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JUDICIAL DISCRETION, OR THE SELF ON THE SHELF

Richard Weisberg*

For the better part of two decades, law has been dominated by the rhetoric of ethical and moral relativism. Leading legal academicians, practitioners, and judges—many of them heavily influenced by the social sciences—have rendered talk of “values” either irrelevant or laughable. Yet at the same time, the most conservative among them have managed to mask a strong moralistic outlook under the guise of value “neutrality” or its progeny: economic analysis and constitutional “originalism.” The ascendency of liberals, who for the four prior decades had stamped our law, has diminished. Unable to employ cogently the seeming neutrality of the social sciences, they have abandoned the struggle and watched, bemused, as conservative theories overtook the classroom and the courthouse.

Since the early 1970’s, a political period of decreasing activism and onrushing apathy, our legal vocabulary has progressively lost its ethical flavor. Absolutes or near absolutes have been reduced to balancing acts. Everything is negotiable in today’s legal climate, and all legal actors are to some extent held hostage to our fear of idealism.1 We hesitate to call one outcome good or another bad unless these judgments relate to the seemingly “impersonal” structures of market efficiency or empirical data. We have lost faith in our native or trained intuition about justice. The most interesting aspect of a legal situation is no longer its potential role as a new sentence or paragraph in the continuing story of a just society;2 rather, each such case is judged in terms of market forces, balancing tests, or seemingly dispassionate modes of statutory or constitutional interpretation.

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1 By “idealism,” I mean the positing of a norm toward which the self or the system is striving. While this is not the forum for a thorough discussion of the now fashionable attack on idealism (sometimes called “foundationalism,” “essentialism,” or “necessarianism”), suffice it to say that anti-idealism is, of course, also merely an idealism. See Weisberg, On the Use and Abuse of Nietzsche for Modern Constitutional Theory, in Interpreting Law and Literature (S. Levinson & S. Mailloux eds. forthcoming 1988).

2 But see for a powerful counter-thrust, R. Dworkin, Law’s Empire (1986).
The change in metaphor—from continuing story to hard-nosed data—has appealed to the times. As novels and histories, with their intricate plots and large casts of characters, gave way to television and film, with their limited demands on attention; as social activism surrendered to glib skepticism—legal intellectuals caved in under the shift from complex story to economically efficient machine. For a long time, co-extensive with the turn to social science, no one was reading fiction. Where was the incentive, or the source, to strive to understand law as a complex mix of linguistic and human factors? The demand curve, with its seductive simplicity, replaced Martin Luther King's "arch of the moral universe." If the latter swung frustratingly wide in its bend toward justice, free market economics seemed to strike home every single time. But in the process, "justice" lost some of its rich flavor.

Discussion of the most sensitive areas of law has been characterized by blandness instead of fervor. Market forces and contractual principles regulate the commercial transfer of human babies. The presumption of innocence quietly disintegrates as bail requests are "balanced" against the general social welfare. Prominent scholars and some courts suggest that art and literature no longer deserve the speech protections afforded newspapers and politicians. For these analysts, even the first amendment may be subject to market analysis—does not each extension of first amendment rights inevitably cheapen those that already exist, they ask. If comparative negligence statutes have mitigated the harsh common law treatment of negligent plaintiffs, the economists are there to assure us that the statutes are inefficient. If, analogously, the ninth amendment appears to safeguard individuals certain otherwise unspecified rights, some are there to remind us that, at least in terms of what they call "original intent," the amendment is a dead letter.

These two influential forces—economic analysis and originalist interpretive theory—come together in the fascinating case of Robert Bork. It is, after all, this provocative scholar, politician, and judge who recently revealed that he had undergone a "conversion" from sloppy moralism to scientific economic theory while studying at the University of Chicago Law School. But what if Chicago theory, like most theory, is itself value laden, every bit as much part of a philosophy—an interpretive scan on the story of the law—as the liberal judicial philosophy now in decline?

Bork's own religious metaphor—his "conversion"—speaks vol-

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3 Id. But see infra note 36.
umes. Yet, even under the often brilliant, and always serious, interrogation by the Senate Judiciary Committee, his imagery was never engaged. Only by implication, under astoundingly strong questioning one Saturday by Senator (or is it Professor?) Arlen Spector, was it suggested that Bork's "originalism" cloaked a full-fledged value system under the mantle of a judicious inquiry into the values of the framers. How better to write himself into the Constitution than to pretend he had simply ascertained the thoughts of men who created language 200 years ago? How better to regulate society according to his new religion than to pick and choose from among congressional statements on the Sherman Antitrust Act? "Original intent," as so understood, emerged less as a scientific constraint upon judges than as yet another means to institutionalize Bork's own values—his own "conversion." How else could he have concluded in a judicial opinion that Senator Sherman had in mind late twentieth-century Chicago views of market efficiency, those views which, of course, were precisely his own?

