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Norms and Narratives: Can Judges Avoid Serious Moral Error?

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Beyond Critique: Law, Culture, and the Politics of Form

***1929** NORMS AND NARRATIVES: CAN JUDGES AVOID SERIOUS MORAL ERROR?

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I. Introduction

We like to think of the common law as evolving toward ever higher reaches of wisdom and flexibility. We have even higher hopes for our public, constitutional jurisprudence. Despite lofty ambitions of justice, however, our system of law has yielded many embarrassingly inhumane decisions. [FN1] Opinions steeped in what we later see as serious moral error ***1930** come down all too frequently—at least one per generation. [FN2] Every casebook has chapters devoted to doctrines or precedents that we are glad to relegate to history. [FN3] And anyone who reads legal biography knows that even the most eminent Justices—Taney, Holmes, Field, Marshall—have chapters that mar their otherwise outstanding careers. [FN4]

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One obvious explanation for these mistakes is judicial inability to identify, imaginatively, with the persons whose fate is being decided. [FN5] Because of the particularized stock of life experiences and understandings judges bring to the bench, these notorious opinions seemed to their authors unexceptionable, natural, "the truth." [FN6] Only hindsight, benefited by increased empathy and understanding, exposes an opinion as monstrous, anomalous—a moral abomination. [FN7]

If a judicial lack of other-awareness rendered these now-embarrassing opinions acceptable at the time, would it have made a substantial ***1931*** difference if the judges had tried to expose themselves to other points of view? Can such exposure accelerate the process of defining justice? The Law and Literature movement promotes a broadened perspective of our condition through the reading of great works with just this ambition in mind. Members of the movement believe that by reading and discussing the world's great texts, lawyers and judges may gain empathy through vicarious experience and thereby avoid pitfalls to which they might otherwise succumb. [FN8] How much of this belief is idealistic wishful thinking?

A precise answer to this question is, of course, unattainable, but it is ***1932*** our premise that some insight into the potential and limits of the Law and Literature movement can be gained by examining it at a higher level of concreteness than is usually employed. Accordingly, we look to a handful of cases that society has judged harshly and seek to identify then-current literature that might have changed the outcome of the cases or the tone of the opinions.

In Part II, we examine the practical merits of the Law and Literature movement. We review illustrative constitutional decisions embodying serious moral error and juxtapose those decisions with literary texts that possess a narrative or perspective that the opinion's author was not aware of or ignored. In each case, the narrative might plausibly have saved the judge from serious moral error—or at least have made writing the wrong decision more difficult. [FN9]

While some of the cases illustrating serious moral error display a blithe, almost mechanical simplicity, as though the author were completely unaware of the treacherous moral ground on which he trod, more often the opinions betray a hint of moral ambivalence. The tension between what is proclaimed as "law" and the subsequent retreats and disclaimers, which often take the form of recitations on the limits of the judicial role, reveals traces of a Pilate-like fear of reprobation. To the discerning reader, the "our hands are tied" disclaimer betrays doubts about the moral correctness of the holding—doubts troubling enough to ***1933*** compel a denial of personal responsibility, but not so troubling as to inspire meaningful action. [FN10]

Could reading a well-written, deeply felt counternarrative save a judge from history's condemnation in cases such as the ones we will discuss? Part III examines this possibility and concludes that the saving potential of most counternarratives is much more limited than we would like to believe or than Law and Literature proponents acknowledge. We are all situated actors, whose selves, imaginations, and range of possibilities are constructed by our social setting and experience. We are, in a sense, our current narratives. Thus, an unfamiliar narrative invariably generates resistance; despite our best efforts, counterstories are likely to effect at most small, incremental changes in the listener or reader. As the pieces in this Symposium show, the question of the extent to which one may escape one's cultural milieu is complex and vexing. But we raise an even more disconcerting possibility: not only does our status as situated actors create in judges and other policy-makers a resistance to potentially saving counternarratives, but it limits the very range of counternarratives in the canons from which policy-makers might draw. So long as this is true, Law and Literature can save us from minor, but not major moral error—from tomorrow's, but not next century's condemnation. Even the most aptly chosen tales can enable us only to escape from one intellectual prison to another, slightly larger, but equally confining one.

To illustrate our predicament, we include summaries and charts of the current Law and Literature canon showing that certain voices and narratives, potentially of the "saving" variety, are notably missing. If the anthologists, men and women of broad education and wide sympathies, compiled such narrow lists, how potent a corrective force could those lists be for busy judges? The canon is always narrow because counternarratives, even when they exist and are known, are assimilated and understood in light of the anthologist's experience. Stories that deviate too much from our own experience strike us as wrong, untrue, coercive, "political"—

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unworthy of inclusion. Saving narratives thus rarely come to the attention of busy bureaucrats, like judges. And when they do, judges reject them for reasons we detail.

Culture, in short, does determine the Self, as the other works in this Symposium show. [FN11] While this insight aids analysis and helps us come to ***1934*** grips with certain dichotomies, such as Self-Other and subject-object, we draw from it an even more sobering lesson about the possibilities for social reform. External reality (the bed out there) and the self (in here) may be socially created constructs whose meanings are interdependent and gain plausibility from repeated use. [FN12] But if one of our tasks in life is to make the bed, not just to understand it, then being in the bed may become a serious obstacle to remaking it. Part IV suggests means by which we may nevertheless make some limited progress, including a new, more audacious role for reform-minded lawyers within the Law and Literature movement.

II. Notorious Cases and Saving Narratives: What the Juxtaposition Shows

In this Part, we review nine opinions generally regarded as embracing serious moral error. The cases today are widely condemned. [FN13] Yet each, at the time of its writing, seemed to the author unexceptionable and true. The cases all center around the treatment of subordinated groups: blacks, women, indigenous people, Asians, homosexuals, and retarded persons. We follow each opinion with a corresponding counternarrative that might have saved its author from serious moral error. In each case, the justice either wrote unaware of the narrative or simply ignored it. Consequently, when society later adopted the counternarrative, condemnation followed.

A. Dred Scott and Plessy v. Ferguson

> [Abolitionists] seek an object which they well know to be a revolutionary one. They are perfectly aware that the change in the relative condition of the white and black races in the slaveholding States, which they would promote, is beyond their lawful authority; . . . that it cannot be effected by any peaceful instrumentality of theirs; that . . . the only path to its accomplishment is through burning cities, and ravaged fields, and slaughtered populations; . . . and that the first step in the attempt is the forcible disruption of a country embracing in its broad bosom a degree of liberty, and an amount of individual and public prosperity, to which there is no parallel in history . . . . [T]hey endeavor to prepare the people of the ***1935*** United States for civil war by doing everything in their power to deprive the Constitution and the laws of moral authority, and to undermine the fabric of the Union by appeals to passion and sectional prejudice, by indoctrinating its people with reciprocal hatred . . . .
>
> —President Pierce's message to Congress about the abolitionists, Dec. 1856 [FN14]

The two most notorious cases upholding this nation's treatment of blacks, Dred Scott v. Sandford [FN15] and Plessy v. Ferguson, [FN16] are now universally condemned. [FN17] But at the time of their decision, they were accepted as valid and even inevitable constitutional renderings. [FN18] In Dred Scott, Chief Justice Taney painstakingly explained why blacks could not become citizens. He relied primarily on the long history of the white man's disdain for blacks to show that the writers of the Declaration of Independence and the framers of the Constitution could not have meant to include blacks in their eloquent demands of liberty for all men:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute . . . . [FN19]

The circularity of the reasoning is apparent: had they been worthy of citizenship, we could not have treated them so badly. Taney's writing reached near-ironic proportions when he pointed to the high moral character of the founding fathers as further proof that blacks were not meant to be included within the protections of the document:

> [T]he men who framed the declaration were great men—high in literary acquirements—high in their sense of honor, and incapable ***1936*** of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the

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civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. [FN20] With this as his predicate, Taney could justify rejection of blacks' citizenship claims by straightforward strict interpretation: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws . . . . The duty of the court is, to interpret the instrument they have framed . . . according to its true intent and meaning when it was adopted." [FN21] Taney's reasoning says much more about the moral character of the Framers (some of whom had slaves) than it does about justice.

Could the Dred Scott majority have been swayed by a saving narrative? In 1857, relatively few slave writings were published, for obvious reasons. But Harriet Beecher Stowe's widely read abolitionist novel, Uncle Tom's Cabin, [FN22] was published in 1852, and it is likely that the Justices had heard of it. Narrative of the Life of Frederick Douglass, [FN23] published in 1845, was equally well known, and Douglass himself was a respected scholar and speaker. [FN24] Would Taney have been able to write his vindication of slavery if he had read even the first chapter of Douglass's narrative? There, Douglass recounted the pain of never having known his mother. [FN25] He remembered the comfort of her presence on the few occasions her master allowed her, after a day's work in the fields, to walk the twelve miles to see her son. [FN26] She had to start back almost immediately in order to be back in the field at sunrise and spare herself a whipping.

> For what this separation is done, I do not know, unless it be to hinder the development of the child's affection toward its mother, and to blunt and destroy the natural affection of the mother for the child. [FN27]

Douglass's feelings about his father-master were as bitter as his feelings for his mother were tender. He said:

> ***1937** [S]laveholders have ordained, and by law established, that the children of slave women shall in all cases follow the condition of their mothers; and this is done too obviously to administer to their own lusts, and make a gratification of their wicked desires profitable as well as pleasurable. [FN28]

Could Taney and the majority have remained unaffected after reading Douglass's account of the suffering of an entire race for the sake of another race's economic and social comfort? Could they have resisted empathizing with the sensitive child described by Douglass, who was forced to awaken each morning to a world full of characters more terrible than those the Justices imagined in their worst childhood nightmares? [FN29]

Could any white reader fail to react with horror and shame? Douglass's narrative was published more than ten years before the decision in Dred Scott, but we can guess that the Justices had not bothered to read it (or that it did not affect their decision), for six of the eight others agreed with Taney's denial of citizenship for blacks, and the dissents did not have the force to save. [FN30]

Justice Brown's opinion in Plessy v. Ferguson is equally notorious for its disdainful treatment of the black race. While a justification of public segregation is less outrageous than one of slavery, the tone of Brown's opinion renders it equally offensive. It is blithely patronizing and betrays little knowledge of the wrong perpetrated on blacks. Brown found that the Louisiana statute requiring blacks to ride in a coach "separate but equal to" the one for whites violated neither the Thirteenth nor the Fourteenth Amendment because a merely.

> legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races [FN31] and because the Fourteenth Amendment "could not have been intended . . . to enforce social, as distinguished from political, equality." [FN32]

Brown rejected the idea that "the enforced separation of the two races stamps the colored race with a badge of inferiority" and added: "If this be so, it is not by reason of anything found in the act, but solely ***1938** because the colored race chooses to put that construction upon it." [FN33] And, finally: "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." [FN34]

Justice Harlan's dissent urged a much more generous constitutional interpretation. The Fourteenth Amendment, he said, guarantees "exemption from legal discriminations, implying

inferiority in civil society . . . and discriminations which are steps toward reducing [blacks] to the condition of a subject race." [FN35] He went on bluntly to state that

[e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons . . . . No one would be so wanting in candor as to assert the contrary. [FN36]

Harlan showed that it was possible for a judge to cut through both accepted legal justifications and the make-believe realities on which they are premised to reach the actual intentions and consequences of legislation. He labeled the statute "sinister" [FN37] and showed uncanny foresight in stating that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." [FN38]

However persuasive the Harlan dissent may seem now, it obviously failed to persuade the majority. Were there other sources of moral persuasion, texts that might have presented the other point of view more effectively? Indeed, many were available; there was a virtual literary ferment over issues of social inequality and integration. [FN39] Leading black newspapers editorialized on the subject. [FN40] Reformers and religious figures questioned whether separate water fountains, hotels, theaters, railroad cars, waiting rooms, and restaurants could exist in a nation committed to "liberty for all." [FN41] A new generation of black novelists, including Frank Webb, Frances E.W. Harper, Sutton Griggs, Charles Chesnutt, and Paul Lawrence Dunbar, were writing about the lives of blacks in a nation which, although ostensibly committed to equality, ***1939** frustrated and denied their humanity and worth at every turn. [FN42] In many of these books, the protagonist is an upward-striving, hard-working black who is respectable, educated, and white-collar, but who nevertheless is handicapped and rebuffed on his way to success. [FN43] To be sure, many of these novelists were not wholehearted egalitarians. Some pressed for social integration only for members of their talented class. They were quick to distance themselves from coarser, less-well-educated Negroes—ones who had not yet, in their opinion, earned the right to be treated by whites as equals. [FN44]

