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Abstract: How to read literature as law, or what Old French judicial scenes tell us about customary law, depends upon theoretical assumptions about literacy. Early studies of orality demonstrated its complexity, while privileging literacy and connections to analytical thinking. Increasing literacy in the twelfth century seemed to confirm the chronological progress from oral, customary law that tolerated feud and ordeals to supposedly more objective methods of proof. The evolutionary view of many medieval textual studies accepts custom as either no law at all, or as inflexible and incapable of self-reflection. Now legal historians draw on anthropologists for models of dispute resolution through collective, oral and written negotiations. We find warrants in critical legal studies and pragmatist strategies for reading the texts, not as faithful renditions of specific legal practices, but as creations of ethical situations that individuals and communities live in vicariously as part of decision-making and dispute resolution.

Résumé : Lire la littérature comme le droit, dire comment les scènes juridiques nous en parlent de la coutume présuppose certaines idées sur l'alphabétisation. Les études de l'oralité y ont montré la complexité, tout en privilégiant l'écrit et la pensée analytique. La croissance de documents au XII^e siècle semblait confirmer le progrès de la coutume orale, qui acceptait la faida et l'ordalie, à la preuve rationnelle. Le préjugé évolutionnaire se voit dans le refus d'accepter la coutume comme le droit, ou de la considérer une forme rigide. Mais, les historiens du droit font appel aux anthropologues pour d'autres modèles de la résolution des conflits dans la collectivité. On peut justifier à partir de « Critical Legal Studies » et le pragmatisme de lire les textes non plus comme la représentation d'une pratique juridique, mais comme la création d'un espace éthique où l'individu et la communauté se mettent à la place de l'autre en cherchant à résoudre le conflit.

In Book 18 of *The Iliad*, Homer describes the search for justice depicted in the city at peace scene hammered in bas-relief on the shield Hephaestus makes to replace Achilles' captured armor.¹ A group of men gathered in a public place debate

¹ Homer, *The Iliad*, trans. R. Fagles, New York, Penguin, 1990, p. 18: l. 580-92.

And the people massed, streaming into the marketplace
where a quarrel had broken out and two men struggled
over the blood-price for a kinsman just murdered.
One declaimed in public, vowing payment in full
the other spurned him, he would not take a thing
so both men pressed for a judge to cut the knot.
The crowd cheered on both, they took both sides,
but heralds held them back as the city elders sat

“over the blood-price for a kinsman just murdered” (l. 582) and ask a judge for a verdict. The scene prompts many questions. Would this god-like expertise in smithing an elaborate scene in rich metals be typical or even conceivable for Mycenaean Greece? In an early warrior culture, would such a precious shield be commissioned for battle; or, does this ekphrasis in the Homeric text merely point to a sophisticated literary art of a later period? While Eric Havelock in *The Greek Concept of Justice* does not ask about the material culture behind this detail, his discussion of the evolution of the concept of justice from oral epic to Plato offers a valuable perspective.² For him, this scene proves that, while *The Iliad* utilizes the mythos of Mycenaean kings and their war, it offers glimpses of real life in the early polis of a later time (ca. 650 B.C.E.) when final composition of the epic took place.³ From 900-650 B.C.E., long after the Mycenaean age when Linear B was used, the Greeks were at best semi-literate, yet at this time tribal culture developed into new social patterns concentrated in the polis. That nascent urban culture could function in a sophisticated manner, according to Havelock, because the epic was an oral “tribal encyclopedia” relating information not just about warfare, but all socially relevant situations. The public meeting described is an obvious anachronism if the period were truly that of the Trojan war of 1200 B.C. But, as with epics and romances of the Middle Ages, the mythologized original events are retold later in ways meaningful to the poet’s contemporaries.

The judicial scene on Achilles’ shield is one of public debate about the law or custom in a civic culture that is still predominately oral, and where judges are not a professional class, but are sought out among the elders who presumably have the wisdom to understand the events and judge the situation. It is tempting to say that they were sorting out the truth, but the value of Havelock’s work is to remind us that prior to Plato, “truth” and “justice” are not abstractions as we think of them now. For Havelock, “the poems report and recommend an oral morality innocent of conceptual content, pragmatic, procedural, and flexible”.⁴ His anthropological approach to social life in the polis is supported by a study of oral diction and the absence of the copulative verb that renders abstract statements about justice impossible.⁵ As he points out, Homer does not tell us what justice *is*; the characters actually enact the psychology of feud. Yet, in the epic, and by implication in the

on polished stone benches, forming the sacred circle,
grasping in hand the staffs of clear-voiced heralds,
and each leapt to his feet to plead the case in turn.

Two bars of solid gold shone on the ground before them,
a prize for the judge who’d speak the straightest verdict.

² E. Havelock, *The Greek Concept of Justice: From Its Shadow in Homer to Its Substance in Plato*, Cambridge, Harvard University Press, 1978.

³ In *The Greek Concept*, p. 56, Havelock mentions that even as recently as the mid-70s some scholars asserted that “Homer” was a poem of the Mycenaean period and reflects that age. His own position is bolstered by Milman Parry’s work.

⁴ Havelock, *The Greek Concept*, p. 55-56.

⁵ Havelock “History of the Verb to Be”, *The Greek Concept*, and Havelock, “The Content and Quality of the Poeticized Statement”, *Preface to Plato*, Cambridge, Harvard University Press, 1963.

debates in the polis, we can certainly see a quest for justice and a society governing itself in the midst of a tremendous disaster caused by the feud between Achilles and Agamemnon. The question is how one defines justice. For Havelock, epic justice restores balance in the world, more than it assesses right and wrong or finds the truth. “Justice, whatever it is, can be seen as something exchanged between two parties, or added to both, in the course of a settlement; or, alternatively, as symbolizing the process of exchange itself. It is certainly not a principle which when applied excludes its opposite”.⁶

In other words, justice is not a concept that can be defined through dialectical reasoning; it is not a theory of law or jurisprudence. It is pragmatic, only articulated through action and character in what we now categorize as imaginative literature. At a later moment when Plato seeks definitions of justice through a reasoned dialogue aimed at finding absolute truth, the epic is found wanting and poets will be banned from his republic precisely because they teach through the emotions.

Although Plato banned them from his republic, neither philosophy nor the law has displaced the poets in exploring what is just. Justice is not only a significant theme in great literature from *The Orestia* to Camus’ *The Fall* and beyond, but literary and legal scholars alike believe it offers superior insights into the nature of the law itself. We have just looked at one of the richest, earliest examples of how we can read *literature as law*, or at least an approximation of it. As with reading *law as literature*, the nature of the relationship between the two genres is contested. The legal scholar James Boyd White believes that literary texts are not merely about the law, but actually construct experience for the reader/audience in ways that the law, as a sub-set of rhetoric, creates community. Writing about “Philoctetes”, White says,

for the play is at its heart about the conditions under which ethical and practical thought take place, about their ontology and epistemology [...] This literary demonstration in the text, as read or performed, has a clarity and force – a persuasiveness – that theoretical argument could never have, for it works by constituting the audience in a new way [...] It integrates the experience and the self, locating them in the conditions of uncertainty in which we must actually live.⁷

The emotional and experiential pursuit of justice in the epic, which Plato worried would deflect from the pursuit of truth, is precisely, according to White, the way to perceive the truthfulness of uncertain communal life.

