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The Place of Law and Literature

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REVIEW ESSAY

The Place of Law and Literature

LAW AND LETTERS IN AMERICAN CULTURE. By Robert A. Ferguson. Cambridge, Mass. and London: Harvard University Press, 1984. Pp. 417. $22.50.

THE FAILURE OF THE WORD: THE LAWYER AS PROTAGONIST IN MODERN FICTION. By Richard H. Weisberg. New Haven, Conn. and London: Yale University Press, 1984. Pp. xvi, 218. $19.50.

WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY. By James Boyd White. Chicago and London: The University of Chicago Press, 1984. Pp. xvi, 377. $25.00.

*Reviewed by William H. Page**

I. INTRODUCTION

The modern field of law and literature began in 1907 with the publication of Wigmore's list of novels related to law.[1] The form of that work is significant because for decades, the field remained largely one of reading lists assembled to broaden the perspectives of practicing lawyers.[2] In literary scholarship, law and literature

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1. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908); *see* Papke, *Law and Literature: A Comment and Bibliography of Secondary Works*, 73 L. LIBR. J. 421 (1980); *see also* Suretsky, *Search for a Theory: An Annotated Bibliography of Writings on the Relations of Law to Literature and the Humanities*, 32 RUTGERS L. REV. 727 (1980).

2. Suretsky, *supra* note 1, contains a chronological bibliography. The reading lists' function of broadening the perspectives of practicing lawyers should not be minimized. A modern, sophisticated application of the reading list is "Doing Justice: Literary Texts, Professional Values, and the Judicial System," a judicial-education program of the Massachusetts Foundation for Humanities and Public Policy.

scarcely could have been called a field; critics discussed the effects of law on the work of various writers, often perceptively,[3] but their studies were independent of each other and of legal scholarship. In the past decade, however, law and literature has shed its nonprofessional heritage and has emerged as a truly interdisciplinary field of study[4] with such trappings as scholarly conferences,[5] symposia in law journals,[6] law school courses, and permanent organizations.[7] The influence of hermeneutics is such that "the footnotes in the kind of constitutional law articles that used to cite Rawls and Nozick now increasingly refer to works of literary theory."[8] Despite these outward manifestations of maturity, the subject matter of law and literature remains poorly defined even in the minds of those lawyers and literary scholars who recognize it as a field.[9]

This lack of clear identity is not a problem in more established interdisciplinary fields. For example, the subject matter of law and economics, a field that has been rigorously academic from its inception,[10] is nothing if not well defined.[11] Law and economics is not simply the application of economic techniques to legal problems; the approach carries with it a set of concerns, a theory of value, a conception of human behavior, and a view of the role of the state, all of which have important jurisprudential consequences.[12] An interdisciplinary field has reached maturity when its techniques have

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3. Papke, *supra* note 1, contains a bibliography of criticism arranged according to the novelist or dramatist discussed.

4. This metamorphosis of law and literature was heralded in two works by J. Allen Smith. Smith, *The Coming Renaissance in Law and Literature*, 30 J. LEGAL EDUC. 13 (1979); Smith, *Aspects of Law and Literature: The Revival and Search for Doctrine*, 9 U. HARTFORD STUD. IN LITERATURE 213 (1977), *see also* Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965).

5. Major conferences on law and literature in recent years have included *The Law and Southern Literature*, 4 MISS. C.L. REV. ____ (1984) (Jackson, Miss., Oct. 21-22, 1983); *Terror in the Modern Age: The Vision of Literature, The Response of Law*, 5 HUM. RTS. Q. No. 2 (1983) (Waltham, Mass., May 1-2, 1982); and *A Moral Critique of Law: The Example of Melville*, (Princeton, N. J., June 20-21, 1980).

6. *See, e.g., Symposium, Law and Literature*, 60 TEX. L. REV. 373 (1982); *Symposium: Law and Literature*, 32 RUTGERS L. REV. 603 (1979).

7. These permanent organizations include the Law and Humanities Institute and the Law and Humanities Section of the Association of American Law Schools.

8. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984).

9. *See* Suretsky, *supra* note 1, at 730.

10. *See* Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-70*, 26 J. L. & ECON. 163 (1983).

11. Unlike other fields, law and economics boasts several first-rate journals. The subject matter of the field can be gleaned from the editorial policies of *The Journal of Law and Economics* and the *Journal of Legal Studies*.

12. *See Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

produced a substantive content that can be examined critically.

Any field must overcome an inherent ambiguity if the simple conjunction of "law and" is used to designate the field. In law and literature, for example, the subject matter of the field sometimes is divided between the law *in* literature and the law *as* literature.[13] The law *in* literature encompasses the analysis of depictions of legal topics—lawyers, trials, the effects of legal doctrines, and so forth—in literature. This area is necessarily circumscribed by the canon of so-called legal novels or drama, however broadly defined.[14] The law *as* literature is much more difficult to define. At one level, it involves reclaiming from the vast body of legal documents—constitutions, arguments, opinions—works of literary merit, and studying them for their aesthetic qualities.[15] At another level, it involves the application of the techniques of literary criticism to legal texts.

Some of the work in law and literature does not fit neatly into this conventional dichotomy. One major conference, for example, compared literary and legal responses to a social question as a way to broaden the perspectives of both fields.[16] Other work examines the transferability of skills from literary to legal study. The field may also include literature in the law—for example, the area of censorship.

The breadth of this catalog of concerns is an obstacle to developing an account of the relationship between law and literature. Some materials suggest that the relationship between law and literature is one of perpetual antagonism—the writer is an outcast hurling literary barbs at the legal establishment. The historical separation of professional study of the two fields lends credence to this view. Yet, the common concerns of law and literature with the medium of language and with human relations suggest an actual or potential harmony. The remarkable publication within the past year of three major synthesizing works,[17] in a field strangely lack-

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13. THE LAW IN LITERATURE and THE LAW AS LITERATURE are the titles of the two volumes of Ephraim London's anthology THE WORLD OF LAW (1960). The distinction is used analytically in Weisberg & Barricelli, *Literature and Law*, in INTERRELATIONS OF LITERATURE (J. Barricelli & J. Gibaldi eds. 1982).

14. *See* Weisberg & Kretschman, *Wigmore's "Legal Novels" Expanded: A Collaborative Effort*, 7 MD. L. FORUM 94 (1977); Wigmore, *supra* note 1; Wigmore, *One Hundred Legal Novels*, 17 ILL. L. REV. 26 (1922).

15. *See, e.g.*, Weisberg & Barricelli, *supra* note 13, at 161-74.

16. *See Terror in the Modern Age: The Vision of Literature, The Response of Law*, *supra* note 5.

17. R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984); R. WEISBERG, THE

ing in book-length studies,[18] offers an occasion for considering this central issue.