B. Indian Cases

In the early 1800s a young, expansion-minded government sought to justify subjugation of the Native American race in the interest of progress. [FN45] Control over the lands and lives of Indians was necessary for the development that our Founding Fathers foresaw. [FN46] The 1823 decision in Johnson v. M 'Intosh [FN47] gave Chief Justice John Marshall a vehicle for articulating the principles of what was to become an elaborate body of law governing the Indians. The gist of the decision follows: although the Indians had a right of occupancy, they had no power to alienate land because the fee lay in the government. [FN48] The source of United States ownership, Marshall explained, lay in rights gained by Great Britain under the "Discovery Doctrine," a euphemistic name for the tacit agreement***1940** of "finders keepers" among the exploring European states. [FN49] Marshall declared that "the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired . . . . T heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied." [FN50]

Perhaps recognizing the tenuousness of this "necessity," Marshall seemed reluctant, at least on a moral level, to commit himself, as author, to the decision he nevertheless made. His opinion is phrased in terms of inevitability, but its result was necessary only in a purely practical sense to legitimate an established system upon which his government relied. [FN51] In the course of rendering his might-is-right decision, Marshall portrayed himself as engaged in a matter-of-fact, mechanical exercise—one in which he as judge took no personal responsibility for the outcome. [FN52] To be sure, Marshall warned that the conquered should not be "wantonly oppressed," [FN53] but went on to observe that the tribes of Indians "were fierce savages, whose occupation was war." [FN54] He set out the range of possibilities as follows: "To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence." [FN55] Cohabitation with the Indians was impossible because it exposed the settlers to "the

perpetual hazard of being massacred." [FN56] ***1941*** Whatever means necessary were thus justified to defend European claims.

As though sensing his error in Johnson, Marshall was more generous to the cause of Indian rights and more cynical about the role of the federal government as inheritor of "discovered lands" nine years later in Worcester v. Georgia. [FN57] Here Marshall focused on the sovereign status of Indian nations, as recognized in treaties between them and the federal government. The issue was whether Georgia's assertion of jurisdiction over non-Indians residing in Cherokee territory was unconstitutional. [FN58] Georgia law required any non-Indian wishing to reside in Indian territory to secure permission from the governor and to take an oath of allegiance to the state's constitution and laws. [FN59] Marshall declared the provision void as directly conflicting with treaties made between the United States and the Cherokees, [FN60] describing the latter, by implication, as a sovereign nation. [FN61]

In Worcester, did Marshall recompense for turning his back on the Indians in Johnson? Unfortunately, he did not: the principles he established in Johnson were later invoked and embellished in decisions that gnawed persistently and jealously at Indian rights in land and self-government. [FN62] During much of the formative period of American Indian ***1942*** law, political theorists and organized religion contributed, along with the courts, to the demeaning of Native American culture. [FN63] Religious leaders spoke of the Indians as heathen. [FN64] Respected writers invoked the doctrine of "waste" to justify the taking of Indian land, the relocation of Indian tribes to desolate areas far from their ancestral homes, and the relentless mining and timbering of the lands to which they were removed. [FN65]

Could judges and these others have been saved from committing what is beginning to seem like a serious moral error in their treatment of the Indians? [FN66] Possibly. Indian leaders themselves spoke eloquently of the injustices being perpetrated; they were generally ignored. For example, Mohawk chief Joseph Brant spoke forcefully about Indians' attachment to and love of "those Lands which the great being above has pointed out for our Ancestors & their Descendants, and placed them there from the beginning, and where the Bones of our Forefathers are Laid." [FN67] He asked "whether the Blood of their grand children is to be mingled with their Bones, thro' the means of our Allies for whom We have often so freely bled?" [FN68] Shawnee military leader Tecumtha (1768-1813) proclaimed:

The White people have no right to take the land from the Indians, because they had it first, it is theirs. . . . Any sale not made by all, is not valid. . . . All Redmen have equal rights to the unoccupied land. . . . There cannot be two occupations in the same place. The first excludes all others. It is not so in hunting or traveling, for there the same ground will serve many, as they may follow each other all day, but the camp is stationary, and that is occupancy. It belongs to the first who sits down on his blanket or skins, which he has thrown upon the ground, and till he leaves it, no other has a ***1943*** right. [FN69]

Other Indian leaders spoke eloquently of their people's attachment to the land in terms that flatly contradicted the prevailing idea that they were barbarians who cared little for it. Chief Seathe of the Seattle Indians, when signing the Treaty of Port Elliot, observed:

Every part of this country is sacred to my people. Every hillside, every valley, every plain and grove has been hallowed by some fond memory or some sad experience of my tribe. Even the rocks which seem to lie dumb as they swelter in the sun . . . thrill with memories of past events connected with the fate of my people. . . .

The braves, fond mother[s], glad-hearted maidens, and even little children, who lived here . . . still love these solitudes. Their deep fastnesses at eventide grow shadowy with the presence of dusty spirits. When the last red man shall have perished from the earth and his memory among the white men shall have become a myth, these shores shall swarm with the invisible dead of my tribe. [FN70]

These narratives, had they been read and heeded, might well have given pause to the religious, judicial, and political figures in the white community who were blithely bent on justifying the taking of Indian land because Indians were unfit, spiritually and morally, to occupy it.

C. The Chinese Exclusion Case

In the late 1800s, labor and other forms of social unrest fueled a growing xenophobia, including demands that immigration of nonwhite populations be curtailed. [FN71] In the midst

of this nativist resurgence, the Chinese Exclusion Case, Chae Chan Ping v. United States, [FN72] was decided. At issue was whether the petitioner, who had been granted a federal certificate assuring his re-entry into the United States following a visit to his native China, could be prevented from re-entering the country. [FN73] Following his temporary departure, Congress had abrogated an earlier treaty which would have guaranteed him the right to return to the United States, where he had resided and worked as a laborer for a number of years. In so doing, Congress was taking action in response to ***1944*** popular sentiment that there were too many Chinese flooding the labor market. [FN74]

Writing for a unanimous Court, Justice Field upheld the exercise of federal power to bar Chae Chan Ping from returning. [FN75] Not only did Congress have the power to exclude, Field wrote, but its decision to exercise that power was fully justified:

[T]he presence of Chinese laborers had a baneful effect upon the material interest of the State, and upon public morals; . . . their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; . . . the discontent from this cause was not confined to any political party . . . but was well-nigh universal; . . . they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the State, without any interest in our country or its institutions. [FN76]

The Chinese Exclusion Case is notorious in the Asian-American community; it typifies the callous, stereotypical treatment our society has afforded Asians at several points in our history. [FN77] Could Field have avoided contributing this sorry chapter by exposure to a saving narrative? Relatively little Asian-American literature was available in English at the time Field wrote. But newspaper editorials and letters to the editor, many of which were written by U.S. citizens of stature, praised the industriousness of the Chinese and their value to the U.S. labor market. [FN78] At least one noted clergyman, Otis Gibson, championed their cause. Writing in 1876, he defended the Chinese residing in America from the charge that they presented "evils and dangers . . . to these shores." [FN79] His book, The Chinese in America, was available more than thirteen years before Field wrote his opinion in Chan Ping. Gibson also defended the Chinese against fellow clergy who had adopted the cause of Chinese exclusion. [FN80] In an 1873 reply to Father Buchard, Gibson rejected the charge that the Chinese displaced native labor or caused economic dislocation***1945*** and defended them against the "absurd" charge of moral inferiority, [FN81] pointing out that they had developed a superior civilization well before the West. [FN82]

Another book, When I Was a Boy in China, [FN83] was written in 1887. The author, Lee Yan Hou, had immigrated to the United States at age twelve. Considered to be an eloquent plea for understanding, the book exploded stereotypes of China as backward and of the Chinese as inhuman, conniving, or inferior. [FN84]

D. The Japanese Internment Cases

In 1943 and 1944 the United States Supreme Court decided two cases upholding Japanese internment, Hirabayashi v. United States [FN85] and Korematsu v. United States. [FN86] During WWII the federal government issued a series of executive orders requiring certain Japanese-Americans to leave their homes and be confined for the duration of the war. [FN87] The orders had been issued at the request of military officials, who argued that the Japanese posed a threat of sabotage and spying—charges which recent research refutes. [FN88] Many—perhaps all—of those interned were loyal American citizens who lost houses and businesses as a result of their treatment. [FN89] Like the Chinese Exclusion Case, Hirabayashi and Korematsu are replete with stereotypes of Asians as untrustworthy and passages evidencing fear and distrust of outsiders. [FN90] The deference to military judgment was nearly complete; the military's allegations about a risk of sabotage were accepted with little examination by the Court. [FN91]

1946 A dissenting opinion by Justice Murphy calls the "racial and sociological grounds [for these assumptions] questionable," [FN92] reserving special treatment for a portion of the military report that characterized the Japanese as "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion . . . given to emperor worshipping ceremonies and to 'dual citizenship.'" [FN93] He dismissed this part of the case against the Japanese as a patchwork of "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices." [FN94] For Murphy, the Court's approval was "to adopt one of the

cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." [FN95] He argued that individualized hearings could have been used to determine loyalty on a case-by-case basis and described any danger from the status quo as not imminent or "urgent." [FN96]

Murphy's dissent is in itself a powerful counternarrative—not one of those cautious, narrow dissents whose failure to persuade is understandable. It is lengthy, impassioned, and direct. Yet it was not the first statement in support of the Japanese. A widely read novel, Etsu Sugimoto's A Daughter of the Samurai, [FN97] originally published in 1925, was dedicated to Japan and America as her "two mothers, whose lives and environments were far apart, yet whose hearts met in mine." [FN98] She portrayed Japanese-Americans as loyal to two cultures and sought to dispel stereotypes of Japanese as unrelentingly warlike and forever bound to Japan. [FN99] Her book found a sympathetic reception; critics praised if for undertaking the difficult task of explaining an unfamiliar culture to the American people. [FN100] They described the book as not pleading a cause but "tel(ling) a tale with delicacy and taste." [FN101]

***1947** E. Bradwell v. Illinois

Myra Bradwell, a female resident of Illinois, applied for membership to the bar of that state. [FN102] Her application met all the requirements for admission, including a certificate of good character and a passing grade on the requisite examination. [FN103] Illinois denied her application on the ground that she was a woman and hence would be incapable of forming contracts, in particular those between an attorney and a client. [FN104] In a brief, dismissive opinion signed by four other Justices, Justice Miller affirmed the state's denial of her application. Admission to the bar, he wrote, is not so basic a right as to be protected as a privilege and immunity guaranteed by the Constitution. [FN105] A concurring opinion written by Justice Bradley and joined by Justice Swayne and Field went even further. In language dripping with condescension, they wrote:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective sphere and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. [FN106]

Bradley further wrote that the separation of the sexes is "founded in the divine ordinance, as well as in the nature of things" [FN107] and described the idea of women's practicing a profession other than that of homemaker and nurturer as "repugnant." [FN108] Bradley found support for his notions on women's role in two sources—the law of contract, which in many states prevented women from contracting separately, and theology. [FN109] "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." [FN110]

Bradley showed few traces of remorse or ambivalence in writing his extraordinary opinion. His conclusion seemed to him compelled and "in the nature of things." [FN111] Yet, at the time he wrote, numerous tracts and books existed, urging women's liberation and condemning the suffocating***1948** stereotypes Bradley invoked. The early feminist movement contained such powerful voices as Mary Wollstonecraft, Sojourner Truth, and Elizabeth Cady Stanton. [FN112] These women and others eloquently demanded full recognition of women's possibilities, intellect, and dignity. For example, Margaret Fuller, in a widely disseminated essay—The Great Lawsuit, published in 1843—wrote:

[T]he time has come when a clearer vision and better action are possible—when Man and Woman may regard one another as brother and sister, the pillars of one porch, the priests of one worship.

. . . .

