

Follow the Reader: Literature's Influence on the Law and Legal Actors

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Introduction

The relationship between literature and the law remains uncertain and contentious. What is clear is that law and literature come together in various ways:¹ many literary texts take legal themes and examine legal issues; a number of writers engage in writing both legal and literary texts; several judgments cite works of literature.² This frequent convergence between literature and the law has led many scholars to believe that there is a meaningful relationship between literature and the law – and so the “law and literature movement” was born.

The law and literature movement should be seen in context of the debate about whether law is just a set of rules or part of a broader social context.³ Rather than accepting the rule-bound conception of law, authors in the law and literature movement believe that the law should be seen as having a natural affinity with literature.⁴ Wigmore and Cardozo are largely credited with pioneering the modern law and literature movement.⁵ In 1908 Wigmore re-examined the connection between law and literature by studying and chronicling novels with legal themes.⁶ And in 1925 Cardozo J examined the idea of utilizing literary tools to more effectively examine and create judicial opinions.⁷ However, the movement only really took flight in 1973 with the publication of White’s book *The Legal Imagination*, which sought to teach law students a new way of reading and understanding language through literature.⁸ This book

¹ Richard Posner *Law and Literature* (3rd ed, Harvard University Press, United States of America, 2009) at xi.

² *Ibid.*

³ Jeanne Gakeer "Law and literature" <http://ivr-enc.info/index.php?title=Law_and_Literature>; Anthony Julius "Introduction " in M D A Freeman and A D E Lewis (eds) *Law and Literature* (Oxford University Press, Great Britian 1999).

⁴ John Cole "Thoughts From the Law of And" (1988) 39 Mercer Law Review 907 as cited in James Boyd White "Introduction to Symposium - Law and Literature: ‘No Manifesto’" (1987-1988) 39 Mercer Law Review 739.

⁵ William Dominarski "Law-Literature Criticism: Charting a Desirable Course with *Billy Budd*" (1984) 34 J Leg Ed 702 at 702; Anthony Musante "Black and White: What Law and Literature Can Tell Us About the Disparate Opinions in *Griswold v Connecticut*" (2007) 85 Or L Rev 853 at 856-858.

⁶ Musante, above n 5, at 857.

⁷ *Ibid.* See Benjamin Cardozo "Law and Literature" (1939) 48 Yale LJ 489. Now see *Cardozo Studies in Law and Literature*, which regularly publishes on studies of law and literature.

⁸ James Boyd White *The Legal Imagination* (University of Chicago Press, United States of America, 1985); Musante, above n 5, at 858-860.

acted as a platform for a lot of discussion surrounding law and literature, and since then a number of scholars have written on this topic.⁹

The movement began idealistically, with many authors excited at the idea of connecting the disciplines of law and literature. But this idealism was also met with great resistance, in particular from those favouring the more economic models of law.¹⁰ However, over the decades since the law and literature movement re-emerged, the strong resistance that challenged the movement has lessened, with even the biggest critics warming to some of the ideas behind the movement. Richard Posner is regarded as the greatest antagonist of the law and literature movement, and once denounced the possibility of there being any meaningful connection between law and literature.¹¹ Yet, while he still remains critical of the movement, he has since adopted a far less negative standpoint and even wrote that he hoped to help the movement continue to move forward.¹²

Today the law and literature movement looks at how the disciplines of law and literature can contribute to each other in meaningful ways. Law refers to the legal system as a whole, including the legal professions, the practice of law, legal precedents, legal concepts, and legal documents. Literature refers to all literary texts, including novels, short stories, prose, and poems. However, for the purposes of this paper, literature is restricted to novels. The traditional division of the law and literature movement sees two strands: 'law in literature' and 'law as literature.'¹³ 'Law in literature' focuses on how literature depicts the law and legal situations, looking at what reading literature can do for the law and legal scholars and practitioners.¹⁴ 'Law as literature' studies legal texts using literary concepts and techniques, drawing similarities between literary and legal texts in an effort to better legal writing.¹⁵ However, some authors have found the original strands inadequate and have attempted to

⁹ Ian Ward *Law and Literature: Possibilities and Perspectives* (Cambridge University Press, Cambridge, 1995); Posner, above n 1, at xiii.

¹⁰ Most notably Richard Posner opposed the law and literature movement while having strong links with the law and economics movement.

¹¹ Richard Posner "Law and Literature: A Relation Reargued" (1986) 72 Va L Rev 1351 at 1351, 1355-1359.

¹² Posner, above n 1, at xvi. Posner admits that his previous editions of *Law and Literature* were defensive in nature because of his involvement with the law and economics movement, but writes that the third edition of *Law and Literature* is much less negative towards the movement.

¹³ Gary Minda "Law and Literature at Century's End" (1997) 9(22) *Cardozo Studies in Law and Literature* 245 at 255.

¹⁴ Ward, above n 9, at 3.

¹⁵ *Ibid*, at 3.

create new strands within the movement. One example comes from Baron, who sees the division as one of hermeneutics, narrative, and humanistic.¹⁶ More recent writings, however, tend to find dividing the movement into strands to be largely inadequate because the areas often overlap and new ideas continue to emerge.

Thus there remains a lot of uncertainty in the law and literature movement¹⁷ – uncertainty in the strands; uncertainty in the aims; uncertainty in what has been achieved. Baron describes the uncertainty in the movement as one of the key reasons that the movement has failed to live up to its potential.¹⁸ Somewhat dishearteningly, Minda wrote that as we came to the end of the century we were nowhere at all with the movement.¹⁹ In an effort to clear up some of the uncertainty surrounding the movement, this paper will examine what the discipline of law can learn from the discipline of literature, with the focus on how literature can critique and change the law itself, and how literature can change legal actors.

The law and literature movement is based on the assumption that there is an interdisciplinary connection between the disciplines of law and literature, but this assumption is not often questioned.²⁰ The first chapter of this paper will begin by examining this assumption of interdisciplinarity, and then go on to evaluate the arguments for and against interdisciplinarity in law and literature, as well as looking at the alternative to interdisciplinarity of ‘interdisciplinary borrowing.’ Chapters two through four will examine three common claims of the law and literature movement – chapters two and three examine the idea that reading literature can have a valuable effect on the law itself, and chapter four will explore the idea that literature can have a beneficial effect on the legal actors. Chapter two will specifically discuss the ability of literature to provide a forum for critiquing the law. The chapter will evaluate whether literature provides a valuable and accurate critique of the law, and whether it is desirable to turn to literature to critique the law given the availability of other resources. Chapter three will then look at the claim that literature’s critique of the law can contribute to

¹⁶ Jane Baron "Law, Literature, and the Problems of Interdisciplinarity " (1998-1999) 108 Yale LJ 1059 at 1063-1066; Musante, above n 5, at 857. See also James Elkins "A Letter to 'Law & Literature' Students in Australia" (2004) <<http://myweb.wvnet.edu/~jelkins/elkinsweb/images-pdf/australia-letter.pdf>> at 5, where Elkins agreed with the strands Baron identified.

¹⁷ Posner, above n 1, at 7.

¹⁸ Baron, above n 16, at 1071.

¹⁹ Minda, above n 13, at 256.

²⁰ Stanley Fish *Professional Correctness: Literary Studies and Political Change* (Oxford University Press Incorporated, United States, 1995); Baron, above n 16, at 1078.

changing the law. This questions literature's role in society and whether the characteristics of literature preclude it from contributing to legal change. Finally, chapter four will look at the most controversial claim coming from the law and literature movement, which is the claim that reading literature can have a beneficial effect on the morality and ethics of legal actors. This chapter will explore what exactly that claim entails, and whether reading literature can actually help to develop the moral capabilities of legal actors in a way that can impact on their professional roles.

Although there is much uncertainty surrounding the law and literature movement, it has many determined supporters. The claims of the movement are often strongly disputed, but authors within the movement provide sound arguments for their claims, and often give valuable evidence to support their positions. There are strong arguments for believing that not only can literature provide a critique of the law, but that it could also contribute to a beneficial change in the law as well as the morality and ethics of its legal actors.

I Law and Literature on an Interdisciplinary Level

A The Assumption of Interdisciplinarity in Law and Literature

In recent years there has been an increase in the number of scholars purporting to engage in law and literature as an “interdisciplinary field.”²¹ This idea of interdisciplinarity is the idea that two disciplines can be combined into one activity. Many authors within the law and literature movement simply claim to be doing interdisciplinary work without properly considering the issue of interdisciplinarity in law and literature.²² The authors assume the movement has interdisciplinary status, and only discuss *how* exactly the disciplines of law and literature contribute to each other.²³ However, there remain challenges to the interdisciplinary status of law and literature on the basis that law and literature do not need to merge because as disciplines they are already combined; that law and literature cannot be combined because they are too different; that although the two could be combined, this is not ‘interdisciplinarity’ but something else.

B The Relationship between the Disciplines of Law and Literature

1 The existence of borders between the disciplines of law and literature

The first challenge to the interdisciplinary nature of the law and literature movement is that the discipline of law has nothing to gain from the discipline of literature because the law already encompasses the traits and tools that authors seek to use from literature.²⁴ This challenges the idea of ‘law’ and ‘literature’ as distinct entities that could have something to

²¹ Richard Posner "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100(4) Harv L Rev 761 at 767, 777-778.

²² Baron, above n 16, at 1060-1061, 1076-1078. Baron considers the law and literature movement's inadequate discussion of interdisciplinarity to be one of the great ‘failings’ of the movement.

²³ See, for example, Richard Weisberg "Literature's Twenty-Year Crossing Into the Domain of Law: Continuing Trespass or Right by Adverse Possession?" in M D A Freeman and A D E Lewis (eds) *Law and Literature* (Oxford University Press, Great Britain 1999) at 47-61. Weisberg writes that critics of the movement have accepted literature into the domain of law, and only argue about how literature can have an effect on law. See also Dominarski, above n 5. Dominarski writes that the issue is not whether reading literature should be part of a lawyer's training, but how to best read literature to make us better lawyers.

²⁴ Sarah Krakoff "Does "Law and Literature" Survive *Lawyerland*?" (2001) 101 Colum L Rev 1742. See Baron, above n 16.

contribute to each other. It is important to consider what the disciplines of 'law' and 'literature' entail in order to examine the possibilities for connecting law and literature.²⁵

Baron considers that most writers in the law and literature movement, and most other 'law and' movements, unquestioningly imply rigorous standards and boundaries to disciplines in order to distinguish the disciplines.²⁶ With these clear divisions in mind, it is argued that the tools from within one discipline can be used in another, thereby making them interdisciplinary.²⁷ Law is depicted as analytical, unemotional, and an "empty domain composed mainly of rules"; literature is portrayed as nuanced, emotional, and complex.²⁸ Writers then seek to incorporate the emotional and imaginative side of literature into the dry and technical law and call it interdisciplinarity. However, Baron writes that the boundaries of both law and literature are not that clear, and suggests that the disciplines of law and literature have more shared traits than authors in the movement would have realised.²⁹ Baron doubts the descriptions showing law as just dry and technical rule manipulation, and literature as a rich and textured examination of emotions.³⁰ She writes that the law can be full of emotions, value, and general "human messiness";³¹ literature is not always emotional.³²

Krakoff takes this argument further, arguing that law and literature do not have distinct aesthetics, and therefore we do not need to turn to literature to aid the law.³³ Krakoff argues

²⁵ Baron, above n 16, at 1081.

²⁶ Jane Baron "Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature" in M D A Freeman and A D E Lewis (eds) *Law and Literature* (Oxford University Press, Great Britain 1999) at 23. Baron writes that the attribution of these rigid characteristics to law and literature shows what society wants the disciplines to be, rather than what the disciplines are.

²⁷ Baron, above n 16, at 1076-1077.

²⁸ Ibid, at 1060, 1079; Baron, above n 26, at 21, 42. See, for example, Gary Watt "The Character of Social Connection in Law and Literature: Lessons from *Bleak House*" (2009) *International Journal of Law in Context* 283 at 264. Watt writes that he proceeds on the assumption that the creative portrayal of the characters in a novel is accomplished by using what the law lacks, and that imaginative literature takes a full account of possibility, complexity, and difficulty.

²⁹ Baron, above n 16, at 1080-1084. See also Minda, above n 13, at 249-250. Minda writes that in some ways the understanding of law as objective and literature as subjective causes much difficulty.

³⁰ Robert Weisberg "The Law-Literature Enterprise" (1988) *Yale Journal of Law & the Humanities* at 17-18 as cited in Baron, above n 26, at 43.

³¹ Baron, above n 16, at 1079; Richard Weisberg "Proclaiming Trials as Narratives: Premise and Pretenses" in Professor Peter Brooks and Paul Gerwitz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, United States of America, 1998) at 61, 70-71.

³² Weisberg, above n 30, at 17-18 as cited in Baron, above n 26, at 43-44.

³³ Krakoff, above n 24. Krakoff challenges the need to merge the two disciplines in the context of challenging the claim that the law is inherently literary and could be improved by turning to literature.

that the novel *Lawyerland*³⁴ is an example of blurring the boundaries between law and art, so that it is not clear that law and literature are separate.³⁵ Krakoff appears to suggest that the lawyer characters in the novel constitute ‘law’ because the book captures “the essence of real-life lawyering.”³⁶ She also suggests that although the lawyers in *Lawyerland* are often “unpleasant, unseemly, even disfiguring” in a very anti-poetic way, the lawyers, and therefore the novel itself, are literature because together the lawyers are provocative, vivid, and elegiac.³⁷ From this she argues that the lawyers in *Lawyerland* make *Lawyerland* both literature and law, and in this way the law is part of the fabric of our literature.³⁸ Because law is not a self-contained aesthetic, but is part of literature, it therefore cannot be “gussied up” by literature.³⁹ However, Glen writes that Krakoff’s argument is misconceived because although the lawyers in *Lawyerland*, and *Lawyerland* itself, could arguably act as literature and law in *some* aspects, *Lawyerland* does not encompass the entire category of ‘literature’ or ‘law.’⁴⁰ There may be some overlap between the characteristics of law and literature, but they are not one and the same.

