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THREE'S A CROWD: LAW, LITERATURE, AND TRUTH

Marianne Wesson[†]

I. INTRODUCTION

I never had the pleasure of Professor Bernard Schwartz's acquaintance, although of *course*, I knew and admired his work. Looking recently through his magisterial *Main Currents in American Legal Thought*,¹ I encountered in many places, evidence of his admiration (which I surely share) for Justice William Brennan. Professor Schwartz quotes from a speech of Brennan's in which the Justice defends the role of passion in the work of judging. Passion, says Brennan, is composed of "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason."² They are, he explains, "the responses of the heart rather than the head."³

What follows is the slightly modified text of a talk I gave for the National Association of Women Judges at their 1998 Annual Conference in St. Louis. Following the implicit advice of Justice Brennan and Professor Schwartz, I aimed for my listeners' hearts instead of their heads (their heads being in any event more than adequately targeted by some of the other speakers). I am honored by its inclusion in this *festschrift* volume.

II. LAW, LITERATURE, TRUTH: THREE'S A CROWD

Because she is a thoughtful and honest woman, the judge must be able to justify to herself the enterprise in which she is engaged. As Robert Cover rather famously observed, law "takes place in a field of pain and death."⁴ The judgments you utter have consequences that extend far beyond the intellectual or aesthetic—they will result in persons losing, or gaining, property, or liberty, or even life. A desperate refugee is, or is not, returned to the possibly murderous intentions of his country's

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1. BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* (1993).

2. William Brennan, *Reason, Passion, and "The Progress of the Law"*, 10 *CARDOZO L. REV.* 3, 9 (1988), *quoted in* BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* at 562-63 (1993).

3. Brennan, *supra* note 2, at 9.

4. Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601 (1986).

leaders. A person, or a business organization, crushed by debt is, or is not, allowed to shed the burden and begin anew. A child of divorce is put into the custody of his father, or his mother, or both together, even though they are no longer together. A convicted murderer, protesting his innocence and the shoddy performance of his lawyer in the proceedings that resulted in his conviction, is, or is not, sent to his death. All because you say so. You enjoy this power, this privilege. You carry this immense burden. How do you bear it?

Perhaps you are comforted by the nature of the enterprise. You remind yourself that you do not stand, or (more appropriately) sit alone, indeed you simply organize the various forces that, perhaps working through you, produce the judgments that have such solemn effects. The nature of the enterprise being essentially combinatorial: the facts plus the law equals the judgment. It is perhaps the judge who must perform the feat of combination, but it is the variables of fact and law, neither the creation of a single judge, that determine the outcome.

But, you must have asked yourself in some dark nights of the judicial soul, is this reassuring account really plausible? Consider the manner in which critical legal theory claims to have pretty well demolished the notion that the law is a timeless and universal tapestry. Of course the observations of the *critics*, although often wittily made, were not original. Legal realism goes back very early in the century, expounded by such notables as Oliver Wendell Holmes, Roscoe Pound, and Karl Llewellyn. I find its best expression in a poem of W.H. Auden that some of you perhaps know; it was written in 1939. Auden, who had just moved from Britain to New York, was very taken with the ideas of the realists, and begins the poem by illustrating the maxim that one's view of the law depends upon one's interests:

Law, say the gardeners, is the sun,

Law is the one

All gardeners obey

To-morrow, yesterday, to-day.

Law is the wisdom of the old,

The impotent grandfathers feebly scold;

The grandchildren put out a treble tongue,

Law is the senses of the young.

Law, says the priest with a priestly look,

Expounding to an unpriestly people,

Law is the words in my priestly book,

Law is my pulpit and my steeple.

Law, says the judge as he looks down his nose,

Speaking clearly and most severely,

Law is as I've told you before,

Law is as you know I suppose,

Law is but let me explain it once more,

Law is The Law.

Yet law-abiding scholars write:

Law is neither wrong nor right,

Law is only crimes

Punished by places and by times,

Law is the clothes men wear

Anytime, anywhere,

Law is Good morning and Good night.

Others say, Law is our Fate;

Others say, Law is our State;

Others say, others say

Law is no more,

Law has gone away.