We only ask of men to remove arbitrary barriers. Some would like to do more. But I believe it needs that Woman show herself in her native dignity, to teach them how to aid her; their minds are so encumbered by tradition. [FN113]

Concerning the roles of wife and mother that Bradley found to exhaust women's possibilities, Fuller wrote:

I have no doubt . . . that a large proportion of women would give themselves to [that employment] . . . . Nature would take care of that; no need to clip the wings of any bird that wants to soar and sing, or finds in itself the strength of pinion for a migratory flight . . . . The difference would be that all need not be constrained to employments for which some are unfit. . . . [FN114]

We would have every arbitrary barrier thrown down. We would have every path laid open to Woman as freely as to Man. [FN115]

F. Buck v. Bell

In 1927, Oliver Wendell Holmes, joined by seven other Justices, upheld a sterilization order issued by a Virginia court in the case of Carrie Buck, a retarded institutionalized person. [FN116] Ms. Buck had evidently been born to a retarded mother and had herself given birth to a daughter described as retarded. [FN117] (Later commentators have discovered, however, that Ms. Buck's other daughter, who died at the age of eight from measles, was not retarded. [FN118])

***1949** Holmes found little constitutional difficulty in affirming the Virginia order. His opinion is brief—approximately three pages in length—and full of facile analogies. [FN119] "It is better for all the world," Holmes wrote, "if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." [FN120]

Holmes's opinion is technically poor—easily his worst. It is nearly devoid of any consideration of Ms. Buck's interests or of less restrictive alternatives. A colorable equal protection argument, stemming from Virginia's practice of sterilizing only the institutionalized retarded, was summarily dismissed as "the last resort of constitutional arguments." [FN121] Holmes's response was that "the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." [FN122] Holmes thus treated Ms. Buck's right to reproduce as an ordinary liberty interest, her equal protection argument like an unreasonable citizen's demand that the state justify its practice of fixing potholes on the west side of town first, those on the east side later.

Could Holmes have saved himself from writing this embarrassing opinion, one that mars the career of an otherwise eminent Justice? Yes, but only by rejecting many of the narratives and accepted wisdoms that constituted his views about the mentally ill. And what would have enabled him to do that? When he wrote Buck v. Bell, Holmes was a camp follower of the American eugenics movement, then in its heyday. [FN123] That movement decried the rapid breeding of the unfit and the purported swamping of America's shores by darker, inferior southern European stock. [FN124] To Holmes, his depiction of retardate Carrie Buck must have seemed obvious and true. Yet the scientific community, even then, was ***1950** beginning to turn against the exaggerated claims of the eugenicists. Early editions of the Encyclopedia Britannica, for example, refuted such claims and took a more moderate view of the role of heredity in determining mental disorders and retardation. [FN125] At the same time, leading biologists were urging re-examination of many of the sweeping claims of the eugenicists. [FN126] Counternarratives were already beginning to be found in the public discourse.

G. Bowers v. Hardwick

Justice White based his 1986 decision to uphold Georgia's statute outlawing sodomy primarily on a history of cultural condemnation of the practice. [FN127] White focused on the statutory prohibitions still on the books in twenty-four states and the District of Columbia to show that homosexuals have no "fundamental right" to engage in consensual sodomy in their own homes. [FN128] He indignantly stated that "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." [FN129]

For White, the only question before the court was whether homosexuals have a fundamental right to engage in sodomy. [FN130] White brushed aside the statute's broad prohibition on all forms of sodomy, including consensual oral sex between married couples in their own homes. [FN131] He also neglected to consider that even if the right, narrowly stated, is not fundamental, it may nevertheless fall under a broader constitutional principle—for example the

emerging right of intimate association. [FN132] Dismissing the possibility that homosexual behavior may be protected by the Ninth and Fourteenth Amendments, as suggested by such decisions as Loving v. Virginia, [FN133] Griswold v. Connecticut, [FN134] and Roe v. ***1951*** Wade, [FN135] White wrote: " I t is evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right . . . . No connection between family, marriage, or procreation on one hand and homosexual activity on the other has been demonstrated." [FN136]

White similarly dismissed on moral grounds the argument, based on Stanley v. Georgia, [FN137] that consensual conduct within the home should be free from state interference. [FN138] He distinguished that decision by stating that it was based on the constitutionally protected right to read and receive ideas. [FN139] In contrast, White likened consensual sodomy to illegal activities such as possession in the home of drugs, firearms, or stolen goods, which Stanley did not protect. [FN140] His reasoning, of course, begs the question: if these activities were constitutionally protected, we could not make them illegal.

Bowers has already attracted a great deal of criticism [FN141] and seems destined to join its predecessors, Plessy, Dred Scott, and Bradwell, as flagrantly and wantonly wrong in the public's imagination. Already, one retired Supreme Court Justice has admitted that he regrets signing the opinion, considering it a mistake. [FN142] There were ample literary sources to enable the Court to avoid—or at least sense—its error. Walt Whitman, Christopher Isherwood, E.M. Forster, James Baldwin, and W.H. Auden all persuasively describe homosexual relations as potentially loving and constructive. [FN143] For example, in his novel Maurice, E.M. Forster wrote:

[Protagonist Clive] flung down all the barriers—not at once, for he ***1952*** did not live in a house that can be destroyed in a day. All that term and through letters afterwards he made the path clear. Once certain that Hall loved him, he unloosed his own love. Hitherto it had been dalliance, a passing pleasure for body and mind. How he despised that now. Love was harmonious, immense. He poured into it the dignity as well as the richness of his being, and indeed in that well-tempered soul the two were one. [FN144]

In James Baldwin's first novel, Giovanni's Room, published in 1956, the narrator describes his thoughts of Giovanni:

We were both insufferably childish and high-spirited that afternoon and the spectacle we presented, two grown men, jostling each other on the wide sidewalk, and aiming the cherry-pits, as though they were spitballs, into each other's faces, must have been outrageous. And I realized that such . . . happiness out of which it sprang yet more so; for that moment I really loved Giovanni, who had never seemed more beautiful than he was that afternoon. And watching his face, I realized that it meant much to me that I could make his face so bright . . . . And I felt myself flow toward him, as a river rushes when the ice breaks up. [FN145]

After reading such lyrical passages full of love and excitement over another being, could the authors of Bowers v. Hardwick still have written as they did? Sadly, we believe the answer is yes, just as the other saving narratives we have identified in this section either did not reach the judges—were not in the canon—or else somehow failed to move them. Let us now examine why this is so.

III. Law and Literature: The Canon and the Possibility of Counternarratives

Narratives, particularly what we have called counter- or "saving" narratives, could conceivably serve as strong antidotes to serious moral error. As we have seen, most serious judicial mistakes result from the judge's inability to empathize with the litigants or their circumstances. In many cases, a counternarrative was close at hand. The judge might have read the counternarrative, internalized its message, and written a wiser, or at least more nuanced, opinion. [FN146] Indeed, this hope constitutes one of the most widely proclaimed advantages of the Law and Literature movement, whose proponents believe that exposure to great texts can ***1953*** enrich and humanize their readers. [FN147]

Yet this result has not been realized to any significant extent, even today. This Part first demonstrates, then explains, the inefficacy of saving narratives for lawyers and judges. First, the canon is always narrow because of limitations inherent in several processes, including anthologizing. Second, a fundamental incommensurability between literature and judging diminishes the liberating effect narratives may have on judges. Finally, Part III asserts, in a related argument, that we are all situated actors, constituted in large part by the "stories" or

narratives by which we understand and impose order on reality. Divergent new narratives, ones that could jar and change us, always spark resistance; we reject precisely those narratives that could save us from history's judgment.

A. The Role of the Anthologist: Examining the Current Canon

In part, saving narratives rarely alter judges' behavior because they are rarely found in the "canon"—the group of texts recognized as valid and legitimate, the "classics"—at any given period in history. [FN148] If a saving narrative exists at all, it is rarely required reading—rarely found in anthologies, rarely included in the reading lists of busy judges, and rarely taught in the best schools. [FN149] Anthologists, editors, and literature instructors may be somewhat more catholic in their tastes than the average reader, but they are still positioned actors, shaped by the views, preferences, and received wisdoms of their times. [FN150] Because of a self-***1954** selection mechanism we discuss more fully in the next two sections, these guardians at the gates rarely let pass a work or text shocking or divergent enough to challenge the current sensibility. As an example of this effect, we choose a single period, namely the present, and examine one canon—namely that of the Law and Literature movement. We recognize that there are many other canons and many other periods we might have examined. Yet our findings are so striking, it seems likely that they are generalizable.

To gain a sense of the narratives commonly employed by the current Law and Literature movement, we reviewed lists of novels, plays, and poems compiled by authorities in the field. Because of the exhaustive nature of these catalogs, we chose to narrow the analysis to novels only, drawing upon four prominent scholars in the field: (1) Davenport's Readings in Legal Literature; [FN151] (2) J.B. White's The Legal Imagination; [FN152] (3) Richard Weisberg and Karen Kretschman's Wigmore's "Legal Novels" Expanded: A Collaborative Effort; [FN153] and, (4) Gemmette's Law and Literature. [FN154] We selected these lists not only because they were compiled by pioneers of the movement, but also because each identifies slightly different benefits to be gained from reading law and literature and because each was prepared in a slightly different era. [FN155]

***1955** Despite the objective of at least two of the compilers to present aspirational, liberating works and ideas, the range of novels included in the lists is remarkably narrow. As the Table shows, most of the novels were written by white men, writing about white men and their experiences. [FN156] Although some of the works deal with themes of equality and were thought radical at the time of their publication, few can be considered fully emancipatory. For example, we speculated in Part I that Bowers v. Hardwick may go down in history as one of the moral anomalies of our age—a present-day case embracing serious moral error. [FN157] Would careful reading of the current canon have saved seven majority Justices from their error? Would it have prevented them from joining in what may appear to history as an abomination? Sadly, the answer is no. Works presenting gay and lesbian relationships in a more loving, sympathetic light do exist. [FN158] But they are not yet part of the Canon. Nor does the Canon contain more than token representation of the views of indigenous people, Third World nationalists, or radical feminists of color, to name just three groups whose problems are now or may soon be on the law's front burner. [FN159]

As we explain later, little can be done to escape this predicament. Because of who we are, we will invariably select texts that provide glosses on, or, at best, minor incremental adjustments in our current understanding of social reality. [FN160] Texts that do more than this strike us as unreal, coercive, "political" and are excluded. [FN161] Sadly, the same forces that lead to serious moral error lead to the formation of a literary canon that is bland, uniform, and unlikely to save us from such errors. Nevertheless, this Part proposes a new, more radical role for humanists and literature-devotees interested in transforming law and legal culture.

***1956**

TABLE

The Law and Literature Canon

Race and Gender of Author	Number of Authors	Number of novels centering around minority rights or feminism
White Men	185	7
White Women	21	3

Minority Men	2	2
Minority Women	0	0
TOTALS	208	12

B. The Appellate Function and Saving Narratives: Posner's Incompatibility Relation

Recently, a number of writers have begun to question the usefulness of the Law and Literature enterprise. Focusing on that enterprise, for example, Richard Posner has written:

The functions of legislation and literature are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed for the one have no useful application to the other. [FN162]

Elsewhere, Posner expands his critique to judging, urging that even great works of literature have little to say to judges, whose objectives are bureaucratic, technical, and narrowly circumscribed, and whose work includes a power dimension not present in literature. [FN163]

While Posner believes that "important opportunities for mutual illumination" between law and literature exist, [FN164] he finds a danger in exaggerating the commonalities between the two fields. [FN165] Other writers have questioned the ability or receptiveness of legally trained readers to absorb the lessons of great literature. [FN166] We believe that other reasons counsel skepticism. As we have mentioned, judges—like other persons—are situated ***1957** actors. Our identities are social constructs; we influence culture and it us. [FN167] For most persons (perhaps particularly judges), society's dominant narratives will seem unexceptionable and "true"—demanding no particular improvement or expansion. [FN168] Counternarratives will seem foreign, "wrong." The self and culture are reciprocally related; but the interaction is powerfully homeostatic. Power-Knowledge replicates itself endlessly and ineluctably. [FN169]

Structural features inherent in the work environment of appellate judges further dampen our faith in the reformative effect of counternarratives. Judges are trained to resolve legal problems on the narrowest possible ground, [FN170] while literature and narratives point toward expansion. Appellate judges have no juries to serve as reminders that "there may be another story," another narrative (in addition to the prevailing one, e.g., about the police always telling the truth).