The authors of all three of these books are lawyers with professional degrees in literature. Richard Weisberg and James Boyd White are law professors who have dominated the field of law and literature in recent years: White as the author of *The Legal Imagination* and a leading theorist of interpretation;[19] Weisberg as a founder of the Law and Humanities Institute and author of articles on the depiction of legal topics in the modern novel.[20] Robert Ferguson, in contrast, is an English professor who has not been deeply associated with law and literature. Yet Ferguson's work provides the historical and literary starting point for a unified conception of the field.

Law and Letters in American Culture looks back to a time in American history, between 1765 and 1840, when law and literature were fused both professionally and intellectually. Joseph Story in 1829 expressed the era's dominant view when he stated that the study of law required "a full possession of the general literature of ancient and modern times."[21] Most prominent writers and critics were lawyers who viewed the law as their primary occupation; the professional writer or scholar was virtually unknown. At the same time, most lawyers, at least among the elite of the bar, were well educated in literature, especially in the Greek and Roman classics. Lawyers viewed a knowledge of these literary works as a professional necessity in an era in which oratorical eloquence and reference to universal principles were keys to success in the courtroom. This professional fusion of the disciplines carried with it an intellectual interdependence as well. The lawyer-writers of the time could not separate their professional training from their literary aspirations. Yet by the Civil War, the professional and intellectual interdependence of law and literature had dissolved.[22] The concerns of legal study became progessively more technical and indif-

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FAILURE OF THE WORD: THE LAWYER AS PROTAGONIST IN MODERN FICTION (1984); J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984).

18. Notable exceptions are C. LANSBURY, THE REASONABLE MAN: TROLLOPE'S LEGAL FICTION (1981) and M. BALL, THE PROMISE OF AMERICAN LAW (1981).

19. *See, e.g.*, White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

20. *See, e.g.*, *How Judges Speak: Some Lessons on Adjudication in* Billy Budd, Sailor *with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

21. *Value and Importance of Legal Studies*, in R. FERGUSON, *supra* note 17, epigraph.

22. *Id.* at 199-206.

ferent to literature, while the concerns of literature became more individualistic and hostile to the operation of positive law. Ferguson's book concludes with an account of the causes of this rift.

The historical rift formed the basis for the modern relationship between law and literature. Both Weisberg's book and White's book are responses to the rift, even though neither work refers to Ferguson's book or to each other. Weisberg's *Failure of the Word* pursues the implications of the rift across modern world literature. His treatment of the almost universal depiction of lawyers as using the language of the law to gain power over less articulate but more complete characters sheds light on the modern antagonism between law and literature. In contrast, White's *When Words Lose Their Meaning* attempts to reestablish a fusion of law and literature based on a knowledge of classical and world literature and on a sophisticated conception of the nature of language.

In this Review Essay, I will examine Ferguson's account of the lost configuration of law and literature and the differing responses of Weisberg and White to the continuing rift between law and literature. These three books when read together reveal not only the breadth of the field of law and literature but also the fundamental unity of the field's concerns. With the insights of these excellent new studies in view, we can begin to define the subject matter of the field.

II. FERGUSON: THE LOST CONFIGURATION

Ferguson's goals in *Law and Letters in American Culture* are many, but among the most important is the definition of a previously unrecognized period in American literature between the Great Awakening and the American Renaissance. This period, viewed by most readers as a wasteland interrupted by a handful of works of minor interest, emerges in Ferguson's analysis as a fertile era whose canon[23] is defined by "the configuration of law and literature."[24] This configuration is an extraordinarily complex intellectual union that dictated both a literary dependence on law and a legal dependence on literature. In Ferguson's hands, however, the configuration has remarkable descriptive and analytical power. Ferguson's description of the configuration shows that works thought to be purely legal are properly understood as part of gen-

23. The formation of literary canons is exhaustively explored in CANONS (R. von Hallberg ed. 1983).

24. R. FERGUSON, *supra* note 17, at 8-10.

eral literature and that works of fiction, drama, and poetry were strongly influenced by the law.

The configuration of law and literature was related to the well-known Enlightenment faith in the unity of all knowledge.[25] Ferguson, however, has not highlighted artificially one aspect of that faith. The configuration he describes is unique in its practical economic basis and its profound aesthetic effect on the principal literary works of the period.

By building on the earlier work of Perry Miller,[26] Ferguson demonstrates that law and the legal profession were at the intellectual and political heart of post-revolutionary America. Although the colonial view was distinctly antilawyer, the needs of the new republic to establish its legitimacy and to impose order on its vast holdings dictated a reliance on law. Lawyers who took control of the revolutionary effort sought to justify rebellion by reference to inalienable rights deriving from natural law as expressed from time immemorial in the common law of England. Blackstone's great synthesis of English law supplied the needed connection between natural and positive law, allowing lawyers such as Jefferson and Paine to rely on these great generalities to urge and justify rebellion.[27]

American lawyers exploited their pivotal role in the revolutionary effort to control the agenda of intellectual debate in the early republic; lawyers became the cultural guardians of the era because of the reliance the precariously situated republic placed on law.[28] Lawyers displaced the clergy as leaders by connecting religion and tyranny and by urging the necessity of separation of church and state. Later, lawyers successfully fenced the military out of a significant role in government after Washington's presidency through polemics against standing armies and dire warnings of the rise of an American Caesar. Legal argument and judicial decisions became the focus of analysis and reform in the new nation. Judicial interpretation was pictured as serving the central role of correcting errors made in the haste of congressional action by bringing to bear the principles of the ages. John Marshall, Ferguson points out, cited no cases in his greatest constitutional decisions, relying instead on self-evident truths.

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25. *See, e.g.*, H. COMMAGER, THE EMPIRE OF REASON (1982).

26. P. MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR (1965).

27. R. FERGUSON, *supra* note 17, at 12-16.

28. *Id.* at 24-28.

Lawyers took as their purview the whole of human knowledge, especially the classics. In an era of generalists, practitioners often appealed to literature as well as precedent. Underlying this breadth of interest was the Enlightenment faith that accumulation of knowledge would lead finally to the kind of unified vision achieved by Blackstone. Law could be fused with both literature and ethics to reach an immanent harmony. This view appealed strongly to intellectuals concerned about the stability of the new republic. As Ferguson states, "Science, system, and national identity merged in law to form the 'nice links and beautiful dependencies' early republicans needed to create intellectual coherence within a cultural vacuum."[29] This view of law formed the basis for the era's "legal aesthetic": "The greatest difficulty for the writer of the period was to resolve and, failing that, to circumscribe the unknowns within his experience . . . . [T]he vision of control within eighteenth-century legal thought and the lawyer's faith in universally applicable forms provided ready answers to a serious literary problem."[30]

Ferguson uses as the prototypical example of this faith Jefferson's *Notes on the State of Virginia*. On the surface, Jefferson's work appears to be a hodgepodge of geographical facts and social commentary, but it emerges in Ferguson's discussion as a carefully designed piece, patterned on the great legal and political treatises of the age. Law provided the organizing principle for Jefferson's analysis of the condition and prospects of the new republic. But one must question, I think, whether Jefferson's conceptualization of the role of law is sufficient to unify his encyclopedic work aesthetically.