In an address before the Association of the Bar of the City of New York, Justice William Brennan recently reminded us "that judges inevitably confront value choices." He recalled for us the example of Judge Cardozo, who had "rejected the [then] prevailing myth that a judge's personal values were irrelevant to the decision process, because a judge's role was presumably limited to application of the existing law, a process governed by external, objective norms." "Cardozo," Justice Brennan continued, "acknowledged that judges, like common mortals, cannot divorce themselves completely from their personal, subjective vision." Indeed, as Justice Brennan put it, "The Judicial branch [itself had been] born not on the lofty peaks of pure reason, but in the trenches of partisan politics." Today, Justice Brennan observed, "the greatest threat to due process principles is formal reason severed from the insights of passion." "If due process values are to be preserved in the bureaucratic state of the late twentieth century, it may be essential that officials possess passion—the same passion that puts them in touch with the dreams and disappointments of those with whom they deal."

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6 Id.
7 Id.
8 Id. at 7.
9 Id. at 17.
10 Id. at 19.
I would differ slightly from Justice Brennan on only two parts of his timely and eloquent address. First, I believe that judges, as much as the bureaucrats he stressed, today risk a dissociation from those whose lives they must regulate. Second, and more important perhaps, I would contend that impersonality is as much a "passion" as anything else. Borkean originalism, indeed Bork's inability to find privacy, or even the ninth amendment in the Constitution, amounts as much to subjective value imposition as does the behavior of the most "activist" judge.

As in some other periods of jurisprudential impasse, so today, we need a Cardozo—or a Brennan—to point out not so much the favorability as the inevitability of personal values in adjudication. In Cardozo's words, judges "do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." In all of his extrajudicial essays, Cardozo stresses to a formally attuned audience the necessary place of subjectivism when judges act. But perhaps more strikingly still, Cardozo practiced on the bench what he preached in his essays. Occasionally, and assisted by that incredible gift of poetic expression, Cardozo risked seeming "injudicious" by overlooking precedents and challenging accepted norms on no more authority than that afforded by his formidable value system alone. I submit that he succeeded in large measure because his forthright value-laden approach eventually impressed his appellate colleagues and the rest of the legal world as being fully appropriate to the judge's job. Since Solomon, our best judges have scrutinized and then embraced their values and unabashedly applied them to the case at hand.

I have earlier written about Cardozo's four methods of adjudication, the last of which—"culture"—called on the judge to seek the best of himself or herself in deciding difficult matters. Also in other arenas, I have analyzed the importance of writing skills to Cardozo's success, using the opinion in *Hynes v. New York Central Railroad* as a principal example. I use the same opinion to exemplify the theme of unabashed value seeking, and to prove that Cardozo saw calling on his own values not only as a good but as an inevitable aspect of adjudication. Harvey Hynes, a "lad of 16," was electrocuted by the rail-

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road’s carelessly maintained wires as he stood “poised for his dive” into the waters of the Harlem River. But Harvey, technically, was a trespasser; the horizontal extension of the railroad’s property embodied in the plank from which he, and other “boys of the neighborhood,” dove robbed him of the protective duty of care otherwise owed by the railroad. Here legal formalism collided with “that realistic justice” that Cardozo espoused. Without citing a single precedent—his sole authority is a law review article by Roscoe Pound—Cardozo strikes out at a system of values opposed to his own, and he challenges that system forthrightly and controversially:

Thus far the courts have held that Hynes at the end of the springboard above the public waters was a trespasser on the defendant’s land. They have thought it immaterial that the board itself was a trespass, an encroachment on the public ways. They have thought it of no significance that Hynes would have met the same fate if he had been below the board and not above it. The board, they have said, was annexed to the defendant’s bulkhead. . . . [T]o bathers diving from the springboard, there was no duty, we are told, unless the injury was the product of mere willfulness or wantonness, no duty of active vigilance to safeguard the impending structure. Without wrong to them, crossarms might be left to rot; wires highly charged with electricity might sweep them from their stand, and bury them in the subjacent waters. In climbing on the board, they became trespassers and outlaws. The conclusion is defended with much subtlety of reasoning, with much insistence upon its inevitableness as a merely logical deduction. A majority of the court are unable to accept it as the conclusion of the law.