C. Narratives and the Situated Actor: Our Stories, Our Selves

Permeating the reasons given for doubt is the realization that we are all positioned actors. Our perception of reality is not a given, but rather something we construct. [FN171] The devices by which we construct and make sense of our social world are largely linguistic, consisting of categories, concepts, and particularly narratives. [FN172] Exposure to new narratives, texts, or ways of organizing reality (e.g., gay people are just like us) may have a very real appeal—vicarious experience through reading is attractive and can be character-deepening and mind-expanding. [FN173] Yet the self that meets, selects, (or deselects) and interprets the new narrative also interacts with it, and does so in terms of the old narrative. [FN174] Change is at best slow and incremental. Few of us have been fundamentally changed by reading a single book or even series of them. As Part IV shows, a more effective approach is at hand, one that entails a new and more audacious role for the humanist and would-be reformer.

***1958** IV. Breaking the Circle: Two Ways of Avoiding Serious Moral Error

We envision two ways to break the lockstep, thus enabling judges to avoid the types of mistakes we include within the term "serious moral error." [FN175] The first way is to seek out and disseminate discordant new texts in the hopes that these will enable judges to expand their sympathies and avoid the condemnation of history's judgment. A suggested list of additions to the current Law and Literature canon is included in Appendix B to this Article. [FN176] The authors disagree on how much even conscientious reading of this "outsider literature" will help. [FN177] Because judges wield such significant power, however, any avenue should be explored. Moreover, judges are interested in transcendence and avoidance of history's condemnation. In a sense, everyone is, but judges perhaps more than most: it is akin to being overruled.

The second is for humanists inside and outside the law to take on a function we call "the oppositionist as film critic." [FN178] Proposing new, better texts is a slow and uncertain way to proceed, one certain to meet resistance. Destruction, however, is more dynamic and readily accomplished. [FN179] It can be carried out by the usual tools of the deconstructionist: (1)

showing false necessity (the narrative need not have gone that way); (2) showing self-interest behind a story or presupposition; and (3) using irony, humor, and metaphor to destabilize the easy acceptance that surrounds the current tale or understanding. [FN180]

***1959** Creating a genuinely new narrative, like creating a new movie script, takes real ability and resources. [FN181] Further, even if the new narrative is better than the old one, there is no guarantee that it will be perceived as such. Destabilizing and deleting the old edifice of narratives may be easier, and is probably a logically prior first step toward building a better, fairer social world. [FN182]

Could humanists in the Law and Literature movement take on this role, assuming they desired to do so? Despite their formidable training and skills, might it not turn out that they are just as unable as judges to break free from the constraints of the familiar and move us onto the path of liberation? There are grounds for cautious hope.

First, many of the canonical texts originally had "bite," were revolutionary and audacious when first written, but have become tame and commonplace through the passage of time. [FN183] The humanists know this better than others; since they know well the setting in which those now-tamed texts were delivered, they know how revolutionary they were for their times. [FN184] Further, many of them are experts in textual analysis—they know the multiple meanings and interpretations a passage may be seen to have. Accustomed to discovering hidden riches in familiar material, many of them are more receptive than others to new material, new texts. Moreover, as literature experts they are in a better position than most of us to know developing writers, schools, and ideas. Their training, then, equips them well for the role of critic—dispassionate appraiser of the extant stock of cultural narratives and stories.

Will they take on this more audacious role? Probably not, unless pressed (shamed?) by outsider writers to do so. Teaching receptive students clever observations on language and text is an easy, enjoyable life. Until someone points out to you that Bowers v. Hardwick was decided on your watch, that you did nothing, that your favorite texts did nothing to stop it, that a highly educated group of judges educated at schools like yours and participating in your culture—the one you helped to create—wrote it, and that no one seems to have found this appalling script lacking.***1960** As with judges, there is nothing like the fear of tomorrow's judgment to instill a little needed reexamination into what we do for a living. [FN185]

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[FN1]. See infra notes 15, 16, 47, 57, 62, 72, 85, 86, 102, 116, 127 and accompanying text. We are not the first to write of such matters. See, e.g., R. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975) (discussing the dilemma of the antislavery judge in choosing between his conscience and the era's accepted legal principles regarding slavery); P. IRONS, JUSTICE AT WAR (1983) (examining the tragedy of the Japanese-American wartime cases).

[FN2]. Our own generation is no exception. See infra notes 62, 85-86, 127 and accompanying text. The concept of "serious moral error" is, of course, impossible to define and perhaps ultimately incoherent. See Critique of Normativity, 139 U.PA.L.REV. 801 (1991). We use the term in three limited senses. A decision will be said to embrace serious moral error if (1) it lacks nuance to an embarrassing degree (see infra notes 9-10, 122-23, 145-47 and accompanying text); (2) it is broadly or universally condemned by subsequent generations, somewhat akin to being overruled (see infra notes 10-11, 173-78 and accompanying text); (3) its assumptions, e.g., about women, are roundly refuted by later experiences (see infra notes 102-15 and accompanying text). Judges will always hand down decisions that will seem offensive to some. We reserve the term "serious moral error" for those shocking cases that virtually everyone later condemns.

[FN3]. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 356, 549 (2d ed. 1988) (discussing Dred Scott, which upheld slavery); id. at 1466-68, 1524 (discussing Korematsu, the Japanese internment case); id. at 567-86 (explaining Lochner, which struck down protective labor laws).

[FN4]. See infra text accompanying notes 19-21 (discussing Taney's role in writing Dred Scott); text accompanying notes 116-22 (examining Holmes's role in upholding involuntary sterilization in Buck v. Bell); text accompanying notes 72-76 (reviewing Field's role in upholding Chinese exclusion); and text accompanying notes 47-56 (analyzing Marshall's role in establishing early principles of American Indian law which dispossessed Native Americans of their ancestral lands and denied them full citizenship); see also Agneshwar, Ex-Justice Says He May Have Been Wrong, Nat'l L.J., Nov. 5, 1990, at 3 (quoting Justice Powell as confessing he "probably made a mistake" in upholding a conviction under a Georgia sodomy law in Bowers v. Hardwick).

[FN5]. For different approaches to the same problem, see K. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 237-38 (1989) (arguing that the courts' failure to look behind abstract legal principles to "recognize real harms to real people" has made the law an instrument of social inequality); Henderson, Legality and Empathy, 85 MICH.L.REV. 1574, 1576 (1987) (rejecting the legal system's assumption that legality and empathy are mutually exclusive).

[FN6]. On the ability of ingrained views to take on the appearance of objective truth, see Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved? (Book Review), 97 YALE L.J. 923 (1988) (reviewing D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987)).

[FN7]. That is, we do not view the mistake as a technical one (e.g., failing to reflect carefully on precedent), nor as one of prudence (e.g., exercising bad business judgment in a contract matter). Rather, we condemn the judge for a collapse of morals or of nerve.

[FN8]. The Law and Literature movement is diverse and includes many claims:

(i) The study of literature expands the lawyer's creative mind. For instance, David B. Saxe has argued that literature "touches and expands our imagination and intuitive nature . . . . For the lawyer and the judge, much professional activity revolves around the need to use imagination and intuition effectively . . . . [E]xploration of great literary works may enliven the creative and, hence, the professional ability of the lawyer and judge." Saxe, Billy Budd, Law Teacher, Nat'l L.J., Apr. 11, 1988, at 13; see also Denvir, Comic Relief, 63 TUL.L.REV. 1423, 1429 (1989) (asserting that "literature's focus on the particular is a healthy antidote for law's obsession with the abstract").

(ii) The study of law and literature promotes the development of values and an understanding of the human condition. Writers have articulated the idea in various ways: "Literature then supports a fuller appraisal of the human condition—an essential component of the sensitive judge. . . . [B]y allowing creative instincts to operate within the framework of the legal process, lawyers and judges will be able to respond as fuller human beings." Saxe, supra, at 14; "Law and Literature, from its infancy, has posited as its major claim the notion that lawyers have the responsibility to explore constantly their own individual and professional values, to challenge them constantly and try to improve them, and to admit that those values exist and implicate almost everything that lawyers do." Weisberg, Coming of Age Some More: "Law and Literature" Beyond the Cradle, 13 NOVA L. REV. 107, 122 (1988); "Rightness—virtue—can be understood through literature," id. at 123; "[Law and Literature] is the study of values and human rights from literary perspectives," Page & Weisberg, Foreword: The Law and Southern Literature, 4 MISS.C.L.REV. 165, 165 (1984); "[L]iterature . . . conditions the feelings [and] . . . through such conditioning, literature aims at framing the ethical and religious standards for what is usually called the policy part of a judicial opinion." Smith & Laughlin, Afterword: Law, Literature and Ethics, 4 MISS.C.L.REV. 327, 328-29 (1984) (footnote omitted).

(iii) Law and Literature promotes a better understanding of constitutional values and analogies. Jay Wishingrad has suggested:

[T]he study of law and literature is necessary . . . to bring us intellectually closer to our distinguished literary predecessors at the bar. . . . [I]t is imperative to remember that the "authors" of the Constitution and the Bill of Rights were Renaissance-Enlightenment men, well versed in literary and classical texts and Enlightenment philosophy. Consequently, one must read the Constitution and the Bill of Rights imaginatively, and not just technically . . . . Wishingrad, Why Law and Literature?, N.Y.L.J., June 23, 1986, at 2, col. 3 (emphasis in original). Wishingrad added: "By applying some of the tenets of new critical theories of reading, along with classical analogical legal reasoning, one can formulate . . . constitutional analogies from two or more amendments in the Bill of Rights. Such analogies can elucidate rights inherent in, and consistent with, the Constitution's text and structure. Such analogies can also bring us closer to the specific and general intentions of the Constitution's myriad of 'authors,' namely leading literary lawyers such as Madison and Jefferson . . . ." Id.

(iv) Law and Literature promotes a better grasp of professional responsibility. William H. Page made this point: "[L]egal 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. . . . [L]iterature . . . develop[s] . . . narrative[s] that may be more illuminating than abstract discussion. These value-laden questions resist theoretical discussion . . . ." Page, The Place of Law and Literature, 39 VAND.L.REV. 391, 416 (1986).

(v) The study of law and literature can "enrich our understanding of great literature that is steeped in law and lawyers." Wishingrad, supra.

(vi) Law and Literature improves legal writing. According to Richard Weisberg, reading one novel a month provides adequately educated lawyers with models of clarity and color to use in their professional writing. Weisberg, supra.

(vii) Understanding literature helps us to understand a traditional legal subject, e.g., "defamation by fiction." R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 9 (1988); see also Rich & Brilliant, Defamation-In-Fiction: The Limited Viability of Alternative Causes of Action, 52 BROOK.L.REV. 1 (1986) (discussing theories of defamation by fictional portrayal).

(viii) Literature can supply insight into the nature and origins of law. For example, revenge literature depicts "the system of justice that precedes an organized legal system, provides a template for the legal system when law first emerges, reasserts itself when the legal system breaks down, and, because of its personalistic and emotional character, offers an illuminating contrast to the ideals of impersonality, neutrality, and objectivity that inform the law." Id. at 354.

(ix) The study of law and literature yields a broader perspective on law and culture: "The life of the law, as Justice Holmes wrote, is rooted in experience more than logic. Experience and exposure to others are needed for the lawyer to bring vision to his presentation and make it stand out. Exposure to literature can bring us into contact with worlds beyond our own and yield perceptions broader and deeper than those that even the most involved person can gain by direct observation." Leventhal, Law and Literature: A Preface, 32 RUTGERS L. REV. 603, 606 (1979). See also Denvir, supra, at 1433-36 (discussing the lessons constitutional law can draw from Shakespeare's The Winter's Tale).

[FN9]. For advocacy of this plausible view, see supra note 8. We will qualify this claim drastically in infra notes 148-59 and accompanying text.

[FN10]. For an example of an opinion's betraying the author's inner fear or doubt, see infra notes 51-56 and accompanying text.

[FN11]. See, e.g., Winter, Foreword: On Building Houses, 69 TEXAS L. REV. 1595 (1991); Schlag, The Problem of the Subject, 69 TEXAS L. REV. 1627 (1991).