To return to Achilles’ shield, the experience depicted on Achilles’ shield, leaves us with unanswered questions, an uncertainty that nonetheless has concrete features. In this city, a murder has been committed, and the crowd takes up both sides in the argument over a blood price. We might at first assume that the task at hand would involve determining guilt, but there does not seem to be a question about the facts of the case. The question to be resolved is not a physical punishment for the perpetrator, but the nature of the fine to be levied as compensation for the aggrieved party. We have no hint as to how the judges are to make their decision, or

⁶ Havelock, *The Greek Concept*, p. 132-33.

⁷ J. B. White, *Heraclides’ Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, University of Wisconsin Press, 1985, p. 23-25.

whether some sense of justice, retribution, or merely keeping peace among warring factions is the goal. If we answer these questions based on Havelock's discussion of justice in the epic, then we would say the important issue is to restore a sense of balance, and we note there is payment, an exchange of wealth to accomplish this goal. A pre-existing harmony has been disturbed by violence and rather than perpetuating that violence, the balance is "righted" by a proxy, i.e., money or goods of value.

Beyond the suggestion of a repayment to the relatives, the wergild known to the Germanic cultures, what are we to make of "two bars of solid gold" (l. 591) offered to the judges? Is this a salary for civic duty? A bribe by one of the interested parties? A prize in a contest of wits? What is the dynamic among the people gathered at the agora? It may be a search for justice, but it tells us little of what we might want to know about how the law functioned. The specific answers about what happened in the Greek polis are not the point here, but the images we glimpse in literature of public assemblies, judgment, payments, and dispute settlement in this oral, civic culture are relevant to an exploration of how medieval customary law functioned. The setting and events present a marked contrast with our conventional notions of the law, courts, judges, and justice as they function under written law administered by a centralized state. The Homeric text reveals, however, a situation analogous to medieval customary (not ecclesiastical) law courts by virtue of being a scene of peacekeeping, "righting the balance" characteristic of face-to-face, oral adjudication. Throughout medieval society, primary oral communities co-exist, of course, with literate communities. Even in the early Middle Ages, writing is used after the fact for recording proceedings and a few written documents are presented in court along with oral witnessing. The process in secular courts, however, remains imbued with oral habits of mind for many centuries, and understanding what is not written is crucial to an appreciation of custom.

Much of what we understand about orality stems from the pioneering work of Havelock, Milman Parry, and Albert Lord⁸ on classical poetry that inspired further work on oral composition/oral poetry by medieval epic scholars.⁹ In another vein, the work of Jack Goody, Ian Watt, and Walter Ong among others on the impact of

⁸ Havelock, *The Greek Concept*, see notes 2 and 5 above. A. Parry, *The Making of Homeric Verse: The Collected Papers of Milman Parry*, Oxford, Clarendon Press, 1971. A. Lord, *The Singer of Tales*, Cambridge, Harvard University Press, 1960.

⁹ *Oral Literature: Seven Essays*, ed. J. Duggan, New York, Barnes and Noble, 1975; J. Duggan, *The Song of Roland: Formulaic Style and Poetic Craft*, Berkeley, U. of California Press, 1973; J. M. Foley, "Epic and Charm in Old English and Serbo-Croatian Oral Poetry", *Comparative Criticism*, 2, 1980, p. 71-92 and *Oral Tradition in Literature: Interpretation in Context*, ed. J. M. Foley, Columbia, MO, University of Missouri Press, 1986; S. Nichols, *Formulaic Diction and Thematic Composition in the Chanson de Roland*, Chapel Hill, University of North Carolina Press, 1961; J. Niles, *Beowulf: The Poem and Its Tradition*, Cambridge, Harvard University Press, 1983; J. Rychner, *La Chanson de geste: Essai sur l'art épique des jongleurs*, Geneva, Droz, 1955; P. Zumthor, *Introduction à la poésie orale*, Paris, Seuil, 1983.

literacy in the West created the field of literacy studies.¹⁰ Throughout the 1980s, their work had a decided influence on the study of law and literature.

The history of literacy and the story of the law are intertwined in northern Europe in the twelfth and thirteenth centuries where a mixture of ecclesiastical, urban, customary, and maritime laws covered overlapping jurisdictions and expressed old and new procedures. An abundance of legal documents and a variety of literary genres all contributed to changing attitudes toward justice. In some cases, texts sparked the creation of new social institutions as with the rediscovery of Roman law in the eleventh century that led to the law school at Pavia and the first university at Bologna. In other cases, new social conditions, such as the burgeoning economies in growing towns and cities, required the expansion of official notariates generating more written texts—business documents, charters, and customaries. All this did not emerge *ex nihilo* in the twelfth century, although there was a clear quickening of literacy practices by that point. The Middle Ages broadly speaking were not the gap between the ancient and modern literacies, but the fulcrum where orality and literacy met, the balance ultimately tipping in favor of the written tradition in law as well as literature.

It would be tempting to call the legal processes of the middle period “practical” law, thereby evoking the practical literacy that M. T. Clancy describes in *From Memory to Written Record: England 1066-1307*.¹¹ The connections between the law and the expansion of literacy beginning in the eleventh century are certainly very close. The usual labels for medieval law are customary and learned; and the two are distinguished, in part, by being thought of as either oral or written respectively. The use of these terms, however, is an oversimplification that masks the interpenetration among types of law and the complex ways in which writing is a technology accompanying, but not displacing, oral law. Nonetheless, the law in all its forms is thoroughly implicated in the phenomenon of renewed literacy. In England, for example, the expansion of the administration of the king’s justice spurs the use of writs and the archiving of pipe rolls. Although northern France lagged somewhat behind, new administrators, such as the *baillis* used records of fines and hearings; and by the end of the twelfth century even customary law itself began to appear in written form.

Writing passes in the era of the *Domesday Book* (1087 C.E.) from being perceived as a quasi-sacred object handled by a restricted group for limited purposes to being a widespread vehicle for recording administrative, legal, and business affairs in a way unknown by Anglo-Saxon society. The spread of this practical literacy can be traced materially in the number of writs produced by the royal courts, going from 2000 for the entire Anglo-Saxon period to 2000 per week during the

¹⁰ J. Goody, *The Domestication of the Savage Mind*, Cambridge, Cambridge University Press, 1977; J. Goody and I. Watt, “The Consequences of Literacy”, *Literacy in Traditional Societies*, ed. J. Goody, Cambridge, Cambridge University Press, 1968, p. 27-68; W. Ong, *Orality and Literacy: The Technologizing of the Word*, London and New York, Methuen, 1982.

¹¹ M. T. Clancy, *From Memory to Written Record: England 1066-1307*, Cambridge, Harvard University Press, 1979.

reign of Edward I,¹² and in the sheer weight of sealing wax used by the royal Chancery.¹³

Among the most important manifestations of the new practical literacy was the documentation connected to legal transactions; in fact, the largest body of texts extant from the high Middle Ages concerns the law.¹⁴ Although the idea of a watershed, twelfth-century renaissance proposed by C. H. Haskins has been substantially revised,¹⁵ current legal histories nonetheless chronicle the connections between the rise of literacy in the eleventh century and legal reforms of the twelfth, an era of “administrative kingship”.¹⁶ Changes in the law also figure in the chapter on orality and literacy that introduces Brian Stock’s seminal study of the relationship between religious heresies and reform movements as textual communities, and the renewal of hermeneutics in the eleventh and twelfth centuries.¹⁷ In *The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries*, he suggests that major transitions beginning in the eleventh century affected the law in ways analogous to shifts in religious practice that passed from an emphasis on liturgy to an embrace of theological scholarship, “in politics, the shift [is] from the priest-king, whose connections are with an oral, pictorial, gestural, and liturgical culture, to the desacralized law-king, whose links are with the literate, the administrative, the instrumentally rational, and the constitutional”.¹⁸ Stock suggests that renewed literacy forced a sea change in methods of legal proof away from seeking the truth through physical objects. The concept of *judicium dei* began to give way to verification through witnesses, consultation of written documents, and the use of juries.