Furthermore, Baron writes that there are meaningful differences and distinctions between disciplines, but that the distinctions can only be seen by contrasting disciplines.⁴¹ Fish agrees that the form and contents of a discipline are not self-generated, but can be seen by looking at the interactions between two disciplines.⁴² This means that what one ‘does’ in a discipline is seen by examining, comparing, and contrasting what other disciplines ‘do.’⁴³ However, what a discipline does, and what a discipline is, will not necessarily always remain the same –

³⁴ Lawrence Joseph *Lawyerland: An Unguarded, Street-Level Look At Law & Lawyers Today* (Farrar, Straus and Giroux, New York, 2004). In this book Joseph reproduces the stories of eight attorneys from New York City. The stories are all quite cynical, profane, and unpleasant.

³⁵ Krakoff, above n 24, at 1743.

³⁶ *Ibid*, at 1743, 1748-1749.

³⁷ *Ibid*, at 1743.

³⁸ *Ibid*. Remnants of this can be seen in the ‘law as literature’ writings of the movement. See also Nina Philadelphoff-Puren and Peter Rush "Fatal (F)laws: Law, Literature and Writing" (2003) 14 *Law and Critique* 191, where the authors argue that literature is part of law’s genre.

³⁹ Krakoff, above n 24, at 1748-1749. Baron also notes that this means that there is no need to turn to authors for edification of the profession.

⁴⁰ Patrick Glen "Franz Kafka, Lawrence Joseph, and the Possibilities of Jurisprudential Literature" (2011) 21 *Southern California Interdisciplinary Law Journal* 47 at 80, 83-92. Glen also finds Krakoff’s argument incomplete because she ignores some vital claims the movement makes.

⁴¹ Baron, above n 16, at 1079, 1082, 1084-1085. Baron’s main goal is not to deny that boundaries exist, but to uncover how, and why, boundaries are defined.

⁴² Fish, above n 20, at 29, 75-76.

⁴³ *Ibid*. Fish stresses that this does not mean that you can only understand what a discipline is by looking outside it; you should also look from inside a discipline to understand what it is and does.

Baron and Fish believe that the categories of ‘law’ and ‘literature’ are not natural and pre-existing, but are socially constructed and can change.⁴⁴ But even though disciplines can change, Fish writes that disciplines are inescapable.⁴⁵ A discipline must be able to present itself as distinct from another enterprise.⁴⁶ And just because parts of disciplines converge on particular jobs it does not mean that they are one in the same.⁴⁷ Certain things will be recognized as appropriate to certain enterprises, and enterprises will present themselves to the outside world as uniquely qualified to perform specific tasks.⁴⁸

Although the disciplines of law and literature may converge on some tasks these disciplines perform, the two should not be treated as one in the same. And although it is difficult to define what exactly ‘law’ and ‘literature’ are, and the boundaries of these disciplines have the ability to change, they are two distinct entities.

2 *Crossing the borders between the disciplines of law and literature*

The interdisciplinarity of law and literature is also challenged on the basis that although law and literature are distinct enterprises, the disciplines cannot contribute to each other in a meaningful way.

Posner writes that law and literature have much in common,⁴⁹ but that there is a misconception about the ability of literature to improve law.⁵⁰ Modern literary theory has expanded, but not enough that it has brought law and literature together in any meaningful way.⁵¹ Duong also argues that the disciplines of law and literature share commonalities –

⁴⁴ Baron, above n 16, at 1082, 1084-1085; Fish, above n 20, at viii-xi.

⁴⁵ See generally Stanley Fish "Being Interdisciplinary Is So Very Hard to Do" (1989) *Profession* 15. See also Ruthann Robson "A Conversation: James R Elkins & Ruthann Robson " (2005) 29 *Legal Studies Forum* 145 at 147. Robson agrees that the potential for law and literature changes over time.

⁴⁶ Fish, above n 20, at 16-17, 19. Fish writes that boundaries between enterprises are not fixed, and that disputes about boundaries are on-going.

⁴⁷ *Ibid.*, at 71-73.

⁴⁸ *Ibid.*, at 19.

⁴⁹ Posner, above n 1, at 1. For example, the emphasis on rhetoric and legal themes in writings.

⁵⁰ Posner, above n 11, at 1351, 1355-1359. Posner particularly doubted the ability of literature to help in providing jurisprudential insights, rhetorical techniques, and insights into social practices, as well as to humanize lawyers. Posner has since published his third edition of *Law and Literature*, which shows a less critical view of the movement.

⁵¹ Posner, above n 1, at 8-9.

namely the use and study of rhetoric.⁵² However, Duong argues that the disciplines are otherwise “divergent and incompatible.”⁵³ Duong writes that the disciplines of law and literature differ in the creative process and the work product.⁵⁴ She considers that literature is created through the sensory process of authors submerging themselves in their subconscious; law requires a more methodical and rational process of creation.⁵⁵ Literature aims to produce work that is “moment-to-moment” and provides a free-flowing experience; law aims to be logical and rational.⁵⁶ Duong considers that because these aspects are so crucial to the makeup of the disciplines, it is difficult to reconcile the disciplines of law and literature.⁵⁷

Fish agrees with Posner that law and literature do not contribute to each other meaningfully, although he disagrees with Posner’s reasoning.⁵⁸ Fish considers the evidence of literature’s effect on law is thus far inconclusive, although there is evidence to indicate that literary theory has altered how some lawyers think about interpreting statutes and the Constitution.⁵⁹ Accordingly, in 1988 Fish considered literary and legal interpretation involved distinct skills that were not easily convertible.⁶⁰ However, Fish realised this might not always be the case. Although Posner took the distinctions and differences between the disciplines as natural and universal, they are actually based on cultural assumptions and disciplinary constraints that tell us how to do things such as read, write, evaluate, and interpret.⁶¹ If literature does not mean anything in legal discourse it is because the assumptions and constraints of legal discourse or literature do not allow it to.⁶² And these assumptions and constraints are able to change.⁶³

⁵² The use and study of rhetoric in law and literature are not discussed in this paper.

⁵³ Wendy Nicole Duong "Law is Law and Art is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Process " (2005) 15(1) Southern California Interdisciplinary Law Journal 1.

⁵⁴ *Ibid*, at 2, 19-30.

⁵⁵ Krakoff, above n 24, at 19-24.

⁵⁶ *Ibid*, at 24-28.

⁵⁷ Duong, above n 53, at 2.

⁵⁸ Stanley Fish "Don't Know Much About the Middle Ages: Posner on Law and Literature" (1988) 97(5) *The Yale Law Journal* 777 at 777-781. Fish considers that one of Posner’s main distinctions between literature and law was that reading law involved searching for authorial intent, but that reading literature did not. Fish disagrees, and considers that in *all* cases of reading (assumed) authorial intention is part of the context with which the reader reads and shapes the meaning of the text.

⁵⁹ *Ibid*, at 790.

⁶⁰ *Ibid*, at 777.

⁶¹ Gwen Mathewson "Challenging the Court: Charles Chesnut's *Marrow of Tradition*" in Michael Meyer (ed) *Literature and Law* (Rodopi, New York 2004) at 220.

⁶² *Ibid*.

⁶³ Fish, above n 58, at 781-786, 790. For Fish’s theory on interpretation and meaning in text, see generally Stanley Fish *Is There a Text in This Class?: The Authority of Interpretive Communities* (Harvard University Press, 1980). In Sanford Levinson "Law as Literature" (1981-1982) 60 *Tex L*

However, Fish writes that changing these disciplines and how they relate to each other would be slow and does not occur just because actors of a discipline will it to be so, but change *is* possible.⁶⁴ Fish even wrote that the apparent change in interpretive labours by the lawyers interpreting statutes and the Constitution could change the interpreters themselves.⁶⁵ What is considered ‘literary’ today is different to what was considered ‘literary’ forty years ago.⁶⁶

Mathewson agrees that the boundaries of law and literature are determined by cultural habits and disciplinary constraints rather than being inherent,⁶⁷ but she does not believe that the two disciplines have nothing to contribute to each other.⁶⁸ Mathewson argues that the boundaries between law and literature are not rigid and impermeable, and that literature does have the power to contribute meaningfully to law.⁶⁹ Mathewson argues that law is just another form of story, and reason, which the law prides itself on, involves the same imaginative and cognitive process to come into fruition as the more imaginative literature.⁷⁰ In this sense Mathewson challenges Duong’s descriptions of ‘law’ and ‘literature,’ and sees law and literature as having fundamental similarities.

Despite the fact that some critics argue that the disciplines of law and literature can never contribute to each other in a meaningful way, it is possible that law and literature could augment each other – and arguably the two disciplines have already done so.⁷¹ However, Fish believes that when two disciplines converge on particular jobs it does not mean they are becoming one because certain jobs will still be identifiable as appropriate for certain disciplines.⁷² Fish argues that while disciplinary borders can be crossed and disciplines can

Rev 373 at 383. Levinson agrees with Fish’s approach to meaning, saying that meaning is created rather than discovered.

⁶⁴ Fish, above n 20, at 38. Fish, at 44-45, considers that any changes are usually restricted to the discipline in which changes occur rather than in another discipline.

⁶⁵ Fish, above n 58, at 790.

⁶⁶ Fish, above n 20, at 25-26.

⁶⁷ Fish, above n 58, at 297; *Literature and Law* (Rodopi, New York 2004) at 220.

⁶⁸ Mathewson, above n 61, at 219-240. This should mainly be seen in response to Posner, above n 11, when he wrote that the disciplines of law and literature have very little to contribute to each other.

⁶⁹ Mathewson, above n 61, at 220. In particular literature has the power to elucidate details and injustices of historical moments. This will be discussed in chapter two.

⁷⁰ *Ibid*, at 221-222. See also Steven Winter *A Clearing in the Forest: Law, Life and Mind* (University of Otago Press, Chicago 2001) at 106.

⁷¹ This will be canvassed in later chapters.

⁷² Fish, above n 20, at 19, 71-73.

contribute to one another, this is not interdisciplinarity – Fish calls this ‘interdisciplinary borrowing.’⁷³

3 *Interdisciplinary borrowing*

Interdisciplinarity attempts to blur or remove the boundaries between academic subjects so that they combine into one subject.⁷⁴ Fish considers that this ambitious task is conceptually impossible because attempting to free a discipline from its boundaries only creates new boundaries and new disciplines.⁷⁵ For example, attempting to remove the machinery of law does not reform law, but instead abandons it and puts something new in its place.⁷⁶ This is the same with literature.⁷⁷

But Fish is not against all interdisciplinary work, just against interdisciplinarity.⁷⁸ Fish proposes that one can reach across disciplines for *specific* tasks, in which case this does not alter the basic operations of the discipline, but the tools and materials that you use from one discipline will be configured through the lens of the task in the new discipline.⁷⁹ This is not interdisciplinarity because the disciplines remain distinct – this is ‘interdisciplinary borrowing’ and involves engaging in disciplinary tasks that require information and techniques on loan from other disciplines.⁸⁰ This is not as ambitious as interdisciplinarity because it does not attempt to blur the boundaries between the disciplines.

While the disciplines of law and literature may have some overlap, they are not to be treated as part of one discipline. Instead the disciplines of law and literature may be able to contribute to each other in a meaningful way but still remain separate disciplines. While the

⁷³ Fish, above n 45.

⁷⁴ Fish, above n 20, at viii.

⁷⁵ *Ibid.*, at 79-83, 237.

⁷⁶ *Ibid.*, at 71-72.

⁷⁷ *Ibid.*, at 41-42.

⁷⁸ *Ibid.*, at 135.

⁷⁹ *Ibid.*, at vii-viii. See also Fish, above n 45, at 19. Fish writes that this is not a departure from disciplinary focus in the way that interdisciplinarity hopes for, but a sharpening of it. He agrees that some writers have crossed boundaries without argument, such as literary writers who are granted entrance to the wider realms of social and political life, but that when they cross the boundaries they are writing for a different audience rather than for literature.

⁸⁰ Fish, above n 45, at 21; Fish, above n 20, at 95. Alternatively Fish writes that they could be working with one discipline as it expands into territories that previously belonged to another discipline, or they could be working in a new discipline. For the purposes of the dissertation, I will argue that the law and literature movement aims to engage in ‘interdisciplinary borrowing.’

law and literature movement may not be engaging in interdisciplinarity in the sense that they are merging the disciplines of law and literature together, law and literature may be able to engage in interdisciplinary borrowing. This would mean that the discipline of literature could borrow materials and tools from the discipline of law in order to engage in particular tasks, and vice versa. The following chapters will address literature's attempt to borrow materials and tools from law in order to engage in the task of critiquing the law, reforming the law, and affecting the ethics and morality of the law through legal actors.

II Literature as a Critique of the Law

One significant claim of the law and literature movement is that literature can act as a critique of the law – a “critique” meaning a detailed and careful analysis and assessment of the law.⁸¹ However, some authors dispute literature’s ability to offer a valuable critique of the law, arguing that literature often misrepresents the law and that other resources offer more appropriate critiques. Authors in the law and literature movement find this argument to be misconceived, instead arguing that literature offers a valuable depiction of the law from various perspectives and provides a different aspect to the critique that cannot be gained from other resources.

A The Value and Accuracy of Literature’s Depiction of the Law

1 Literature offers an inaccurate depiction of the law

Some authors assert that literature inaccurately depicts the law. This is consistent with the idea that when literature engages in interdisciplinary borrowing with law it borrows tools and materials from law for its own literary projects, rather than for legal projects. This leads to literature using law only for its own ends; law only playing a minor role in literature; authors simply misrepresenting the law. On this basis, authors argue that literature inaccurately portrays the law, and that any assessment of this inaccurate depiction does not offer a valuable critique of the reality of law.

