory, law professor Patricia Williams has used the autobiographical mode to make visible the continued oppression of African Americans (1991). Derrick Bell is also credited with using story-telling techniques to make underlying issues of race oppression apparent to his law school students. Most notably, Bell's story "The Space Traders' Solution" from *Faces at the Bottom of the Well* (1992) introduces an allegory about the United States selling all African Americans to space travelers as a counter-narrative to the hypothetical case work students do in law school.⁹ Williams and Bell, among others, have also contributed to a new field called narrative legal studies.

Such examples provide an initial overview of some of the ways CLS can be undertaken:

1. CLS may examine legal texts to determine how they underpin social hierarchies (Hyde);
2. CLS may develop or analyze alternative texts to those traditionally considered part of the canon of legal studies; such texts may include autobiography and allegory (Williams, Bell); CLS may contrast 'legal' and 'literary' texts to show their overlaps and contradictions (Hyde).

One will note that all of these enterprises are, first of all, text oriented. Text is here understood to include any variety of human productions and actions: hence alternative types of text may be juxtaposed with legal cases and their interpretations. To the extent that CLS theorizes the manner in which narratives underlie both legal and literary texts, it shows that issues of interpretation, ambiguity, and social formation are crucial factors in Law and Literature. Second, CLS points out that the practice of law is influenced by political and economic interests. Thus notions of justice which are grounded in abstract principles are found to be suspect and can be shown to have ideological underpinnings. Third, by pointing out how legal procedures work as

⁸ "Law schools are intensely political places. The trade-school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand – all these are only a part of what is going on. The other part is the ideological training for willing service in the hierarchies of the corporate, welfare state" (Kennedy 1983). See also the introduction to the British *Critical Lawyers' Handbook* Vol. 1: "In short, law generally acts to consolidate and maintain an extensive system of class, gender and racial oppression. Critical lawyers seek a theory and practice that makes the overcoming of such oppression a central political task" (1992).

⁹ Cf. Bell's "The Power of Narrative" for a reprint of the story and an analysis of the impact of his work on critical race theory (1999).

normative cultural practices and by introducing alternative non-canonical texts into the classroom, critical legal theorists aim to bring about reform in law school and the way law is practiced.

We now return to our hypothetical courtroom to hear the opposing counsels' closing statements. Posner might argue that the validity of his approach has been demonstrated by the popularity of his book, now in the second printing of its second edition. After all, Posner judges the value of literature on the basis of its "universality" (1998: 7, 18, 21) – shades of T. S. Eliot – and its capacity to withstand time, or, to borrow Posner's preferred vocabulary, its consistently high market value. Furthermore, Posner would argue that the various ways of performing law-*and*-literature scholarship that he outlines and evaluates in his book have in fact been realized. According to Posner, law-*and*-literature studies

1. primarily treats literary texts that – to use a loaded word for those who see literature as culturally productive – "reflect" on the law, mostly metaphorically rather than in terms of actual procedure: literary treatments of law muse about the "antinomies" inherent in judicial practice, such as the difference between law and equity; they do not add insight to legal argument or practice;
2. secondarily, law-*and*-literature reads legal texts using the methods of literature studies, a project whose value Posner describes as only slight (1998: viii).¹⁰

Posner also notes and dismisses what he characterizes as the third branch of the law-*and*-literature movement. This is the untoward desire by some scholars

3. "to bring works of imaginative literature into the legal classroom in order to present vivid pictures of the despised, the overlooked, and the downtrodden, and by fostering empathy for them to encourage legal reform along egalitarian or even revolutionary lines" (6). Posner's criticism of what he sees as the rigid didacticism of these projects and their efforts to influence moral attitudes follows in the third part of his book;
4. finally, law-*and*-literature studies concerns itself with how literature is controlled by legal practices. This includes questions of who owns the text and how it may be used, and involves questions of defamation, copyright, and censorship.

In summary, Posner's typology marginalizes literature and the methods of critical literary studies from the 'hard' practice of the law. Posner concedes that lawyers and judges may refer to 'great' literature to hone their rhetorical skills. Yet in his opinion the digressive arguments of deconstructive and post-structuralist theory and practitioners of narrative legal studies should not be allowed to interfere with the

¹⁰ For an interesting interpretation of the fictional qualities of one of Posner's opinions regarding a case on sexual harassment, see Ranney (1999).

serious business of making legal decisions. Literature is only of minimal usefulness for actual legal debate. Given this understanding of literature, Posner's views lead to the following implications for law-and-literature scholarship. He argues that:

[...] the movement will make a greater contribution to illuminating jurisprudential issues than to improving law at the operating level, that it will contribute little to statutory or constitutional interpretation, and that it will not guide legal scholars, judges, and other members of the legal profession to a resolution of the burning issues that confront American law today. [...] Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods of interpreting and evaluating it are aesthetic. (1998: 7)