It is often repeated that earlier phases of medieval justice, as with other social behaviors, were more dependent on symbols and rituals than writing. Clanchy points to the survivals of ancient Anglo-Saxon custom where titles to land are carved on knives or swords. Later these objects can be found attached to writing to verify gifts of land, but ultimately writing alone is necessary. By the time of Henry III (1216-1272) even vagrants needed to furnish proof of trustworthiness in writing.¹⁹ This also underscores an apparent democratization of literacy – what began with Henry II’s administration in England (1154-89), involved the aristocracy and the growing

¹² *Ibid.*, p. 15.

¹³ *Ibid.*, p. 43. From the 1220s to the 1260s, the amount went from approximately four pounds per week to approximately thirty-two pounds.

¹⁴ J. A. Brundage, *Medieval Canon Law*, New York, Longman, 1995, p. 1.

¹⁵ C. H. Haskins, *The Renaissance of the Twelfth Century*, Cambridge, Harvard University Press, 1927. See also R. W. Southern, *Medieval Humanism and Other Studies*, New York, Harper & Row, 1970; *Renaissance and Renewal in the Twelfth Century*, ed. R. L. Benson and Giles Constable, Cambridge, Harvard University Press, 1982.

¹⁶ C.W. Hollister and J. Baldwin, “The Rise of Administrative Kingship, Henry I and Philip Augustus”, *American Historical Review*, 83, 1978, p. 867-905.

¹⁷ B. Stock, *The Implications of Literacy: Written Language and Models of Interpretation in the Eleventh and Twelfth Centuries*, Princeton, Princeton University Press, 1983.

¹⁸ *Ibid.*, p. 33.

¹⁹ Clanchy, *From Memory*, p. 32.

merchant class in more writing by the next century, and then reached the peasantry by the fourteenth century.

The shift in literacy practices in the Middle Ages was not, however, an advance from pure orality to literacy except for the pre-literate Germanic tribes as they settled into the Empire in the fifth century. A continual written tradition, while largely restricted to the ultra-literate clergy, co-existed within the predominately oral culture from the fall of the Empire to the Carolingian era, and on through the period of northern invasions, prior to the revival of the economy and more widespread literacy in the eleventh century. Learning was not limited to the palace courts of King Alfred and Charlemagne, or the monasteries, even in the early Middle Ages. The complexity and extent of this literacy included those who were not necessarily clerics, but were quasi-literate, to use Franz Bäuml's term.²⁰

Literacy was a complex phenomenon also because the increase in uses of written genres which began in the eleventh century did not mean a suppression of oral culture or the triumph of the silently read written word. It signaled a realignment of attitudes toward both the oral/aural and writing. In reference to the law specifically, one unintended consequence of the tight linkage that scholars saw between increasing literacy and the law is the trap of social Darwinism. This evolutionary thesis suggests that superannuated oral custom, with its "irrational" proofs, was replaced by a superior form of written law. The evidence is ample that writing was increasingly utilized and contributed to social change, but if we emphasize only how literacy helped the law become more "instrumentally rational and constitutional" to repeat Stock's terms, we may overlook his caveat that immediately followed this statement about medieval communication being more complex than either the renaissance or the evolutionary theory allows.²¹ Keeping in mind the simultaneity of orality and literacy as well as the multiple forms of law, we should be cautious about assuming there was a simple chronological progression from early customary law that tolerated feud and accepted ordeals to "objective" methods of proof, such as the inquest, based on writing. While it is true there was a significant change in the tolerance of judicial combat (Lateran IV banned the clergy from participating in it), this does not mean that earlier forms of proof were irrational, that the ban was a result of increased literacy, or that private war ceased. Indeed, the most important recent scholarship points clearly to the opposite view.²²

For social scientists who claim it is impossible to reconstruct the status of early law, the difficulty lies in the terms themselves, such as "law" and "state" that cannot be given a universal definition, and thus should be abandoned.²³ Another

²⁰ F. H. Bäuml, "Varieties and Consequences of Medieval Literacy and Illiteracy", *Speculum*, 55, 1980, p. 237-65.

²¹ Stock, *The Implications of Literacy*, p. 33.

²² See P. Hyams, *Rancour & Reconciliation in Medieval England*, Ithaca, N.Y., Cornell University Press, 2003.

²³ See W. C. Brown and P. Górecki, "What Conflict Means: The Making of Medieval Conflict Studies in the United States 1970-2000", *Conflict in Medieval Europe: Changing Perspectives on Society and Culture*, ed. W. C. Brown and P. Górecki, Aldershot, Ashgate, 2003; and S. F. Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology 1949-99", *Journal of the Royal Anthropological Institute*, 7, 2001, p. 95-116.

perspective asserts that early medieval law, like the Torah, reflects cultural values and is more akin to literature than law. It was not meant to be used in a court.²⁴ The relegation of custom to something other than “real” law is not supported in contemporary legal theory, especially that drawing on anthropologists, such as Malinowski. Dennis Lloyd in *The Idea of the Law* points out that custom is not to be confused with habit or convention. In most respects except for the central administration, customary (or primitive law) entails most of the qualities associated with what is considered sophisticated law in developed countries – enforceable sanctions, recognition of freedom to disobey, and flexible response to new situations. While a traditional society may lack “the vital centralized organs of law and government”, its customary law is nonetheless binding.²⁵ In early medieval culture with strong or weak kings, custom is a normative system, dependent on self-help and community more than on a strong central government. It nonetheless guarantees order and dispute resolution.

The progressivist, evolutionary view has, nonetheless, been evident in studies of medieval literary texts and legal issues, beginning with Howard Bloch’s pioneering study *Old French Literature and the Law*.²⁶ Bloch offered one of the first insights into the impact of literacy and its connection to the broad themes of courtly literature. Although now superseded by recent legal histories, it continues to influence many literary scholars.²⁷ This alone suggests that its assumptions should be examined. Referring to proofs used in the early periods as “irrational” it begins with nineteenth-century legal histories, and Bloch continues in this vein by contrasting the “collective, concrete” old feudal law seen in the epic with the individualizing ethos of the romance and lyric. He claims that the rise of the central state and use of written forms, such as the inquest, introduces rational truth and human, rather than divine, justice into trials.²⁸ His view of the early law being based on immanent justice is not original to him, but the importance he places on the expansion of writing, changes in the law, and literary forms was innovative at the time. Writing, Bloch suggests, is the new vehicle for mediating between judge and defendant, just as poetry mediates between poet and lady. Physical combat becomes interiorized, intellectual combat, thus mitigating the violence of the old feudal world.²⁹

²⁴ This is the position of writers like A. S. Diamond, *Primitive Law Past and Present*, London, Methuen, 1971, and P. Wormald, “Lex Scripta and Verbum Regis: Legislation and Germanic Kingship from Euric to Cnut”, *Early Medieval Kingship*, ed. P. H. Sawyer and I. N. Wood, Leeds, The School of History, University of Leeds, 1977, p. 105-38. He sees the laws as more symbolic than practical.