Lawyers were foremost in framing the Constitution—"visible proof . . . of the bond men saw between knowledge, virtue, and the act of writing."[31] But the creation of the Constitution left lawyer-writers with the continuing duty of educating the public through literary expression. Within the configuration of law and literature, general education was necessary to the survival of the nation.[32] The lawyer-writer considered the transmission of classical learning the central civic task of his profession. Classical learning in briefs, oratory, and judicial opinions as well as in the overtly literary works of prominent lawyers like Story and Kent remains as evi-

29. *Id.* at 32.
30. *Id.* at 33.
31. *Id.* at 64.
32. *Id.* at 75-78.

dence of the lawyer-writer's mission. Literature was valued "for what it could do rather than for what it was."[33]

The heart of Ferguson's book is its discussion of the effect of the configuration on the leading lawyer-writers of imaginative literature during the period. The configuration dictated that a lawyer-writer could no more forsake the law than he could ignore the classics. Writing was justified as a service to the nation, and therefore was expected to advance the unification of the republic by instilling universal values in the populace. Moreover, a lawyer was supposed to be a man of action and could not responsibly forsake the practice for the contemplation of the study. Paradoxically, one of the most significant discoveries of Ferguson's study is that the greatest works of the period were created not by those who forced their art into the framework dictated by the configuration of law and literature but by those who rejected that framework. Ferguson devotes only a chapter to three successful lawyers of the period who also wrote literature, John Trumbull, Royall Tyler, and Hugh Brackenridge. In contrast, Ferguson devotes a chapter to each of the failed lawyers who devoted at least a portion of their lives exclusively to literature, Charles Brockden Brown, William Cullen Bryant, and Washington Irving. The lawyer-writer's search for equilibrium between the demands of law and letters, it appears, did not produce as much literature as it did the vocational anxiety that accompanied the abandonment of a legal career. The artificial constraints imposed by the configuration inevitably created tensions in the best literary minds of the age, who were drawn to personal and social concerns denied by the configuration.

The lawyer-writers who bent their art to the requirements of the configuration had some success in precise descriptions of republican society and in the use of satire. Brackenridge's picaresque novel *Modern Chivalry* satirized Jeffersonian democratic ideals through its descriptions of mob behavior in the countryside.[34] But the sacrifice in emotional range and the larger demands of their art were clearly greater. While the configuration of law and literature allows us to view these forgotten works in a new light and to appreciate the perspective they gave republican society, the new light does not reveal an unjustly neglected greatness.

In contrast, the lawyer-writers who rejected the law and transformed their sense of guilt and rebellion into poetry and fiction

33. *Id.* at 84.
34. *Id.* at 120-28.

were the most successful authors of the period. Brown's gothic novels like *Wieland* convincingly reflect the futility of the law's efforts in the face of the irrational.[35] Perhaps the most illuminating discussion in this portion of Ferguson's book is of Irving's *History of New York*. When viewed as a "photographic negative" of Jefferson's *Notes on the State of Virginia*,[36] Irving's comic masterpiece reveals its greatness, satirizing the rambling, comprehensive treatises of the day and ridiculing the goal of establishing a just social order through a regime of law. Although many of Irving's works are great, his works are greatest when they are most subversive.

By the Civil War, the configuration of law and literature had collapsed, Ferguson says, for three reasons. First, the rise of legal specialization eroded the professional dependence of lawyers on general literature. Specialization placed paramount emphasis on technical expertise[37] and far less emphasis on political service and oratorical eloquence. Second, the democratization of the bar by the influx of lawyers without classical education caused a breakdown of the professional elites that had dominated the bar in earlier decades.[38] Third, in line with Jacksonian conceptions, positive law, particularly in the form of codes, increasingly was seen as a utilitarian device for advancing political policies rather than as an expression of an underlying natural order.[39] Correlatively, because the lawyer was no longer a cultural guardian but the agent for narrow political interests, lawyers were forced to abandon the lofty principles of the early republic for a series of compromises. When these compromises failed, particularly in the case of slavery, lawyers bore the opprobrium. "The lawyer's truth," wrote Thoreau, "is not truth but consistency or a consistent expediency."[40]

Ferguson uses the career of Daniel Webster to illustrate the changes in the intellectual climate of the period. No orator has so commanded the attention and devotion of America; his speeches both in court and in the political arena were aimed at unifying the nation under the Constitution by establishing a sympathy between speaker and audience. Ferguson writes, "He was the lawgiver deliv-

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35. *Id.* at 138-42.

36. *Id.* at 154-67.

37. *Id.* at 199-200, 230-31.

38. *Id.* at 201-02.

39. *E.g., id.* at 288-90. Ferguson recognizes the complexities of the relationship between positivist and natural law theories in this period, and does not rest his argument on a thorough account of them. *See id.* at 391 n.58.

40. *Id.* at 238 (quoting H. THOREAU, *Civil Disobedience*, in 4 THE WRITINGS OF HENRY DAVID THOREAU 384 (1906)).

ering the word to a waiting people, and his first readers inevitably held that image when they made his published works an absolute standard. The collected orations gave the best available summary of American purpose."[41]

Webster's Olympian stature was gradually eroded, however, by the issue of slavery. The existence of slavery made a mockery of the assertions by lawyers of the era, including Webster in his earlier years, that a harmony existed between natural and positive law. Gradually, Webster abandoned the claim to support from higher law and came to rely on the Constitution as the sole embodiment of law. At the same time, he abandoned the claim to an eternal moral principle and came to rely on compromise as embodying its own moral principle. At this point the literary and legal imaginations began their radical separation.

> The moral outrage of the antislavery movement and the creative impulses of the American Renaissance ran together at mid-century, mixing a language of prophetic warning with radically private modes of expression. Out of this combination came a fresh perspective on moral issues, a perspective that regarded the legal mind as a natural enemy.[42]

Webster, as the embodiment of the configuration of law and literature, was the most inviting target for the new generation of writers, who valued personal feeling and introspection over political oratory and legal argument.