Baron writes that often one discipline will hijack or abuse another other discipline for its own ends.⁸² Accordingly, Julius writes that literature is not used for its accurate depiction of law, but is instead mined for its representations of legal processes and lawyers.⁸³ Posner writes that ideas and scenarios literature borrows from law do not retain their legal character in literature – literature focuses more on engaging with the audience through drama, comedy,

⁸¹ This definition is based on the definition of “critique” in Elliot Cohen, Michael Davis and Frederick Elliston (eds) *Ethics and the Legal Profession* (2nd ed, Prometheus Books, United States of America, 2009) at 105; “Critique” (2012) <<http://oxforddictionaries.com/definition/english/critique?q=critique>>; the general use of the word “critique” in the law and literature writings.

⁸² Baron, above n 26, at 31-33. For example, Baron writes that when attempting to merge law and history, law professors scavenge history to find arguments supporting their vision of the social order.

⁸³ *Law and Literature* (Oxford University Press, Great Britain 1999) at xvi.

and conflict.⁸⁴ For example, Wertheim writes that Dickens only took interest in legal technicalities when he could point to a particularly curious rule and use it for dramatic effect.⁸⁵ Additionally, Posner writes that we very rarely learn about the day-to-day operations of the legal system from literature because literature focusses on law as a metaphor, rather than an object of interest.⁸⁶ Posner concedes that one can learn a great deal of jurisprudence from literature, but he considers this the extent to which people can learn about the law from literature, and even this is limited.⁸⁷

Moreover, Posner writes that while many novels take law for their theme, the focus is often on social issues with law only operating in the background.⁸⁸ Posner gives the example of *Pudd'nhead Wilson*,⁸⁹ which appears to focus on law but ultimately uses law only as a means of talking about other social concerns.⁹⁰ During this novel a black maid gives birth to a predominantly white child and switches him with her employer's child in the hopes that her child would have a better life. When Wilson later defends a murder accused he discovers the switched children, now fully grown men, and that one of them is the murderer – he exposes the situation.⁹¹ West considers that this is a criticism of legalism because Wilson goes further than necessary to save his clients by exposing the switch.⁹² However, Posner considers the story is about the nature versus nurture debate with law only operating in the background.⁹³

⁸⁴ Posner, above n 1, at 33-34.

⁸⁵ Larry Wertheim "Law, Literature and Morality in the Novels of Charles Dickens" (1994) 20 William Mitchell Law Review 111 at 116. Wertheim suggests this may be attributed to the "furious rate at which Dickens produced his voluminous novels."

⁸⁶ Posner, above n 1, at 21.

⁸⁷ Ibid, at 22, 124. Posner, at 124-135, considers that literature is able to demonstrate the various antinomies in law that give structure to jurisprudence, such as positive versus natural law and judge versus jury. Posner gives the example of Sophocles' play *Antigone*, which is set in Thebes during the rule of Creon. Creon orders one of two men who challenged him not be buried honourably, which was considered a "hideous punishment" in Ancient Greek Society, but his sister defies Creon. She, Antigone, asserts the decree of divine law and the inviolability of Creon's law at trial but is put to death by Creon. Creon later suffers for failing to obey the Gods of the underworld in having a proper burial. This is said to show Antigone setting up natural law in opposition to Creon's positive law, and show that the positive law is not a decree from a higher power.

⁸⁸ Ibid, at 51.

⁸⁹ Mark Twain *Pudd'nhead Wilson* (Dover Publications, United States of America, 1999).

⁹⁰ Posner, above n 1, at 37.

⁹¹ Ibid, at 38.

⁹² Ibid, at 39. This is Posner's interpretation of Robin West *Narrative, Authority, and Law* (University of Michigan Press, United States of America, 1994), chapter 3. Posner, at 39-40, disagrees that Wilson went further than necessary in exposing the switch because it was necessary to show that his client was not guilty.

⁹³ Posner, above n 1, at 39-40.

Posner also considers Kafka's *The Trial*⁹⁴ not to have law at the heart of the work.⁹⁵ *The Trial* tells the story of the main protagonist, K, as he is arrested, prosecuted, and finally executed by a remote authority without being informed of the nature of his crime. Posner considers that the main point of *The Trial* is not how awful it is to be arrested, charged with an unspecified offense by a secret court, and then summarily executed.⁹⁶ While *The Trial* has some legal interest, metaphysical and psychological themes are Kafka's focus⁹⁷ – Posner believes the main focus is on K's trying to find meaning in the universe, which is just symbolized by the court.⁹⁸ Posner considers *The Trial* and *Pudd'nhead Wilson* to be “legal teases” because they only use legal themes as bait.⁹⁹ Posner suggests that novels today demonstrate even more so that literature uses law for its own ends and relegates law to the background.¹⁰⁰ Grisham's *The Firm*¹⁰¹ involves a young lawyer who works for a prestigious firm that is ultimately quite sinister. Posner considers this novel also does not illuminate the questions it glances at – whether there are too many lawyers, whether lawyers are paid too much, and the exploitation of young lawyers.¹⁰² The novel is more of an “engaging potboiler” of “stick-figure good guys” and “bad guys” keeping up with the cinematically fast pace.¹⁰³

Other authors simply argue that authors of literature do not portray the law accurately to critique it, using the main example of *Bleak House*¹⁰⁴ to illustrate this. The story of *Bleak House* is framed by the “indeterminable equity case” in the Court of Chancery of *Jarndyce v Jarndyce*,¹⁰⁵ and shows the devastating effects of this estate-related lawsuit on the litigants.¹⁰⁶ John Jarndyce, the would-be hero, says that “the legatees under the will are reduced to such a miserable condition that they would be sufficiently punished, [as] if they had committed an enormous crime in having money left them.”¹⁰⁷ The best example of the destruction the lawsuit causes is the steady decline of Richard Carstone, a once happy young man who is

⁹⁴ Franz Kafka *The Trial* (United Holdings Group, United States of America, 1937).

⁹⁵ Posner, above n 1, at 173.

⁹⁶ *Ibid.*, at 179.

⁹⁷ *Ibid.*, at 179-180.

⁹⁸ *Ibid.*, at 181.

⁹⁹ *Ibid.*, at 40.

¹⁰⁰ *Ibid.*, at 55-60.

¹⁰¹ John Grisham *The Firm* (Random House, United States of America, 2010).

¹⁰² Posner, above n 1, at 56.

¹⁰³ *Ibid.*, at 56.

¹⁰⁴ Charles Dickens *Bleak House* (Wordsworth Editions Limited, Hertfordshire, 1993).

¹⁰⁵ Posner, above n 1, at 187.

¹⁰⁶ Wertheim, above n 85, at 125-126.

¹⁰⁷ Dickens, above n 104.

consumed by the lawsuit and the promise of money.¹⁰⁸ The novel finishes when it seems the lawsuit will finally be resolved with the finding of a new will, but instead the case has been entirely consumed by legal fees and other costs.¹⁰⁹ Although there is exaggeration and fantasy in *Bleak House*, the novel was intended as a serious critique of a particular institution.¹¹⁰ However, Posner believes this criticism was misplaced because Chancery procedure had been reformed before *Bleak House* was written and published.¹¹¹ Fyfe considers that despite Dickens' extensive background in the law that his criticisms are "too hard" on the Court of Chancery,¹¹² and Wertheim writes that Dickens' dramatic flair might have resulted in him only taking notice of processes and scenarios that perpetuated drama, to his exclusion of technical rules of the law.¹¹³

Sharpe writes that trying to read the law as a critique can actually hurt the law because it can lead to a misunderstanding of the law.¹¹⁴ Sharpe considers that when literature deals with law it confirms its own superiority by at least partially distorting law's premises, operations, and consequences.¹¹⁵ One example of literature representing itself as superior is seen in literature staking claim to virtual realities.¹¹⁶ Sharpe gives the example of *The Island of Dr Moreau*.¹¹⁷ Set on an island, this dystopian fable sees a scientist creating and enforcing his own 'laws' in an "Apollonian frenzy" that literature tends to associate with the law – this paints an unfair picture of law.¹¹⁸ Another example is the representation of literature as flexible and the law as overly rigid.¹¹⁹

¹⁰⁸ Wertheim, above n 85, at 128.

¹⁰⁹ Ibid, at 132; Posner, above n 1, at 187.

¹¹⁰ Posner, above n 1, at 188. See generally Kieran Dolin "Law, Literature and Symbolic Revolution: *Bleak House*" (2007) 12(1) Australian Journal of Victorian Studies 10 at 115-119. Dolin outlines how *Bleak House* engages with and critiques lawyers and their attitudes to the legal system.

¹¹¹ Posner, above n 1, at 188; William Holdsworth *Charles Dickens As a Legal Historian* (Lawbook Exchange, New Jersey, 2010) at 113.

¹¹² Thomas Fyfe *Charles Dickens And The Law* (Lawbook Exchange Limited, New Jersey, 1910) at 28.

¹¹³ Holdsworth, above n 111 as cited in Wertheim, above n 85, at 115.

¹¹⁴ Tony Sharpe "(Per)versions of Law in Literature" in M D A Freeman and A D E Lewis (eds) *Law and Literature* (Oxford University Press, Great Britain, 1999).

¹¹⁵ Ibid, at 91.

¹¹⁶ Ibid, at 105.

¹¹⁷ Herbert Wells *The Island of Dr Moreau* (Garden City Publishing Company Incorporated, New York, 1927).

¹¹⁸ Ibid, at 117 as cited in Sharpe, above n 114, at 105-106.

¹¹⁹ Sharpe, above n 114, at 115.

Literature can also lead to misconceptions of the lawyer's role. For example, Weisberg and Asimow examined the question of what a lawyer should do if a client confesses to a crime – this was examined in the context of legal ethics, popular culture, and literature.¹²⁰ While the rules of legal ethics provided for discretion as to what a lawyer should do, popular culture advocated for lawyers betraying the client in order to protect the public.¹²¹ Literature tended to distinguish “decent human beings” from effective lawyers, showing strongly adversarial lawyers as distorting the truth and less adversarial lawyers as losing their cases.¹²² Weisberg and Asimow suggest that these sources show what people believe, but also inform readers' beliefs of how lawyers and legal institutions function because for some people pop culture and literature are their only source of information on this topic.¹²³

2 *Literature offers different perspectives of the law*

Glen argues that it is not that works of literature are *inaccurate* portrayals of the law, rather that they show different perspectives of the law.¹²⁴ Glen contends that this different perspective is often that of the outsider, and that people like Posner have difficulty accepting this because they do not look at the law from the point-of-view of an outsider.¹²⁵ He further argues that these different perspectives of law should be viewed together to get a complete picture of the law.¹²⁶

Glen responds to Posner's claim that *The Trial* does not have law at its centre, and Posner's suggestion that novels like *Lawyerland*¹²⁷ provide a more accurate depiction of the law.¹²⁸ *Lawyerland* is largely about the law from the perspective of lawyers. The story follows a “vulgar, fast-talking criminal defense attorney” recounting his defence of a burglar whose

¹²⁰ Michael Asimow and Richard Wesiberg "When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature" (2008) 18 Southern California Interdisciplinary Law Journal 229. It should be noted that Weisberg is actually a supporter of the law and literature movement.

¹²¹ Ibid, at 248. One example of this was Michael Connelly *The Lincoln Lawyer* (Little, Brown & Co, United States of America, 2005).

¹²² Asimow and Wesiberg, above n 120, at 255-257.

¹²³ Ibid, at 251-252.

¹²⁴ Glen, above n 40, at 47-94.

¹²⁵ Ibid, at 47-94. Although in Posner, above n 11, at 1356-1357, Posner does write that depictions of law in literature may provide an insight into how law was perceived by non-lawyers.

¹²⁶ Glen, above n 40.

¹²⁷ Joseph, above n 34.

¹²⁸ Glen, above n 40.

‘victim’ was a federal prosecutor who beat him severely and then used the legal system to destroy him.¹²⁹ *Lawyerland* is described being “intimately connected with the practice and experience of law in the late twentieth and early twenty-first century.”¹³⁰ In comparison, in *The Trial* K initially only has a brief interaction with the legal system and then several bizarre dealings with the law throughout his life – K is left thinking of the failings of untried procedures, the unfollowed possibilities, and the inability to penetrate the legal system.¹³¹ From this Posner argues that *The Trial* only uses the legal system as a frame of reference through which more personal themes are explored.¹³² However, Kennedy J of the United States Supreme Court states that *The Trial* is “actually closer to reality than fantasy as far as the client’s perception of the system...[i]t’s very important that lawyers read it and understand this.”¹³³ Glen writes that Posner fails to recognise that his view of the legal system is just *one view* – that of inside the system.¹³⁴ *The Trial* views the law from the point-of-view of the subject outside of the courtroom, desperate to understand, and operate within, the legal system.¹³⁵ The law is seen as subjective and absent, and this is at the heart of Kafka’s jurisprudence.¹³⁶ In contrast, *Lawyerland* gives a backstage view of the law. Glen argues that the interpretations of law in *The Trial* and *Lawyerland* are complimentary, rather than contradictory.¹³⁷ The two books provide a unitary, but multifaceted, interpretation of the law.¹³⁸

Additionally, authors dispute the claims of inaccuracy levelled at *Bleak House*. In 1852 a Commission appointed to enquire into the Court of Chancery concluded that there were inherent, but remediable, causes of delay and costs in court procedures.¹³⁹ Following this report there were a series of Chancery Reform Acts. However, although reforms had taken place so that the law was not exactly as *Bleak House* described, Dolin writes that injustices and abuses continued after the ‘reform’ of the Chancery.¹⁴⁰ Welch agrees that when *Bleak*

¹²⁹ Ibid, at 65-66.