[FN12]. This view is associated with modernist and postmodernist scholars such as Pierre Schlag and Steven Winter. See Schlag, supra note 11; Winter, supra note 11. For further discussion of

modernist theories of world-making, see generally N. GOODMAN, WAYS OF WORLDMAKING (1978); E. SCHUMACHER, A GUIDE FOR THE PERPLEXED (1977); P. BERGER & T. LUCKMAN, SOCIAL CONSTRUCTION OF REALITY (1967); and Delgado, Legal Storytelling for Oppositionists and Others: A Plea for Narrative, 87 MICH.L.REV. 2411, 2416 (1989).

[FN13]. See, e.g., R. COVER, supra note 1; P. IRONS, supra note 1.

[FN14]. President's Message to Congress, CONG. GLOBE, 34th Cong., 3d Sess. app. 1 (1856).

[FN15]. 60 U.S. 393 (1856).

[FN16]. 163 U.S. 537 (1895).

[FN17]. See Strauss, Discriminatory Intent and The Taming of Brown, 56 U.CHI.L.REV. 935, 954 (1989) (noting that "Plessy v. Ferguson is now universally condemned"); Pollak, We're Going to Miss You on the Court Because We Need You (Book Review), 99 YALE L.J. 2091, 2102 (1990) (reviewing J. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989)) (finding that Dred Scott is "completely discredited").

[FN18]. Thus there are few dissents. See, e.g., infra notes 30, 35, and accompanying text.

[FN19]. Dred Scott, 60 U.S. at 407.

[FN20]. Id. at 410.

[FN21]. Id. at 405.

[FN22]. H. BEECHER STOWE, UNCLE TOM'S CABIN (K. Sklar ed. 1982) (1st ed. 1852).

[FN23]. F. DOUGLASS, Narrative of the Life of Frederick Douglass, An African Slave, in THE CLASSIC SLAVE NARRATIVES (H. Gates ed. 1987) (1st ed. 1845). Douglass's book sold well—11,000 copies between 1845 and 1847. See id. at xi.

[FN24]. On Douglass's prominent role, see D. BELL, RACE, RACISM AND AMERICAN LAW 3, 20 n.9, 30-31, 48 n.3 (2d ed. 1980); see also B.T. WASHINGTON, FREDERICK DOUGLASS (1906).

[FN25]. See F. DOUGLASS, supra note 23, at 256.

[FN26]. Id.

[FN27]. Id.

[FN28]. Id. at 256-57.

[FN29]. "I have often been awakened at the dawn of day by the most heart-rending shrieks of an own aunt of mine, whom he used to tie up to a joist, and whip upon her naked back till she was literally covered with blood . . . . The louder she screamed, the harder he whipped . . . . I never shall forget it whilst I remember any thing." Id. at 258.

[FN30]. Only Justices McLean and Curtis dissented. See Scott v. Sandford, 60 U.S. (19 How.) 393, 529 (1856) (McLean, J., dissenting); id. at 564 (Curtis, J., dissenting).

[FN31]. Plessy v. Ferguson, 163 U.S. 537, 543 (1895).

[FN32]. Id. at 544.

[FN33]. Id. at 551.

[FN34]. Id. at 552.

[FN35]. Id. at 556 (Harlan, J., dissenting) (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

[FN36]. Id. at 557 (Harlan, J., dissenting).

[FN37]. Id. at 563 (Harlan, J., dissenting).

[FN38]. Id. at 559 (Harlan, J., dissenting).

[FN39]. See, e.g., THE VOICE OF BLACK AMERICA: MAJOR SPEECHES BY NEGROES IN THE UNITED STATES, 1799-1971, at 249-595 (P. Foner ed. 1972).

[FN40]. See THE BLACK PRESS 1827-1890: THE QUEST FOR NATIONAL IDENTITY (M. Dann ed. 1971).

[FN41]. Id. at 168, 174.

[FN42]. See F. WEBB, THE GARIES AND THEIR FRIENDS (1857); F. HARPER, IOLA LEROY, OR SHADOWS UPLIFTED (1892); S. GRIGGS, IMPERIUM IN IMPERIO (1889); C. CHESNUTT, THE CONJURE WOMAN (1899); P. DUNBAR, FOLKS FROM DIXIE (1898).

[FN43]. See R. BONE, THE NEGRO NOVEL IN AMERICA 13-18 (rev. ed. 1965). In a telling passage from The Garies, Frank Webb describes a railroad trip from North Carolina to New York taken by his protagonist, Charlie Ellis, and Ellis's guardian, Mrs. Bird. Shortly after they boarded the train and found their seats, the conductor roughly shook Charlie, who was ill and sleeping, and ordered him and Mrs. Bird out of the white car. After an argument between the conductor and the car's passengers, eventually Mrs. Bird and the child acquiesced to group pressure and moved to the colored section of the train. F. WEBB, supra note 42, at 110-12.

[FN44]. R. BONE, supra note 43, at 18. Was this attitude yet another insidious aspect of racism? See generally Delgado, supra note 6 (discussing identification with the aggressor and similar mechanisms by which subordinated people cooperate with their own subordination).

[FN45]. On the historical and theoretical foundations of Indian law, see V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983), and C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 7-14 (1987). See also R. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (discussing how various European philosophies affected colonists' perceptions of Native Americans).

[FN46]. See R. WILLIAMS, supra note 45, at 312-17 (discussing Marshall's legal rationalization of American control over Indian lands); Williams, Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 ARIZ.L.REV. 237, 254-58 (1989) (discussing rationalizations of the postrevolutionary United States government in removing American Indians from their lands).

[FN47]. 21 U.S. (8 Wheat.) 543 (1823).

[FN48]. Id. at 574, 583-84.

[FN49]. Id. at 574-84.

[FN50]. Id. at 574.

[FN51]. See id. at 581 ("Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations, and treaties which the different nations . . . have carried on . . . ."); id. at 588 ("Conquest gives a title which the Courts . . . cannot deny . . . ."). Marshall also stated:

> [I]f the principle [of conquest] has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants . . . incapable of transfering the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.

Id. at 591-92 (emphasis added).

[FN52]. That is to say: the result seemed necessary and externally dictated so that any other result was impossible.

[FN53]. Id. at 574 (saying that "the rights of the original inhabitants were . . . [not to be] entirely disregarded").

[FN54]. Id. at 590.

[FN55]. Id.

[FN56]. Id.

[FN57]. 31 U.S. (6 Pet.) 515 (1832).

[FN58]. Id. at 515, 536, 540.

[FN59]. Id. at 515, 536.

[FN60]. Id. at 547-48, 550-58 (discussing treaties with the Indians).

[FN61]. Id. at 560 (noting that the tributary states "do not thereby cease to be sovereign"). Marshall based his opinion on the treaties, terming them the "supreme law of the land," id. at 559, and held that they should be read as reflecting the intent and limited understanding of the Indian parties.

> Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? . . . It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government . . . . Such a construction would be inconsistent with the spirit of this and of all subsequent treaties . . . . It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties.

Id. at 554. The political existence of the Indian parties, said Marshall, included exclusive authority within territorial boundaries. Id. at 557. The Treaty of Hopewell, on which he relied, went so far as to extend this power to allow the Indians to punish any United States citizen who refused to leave the territory within six months. Id. at 553. And Marshall stated generally that "[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state," Id. at 561.

[FN62]. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), for example, Chief Justice Rehnquist used the approach laid down by Marshall to disadvantage Indians in holding that Indian tribal courts lack criminal jurisdiction over non-Indians and may not assume jurisdiction unless specifically authorized to do so by Congress. Id. at 194-96. This decision leaves Indian nations devoid of authority over non-Indians who enter their territory and commit crimes against Indians or their property. Rehnquist described the lack of Indian criminal jurisdiction as a commonly shared, unspoken assumption of all branches of the government, id. at 197-98, 203-06; he offered as proof the intent of Congress, gleaned from a few random acts, and his own interpretation of certain treaties. Id. at 203-09.

[FN63]. See generally Williams, Jefferson, The Norman Yoke, and American Indian Lands, 29 ARIZ.L.REV. 165, 179-80, 186 n.61 (1987) (discussing legal debates concerning American Indians' land rights in the early 1800s); Williams, supra note 46, at 308-17 (describing the discreditation of the Tlinglet society in Alaska in the 1880s).

[FN64]. See R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 42-43 (1982) (describing early American propagation of the gospel among the "heathen"—Indians).

[FN65]. See Williams, supra note 46, at 244-45, 248-58 (noting that breaches of treaties were often justified on the grounds that Indians were savage, barbaric, and unconcerned about civilization, land use and economic development).

[FN66]. Revisionist historians are questioning the long-accepted doctrine that our domination of the Native Americans was necessary or just. See generally V. DELORIA, CUSTER DIED FOR YOUR SINS (1975); Williams, supra note 46; Williams, supra note 63. At the same time, our treatment of the Indians has become increasingly embarrassing in international human rights circles. Telephone interview with Robert Williams, Professor of Law, University of Arizona (Feb. 3, 1991) (describing the work of the U.N. Commission on the status of indigenous peoples).

[FN67]. I. KELSAY, JOSEPH BRANT 1743-1807: MAN OF TWO WORLDS 342 (1984).

[FN68]. Id.

[FN69]. THE WAY: AN ANTHOLOGY OF AMERICAN INDIAN LITERATURE 5-7 (S. Witt & S. Steiner eds. 1972).

[FN70]. Id. at 29. In addition to these voices, many colonial leaders, including Benjamin Franklin, championed the Indians' cause. See Delgado, supra note 6, at 937 & nn.74, 75, 82 (describing the "constitutional" system of the Iroquois, a system the influence of which on Benjamin Franklin was freely acknowledged by him).

[FN71]. See Forbath, The Shaping of the American Labor Movement, 102 HARV.L.REV. 1109, 1223 (1989) (noting that William Jennings Bryant enjoyed the support of Samuel Gompers and the AFL in part because Bryant favored immigration restriction).

[FN72]. 130 U.S. 581 (1889).

[FN73]. Id. at 582, 589.

[FN74]. Id. at 594-96.

[FN75]. Id. at 609.

[FN76]. Id. at 595-96; see also id. at 608-09 (likening Congress's action to the exercise of its

"never . . . question[ed]" power to exclude "paupers, criminals, and persons afflicted with incurable diseases").

[FN77]. S.-S. TSAI, THE CHINESE EXPERIENCE IN AMERICA 56-81 (1986) (discussing American exclusion of the Chinese); S. LYMAN, CHINESE AMERICANS 54-85 (1974) (discussing the Anti-Chinese Movement in America between 1885-1910). For treatments of this and other embarrassing chapters of our history, see P. IRONS, supra note 1, at 65, and R. TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1989).

[FN78]. R. TAKAKI, supra note 77, at 84, 88, 89, 91, 98.

[FN79]. O. GIBSON, THE CHINESE IN AMERICA 4 (1877 & reprint 1978). In particular, Gibson addresses claims that Chinese labor damages the American economy. Id. at 97-99.

[FN80]. Id. at 13-23.

[FN81]. Id. at 257.

[FN82]. Id. at 241, 249-50.

[FN83]. LEE YAN HOU, WHEN I WAS A BOY IN CHINA (1887).

[FN84]. See E. KIM, ASIAN AMERICAN LITERATURE: AN INTRODUCTION TO THE WRITINGS AND THEIR SOCIAL CONTEXT 25 (1982).

[FN85]. 320 U.S. 81 (1943).

[FN86]. 323 U.S. 214 (1944).

[FN87]. Hirabayashi concerned a challenge to Executive Order 9066, subsequently ratified and confirmed by an act of Congress. 320 U.S. at 81-83. Korematsu stemmed from an appeal of a conviction for violating Civilian Exclusion Order 34. 323 U.S. at 215-16, 219. Both orders authorized the removal of certain Japanese residing in the United States, their confinement in internment facilities for the duration of the war, and curfews for others.

[FN88]. See B. HOSOKAWA, NISEI: THE QUIET AMERICANS 292-301 (1969) (discrediting every argument given for Japanese internment).

[FN89]. See id. at 348.

[FN90]. See Hirabayashi, 320 U.S. at 90-91, 95-98 (accusing the Japanese community of fifth column activity, pro-Japan propaganda dissemination, and a failure to assimilate into the white population); Korematsu, 323 U.S. at 218-19 (noting Japanese residents' ties to Japan and disloyalty to the United States).

[FN91]. See Korematsu, 323 U.S. at 217, 218 ("military authorities . . . concluded . . . in accordance with Congressional authority . . . ."; "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population"; "we cannot say that the war-making branches of government did not have grounds for believing . . .").