And always the loud and angry crowd,

Very angry and very loud,

Law is We,

And always the soft idiot softly Me.⁵

Some say the more nihilistic versions of legal realism—the suggestion, for example, that the law is determined by what the judge had for breakfast—can be avoided by employing the device of original intention, by applying every legal enactment from constitutional provision to municipal regulation as it was meant to be applied by its authors. But originalism is not a secure refuge, either. It sometimes seems that we're all, right and left alike, originalists now, but that does not of course answer the inevitable next inquiry: how does one erase the taint of personal subjectivity from the search for original intention? As Cass Sunstein writes in a recent review of Akihil Amar's new book on the bill of rights:

Suppose that we agree to be "originalists." Hard questions still remain. The historical record is far from clear about issues small and large, such as whether the equal protection clause forbids school segregation and whether and how the First Amendment protects commercial speech or libel. The past can be varied and murky. In addition, originalists need to decide whether to understand constitutional provisions as setting out particular and concrete ideas or general and abstract principles. The history of the equal protection clause does not establish whether it is supposed to set out the late nineteenth century's particular judgments or instead a principle whose content changes over time. . . . And there is a further perplexity for originalism, which is how to apply, or to "translate," a constitutional provision when new circumstances arise. When the question involves the application of the First Amendment to the Internet, or the Fourth Amendment to electronic eavesdropping, no mechanical appeal to the past is available. Some kind of judgment is required.⁶

In other words judgment, which must in the end must be personal (meaning that not every judge we can imagine would reach the same conclusion that you have reached), is inescapable. The judge can employ the aid of history, precedent, logic, the common-law method, but in the end you do, in a way, stand alone, presiding in your solitude over that field of pain and death. It's not as comforting as one might hope, but I suppose we've all gotten used to this, to the idea that law is more art than science. That doesn't mean it amounts to nothing more than what the judge had for breakfast. And if the law is squishy and subjective, at least the facts can be counted on to ground the judgment of a court in some kind of reality. Can't they?

But no. Just as we've accustomed ourselves to the uncertainties of legal realism, postmodernism arrives to make it worse—not only has the law "gone away" as Auden would say, now even the facts cannot be counted on. Just as the Realists

5. W.H. Auden, *Law Like Love*, in W.H. AUDEN: COLLECTED POEMS (Edward Mendelson ed., 1940).

6. Cass R. Sunstein, *Originalism for Liberals*, THE NEW REPUBLIC, Sept. 28, 1998 at 31, 31-32.

sought to demonstrate there is no difference between law and politics, now the postmodernists wish to call our attention to the circumstance that there is no difference between a belief and a fact. If the victim of an alleged sexual assault believes passionately that she was forced, and the accused believes that she consented, well, they're both right. She was and was not forced, she did and did not consent. There is no principled way to quarrel with either conclusion, each one is as much of a fact as the other. A principle that makes for fascinating discussions, but its application to the art of judging, to those who must decide whether to convict or acquit, and how to sentence, is far from clear. How does one justify the exercise of authority in a field of pain and death if one's judgments are composed of good law and true facts, but there is no good law, and there are no true facts?

Of course facts are frequently found by jurors instead of judges, but there is certainly reason to think, for example when you hear jurors in some recent celebrated cases explain their factual findings, that jurors have become (or have always been) postmodernists, willing to subscribe to the most pessimistic of postmodern tenets, the notion that we do not know, and cannot know, anything at all. I suspect, for example, thought I cannot of course prove, that this form of postmodernism prevailed among the jurors who returned such a mixed and puzzling verdict in the Terry Nichols trial. You may recall that Nichols, according to the evidence at his trial, helped plan the OKC bombing, but was at home on the day the truck bomb was delivered and detonated; the jurors found him guilty of conspiracy to use a weapon of mass destruction resulting in death, but not guilty of the murders of the victims. They rendered their finding in postmodern notation: Nichols did/did not intend to kill the victims of the bombing. Some of them later explained this rather paradoxical result by saying they didn't find enough evidence that Nichols *knew* what Timothy McVeigh's plans for all that ammonium nitrate and fuel oil were. Having watched much of the trial, I must say I think this suggestion very unconvincing, unless our ordinary language notion of *knowledge* is stretched beyond recognition, but it is of course the goal of much contemporary theorizing is precisely to suggest that knowledge is unattainable. (For myself, I suspect these jurors were actually enacting the well-documented disinclination of the nonlawyer to acquiesce in the law's insistence that the accomplice is as guilty as the principle, but that they found it more convenient to explain their verdict by reference to the difficulty of knowing than to say they disregarded or misunderstood the court's instructions.)

Such icons of postmodernism as Stanley Fish offer reassurance to the troubled judge who sometimes wonders if she knows what she's doing. You know more than you can explain, Fish counsels.⁷ The main thing is to take care with your work, to be convincing, to persuade other adherents to the same conventions, even if the conventions themselves cannot withstand close examination, and to avoid cynicism. But if care means close examination, and if close examination always discloses contradictions, how does one avoid cynicism?