²⁵ D. Lloyd, *The Idea of the Law*, Baltimore, Penguin, 1964, p. 238.

²⁶ H. Bloch, *Old French Literature and the Law*, Berkeley, University of California Press, 1977. Critical reviews: E. Tabuteau, *The American Journal of Legal History*, 25, 1981, p. 249-51; and P. Dembowski, *Speculum*, 54, 1979, p. 112-15.

²⁷ See K. Gravdal, *Ravishing Maidens: Writing Rape in Medieval French Literature and Law*, Philadelphia, University of Pennsylvania Press, 1991; P. Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature*, Chicago, University of Chicago Press, 2000.

²⁸ Bloch, *Old French Literature*, p. 131.

²⁹ *Ibid.*, p. 134.

Much of this argument is based on his view that feudal justice offers punishment or escape, but not judgment. Although it is true that in early trials the judge presided over procedures and the assembled barons would determine the law, it is incorrect to say that “judgment” is not expressed and that writing introduced rationality. Long before writing became an integral part of judicial proceedings, judgment was exercised in deciding what the custom was, whether the defendant was credible, and what the punishments should be. Bloch and those influenced by his work have tended to make feudal justice synonymous with the judicial battle although this form of *judicium dei* was just one method of proof, perhaps rarely used, as we now know.³⁰ Setting aside the problematic use of the word feudal for early justice,³¹ an argument that places so much emphasis on legal innovations of the twelfth century, claims too much for the impact of the inquest, and too little for the validity and stability of customary law that dominated northwestern Europe up to the early modern period.

Any number of otherwise excellent studies of medieval literature also display the bias about early law.³² Don Maddox builds on Bloch for his justification in connecting “ethics and poetics”. In *The Arthurian Romances of Chrétien de Troyes: Once and Future Fictions*, Maddox also takes the position that medieval law falls into two eras, with custom representing the bad old days.³³ As opposed to Kohler who suggested that Chrétien invented a positive role for customs as “a compensatory fictive world for a crepuscular feudal nobility”,³⁴ Maddox points out that Chrétien’s Arthur is not the charismatic king of Wace and Geoffrey of Monmouth. He is relegated to the background by his problematic leadership and adherence to rigid customs. The court is subject to repetitive crises, personal ones for the heroes and collective ones for the court. These repeated crises have, for Maddox, a particularly legalistic cast because they concern customs, and Arthur clings to and perhaps even desires to restore the customs of Utherpendragon times. The crises are taken on by the new, young heroes who leave the court “adventuring” out to right an imbalance created by none other than the backward-looking Arthur who is wedded to an anterior, idealized world. Like Bloch, Maddox tends to demonize custom. Although he does not define it at the outset, certain associations are implicit in his use of the term. To say, as he does for instance, that customs, “rely exclusively on oral tradition, actually entail interruption of juridical continuity and imperil social and

³⁰ Two important articles on negotiated settlements are: F. Cheyette, “Suum Cuique Tribuere”, *French Historical Studies*, 6, 1970, p. 287-99, and S. D. White, “‘Pactum Legem Vincit et Amor Judicium’: The Settlement of Disputes by Compromise in Eleventh-Century Western France”, *The American Journal of Legal History*, 22, 1978, p. 281-308.

³¹ See S. Reynolds’ challenge to the notion of feudalism in *Fiefs and Vassals*, Oxford, Oxford University Press, 1994.

³² See Gravdal, *Ravishing Maidens*; Brooks, *Troubling Confessions*; L. Jefferson, *Oaths, Vows, and Promises in the First Part of the French Prose Lancelot Romance*, Bern, Peter Lang, 1993; P. Haidu, *The Subject of Violence: The Song of Roland and the Birth of the State*, Bloomington, Indiana University Press, 1993.

³³ D. Maddox, *The Arthurian Romances of Chretien de Troyes: Once and Future Fictions*, Cambridge, Cambridge University Press, 1991.

³⁴ *Ibid.*, p. 136.

political stability”³⁵ is revealing. In Chrétien’s work, this is appropriate for customs that are socio-cultural phenomena (ceremonies like the hunt for the White Stag and its connection to marriage), but to take these customs as references to customary law is a confusion of terms and an unquestioned belief in a “second feudal” age. Readers should thus be aware of these underlying assumptions when reading literature *as* law.

Literary scholars often follow one vein of legal history which views custom, either as no law at all, or as inflexible, unable to innovate and incapable of self-reflection. There is but a small step from this view to the assertion that early forms of proof, especially early medieval ones, were “irrational” in contrast to “rational” and “individualizing” proofs connected with the increased use of writing that led to social progress. This has been, in short, what the evolution of the law means. The deeply entrenched assumption is that if a practice (legal, social, or aesthetic) is connected to writing, it must be cognitively more developed. That assumption must be examined.

Behind explanations of the connections between changes in the law and the revival of literacy in the Middle Ages lie ideas about writing generated by distinguished pioneers of anthropological/linguistic approaches: Goody, Watt, and Ong. They make very broad claims about the impact of literacy based on the recognition that alphabetic writing is not merely oral language written down. Writing has its own structure and, more importantly, they assert, when alphabetic writing was created, it led to new ways of thinking – especially about the self. Writing creates the possibility for a more objectified view of the self, and one’s relationship to experience. This is an essential point for the cognitivists who elaborate the view that writing engendered depersonalized analysis.³⁶

Alphabetic written language, as opposed to oral language according to this view, is context-free and can make its arguments not on an appeal to tradition or authority but logic.³⁷ Literacy thus allowed for the development of history and science and broke the bonds of myth and oral tradition. It was an instrument of progress, a liberation of the individual from mystery, from authorities, priests or gods, who controlled lives. Values, such as loyalty, honor, or truthfulness, that might once have been personal and maintained only through oral means (which they implied were rather arbitrary), could be analyzed and given standardized rules through writing. If the oral mindset can be compared to bartering, then writing, as Stock puts it, is the money of the intellectual economy. “Literacy, like the market, insured that an entity external to the parties in a given interchange – the text – would ultimately provide the criteria for an agreed meaning”.³⁸

³⁵ *Ibid.*, p. 6.

³⁶ Classic studies: A. R. Luria, *Cognitive Development: Its Cultural and Social Foundations*, ed. Michael Cole, Cambridge, Harvard University Press, 1976; D. R. Olsen, “From Utterance to Text: The Bias of Language in Speech and Writing”, *Harvard Educational Review*, 47, 1977, p. 257-81.

³⁷ Olsen, “From Utterance to Text”, p. 257-81.

³⁸ Stock, *The Implications*, p. 86.

The cognitivist argument unfortunately also fostered ethnocentric arguments about the power of literacy.³⁹ As much as Goody tried to describe the alphabet as a “technology” which yielded new results, rather than as a product of a superior culture, his work has been used to support evolutionary and ethnocentric arguments about the value of Western forms of literacy in general and canonical texts in particular. Challenges to the cognitivist position and the myth of school-based literacy, however, have been forcefully articulated, especially with the contemporary revival of rhetoric.