¹³⁰ Ibid, at 47-48.

¹³¹ Ibid, at 57.

¹³² Ibid, at 48-49.

¹³³ Ibid, at 49.

¹³⁴ Ibid, at 50.

¹³⁵ Ibid, at 50-51, 53

¹³⁶ Ibid, at 57.

¹³⁷ Ibid, at 51, 75.

¹³⁸ Ibid, at 52, 75.

¹³⁹ Dolin, above n 110, at 15. See "First Report of the Chancery Commission (1852)" in AH Machester (ed) *Sources of English History* (Routledge, London, 1992).

¹⁴⁰ Dolin, above n 110, at 15.

House was published the Chancery was not yet fully reformed and was still susceptible to attack from reformists.¹⁴¹ Additionally, *Bleak House* was set around 1827, depicting abuses from around that time, which was said to be the worst era of injustices for the Court.¹⁴² Furthermore, Welch writes that the *Jarndyce* lawsuit was not out of the realm of probabilities, and had a “real-life counterpart” in a case where the client was continuing to suffer because of the inability to resolve litigation.¹⁴³ Little notes that Dickens’ depictions, as satirical and exaggerated though they are, may have been based on his long experience with law and lawyers.¹⁴⁴

The Jungle provides an example of an accurate depiction of the law from the outsider’s perspective that could act as a ‘critique’ of the law.¹⁴⁵ *The Jungle* follows the life of Jurgis and his family as they move to America in the hopes of making money. The family moves to the Packingtown district, known for its meatpacking industry, and initially they have high expectations for their jobs and lives. The family soon finds that Packingtown is dangerous and deceitful, and that they cannot earn the money or lead the life they had hoped for. The meatpacking plants have unsavoury and unsafe working conditions, and the meat itself is unsanitary. These conditions lead to death, deception, and the family falling apart. Jurgis leaves the area, but after being sent to jail twice and being in and out of jobs, he returns to the family he has long since lost touch with, only to find them in a miserable state. The novel ends with Jurgis full of hope that socialism will take over Chicago and help workers.

Much like *The Trial*, *The Jungle* is not obviously concerned with the law, with only a few scenes directly engaging with the legal system. One such scene shows Jurgis on trial for fighting a man.¹⁴⁶ Jurgis attempts to explain his situation to the judge but the judge does not understand or care, saying that if the man he assaulted made love to his wife then she should have complained or left work; the judge ignores Jurgis’ attempts to explain that this was not possible because of money.¹⁴⁷ Finally the judge claims that he has heard this “often enough”

¹⁴¹ Brenda Jean Welch "Charles Dicken's *Bleak House*: Benthamite Jurisprudence and the Law, or What the Law Is and What the Law Ought to Be " (Doctor of Philosophy Baylor University 2008) at 12.

¹⁴² Holdsworth, above n 111, at 79.

¹⁴³ Welch, above n 141, at 3.

¹⁴⁴ Gavin Little "Literature and Legal History: Analysing Methodology " (2006) 3(2) Entertainment and Sports Law Journal 1 at 3.

¹⁴⁵ Upton Sinclair *The Jungle* (University of Illinois Press, Urbana and Chicago 1988).

¹⁴⁶ *Ibid*, at Chapter 18.

¹⁴⁷ *Ibid*, at 162.

and with a wave he sentences Jurgis to thirty days and costs, again not listening to his protests and concerns for his family.¹⁴⁸ But similar to *The Trial*, *The Jungle* is about the absence of law, or a proper law, regulating workers' conditions and the meatpacking industry. Sinclair presents some horrendous images that illustrate the lack of regulation surrounding the meatpacking industry. The first area we see this in is in the lack of regulation concerning health and safety of workers. For example, Dede Antanas is employed in the packinghouse as a "squeedgie man" who mops floors all day.¹⁴⁹ But there is no heating where he works and Antanas grows very sick – his "cough grew worse every day."¹⁵⁰ And chemicals ate through his boots, causing sores on his feet that would never heal.¹⁵¹ One day Antanas fell to pieces, was taken home, and "could never get up again."¹⁵² The second area that cried out for regulation was the dealings with meat – again Sinclair presents images to illustrate the lack of regulation in this area. He writes that the plants "sell diseased meat and label cans as 'deviled ham' or 'potted ham' although the contents are a mixture of leftover bits and entrails from any number of slaughtered animals," that "whenever meat was so spoiled that it could not be used for anything else, [the solution was] either to can it or else to chop it up into sausage" and that "[t]here would be meat stored in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about on it."¹⁵³

Like *The Trial*, *The Jungle* provides the perspective of an outsider to the law – the non-lawyer who is regulated by the 'laws' that they do not quite understand. This is especially evident in *The Jungle* because Sinclair presents the reader with foreign characters who are uncertain of American ways and are initially thwarted by their lack of understanding. For example, when they are moving to America they are 'helped' by an agent who gets them into a trap with some officials, which costs them "a good deal of their precious money."¹⁵⁴ Another agent takes advantage of their naivety and tricks them into buying a derelict house – "[t]he flaws in the house did not chill the family's ardour as much as might have been expected because of the volubility of the agent."¹⁵⁵

¹⁴⁸ Ibid, at 163.

¹⁴⁹ Ibid, at 60.

¹⁵⁰ Ibid, at 73.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid, at 92-96, 130-132.

¹⁵⁴ Ibid, at 24.

¹⁵⁵ Sinclair, above n 145, at 48.

Barrett writes that with although at some parts the narrative is implausible and the organization is poor, *The Jungle* is quite accurate.¹⁵⁶ Sinclair moved to Chicago with the intention of writing about the labour movement, and lived among the labourers in the area for seven weeks, taking interviews with them and people in the surrounding area.¹⁵⁷

While literature may not always provide a technically correct representation of the law, what literature may be said to provide is an accurate portrayal of law from one of many different perspectives, such as that of the outsider. This could allow literature to critique the law as depicted in the novels and in reality. The question is then whether this literary critique of the law is necessary when other sources serve a similar purpose.

B The Value of Literature's Critique of the Law

1 *Availability of more appropriate resources*

Posner argues that there is no need to turn to literature to critique the law because more appropriate resources are available – “[i]f I want to know about fee entails I do not go to *Felix Holt*.”¹⁵⁸ He writes that “[a]lthough the writers we value have often put law into their writings, it does not follow that those writings are about law in any interesting way that a lawyer might be able to elucidate.”¹⁵⁹ Duong agrees that just because fiction writers use legal situations in their novels, it does not mean that one should turn to novels to learn about the law.¹⁶⁰ Dominarski writes that we can get principles, conflicts, and background from legal opinions and cases.¹⁶¹ He believes that we should not turn to fiction for something that political, sociological, or historical studies can give us.¹⁶² Little writes that literature is unlikely to offer “valuable insights” into the history of law, and unlikely to tell much about the history of “lawyer’s law.”¹⁶³

¹⁵⁶ Ibid, at “Introduction.”

¹⁵⁷ Ibid, at xi.

¹⁵⁸ Posner, above n 11, at 1356.

¹⁵⁹ Ibid, at 1356.

¹⁶⁰ Duong, above n 53, at 31.

¹⁶¹ Dominarski, above n 5, at 703.

¹⁶² Ibid.

¹⁶³ Little, above n 144, at 5.

2 Literature's added value to critiques of the law

However, it is argued that literature can offer a different aspect to the critique of law than other resources can. Little writes that literature helps to create a more contextual interpretation of laws and legal systems, rather than one-dimensional and historical 'truths.'¹⁶⁴ Dominarski agrees that novelists can provide a deeper understanding of characters and conflicts that should allow readers to better understand the conflicting social and legal principles at work.¹⁶⁵ He writes that we can turn to literature to understand and experience human drama and see the law from a participatory perspective.¹⁶⁶ *Bleak House* is then important not for the view of the legal system but for the way that the individual characters respond to each other and the legal system.¹⁶⁷

Mathewson argues that literature can elucidate the missteps and injustices in law and offer persuasive alternative renderings of a just society.¹⁶⁸ Dunlop agrees that the value of literature lies in its ability to show the reader an alternative reality to a situation, which allows the reader to compare this alternative reality with their own reality.¹⁶⁹ This presenting of new possibilities to the reader of literature allows the reader to challenge their assumptions of the law, which can change the reader's way of thinking about situations and may influence their actions and decisions.¹⁷⁰ Mathewson uses the novel *Marrow of Tradition*¹⁷¹ as an example of how literature can intervene in cultural conversations and change those conversations.¹⁷² Mathewson writes that Chesnut's novel was devoted to challenging the "racist logic" that underlay the 1898 race riots in Wilmington and the 1896 United States Supreme Court case

¹⁶⁴ Ibid, at 5.

¹⁶⁵ Dominarski, above n 5, 703, 707-712. Dominarski's main objection is to turning to literature to assess the legality of a character's actions. He argues that we should only look at literature for characters' interactions with each other and with society. He gives an example of what he is writing against as the many articles that attempt to determine the guilt of Billy in *Billy Budd*. One example of this is Richard Weisberg "Accepting the Inside Narrator's Challenge: *Billy Budd* and the "Legalistic" Reader" (1989) 1 *Cardozo Studies in Law and Literature* 27. Weisberg provides "legalistic readings" of *Billy Budd* and challenges Vere's decision to hang Billy on the grounds that it violating procedure.

¹⁶⁶ Dominarski, above n 5, at 703.

¹⁶⁷ Ibid.

¹⁶⁸ Mathewson, above n 61, at 219-244.

¹⁶⁹ C R B Dunlop "Literature in Law Schools" (1991) 3(1) *Cardozo Studies in Law and Literature* 63 at 97.

¹⁷⁰ Ibid, at 70. This will be discussed in more detail in chapter four.

¹⁷¹ Charles Chesnut *The Marrow of Tradition* (The Riverside Press, Cambridge, 1901).

¹⁷² Mathewson, above n 61, at 219-244.

of *Plessy v Ferguson*.¹⁷³ In *Plessy v Ferguson* the majority of the Supreme Court upheld the constitutionality of laws that required racial segregation of railway cars for “the public good.”¹⁷⁴ In his novel Chesnutt challenges the logic of the law underlying such segregation by detailing the racial inequality that resulted in violence, extreme indignities, suffering, and fear.¹⁷⁵ He articulates and dramatizes several strands of anti-black rhetoric through three characters with obvious shortcomings, while the heroes of the novel show through their views and actions that nature did not determine the racial hierarchy.¹⁷⁶ Chesnutt directly challenges the reasoning in *Plessy v Ferguson* by using similar facts to the case – there is a scene where a white man may smoke in a black man’s train car but not the other way around.¹⁷⁷ Chesnutt puts arguments persuasively that failed before the court, and illuminates fallacies in the court’s arguments, finally offering an alternative vision of progression towards a multiracial community.¹⁷⁸ Additionally, reading literature could lead to readers turning to other resources to follow up on the issues that novels elucidate, thereby furthering the reader’s understanding of the situation.

Furthermore, literature allows for a critique from a larger portion of society than would otherwise contribute to, or read, other resources. In fact, Ayres argues that literature can give a more real voice to criticisms of members of society who are otherwise silent.¹⁷⁹ Judge Ronald White recognised the importance of literature critiquing the law when he dismissed claims against John Grisham and another that alleged that they conspired to commit libel through the publication of their books about the wrongful convictions of two men.¹⁸⁰ In dismissing the allegations, the judge wrote that it was important for society to be able to analyse and criticize the judicial system so that past mistakes do not become future ones, and continued to say that these wrongful convictions “must be discussed openly and with great vigor.”

¹⁷³ *Plessy v Ferguson* (1896) 163 US 537 at 539.

¹⁷⁴ Mathewson, above n 61.

¹⁷⁵ *Ibid*, at 222-224.

¹⁷⁶ *Ibid*, at 227-231.

¹⁷⁷ *Ibid*, at 231-236.

¹⁷⁸ *Ibid*.

¹⁷⁹ Susan Ayres "The Silent Voices of the Law" in Michael Meyer (ed) *Literature and Law* (Rodopi, New York, 2004).

¹⁸⁰ Sean Murphy "Judge Dismisses Libel Suit Against John Grisham " *Entertainment The Huffington Post* (online ed, United States of America, 26 August 2008).

The Jungle provides an example of how literature can offer a different aspect to the critique of law. As Little suggests, *The Jungle* provides context that informs the understanding of the laws operating, or not operating, in the meatpacking industry in the 1900s. And as Dominarski writes, *The Jungle* provides insight into how the people who operated within the legal system at that time responded to the lack of regulation of their employment and food hygiene.

Along the same lines as Dunlop and Mathewson's arguments, *The Jungle* produces a disconcerting view of the law, using images to expose the injustices and seedy on-goings in the meat industry, and shocking readers with graphic images so that they feel for the people in the characters' situation. The first graphic image is of squealing pigs being hoisted into the air "dangling by a foot in a kicking frenzy" and wailing with agony before "one by one with a swift stroke [the men] slit their throats."¹⁸¹ And the imagery only gets worse from there, with Sinclair writing of spoiled meats, and rats climbing over food that is later sold.¹⁸²

Additionally, *The Jungle* offers an alternative reality to the situation when Jurgis accidentally walks in on a socialist rally – Sinclair shows the reader what a more socialist take on regulations could mean for workers.¹⁸³ Jurgis is filled with inspiration as he hears from a man who speaks for "the millions who are voiceless" and promises a better world for the working man.¹⁸⁴ Sinclair believed that the only way out of the horrible situation he presented was through the Socialist party, and this is made evident in the novel.¹⁸⁵

And just as Chesnut's novel put a face to racial inequality, *The Jungle* provides one family as a representation of the injustices that surrounded the meatpacking industry in the 1900s. In doing this, *The Jungle* gave a voice to the many industry workers who would otherwise not have much of a say in their situation because, like Jurgis, they could not afford to leave work.