If you're not sure what I mean by cynicism, consider this recent well-known

7. See Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *YALE L.J.* 1773 (1987).

observation by a prominent postmodern philologist: "It all depends on what the meaning of 'is' is." I gather the argument of this philosopher was that it is doubtful whether one can claim to be, or justly be accused of being, engaged in a certain activity unless he is performing the acts essential to that activity at the moment of the claim or accusation. In other words, it can be claimed that I am not at this moment (gesture) speaking before an audience, because at that (gesture) moment, I was uttering no sound.

This exercise in poststructuralism is matched by one performed by an acquaintance of mine, a lawyer who specializes in criminal defense. He and I were discussing, in an abstract way, the prohibition against putting one's client on the stand if one knows that the client's testimony will be false. This prohibition, he informed me, causes him no disquiet at all. He never, he disclosed, *knows* that his client's testimony will be false. Suppose the testimony is in conflict with what the client has told you in private communications? I asked. I don't know, my acquaintance replied, that he wasn't lying *then*, and isn't telling the truth *now*. I don't know, he asserted, anything, really, do I? And indeed, I suppose it all depends on what the meaning of "know" is. I don't know that I'm really in St. Louis, for after all, this might all be an elaborate hoax, like *The Truman Show*.

But if one cannot look for truth in life, not even in a courtroom, not even in what one would hope to be the least fictional moments of all, when the speaker has taken an oath to tell the truth, then how does one avoid cynicism? Is the lover of truth to be disappointed forever?

I have only two comforts to offer, neither especially original. One comes from a metaphor suggested by a computer scientist of my acquaintance. The problem is, he once explained to me, that the world is analog, but language is digital. There are an infinite number of gradations between noon and midnight, but only a finite number of words available to describe them, an infinite number of shades between black and white, but only a small number of words available to describe them. So language, even when wielded with the most skill and scruple imaginable, can only approximate the world, only prompt an illusion of understanding the object described. Yet the approximations can be very good, the illusion most satisfying, as when I listen to a digital recording of a Leontyne Price singing *Aida* or Lucinda Williams singing *Car Wheels on a Gravel Road*. The fact that the digital sampling method will never produce an isomorph of the original sound is no reason for the engineer not to try to get it as close as possible. The fact that language is but an imperfect reflection of the world is no excuse for the writer, or the witness, or the judge, not to try to get it as close as possible, and no justification for a refusal to declare that some accounts are honest, and others are not. The line between honesty and dishonesty may be hard to identify, like the moment when day becomes night, but that is not to say there is no difference between them.

The second source of consolation I suggest for those who love the truth is, perhaps paradoxically, fiction. Perhaps our craving for truth can be satisfied with something other than facts, and fiction has the virtue that it seeks to create not deception, but its gentler cousin, illusion. If truth is stranger than fiction, possibly

fiction is truer than truth. And I will go further, in this gathering, and suggest that women readers, have a particular need for, and gift for, finding the truths we crave in stories about things that never happened.

In the United Kingdom, a very gifted husband and wife team write fiction together under the name Nicci French (their real names are Sean French and Nicci Gerard). They are both prodigious readers as well as writers, and they recently wrote about their different approaches to reading. Here is what Nicci wrote:

The contents of my husband Sean's bedside table long ago spilled onto the floor: a pile of novels, some short stories, several volumes of poetry, a leaning tower of math and science books, a thumbed Ancient Greek *Made Easy*, *the New Testament*, a sprawl of biographies and essays and philosophical reflections. Currently, I'd estimate Sean is "reading" about 50 books seriously; their pages are marked with torn *lengths* of paper . . . He lies in bed surrounded by his books and his magazines, picks them up at random, browses, *grazes*, assimilates facts, reads a poem out loud to me, exclaims over new discoveries, learns a Swedish drinking song and chants it softly to himself, tells me about Montaigne in *his* garden or the Book of Job, navigates his way through the sea of words he has spread *around* himself. . . .