Cardozo describes here a battle not of humanity versus logic. Instead, he asserts that both approaches are value oriented. The lesson of these lines does not require us to think of Cardozo as a plaintiff-oriented judge countering the abstract, propertied rules of the courts below. The depersonalized “they”—as Cardozo consistently calls the courts below—have tried valiantly to tell “us” that their approach is correct. Formalism does not thereby stand apart from value assertion—it is merely a means (like Bork’s originalism) to the end of enforcing the torts rule against the equally forceful argument that the boy was still “in the enjoyment of the public waters” when the tragedy occurred. Cardozo chastises the courts not for forgetting them-

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14 *Hynes*, 231 N.Y. at 235, 131 N.E. at 900 (citing Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 608, 610 (1908)).
15 Id. at 232-33, 131 N.E. at 899.
16 Indeed, in Palsgraf versus that other railroad—the LIRR—Cardozo insisted equally as strongly that the defendant should have prevailed below. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
selves behind a rule but for permitting the rule to become themselves; “[r]ights and duties in systems of living law are not built upon such quicksands.”17

Rhetorically at the climax of this stunning opinion, these words focus on what Justice Brennan would call the “passion” of the courts below. “They” have passionately insisted that their “dryly logical extreme”—Pound’s phrase, cited here by Cardozo—represents law. Cardozo mitigates their passion by showing that it only represented intuition:

Here structures and ways are so united and commingled, superimposed upon each other, that the fields are brought together. In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed alio intuitu. They must be reformulated and readapted to meet exceptional conditions. Rules appropriate to spheres which are conceived of as separate and distinct cannot, both, be enforced when the spheres become concentric. There must then be readjustment or collision.18

Brilliantly rendered, this thought deliberately reinvokes the horrible fact pattern of the Hynes tragedy. Just as man-made wires collided with youthful flesh and blood, so man-made rules of law have been permitted to strike and destroy other man-made rules. But “[t]he law must say whether it will subject [Hynes] to the rule of the one field or of the other, of this sphere or of that.”19

At every point along the circle, human beings strive to impose their views on others. The judicial act, for Cardozo, heightens—it cannot hide—this all too human reality. Passion must occasionally be met with passion, and we would err badly to assume that passion has been overcome by the mere donning of judicial robes.

In any but an age proud of its value neutrality, as Justice Brennan observed, “[w]ith all respect to Cardozo, there would have been little in his account of the nature of the judicial process that would have struck” us as “remarkable.”20 But for judges today, “although Cardozo’s insights have taken deep root, they have yet to displace completely what might be called the myth of judge-as-oracle.”21 With this in mind, I recently asked my “Law and Literature” class to compare the Hynes opinion with one written by a supposed exemplar of precedential and logical precision, our present Chief Justice. The case

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17 231 N.Y. at 233, 131 N.E. at 899.
18 Id. at 235-36, 131 N.E. at 900.
19 Id. at 236, 131 N.E. at 900.
20 Brennan, supra note 5, at 7.
21 Id. at 5.
was *Paul v. Davis*, a suit brought by a private individual for the vindication of his alleged right to liberty under the fourteenth amendment and other rights he thought granted him under section 1983 of the Civil Rights Act. Davis found his name and mug shot publicized by the local police under the rubric of “shoplifter” for all to see in his hometown community. He had been arrested, but never arraigned or indicted, under that charge. He felt that the state, acting through its police, had deprived him of those rights.

Justice Rehnquist, writing for a divided Court, felt differently. But was that his feeling, or was it rather a result compelled by the texts and precedents? My students pointed out that Rehnquist, unlike Cardozo, cited earlier cases ad nauseam. They described his style as less literary than compendious. He was more the professor than the poet. His conclusions arose as though dictated by an inexorable logic. Whatever our stance as to the conclusion reached here by Rehnquist, my students went on, we must admire his lucidity, his “science”—the modern judge par excellence.

Others in the classroom, especially those who had become sensitized to the workings of language and structure within the judicial opinion, refused to see Rehnquist as scientific and dispassionate. They pointed out not only the often persuasive dissent of Justice Brennan but also indicia of subjectivism within Rehnquist’s seemingly value-neutral prose. The differences between Cardozo and Rehnquist began to disintegrate quickly, as these students called on us to read closely Rehnquist’s opening gambit:

Petitioner Paul is the Chief of Police of the Louisville, Ky., Division of Police, while petitioner McDaniel occupies the same position in the Jefferson County, Ky., Division of Police. In late 1972 they agreed to combine their efforts for the purpose of alerting local area merchants to possible shoplifters who might be operating during the Christmas season. In early December petitioners distributed to approximately 800 merchants in the Louisville metropolitan area a “flyer”... [of active shoplifters]. The flyer consisted of five pages of “mug shot” photos, arranged alphabetically... In approximately the center of page 2 there appeared photos and the name of the respondent, Edward Charles Davis III.