Changes in the legal profession and its conception of law also were weakening the links between law and literature. The legal profession that Richard Henry Dana entered in 1840, just after publishing his masterpiece *Two Years Before the Mast*, was moving toward specialization and an instrumental view of law that gradually would draw him away from literature.[43] As lawyers began to abandon natural law, however, Romantic writers claimed it. The Romantic writers embraced private, prophetic visions and assumed a dissenting role as lawyers became agents of narrower interests. Works like *Civil Disobedience, The Scarlet Letter,* and *Moby Dick* held the established order to account against a higher system of values. The American Renaissance also eroded the period's most cherished views of the duties of the writer. Whitman's poetry and the essays of Thoreau and Emerson, though deeply concerned with defining the nation, exalted the individual's personal search for truth over a faith in a civic identity. Finally, writers were moving

41. *Id.* at 213.
42. *Id.* at 235.
43. *Id.* at 265.

toward greater psychological and philosophical complexity. They rejected falsifying conceptualizations of the nation in favor of openness to its infinite variety. Their language reflected these ambiguities.

> This new aesthetic of the American Renaissance excludes the legal mind from literary enterprise. Hawthorne can describe the possibilities in a moonlit room, and Melville can tell Hawthorne that "truth is ever incoherent," but in the law reality is always otherwise. Practitioners with clients must deal in facts, certainty, affirmation, and assurance. They accept complexity and nuance only to solve problems. Reason is their tool; institutional continuity, their control. Of the emotional vortices and philosophical doubts that undermine the professional search for answers, they have little to say. Plays upon the ambiguous, the unique, and the bizarre—these possibilities excite the modern writer, and they also run counter to every lawyer's interests and goals. Since 1850, the best American writers have aimed for an original show of consciousness. Lawyers have thought ever more consciously of standards, norms, and rules.[44]

The giants of the configuration of law and literature—Webster, Story, Kent, Marshall, and Adams—viewed the social and political changes around them with despair for the fate of the union. Their reliance on a republic of stable institutions guided by elites was inconsistent with the rapid trend toward participatory democracy. At the same time, their very classicism taught them that change and especially unbridled democracy would lead the republic toward destruction. Some lawyers, like the revivalist Charles Finney and the indefatigable reformer David Dudley Field, maintained an optimistic outlook only by substituting a new universal vision for the configuration of law and literature.[45]

The changes of the era forced intellectuals to choose either the path of romanticism—turning toward emotion and psychological complexity—or modern professionalism—turning toward a community of specialized scholars. Lawyer-writers were left without a role in this new scheme. In the latter part of the nineteenth century, the split between law and literature became institutional. Langdell introduced the case method at the Harvard Law School, fencing off the study of law from external influences and seeking to establish law as a science unto itself. Holmes announced his extreme brand of positivism, which repudiated vaguely stated general principles for precision in the analysis of legal doctrines.

> Modern lawyers would enfold themselves and their subjects in expertise.

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44. *Id.* at 271-72.
45. *Id.* at 273-86.

> The price of their intellectual precision would be a deliberate rejection of comprehensive ideas and a corresponding loss in communicative power. Legal knowledge in the twentieth century would reach only the few; it would have less and less to do with America's general search for self-expression.[46]

Ferguson's description of the rift between law and literature understandably does not take account of the importance of conceptually oriented academic lawyers in the development of recent legal thought. In the 1960's scholars began to apply the insights and techniques of various other disciplines, especially philosophy and the social sciences, to legal problems. In so doing, these scholars manifested a renewed faith in the interdependence of law and general knowledge.[47] The academic field of law and literature is very much a part of this trend, although it developed later. By this circuitous path, literature has begun once again to supply insights in legal thought, as the works of Weisberg and White demonstrate.

III. WEISBERG: THE MODERN DISFIGURATION

The Failure of the Word examines the work of the giants of world literature in the period following the collapse of the configuration of law and literature in America. In many ways, *The Failure of the Word* can be viewed as a companion to Ferguson's *Law and Letters in American Culture* because it explores the consequences of the radical separation of law and literature. The critical approaches taken in these books are remarkably similar. Both works trace the implications of a concept in the central works of an entire literary age; Ferguson's treatment of the configuration of law and literature parallels Weisberg's treatment of ressentiment. Both ages are defined largely by their relationship to law, but in Weisberg's book the relationship has been transformed radically.

Both works take a historical approach. Just as Ferguson shows how the vocational anxiety of the major lawyer-writers of his era defined the central concerns of their art, Weisberg shows how the experiences of Dostoyevski, Flaubert, Camus, and Melville affected their artistic interests. More important, both Ferguson and Weisberg demonstrate the political significance of the concepts they examine by highlighting their relationship to the overriding moral and political concerns of their respective eras. Ferguson repeatedly demonstrates the centrality of the question of slavery to the fate of the configuration; Weisberg's starting point is the role of law and

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46. *Id.* at 290.

47. R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980's 272-79 (1983).

lawyers in the modern totalitarian state. Weisberg begins his work with a meditation on a short article written by a French lawyer during the Nazi occupation. The lawyer argued on humanitarian grounds that the state should have the burden of persuasion that a person with only two Jewish grandparents was a Jew.[48] This workmanlike effort by an ordinary lawyer—whom Weisberg later compares with Camus' Jean-Baptiste Clamence in *The Fall*—exemplifies the power of complex verbalization to obscure for both writer and reader the greatest moral crime in history. By this device, Weisberg demonstrates the contemporary jurisprudential importance of the failure of the word.

This recognition of the failure of the word distinguishes the modern outlook from that of the lawyer-writers of the configuration of law and literature. The fusion of law and letters was based on a faith in the underlying harmony of natural and positive law and on the power of writing and oratory to unify the nation in a common vision. This faith motivated lawyer-writers to frame the Constitution and later to turn to a legal aesthetic in structuring the intractable realities of the new nation. Jefferson's writings and Webster's oratory were the greatest expressions of this classical tradition. The art of the period dealt with large political themes designed to create a vision of nationhood. For the modern novelist, however, literature and the established legal structure are at odds. The writers of this period do not attack law per se, but assail the use of language by agents of the state to manipulate law toward their own ends. They distrust the formal, theoretical approach to reality as necessarily requiring the sacrifice of sensitivity to the full complexity of life. Furthermore, the writers more directly distrust eloquence and verbalization as means by which intelligent but resentful individuals gain power over simpler but more harmonious ones.