As for legal history, it is not difficult to see the implication of a cognitivist attitude when oral law is perceived as primitive and the colonial imposition of western law around the globe is considered an unalloyed improvement. But equating alphabetic writing with logical discourse and, by extension, with social progress has been demythologized. Even Stock realized that literacy did not suddenly create objectivity. “The rebirth of literacy [...] did not bring objective and subjective dimensions of meaning into existence; it merely threw them *into relief* [emphasis mine] in a new way”.⁴⁰ For him, writing does not supersede orality. He acknowledges that theories of language in the Middle Ages were between “a majority of thinkers, who, like Frege, Husserl, and the early Wittgenstein, gave first place to purely logical considerations, and a minority who, like Heidegger, Derrida, and the later Wittgenstein, criticize inherited logical assumptions and proposed instead a contextual and conventionalist understanding of language”.⁴¹ To write today about law and literature, we have to recognize that post-structural and social constructivist thinking now reflect the majority view. Given that medieval customary law is communal and hence contextualist, that mode of thinking may have been more the norm than Stock suggests.

The broad critique of structuralism and the logocentric western philosophic tradition launched by deconstruction has been the most powerful challenge to easy assumptions about the nature and impact of literacy. Derrida taught us that the minimal differences Saussure thought created the possibility of meaning are the beginning of *différance*. Meaning is not present in the combinations of two parts of the sign but always absent, constantly deferred in the slippage of the signifier.⁴² The Derridean notion of supplementarity opens the way for the most significant assault on formalism and undercuts the claims that alphabetic literacy is the « access » to complex thinking and, by extension, to significant social improvement. Deconstruction posed a considerable threat by seeming to justify total subjectivity in reading and an attack on principles of evidence. Pointing to the undecidability of tropes, undercutting the binaries of literal/figural, and following an infinite regress

³⁹ See *The Right to Literacy*, ed. A. Lunsford, H. Moglen, and J. Slevin, New York, Modern Language Association, 1990.

⁴⁰ B. Stock, “Literacy and Society in the Twelfth Century”, *The Spirit of the Court: Selected Proceedings of the Fourth Congress of the ICLS Toronto 1983*, Cambridge, D. S. Brewer, 1985, p. 1-4 at p. 3.

⁴¹ *Ibid.*, p. 4.

⁴² J. Derrida, *Of Grammatology*, Baltimore, Johns Hopkins University Press, 1976.

of etymologies sparked the new philology in French medieval studies.⁴³ The lively polemic, unleashed by the deconstructionists' abstruse language and readings struck other medievalists as ungrounded in textual evidence and based on faulty philology. Once the deconstructive genii was out of the formalist bottle, however, there was no way to put him back into the old philologists' container. Rather than dismissing post-modern approaches all together, however, many scholars made solid cases for modern interpretative strategies grounded in meticulous editorial practice, exploring textual variants while avoiding solipsism.⁴⁴ Indeed, the work of Paul Zumthor, Jean Rychner, Rupert Pickens, and others argues for the socially constructed text, *mouvance*, and questions of reception, without turning all text into writing about the impossibility of writing.⁴⁵ Nevertheless, the great value of the deconstructionists' anti-foundationalism was in reminding us that the lingering pejorative connotations attached to orality (if considered "primitive" in some sense) only stem from an unexamined privileging of literacy. I would advocate a middle path for reading literary reflections of oral, customary law and justice that brings the post-modern skepticism about "representation" in these scenes into contact with solid evidence of community formation in historical contexts outside the text. This is a pragmatic approach that navigates between the foundational and the deconstructive in that vexed space where law and justice intersect with text and rhetoric.

Writing about the law also requires at least a brief word about jurisprudence which is, in part, about the nature and source of authority. Does the law, for instance, rest on universal principles, or is it whatever has authority in a particular community? Some legal and literary scholars would say that there is no jurisprudence in customary law because to theorize about the law requires it be in written form. A textbook version of medieval legal theory, in fact, might move from Augustine, to Isidore of Seville and then to Aquinas, pausing only for the canonists in between. To write about the intersection of law and literature in the context of complex literacies of the Middle Ages, however, requires inquiry into the sources of legal authority that include the customary. Critics have not hesitated to project backwards a jurisprudence onto the period and assume that immanent justice explains everything about early law. Why, however, should we assume that in a predominately oral culture, all law is believed to be natural, or transcendent, authorized by a god, or by transpersonal, universal human nature? Is not law in an oral culture also positive, meaning concrete, and is it not, quite simply, whatever the society takes to be a rule? Usually the term "positive law" refers only to written

⁴³ See B. Cerquiglini, *Éloge de la variante: Histoire critique de la philologie*, Paris, Seuil, 1989; *The New Philology*, ed. S. G. Nichols, special edition of *Speculum*, 65/1, 1990, and M. S. Brownlee, K. Brownlee, and S. G. Nichols, *The New Medievalism*, Baltimore, Johns Hopkins University Press, 1991.

⁴⁴ See especially W. Paden, "Scholars at a Perilous Ford" and R. Pickens, "The Future of Old French Studies in America: The 'Old' Philology and the Crisis of the 'New'", *The Future of the Middle Ages: Medieval Literature in the 1990s*, ed. W. D. Paden, Gainesville, University Press of Florida, 1994, p. 3-31, and p. 53-86, respectively; also *Towards a Synthesis? Essays on the New Philology*, ed. K. Busby, Amsterdam, Rodopi, 1993.

⁴⁵ See especially R. Pickens, *The Songs of Jaufré Rudel*, Studies and Texts, 41, Critical Edition, Toronto, University of Toronto Press, 1978.

codes to distinguish them from abstract principles, but customary law is also positive, since there are rules formulated and upheld by the community, although we cannot say they are enacted or legislated.

The traditionally conceived split between law and custom is preserved when a series, such as the *La Coutume: Typologie des sources du moyen âge occidental* (1982) puts “Lex” into one volume,⁴⁶ and “La Coutume” in another.⁴⁷ In his treatment of custom, John Gilisson begins with some of the juxtaposed terms accepted by medieval writers. From Isidore, “*lex est constitutio scripta. Mos est vetustate probata consuetude, sive lex non scripta*” [law is regulation or agreement in writing. Custom is approved usage of long-standing, or unwritten law]. For Gratian, “loi est droit écrit; la coutume loi non-écrite” [law is written law; custom is unwritten law]. And from Frederick Barbarossa, Gilisson cites, “loi des empereurs et la bonne coutume des ancestres” [law of the emperors and the good custom of the ancestors].⁴⁸ Each of these posits a distinction, but they show that, for two of them at least, the division was based on *form* (written vs. unwritten) not the *source* of their authority, nor degree of their *influence* or *power*. As Gilisson goes on to demonstrate, custom cannot in any way be relegated to a secondary status. “Le droit médiéval est presque exclusivement coutumier; autrement dit, la coutume est la principale, et même à certaines époques, dans certaines régions, pour certains domaines, l’unique source de droit”.⁴⁹ For him, custom is “le droit” but *lex* is “la loi” meaning jurisprudence.⁵⁰ The issue is confused for us in English because we use the word “law” for the rule, the authority, as well as the theory behind the rule, and writers do not always make clear how they are using the term.