I, by contrast, have one novel on my bedside table. I begin it at the beginning and read *it* to the end, immersed in its consoling narrative world. I want to sink down into fiction, abandon myself to it, forget about the real world above its watery depths—the world from which I have, for *a moment at least*, escaped. . . . When, at about 14, I first read *Jane Eyre*, I knew at once that it was written for and to me. . . . It wasn't just a simple matter of identification with the plain, stubborn, misunderstood and unloved heroine. The novel has everything—it is like a masterclass in what women want from fiction . . . It has empathy—we are all Jane, all yearning for love and home, all in love with Mr. Rochester. It has a narrative that takes us from loss to gain, desire to fulfillment, loneliness to community. It appeals to the victor and the victim in us. It has a happy-sad ending, the kind of sweet and melancholy ever after we want and can't get from real life. . . . And it makes its secret appeal to women: madness up in the attic and between the lines; a powerful sense of injustice and emotional hunger rippling the text.⁸

So which is truer, which more likely to satisfy our thirst: *Jane Eyre*, a fiction, or a treatise, as nearly accurate as human effort can make it, on the shocking conditions in girls' boarding schools in England in the mid-eighteenth century? I know my answer, and I suspect it's yours as well. Perhaps the truth we crave is less a matter of facts, and more a matter of a different sort of honesty.

Consider, for example, your colleague Judge Sonia Klonsky, a trial judge in a large midwestern city. Here she is, musing on the profession she has *chosen* (the

8. Nicci Gerrard & Sean French, *Books for Girls*, THE (LONDON) OBSERVER REVIEW Sept. 27, 1998, at 2.

Nikki whom she mentions here, is her six year old *daughter*):

Even now, she is not certain the bench is really right for her. It was an honor, and a convenient exit from the U.S. Attorney's office, where she had begun to repeat herself. At the most pragmatic level, becoming a judge met *the* desperate need of a single mother to control her working hours and, almost as important, kept her in the law. She had tired of the battle hymn of practice, the race going always to the aggressive and the shrewd. It had brought out the Sonny she least liked, the child always secretly wounded, and, as she explained to herself in the most secret way, had forced her to accept the world according to men. After Nikki—after Charlie—she wanted to have a working life that depended not on slick maneuvering and sly positions, but which was anchored instead by kindness, which had some feeling connection to what surged through her when she held her child, the emotions she knew, *knew*, were truly the best, the rightest things in life. But is the serious-looking dark-haired woman of fading looks, the Sonny she envisions up on the bench, this person scolding and sentencing the vicious and the woe-torn, is that *her*?⁹

Were truer words ever spoken? And yet Sonia Klonsky never existed, each and every claim made for or about her in the passages I read a complete lie, or to put it more familiarly, an unmitigated fiction. She is the creation of Scott Turow in his excellent novel *Laws of Our Fathers*, but she is as real to me, more real in some ways, than women about whom I've read admirable and factually meticulous biographies. Others will have their own lists of books that they turn to for such a bracing and comforting immersion in the truth: mine includes *A Thousand Acres*, *One Hundred Years of Solitude*, *Push*, *Cold Mountain*, *Jane Eyre*, *A Map of the World*, *American Pastoral*, *The House of Spirits*, *Before and After*, *The Deep End of the Ocean*, *Emma*, *Alias Grace*. I must say that, although I admired *The Perfect Storm* and *Into Thin Air*, both of which seem to be rigorously factual accounts, neither one brought me face to face with that which cannot be denied. But *A Civil Action*, also nonfiction, did. Go, as the saying is, figure. All I can say is that for me, some books have the unmistakable ring, not necessarily of accuracy, but of truth, and those are the books that sustain and nurture me when in the rest of life, the truth seems hard to find.

We all crave narrative truth, we mentally connect the dots to make a pattern, even when all there really is, in truth, is a bunch of unrelated dots. Our minds are hard-wired to relentlessly convert historical event into narrative truth. It is natural that we wish to see all the dots connected in our work, but too often the facts, even those we can know (of course, it depends on what you mean by *know*), resolutely refuse to be connected, remain vague or puzzling or even contradictory. She consented, she was forced. Terry Nichols knew what Timothy McVeigh was planning, and he didn't know. Lovers of truth, do not despair. Assuage your thirst

9. SCOTT TUROW, *LAWS OF OUR FATHERS*, 28-29 (1996).

with fiction, and expect less of the factual but slippery and mendacious real world that confronts us when we lift our eyes from the page.

Another virtue of fiction, at least in my experience, is that it allows an escape from the relentless theorizing that seems to accompany every scrap of experience today. Now that no manifestation of nature or culture, from the Grand Canyon to the Spice Girls, and no activity, from sport to cooking, is immune from the colonizing ambitions of theorists, mostly I am sorry to say employed by academe, isn't it a relief to escape to a place where the experience may be described without being analyzed, where the sensuous and immediate resist the fell scrutiny of the classifying eye, and its need to reduce everything to jargon? George Orwell once illustrated the tendency of abstraction to drain language of life, in this pair of quotations made famous by its inclusion in the Strunk and White classic *The Elements of Style*.¹⁰ First the original, from *Ecclesiastes*:

I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all.