In the modern novel, the lawyer often represents a manipulative verbalizer who conceals his subjective aims in legal forms. Through the medium of a trial, the lawyer-protagonist distorts reality to achieve dominance over a just but nonverbal individual. The point is not that lawyers are the only representatives of this kind of verbalizer. To the contrary, any intellectual, by virtue of his penchant for complexity, is susceptible to this malaise. But in the secular era, lawyers—especially prosecutors—are uniquely situ-

48. R. WEISBERG, *supra* note 17, at 1-2, 181-82.

ated to cause harm through their use of language.[49]

The writers, as befits modernity, find the source of this destructive impulse in a psychological condition. Nietzsche termed the condition "ressentiment," the prolonged sense of injury based on real or imagined insult. Ressentiment causes

> the slow poisoning of the intellect . . . . Ressentiment, unlike hatred, which can be resolved in a single decision or gesture is full-blown intellectual malaise, inclined to take institutional and formal, rather than personal and spontaneous, revenge. It emerges only subtly and gradually from an unresolved sense of insult. The "insult"—real, imagined, or provoked by the desire to possess an inaccessible object or trait—grates on the intellect as much as on the emotions. The wounded party may eventually find himself thinking of little else, even wallowing in an exaggerated sense of injury. Perversely, though, he elevates the perpetrator of the "insult," who dominates his thought, to the level of an idol. The rage which should theoretically be directed against this figure he venomously misapplies to innocent third parties. If unchecked by a major act of will, this process continues to pollute the victim's relationships until his values are overturned utterly. Existential envy . . . of the perpetrator, which renders his presence a continuing necessity to the victim, and organic falsehood . . . , which flows from the vicissitudes in his personal and intellectual perspective, culminate the insidious process.[50]

Against this reactive, vindictive model, Nietzsche opposes the active man who is committed to timeless ethical values and to establishing these values in a system of positive laws.[51] The ressentient individual most often finds that the active man is the source of his sense of injury, and this discovery provokes the ressentient individual to form a web of words, which often ends in violence.

For Weisberg, the model of the ressentient protagonist is Hamlet, who cannot act decisively to resolve injustice, relying instead on his facility with words and leading himself and the innocent around him to destruction.[52] In *The Failure of the Word*, Weisberg treats *Hamlet* almost as a myth and repeatedly refers to the play in virtually every chapter. But, the ressentient protagonist begins to dominate the field only in the modern novel. Weisberg discusses at length Dostoyevski's Underground Man, who considers himself superior to those around him in intellect but who is poisoned by both his envy for the balanced existence of others and by his inability to act to resolve perceived insults. Of a former schoolmate, Dostoyevski's protagonist says, "I hated his handsome but stupid face (for which I would, however, have gladly exchanged

49. *Id.* at 3-9.
50. *Id.* at 19-20.
51. *Id.* at 17.
52. *Id.* at 8-9.

my intelligent one) . . . ."[53] When the protagonist is (once again) the object of ridicule at a party, he picks up a bottle intending to hurl it at his mockers, but instead uses it to fill his glass.[54] The protagonist acts ultimately only by hurling a verbal assault on an available innocent party because his contorted mind has substituted the innocent party for his tormentors. The same flaws appear in the character of Camus' Clamence, the lawyer-protagonist.

Weisberg argues that the ressentient protagonists like those in *Hamlet, Notes from Underground,* and *The Fall* have been interpreted more favorably than their actions deserve because of the susceptibility of critics to verbal display.[55] For Weisberg, this phenomenon validates the authors' concern with the power of eloquence to convert even intelligent readers to the ressentient side.

Again and again, in the modern novel's treatment of the law, the lawyer appears as a self-motivated manipulator, twisting the available evidence to fit a theory of the event rather than remaining open to the event's complexities. This distortion occurs typically in the context of continental criminal procedure, which depends upon the procurator's dramatic narrative of the crime assembled from the materials gleaned in an inquisitor's investigation. The procurator, Ippolit Kirillovich, in *The Brothers Karamazov,* for example, constructs the official theory of theft as the motivation for Dmitri Karamazov's alleged murder of his father. Kirillovich's vision of the event leads him to dismiss crucial testimony by Dmitri and to make serious errors of fact, which culminate in an artistic but deeply distorted narrative depiction of the crime. The jurors are persuaded, and the innocent Dmitri is convicted.[56] Similarly, in Camus' *Stranger,* the inquisitor and procurator jointly create a fundamentally flawed official portrait of the sensuous and nonverbal defendant Meursault as an antichrist and a moral monster. One witness sobs, "[T]hey forced me to say the opposite of what I was thinking."[57] Thus, both authors suggest that "whoever brings ressentiment to the act of formulating life through words only succeeds in producing an artistically convincing but essentially unjust portrait of reality."[58]

This distortion of reality applies to the novelist's art as well.

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53. *Id.* at 36.
54. *Id.* at 37.
55. *Id.* at 4.
56. *Id.* at 54-64.
57. *Id.* at 121.
58. *Id.* at 63-64.

Weisberg reveals Dostoyevski's agony at his inability convincingly to portray his Christian faith in *Karamazov*, particularly in comparison with the vivid scenes involving the atheist, Ivan Karamazov. For Weisberg, this tension is inherent in the inadequacy of novelistic form to capture the full spontaneity of life. The author's guiding ideals—Dostoyevski's religious experience and Flaubert's classical heroism—suffer vis-à-vis the rancorous verbalizers. Thus, the modern novel's criticism of mendacious verbal structures of the lawyer betrays a strand of self-criticism as well.

Perhaps the most striking treatment of these themes in the modern novel is Melville's *Billy Budd, Sailor*, to which Weisberg devotes the last two chapters of his work. Because Melville's novella links the works of Ferguson and Weisberg, it is useful to examine Weisberg's treatment of the novella.

In *Billy Budd*, the simple and handsome Billy impetuously, if not involuntarily, strikes the villainous Claggart dead because Claggart falsely accuses Billy of mutiny, and Billy is unable to respond because of a stutter. Captain Vere, while recognizing the injustice, convenes a kangaroo court and makes tendentious arguments that virtually order the court to condemn Billy to death. Yet Captain Vere, the embodiment of the ressentient protagonist, has been viewed by many critics as nobly struggling with an impossible choice forced upon him in time of war. In a brief discussion of the novella at the end of his work, Ferguson writes that "[u]nmistakably, it is precision of language, an excluding logic, insistence upon context, and an overruling distrust of moral philosophy—traits of the modern professional—that kill Billy Budd."[59] In a similar vein, Merlin Bowen states that *Billy Budd* is "a study in the possible consequences of a commitment to a fixed and theoretic pattern rather than to patternless life itself with all its contradictions, crosscurrents, and inescapable risks."[60]

The novella attacks the theoretical approach to reality that would exclude concerns arising from the unique circumstances of the cases. But Weisberg argues that Billy's death is not the result of Vere's inability to look beyond the letter of the law, as Vere himself would have it, but upon his willingness to misrepresent the terms of the law to reach a desired end. Weisberg shows, as a matter of legal history, that the applicable law in no way required

59. R. FERGUSON, *supra* note 17, at 289.

60. R. WEISBERG, *supra* note 17, at 144 (quoting M. BOWEN, THE LONG ENCOUNTER 217-18 (1960)).

Vere's action; indeed, Vere violated eight established procedural safeguards in the Articles of War, including failing to regain the fleet, inappropriately invoking summary procedures, acting in secret, and executing a capital sentence without review.[61] This part of Weisberg's argument seems less than convincing because it depends on evidence outside the novella, and Melville could not have assumed that his audience had such a sophisticated knowledge of the law. Weisberg demonstrates, however, that there was ample latitude in the applicable law, even as Melville describes it, to mitigate the sentence.[62] Certainly, there was no need to force an execution to placate the crew, as Vere argued, because the crew would have approved fully a regular procedure that saved the life of their hero.