The impetus for re-conceptualizing custom and changes in the law came in part from the work of Stock on the impact of literacy, but his brief comments on the law repeat the conventional dichotomy between the old, ritualistic and the new literate practices beginning in the eleventh century. More recently, British and American historians have contributed to a comprehensive rethinking of the early law.⁵¹ For the high Middle Ages, others have been working on negotiation and feud, while also redefining the fundamental terms of the inquiry.⁵² Medievalists have turned to anthropologists to find parallels in oral cultures for understanding how the law functioned among the Germanic tribes and to sociologists for new models of

⁴⁶ L. Génicot, *Lex. Typologie des sources du moyen âge occidental*, Turnhout, Brepols, 1982.

⁴⁷ J. Gilissen, *La Coutume. Typologie des sources du moyen âge occidental*, Turnhout, Brepols, 1982.

⁴⁸ *Ibid.*, p. 16.

⁴⁹ *Ibid.*, p. 41.

⁵⁰ His usage of “droit” conflicts with the other expression “pays de droit” as written law.

⁵¹ See essays by W. Davies, P. Fouracre, J. Nelson, I. Wood, and P. Wormald, *The Settlement of Disputes in Early Medieval Europe*, ed. W. Davies and P. Fouracre, Cambridge, Cambridge University Press, 1986.

⁵² Among many books and articles: Cheyette, “Suum Cuique Tribuere”; Hyams, *Rancour & Reconciliation*; White, “Pactum Legem Vincit et Amor Iudicium”; and the introductory essay “What Conflict Means” by Brown and Górecki, *Conflict in Medieval Europe*, offers a useful overview of the field. See also Reynolds, *Fiefs and Vassals*.

how social groups resolve disputes.⁵³ Susan Reynolds sees commonalities in the way traditional customary systems function in other cultures; and she says custom was the bedrock across all of Europe. “Law was custom – normative custom”.⁵⁴ Her study on communalism, *Kingdoms and Communities*, offers a broad view, garnered from the documents and chronicles of lay communities, that reveals collective judgment is at their core. As she says, lay political ideas did not come from the clergy. She does not ignore that medieval culture was thoroughly Christian, nor that hierarchical influences were always at work. But she believes that too much emphasis has been placed on monastic and academic sources, as well as lay groups such as the family and guilds, in the discussion of sources of authority.⁵⁵ She begins her discussion of the period 900-1140 with the law, not because it forms communities in some independent way, but because traditional law reflects the communal values that permeated the culture up until the end of the thirteenth century.

In the absence of adequate written evidence, it may be difficult to discern how community decision-making actually functioned in early societies, and that is why scholars have recourse to literary depictions of trials that appear to reflect earlier periods. Nevertheless, the philosophical difference between the customary mind-set and jurisprudence derived from the learned law has an ancient, documented pedigree. For medieval secular courts, the non-ecclesiastical world, where both lords and the “good” people of the region gathered, the concept of justice was close to what is today called legal realism, as opposed to legal formalism. The distinction goes back to the Sophists, who were the first realists in the sense of modern legal realism. It is not surprising that post-structuralists have rehabilitated them from Plato’s attack. They believed that human knowledge was limited by perceptions and contingent upon social circumstances, and they could be credited with creating situational ethics. The revival of rhetoric studies finds in them the source of social-constructivist theory (or anti-theory).⁵⁶

Plato, on the other hand, was a formalist (foundationalist) in his opposition to the Sophists, and he, along with Aristotle, set the course for later study of romano-canonical law in the medieval universities.⁵⁷ Plato’s philosopher-king of the

⁵³ M. Gluckman, *Custom and Conflict in Africa*, Oxford, Blackwell, 1955; J. Goody, *The Domestication of the Savage Mind and The Development of Marriage and the Family in the West*, Cambridge, Cambridge University Press, 1983; P. Bourdieu, *Outline of a Theory of Practice*, Cambridge, Cambridge University Press, 1977. Among many pertinent studies: P. Brown, “Society and the Supernatural”, *Daedalus*, 104, 1975, p. 133-35; and R. Coleman, “Reason and Unreason in Early Medieval Law”, *Journal of Interdisciplinary History*, iv, 4, 1974, p. 571-91.

⁵⁴ S. Reynolds, *Kingdoms and Communities*, 1984, 2nd ed., Oxford, Oxford University Press, 1997, p. 32.

⁵⁵ *Ibid.*, p. 11-12.

⁵⁶ See S. C. Jarratt, *Rereading the Sophists: Classical Rhetoric Refigured*, Carbondale, Southern Illinois University Press, 1991, and J. Neel, *Plato, Derrida, and Writing*, Carbondale, Southern Illinois University Press, 1988.

⁵⁷ Plato is referred to as a realist in the sense that he believed in the real existence of the ideal forms, but he is a “formalist” in the debate with the Sophists.

Republic should pursue knowledge of the pure form of justice, not be confused or absorbed by mere human laws (*nomos*) of the polis. His belief that abstract principles exist and are knowable through reason, is further developed by Aristotle, who was, however, not as dismissive as Plato of human laws. Aristotle saw in them the potential expression of the true nature of humans to be ordered, rational, and moral. Throughout the West, whether conceived of as transcendent (Platonic or Judeo-Christian-Islamic), or of this world (human nature or laws of nature), theories of natural law are foundational, not situational. A belief in natural law also usually joins law to morality. Justice, for instance, is a “good”. Legal formalism thus accepts that the law is based on principles, rationally knowable and located beyond individuals in universals (be they transcendent or not).

Community-based law is a form of legal realism that touched all medieval people, and it co-existed up through the thirteenth century, while natural law and legal formalism were articulated through the universities and ecclesiastical courts. Ultimately, however, by the fourteenth century formalism won out in code-based law on the continent, and English common law became more formalistic. One could argue, however, that it retained some elements of legal realism in the notion of precedent, or judge-based law. In the modern world, formalism dominates, and due to the influence of utilitarianism, its foundational basis is reason, rather than transcendent origins of the law. Justice is to be rational and objective; and now the warrants for legal judgments are increasingly found in scientifically observed social phenomena, such as the political or economic impact of a law.

The study of law in modern universities has likewise followed the utilitarian path, no longer being considered part of the disciplines of philosophy and rhetoric, but the social sciences. With the cultural turn to post-modernism, however, unexamined political and economic theories are called into question by the new legal realists. These modern sophists want to reconnect the study of law to the humanities to incorporate their models of interpretation and to recognize the role played by languages and literature in shaping liberal values. They have created the field of Critical Legal Studies that gave new life to the law and literature movement.

Two legal scholars, James Boyd White and his opponent Richard Posner, bring critical rigor to discussions of reading the law and its relationship to literary texts.⁵⁸ White and other scholars in the Critical Legal Studies group view the law as language or text and advocate post-modern interpretative strategies. For him, law is a branch of rhetoric, “an art of constituting culture and community”.⁵⁹ Law “as” literature has come to mean not mere reading to appreciate style, but reading legal documents or opinions, analyzing metaphors as socially constructed language, with the goal of deconstructing them. Reading law texts from a neo-Marxist or gender

⁵⁸ R. Posner, *Law and Literature*, 1988, revised ed., Cambridge, Harvard University Press, 1998 and J. B. White, *The Legal Imagination*, Chicago, University of Chicago Press, 1985. Posner says the movement began with the publication of this title by White.