Posner's last two sentences, definitional and normative in tone, reject the idea that law might rely in any manner on literature or literary method. Literature is marginalized as belonging to the realm of the aesthetic, whose judgments are evaluations and criticism without a firm base in positive truth. It remains radically separate from "the burning issues that confront" legal practice. Yet by seeing law as framed by the trinity of social control, textuality, and morality, Posner in fact opens the way to much more extensive applications of the literary method. Since the law is partly a textual matter, the philological expertise of literary studies is entirely appropriate for analyzing legal discourse; at the same time, morality and social control do not necessarily fit the image of rationality and empirical objectivity that Posner is at pains to establish. Instead, they suggest that social power structures and the constitution of social norms (and normality) lie at the heart of the law. Such a view of law as social figuration then comes very close to literary studies' analysis of political and cultural norms and discursivities. Significantly, Posner's discursive formation excludes the notion of truth or justice. Indirectly, Posner admits the possibility that legal decision making and interpretation is contingent (and political), an insight from critical legal studies.

In contrast to Posner, Weisberg might argue in his closing remarks to the jury that, given the difficult questions and complex issues that face us in legal practice and debate, we cannot look to some abstracted notion of law as an economic science but need to turn to literature:

We must be open to learn and apply, not to memorize and apply. We must seek to implement, at every point on our professional spectrum, a reflected sense of human experiences, our own and indeed those described in imaginative literature. Literature teaches us what social science cannot, because literature is the best source (outside of ourselves) of sense and sensibility. (1988: 110)

Weisberg postulates a theory of literature as teaching ethics and the intricacies of human experience in a manner that the social sciences cannot do. Left to themselves, lawyers, whether interpreting the US constitution or racial policy in Vichy France, will avoid examining the effects of their actions by referring to the rules of their profession (145). Lawyers, Weisberg argues, "need textual standards of conduct and cannot rely on the practices of their profession alone to avoid future catastrophes" (ibid.)

For those members of the reading jury who are still unable to decide on what to name literature-and-law studies and how to understand this practice, it may be important to note that Weisberg and Posner articulate extreme positions in the debate. This may result in part from the rhetorical necessity of their defining their standpoints in contradistinction to one another. Two other law-and-literature theorists take on more circumspect positions with respect to the question of how integrally literature and law relate. These are Ian Ward and Brook Thomas.

In his introduction to the subject, Ward sidesteps the conundrum of choosing between law *and* literature versus law *as* literature by emphasizing the value of both (*Law and Literature: Possibilities and Perspectives*, 1995). He suggests that literature-and-law studies work on the basis of two premises. Either they see "law *in* literature," which is roughly equivalent to Posner's first category, or they read "law *as* literature" by employing methods of literary studies to read legal texts for their linguistic, metaphorical, and creative qualities (Ward 1995: 20). Ward suggests that both approaches have validity and are by no means mutually exclusive. Nonetheless, he sees the future of law-in/as-literature scholarship in its ability to suggest alternative ways of thinking. Law and Literature should be used to teach about the slippery, undecipherable quality of the language that creates laws, judicial opinions, and meaning in general. This would help lawyers in training to avoid the trap of thinking of the law as an objective and stable reality (26). Furthermore, unlike much law school work, studying literature, as Weisberg pointed out in his essay from 1988, is fun. With his eye trained steadily on the pedagogical relevance of law-and-literature study, Ward argues that most people form their notions of law and morality early on by reading children's literature and later by discussing texts like William Golding's *The Lord of the Flies* (1954) in classrooms.

As noted above, the second standpoint on literature and law's relation to each other is provided by Brook Thomas, who begins his overview of literature-and-law studies with a review of the movement towards scientificity within legal thought ("Reflections on the Law and Literature Revival"). This synopsis is intended to supply some context to Posner's denunciation of the supposed merits of literary methods and literature studies. The problematic nature of this effort to put law on a scientific basis is contrasted by Thomas with what turns out to be the equally problematic claims of those who look to literature or "rhetoric" (understood here as the entirety of discursive relations) to discover the ways in which language creates human practices including legal ones. Thomas proposes that thinkers such as James Boyd White go too far in their prescriptions of a "*proper* use of legal rhetoric" (529) to foster public ethical debate. This sense of rhetoric includes a notion of creating community through rhetoric so as to alter social practice.