Just as Cardozo had humanized Harvey Hynes to begin his tragic tale, so Rehnquist starts this story by highlighting the police officer defendants whose interests he goes on to safeguard. Plaintiff Davis and his grievance must tarry a score of lines before surfacing.

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23 Id. at 694-95.
By then, Rehnquist’s reader has assimilated a pleasant picture of two dutiful officers—as much this tale’s protagonists as the “lad of 16” was Cardozo’s—endeavoring to safeguard the serenity of the Christmas season against potential riffraff.

Rhetoric and fact denigration of this kind, we are learning, are endemic to the judicial act—certainly in difficult cases, perhaps universally. Judges employ the tools of language and organization—Cardozo’s “architectonics”\(^{24}\)—not to manipulate readers but to bestow the aura of correctness upon their often value-directed conclusions. Thus Justice Rehnquist, ever mindful of the limitations he believes restrict federal court jurisdiction, introduces respondent Davis only to chastise him:

Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.\(^{25}\)

The adverb “concededly” and the verb “transmuted” subtly guide us into the passionate judge’s value system. There is no need for precedent here. The plaintiff’s choice of a federal court forum immediately marks him off as aberrational, for even he seems (through Rehnquist’s prose) to have “conceded” that he has at best a common-law defamation action here. Rehnquist’s architectonics succeeds in ridiculing the plaintiff’s very choice of a federal court forum; such a suit, if permitted, “would come as a great surprise to those who drafted and shepherded the adoption of [the 14th] Amendment.”\(^{26}\) The plaintiff thus has been excluded, through structure, from the universe of both law-abiding Christmas shoppers and our constitutional heritage. Like the Martian the verb conjures, plaintiff Davis cannot be permitted to “transmute” these heritages into self-serving litigation.

By the time, then, that Rehnquist arrives at the operative precedents, techniques anything but neutral have worked their will upon many readers—perhaps even upon a majority of his Court colleagues. It so happens that there is a Supreme Court case that, on its terms, would clearly thrust Davis’ fact pattern into the sphere of fourteenth amendment protection. The case is Wisconsin v. Constantineau,\(^{27}\) and the language is as follows: “Yet certainly where the State attaches a

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\(^{25}\) 424 U.S. at 698.

\(^{26}\) Id. at 699.

\(^{27}\) 400 U.S. 433 (1971).
'badge of infamy' to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."28 In Constantineau, the police chief of Hartford, Wisconsin "posted" the plaintiff's name on all retail liquor outlets, banning sale to her of alcohol under the challenged state statute. Justice Douglas, writing for the Court, had no trouble with the State's regulation of alcoholism and its effect in some cases on families and public order. However, in language not quoted by Rehnquist in Paul v. Davis, he stated: "The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."29 Justice Douglas held the statute unconstitutional for failure to provide such opportunity and notice. A subsequent case, Board of Regents v. Roth,30 found the Supreme Court following Douglas' decision in an analogous situation.

Rehnquist, reputedly the master of judicial logic, avoids the most lucid reading of these precedents—that defamation produced by the state may be a violation of a protected constitutional interest. Instead, he reads the precedents to require both a defamatory utterance and a retraction by the state of a previously retained right—in Constantineau, the right to purchase liquor, in Roth the right to retain one's job. Since Davis lost nothing except his reputation by being branded as a shoplifter, the precedents are deemed inapposite.

The distinction between Cardozo and Rehnquist has become less pronounced. Neither felt bound, in cases they found provocative, to follow precedent closely. Brilliant jurists of quite differing stripes, these two largely relied in such cases on their trained intuition of a just outcome. They then integrated and refined that intuition into an act of craftsmanship, the opinion itself. In both jurists, value assertion overrides the merely technical, logical, or even precedential aspects of their approach. And, although both were writing for courts of ultimate jurisdiction, their lesson seems equally as applicable to the trial court judges who are the immediate audience for these remarks.

Can trial court judges also implement their deepest values? Can you, in the terms of my title, find the self that is as much on your shelf as are the statute books and reporters? Or is that volume, the volume containing your own intuitions, your own culture, closed to you when

28 Id. at 437.
29 Id. at 436.
30 408 U.S. 564 (1972).
you are on the bench? Are not trial court judges bound by precedent, are they not more constrained, less free? Some may answer “yes” to these questions. More important, and I think more troublingly, some may relish the opportunity they think they have to keep themselves out of the equation of justice.