⁵⁹ J. B. White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life”, *University of Chicago Law Review*, 52, 1985, p. 684-702 at p. 692.

studies perspective, for instance, reveals the historical context of the law and hence a contingency that may justify social change.⁶⁰

Posner's well-known work, *Law and Literature*, was revised in 1998 as a response to Critical Legal Studies. He identifies himself as a pragmatist (contextualist) when acting as a judge (he is a Federal one), meaning that when he reads the law, he considers the authors' intentions and context; but he is a strict formalist (new critic) when reading literary texts. Laws or legal decisions are to be evaluated primarily, if one takes Posner's position, using economic theory that is itself rooted in the utilitarian view of the individual who pursues self-interest and wealth. Because the law is seen in this way, Posner's discussion of vengeance and what is wrong with it is laced with marketplace metaphors. He begins with speculation on how aggressors and victims will assess the cost to themselves, noting that vengeance "flouts the economist's commandment to ignore sunk costs, to let bygones be bygones".⁶¹ Of a revenge culture – it "retards specialization of the labor force [...] makes large-scale cooperation difficult" and is "potentially unstable".⁶² He slips into connections with literature when he comments that Homer is pre-legal because, "the society depicted in the poem lacks public agencies for resolving disputes and must therefore fall back on custom, ritual, and the gods (as in Athena's grabbing Achilles by the hair) to minimize the *costs* [my emphasis] of purely private methods of dispute settlement, such as the feud".⁶³ He includes very few references to medieval texts, although he does refer to the Icelandic sagas as the best picture of a revenge society. Preferring the classical Greeks or Shakespeare for his examples, he presents the Middle Ages as mere transition and repeats much of the traditional wisdom. "Intermediate stages in the evolution from revenge to public enforcement include the duel and, closely related, the trial by battle, and ritualized medieval warfare".⁶⁴

We can see the cognitivist bias in Posner's work, from the assumption that *law* means written law, to references about the evolution of law, to claims for universality and timelessness as criteria for literary judgment. His insistence on respecting what for him are clear boundaries between literature and law is based on assumptions about purpose and intentionality that postmodernists challenge. As for reading literature *as* law, the danger would be to see it as a mirror. "Dramatic exigency is a reason why readers should not bring to literature too high hopes of finding legal meat".⁶⁵ But formalism in literary criticism, which may include taking texts as mirrors, has long since been discarded.

Post-structuralist reading strategies and the rhetorical turn in legal studies have been very powerful in the interdisciplinary conversation of law and literature. James Boyd White, as mentioned above, sees the law as a sub-set of rhetoric. He

⁶⁰ See F. Olsen, ed., *Feminist Legal Theory II: Positioning Feminist Theory Within the Law*, New York, New York University Press, 1995; R. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, New Haven, Yale University Press, 1984.

⁶¹ *Ibid.*, p. 50.

⁶² *Ibid.*, p. 52-55.

⁶³ *Ibid.*, p. 75.

⁶⁴ *Ibid.*, p. 57.

⁶⁵ *Ibid.*, p. 66.

refutes the contention that law and literature are entirely separate fields by pointing out that the lawyer, unlike a scientist or social scientist, is not dealing with data but is always immersed in texts.⁶⁶ The lawyer is a translator working at the edges of languages and interpreting stories from one audience to another. Whereas Posner accepts the value of rhetoric in the restricted sense – legal language can be crafted, a good metaphor can serve well – White emphasizes the performative nature of all language to engage and shape the mind. Literature is not just useful as a means of extending an economic argument or exploring a legal theme, as Posner might see it; literature is demonstrating in another language a different reality. Literature problematizes the very issues that Posner expects to see objectified or universalized. For White, story resembles the law by allowing us to feel, experience, and imagine circumstances that are not our own.

It is in fact the genius of law that it is not a set of “commands”, but a set of texts meant to be read across circumstances that are in principle incompletely foreseeable. This is what it means to pass a piece of legislation, or to decide a case – or even to draft a contract – at one point in time, with the knowledge that it will in the future be brought to bear by others (or ourselves) in contexts, and with meanings, that we cannot wholly imagine. It is this fact that gives rise to the intellectual and ethical life of legal thought and argument. If the law worked as Judge Posner here claims, it would be a simple and purely authoritarian system.⁶⁷

The difference between those who see law and literature as distinct fields with their own ways of finding meaning, and those approaching all texts as performative and open to multiple interpretations is usually construed as a battle of opposites – formalists vs. subjectivists or foundationalist vs. anti-foundationalists. But as White says, Posner cannot extricate himself from the conversation by polarizing it. Whether he sarcastically dismisses a critic’s deconstructive reading or not, Posner has still used literature as a bridge to discuss the law and has shown that “law requires constant attention to what others say. This is how law is different from economics. It is an art of language and meaning”.⁶⁸ We could add that Posner, as mentioned above, also said that the best view of a revenge culture is found in sagas.

The polarization White alludes to is reminiscent of a standoff between hermeneutics and deconstruction, captured in the confrontation between Gadamer and Derrida. Their debate is also germane to the law and literature discussion. “For Gadamer [...] [a]lthough a text might give off a multitude of possible meanings, the intersubjective relationships of text and reader, and of reader and reader, create a bounded or ‘constrained’ meaning for every text”.⁶⁹ Derrida accused him of being “an unreconstructed Kantian transcendentalist and refused to accept the hermeneutic distinction of circularity as opposed to transcendence”.⁷⁰ Followers of Gadamer, legal scholars Owen Fiss and Roland Dworkin, line up against Stanley Fish, who has often been taken for a radical Derridean, especially when he moved from literary

⁶⁶ J. B. White, “What Can a Lawyer Learn from Literature”, *Harvard Law Review*, 102, 1989, p. 2014-47 at p. 2021.

⁶⁷ *Ibid.*, p. 2035.

⁶⁸ *Ibid.*, p. 2045.

⁶⁹ I. Ward, *Law and Literature*, Cambridge, Cambridge University Press, 1995, p. 43-44.

⁷⁰ *Ibid.*, p. 44.

criticism to a profound critique of legal formalism. He took on difficult issues, such as the first amendment, challenging its status as a foundational value.⁷¹ With his turn to the law, the implications of there being nothing beyond the text had serious implications. He certainly became the “*agent provocateur*” Fish who abandoned dense analyses of the temporal element in reading in favor of high-flying, high-stakes rhetorical performances in legal theory and campus politics” as Michael Bérubé has put it.⁷² Along the way, he took on the pragmatists who, like himself, claim to be rooted in the specifics of context for interpretation, but, unlike him, cling to the idea of right decisions based on independently verifiable judgments. Included among those pragmatists was Posner. Fish says in “Almost Pragmatism: Richard Posner’s Jurisprudence”, that it might surprise some but they agree on many points, especially that legal inquiry is governed not by pure reason and objectivity, but primarily through “practical reason” and specific instances. He points out that Posner’s insistence on the irreducibility of differences (specifics or individual cases) is an unrecognized anti-foundationalism. He considers that Posner’s pragmatism is, however, a doubled gesture. Posner is skeptical about objective, universal beliefs, but he substitutes for that a belief in “actual facts”, and this empiricism is essentialist, i.e. he believes that “economics is the language of real motives and actual goals”⁷³

Although he points to the lurking foundationalism in others’ pragmatism, Fish says he is neither a cynic nor a skeptic. It remains to be asked, however, how *can* the performative power of language be harnessed for better societies and better interpretations of our place in the world, those twin goals of law and literature? Or as Fish puts it, can language be disciplined? Owen Fiss thinks so. In “Objectivity and Interpretation”, he suggests that interpretation is neither wholly discretionary, nor wholly mechanical, but guided by “‘disciplining rules’ derived from the specific institutional setting of the interpretive activity”.⁷⁴ One thinks here of standards of the bench, or, in the case of literature, the rule of the game for an MLA paper. Richard Dworkin takes a similar position to Fiss’s, and “he famously used the idea of the ‘chain novel’ as a metaphor for the kind of historically constructed ‘constraint’ which he had in mind. The meaning of a text was thus constrained by its past, and the shared past of the reader”.⁷⁵ But Fish counters, “Unfortunately, rules are texts. They are in need of interpretation and cannot themselves serve as constraints on

⁷¹ S. Fish, “The Law Wishes to Have a Formal Existence”, *The Fate of the Law*, Ann Arbor, U. of Michigan P, 1990; *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too*, New York, Oxford University Press, 1994.

