

# Vanderbilt Law Review

---

Volume 43  
Issue 6 *Issue 6 - Symposium: Law, Literature,  
and Social Change*

---

Article 7

11-1990

## Law As Text: A Response to Professor Michael Ryan

Robert N. Covington

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law and Society Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Robert N. Covington, *Law As Text: A Response to Professor Michael Ryan*, 43 *Vanderbilt Law Review* 1787 (1990)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol43/iss6/7>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Law As Text: A Response to Professor Michael Ryan

*Robert N. Covington\**

Law, Professor Michael Ryan reminds us by his emphasis on law as legitimating representation, is also text. This is the most telling of the many points he sets out in his provocative and thoughtful article; for those of us called to the bar, it is an important reminder. For us lawyers, after all, law is not so much text as it is process, not so much noun as verb. It is not that we disregard the fact that law is in part a pen-and-ink affair. Our shelves sag with books; in academic life, few divisions of a university spend so great a portion of the budget on the library as does a law school. It is rare for lawyers, however, to read a volume of a code from cover to cover, or a whole volume of reported decisions, even of the United States Supreme Court. We seek out paragraphs here and there, stumble over subsections, or ferret out helpful passages from opinions much as a carpenter rummages in the wood box to find those bits and pieces that will make the new bookshelves presentable. The text of law is for us tool or obstacle, a starting point for our labor, not an end.

If we lawyers have a chief reason to be grateful to the law-and-literature theorists, surely it is this: They remind us that for much of society, including many of its most articulate and thoughtful members, law is first and foremost text, a text with structure, tone, and syntax. Thus, for those in society who must work with the law, legal text represents a part—arguably an indispensable part—of law's reality.

No doubt our failure as lawyers to think of law as a body of text reflects that, while our skills are generalized, our interests become increasingly particular after we pass the bar examination and apprentice ourselves to become tax lawyers, or labor lawyers, or any one of many specialists within the legal profession. As we thus narrow the focus of our work we narrow also our use of the written law. We disregard most of the available text, instead seeking out increasingly particularized sections of code, opinion, or regulation that conform to our theories of what the law should be.

---

\* Professor of Law, Vanderbilt University School of Law. B.A., Yale University, 1958; J.D., Vanderbilt University School of Law, 1961.

Additionally, it may be true that those of us who are drawn to the law have an uncommon tolerance for ambiguity and inconsistency in text—so long as we still can use the text effectively. For example, the principal lawyer-drafters at the Constitutional Convention of 1787 clearly recognized the irony of proclaiming in its preamble that the purpose of our Constitution is to “secure the Blessings of Liberty to ourselves and our Posterity,”<sup>1</sup> but providing elsewhere in the document for the continuation of the slave trade.<sup>2</sup>

Our tunnel-vision approach to law as text may be appropriate to our calling, but Professor Ryan does well to remind us that it separates us from our fellows, and that we need on occasion to back away from our specialist microscopes and view law as text in a broader and more structural way. Looking at law in this manner may enable us to appreciate more keenly the surprise and dismay many feel a quarter century after the Equal Pay Act of 1963<sup>3</sup> and Title VII of the Civil Rights Act of 1964<sup>4</sup> proclaimed the day of equal treatment for women when reminded that the gender gap in take-home pay actually has narrowed very little.<sup>5</sup> For those who seriously view law as text, it is not wholly unreasonable to read statutes with titles like “Equal Credit Opportunity Act”<sup>6</sup> or “Fair Packaging and Labeling Act”<sup>7</sup> as implying a general societal commitment to leveling the marketplace playing field. We are warned fairly, then, by Professor Ryan that too much lawyerly tolerance for the loose use of text can lead to cynicism not only about us—surely we can live with cynicism as easily as can literary critics and, thus, may not find this worrisome—but also about the structure of law as a whole.

One peculiar danger inherent in our failure to look at the general corpus of law as text is our indifference to how overblown our text has become. Some portions of legal text—the Internal Revenue Code,<sup>8</sup> for example—may have become so complex and unwieldy that they no longer are understood broadly even by those who work with them daily. Such a level of textual complexity may make an individual grappling

---

1. U.S. CONST. preamble.

2. See R. RUTLAND, *JAMES MADISON* 239-41 (1987); C. VAN DOREN, *THE GREAT REHEARSAL* 226 (1982). There was far less awareness, however, of the logical incongruity between proclamations of the rights of the individual and the absence of political recognition of the rights of women. See S. EVANS, *BORN FOR LIBERTY* 45-66 (1989).