Freedom, however, cannot be avoided. It may be that the kinds of decisions fact-finding judges make require a more finely honed intuition, a deeper, if less frequently analyzed, position about human beings: their needs, their credibility, their direct relationship with our system of law. The ivory tower of the appellate bench has shielded some from the clash of personalities and politics that no trial-level judge can ignore. Many think this distancing from human realities is Professor—then appellate judge—Robert Bork’s real weakness as a constitutional theorist. I would surmise that adjudication on the level of original jurisdiction must call into play all of the judge’s education, experience in life, and contextual sensitivity—his or her full range of values.

But even if the everyday practice of judging might dull the passions, or more likely emphasize the technical or bureaucratic aspects of the job, specific kinds of situations suddenly reawaken the Solomonic yearnings of all good judges. It then turns out that, like a Judge Cardozo, a civil court judge, too, may work within the system to effectuate a vision of justice.

Two cases briefly serve as examples. Judge Shirley Levittan, an acting Supreme Court jurist in New York County, was petitioned by a man dying of AIDS and accused of second degree robbery. Richard Williams, the accused, had at most two years to live, probably less. Williams asked that the indictment be dismissed; the People insisted that he be brought to trial.\footnote{People v. Williams, N.Y.L.J., Sept. 18, 1987, at 12, col. 4 (N.Y. Sup. Ct. Sept. 17, 1987).} Surely in this situation, a series of highly subjective impulses affected the judge. As a technician, she would have had little trouble denying the petition. There was no law specifically helpful to the petitioner, and there was some risk—expressed by the People—that a bad precedent would be set in dismissing the indictment. No power group stood behind the petitioner, and no law directly on point came to his assistance. It was simply the judge, alone and staring into the volume of her being—her self on the shelf. There, and with the help of CPL 210.40(1)—although she had to distinguish the closest case under that provision from the Williams facts—the judge found her answer:

The circumstances of this particular case are such that the sole
result of a dismissal would be that Richard Williams, who is fatally ill (a fact which the People do not dispute), would not have to die in custody. To hold otherwise would mean that the last days of a man’s life would be spent strapped to a bed and under guard. . . . It is extremely unlikely that if this indictment is dismissed he will ever be able to walk the streets again, let alone commit new crimes to support his drug habit. In the past the defendant’s drug addiction led him to commit crimes—it is now the cause of a disease the result of which is tantamount to a sentence more severe than any court could impose for the crime charged. . . . Despite the protestations of the People, the . . . [case of] Richard Williams would not serve as a precedent for future abuses. It is truly a case which stands on its own facts—a man who, because of an illness, cannot be justly tried in our system. . . . Rather than force this man to remain in what amounts to legal limbo awaiting his death, justice dictates that dismissal of this indictment is the only remedy for this case. I am convinced that the public’s confidence in our criminal justice system can only be strengthened by such a demonstration of compassion, especially since in no way does the defendant now constitute a criminal threat to the community. Even if a man has not lived with dignity, our society’s own self-respect demands that he be permitted to die in dignity. This shall constitute the decision and order of this court.32

By coincidence, this decision was reported in the same mid-September issue of the New York Law Journal that recounted the speech of Justice Brennan. Justice Brennan and his own point of reference in that speech, Judge Cardozo, would have smiled upon this show of value assertion. Particularly noteworthy, perhaps, is the judge’s willingness, without any legalistic authority for the proposition, to declare her own values; her chosen result is deemed inevitable not because of precedent but because of what any trained intuition would find consonant with justice.

Less dramatic perhaps, but equally as relevant and moving, is the 1977 opinion of Judge Herbert Posner in the Civil Court of Queens deciding a case called TKU-Queens Corp. v. Mabel Food Corp.33 The latter, a “ma and pa” restaurant, could not meet its final payment under an agreement to which it had stipulated several months earlier. Mabel Food petitioned to stay an eviction order filed with the city marshal by TKU-Queens, its creditor-landlord, but those technicalities first had to be siphoned through the judge’s sense of fairness. Notable in the opinion are Judge Posner’s frequent citations to literature,

32 Id. at 13, col. 1.
an authority system that used to be integral with law and is now returning to fashion.

"Is there a place for 'Mercy' in the civil courts of this state?"—the judge asks in opening; he then proceeds:

or does justice require the judge to observe the strict letter of the law under all circumstances? As Portia stated, in possibly the best-known passage in all of Shakespeare's plays: "The quality of mercy is not strained, it droppeth as the gentle rain from heaven upon the place beneath. It is twice blest—it blesseth him that gives and him that takes. 'Tis mightiest in the mightiest. It becomes the throned monarch better than his crown. His sceptre shows the force of temporal power, the attribute to awe and majesty; wherein doth sit the dread and fear of kings; but mercy is above this sceptred sway. It is enthroned in the hearts of kings; It is an attribute to God himself; and earthly power doth then show likest God's—when mercy seasons justice."