In his *Acts of Hope: Creating Authority in Literature, Law, and Politics* (1994), James Boyd White reads texts ranging from Shakespeare's *Richard II* through Lincoln's Second Inaugural Address to Nelson Mandela's speech to the dock during his sabotage trial in order to demonstrate how such texts create "ethical meaning." In this concept White includes both the changes which such texts may bring about in language, by for instance destroying divisions between 'us' and 'them' linguistically, and in so doing thereby creating a new kind of ethical community: "And this

achievement is not one that takes place at the level of theory or proposition, but is performed in the text itself, ethically, as he [in this case Lincoln] acts upon his language and audience" (1994b: 285). The changes created by the texts of Mandela and Lincoln have the power to transform the way individuals relate to the authorities that have power over them. Audiences may take on a new set of meanings created by these uniquely productive texts.¹¹

For Thomas, White overstates the case for literature's ability to cure the abuses committed by legal authority. Some division between the actual practice of law and the study of rhetoric, he insists, remains: "Whereas Posner's strict instrumentalism neglects the social dimension of rhetoric and authorship, White's stress on the performative aspect of legal rhetoric minimizes its necessarily instrumental function" (529). According to Thomas, both Posner's instrumentalist view of law and White's notion of reformist rhetoric fail to address the claims of equity in actual legal decisions and in discourse about law.

Equity, it may be remembered, is both a legal institution in England (that was immortalized in the negative by Dickens's *Bleak House*) and a concept to describe the mitigating situational circumstances that must be brought into play to counteract a narrowly legalist understanding of law.¹² Thomas attempts to bring equity back into the courtroom and law-and-literature classroom using the vehicle of supplemental, meant now in the Derridean sense, literature. Advocating the usefulness of paradoxical and dialogical literature which does not necessarily teach ethics to (implicitly) nasty lawyers, Thomas suggests that literature may indeed demonstrate the lack of community and the lack of representation of repressed voices in a culture at a given moment. Hence literature does not merge with law as Weisberg would have it or reinvent systems of authority as White might wish it to do, but offers an additional and necessary critical reading of cultural and legal processes:

Indeed, when it comes to questions of governing societies ruled by law, the most literature can hope for is a supplementary role. It is precisely in such societies, however, that maintaining literature's supplementary role takes on added importance. This is because whereas they can conceive of no system more just than rule by law, they are also forced to confront the failure of their particular set of laws to be truly representative. By using literary texts to cross-examine particular laws at particular historical moments, the law and literature movement has helped raise important questions about the representativeness of such laws. (Thomas 1991: 539)

While this view seems balanced and conciliatory, it may strike a false note for those who understand literature as a productive discourse that contributes to material culture, a lesson teachers such as Michel Foucault and Raymond Williams have taught us. The notion that literature may at best point out the gaps that occur in the rule of law appears disconcerting. The marginalization (and inherent feminization) of

¹¹ Cf., for instance, the Afterword to *Acts of Hope* (1994a: 303-7): However, readers may find the formulation of White's ethical philosophy in "The Ethics of Meaning" (1994b) more accessible.

¹² Cf. Ziolkowski's brief history of equity in Elizabethan England (1997:167-74); or Kayman (2002: 14-16); for an extended analysis of equity in eighteenth and nineteenth-century British legal practice and in fiction, see Polloczek (1999).

literature, familiar from Posner, takes place in the context of the foregrounding of the rough-and-ready world of law.¹³

On another note, the last sentence of the passage quoted above bespeaks an awareness of history in Thomas's work on Law and Literature, which he has intensified in his monograph on writings from the American Renaissance (*Cross-Examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville*, 1987). On the premise that law and literature both work within the framework of the stories a culture tells about itself, Thomas reads historical literary texts to address questions about legal ideology. Thus he shows that an interest in literature's effect on legal practice and vice versa did not begin with the literature-and-law movement of the 1970s. This diachronic approach to law-and-literature studies has been followed by Wai Chee Dimock in her juxtaposition of nineteenth-century American literary texts with both contemporary legal cases and a selection of philosophical theories about justice; her point is that literature expresses that which remains residual and unresolved in notions of commensurate justice (1996). Even more ambitiously, Jörg Schönert, instituting a German research group, has attempted to construct a historical typology of the overlap between penal laws and literary treatments of criminality in France, Germany, and Britain in the period between 1790 and 1920 (Schönert et al. 1983, 1991). Also following the historical trajectory of literature-and-law scholarship, Uwe Böker and his team have in a number of publications examined the effect of law on literature as well as other forms of public communication. Their research historically places legal discourses within the larger frameworks of institutionalized cultures of modernity (Böker et al. 1996, 2001, 2002a, 2002b).