3. 29 U.S.C. § 206(d) (1988).

4. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988).

5. A recent Bureau of Labor Statistics study calculated that full-time working women earned 72% of the pay men earned during the second quarter of 1990. *U.S. Workers Still Losing Ground to Inflation, BLS Report Says*, Daily Labor Report (BNA) No. 146, at B-26 (July 30, 1990).

6. 15 U.S.C. §§ 1691-1691f (1988).

7. *Id.* §§ 1451-1461.

8. I.R.C. §§ 1-9602 (1990).

with an administrative agency feel like a powerless character from a Franz Kafka novel. "Due process" in such a situation provides little comfort. Indeed, the idea of a helpless individual trapped in a maze of administrative law may have prompted Professor Grant Gilmore to state: "In Heaven there will be no law, and the lion will lie down with the lamb. . . In Hell there will be nothing but law, and due process will be meticulously observed."<sup>9</sup>

Our gratitude to Professor Ryan for enjoining us to examine law as text with a closer eye for both false promises and false premises, however, need not blind us to certain weaknesses in his case. Let us turn to just one of these.

Professor Ryan understates the strength and continuing vitality of the tradition of dissent in American literature and discourse. While at times he takes care to aim his barbs only at what he characterizes as a "dominant" tradition, at other times he couches his indictment in more universal terms. To assert that the social-cultural-political representation found in the American press is one-voiced and inevitably pro-right clearly is misleading. Coverage of the recent rapid changes in Eastern Europe have evoked not just self-congratulatory editorials of the "we're always right" sort, but also cartoons<sup>10</sup> and articles<sup>11</sup> which observe that American politicians and business executives cheering on the demise of Communist regimes in Eastern Europe might find themselves seriously discomfited by the ideologies and practices emerging there.

Perhaps Bobby Weir of the Grateful Dead lies outside the range of those who contribute to our political-cultural representation, in a narrow traditional sense, but certainly from Brendan Byrne Arena in the Meadowlands to Henry Kaiser Stadium on the San Francisco Bay, he has led tens of thousands to chant that when "pinstriped bosses roll the dice / any way they fall guess who gets to pay the price / money green from proletarian grey / selling guns instead of food that day."<sup>12</sup>

I would not dispute for a moment that many a novel, many a politician's speech, many a junior high civics text, and many a treatise have presented the sort of representation Professor Ryan decries. Nor do the advocates of totally unrestrained laissez faire give up easily or fade from the scene. In the course of this past decade laissez-faire advocates have demonstrated that they are as clever and ingenious as ever. "Trickle down" became "supply side" in the twinkling of a conservative

---

9. As recounted in QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS 217 (E. Gerhart ed. 1988).

10. See, for example, the cartoon by Michael Luckovich in NEWSWEEK, Mar. 12, 1990, at 17.

11. See, e.g., Greider, *The Morning After*, ROLLING STONE, Feb. 22, 1990, at 46, 51.

12. Bob Weir & John Barlow, "Throwing Stones" as recorded by the Grateful Dead, on *In The Dark* (Arista Records 1987).

eye. With amazing agility, those willing to let the state sidle its way into the bedroom to censure the sexual practices of consenting adults<sup>13</sup> persuaded Congress that the state had no business sticking its nose into the boardrooms of financial intermediaries.<sup>14</sup> "Deregulation" became the banner cry of the day. We still are assessing the costs of deregulating the lending and interest-paying practices of our thrifts, with a price tag now exceeding 150 billion dollars.<sup>15</sup> How much of that debacle is to be laid at the feet of the guileful among savings and loan executives, and how much at the feet of the guileless, we cannot say yet and never may be able to estimate. Clearly, however, it is an instance in which the "interest of the larger group" of which Professor Ryan speaks—the larger group being us taxpayers in this instance—was ill-protected by our elective representatives, who were swept along on a torrent of free enterprise rhetoric.