[FN92]. Id. at 236 (Murphy, J., dissenting).

[FN93]. Id. at 237 (quoting FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST vii, 10-11, 22 (1942)).

[FN94]. Id. at 239.

[FN95]. Id. at 240.

[FN96]. Id. at 241-42.

[FN97]. E. SUGIMOTO, A DAUGHTER OF THE SAMURAI (1925).

[FN98]. Id. at v.

[FN99]. See, e.g., id. at 196-220, 311-14.

[FN100]. See E. KIM, supra note 84, at 27; Contemporary Chivalry of the Samurai, N.Y. Times, Jan. 10, 1926, § 7 (Book Review), at 2.

[FN101]. E. KIM, supra note 84, at 27.

[FN102]. Bradwell v. Illinois, 83 U.S. 130, 130 (1872).

[FN103]. Id. at 130.

[FN104]. Id. at 131.

[FN105]. Id. at 139.

[FN106]. Id. at 141 (Bradley, J., concurring).

[FN107]. Id.

[FN108]. Id.

[FN109]. Id.

[FN110]. Id. at 141-42.

[FN111]. Id. at 141.

[FN112]. See M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMEN (2d rev. ed. 1792); Truth, Ain't I A Woman?, in THE NORTON ANTHOLOGY OF LITERATURE BY WOMEN 253 (S. Gilbert & S. Gubar eds. 1985) [hereinafter NORTON ANTHOLOGY]; Stanton, Address to the New York State Legislature (1860), reprinted in id. at 344.

[FN113]. Fuller, Women in the Nineteenth Century, in NORTON ANTHOLOGY, supra note 112, at 295, 306 (originally entitled The Great Lawsuit).

[FN114]. Id. at 308.

[FN115]. Id. at 297.

[FN116]. Buck v. Bell, 274 U.S. 200 (1927).

[FN117]. Id. at 205.

[FN118]. See M. SHAPIRO & R. SPECE, BIOETHICS & LAW 404-05 (1981) (noting that Ms. Buck's other daughter "was reported as being a bright child" (quoting Batt, They Shoot Horses, Don't They?: An Essay on the Scotoma of One-Eyed Kings, 15 UCLA L. REV. 510, 526 (1968))).

[FN119]. See Buck, 274 U.S. at 207 (comparing sterilization with compulsory vaccination in times of epidemic).

[FN120]. Id.

[FN121]. Id. at 208.

[FN122]. Id.

[FN123]. See J. GOULD, THE MISMEASURE OF MAN 32, 335-36 (1981) (mentioning Holme's belief that breeding between Native Americans and Europeans was an aesthetically unpleasing idea); Holmes, Law and Social Reform, in THE MIND AND FAITH OF JUSTICE HOLMES 399, 400-01 (M. Lerner ed. 1943) ("I can understand better legislation that aims rather to improve the quality than to increase the quantity of the population.").

[FN124]. See generally J. GOULD, supra note 123, at 21-23, 146-320 (discussing the American advent of a hereditarian theory of IQ); H. LAUGHLIN, CONQUEST BY IMMIGRATION (1939) (discussing ways the government can regulate immigration in response to eugenics concerns).

[FN125]. See XI ENCYCLOPEDIA BRITANNICA 728-29 (Heredity) (1893) (discussing the writings of Johann Gottfried von Herder on heredity); see also THE IQ CONTROVERSY (H. Block & G. Dworkin eds. 1976) (providing a collection of articles offering a retrospective of the eugenics debate and examining whether there is a genetic component to intelligence in light of new evidence).

[FN126]. For a description of this early controversy, see D. KEVLES, IN THE NAME OF EUGENICS 118-28 (1985); K. LUDMERER, GENETICS AND AMERICAN SOCIETY 121-24 (1972).

[FN127]. Bowers v. Hardwick, 478 U.S. 186, 192-95 (1986).

[FN128]. Id. at 193-94.

[FN129]. Id. at 194.

[FN130]. See id. at 193-94.

[FN131]. See id. at 190 (declining to decide "whether laws against sodomy between consenting adults in general . . . are wise or desirable").

[FN132]. See generally Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980) (describing how the emerging doctrine of freedom of intimate association spans a constitutional spectrum including the right to privacy and to freedom of association).

[FN133]. 388 U.S. 1 (1967).

[FN134]. 381 U.S. 479 (1965).

[FN135]. 410 U.S. 113 (1973).

[FN136]. Bowers, 478 U.S. at 190-91.

[FN137]. 394 U.S. 557 (1969).

[FN138]. Bowers, 478 U.S. at 195-96; cf. Stanley, 394 U.S. at 565 (holding that the First Amendment allows people to read or watch whatever they wish in their own homes).

[FN139]. Id. at 195.

[FN140]. Id.

[FN141]. See, e.g., Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick, 31 B.C.L.REV. 375 (1990); Law, Homosexuality and the Social Meaning of Gender, 1988 WIS.L.REV. 187 (1988); Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U.L.REV. 800 (1986); Stoddard, Bowers v. Hardwick: Precedent by Person Predilection, 54 U.CHI.L.REV. 648 (1987); Sullens, Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right to Privacy, 61 TUL.L.REV. 907 (1987); Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L.J. 145 (1987).

[FN142]. See Agneshwar, supra note 4 (describing Justice Powell's doubts that the opinion was consistent with his stance in Roe v. Wade).

[FN143]. See, e.g., W. AUDEN, Heavy Date, in THE COLLECTED POETRY OF W.H. AUDEN 105-08 (1945); W. AUDEN, The Lesson, in id. at 116-17; W. AUDEN, What's the Matter, in id. at 143-44; J. BALDWIN, GIOVANNI'S ROOM (1956); E. FORSTER, MAURICE (1971); C. ISHERWOOD, A SINGLE MAN (1964); W. WHITMAN, LEAVES OF GRASS (M. Cowley ed. 1959) (1855). For an account of Auden's relationship with Chester Kallman, see D. FARNAN, AUDEN IN LOVE (1984).

[FN144]. E. FORSTER, supra note 143, at 64.

[FN145]. J. BALDWIN, supra note 143, at 121.

[FN146]. See supra notes 49-56 and accompanying text. Justice Marshall arguably reconsidered Johnson v. M'Intosh nine years later, but the broad reasoning he articulated in 1823 remained capable of doing harm. See supra note 62. Today we are reconsidering the cartoon-like characterizations of Indians and conquest we developed during this period in history. See supra notes 64-66 and the sources cited therein.

[FN147]. See supra note 8 (reciting various arguments offered in support of the Law and Literature movement); see also Stefancic & Delgado, Panthers and Pin-Stripes: The Case of Ezra Pound and Archibald MacLeish, 63 S. CAL.L.REV. 907, 908 (1990) (asserting that Archibald MacLeish, "like many lawyers, was an excellent technician who hungered for something else, namely literature").

[FN148]. On the debate over "the canon" and what should be included in it, see New 'Great Books' Criticized, San Francisco Chron., Oct. 26, 1990, at E-15, col. 4 (reporting that a sixty-volume set edited by Mortimer Adler has been criticized by Henry Louis Gates, Jr., as excluding women and cultures of color); Gilbert & Gubar, A New Anthology of Literature by Women: Does It Define a Canon or Merely "Baptize a Kangaroo?", Chron. Higher Educ., Nov. 22, 1989, at B-1, col. 2; Begley, Henry Louis Gates, Jr., Black Studies' New Star, N.Y. Times, Apr. 1, 1990, § 6 (Magazine), at 25; Winkler, Proponents of 'Multicultural' Humanities Research Call for a Critical Look at Its Achievements, CHRON. HIGHER EDUC., Nov. 28, 1990, at A-5, col. 1; and Coughlin, Despite Success, Scholars Express Ambivalence About Place of Minority Literature in Academe, Chron. Higher Educ., Jan. 10, 1990, at A-7, col. 1. See generally A. BLOOM, THE CLOSING OF THE AMERICAN MIND 344-47 (1987) (discussing the fall from favor of the Great Books approach in many academic circles).

[FN149]. See Atlas, The Battle of the Books, N.Y. Times, June 5, 1988, § 6 (Magazine), at 24 (discussing the current academic trend of revising or rejecting the traditional literary canon); Table, infra; Appendix A, infra. For the "Anthologist's dilemma," see infra note 150 and

accompanying text; see also Raines, Getting To the Heart of Dixie, N.Y. Times, Sept. 17, 1989, § 7 (Book Review), at 3 ("[It] would be wrong to attribute, unfair to impute deliberate fear to the editors or their contributors . . . . Of the 24 consultants chosen to assemble the major sections, only one is black and only two are women. . . .").

[FN150]. See H.-G. GADAMER, TRUTH AND METHOD 250-53 (1975) (exploding the myth that tradition and reason are antithetical but explaining that each actor's perception is limited by his milieu); S. FISH, Introduction: Going Down the Anti-Formalist Road, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 1, 4 (1989) (stating that there can never be a literal meaning); S. FISH, Is There a Text in this Class?, in IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 303, 303-04 (1980) (claiming that communication can only occur when people live in the same intellectual universe); see also W. BOOTH, THE COMPANY WE KEEP 40 (1988) (asserting that a clear "circularity . . . springs from the obvious fact that the minds we use in judging stories have been constituted (at least in part) by the stories we judge"); cf. Winter, The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning, 87 MICH.L.REV. 2225, 2279 (1989) (determining that communication and understanding are a result of the expression of common experiences and culture).

More optimistic views exist. See J. WHITE, JUSTICE AS TRANSLATION 35-36 (1990) (arguing that language necessarily takes on private meaning based upon each person's prior experiences, but that the communication of the language itself may form part of that experience which colors the private meaning); C. GEERTZ, LOCAL KNOWLEDGE 1 (1983) (stating that "[t]he reshaping of categories . . . so that they can reach beyond the contexts in which they originally arose" is a necessary part of anthropology); supra note 8 (offering a variety of views espoused by the Law and Literature movement); see also Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 HARV.L.REV. 985, 1018 (1990) (describing the ability of oppressed peoples to deconstruct and reinterpret the texts of their oppressors).

[FN151]. Davenport, A Bibliography: Readings in Legal Literature, 41 A.B.A. J. 939 (1955); Davenport, Readings in Legal Literature: A Bibliographical Supplement, 43 A.B.A. J. 813 (1957).

[FN152]. J. WHITE, THE LEGAL IMAGINATION (1973).

[FN153]. Weisberg & Kretschman, Wigmore's "Legal Novels" Expanded: A Collaborative Effort, 7 MD. L.F. 94 (June 1977).

[FN154]. Gemmette, Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum, 23 VAL.U.L.REV. 267 (1989) (Appendix II, Cumulative Bibliography) (compiling reading lists of various Law and Literature classes).

[FN155]. Weisberg and Kretschman, in particular, seem to view the Law and Literature movement in more transformative or aspirational terms than do most of its other proponents. See Weisberg & Kretschman, supra note 153, at 94-96. The tables reflect a combined list of novels contained in the four bibliographies listed immediately above. For a further breakdown, see Appendix A. Other bibliographies and reading lists exist, of course. See, e.g., Heilbrun & Resnick, Convergences: Law, Literature, and Feminism, 99 YALE L.J. 1913, 1954 (1990) (listing works discussing feminism and the law); Elkins, A Bibliography of Narrative, 40 J. LEGAL EDUC. 203, 212-18 (1990) (cataloguing professional and popular works about law and literature).

[FN156]. See Table, infra.

[FN157]. See supra notes 127-42 and accompanying text.

[FN158]. See supra notes 143-45 and accompanying text.

[FN159]. See Table, infra; Appendix A, infra.

[FN160]. See supra notes 148-56 and accompanying text (arguing that anthologists are temporally bound and thus collect works central to the cultural norm); infra notes 171-74 and accompanying text (describing the reader as a "situated actor" naturally resistant to radically different views).

[FN161]. Recall, for example, the furious debate that currently surrounds the "Great Books" controversy and efforts to broaden the Canon. See supra note 148.

[FN162]. Posner, Law and Literature: A Relation Reargued, 72 VA.L.REV. 1351, 1374 (1986).

[FN163]. See id. at 1374, 1387-88; accord West, Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement, 54 TENN.L.REV. 203, 205-06 (1987) (warning that although law and literature both deal in texts, law is imperative while literature is expressive).