C Concluding Comments

There continues to be debate about the accuracy of law as literature depicts it, but literature can offer readers a different perspective on the law than they might otherwise have. And

¹⁸¹ Sinclair, above n 145, at 35-36.

¹⁸² Ibid, at 132-134.

¹⁸³ Ibid, at chapter 28.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, at xxvii.

although there are other resources available to analyse and critique the law, literature can provide a different aspect to the critique by providing a participant's view of the law, creating images that resound with the reader, providing context to the legal system, and showing alternatives to the current system. Some supporters of the law and literature movement seek to take this idea that literature can critique the law further. These authors argue that this critique of the law can contribute to some sort of change in the law.

III Literature as a Tool for Changing the Law

Building on the claim that literature can act as a valuable critique of the law, some authors argue that literature's critique can play a part in changing the law. Opponents to this view argue that there is no evidence of literature's influence in legal reform, and that literature's role in society precludes it from contributing to any legal changes – authors who write on social issues are following the movement for social change, rather than being active participants themselves.

A Literature's Ability to Contribute to a Change in the Law

1 The role of literature in society

Fish considers that because of the role that literature and literary authors play in society, literature cannot contribute to changes in the structure of society.¹⁸⁶ He considers that one restriction on literary authors is that they must remain distant from efforts to work changes into the crafts of society.¹⁸⁷ For Fish the reward of literature lies more in the pleasure of literary interpretation and understanding of texts.¹⁸⁸ The pre-eminent question of literary interpretation is what a poem, novel, or play means, and literary effectiveness is done at the level of conceptual analysis and does not involve urging a particular agenda.¹⁸⁹ Literature may contain propositions but these propositions do not come into primary focus, instead they just provide material that allows the reader to probe deeper into the assertion and meaning of the text.¹⁹⁰ Furthermore, Fish considers that claims that poets are the “unacknowledged legislators” of the world are abstract and difficult to verify.¹⁹¹

Fish writes that the effects of one's actions will largely be confined to their disciplinary settings; if you purport to engage with another discipline or aim for a “general, unified” wisdom then you are in fact doing the work of another discipline rather than your own.¹⁹²

¹⁸⁶ Fish, above n 20.

¹⁸⁷ Ibid, at 1.

¹⁸⁸ Ibid, at 110-111.

¹⁸⁹ Ibid, at 33-34.

¹⁹⁰ Ibid, at 34.

¹⁹¹ Ibid, at 32.

¹⁹² Ibid, at 86.

Objects come into being with the vocabularies of the specific enterprises engaging with them and in relation to the purposes of those enterprises, so if you use different enterprises to view the object it is not bringing out the complexities in the object, but creating a different object.¹⁹³ On this view, authors of literature have little influence in the realm of political change because while they are engaging in literary work no one but other literary critics will be listening; if the critics were to write in ways unrelated to literary criticism in order to be more politically effective then they are no longer practicing literary criticism but are practicing something else.¹⁹⁴ Although literary criticism now occupies a place in the public conscious that “few would have dreamt of three years ago,” our society today still does not enable interpretations of literary works to connect up with the issues that are being debated in the political arena.¹⁹⁵

In response to the arguments that certain writings, such as feminist writings, have had an effect in the public sphere, Fish says that this does not show that academic work can have ripple effects into larger society, but that when changes in society are already occurring certain agents will link academic work to the changes if it is useful for their politics.¹⁹⁶ Extra-literary contexts will use academic work to add support to already existing arguments and ideas, but these extra-literary contexts will largely remain unaffected by this application of literature.¹⁹⁷ It will not necessarily be the case that literary criticism will never have far-reaching effects, but this change would require general restructuring of the influence and power in our culture and conscious, which cannot just happen by people declaring their intention for it to occur.¹⁹⁸ Fish goes on to say that if enough people produce their interpretations with an eye to their immediate political effect and call this literary criticism that this could be literary criticism, and this may lead to more participation in political life, but given the current shape of the political life in the United States this is unlikely to come about soon.¹⁹⁹

¹⁹³ Ibid, at 137.

¹⁹⁴ Ibid, at 1.

¹⁹⁵ Ibid, at 50-53, 64-65. However, Fish notes that some people, such as Professor Epstein, can hope to make changes because of their already established connections to networks of communication and political action. His political connections play a part in his influence.

¹⁹⁶ Ibid, at 86.

¹⁹⁷ Ibid, at 91.

¹⁹⁸ Stanley Fish *There's No Such Thing As Free Speech: And It's a Good Thing, Too* (Oxford University Press, United States of America, 1994) at 254-256.

¹⁹⁹ Fish, above n 20, at 68-69.

Posner writes that reading literature can have moral and political consequences because information and persuasion affect behaviour, and literature informs and persuades.²⁰⁰ But Posner writes that the political or other behavioural influence of a literary work is “at its zenith” when, or shortly after, the work is published, when it is not yet a classic but a piece of pop culture.²⁰¹ Duong, although she doubts the ability of literature to contribute to law in many ways, says that there may be room for substantive rhetoric to aid and promote social activism in the law.²⁰² Duong writes that literature uses rhetoric to express ideas and emotions.²⁰³ This use of rhetoric can then engender ideas and emotions in the reader. These ideas and emotions are shown as ‘truths,’ and they can persuade readers to get involved in social activism and reform the law.²⁰⁴ And Ayres and Ashburn argue that literature’s role in society includes giving a voice to those who otherwise do not have one, in order to predicate change.²⁰⁵ Authors in the law and literature movement typically demonstrate their argument that literature can lead to legal change through examples.

2 *Evaluating examples of literature contributing to legal reform*

One of the most debated examples of literature contributing to legal change is that of *Bleak House*. George Orwell writes that while Dickens set out to criticize society, it was more exclusively moral rather than attempting reform.²⁰⁶ Dickens provided no constructive suggestions of what he would put in place of the law he was attacking, and there was no sign that he wanted the existing order overthrown.²⁰⁷ Orwell considers that Dickens was more

²⁰⁰ Posner, above n 20, at 457.

²⁰¹ *Ibid*, at 458.

²⁰² Duong, above n 53, at 13-14.

²⁰³ *Ibid*, at 14.

²⁰⁴ *Ibid*.

²⁰⁵ Ayres, above n 179, at 21-37. Ayres examines how women’s stories are often excluded by the law but can be recognised by literature. She uses the case of *United States v Morrison* (2000) 529 US 598 as an example of a case suppressing women’s voices. The court held that a rape victim could not get civil remedy because rape was more private conduct than public. Ayres compares this with the example of Jane Smiley *A Thousand Acres: A Novel* (Ballantine Publishing Group, United States of America, 1991). Smiley’s rewriting of Shakespeare’s *King Lear* tells the story from the point-of-view of Lear’s two young daughters who try to escape the horrors he inflicted upon them. Ayre argues that the novel forces readers to blur the distinction between public and private by hearing the story from the otherwise unheard female point-of-view. See also Gwen McNeill Ashburn "Silence in the Courtroom: Language, Literature, and Law in *The Ballad of Frankie Silver*" in Michael Meyer (ed) *Literature and Law* (Rodopi, New York 2004) at 67-83.

²⁰⁶ George Orwell, *A Collection of Essays* 82 (1946) as cited in Wertheim, above n 85, at 117.

²⁰⁷ *Ibid*.

attacking human nature than the law.²⁰⁸ Wertheim agrees that there was little intent to reform, saying that Dickens addressed specific abuses of the system from decades earlier so that when he published *Bleak House* the problems he discussed had already been reformed.²⁰⁹

As was discussed earlier, the movement to reform the Court of Chancery began prior to the publication of *Bleak House* in 1852.²¹⁰ However, injustices still remained after the reforms of the Court.²¹¹ Dolin writes that instead of lobbying for legislation to be amended, Dickens instead attempted to influence reform by portraying the problems of the Court through his novel.²¹² Tartovksky writes that Dickens was a lawyer in the ‘court of public opinion,’ and like lawyers, for novelists it is the best story that wins.²¹³ And while any concerted effort to effect large scale reformation is quite an undertaking, Welch writes that Dickens had an advantage in that he was a respected author who was often credited with spearheading legal reform by exposing ‘evil’.²¹⁴ Dickens himself could not make reforms, protect clients, or draft fairer rules, so he needed to work hand in hand with lawyers to make improvements to the system.²¹⁵ While authors cannot point to a direct effect *Bleak House* may have had on the law, *Jarndyce v Jarndyce* became a reference point for criticisms of the Court of Chancery.²¹⁶ Today *Bleak House* is frequently cited in scholarship surrounding legal ethics.²¹⁷

The Jungle has also been credited with contributing to legal reform. The novel reached a wide audience and was extremely successful, selling over 25,000 copies within six weeks of its 1906 publication.²¹⁸ Posner writes that *The Jungle* led to federal regulation of food

²⁰⁸ Ibid.

²⁰⁹ Wertheim, above n 85, at 151; Posner, above n 1, at 188.

²¹⁰ Dolin, above n 110, at 15.

²¹¹ Ibid.

²¹² Michael Lobban "Preparing for Fusion: Reforming the Court of Chancery: Part One" (2004) 22 LHR at 383-428 as cited in Dolin, above n 110, at 15-16. This was because Chancery officials were paid through the court fees rather than by salary, and this promoted the corrupt expansion of court procedure.

²¹³ Joseph Tartakovsky "Dickens V Lawyers" *The Opinion Pages New York Times* (online ed, New York, 6 February 2012) A23.

²¹⁴ Welch, above n 141, at 7.

²¹⁵ Tartakovsky, above n 213, at A23.

²¹⁶ Dolin, above n 110, at 16.

²¹⁷ Kieran Dolin "Continuing Professional Education in Legal Ethics through Literature: An Example Using Dickens' *Bleak House*" (2012) 6(1) Law and Humanities 111, at 112 gives the example of the West Australian Law Reform Commission Report on Advantages and Disadvantages of the Adversarial System in Civil Proceedings that included *Bleak House* among the list of authorities.

²¹⁸ Sinclair, above n 145, at xi.

processing,²¹⁹ and the novel has frequently been credited with leading to the passing of the Pure Food and Drug Act 1906.²²⁰ Millions of readers were ‘sickened’ with images that came from Sinclair’s vivid descriptions of the meat processing scene, and the novel roused public support behind the idea of pure food and drug meat inspection.²²¹ President Roosevelt then ordered government investigators to prepare a report on the Chicago stockyards, which turned out to be “almost as revolting as the novel itself.”²²² Then, in 1906, the President signed a bill regulating the handling and processing of meat.²²³ Sinclair was aiming for reform, holding faith that the power of empirical investigation and blunt exposition of ‘the facts’ would produce reform in a democratic society.²²⁴ Sinclair believed that citizens would demand reform, if only they understood the facts.²²⁵

Unfortunately, the novel actually had the opposite effect to what Sinclair was hoping for. Sinclair’s concern was for the industry’s workers and their families, rather than the unsanitary production of the meat.²²⁶ Sinclair intended for his novel to be part of the process of the working-class liberation, but instead it led to more difficult conditions for workers as sanitation standards were trialed.²²⁷ Sinclair, in his disappointment at this, wrote “I aimed at the public’s heart...and by accident I hit it in the stomach.”²²⁸ Today readers still pay very little attention to the workers whom Sinclair intended to be the focus of his book.²²⁹

B Concluding Comments

It is certainly arguable that because of the characteristics of literature and the place of literature in society, literature should have little influence in changing society, and in particular law. Often novels will canvass similar themes to those in reform, but not actually play a role in reform. However, that may not always be the case, and already there exist examples of literature that challenge this idea that literature’s role is not one that enables it to

²¹⁹ Posner, above n 1, at 458.

²²⁰ Sinclair, above n 145, at xii; Pure Food and Drug Act 1906.

²²¹ Ibid.

²²² Ibid, at xiii.

²²³ Ibid.

²²⁴ Ibid, at xiv.

²²⁵ Ibid.

²²⁶ Ibid, at xiii.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

contribute to change. However, as *The Jungle* demonstrated, the change that literature affects may not be what the author intended.

IV Literature's Contribution to Morality and Ethics in the Law

Some authors in the law and literature movement believe that not only can literature critique and change the law, but that reading literature can affect the ethics and morality of legal actors, thereby affecting the ethics and morality of the law.²³⁰ The claim is often expressed as the idea that literature can act as an “ethical corrective” to the more scientific and technical visions of law by morally and ethically improving judges and lawyers.²³¹ The essence of this claim is that reading literature can develop the moral faculties of lawyers and judges in a way that will affect their decision-making in both the personal and legal realms. What being more “moral” and “ethical” means is rarely defined by writers in the movement, except to note the difference between specific codes of legal ethics and ethics in an ‘ordinary’ sense of “what moral principles should govern our choices and pursuits.”²³² This edification school of law and literature faces strong arguments that there is no need for legal actors to be more moral and ethical, and that there is no evidence that literature can contribute to the morality or ethics of lawyers and judges, especially in a way that would affect their decision making and the law.

A Evaluating the Need to Change the Morality and Ethics of Legal Actors

1 The assumption that legal actors need to be more moral and ethical

Underlying the claim that literature can make the legal actors more ethical and moral is the assumption that making legal actors more moral and ethical is a good thing. Fish writes that there are no general obligations on human beings;²³³ obligations arise only from assuming a particular role or function.²³⁴ Some writers doubt that the roles of judges and lawyers require ethical and moral standards beyond those specified in codes of legal ethics.

²³⁰ Posner, above n 1, at 467.

²³¹ Ian Ward "From Literature to Ethics: The Strategies and Ambitions of Law and Literature" (1994) 14 *Oxford Journal of Legal Studies* 389 at 391, referring to Richard Weisberg *Poethics, and Other Strategies of Law and Literature* (Columbia University Press, 1992). Weisberg considers it important to introduce ethics into legal thinking in order to fill the void left by postmodernism and economic analysis.