My criticism, then—if I fairly may use the term colloquially when responding to a practitioner of criticism—is not that Professor Ryan errs when he tells us that a variety of rogues have appropriated the term "liberty" on occasion to mean the chance to get rich by grinding others into the mud. Nor is he in error to say that there have been a host of authors—some of them academics, some of them lawyers—ready to prepare long-winded apologies for this appropriation of the word, or for the disenfranchisement of women or minorities. My difficulty is that Professor Ryan sketches out this usage so deftly that we might be inclined to believe that the usage of "liberty" and "freedom" to mean laissez-faire capitalism has been universal, that the robber barons committed their thievery without detection or condemnation, that white supremacists and male chauvinists have reigned unchallenged.

One need not turn to rock lyrics or indeed to any of what might be termed "pop culture" to find the contrary. Oft-reprinted works likely to be found on many middle-class American bookshelves have presented their readers with a less one-dimensional view. Certainly the superiority of male character and resolve does not reveal itself to the reader of the story of Hester Prynne;<sup>16</sup> nor does James Fenimore Cooper depict Na-

---

13. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

14. See White, *The Partial Deregulation of Banks and Other Depository Institutions*, in *REGULATORY REFORM: WHAT REALLY HAPPENED* 169-209 (L. Weiss & M. Klass eds. 1986).

15. As of August 1990 sources estimated that the total cost of the savings and loan crisis would exceed \$500 billion and possibly reach the \$1 trillion mark. Gorey & Hornick, *No End in Sight*, *TIME*, Aug. 13, 1990, at 50.

16. See N. HAWTHORNE, *THE SCARLET LETTER* (1935). The struggle by women seeking political representation did not occur on any organized basis until roughly 1850, but from that point on the movement grew rapidly. See generally S. EVANS, *supra* note 2, at 93-143. As a labor lawyer, it is interesting to note that economic strike activity preceded this political activism by several years.

tive Americans as uniformly—or even typically—incompetent, insensitive, or immoral as compared with their Anglo-American foes, even when writing from a clearly Anglo perspective.<sup>17</sup> Indeed, as Professor Albert Keiser's 1933 survey showed, the portrayals of Native Americans have varied substantially since the late eighteenth and early nineteenth centuries.<sup>18</sup> Nor has the American writer been all that kind to the capitalist. Whether novelist—like Frank Norris, the author of *The Octopus*<sup>19</sup>—or journalist—Lincoln Steffens leaps to mind, of course<sup>20</sup>—the American writer has seen the business tycoon as something less than heroic much of the time. Do not take the word, however, of a poorly read lawyer. Try the delightful chapter in Professor Emily Stipes Watts's *The Businessman in American Literature* entitled "The Boobus Americanus and the Artist."<sup>21</sup> The sort of stereotyping Professor Ryan suggests is more prevalent, admittedly, in the case of Afro-Americans, particularly Afro-American women, but even in that instance, a change in depiction had begun to emerge by the years following the Second World War.<sup>22</sup> Sympathetic portrayals of homosexuals, he rightly implies, have been relatively rare.<sup>23</sup>

Formal dissent is, naturally, a long-honored practice in judicial opinions; perhaps that is what makes an academic lawyer especially conscious of dissenting traditions elsewhere. The dissenting opinion of Justice John Harlan in *Plessy v. Ferguson*<sup>24</sup> denouncing the concept of

See *id.* at 81-84.

17. See J.F. COOPER, *LAST OF THE MOHICANS* (1983).

18. A. KEISER, *THE INDIAN IN AMERICAN LITERATURE* (1933). One can, of course, quarrel with some of Professor Keiser's readings, but that the portrait of this ethnic group is not uniformly one of inferiority clearly is validated by the references he makes. For further reading, one might consult the bibliography in K. LINCOLN, *NATIVE AMERICAN RENAISSANCE* 285 (1983).

19. F. NORRIS, *THE OCTOPUS* (1958).

20. See, e.g., L. STEFFENS, *SHAME OF THE CITIES* (1957).

21. E. WATTS, *THE BUSINESSMAN IN AMERICAN LITERATURE* 81 (1982). She begins another chapter: "Most businessmen depicted in post-1945 television and serious literature are still characterized as greedy, unethical, and immoral (or amoral) . . ." *Id.* at 150.