Petitioners—need it be added—were granted their stay.

This last opinion, which along the way has recourse to Robert Burns as well as Shakespeare, relies more heavily on literature than on the traditional precedents, one of which had to be distinguished forcefully. Judge Herbert Posner's willingness to use the cultural sources available to him would have pleased Cardozo, who always argued that judges should draw on the best wisdom available to help decide a case. In an address fifty-five years ago to the New York State Bar Association, Cardozo declared:

Now, personally, I prefer to give the label law to a much larger assembly of social facts than would have that label affixed to them [even] by the neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and customs and usages and moralities. If these are so established as to justify a prediction with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say they are the law.

Cardozo, whose own education was in literature and philosophy, constantly enriched the volume of self by reading and reflecting over a wide range of subjects. The self was not to be left on the shelf, gathering dust. It was to be edited, amended, improved. New chapters were to be added and old ones retained on the standard not of inertia but of their value for the whole developing volume.

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34 Id. at 48, 393 N.Y.S.2d at 273 (judge's punctuation).
35 B. Cardozo, Address to N.Y. State Bar Association (Jan. 22, 1932), reprinted in Selected Writings of Benjamin Nathan Cardozo, supra note 24, at 18.
Indeed, if we can and should express our values fully in the practice of law, how are we to recognize and then constantly self-criticize those values? Not all of us have the background of a Cardozo, and fewer and fewer lawyers receive the kind of enriched education he had in college and even law school. As to this betterment of the volume of the self, it must truly be said nowadays, "they don't teach that in law school." Our failure as educators to enliven and challenge the value systems of our students has undoubtedly contributed to the increasing inability of fledgling lawyers to know right from wrong in the practice of their craft. But it is never too late to scrutinize the self.

Education is the first step into value awareness. Law schools must begin to reform their curricula. By this I do not mean that law schools can or should seek to inculcate the most basic values. But there is ample time during those often redundant three years to insist that students become aware of their own values and of the place of those values in their professional lives. As legal educators are increasingly recognizing, the primary jurisprudential source for the understanding of professional and personal ethics is literary art.36

Education along these lines should continue for practitioners and for judges. A suggestion I would offer on this occasion for taking the self off the shelf, brushing it up a bit, and making it as relevant to practicing law and judging as the printed volumes it competes with, is a simple one. Read one law-related piece of fiction each month.37 Then organize groups to discuss each of the works and their relevance


However, many in the law schools are still at best disturbed by law and literature or at worst ignorantly indifferent to it. The latter group, the "trashers" or the parochialists, seem to have been forced by events to go on the defensive. Law, as we teach it, law as it is practiced, needs the invigoration of imaginative literature to reassert its primacy in the culture. If that is not the case, the narrowness, the ethical relativism, the utter blandness of vision and rhetoric pervasive in the field today will continue.

Lawyers without literature are lawyers without a stabilizing, normative sense of themselves. This fact, recognized by western cultures from the Jews and Romans until, as Robert Ferguson states, the fourth decade of the 19th century in America, has been lost to us. See R. Ferguson, Law and Letters in American Culture 5 (1984). The results range from the insipidness of our legal prose these days to the enormity of legalistic wrongdoing in Watergate, on Wall Street, and even in the decisions of some lower federal courts. See, e.g., Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986), rev'd sub nom. Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988).

37 See R. Weisberg, supra note 13, at 210, 297-317 (bibliography).
to adjudication. Let the literary volumes inform and interact with the volume of yourself.  

Here is my proposed annotated reading list. Each work on it is delightful, but each will force you to examine your judicial values, to evaluate your passions, to refine your intuitions. November is month one in the renewed story of yourself.

NOVEMBER. John Barth, The Floating Opera. We begin with a short and riotously funny novel, Barth’s first. It is about a Maryland lawyer, Todd Andrews, and his dealings with his father, his clients, his mistress, and the judges of the state. The centerpiece of the story is a complicated wills case involving an eccentric testator whose

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38 Law and literature theory has increasingly moved toward the literary text itself and, to some extent, away from the debate on interpretation that has characterized it for the past half-decade.