²³² "Ethics" in Robert Audi (ed) *The Cambridge Dictionary of Philosophy* (2nd ed, Cambridge University Press, Cambridge, 1999) at 285 as cited in Dolin, above n 217, at 111.

²³³ Fish, above n 20, at 138-139.

²³⁴ *Ibid.*

2 *The role of lawyers and judges in society*

One view of the role of the lawyer does not require them to be more ethical than codes of legal ethics set out – personal moral views should not influence the lawyer’s actions. This role sees the lawyer as an advocate for the court and intermediary between the law and citizens – they should not promote their personal beliefs.²³⁵ Lawyers are not morally responsible for their clients’ causes.²³⁶ This role involves ‘role-differentiation,’ which is the idea that a lawyer’s moral response will vary depending upon whether he or she is acting in a personal or professional capacity.²³⁷ This means it can be appropriate for lawyers in their professional role to act in ways that the ordinary person should not.²³⁸ This view of the role of the lawyer is based on the ‘rule of law.’²³⁹

The rule of law requires those who exercise government authority to conform strictly to the rules²⁴⁰ – consistent application of prior stated rules is important.²⁴¹ This allows all people to be treated as equal before the law, despite disagreements about moral matters.²⁴² Webb writes that if lawyers incorporate their own moral beliefs, rather than following strict rules, there is no certainty in the lawyer’s actions.²⁴³ Incorporation of personal beliefs also damages the objectivity of the law because the lawyer would be using their subjective values and beliefs to evaluate their client’s problems and regulate their day-to-day interactions.²⁴⁴

However, a competing view of the role of the lawyer allows lawyers to supplement the code of ethics with personal ethics and morality.²⁴⁵ This view holds the lawyer responsible to

²³⁵ Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis NZ Limited, Wellington, 2006) at 39; Bradley Wendel *Lawyers and Fidelity to Law* (Princeton University Press, New Jersey 2010) at 29.

²³⁶ Wendel, above n 235, at 29, 33.

²³⁷ Monroe Freedman "Personal Responsibility in a Professional System " (1977-1978) 27 *Cath UL Review* 191 at 194.

²³⁸ Wendel, above n 235, at 29; Stephen Pepper "A Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) 11(4) *American Bar Foundation Research Journal* 635 at 614; Webb, above n 235, at 31.

²³⁹ Wendel, above n 235, at 18.

²⁴⁰ Toni Massaro "Empathy, Legal Story Telling, and the Rule of Law: New Words, Old Wounds?" (1989) 87(8) *Mich L Rev* 2099 at 2102.

²⁴¹ *Ibid*, at 2103.

²⁴² Wendel, above n 235, at 18. Pepper, above n 238.

²⁴³ Webb, above n 235, at 34.

²⁴⁴ *Ibid*, at 57.

²⁴⁵ *Ibid*, at 48.

professional standards and their own conscience for their decisions.²⁴⁶ Webb suggests that requiring lawyers to act without recourse to their beliefs demands too much from lawyers and fails to recognise the fundamentally moral nature of legal actors.²⁴⁷ White writes that to separate the role of the lawyer from the person implies a sorry view of the law and legal actors because it suggests that legal work is a mere technique that calls for no significant aspects of the self.²⁴⁸

Additionally, some authors argue that we should expect lawyers to aim for justice in their actions.²⁴⁹ Ward considers that the exercise of law is as much about love and compassion as it is about rights and rules,²⁵⁰ and lawyers should not ignore the social and moral costs of their actions.²⁵¹ Nussbaum considers that we should adopt an ethical stance that asks us to concern ourselves with the good of other people as well as for rules and formal decisions procedures.²⁵²

Much for the same reasons as lawyers should not incorporate their personal beliefs in their professional role, Green argues that judges should not draw on personal moral beliefs during the decision-making process.²⁵³ However, Massaro writes that legal decision-making should not discount feelings, and that our emotions should be as much a part of normal legal discourse as the 'objective' legal rules.²⁵⁴ Massaro argues that a judge who approaches decision-making in a completely formal way could sacrifice substantive rationality by ignoring the impact of the decision on the people.²⁵⁵ In this vein Nussbaum believes that it is important for judges to develop sympathetic emotions towards things they do not suffer so

²⁴⁶ Ibid, at 50; John Jr Noonan and Richard Painter *Professional and Personal Responsibilities* (The Foundation Press Incorporated, New York 1997) at vii.

²⁴⁷ Webb, above n 235, at 37, 41-42; Gerald Postema "Moral Responsibility in Ethics" (1980) 55 NYU Law Review 63 at 64.

²⁴⁸ White, above n 4, at 742.

²⁴⁹ Webb, above n 235, at 36.

²⁵⁰ Martha Nussbaum *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press, United States of America, 1997); Ian Ward "Literature and the Legal Imagination " (1998) 49 NILQ 167 at 178. Ward writes that it is not only turning to literature that is important, but that we must also realise that the community is a form of narrative.

²⁵¹ Postema, above n 248; Ward, above n 251, at 179.

²⁵² Nussbaum, above n 251, at xvi.

²⁵³ Bruce Green "The Role of Personal Values in Professional Decisionmaking " (1997-1998) 11 Geo J Legal Ethics 19 at 34.

²⁵⁴ Massaro, above n 240, at 2104.

²⁵⁵ Ibid, at 2103.

they can identify with the wide range of characters they may encounter in the court room.²⁵⁶ Nussbaum considers that these emotions are also important to allow a judge to see the defendant as an inhabitant of a complex web of circumstances.²⁵⁷ Nussbaum argues that a judge should be committed to “empathetic scrutiny” of an individual’s life, giving the example of the role that mercy should play in cases where there is judicial discretion to exercise mercy.²⁵⁸ In the case of *Walton v Arizona*²⁵⁹ Judge Scalia criticised the notion of mitigating factors being discretionary.²⁶⁰ Nussbaum argues that this attack by the judge was wrong because it is impossible to anticipate the countless ways in which factors interweave and bear upon one another, and that it was therefore necessary for a judge to consider the whole story and the particulars, which is why mitigating factors should not be codified.²⁶¹ This is an example of why it is important for judges to take a more empathetic view of the entire situation of people in their courtroom and how it is not occurring. Nussbaum argues that the judgements should be informed not only by legal precedent, but by empathetic knowledge.²⁶²

Pepper writes that the currently accepted role of legal actors is the more amoral role that requires legal actors to comply with the rule of law to the exclusion of their own personal morality and ethics.²⁶³ There are good justifications for legal actors adopting such a role, in particular the need for certainty in the law and the importance of the law applying universally and evenly, regardless of people’s moral beliefs. However, there are also good reasons for lawyers and judges being able to supplement the rules with their own personal morality, especially considering the arguments that this will allow recognition of the legal actor as a moral person and that this could further the aim of having justice in legal decisions and the law. Whether or not one believes that we should be looking to develop the ethics and morality of legal actors beyond what is in the codes of ethics will depend on one’s view of the role of legal actors. Both roles have advantages and disadvantages, but there is at least an arguable case that lawyers and judges should supplement rules of ethics with personal

²⁵⁶ Martha Nussbaum "Equity and Mercy" (1993) 2 *Philosophy & Public Affairs* 83 at 111-112.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, at 114-115.

²⁵⁹ *Walton v Arizona* (1990) 110 SC 3047.

²⁶⁰ Nussbaum, above n 257, at 118.

²⁶¹ *Ibid.*, at 119.

²⁶² *Ibid.*, at 257 as cited in Robin West "The Literary Lawyer" (1995-1996) 27 *Pacific Law Journal* 1187 at 1200-1201.

²⁶³ Pepper, above n 238.

morality, and thus that we should be looking to develop the ethics and morality of these lawyers and judges.

B Whether Literature Can Contribute to the Morality and Ethics of Legal Actors

Nussbaum writes that the novel can steer judges in judging, legislators in legislating, and policy makers in measuring the quality of life.²⁶⁴ The edification school of law and literature claims that reading literature can develop the moral faculties of judges and lawyers by influencing the way that these legal actors think and make decisions, and that this can influence their decision-making in the legal profession.²⁶⁵ This is often referred to as the claim that reading literature can ‘humanize’ judges and lawyers. However, this edification school of thought faces much criticism.²⁶⁶ Critics argue that literature does not have the ability to develop moral faculties; that literature is not inherently moral; that to read literature for ethics and morality would encourage a particular author’s political agenda; that the multiple interpretations possible from literature make it difficult to find guidance in literature; that consequences of reading literature are minute.

1 *Literature’s ability to develop the reader’s moral faculties*

Fish writes that he is all for moral and creative capacities, but he is not sure that there is much that anyone could do to teach and develop them.²⁶⁷ Moral capacities do not have any relationship with the reading of novels or other education tasks – these can teach certain skills but not moral states.²⁶⁸ While analytical abilities and knowledge can be taught, ‘insightful use’ is a matter of character that cannot be taught.²⁶⁹ There could be some connection between the practice of ethical, social, and political virtues and the courses of college, but the

²⁶⁴ Nussbaum, above n 251, at 2-3.

²⁶⁵ Todd Henderson "Citing Fiction " (2008) 11(2) *The Green Bag: An Entertaining Journal of Law* 171 at 171; Nussbaum, above n 251; Baron, above n 16, at 1067, 1076. Baron notes that this experience is not limited to books about law.

²⁶⁶ Posner, above n 1, at 7, chapter 12. Posner is the main objector to this idea, but there are also several other strong critics of this school of thought.

²⁶⁷ Stanley Fish *Save the World on Your Own Time* (Oxford University Press, United States of America, 2008). This book is largely about academic disciplines in the classroom overstepping their boundaries and attempting to teach students political ideas. This could be relevant to the law and literature movement because it reflects the objection that literature is overstepping its boundaries in attempting to “save the world.”

²⁶⁸ *Ibid*, at 11.

²⁶⁹ *Ibid*.

effects would simply be contingent and could not be designed or aimed at.²⁷⁰ Posner writes that reading is unlikely to *change* the reader at all, rather it is more likely to lead to confirmations of the reader's true self in what the reader chooses to read.²⁷¹

However, supporters of the edification school of law and literature believe that literature can beneficially develop moral capacities. Nussbaum claims that literature can provide a surrogate experience that allows the reader to participate in situations that they would not otherwise experience, thereby creating empathy and sympathy for people and situations that the reader would not otherwise feel.²⁷² This is said to develop a different way of thinking and making decisions that can contribute to decision-making in real-life situations.²⁷³ In this way it is argued that the moral faculties of the reader can be developed by literature.²⁷⁴

White writes that reading literature can enable the reader to perceive or imagine other worlds.²⁷⁵ Nussbaum believes that reading literature allows the reader to imagine what another person's life might be like, and to understand the emotions and desires of that person.²⁷⁶ Reading literature allows us to participate in the lives of the characters in literature.²⁷⁷ Literature shows "things such as might happen" in human life.²⁷⁸

Dunlop believes that by allowing the reader to participate in another person's life, literature can extend the reader's sympathies and understanding of human nature.²⁷⁹ Nussbaum writes that stories give a close and intimate experience with characters, which can induce feelings

²⁷⁰ Ibid, at 13.

²⁷¹ Richard Posner *Law and Literature* (2nd ed, Harvard University Press, United States of America, 1998) at 328 as cited in Carrie Menkel-Meadow "Telling Stories in Law School: Using Case Studies to Teach Legal Ethics" (2000-2001) 69 *Fordham L Rev* 787.

²⁷² Nussbaum, above n 251. Nussbaum was the primary contributor to this line of argument, but she has since been joined by a few dedicated followers. Menkel-Meadow and West also support the idea that stories can teach ethics to legal actors by creating empathy in situations. Massaro, above n 240, at 2106 writes that the terminology "empathy" and context" are not very useful analytical tools; however, the majority of authors in the movement still use these terms.

²⁷³ Henderson, above n 266, at 171; Baron, above n 16, at 1076.

²⁷⁴ Nussbaum, above n 251.

²⁷⁵ James Boyd White "What Can a Lawyer Learn from Literature?" (1989) 102(8) *Harv L Rev* 2014 at 2023.

²⁷⁶ Nussbaum, above n 251, at 118-119.

²⁷⁷ Ibid, At 31. However, at 35, Nussbaum writes that a novel's moral operations are not independent of its aesthetic excellence, and novels bind us to the characters because they cause us to take pleasure in the character's company – a tedious novel will not have the same moral power.

²⁷⁸ Nussbaum, above n 251, at 5; Posner, above n 1, at 482. Even Posner writes that literature can provide a "low-cost, low-risk" surrogate experience that experiments with the "what if?"

²⁷⁹ Dunlop, above n 169, at 70.

that make the reader feel directly implicated in literature.²⁸⁰ Posner agrees that literature can expand our emotional horizons by engendering emotional responses in readers to experiences they have not had.²⁸¹ For example, a reader of *Billy Budd* may feel the loneliness of the command.²⁸² Mathewson also gives the example of *The Marrow of Tradition*, saying that Chesnutt achieves what Nussbaum hoped from literature by using the literary imagination to concern readers with the good of other people whose lives are distant from our own – he places a human face on racial prejudice that the court failed to see.²⁸³

Krakoff, however, doubts the ability of literature to engender empathy in the reader.²⁸⁴ She uses the example of *Lawyerland*, which depicts many lawyer characters in a bad light, to illustrate that literature does not always create empathy for a particular group and that it can instead engender alienation and despair.²⁸⁵ In response to this, Glen argues that through the despicable characters in *Lawyerland* readers can get to know the lawyer they do not want to be, and this can shape the reader's thinking and actions.²⁸⁶ Additionally, the edification school does not demand that readers only feel empathy and sympathy for legal characters. In the case of *Lawyerland* the reader may feel empathy for the burglar-character, who, while he did commit a crime, becomes a victim of the legal system and its actors.