22. See T. HARRIS, *FROM MAMMIES TO MILITANTS* 111-33 (1982).

23. It is arguable that positive portrayals of homosexuals are most likely to come from persons of literary talent who themselves are homosexual and that these persons were unwilling to write in this vein until recently. See generally S. ADAMS, *THE HOMOSEXUAL AS HERO IN CONTEMPORARY FICTION* (1980); R. AUSTEN, *PLAYING THE GAME* (1977). Austen's position is that not until Gore Vidal's *The City and the Pillar* (1948) was there a major character in a major novel by a major writer who was clearly and explicitly homosexual. R. AUSTEN, *supra*, at 118. Adams clearly agrees, and opens his work with a treatment of Vidal. S. ADAMS, *supra*, at 15-34. French critic George-Michel Sarotte suggests that American writers have a very difficult time accepting the notion that truly virile men can form couples and instead depict the male homosexual relationship as involving either a sadist or a highly feminine male. G. SAROTTE, *LIKE A BROTHER, LIKE A LOVER* 292-305 (1978).

24. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting). It is interesting to note how contemporary some of the opinion seems, as when, for example, Justice Harlan asserts that all individuals have "pride of race." *Id.* at 554 (Harlan, J., dissenting).

“separate but equal” facilities is a famous example. This Symposium opened examining the life of a Justice known as “The Great Dissenter.”<sup>25</sup> There surely never has been a period when the importance of dissent on the bench was as clear as the mid-1930s, the period when laissez-faire economics seemed to have its strongest hold on the American legal system. Because the struggle over “freedom of contract” in that era of Supreme Court jurisprudence has been well chronicled many times,<sup>26</sup> let me note a more homespun illustration from Tennessee law. *Payne v. Western & Atlantic R.R.*<sup>27</sup> is an oft-cited 1884 case credited with establishing the doctrine of employment at will. The employment at will point actually is developed far more extensively in the majority opinion than was necessary. I have asserted elsewhere<sup>28</sup> that the reason for the frequent citation of the opinion was the vigor of its language: “The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose . . . .”<sup>29</sup> What often is overlooked is that *Payne* was decided by a single vote, three to two. In the dissent, Judge Thomas Freeman wrote:

In view of the immense development and large aggregations of capital in this favored country—a capital to be developed and aggregated within the life of the present generation more than a hundred fold—giving the command of immense numbers of employes [sic] . . . it is the demand of a sound public policy, for the future more especially, as well as now, that the use of this power should be restrained within legitimate boundaries.<sup>30</sup>

In law, then, as in literature, the tradition of dissent, of skepticism about all the promises and premises of laissez faire, of caution about its social, economic, and political impact is an honored tradition. Dissent, too, is part of the sociocultural “representation” that is the background fabric of much of legal thought.

My two final comments must be made much more succinctly. One is essentially an invitation, not to Professor Ryan alone, but to others engaged in the same sort of analysis, to consider the implications of that analysis for private law, particularly the law of contracts. Individuals as well as entities surrender goods and services on a regular basis in

---

25. See White, HOLMES AS CORRESPONDENT, 43 VAND. L. REV. 1707 (1990) (referring to Oliver Wendell Holmes).

26. See, e.g., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 976-80 (E. Corwin rev. ed. 1953).

27. 81 Tenn. 507 (1884).

28. See Covington, *Employment at Will in Tennessee: Expect Reasonable Changes*, 17 MEM. ST. U.L. REV. 363, 365 (1987).

29. *Payne*, 81 Tenn. at 519.

30. *Id.* at 542-43 (Freeman, J., joined by Turney, J., dissenting). It would be unfair, however, to list these opinions without noting that the refusal of the Supreme Court to find that denying a woman admission to the bar of a state did not constitute a violation of the Constitution occurred with only a single dissenting vote and no written opinion.

our society in exchange for the words of promises. A substantial theoretical discussion has developed in recent years about whether we ought to enforce contracts because they are promises, or whether we ought to enforce contracts because it is socially useful to do so in some circumstances.<sup>31</sup> Some of Professor Ryan's comments about the abuse of economic power suggest that those who share his framework might have things to say about these private law matters as well as the public law issues he has addressed today.