Why the turn to text? Clifford Geertz has said that it helps lawyers to “imagin[e] the real.” M. Glendon, Abortion and Divorce in Western Law 8 (1987) (citing C. Geertz, Local Knowledge: Further Essays in Interpretive Anthropology 175 (1983)). And reality, as literature observes perhaps most persuasively, is only partly a verbal or even a hermeneutic phenomenon. It includes everything that fiction teaches us and that touches our practice, our values, and our lives. Thus where those like Ronald Dworkin have, in Law’s Empire, supra note 2, made an identity between law and interpretation, those interested in texts tend to see law more broadly. Learning from fictional utterances, scholars turning to texts see law as irrational, more concerned with people’s values—with the basic urge to power or to self-preservation—than it is with the verbal act alone. These thinkers understand that law is primarily image, structure, and myth. They seek fiction, somewhat paradoxically, not for its verbal complexity but instead for its deeply irrational hold on our imagination. As wonderful as fictional models are for the legal rhetorician, they come to prominence instead for their non-verbal aspects. Law, in this view, always includes a substantial component of the structural, mythic, and pre-verbal wisdom and fears of a society; unless we grasp these and recognize their inevitable place in law, we risk being overwhelmed.

Paul Gewirtz, in a recent Harvard Law Review, puts it this way:

Practitioners of “law and literature,” a newly fashionable area of legal scholarship, are rarely concerned with literature at all . . . [seeking rather] to apply current theories about interpreting literary texts to the judicial enterprise of interpreting legal texts . . . I am more interested, though, in efforts to augment the “law and literature” movement with work that explores the relevance to law of literature itself. . . .

Gewirtz, supra note 36, at 1043. Gewirtz gives method to his madness, and provocatively analyzes the Oresteia to perceive truths otherwise unavailable to lawyers outside of their own personalized spheres: that “passion is seen as a central, necessary element of law; and [that] law is presented as a gendered phenomenon.” Id. at 1044. Gewirtz recognizes, perhaps particularly in our culturally impoverished times, that fictional texts about law fill a void in the lawyer’s knowledge of his or her everyday pursuits. Lengthy discussions of Aeschylus belong in the Harvard Law Review because such texts are not fungible into any other approach to law. They are instead irreducible sources of law. I have long argued this point, suggesting that certain texts surely teach us more about the realities of law than can be learned anywhere else. See R. Weisberg, The Failure of the Word, chs. 8-9 (1984); Weisberg, How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor With an Application to Justice Rehnquist, 57 N.Y.U. L. Rev. 1 (1982); see also West, Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement, 54 Tenn. L. Rev. 203 (1987) (discussing whether adjudication is an interpretive act).
scatological contingent bequest challenges both the surrogate to con­
strue it and the parties to abide by it. There is also an automobile
accident case described knowledgeably as to both torts and civil pro­
cedure by the brilliant John Barth. But the tale’s chief contribution is
its recognition that nihilism, or at least radical relativism, constrains
all lawyers and judges today to re-evaluate the law’s underlying
premises.

DECEMBER. Shakespeare, *The Merchant of Venice*. Perhaps
the single work of literature most frequently cited by lawyers, this
play has always attracted judges, including (as we have seen) those
who work in New York’s civil court system. Portia’s lovely speeches
about mercy are fittingly read during the Christmas season. But
Shakespeare forces us to see, through the nobility of Shylock’s stand
for justice and simple acceptance of the legalistic cruelty finally thrust
upon him, that Portia’s system is not necessarily the better one.

JANUARY. Dickens, *Bleak House*. The cold winter nights in­
vite a longer read, and who better than Dickens to entertain us? Al­
ways fascinated and repulsed by law, Dickens in this work describes
the endless chancery action of *Jarndyce v. Jarndyce*. In the process, a
dozen comic and more serious lawyers and judges are introduced,
from the clerk Guppy (who makes sure his marriage proposal to Es­
ther Summerson is made “without prejudice”) to the demonic and
powerful Mr. Tulkinghorn, to the Chancellor himself. *Bleak House*
stands as one of the most powerful condemnations of a legal system
designed to create business for itself, one in which form has totally
swallowed up all dynamic notions of justice.