It is argued that this surrogate experience engendering sympathy and empathy in the reader can teach a new way of reading and understanding situations – this is how literature develops the moral capacities of the reader. White considers that reading literature transforms “the self” as the reader understands and responds to the text²⁸⁷ – the process of reading literature is a process of perpetual attunement.²⁸⁸ Nussbaum believes that surrogate experience provided by literature can give a broader context for legal decision-making than primary legal texts can, which will deepen decision making.²⁸⁹ Reading various works of literature allows readers to see how one situation may be different from another by focussing on more than

²⁸⁰ Menkel-Meadow, above n 272, at 792.

²⁸¹ Posner, above n 1, at 486.

²⁸² *Ibid.*, at 486; Herman Melville *Billy Budd* (Oxford University Press, Oxford, 1981).

²⁸³ Mathewson, above n 61, at 240.

²⁸⁴ Krakoff, above n 24, at 1742.

²⁸⁵ *Ibid.*

²⁸⁶ Glen, above n 40, at 80.

²⁸⁷ White, above n 276, at 2018-2020. White gives the example of the reader of Jane Austen's *Emma* finding his or her own initial opinions of Emma's selfishness repeatedly disturbed and corrected, and this should move the reader in the direction of greater generosity and accuracy of judgment.

²⁸⁸ *Ibid.*, at 2020.

²⁸⁹ Menkel-Meadow, above n 272, at 792.

“just the facts.”²⁹⁰ Nussbaum agrees that to read a complex case in the manner of a narrative allows the reader to be more attentive to particularity.²⁹¹ Nussbaum also writes that the empathy and sympathy that the surrogate experience creates develops a more sympathetic understanding of the context of a situation – she uses Dickens’ *David Copperfield*²⁹² to illustrate her point. While the character of James Steerforth is seen as a bad person who acts badly and destroys the lives of others, the reader has seen his extremely complicated character have an unfortunate family history and be genuinely nice at times.²⁹³ The reader sees the whole tangled history and participates in this life.²⁹⁴ This leads the reader to feel mercy for this character in a way that the reader would not otherwise feel.²⁹⁵ But Nussbaum cautions that a reader cannot learn everything that is necessary to know simply by reading works set in a distant time and place.²⁹⁶ The literary imagination only plays a role in the constructing an adequate moral theory and the development of capacities necessary to make reality out of that theory.²⁹⁷

Baron doubts the ability of literature to contribute to better moral judgement, and writes that “[s]urely many an insensitive brute has read great books without becoming one whit less insensitive or brutish.”²⁹⁸ Posner writes that this edifying school of thought “has a lot to explain,” such as the 20th century behaviour of Germany, a nation highly cultured in literature, classics, music, philosophy, and history.²⁹⁹ Posner writes that culture did not inoculate Germany against Hitler’s actions.³⁰⁰ However, White writes that this argument misunderstands the claim of the edification school of law and literature.³⁰¹ White insists that this edification is not coercive and the outcome of reading will be different for different readers because some may read a text differently or fail to respond to it³⁰² – we should expect

²⁹⁰ Ibid, at 793.

²⁹¹ Nussbaum, above n 251, at 105.

²⁹² Charles Dickens *David Copperfield* (University Society, Harvard University, 1908).

²⁹³ Nussbaum, above n 251, at 107.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid, at 11.

²⁹⁷ Ibid, at 12.

²⁹⁸ Baron, above n 16, at 1066.

²⁹⁹ Posner, above n 1, at 461.

³⁰⁰ Kenneth Ruthven *Critical Assumptions* (Cambridge University Press, Cambridge, 1979) as cited in Posner, above n 461. And Ruthven writes that despite their familiarity with the classics, professors of literature do not appear to lead better lives than other people, and frequently “display unbecoming virulence.”

³⁰¹ White, above n 4, at 746.

³⁰² White, above n 276, at 2020, 2028.

variety in voice, direction of thought, political positions and fundamental concerns.³⁰³ We must accept responsibility for what we make of our readings just as we accept responsibility for our other conduct.³⁰⁴ Nussbaum also acknowledges that the literary imagination will not always prevail against deep prejudices of many human beings and institutions; society is full of refusals to imagine one another with empathy and compassion.³⁰⁵ But she writes that this is not a flaw in the literary imagination, but in the people who do not exercise the imagination well and who cultivate their human sympathies unequally and narrowly – this could be remedied by more consistent and humane cultivation.³⁰⁶ The reading of literature does not guarantee a morally and ethically sound person because the morality and ethics of a person will depend on their own use of what is put before them. We are responsible for what we see when we look out into the world as lawyers and judges, and what we judge from must come from within ourselves individually and collectively.³⁰⁷

2 *The morality of literature*

Baron writes that the edification claim rests on the idea that lawyers rely excessively on abstract reasoning found in law instead of the emotional and concrete scenarios literature can provide, therefore literature can help lawyers get the moral training they need to make moral judgements.³⁰⁸ This appears to be based on the idea, as discussed in chapter one, that the law is a discipline that is inherently empty of values, while literature has the values that law should be looking for. But Baron writes that it is not always the case that literature is emotional and moral, nor that the law is always amoral.³⁰⁹

Some critics argue that it is not literature's role to be moral. Oscar Wilde wrote that books are not moral or immoral, just good or bad.³¹⁰ George Orwell believed that books should not be

³⁰³ White, above n 4, at 743.

³⁰⁴ Ibid, at 743, 746.

³⁰⁵ Ibid, at xvii.

³⁰⁶ Ibid, at xviii.

³⁰⁷ White, above n 4, at 749.

³⁰⁸ Baron, above n 16, at 1064.

³⁰⁹ Baron, above n 26, at 43.

³¹⁰ Oscar Wilde *The Picture of Dorian Gray* (Oxford University Press, United States of America, 2011) as cited in Posner, above n 1, at 456.

judged on their moral uplift.³¹¹ Posner says that literature is art for art's sake.³¹² Art's most essential requirement is not that its characters be morally good but that they be *interesting*.³¹³ Duong writes that because literature's purpose is to follow the sensory path, literature often wanders outside of moral boundaries, and in this way art does not always preach, nor aim, to make readers better people.³¹⁴ Artists do not aim for justice and neither does their art because that is not the aesthetic ideal.³¹⁵

Posner writes that literature is not inherently moral because it often depicts immoral situations. Because of the extreme situations and drama that authors tend to be attracted to,³¹⁶ literature is often filled with moral atrocities that are depicted with "uncritical acceptance" and "relish," such as rape, murder, and human sacrifice.³¹⁷ Posner writes that at times authors even condone a morality that readers may not agree with.³¹⁸ For example, *Othello* depicts racially mixed couples as prone to catastrophe.³¹⁹ Posner believes that because most readers do not discontinue reading books that do not accord with their morality, great literature must lull the reader into suspending moral judgment – Posner believes this is possible because the moral content is irrelevant and is just the raw material that the novel is built with.³²⁰ In this way moral content is irrelevant even when it conforms to our moral opinions.³²¹ Posner writes that anyone who took seriously the implied morals in novels would be a "menace to civilized society."³²²

³¹¹ George Orwell "Politics vs Literature: An Examination of *Gulliver's Travels*" in *The Collected Essays, Journalism and Letters of George Orwell* (Harcourt Brace Jovanich, New York, 1968) at 205, 222-223 as cited in Posner, above n 1, at 456.

³¹² Posner, above n 1, at 457-458.

³¹³ Dennis Dutton *The Art Instinct: Beauty, Pleasure, and Human Evolution* (Bloomsbury Press, New York, 2010) as cited in Posner, above n 457.

³¹⁴ Duong, above n 53, at 28-30. Duong writes that readers of literature are not concerned about the author as a regulator of conduct because they individualize their experience independent of the author's voice. In contrast, the law commands obedience and disregards the individual's preference, instead using the invisible "reasonable man" who considers the legal consequences of his actions.

³¹⁵ *Ibid*, at 1199-1200.

³¹⁶ Posner, above n 11, at 1388.

³¹⁷ Posner, above n 1, at 462-463.

³¹⁸ *Ibid* at 464-465; William Shakespeare *Othello* (Saddleback, United States of America, 2003).

³¹⁹ Posner, above n 1, at 464-465; Shakespeare, above n 319.

³²⁰ Posner, above n 1, at 464-465. Note that he uses the argument in the first part of his book to support this, saying that it is just like how law is not the main focus of novels.

³²¹ *Ibid*, at 465.

³²² Posner, above n 11, at 1388.

Schramm argues that authors of literature have licence to write anything they wish without repercussions; they are not limited to writing what is morally correct, and often they do not write what is morally correct.³²³ Schramm uses the example of authors writing about legal representation for felons in the 19th century – in particular the case of John Thurtell, who was accused of murdering his business partner based on the confessions of two alleged accomplices and other circumstantial evidence.³²⁴ Schramm writes that Thurtell was essentially tried by newspapers on evidence that would not otherwise be before the court and was found guilty before the public.³²⁵ While this was trial by journalists, the authors of literature have a similar lack of boundaries in their writing. Winter writes that “[t]he extent to which literature can act as a moral commentary on the excesses of the law... is dependent on the extent to which fiction is itself committed to a realist representation and the amelioration of injustice.”³²⁶ Winter questions the right of authors to shape public opinion about the administration of justice when they have no concomitant responsibility to present evidence fairly or dispassionately – he is troubled by authors’ lack of public accountability.³²⁷ The law has its own internal standards it must adhere to, but there is no such check on the morality of authors of fiction.³²⁸

Plato, however, suggests that there is moral importance in works of literature.³²⁹ Gardner states that art should be moral, and the first business of criticism should be to judge literature on its moral worth.³³⁰ West writes that most American legal scholars today believe that the law has power over its subjects because it is believed to be mostly just and moral.³³¹ West considers that the morality of law should not be uncritically accepted, and that the humanities might be sufficiently removed from the influence of law to provide moral criticism of it.³³² West argues that moral convictions are grounded in conceptions of our shared nature, which

³²³ Jan-Melissa Schramm "Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation for Felons" in M D A Freeman and A D E Lewis (eds) *Law and Literature* (Oxford University Press, Great Britain 1999) at 417-437.

³²⁴ *Ibid.*, at 418-421.

³²⁵ *Ibid.*

³²⁶ *Ibid.*, at 432.

³²⁷ *Ibid.*, at 432-433.

³²⁸ *Ibid.*, at 433.

³²⁹ Posner, above n 1, at 458.

³³⁰ John Gardner "Premises on Art and Morality" in Stephen George (ed) *Ethics, Literature, and Theory: An Introductory Reader* (2nd ed, Rowman & Littlefield Publishers Incorporated, United States of America, 2005) as cited in Posner, above n 450.

³³¹ West, above n 92, at 1.

³³² *Ibid.*, at Part 1.

are informed by our experiences, and that literature provides us with narratives of stories that we would not otherwise experience that can thereby shape our moral convictions.³³³ In this way, West believes narrative practice may provide a point of shared reference for moral criticism and growth.³³⁴

3 *Literature pushing political agendas*

Following on from Schramm's argument that authors have a 'licence' to write as they wish without being restricted to moral content, another problem identified with looking to literature for 'moral guidance' is that often authors write politically in the guise of writing morally. Instead of writing in a more 'neutral' and 'moral' way, authors write to support their own political ideas and agendas but claim to be writing 'morally.' Posner writes that often authors mine literature for support of their own views.³³⁵ He accuses Dolin of this folly, writing that Dolin focusses much of his writing on social issues and only looks to literature to argue that it should be used to promote a left-liberal agenda.³³⁶ Posner also writes that White reads literature for support of his political views, using, like any moralist, literature that supports his vision of what is good.³³⁷

Ward agrees that there is danger in authors of literature writing situations with 'morally correct' outcomes, when they are in fact pushing their own political or moral agenda.³³⁸ He notes the difficulty in distinguishing between ethics and politics.³³⁹ Ward writes that Weisberg showed that it is nearly impossible to write about the law without introducing politics in the guise of ethics.³⁴⁰ And the educative potential of law and literature must not be smothered by partisan political rhetoric and dogma – a balance must be struck.³⁴¹ Weisberg

³³³ Ibid, at 10.

³³⁴ Ibid, at Part 2.

³³⁵ Posner, above n 1, at 470.

³³⁶ Ibid, at 15-17.

³³⁷ Ibid, at 470.

³³⁸ Ward, above n 231, at 395. Fish, above n 261 explored the importance of those teaching higher education not pushing their political and moral ideas on others – the idea of keeping to job description. By the same token, it could be argued that literature should keep to its duty and not impose the author's political views on others.

³³⁹ Ward, above n 231, at 395.

³⁴⁰ Ibid.

³⁴¹ Ibid.

just about strikes this balance, but he does flirt with political dogma in the guise of ethics.³⁴² However, Weisberg stresses that literature should only go so far as to reveal ethics, and should not write about politics.³⁴³ Ward agrees that there is a “sliding scale” and one should be careful to strike a balance – he cautions against declaring that all things against your opinion are wrong.³⁴⁴ Most importantly, literature should only go so far as to present, and not seek to answer, ethical questions.³⁴⁵

4 *The ability of multiple interpretations to provide guidance*

If literature is just supposed to raise ethical questions and not to answer them then there is the issue of just what guidance literature is offering to moral judgment. Along these same lines is Baron’s concern that reading literature often presents the reader with multiple interpretations,³⁴⁶ therefore there is no obvious moral answer and literature is of little help in guiding moral judgment. Posner also states that even if moral dilemmas are more vivid in literature than in books about ethics, they cannot help to navigate the moral dilemmas in our own lives.³⁴⁷ Posner writes that this is because literature’s richly ambiguous nature and lack of pressure to find the “right reading” can accommodate incompatible moral responses.³⁴⁸ Posner uses an example that Nussbaum discusses of *The Golden Bowl*, which is a story of adultery, to show that on the one hand you can condemn the adulterers, and on the other you can side with them thinking that the other parties are social snobs for looking down on their complicated lives – a reader can hold either of these incompatible views.³⁴⁹

However, the moral and ethical guidance that literature provides does not come from pushing certain answers on the reader, but by presenting them with ethical dilemmas that they can

³⁴² Ibid, at 396. One example of this is Weisberg’s discussion of the Holocaust. Weisberg insists this is ethical rather than political – Ward agrees that this is relatively safe ground to tread, but one must remember that this was essentially a political movement.