Finally, a word about Professor Ryan's suggestion of a possible solution to the perceived problem of political impotence on the part of ethnic minorities and women: election districts in which all voters would be women, or Polish-Americans, or WASPs. Political subdivisions based on race, sex, or ethnicity, as opposed to geography, are not a totally new idea. The Voting Rights Act of 1965<sup>32</sup> provides for the redrawing of political district election lines to give previously disadvantaged racial minorities a more potent voice at the ballot box. In 1982 Congress amended the original statute to broaden the availability of this remedy to those cases in which the use of a given election district system resulted in a discriminatory impact upon racial minorities, not just in cases in which a discriminatory impact actually was intended.<sup>33</sup> During the development of these amendments, Senator John East, a North Carolina Republican, suggested the addition of gender discrimination and religious discrimination as acts prohibited by the statute.<sup>34</sup> His proposal was rejected, however, and gender and religion remain unprotected classes under current voting rights law.

It is possible to argue that the Senator's proposal really was not intended to advance the causes of women's rights or religious freedom. Senator East was unenthusiastic about the underlying legislation, and his colleagues possibly rejected the amendment simply because it was not put forward with zeal or conviction.<sup>35</sup> Before dismissing the rejection of those proposals as totally accounted for on that *ad hominem* basis, however, one should recall that gender discrimination was added

---

31. This gross oversimplification is clearly the Author's awkward and inadequate effort to give at least a sense of the positions of Professors Charles Fried and Grant Gilmore, respectively. They certainly are much better presenters of their own views. See C. FRIED, *CONTRACT AS PROMISE* (1981); G. GILMORE, *THE DEATH OF CONTRACT* (1974).

32. 42 U.S.C. §§ 1973 to 1973dd-6 (1988).

33. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973).

34. S. REP. No. 417, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 180-81.

35. See the separate remarks of Senator East. *Id.* at 201, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 370.



at the last minute to Title VII of the Civil Rights Act of 1964<sup>36</sup> when proposed by conservative Democrat Congressman Howard Smith, who also lacked enthusiasm for the underlying bill, in an apparent effort to defeat the legislation.

The rejection of the proposed amendment to the Voting Rights Act by a majority that included several well-known advocates of equal rights legislation<sup>37</sup> in my view was well advised. Proposals such as this raise logistical and administrative difficulties of an ideologically painful sort, such as how many electorates to create. For example, what of a separate district for Irish-American Catholic women over forty? As soon as one urges that we ought not to submerge the identity of "female-ness" by representing that female in Congress through a male, it becomes difficult indeed to identify what other aspects of the complex factors that make up each of our personal identities should be protected as well. Should there be a district for the unemployed? If so, should that be subdivided by length of unemployment? By skills? By whether the unemployment is caused by import competition? Dividing the electorate by certain defined characteristics can contribute also to the development of more and more single-issue politicians. This, in turn, can be expected to lead to a marked increase in the level of dissonance in public debate and discussion.

We Americans already live with a level of vigorous dissonance in our public discussion that is greater than that in much of the world. How much more can be tolerated? Obviously, none of us can know, but probably a bit more than at present. The political system at the federal level does not seem to show signs of collapse just yet. But can we tolerate the level of dissonance required to live with the fragmentation envisioned by Professor Ryan's proposal?

Professor Ryan would argue that I make too much of the importance of the perception of dissonance and disorder in governance. We meet today under the banner of "Law AND Literature." "Law" is a term that seems to invite use with conjunctives. Courses on "Law and Economics," "Law and Sociology," and "Law and the Status of Women" have sprung up in many curricula. Over the years "law" has been juxtaposed with three other terms with uncommon frequency: "Law and Justice," "Law and Liberty," and "Law and Order." Men and women of all sorts and conditions, of all races and creeds, have labored and even fought and died in the name of all of these. My own reading

---

36. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988).

37. Senators Joseph Biden, Edward Kennedy, and Howard Metzenbaum, for example, opposed both amendments. S. REP. NO. 417, *supra* note 34, at 77-78, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS at 256-57.

of history is that of the three, it is the last of these—law and order—that exacts the highest price from the human spirit, but it is also law and order for which most of us are willing to pay the highest price. The perception that government is not governing justly may give rise to unrest and change; the perception that government is not governing at all is certain to bring change—and the likelihood is that the change may be one that forfeits both justice and liberty for order. It is a sobering concern.