[FN164]. R. POSNER, supra note 8, at 13-14.

[FN165]. Id. (expressing concern that seeing law and literature as parts of the same continuum contorts them both).

[FN166]. See, e.g., Abramson, Law, Humanities and the Hinterlands, 30 J. LEGAL EDUC. 27, 34 (1979) (suggesting that legal training is not merely unreceptive but hostile to the association of law and literature).

[FN167]. See Delgado, supra note 12, at 2440; infra notes 171-74 and accompanying text.

[FN168]. See Delgado, supra note 12, at 2412; Delgado, supra note 6, at 947.

[FN169]. Michel Foucault coined the term. See M. FOUCAULT, POWER-KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 233 (1980).

[FN170]. See, e.g., United States v. Ehrlichman, 546 F.2d 910, 935 (D.C. Cir.1976) (Leventhal, J., concurring), cert. denied, 429 U.S. 1120 (1977); L. TRIBE, supra note 3, at 155-56, 162-73.

[FN171]. See Delgado, supra note 6, at 947; Delgado, supra note 12, at 2416-18.

[FN172]. See P. BERGER & T. LUCKMAN, supra note 12, at 34-46 (discussing the importance of language to attaining knowledge). See generally 1 & 2 P. RICOEUR, TIME AND NARRATIVE (1984-85); Delgado & Stefancic, Why Do We Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma, 42 STAN.L.REV. 207, 216 (1989).

[FN173]. See W. BOOTH, supra note 150, at 223.

[FN174]. See supra note 150 and sources cited therein.

[FN175]. See supra note 2.

[FN176]. The list contains some titles calculated to enrich experience with "outsider" cultures and perspectives-a lack of which we believe plays a part in most cases of serious moral error. See Appendix B, infra.

[FN177]. One of us believes that unawareness is the principal problem; the other believes that judges, like most readers, will simply ignore narratives that differ drastically from their own. These differences are perhaps only matters of degree—the same forces that cause an

anthologist to exclude a work from the canon cause us as readers to devalue the work even if we happen across it. Placing an arresting, novel piece of "outsider" literature in the canon is obviously one step in improving the chance of the message's being heard. In this, we agree.

[FN178]. By this, we do not literally mean criticizing films. Rather, we propose the task of critiquing, jarring, and displacing—of showing the banal, self-serving nature of many of the ruling narratives in current legal tradition. For another treatment of this subject, see Delgado, supra note 12, at 2437-40.

[FN179]. See Delgado, supra note 12, at 2415.

[FN180]. See Delgado, supra note 6, at 2425-26; Delgado, supra note 12, at 947 (detailing how the deconstructionist process can work). There are several current myths and dominant narratives in the law: Cinderella is the myth that justice and the right will ultimately always prevail; as applied to law, it is the myth that our common law and constitutional jurisprudence are evolving toward higher and higher reaches of moral sensitivity and refinement. Fair fight is the myth that our current methods for sifting out and identifying merit and justice are fair and equitable. Just deserts is the myth that the winner in any competitive struggle or market place deserved to win and is superior. Do what your mother tells you is the myth that regularity and following precedent are valuable in themselves.

[FN181]. Even the destructive-constructive opposition can be pressed too far. Many who criticize deconstruction as nihilistic and corrosive have a limited, almost banal notion of what being "constructive" is. It often turns out that they are acting out in uncreative ways standard, stereotyped moves that merely reshuffle the hierarchy slightly.

[FN182]. See Delgado, supra note 12, at 2413-15, 2437-40.

[FN183]. See Danto, The Canon and the Wisdom of the West, HARPER'S, May 1990, at 33; see also J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984) (describing common themes which run amongst the canonical works and suggesting methods of applying the themes to the law).

[FN184]. Notice, for example, how we canonize and tame today the political writings of Locke, Hobbes, Paine, and Thoreau. These writers were true revolutionaries who believed in the right to overthrow any oppressive government. We conveniently neglect to consider that they might also have been writing for our times, not just that of kings.

[FN185]. Fear of tomorrow's judgment may also induce perseveration—i.e., digging in and trying even more desperately to justify the harm one does today by writing an even more normative—or literary—opinion. For the view that fear is not necessarily redemptive, see Delgado, Norms and Narratives: Toward a Critique of Normativity in Legal Thought, 139 U.PA.L.REV. 935 (1991). See also Ball, Stories of Origin and Constitutional Possibilities, 87 MICH.L.REV. 2280, 2281 (1989) (asserting that "narrative is not itself redemptive").

*1961 APPENDIX A:

THE LAW AND LITERATURE CANON

The following list contains the titles (novels only) from which Table A, supra, was prepared, broken down by race and gender of author. We used four sources in preparing the master list. The source of each title is indicated in the list.

1. Davenport, A Bibliography: Readings in Legal Literature, 41 A.B.A.J. 939 (1955); supplemented, Davenport, Readings in Legal Literature: A Bibliographical Supplement, 43 A.B.A. J. 813 (1957).

2. J.B. WHITE, THE LEGAL IMAGINATION (1973).

3. Weisberg & Kretschman, Wigmore's "Legal Novels" Expanded: A Collaborative Effort, 7 MD. L.F. 94 (June 1977).

4. Gemmette, Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum, 23 VAL.U.L.REV. 267 (1989) (Appendix II, Cumulative Bibliography).

WHITE MEN

SOURCE AUTHOR & TITLE	1	2	3	4
James Agee		√		
A Death in the Family		√		
Thomas Bailey Aldrich			√	
The Stilwater Tragedy			√	
Grant Allen			√	
Miss Cayley's Adventures			√	
Jeffrey Ashford (Roderic Jeffries)			√	
Burden of Proof			√	
Louis Auchincloss	√		√	√
Diary of a Yuppie				√
The Great World and Timothy Colt	√		√	
I Come as a Thief			√	
A Law for the Lion			√	
The Partners			√	
Powers of Attorney			√	
***1962** Honoré de Balzac	√		√	
An Historical Mystery			√	
César Birotteau			√	
Colonel Chabert			√	
Cousin Pons			√	
Eugénie Grandet	√			
The Gallery of Antiquities			√	
Gobseck			√	
The Last Incarnation of Vautrin			√	
The Lesser Bourgeoisie			√	
Lost Illusions			√	
The Marriage Contract			√	
Père Goriot			√	
A Start in Life			√	
Scenes from a Courtesan's Life			√	
Ursule Mirouët			√	
Sabine Baring-Gould			√	
Broom Squire			√	
John Barth			√	
The Floating Opera			√	
Hamilton Basso			√	
View From Pompey's Head			√	
Louis Becke (and Walter Jeffrey)			√	
First Fleet Family			√	
Stephen Becker			√	
A Covenant With Death			√	
Thomas Bell				√

Out of This Furnace			√
1963 Béroul		√	
Le Roman de Tristan		√	
Walter Besant		√	
The Chaplain of Fleet (with James Rice)		√	
For Faith and Freedom		√	
Orange Girl		√	
St. Katherine's by the Tower		√	
R.D. Blackmore		√	
Lorna Doone		√	
Curtis Bok	√	√	
Backbone of the Herring	√	√	
Heinrich Böll		√	
End of a Mission		√	
Bernard Botein	√	√	
The Prosecutor	√	√	
Pierre Boulée		√	
The Executioner		√	
Face of a Hero		√	
Anthony Burgess		√	
A Clockwork Orange		√	
Niven Busch		√	
The San Franciscans		√	
Samuel Butler			√
Erewhon			√
Hall Caine		√	
The Deemster		√	
Albert Camus		√	√
The Fall		√	√
The Plague			√
The Rebel		√	
The Stranger		√	√
1964 Truman Capote			√
In Cold Blood			√
Henry Carlisle		√	
Voyage to the First of December		√	
Henry Cecil	√	√	
According to the Evidence		√	
Alibi for a Judge		√	
Brothers in Law	√	√	
Daughters in Law		√	
Friends at Court	√	√	
Full Circle		√	
Independent Witness		√	
Long Arm		√	
Natural Causes		√	
No Bail for the Judge		√	
Settled Out of Court		√	
Ways and Means		√	
John Cheever			√
Oh What a Paradise It Seems			√

Chrétien de Troyes			√	
Lancelot			√	
Yvain			√	
Winston Churchill			√	
Mr. Crewe's Career			√	
A.A. Clark	√			
Tragedy at Law	√			
Walter Van Tilburg Clark			√	√
The Ox-Bow Incident			√	√
Humphrey Cobb				√
Paths of Glory				√
Wilkie Collins			√	
The Law and the Lady			√	
***1965** Joseph Conrad		√		√
Almayer's Folley		√		
Lord Jim		√		√
The Nigger of the Narcissus		√		
Nostromo		√		
Outcast of the Island		√		
Typhoon		√		
Irving Spencer Cooper				√
It's Hard to Leave While the Music's Playing				√
James Fenimore Cooper		√	√	√
The Chainbearer			√	
The Deerslayer		√		
The Pathfinder				√
The Pioneers				√
The Prairie		√		
The Redskins			√	
Satanstoe			√	
The Ways of the Hour			√	
John William Corrington				√
All My Trials				√
James Gould Cozzens	√		√	$63
By Love Possessed			√	
Guard of Honor	√			√
The Just and the Unjust	√		√	√
Francis Marion Crawford			√	
Sant'Ilario			√	
Samuel R. Crockett			√	
The Gray Man			√	
Borden Deal			√	
The Advocate			√	
Al Dewlen			√	
Twilight of Honor			√	
***1966** Charles Dickens	√	√	√	√
Barnaby Rudge			√	
Bleak House	√	√	√	√
David Copperfield		√		
Great Expectations	√			√
Hard Times		√		√

Little Dorrit		√		√
The Old Curiosity Shop			√	
Oliver Twist		√	√	√
Our Mutual Friend		√		
The Pickwick Papers	√		√	√
Tale of Two Cities		√	√	√
E.L. Doctorow			√	√
The Book of Daniel			√	√
Feodor Dostoevsky	√	√	√	√
The Brothers Karamozov			√	√
Crime and Punishment	√	√	√	√
The Idiot			√	
Arthur Conan Doyle			√	
Micah Clarke			√	
Theodore Dreiser	√		√	√
An American Tragedy	√		√	√
Sister Carrie				√
Allen Drury			√	
Advise and Consent			√	
Capable of Honor			√	
Preserve and Protect			√	
A Shade of Difference			√	
Alexandre Dumas			√	
The Black Tulip			√	
The Count of Monte Cristo			√	
Marguerite de Valois			√	
Twenty Years After, Part II			√	
John Gregory Dunne				√
Dutch Shea Jr.				√
1967 Edward Eggleston			√	
The Graysons			√	
The Mystery of Metropolisville			√	
William Faulkner			√	
Sanctuary			√	
Henry Fielding			√	
Jonathan Wild			√	
Tom Jones			√	
Joseph Fletcher			√	
The Middle Temple Murder			√	
Paul Leicester Ford			√	
The Honorable Peter Stirling			√	
Karl Emil Franzos			√	
The Chief Justice			√	
Harold Frederic			√	
The Damnation of Theron Ware			√	
Emile Gaboriau			√	
File No. 113			√	
Monsieur Lecoq			√	
John Galsworthy	√			
The Forsythe Saga	√			
Earle Stanley Gardner				√

The Case of the Grinning Gorilla			√
John Gardner		√	
The Sunlight Dialogues		√	
Brian Wynne Garfield		√	
Death Sentence		√	
R. Gehman	√		
Murder in Paradise	√		
Albert Gerber		√	
The Lawyer		√	
***1968** Michael Gilbert		√	
Flash Point		√	
William Godwin			√
Things As They Are			√
Nikolai Gogol		√	
Dead Souls		√	
William Golding			√
Lord of the Flies			√
Oliver Goldsmith		√	
The Vicar of Wakefield		√	
Gottfried von Strassburg		√	
Tristan		√	
Charles Grant		√	
Stories of Naples and Camorra		√	
Manfred Gregor		√	
Town Without Pity		√	
H. Rider Haggard		√	
Mr. Meeson's Will		√	
Edward Everett Hale		√	
Philip Nolan's Friends		√	
Bruce Hamilton		√	
The Hanging Judge		√	
Dashiell Hammett			√
Red Harvest			√
Francis Bret Harte		√	
Gabriel Conroy		√	
Cameron V. Hawley		√	
Cash McCall		√	
***1969** Nathaniel Hawthorne	√	√	√
Blithedale Romance	√		
The Scarlet Letter		√	√
Alan Patrick Herbert		√	
Holy Deadlock		√	
Robert Herrick		√	
The Common Lot		√	
John Hersey			√
The Child Buyer			√
George Higgins			√
The Friends of Eddie Coyle			√
Kennedy for the Defense			√
Penance for Jerry Kennedy			√
Frederick Trevor Hill		√	
Tales Out of Court		√	