Now the jargon version, and doesn't this just sound like something you've read wearily a million times?

Objective consideration of contemporary phenomena compels the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must inevitably be taken into account.¹¹

Something like a weariness with the second sort of language has caused me to forsake, at least temporarily, my scholarly efforts, and seek a second career as a writer. One of my unlikely heroes is a man who was, by many measures, a failure at life as a legal scholar, exactly because he found intolerable the law's insistence on cramming untidy analog life into digital classifications. His name was Charles Reznikoff, a lawyer educated at the NYU Law School shortly after the turn of the century. Thereafter he went to work at a perfectly respectable legal job, writing case digests for *Corpus Juris Secundum*, an important research tool in those days long before Westlaw, Lexis, or Boolean-capable search engines. Each case had to be scrutinized, and the numbered legal principles concealed in its messy recital of facts identified and catalogued. But Reznikoff was hopeless at this work. He struggled to produce his weekly quota of digested cases, but the detail and pathos of the stories he read in the case reports (for example, one concerning a woman who in a fit of anger assaulted her husband with an enormous fish she had bought home to be prepared as their breakfast) arrested his thoughts and defied his efforts to categorize

10. WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE*, 23 (3d ed. 1979).

11. WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* 17 (1959).

them. He worked more and more slowly and was eventually fired, but out of the ashes of his career as a piecework scholar grew a new one: he became a noted poet, transforming the raw material of the law into poems of great wit and clarity. His masterpiece *Testimony* was a two-volume collection of poems based on cases he had discovered while reading law reports. Here's an example, based on a 1905 Kansas Supreme Court case called *State v. McAnarney*¹²:

He was seventy and homeless,
estranged from his wife who owned the farm.
He would visit her now and then
and beg her to share some of her property with him
for his support—
visits wrangling and unpleasant
and bad for his wife who had heart disease.

His son was in a field nearby
stacking wheat—
for it was the harvest season—
and a boy, shortly before noon,
ran out to the field and told him
to come home at once:
his mother had fainted as a result of a meeting with his father
and was thought to be dying.
His son came at once
and sent to town for a doctor.

12. 79 P.2d 137 (Kan. 1905).

His father had left the house

and gone down the public road, slowly, leaning on his cane.

The old man found a battered tin can—it had been opened—

the top ragged and rusted,

and crept under a heavy, rank hedge on the side of the road

and cut his throat with the top of the can.

But he could not cut deeply enough to die quickly

and crawled to a well and drowned himself.

His son later went to the well

and found his father's body lying in the water.

At the funeral, his younger brother saw his grief and said to him,

“You need not be crying: you are glad of it—

and I am damned glad of it, too.¹³

In reading the original case, I was surprised to note that the son who found the old man in the poem had in real life been convicted of his murder. In other words, the case was one of homicide, not suicide, at least so far as the jury believed. Yet which speech-act would we be more likely to describe as “remarkably honest”—the jury’s verdict, or the poem? Which would best feed our hunger for the truth? You need not think the jury was mistaken to find the poem more satisfying, even more true.

In a work life that inevitably, for most of you, consists of deciding into which category you will classify a particular phenomenon, isn’t it a pleasure, a necessary pleasure, and a reminder that even a diligent practitioner of a digital profession can profit from an immersion in the unclassifiable, to reach for a novel, a short story, or a poem, even though it is all lies.

13. C. REZNIKOFF, 2 TESTIMONY 163-64 (1979).

And then, if you must forswear truth as the beacon of your work, you judges, you creators and interpreters of the law, what will be your beacon instead? Perhaps you remember the end of that poem by Auden, where he suggests an answer.

If we, dear, know we know no more
Than they about the Law,
If I no more than you
Know what we should and should not do
Except that all agree
Gladly or miserably
That the Law is
And all know this,

If therefore thinking it absurd
To identify Law with some other word,
Unlike so many men
I cannot say Law is again,
No more than they can we suppress
The universal wish to guess
Or slip out of our own position
Into an unconcerned condition.
Although I can at least confine
Your vanity and mine
To stating timidly

A timid similarity,

We shall boast anyway:

Like love I say.

Like love, we don't know where or why,

Like love we can't compel or fly,

Like love we often weep,

Like love we seldom keep.¹⁴

May the love that you bring to your work sustain you. May you weep as little as possible, and keep for a long long time.

14. W.H. AUDEN, *supra* note 2.