⁷² M. Bérubé, “There is Nothing Inside the Text, or, Why No One’s Heard of Wolfgang Iser”, *Postmodern Sophistry: Stanley Fish and the Critical Enterprise*, ed. G. Olson and L. Worsham, Albany, State University of New York Press, 2001, p. 11-26 at p. 20.

⁷³ S. Fish, “Almost Pragmatism: Richard Posner’s Jurisprudence”, *University of Chicago Law Review*, 57, 1990, p. 1447-75 at p. 1461.

⁷⁴ Cited in S. Fish, “Fish vs. Fiss”, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durham, Duke University Press, 1989, p. 120-40 at p. 120.

⁷⁵ Ward, *Law and Literature*, p. 47.

interpretations”.⁷⁶ Yet, it need not be Fish vs. Fiss; pragmatism points to the middle ground.

The debate over whether hermeneutics or deconstruction offers legitimate strategies of interpretations of law (law *as* literature) has far more real-life consequences than does the same debate if we are writing only of imaginative literature. Yet, *literature as* law has real social relevance too because the imagination shapes our understanding of justice as a “good” and creates our moral compass. Common sense dictates that interpretation involves the interaction of readers as well as material culture (history) that exist outside of texts, deconstructionist notwithstanding. Without getting into the question of “history”, or “plain meaning”, to say nothing of common sense, I maintain that our literary conversations and legal conversations reveal that we act “as if” there can be clarity of meaning, agreement of interpretation. This is “bricolage”⁷⁷ that works; or, if it does not, as with a jerry-rigged machine, it is a question of a practical failure, not a moral lapse that leaves us running for foundational beliefs or in despair over their absence. We confirm what did not work as a community of observers and start over for a variety of reasons and in a variety of ways. I believe that early in his career, when he was more interested in literature than the law, Fish was, in fact, this sort of pragmatist who points us toward “interpretive communities” that circumscribe interpretation and are examples of this “bricolage”. In the late 70s, the new critics and other formalists charged that, if Fish denied meaning was in the text, meaning would be everywhere, hence nowhere. His counter to the accusations was not radical subjectivism. As early as his lecture at the School of Criticism at Irvine in 1979 that became the classic, *Is There a Text in this Class*,⁷⁸ Fish was explaining that anti-foundationalism did not mean a descent into the chaos of individual interpretations. Since all utterances are embedded in specific social contexts, meaning is generated by context, and “interpretive communities” differ, but are never completely idiosyncratic. The alternative to there being no determinate meaning is not “debilitating relativism” but an inevitable practical engagement in situations. Speaking of the new critics, Fish says that they assume a gap between hearing words and deciphering them. “What I have been arguing is that meanings come already calculated, not because of norms embedded in the language but because language is always perceived, from the very first, within a structure of norms. That structure, however, is not abstract and independent but social”.⁷⁹ The social construction of knowledge does not necessarily lead to relativism. At a philosophical level, accepting situational norms destroys the idea of one foundational set believed by all, but that is philosophy, and practically speaking, we don’t live there. “In other words, while relativism is a position one can entertain, it is not a position one can occupy. No one can *be* a relativist, because no one can achieve the distance from his own beliefs and assumptions which would result in their being no more authoritative *for*

⁷⁶ Fish, “Fish vs. Fiss”, p. 121.

⁷⁷ I appropriate the term from C. Levi-Strauss, *The Savage Mind*, Chicago, University of Chicago Press, 1966.

⁷⁸ S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities*, Cambridge: Harvard U. P., 1980.

⁷⁹ Fish, “Is There a Text in This Class”, p. 318.

him than the beliefs and assumptions held by others, or, for that matter, the beliefs, and assumptions he himself used to hold".⁸⁰ His view of interpretive communities appropriately places the emphasis on being *in situ* not *in cogito*.

A social constructivist reading of the rules explains constrained interpretation in a way that illuminates especially well how customary law functions, so it provides a useful approach to literature *as* law when the trials are in the *Chanson de Roland* or the *Roman de Renart*. These works show us characters enacting the "constraints" on their interpretation of the law. Customary law is pragmatic and conventional, and as Havelock pointed out about justice in the epic, it is acted out, not thought out through the logic of non-contradiction. It is not a theorizing about right and wrong, but a situational and flexible ethic. That does not mean it is arbitrary, unstable, or maintained solely by force; its touchstones for meaning and continuity are not reasoning about the law or written texts but the community. In that respect, it is well suited for a pragmatist's reading. For us to understand the way rules and practice worked in the customary medieval community, we could keep in mind Fish's basketball analogy. He uses it to counter Fiss's argument about meaning being constrained by rules, but I believe it actually reveals the pragmatism at work in the *middle space* between the objective rule and subjective interpretation. He asks us to consider a complete naïf, learning several rules without ever having seen a basketball game and then trying to execute "a good shot". He might not take a shot in the last, heated seconds of the game, because it had been defined one way in the rulebook that didn't account for a different context.

Just as rules can be read only in the context of the practice they supposedly order, so are those who have learned to read them constrained by the assumptions and categories of understanding embodied in that same practice. It is these assumptions and categories that have been internalized in the course of training, a process at the end of which the trainee is not only possessed of but possessed by a knowledge of the ropes, by a tacit knowledge that tells him not so much what to do, but already has him doing it as a condition of perception and even of thought.⁸¹

For the Middle Ages, basketball players are hardly appropriate examples, but imagine those hearing stories about Ganelon's rickety defense or Isolt's escape from justice; they may be piecing together what they know of the rules and the realities of the common experiences. Early in the oral history of the action, the warrior ethos might have been taken "straight-on" or have plain meaning. By the twelfth century, other social currents are washing through society, and the consumption or dissemination of the *Chanson de Roland* for instance, is analogous to the reading/hearing of Homer's epics in Plato's time when the civic culture offered different ways of solving judicial conflicts. The text functions as the "bridge" that White referred to between law and literature, creating a space to explore ethical dilemmas and a way for the community to interact with their tacit knowledge; listening to or reading the stories of others and watching the conflict contributes to the sense of how to negotiate and use proxies to resolve social tensions and

⁸⁰ *Ibid.*, p. 319.

⁸¹ Fish, "Fish vs. Fiss", p. 127.

imbalances while responding to new, ambiguous situations. Likewise for the outsider, reading the stories and attending to the dramatic enactments of law mimics the ethical experience of that society and provides glimpses of their tacit dimension, not necessarily their rules. The pragmatic reading of literature as customary law does not mine the imaginative texts for the pre-history of legal procedures; it allows the reader to participate in the created ethic of lived, hence uncertain experience.

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