FEBRUARY. Shakespeare, *Measure for Measure*. Angelo has
been placed in charge of the criminal justice system in Vienna. He
begins to try lovers for the crime of “fornication,” one that has been
on the books but unenforced for years. He will not listen to pleas for
mercy, even after he himself falls desperately in love with the chaste
Isabella and urges her to the very act for which others may hang.
Shakespeare not only teaches us about victimless crimes and about
hypocrisy here but also about the dangers of delegating judicial duties
to others who may be unprepared or untrained to exercise them.

MARCH. E.L. Doctorow, *The Book of Daniel*. This masterful
rendition of the Rosenberg spy case should be read by all judges.
Among Doctorow’s first works, it tells the story from the perspective
of Daniel, one of the accused couple’s children. A detailed fictional
trial scene captures the passions of judges as well as the stratagems of

39 See supra text accompanying notes 33 & 34.
lawyers. As Doctorow, through Daniel, sees it, an entire legal system can become embroiled in its own political passions and then, in the name of objective law, ignore the reality of those it has come to judge.

APRIL. Harper Lee, *To Kill A Mockingbird*. One of fiction’s most sympathetic lawyers, Atticus Finch finds himself defending a black man against a false charge of rape. The relationship of community values to justice, in part conveyed by the judge in the trial, again indicates that law’s rational forms often mask and thus further the unbridled passions of those in power. Read together with this shorter novel, Katherine Anne Porter’s marvelous story “Noon Wine” explores the intuitive nature of justice and the puzzling futility of law within a small community.

MAY. Kafka, *The Trial*. Perhaps the most representative of all twentieth-century works, this novel is deliberately set in the bizarre law courts of Kafka’s darkest imagination. Judges sometimes forget what even more benign systems look like to those outsiders who must occasionally confront the law. This work adds a chapter to the book of the self about seeing law as others see it.

JUNE. Faulkner, *The Hamlet*. One of Faulkner’s lighter works, this book features his favorite fictional lawyer, Gavin Stevens. Stevens runs into the wily parvenu, Flem Snopes, and their battle of wits extends to the courthouse and the boudoir. Faulkner indicates that gritty common sense has its place in law and love, and that words alone, if divorced from vitalistic experience, sometimes fall short of grasping essential realities.

JULY. Scott Turow, *Presumed Innocent*. As long as this is not the first book on such a list, it is certainly acceptable as a vacation “read.” Turow takes us into big city legal politics, his protagonist an assistant D.A. investigating a brutal crime. There are innumerable twists, turns, and surprises, and there is also an excellent portrait of a black judge, the dynamic and passionate Judge Larren Lyttle.

AUGUST. Camus, *The Fall*. This masterpiece of postwar French fiction tells the story of Jean-Baptiste Clamence, a self-exiled Parisian lawyer now in watery Amsterdam. His personal fall matches that of European culture itself; his years during Vichy and the Nazi occupation of France are testimony to the evil that intellectuals do by remaining silent (or even gently contributing to the “debate”) when the beast has entered the courts of law.

SEPTEMBER. Sophocles, *Antigone*; Aeschylus, *The Eumenides*; the Bible, 1 Kings, chapter 3. These three short, foundational texts will link the self to our culture’s basic sense of justice. In *Antigone*, a brave young woman fights to maintain her natural sense of
right as against Creon’s cruel dictates of power-backed law; in *The Eumenides*, Athena establishes trial by jury to resolve a dispute between Orestes and the Furies; and in 1 Kings, the greatest judge of all—Solomon—teaches us that judging is far more than logic, empiricism, or economics.

**OCTOBER.** Melville, *Billy Budd, Sailor*. The most centrally important work about law, this short story tells of Captain Vere’s dilemma in adjudicating the case of the morally innocent foretopman, Billy Budd. The easygoing, popular, and forthright sailor has struck and killed the evil master-at-arms, John Claggart, just as Claggart was falsely accusing him of mutiny. “Struck dead by an angel of God,” intones the agitated witness to the deed, Captain Vere himself. “Yet the angel must hang!” This peculiar prophecy sets the stage for a trial at sea, and for a judgment not so much about Billy as about Vere, the captain-turned-adjudicator.

Once finished this cycle, the judge will want to repeat it, using other books in the next twelve-month period. For the self is always there, whether we admit it or not. Our choice is to leave it gathering dust—at a great cost to our judicial system—or to place it always in the company of those people or things that can challenge it to be its best. The least result of this education into the self is the awareness that judges cannot remove themselves from the adjudicatory equation.

Cardozo’s “values,” Brennan’s “passion,” Weisberg’s “self on the shelf.” However it is put, this personal side to judging must be recognized and, I believe, embraced. But accepting that part of the judge’s task with gusto only begins the risk-fraught process of recognizing who you are and what you have to do.