³⁴³ Weisberg, above n 231 as cited in Ward, above n 396.

³⁴⁴ Ward, above n 231, at 398.

³⁴⁵ Ibid.

³⁴⁶ Baron, above n 16, at 1070; Penlop in Lynn Penrod "Ethical Sentiments and the Role of Literature in a Jurisprudence Seminar" (2010) 3 Forum on Public Policy Online at 3 also notes that CRB Dunlop criticised literature for raising ethical sentiments but not resolving the issue.

³⁴⁷ Posner, above n 1, at 471.

³⁴⁸ Ibid, at 471-472.

³⁴⁹ Ibid, See Henry James *The Golden Bowl* (Tom Doherty Associates, United States of America, 2000).

analyse and evaluate the outcomes of.³⁵⁰ Winter writes that “[a] literary turn of mind is vital to morality because it is through narrative enactment that we imagine how various situations might be carried forward and, thus, are able to assess their ethical implications.”³⁵¹ The guidance from literature lies in the raising and examining ethical and political issues about the legal order – literature can suggest the complexity of an ethical question and conjure up many possible solutions.³⁵² Stories are good because they tell us how others have resolved similar issues, and may reveal difficult situations we may be placed in so that we can anticipate what to do in similar situations.³⁵³ We can examine with hindsight, foresight, and peripheral vision what has happened to others in certain situations.³⁵⁴ Stories allow multiple levels of analysis and multiple points-of-view of characters.³⁵⁵

Building on this idea, Nussbaum suggests that the significance of reading literature lies in the idea of “literary judges.”³⁵⁶ This is the idea, discussed earlier, that a reader of literature participates in stories they would otherwise not understand and therefore can better understand the context of similar stories when faced with them in reality.³⁵⁷ But the reader is able to remain somewhat neutral in the sense that the reader will read without emotions relating to their own concrete placement in the situation³⁵⁸ – when reading a novel we are reading free from bias and favour because we have no prior ties to the characters.³⁵⁹ Additionally, the reader of literature is not reading with a framework of the law in mind.³⁶⁰ For Nussbaum this means that the judgments we make while reading are based on the search for “human good,” a type of good that makes sense with our personal morality but also that we can defend to others and support along with others that live in our community.³⁶¹ This

³⁵⁰ Ward, above n 231, at 398.

³⁵¹ Steven Winter "Law, Culture, and Humility" in Austin Sarat, Matthew Anderson and Catherine Frank (eds) *Law and the Humanities: An Introduction* (Cambridge University Press, New York, 2010) at 98.

³⁵² Dunlop, above n 169, at 71.

³⁵³ Menkel-Meadow, above n 272, at 814.

³⁵⁴ *Ibid*, at 814.

³⁵⁵ *Ibid*, at 815.

³⁵⁶ Nussbaum, above n 251, at 79-121

³⁵⁷ Nussbaum, above n 257, at 110.

³⁵⁸ *Ibid*, at 87, 90, 110.

³⁵⁹ *Ibid*, at 83, 87, 90.

³⁶⁰ Nussbaum, above n 251, at 83-84.

³⁶¹ *Ibid*, at 84.

ability to think of people's lives in the novelist's way is an important for being a judge³⁶² and Nussbaum believes this can translate to real life.³⁶³

5 *The measurable consequences of reading literature*

Even if literature could provide some sort of moral guidance for the reader, Posner writes that the morally beneficial effects of literature are “so obscure and self-contradictory” that they are not valuable evidence for the claim that moral edification is the main achievement of literature.³⁶⁴ Posner accepts that reading literature can have consequences, including moral and political consequences, because information and persuasion affect behaviour, and literature informs and persuades.³⁶⁵ But Posner writes that the behavioural influence of a literary work is “at its zenith” when, or shortly after, the work is published.³⁶⁶ Henderson considers that that law and literature movement has not been successful in its edification claims because if it had been successful one should expect to see literature cited in judgments, and it would be cited “to reveal that the fiction has evoked feelings of pity and empathy for the less fortunate and given a voice to traditionally marginalized segments of society” – but this is not occurring.³⁶⁷ Henderson writes that although judges routinely cite sources of history, social science, and economics, after a study of over two million federal appellate opinions over 100 years there were only 543 references to works of fiction.³⁶⁸ Henderson writes that the citations that were present related to the judicial world rather than the parties – about half of the citations related to delays, definition of legal terms, and the role

³⁶² Ibid, at 99.

³⁶³ Ibid, at 83-84.

³⁶⁴ Dutton, above n 314 as cited in Posner, above n 1, at 457.

³⁶⁵ Posner, above n 1, at 457. Posner fleetingly cites Peter Marzuk "Increase in Suicide by Asphyxiation in New York City After the Publication of *Final Exit*" (1993) 329 *New England Journal of Medicine* 1508. In this publication Marzuk found that after the publication of the non-fiction book Derek Humphry *Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying* (Random House, United States of America, 1991), which condemned most forms of attempting suicide but recommends “self-deliverance via plastic bag”, there was an increase of 313% in asphyxiations by plastic bag. It was assumed that people had read the book if they died by the means described in the book and the book was found at the scene.

³⁶⁶ Posner, above n 1, at 458.

³⁶⁷ Henderson, above n 266, at 172.

³⁶⁸ Ibid, at 171, 174. At 178 Henderson provides a list of the most frequently cited authors and the frequency of citations.

of courts.³⁶⁹ Henderson considers this is a disappointment to the goal of increasing judicial empathy to others.³⁷⁰

Solove disagrees with Henderson's assumption that the effect of the law and literature movement's claims can be assessed by counting instances when literature appears in judicial opinions.³⁷¹ Solove writes that if there was a "direct impact" he doubts that a judge would admit to this, and that often judges read and rely on law review articles and works of philosophy that they do not cite.³⁷² And Henderson himself offers reasons why judges might not be citing fiction – for example, that the social norms in court mean that non-traditional sources are not cited, or perhaps judges could be concerned at the impact citing fiction would have on the litigants.³⁷³ Solove agrees that reading literature may not mean that a judge is inclined to decide a case in one way or another, but that it may help shape their mind-set and have an indirect effect.³⁷⁴ Literature is likely to have an indirect influence by providing readers with the opportunity to think about situations and question their views.³⁷⁵

Henderson even provides an example of how a judge has used citations consistently with the edification school's claims.³⁷⁶ Henderson gives the example of *Florida v Riley*,³⁷⁷ which saw the dissent of Brennan J from the decision that the police could search a person's property from a helicopter without a search warrant.³⁷⁸ Brennan J provided a legal analysis of the lower court's decision, and a public policy analysis, before ending with an emotional plea citing *Nineteen Eighty-Four*.³⁷⁹ Brennan J wrote that although the Court approved the warrantless helicopter surveillance, he hoped that his colleagues would be concerned that police surveillance methods they were sanctioning were among those described in George Orwell's *Nineteen Eighty-Four*: "BIG BROTHER IS WATCHING YOU, the caption said.... In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping

³⁶⁹ Ibid, at 177.

³⁷⁰ Ibid, at 178.

³⁷¹ Daniel Solove "Judges Citing Literature" (2008) <http://www.concurringopinions.com/archives/2008/04/judges_citing_1.html>.

³⁷² Ibid.

³⁷³ Henderson, above n 266, at 172, 175.

³⁷⁴ Solove, above n 372.

³⁷⁵ Ibid.

³⁷⁶ Henderson, above n 266, at 182.

³⁷⁷ *Florida v Riley* (1989) 488 US 445.

³⁷⁸ Henderson, above n 266, at 183-184.

³⁷⁹ George Orwell *Nineteen Eighty-Four* (1st World Library - Literary Society, Fairfield, 2004).

into people's windows."³⁸⁰ Brennan J continued saying "[w]ho can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent."³⁸¹ Henderson considers this citation of fiction brings forward the meaning and context of the work of literature and allows readers to imagine the acts of surveillance and what flows from those acts.³⁸²

C Concluding Comments

Whether or not one believes that we should turn to literature to develop the moral and ethical capacities of legal actors will depend on what one's view of the role of these legal actors is. There are good arguments supporting the idea that personal ethics and morality should be left out of the law, but there are equally as good arguments supporting the position that it can be valuable to include the personal morality of legal actors to supplement the rules of ethics.

In either event, there remains doubt that literature has the ability to cultivate personal moral capabilities in a way that can contribute to law. However, there are strong arguments supporting the idea that reading literature allows the reader to participate in situations that a reader may not otherwise understand, and that this can lead to a new way of reading and understanding situations, and a new way of legal reasoning. Whether or not this will occur depends on the individual reader and their response to the literature. Although literature may not always contain moral content, it can provide moral guidance to legal actors who read literature. Literature should not aim to force an author's view of a particular situation or morality on the reader, but it should raise ethical questions and issues in scenarios that allow the reader to evaluate the potential outcomes. This could, in turn, have an effect on decision making in real-life. The effect may be more indirect than direct, but it is nevertheless arguable that reading literature can have a valuable effect on the decision making of legal actors.

³⁸⁰ *Ibid*, at 8.

³⁸¹ *Florida v Riley* (1989) 488 US 445 at 446-67.

³⁸² Henderson, above n 266, at 184.

Conclusion

The law and literature movement is plagued with uncertainty, but buried within the various aims and ideas that make up the matrix of the law and literature movement there are strong arguments for how literature can benefit law. And despite strong resistance, authors within the movement have provided powerful foundations for their claims and good examples to support their arguments. This paper explored the relationship between the disciplines of law and literature, looking first at law and literature on an interdisciplinary level, before moving to discuss the specific claims of the law and literature movement that literature can provide a critique of the law; that literature can contribute to legal change; that literature can develop the ethics and morality of the actors operating within the law.

Chapter one sought to challenge the assumption of interdisciplinarity within the law and literature movement. Despite the fact that the disciplines of law and literature may converge on some tasks, the two remain distinct disciplines. However, the two are not so separate and distinct that they can have no meaningful relationship. Although in the past there have been doubts as to the ability of law and literature to contribute to each other because of their “fundamental differences,”³⁸³ it is recognised that this would not necessarily always be the case and that law and literature could share a meaningful relationship.³⁸⁴ However, this is not ‘interdisciplinarity,’ rather the more appropriate term for what the law and literature movement is engaging in is ‘interdisciplinary borrowing.’³⁸⁵ The discipline of literature is borrowing materials from the discipline of law for specific law-related tasks – the tasks of critiquing the law; changing the law; developing the moral capacities of legal actors.

Chapter two then asked whether literature could provide a forum for critiquing the law, and demonstrated that while literature may not provide a technically accurate critique of the law, literature was still able to offer a valuable and accurate critique in the sense that it offered another perspective to the law, namely that of the outsider. Chapter two also demonstrated that while textbooks regarding the law and legal history are important, looking to literature for a critique of the law can add another aspect to the critique by offering a contextual

³⁸³ Posner, above n 11, at 1351, 1355-1359; Fish, above n 58, at 777-781.

³⁸⁴ Fish, above n 20, at 38.

³⁸⁵ Fish, above n 20.

understanding of the law as it operated at the time, as well as offering an alternative vision of reality that can challenge the assumptions of the reader and the reader's reality.

Chapter three then discussed the idea that literature could act as a tool for reforming the law and whether literature's role in society precluded it from participating in legal change. While there were strong arguments that literature's role in society and the purpose of literature did not allow it to participate in changing the law, there were also credible arguments that literature could engage in legal change through its ability to be informative and persuasive,³⁸⁶ and its ability to engender emotions in the reader that could lead to social activism.³⁸⁷ The evidence of literature leading to social change from the examples of *Bleak House* and *The Jungle* was compelling, but not conclusive. There remains hope that literature could lead to social and legal change, but direct evidence of this is difficult to produce.

The final chapter discussed the more controversial claim that literature could contribute to the ethics and morality of lawyers and judges by developing the moral capacities they use in decision-making. Whether or not lawyers and judges should be required to meet a higher moral and ethical standard than in the rules of ethics depends on one's view of the role of legal actors – whether the role is based on the rule of law and the idea that legal actors should act in accordance to strict legal rules, to the exclusion of their own personal morality, or whether one believes that legal actors should be able to supplement the rules and the law with their own moral views. In either event, the law and literature movement provides persuasive arguments supporting literature's ability to develop the moral capacities of legal actors. This is done through surrogate and participatory experiences, which novels create, providing for contextual and sympathetic readings of situations that can shape the way legal actors make decisions in their professions. The development and use of these moral faculties, however, will depend on the individual person and cannot be forced upon the reader. It is the job of literature to present readers with the situation and the readers can then evaluate the situation.

Debate on these issues is far from settled, with authors continuously revising arguments as the field of law and literature grows – this paper only covered a small portion of the claims that the law and literature movement makes. However, there are strong arguments for the law and literature movement that the disciplines of law and literature can contribute to each other

³⁸⁶ Posner, above n 1, at 457.

³⁸⁷ Duong, above n 53, at 13-14.

in a meaningful way, and that the law and literature movement is a valuable movement. Unfortunately, for the moment the contributions and achievements of the law and literature movement continue to remain overshadowed by the uncertainty hovering over the movement.

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