Beyond Vere's formalistic turn of mind, what explains this calculated action of the captain against Billy, whom he clearly admires? Weisberg argues in his final chapter that the cause is ressentiment provoked by an unconscious association of Billy with Admiral Nelson, who typifies the "handsome sailor" whom Vere envies. Billy, a simple, honest actor rather than a covert dissembler, becomes a surrogate for Vere's frustration and self-contempt when Vere compares himself to Nelson.

Weisberg shows that Melville does not simply criticize the rise of modern professionalism or the inability of judges to mitigate the strict letter of the law. Melville's subject is the susceptibility of the law to the individual who uses obfuscating verbal structures to thwart the operation of justice. The self-critical element in this theme is particularly pronounced here. Weisberg quotes a remarkable passage from *Billy Budd*, in which Nelson sits down to write his will just before Trafalgar. For Melville, Nelson's actions represent the magnificent possibility of a fusion of art and just action. As Weisberg observes, "Only ressentient modern-day verbalizers see alienation from heroic activities as a sine qua non for the verbally expressive life."[63] The classical epic, for Melville, was the literary equivalent of Nelson's act, uncritically praising heroism. "One arm acted, the other wrote. The match of outer form with inner man achieved artistic harmony in such figures."[64] Weisberg concludes his work with the following paragraph:

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61. *Id.* at 145-53.
62. *Id.* at 153-59.
63. *Id.* at 171.
64. *Id.* at 172.

> Melville grasped a truth we may pursue—that modern novelistic complexity results in an overly reactive and negative series of private formulations. Although his self-awareness is insufficient to repel the influence of the declining culture in which he is steeped, it enables him to call for a renewal of the old alliance of artistry with just action. For whatever has furthered the preoccupation of the narrative mode with ressentiment can yet be altered. Social institutions wax and wane, and romanticisms of various sorts yield eventually to the ebullient creativity of self-willed people with a firm sense of communal ethics. Literary art, ever the reflection of a culture's sense of itself, may again join with a positive system of law to generate admirable language.[65]

Weisberg ends with the aspiration that motivated Ferguson's study of the configuration of law and literature: to recapture the harmony of art and polity that was the most positive element of the configuration. In the era of the configuration of law and literature, the ideal of the lawyer-writer was to fuse his professional action in public service with writing that served the larger goals of nationhood. Modern authors retained a public commitment but from a point of view of criticism from the outside. Their writing probed psychological complexities, often in the context of an unjust social order. Yet as Weisberg demonstrates, the author's status as an outsider has dangers as well. As much as the intellectual may criticize the corruption of government, his social vision must always implicitly condemn purely verbal activities; the ideal remains the man of action, often portrayed as nonverbal. For Weisberg, writing in the modern age is inherently suspect, because it attempts to reduce reality to a narrative that is deceptive and self-serving. The isolation of modern writers from the turbulence of life is a source of anguish to them even now.[66] As Weisberg's treatment of Melville shows, however, the writers held out the hope for a life that would combine writing with just action.

IV. WHITE: A NEW CONFIGURATION

While Ferguson's work is one of literary and intellectual history and Weisberg's is one of comparative literary criticism, White's *When Words Lose Their Meaning* is unashamedly didactic. Although White deals with works of literature and politics, as does Ferguson, White's purpose is not to identify or elaborate a quality of a particular culture. And although he pursues common themes across a range of texts from diverse cultures, as does Weisberg, White's most direct aim is not to show the identity of these

65. *Id.* at 175-76.

66. *See, e.g.*, P. ROTH, THE ANATOMY LESSON (1983).

concerns but to teach a "way of reading" that has extraordinary depth, subtlety, and significance. For White, reading in this way implies a concept of the nature of language, the self, and the relations between the self and others, not only in personal friendships but at the level of legal and political discourse. Reading is not solely the acquisition of knowledge but an ethical process in which one's character is formed. As a result, White's work often resembles a highly sophisticated self-help manual. White describes the book as being "at its heart a report of my own search for such an education" that is "directed to a reader similarly engaged."[67]

White's texts suggest the generality of his concerns: Homer's *Iliad*, Thucydides' *History of the Peloponnesian War*, Plato's *Gorgias*, Swift's *Tale of a Tub*, Johnson's *Rambler* essays, Austen's *Emma*, Burke's *Reflections on the Revolution in France*, and the basic constitutional documents of early America. White's treatment of these works is very difficult to summarize because so many of his insights emerge only in the context of the readings. The readings of these disparate works, conventionally assigned to literature, philosophy, and law, are unified only at the most conceptual level. White attempts to show that each author treats the "cultural and ethical activity of making meaning in relation to others."[68] The arrangement of the texts also is crucial; White progresses from works concerning "the community of two," or personal friendship, to those addressing the political community. Moreover, the authors themselves devise progressively more complex ways of making meaning in relation to others—from the depiction of the utter collapse of meaning in Thucydides to the sophisticated definition of conversational roles in the American Constitution.

The central difficulty that White addresses in his analysis of these texts is the fluidity of the self and its surrounding culture because of the peculiar nature of language.[69] As White says, "[W]henever we speak or write we define ourselves and another and a relation between us, and we do so in words that are necessarily made by others and modified by our use of them."[70] Both parts of this assertion are crucial to White: first, that language is central to the formation of individual character and human relationships and, second, that language is in part inherited and in part depen-

67. J. WHITE, *supra* note 17, at 287.
68. *Id.* at 275.
69. *Id.* at x.
70. *Id.* at 276.

dent upon our use of it.[71] White captures this fluidity dramatically in his theme that words can lose their meaning. Thucydides says, for example, that in the Peloponnesian War, "[i]rrational boldness was considered as manly loyalty to one's partisans; prudent delay as specious cowardice, moderation as a disguise for unmanliness, and a well-rounded intelligence as a disqualification for action."[72] Yet this "uncertain reciprocity" between the speaker and his language does not inevitably foreclose the discovery of meaning; it dictates that this discovery must be made through an organic process of "reconstitution of language and community."[73] This process cannot be purely conceptual; it must emerge through a variety of complex literary processes.