After an introduction to the variety of standpoints on Law and Literature, notice must be taken of how literature-and-law studies differ across national borders. Differences in recent historical developments and contemporary judicial systems have, for instance, led to contrasting foci in American and British law-and-literature scholarship. In the United States the perception that legal theories were extremist and either radically left (critical legal studies) or conservative and pseudo-scientific (law-and-economics movement) led many legal practitioners to seek a third, less partisan, way to understand law that was not so subject to ideological claims (Kayman 2002: 6). A middle ground was found in Law and Literature.¹⁴

The necessity of applying insights from literature-and-law scholarship made itself felt in another arena as well. With his appointment by President Reagan to the Supreme Court in 1986, William Rehnquist ushered in a newly conservative era in United States' judicial practice and interpretation. One of the major debates that has marked the Rehnquist era has been whether the Constitution should be interpreted in the manner its authors wrote it 'originally' or as a 'living' document that may be interpreted to effect social change as circumstances in the United States alter. Issues familiar from literary studies such as the question of author intentionality, the

¹³ Kayman also makes this point, although with reference to White and Ward (2002: 7).

¹⁴ This last point brings up a criticism that, with its liberal tendencies, law-and-literature scholarship may not show enough teeth in its political stance (cf. Dolin 1999: 9).

partiality of interpretation, and the impossibility of a 'literal' interpretation of texts have thus entered American Constitutional debate (cf. Levinson 1988).¹⁵

In comparison to its American counterpart, British legal debate is far less concerned with the correct interpretation of the Constitution, because there is no Supreme Court to declare laws unconstitutional. The more loosely structured common law tradition encourages discussion of the validity of particular bills and their precedents.¹⁶ Yet as Kayman points out, Britain's increasing legal integration with the European Union may have caused its tradition-bound judiciary to be forced into a "deferred critical encounter with theory" (2002: 5). This turn to theory has been carried out by postmodern thinkers, who stress the linguistic quality of law as well as the need to test law and legal institutions on the basis of their ethical treatment of the individual who enters their grasp. Summarizing this type of work, Costas Douzinas, Peter Goodrich, and Yifat Hachamovitch write: "In the most synoptic of terms, we may say that language and ethics precede the law in the precise sense that justice, the right to a hearing, to a day in court, to judgment, is the precondition for the appearance of law" (Douzinas et al. 1994: 22). Peter Goodrich, in particular, has opened up a new form of critical inquiry with his insistence that the language of law contains a hidden reservoir of emotions and passions that are generally repressed but become concretized in legal facts (1990, 1994). This intertwining of linguistic and psychoanalytical method to approach legal texts presents yet a new type of interdisciplinary research.

This overview of Law and Literature has demonstrated a lack of consensus between the movements' leading proponents about what is the ultimate purpose of this interdiscipline. Some practitioners see literature as ancillary and of little actual importance to legal practice or Constitutional interpretation. For these thinkers, one can read literature to muse about problems in the human condition that are dealt with practically in adjudication. Still others in the CLS movement understand law as a practice that supports racist and sexist status quo power arrangements; hence critical interpretation of legal language, texts, and practices must be enacted to aid the disadvantaged. For them, applying critical reading strategies to legal texts is a vital political practice. Weisberg and White both understand literature to teach law about ethics. Ward, by contrast, wants literature to supplement narrow rule-governed learning in law school, and Thomas looks to literature to teach law about the processes of equity. Finally, postmodern research studies the language of legal texts to highlight how unconscious motivations have been repressed in social-scientific theories of law.

The range of ways to practice literature-and-law studies remains a broad church then. A sense of the importance to decide on the relations between literature, text, and law also remains fervent. In a much-quoted extreme statement of the one indissoluble difference between literary and legal practices, Robert M. Cover writes: "We begin,

¹⁵ Essays in this volume on *Caleb Williams* and contemporary linguistic theories as well as on the High Treason Trials of 1794 will show that debates about the degree to which individual legal texts and words themselves have concrete or alterable meanings were already pertinent in late eighteenth-century England and did not arise newly in the United States.

¹⁶ Cf. Levinson (1988: 156); Kayman (2002: 5); Murphy (1994).

then, not with what the judges say, but with what they do. The judges deal pain and death" (1986: 1609). Cover reminds the reader that judges perform speech acts: they commit actions with their words. In contrast to Cover, Weisberg states that without a sense of ethics won from an understanding of the textual unity of meaning and form, lawyers and judges may commit acts of cruelty. Relying on a sense of their own "legal professionalism" (Weisberg 1992: 145), lawyers in Vichy France overzealously interpreted German racial laws to cause the unnecessary deaths of tens of thousands of Jews. This might have been avoided if a respect for the foundational principles of French constitutional law had been remembered. Hence the danger of a formalistic application of the law lies in forgetting that "justice and words must be linked" (10). Thus Weisberg asserts that "[t]he battleground for us is the battleground of texts, not of situationalist theory" (175). As we explore the texts dealing with tribunals and incarceration in this volume, it is important to recall that our interpretive decisions may have social and ethical implications. But this, Ladies and Gentleman of the jury, remains in your hands to decide.