Josiah Gilbert Holland		√	
Sevenoaks		√	
T. Howard	√		
Blood Like New Wine	√		
William Dean Howells		√	
A Modern Instance		√	
Thomas Hughes	√		
Tom Brown's School Days	√		
Victor Hugo		√	
The Last Day of a Condemned Man		√	
The Man Who Laughed		√	
Les Misérables		√	
Ninety-Three		√	
Evan Hunter		√	
The Paper Dragon		√	
***1970** Aldous Huxley			√
Brave New World			√
George James		√	
Morley Ernstein		√	
Henry James			√
The Bostonians			√
Owen Johnson	√		
The Varmint	√		
James Joyce	√		
A Portrait of the Artist as a Young Man	√		
Franz Kafka		√	√
The Trial		√	√
Mackinley Kantor			√
Andersonville			√
Elia Kazan		√	
The Assassins		√	
Ken Kesey			√
One Flew Over the Cuckoo's Nest			√
Henry Kingsley		√	
Austin Elliott		√	
Heinrich von Kleist		√	
Michael Kohlhaas		√	
Arthur Koestler		√	√
Darkness at Noon		√	√
D.H. Lawrence	√		
The Plumed Serpent	√		
Women in Love	√		
Albert Lebowitz		√	
Laban's Will		√	
***1971** Alain LeSage		√	
The Adventures of Gil Blas		√	
Meyer Levin	√		√
Compulsion	√		√
Michael Levin			√
The Socratic Method			√
Sinclair Lewis	√	√	
Cass Timberlane	√	√	

Eleazer Lipsky	√		√	
Lincoln McKeever	√		√	
Malpractice			√	
The Scientists			√	
John (Jack) London				√
The Star Rover				√
Ernst Lothar			√	
Loom of Justice			√	
Edward Lytton			√	
Eugene Aram			√	
Night and Morning			√	
Paul Clifford			√	
Bernard Malamud			√	
The Fixer			√	
Thomas Malory		√		
Le Morte D'Arthur		√		
Don Mankiewicz	√		√	
Trial	√		63	
Harold Masur			√	
The Attorney			√	
John McGahern		√		
The Barracks		√		
***1972** Herman Melville	√	√	√	√
Bartleby, the Scrivener			√	√
Billy Budd	√	√	√	√
Moby Dick		√		
James Mills			√	
One Just Man			√	
S. Weir Mitchell			√	
Constance Trescot			√	
Willard Motley			√	
Knock on Any Door			√	
John Treadwell Nichols				√
The Milagro Beanfield War				√
Frank Norris				√
Octopus				√
John O'Hara			√	
Ten North Frederick			√	
Howard Oleck			√	
A Singular Fury			√	
John Boyle O'Reilly			√	
Moondyne			√	
George Orwell		√		√
1984		√		√
J.J. Osborn			√	
The Paper Chase			√	
Thomas Nelson Page			√	
Red Rock			√	
Edgar Pangborn			√	
The Trial of Callista Blake			√	
Gilbert Parker			√	
The Right of Way			√	

***1973** J.R. Parker	√		
Attorneys At Law	√		
Tony Parker		√	
The Frying Pan		√	
Alan Stewart Paton			√
Cry, The Beloved Country			√
William Pearson		√	
Trial of Honor		√	
Walker Percy			√
The Thanatos Syndrome			√
Richard Powell		√	
The Philadelphian		√	
Julian Prescot		√	
Case for the Accused		√	
Marcel Proust		√	
Remembrance of Things Past		√	
Opie Read		√	
The Jucklins		√	
A Tennessee Judge		√	
Charles Reade		√	
Griffith Gaunt		√	
Hard Cash		√	
It Is Never Too Late to Mend		√	
John Reywall		√	
Trial of Alvin Boaker		√	
Robert Rylee		√	
Deep Dark River		√	
Charles Samuels			√
Girl in the Red Velvet Swing			√
***1974** Walter Scott		√	
Anne of Geierstein		√	
The Antiquary		√	
The Fair Maid of Perth		√	
The Fortunes of Nigel		√	
Guy Mannering		√	
The Heart of Midlothian		√	
Ivanhoe		√	
Peveril of the Peak		√	
Quentin Durward		√	
Redgauntlet		√	
Rob Roy		√	
Upton Sinclair			√
The Jungle			√
Edgar Smith		√	
Reasonable Doubt		√	
C.P. Snow		√	
The Affair		√	
Corridors of Power		√	
In Their Wisdom		√	
Strangers and Brothers		√	
Arthur Solmssen		√	

Alexander's Feast			√	
The Comfort Letter			√	
Rittenhouse Square			√	
Aleksandr Solzhenitsyn			√	√
The First Circle			√	
The Gulag Archipelago			√	
One Day in the Life of Ivan Denisovich				√
Sol Stein			√	
The Magician			√	
John Steinbeck				√
Cannery Row				√
Grapes of Wrath				√
***1975** Lawrence Sterne				√
Tristram Shandy				√
Robert Louis Stevenson			√	
David Balfour			√	
Kidnapped			√	
Weir of Hermiston			√	
George Rippey Stewart				√
Earth Abides				√
Frederic J. Stimson			√	
The Residuary Legatee			√	
Frank R. Stockton			√	
The Late Mrs. Null			√	
Robert Stone				√
A Flag for Sunrise				√
August Strindberg			√	
The Scapegoat			√	
William Makepeace Thackeray			√	
Pendennis			√	
Hunter Thompson				√
Fear and Loathing in Las Vegas				√
Leo Tolstoy		√	√	√
The Death of Ivan Ilyitch			√	√
Resurrection			√	√
War and Peace		√		
***1976** Arthur Train	√		√	
Ambition			√	
As it Was in the Beginning			√	
By Advice of Counsel			√	
McAllister and His Double			√	
Mr. Tutt Comes Home			√	
Mr. Tutt Finds a Way			√	
Page Mr. Tutt			√	
Tut, Tut Mr. Tutt			√	
Tutt and Mr. Tutt	√		√	
Robert Traver				√
Anatomy of a Murder				√
Max Trell			√	
Lawyer Man			√	
Anthony Trollope	√		√	√

Orley Farm	√		√	√
Phineas Redux	√			
The Vicar of Bullhampton			√	
Scott Turow				√
Presumed Innocent				√
Mark Twain		√	√	√
Huckleberry Finn		√		√
Pudd'n'head Wilson			√	√
Leon Uris			√	
QB VII			√	
?? Vidal			√	
Burr			√	
John Voelker			√	
Anatomy of a Murder			√	
Walter Walker				√
Rules of the Knife Fight				√
Joseph Wambaugh				√
The Onion Field				√
***1977** Robert Penn Warren			√	√
All the King's Men			√	√
Meet Me in the Green Glen			√	
Samuel Warren		√	√	
Confessions of an Attorney	√		√	
Experiences of a Barrister			√	
Ten Thousand a Year	√		√	
Frank Waters				√
The Man Who Killed the Deer				√
Morris West			√	
Daughter of Silence			√	
Stanley Weyman			√	
The Man in Black			√	
My Lady Rotha			√	
The Story of Francis Cludde			√	
Ben Ames Williams	√		√	
Leave Her to Heaven	√		√	
Tom Wolfe				√
The Bonfire of the Vanities				√
William Woolfolk			√	
Opinion of the Court			√	
Herman Wouk		√	√	√
The Caine Mutiny	√		√	√
Israel Zangwill			√	
The Big Bow Mystery			√	
Émile Zola	√			
J'Accuse!	√			

WHITE WOMEN

	SOURCE			
AUTHOR & TITLE	1	2	3	4
Jane Austen		√		
Mansfield Park		√		
Pride and Prejudice		√		

Mary Borden		√	
Action for Slander		√	
You, the Jury		√	
Frances Hodgson Burnett		√	
In Connection With the DeWilloughby Claim		√	
Willa Cather	√		
Death Comes for the Archbishop	√		
Charles Egbert Craddock (Mary Murfee)		√	
The Prophet of the Great Smoky Mountains		√	
George Eliot (Marian Evans)	√	√	√
Adam Bede		√	
Felix Holt		√	
Middlemarch	√	√	√
Mill on the Floss		√	
Romola	√		
Mary Foote		√	
John Bodewin's Testimony		√	
Frances Ormond Gaither		√	
Double Muscadine		√	
Maxwell Gray (Mary Gleed Tuttiett)		√	
The Silence of Dean Maitland		√	
Harper Lee		√	√
To Kill a Mockingbird		√	√
Marie de France		√	
Lanval		√	
Joyce Carol Oates		√	
Do With Me What You Will		√	
***1979** Ouida (Louise de la Ramée)		√	
Under Two Flags		√	
Katherine Anne Porter		√	√
Noon Wine		√	√
Ship of Fools			√
Monica Porter		√	
The Mercy of the Court		√	
Babette Rosmond		√	
The Lawyers		√	
Gertrude Schweitzer		√	
Born		√	
Harriet Beecher Stowe	√		√
Uncle Tom's Cabin	√		√
Octave Thanet (Alice French)		√	
The Missionary Sheriff		√	
We All		√	
Jessamyn West		√	
The Massacre at Fall Creek		√	
Constance Fenimore Woolson		√	
Anne		√	

MINORITY MEN

	SOURCE			
AUTHOR & TITLE	1	2	3	4
Ralph Ellison				√

Invisible Man		√
Richard Wright	√	√
Native Son	√	√

MINORITY WOMEN

	SOURCE			
AUTHOR & TITLE	1	2	3	4
None				

***1980** APPENDIX B:

RECOMMENDED ADDITIONS TO THE CANON [FNd]

AFRICAN-AMERICAN NARRATIVES

Baldwin, James. Go Tell It On The Mountain. New York: Grosset & Dunlap, 1954; New York: Dell, 1985.

Bontemps, Arna. Black Thunder. New York: Macmillan, 1936; Boston: Beacon Press, 1968.

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Gaines, Ernest J. A Gathering of Old Men. New York: Knopf, 1983; New York: Random House, 1984.

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Marshall, Paule. Brown Girl, Brownstones. New York: Random House, 1959; New York: Feminist Press, 1981.

Morrison, Toni. Beloved. New York: Knopf, 1987.

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ASIAN-AMERICAN NARRATIVES

Bulosan, Carlos. America Is In the Heart: A Personal History. Seattle: University of Washington Press, 1946.

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Yung, Judy, ed. Island: Poetry and History of Chinese Immigrants on Angel Island, 1910-1940. San Francisco: San Francisco Study Center, 1980.

MEXICAN-AMERICAN NARRATIVES

Acosta, Oscar Zeta. The Autobiography of a Brown Buffalo. San Francisco: Straight Arrow Books, 1972; New York: Random House, 1989.

———. The Revolt of the Cockroach People. New York: Vintage Books, 1973; New York: Random House, 1989.

Anaya, Rudolfo A. Bless Me, Ultima. Berkeley: Tonatiuh International, 1972; Berkeley: TQS Publications, 1976.

Barrio, Raymond. The Plum Plum Pickers. New York: Canfield, 1971; 2d. ed. Tempe, AZ: Bilingual Press, 1984

Galarza, Ernesto. Barrio Boy. Notre Dame, IN: University of Notre Dame Press, 1971.

***1982** Mohr, Nicholasa. Rituals of Survival: A Woman's Portfolio. Houston: Arte Publico Press, 1985.

Rivera, Tomás. ". . . y no se lo trago la tierra"/And the Earth Did Not Part. Berkeley: Quinto Sol Publications, 1971; Houston: Arte Publico, 1989.

Romero, Orlando. Nambé - Year One. Berkeley: Tonatiuh Publications, 1976; Berkeley: TQS Publications, 1976.

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Brown, Rita Mae. Rubyfruit Jungle. Plainfield, VT: Daughters, Inc., 1973; New York: Bantam, 1983.

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