At the heart of this activity is an exalted view of the written text and a highly complex view of reading. White believes that

> the written "text" has a unique place in the history of culture, for it reduces to permanence a process that is otherwise ephemeral and renders public, through the multiplication of readings, what is in the first instance essentially private. Unlike any other conversation, it has an unlimited number of anonymous but necessarily individual partners, located in an unlimited set of cultural contexts. It offers its reader an experience of cultural reconstitution that can be repeated in the imagination at any place and time. In this sense it is a part of the culture that transcends its own immediate location in space, time, and social context . . . .[74]

To read such a text, one must "engage" it by participating in its world and by constructing a response to it. Lawyers will recognize this kind of reading as drawn from the searching case analysis taught in the first year of law school;[75] literary critics will see it as a form of "reader response" criticism.[76] By imaginatively placing himself in the culture of which the author is a part, the reader familiarizes himself with the language that the author has inherited. The reader sees how the author makes use of his resources and addresses his limitations by paying special attention to the "key words" of that culture, those that define its values. The reader must also attend to what White calls the "social and literary forms" in which language operates within the culture. These diverse forms include Socrates' distinction between rhetoric and dialectic in the *Gorgias*; the culture of argument in the American legal

71. *Id.* at 8.
72. *Id.* at 81.
73. *Id.* at 278-83 *passim.*
74. *Id.* at 280.
75. *Id.* at 9.
76. *Id.* at 289.

system and the very different culture in Thucydides' world, in which cities are represented in debate as individuals; and the difference between language addressed merely to the intellect and "poetic language" that is addressed to the whole person.[77]

In this process of cultural reconstitution, a community is established between author and reader through the medium of the text. By identifying the "ideal reader" of the text[78]—the author's conception of what he would like his reader to become—the actual or "central" reader[79] can question the language of the author against the reader's experience. The reader participates in the relations among individuals and the relations between individuals and their culture, and in the process, the reader sees how these relations are determined by language within the text. For White, this textual community is a species of friendship[80] typified in its positive form by the sense of personal intimacy with the author that the reader derives from the novels of Jane Austen, and typified in its negative form by the sense of shame one feels in laughing at a racist joke. As these examples show, the ideal reader is a construct, whom we may choose to become or repudiate in the dialectic of reading.

These examples suggest the variety of ways that a text can engage the reader. White makes clear that, for him, the best texts always recognize the autonomy and wholeness of the reader and educate him through the literary process of distinction, complication, and refutation. From the sense of character and relation that emerges gradually from the textual community, White asserts, we most confidently can make ethical judgments about the text and about the culture that produced it. White's aim is to illustrate this ineffable process of formulating critical judgments, of which literary, philosophical, and legal criticism are species. White necessarily challenges as incomplete—or inadequate to his purposes—the techniques of science and economics, which maintain sharp distinctions among facts, values, and the process of reasoning.

Indeed, in White's view, the act of writing and reading is inherently ethical, "for it always entails the definition of at least two roles (writer and reader) and the establishment of a relationship between them that can be seen to have both political and ethical

77. *Id.* at 279-80.

78. *Id.* at 15.

79. *Id.* at 17 n.*.

80. *Id.* at 289. White ascribes this analogy to Wayne Booth who developes the analogy in *The Way I Loved George Eliot*, 2 KENYON REV. (n.s.) No. 2 at 4 (1980).

content."[81] White means more by this observation than that writing and reading must have some ethical implications. As one of his epigraphs, he quotes Sartre's statement that "[i]t would be inconceivable that this unleashing of generosity provoked by the writer could be used to authorize an injustice, and that the reader could enjoy his freedom while reading a work which approves or accepts or simply abstains from condemning the subjection of man by man."[82] While one certainly must question this generalization, it is true that the works White discusses are ethical because their very subjects are social relationships ranging from the purely personal to the most broadly political.

White finds a linkage between the personal friendships enacted in the texts and the larger political relationships, quoting Aristotle's claim that justice and friendship are concerned with fundamentally the same ideals. White shows that the culture of argument depicted in Thucydides' *History* collapsed because of the Athenians' single-minded commitment (most strikingly in the Melian debates) to the norm of self-interest, to the exclusion of a notion of justice that would give the self meaning.[83] By extension, an ideal political community would be a world of friendship among equals, in which autonomous speakers reconstitute their culture from the available materials by structured conversation. A just legal system likewise is based on proper relations between the court and the body of law and among the actors in the case.

White makes clear by his arrangement of materials that the closest any political community has come to this ideal was in the collective drafting of the American Constitution during the eighteenth century, and the closest any legal system has come to the ideal is in the American system's culture of argument. White emphasizes the dependence of the Constitution's dictates on the collective assent of the people to self-regulation. The Constitution's function is not to create power but to establish a language and a set of roles and occasions for speaking, which, with the participation of the people, create a government.[84] The speakers that fill those roles are the ideal readers of the document. To support this view of the Constitution, White refers to the obscure clauses re-

81. J. WHITE, *supra* note 17, at 17.

82. The quotation is from the French edition of Sartre's QU'EST-CE QUE LA LITERATURE?. The translation I have quoted is from J. SARTRE, WHAT IS LITERATURE? 57 (B. Frechtman trans. 1965).

83. J. WHITE, *supra* note 17, at 91.

84. *Id.* at 244-47.

quiring each House of Congress to keep a journal[85] and empowering the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[86] These provisions, trivial in themselves, suggest a larger purpose of the framers to create a continuing discourse within government.

White, like Ferguson, focuses on the role of the courts in the constitutional scheme. White sees in the case or controversy requirement the defining characteristic of the courts and the reason why the courts have played the greatest role in developing the meaning of the Constitution. By examining *McCulloch v. Maryland*, again from a rhetorical perspective, he shows how Marshall casts the court in the role of arbiter in the great intergovernmental clashes over the meaning of the Constitution. Although Marshall canvasses the experience of the nation on the question of the power to create a national bank, only through Marshall's opinion does that experience become crystalized as the ground for decision.[87] By reconstituting the developing national consensus, the court distills the wishes of "the People," the original but dispersed source of the Constitution's power.

These observations lead White to a discussion of the judicial opinion as a part of "a continuing and collective process of conversation and judgment."[88] The court only decides after formal argument; the opinion that emerges becomes the basis for future argument. In the process, the court establishes connections with the past and future, and acknowledges the need for both stability and change. While Weisberg finds the process of narrative in the continental legal system to be the source of profound distortion, White believes the American adversary system creates a culture of argument:

> It is a way of making a world with a life and a value of its own. The conversation that it creates is at once its method and its point, and its object is to give to the world it creates the kind of intelligibility that results from the simultaneous recognition of contrasting positions. This recognition is necessary to the rational definition and pursuit even of the most selfish ends. Without it, neither reason nor ambition can have form or meaning.[89]

One of the critical features of the collapse of the configuration

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85. U.S. CONST. art. I, § 5, cl. 3.
86. U.S. CONST. art. II, § 2, cl. 1.
87. J. WHITE, *supra* note 17, at 253.
88. *Id.* at 264.
89. *Id.* at 267.

of law and literature was the specialization of the law with the accompanying movement away from the talk of universal principles that made recourse to classical literature in legal argument so common. White does not bemoan the segregation of legal from literary discourse because his view of reading reintegrates the legal enterprise with the process of cultural definition. The reader of the legal text reads in his culture as a way of criticizing the text. "The lawyer's work thus contributes to a process of collective or cultural education that is in structure analogous to that experienced by the single reader of a literary text."[90] While no individual's reading is authoritative, each individual's criticism becomes part of the ongoing process of argument that provides for continuity as well as change.

White's description of the process of reconstitution of culture is strongly reminiscent of the vision of the lawyer-writers of the early republic. Compare Tocqueville's statement that the American Constitution exists "only in the mind" with White's assertion that "writing is always a kind of social action: a proposed engagement of one mind with another."[91] Jane Austen's readers become more ethical by the enactment of the relations in the text (in White's view) in much the same way that the lawyer-writers hoped that the Constitution and the works and oratory that expounded it would create the ideal citizen. This parallel raises the suspicion that White's view is bound to his choice of works, which are largely from the same era that Ferguson treats. White demonstrates his position only through the study of carefully selected classical and neoclassical works; what he terms the "literature of friendship."[92] Is White's view hopelessly idealistic in an age of the literature of alienation, which Weisberg so convincingly treats? Weisberg's suggestion that intellectuals are susceptible to ressentiment seems inconsistent with White's faith in the ethical power of the text. Does White's discussion of the "possibilities of American law" have meaning in an age of more mundane realities?

It certainly would be wrong to dismiss White's approach on these grounds. White does not advocate an uncritical acceptance of the ethical views of any author. By choosing to demonstrate his way of reading with works whose ideal readers he finds most appealing according to his ethical norms, White illustrates how char-

90. *Id.* at 272.
91. *Id.* at 15.
92. *Id.* at 220.

acter might be formed in the act of reading; he does not deny the need to repudiate other ideal readers.

However, we still are not thoroughly comforted by White's demonstration of the constitutive possibilities of the text. The reason lies, to some extent, in White's critical style, which eschews the social and historical research of a critic like Ferguson as well as the psychological emphasis of Weisberg. As a result, White's approach seems curiously abstract. This quality of White's work is related to his failure to address the problem, so basic to both Ferguson and Weisberg, of the relationship between language and just action. White rarely admits a distinction between writing and life itself because in his view of writing and reading, the actor's entire being is engaged. Indeed, White explicitly equates culture or a society's values with its language; he states that "[i]n a sense we literally are the language that we speak."[93] He insists, however, that he is not reducing all problems to ones of language. He states that "[t]he world of language mediates between the languageless within and the languageless without."[94] White's view assumes that the nonverbal individual cannot be just or harmonious. For him the creation of a text is the most important constitutive act an individual can make. After Weisberg's demonstration of the inadequacies and destructive possibilities of complex verbalization, however, we must question whether White's optimism is justified.

V. The Relationship of Law and Literature

The modern field of law and literature is, paradoxically, a product of the breakdown of the configuration of law and literature. When law and literature were considered coordinate disciplines, united by their consonance with universal principles, and when lawyers considered writing an adjunct to their larger patriotic commitment, by definition there was no need for an interdisciplinary field of study. With the collapse of the configuration, lawyers and writers were no longer lawyer-writers but different individuals with radically different philosophical, aesthetic, and political outlooks. Lawyers began to view the skills essential to their occupation as analytical and practical, a science unto themselves that excluded general literary and philosophical concerns. Law became viewed as an instrument of politics, and law study turned exclusively to the documents of the law itself. Writers, in

93. *Id.* at 20.
94. *Id.* at 21.

contrast, turned their attention to psychological complexities; they retained a political concern but focused on the plight of the individual in opposition to the existing order, an order that often conflicted with the writers' ethical sense. We are deeply indebted to Ferguson for his exhaustive social and intellectual history of the rise and fall of the configuration, as well as for his enrichment of the canon of American literature.

As the rift widened, it became apparent to some lawyers that the scientific turn in law study had gone too far. The first configuration was based in part on meaningless generalities and obfuscating fictions and was linked to an aristocratic professional and social structure. Nonetheless, lawyers began to feel that the dissolution of the link with literature had sacrificed much that was valuable. Not only had the abandonment of classical rhetoric impoverished the persuasive resources of the lawyer, but all of literature was lost as a source of knowledge of human character and the operation of the law. The study of law and literature then arose as a means of mediating between the separate domains. At first urged as a pursuit ancillary to law practice,[95] the field required only the influx of legal scholars with professional training in literary criticism to complete the formation of a new academic discipline. While the early work in the field lacked rigor, it perceived, in a general way, the shortcomings of the law's methodological focus and the potential for interdisciplinary study.

Of course, legal subjects like jurisprudence and professional responsibility also deal with topics like the nature of law, the relationship of law and morality, and the duty to obey the law. But literature makes these issues concrete by developing a narrative that may be more illuminating than abstract discussion. These value-laden questions resist theoretical discussion and often can be addressed most effectively through a literary process.

This view of the field's origins explains its insistent concerns with criticism of "legal novels," with the problems of language and interpretation, and with values. All of these concerns were encompassed by the study of law itself in the era of the configuration; now that these concerns are excluded by the mainstream of modern law study, law and literature makes possible serious discussion of them within the law school community. Weisberg's work is one of the finest expressions of this enterprise. It unites the traditional

95. *See, e.g.*, Hitchler, *The Reading of Lawyers*, 33 DICK. L. REV. 1 (1928); Wigmore, *supra* note 1.

criticism of novels on explicitly legal subjects with an ethical perspective related to the problems in the use of language. Few works have so completely reflected the most basic concerns of the field. White's work is unique in that it does not address legal novels, but only works of general literature and purely legal documents. Yet White's work is undeniably a part of law and literature because it advances a way of reading that not only draws on the analytical strengths of both disciplines but implies an ethical and political vision that unites the disciplines, at least in an ideal sense. It may be viewed as an attempt to construct a new configuration of law and literature, based not on a mystical unity of positive and natural law but on a political and legal system of equal speakers.

These three works are the best expressions of the developing field of law and literature. Their critical styles provide useful contrasting models for future work. Most important, their insights into the problems and possibilities of language and its relationship to ethical action will define the scope of the field for years to come.