PART I

Possibilities

CHAPTER 1

Law and literature: a continuing debate

> Students seek out good teaching to learn not the rules but the culture, for the rules are everywhere the same.[1]

The purpose of this introductory chapter is essentially synoptic. Indeed there is a very tangible sense in which, after more than a decade of the renewed law and literature 'debate', it seems appropriate to a number of the debaters to look back and take stock.[2] This is not to suggest any running out of ideas or cooling in the heat of debate, but rather, as both Brook Thomas and Richard Posner have recently suggested, because law and literature is becoming increasingly 'serious'.[3] It is now sixteen years since Allen Smith predicted the 'coming renaissance in law and literature', and an ancillary purpose of this first chapter is, then, not only to examine the various positions taken in the 'debate', but also to impress its enduring strength.[4] The familiar distinction taken in law and literature studies is between 'law *in* literature', and 'law *as* literature'. Essentially, 'law *in* literature' examines the possible relevance of literary texts, particularly those which present themselves as telling a legal story, as texts appropriate for study by legal scholars. In other words, can Kafka's *The Trial*, or Camus's *The Fall*, tell us anything about law? 'Law *as* literature', on the other hand, seeks to apply the techniques of literary criticism to legal texts. Although both convenient and essentially effective, it is not always possible to sharply delineate the two approaches, or indeed desirable to do so. It is very much a complementary relation; a fact which is commonly appreciated by the more prominent scholars who have produced such a wealth of material in the debate. Whenever a justification of law and literature is asserted, or indeed a limitation, considering both approaches is very much the norm – for if one is valid then it tends to suggest that the other is too. The same writers

have much to say on both positions – the rules of the game might change, but the players remain the same.

LAW *IN* LITERATURE

A commonly applied distinction, in literary form, lies between the use of metaphor and the use of narrative. Richard Posner, for example, virulently denies the significance of legal narrative, but appears to be prepared to accept the validity of metaphor as a means of enhancing judicial style.[5] Just how far such a distinction can extend is, however, dubious. Although he uses it as a tool of convenience, Paul Ricoeur, for example, has stressed that substantively metaphor and narrative are simply variants of the same thing – 'storytelling'. Ricoeur posits writing as 'storytelling' in opposition to writing as 'science'. The characteristic of 'storytelling' is history; if a text seeks to present sequence and context then it is a 'story', and metaphors and narratives are defined by this attempt.[6] If legal scholarship attempts to present such context, then, in Ricoeur's analysis, legal text is, in literary terms, indistinguishable from metaphor and narrative.[7] It is, of course, the historicity of legal texts that is so hotly disputed, and as will be seen repeatedly throughout this book the whole area of historicity and hermeneutics, which lies at the very core of critical theory, is an extremely contentious one in contemporary legal writings. Another leading contemporary philosopher who clearly shares Ricoeur's position on the creation and uses of language, and who enjoys considerable influence in certain areas of legal scholarship, is Richard Rorty. According to Rorty, if we are to understand the essential problems of the twentieth century we must read the philosophy of Heidegger, Dewey and Davidson, together with the novels of Nabokov, Kafka and Orwell. The characteristic of critical scholarship, legal or otherwise, is, according to Rorty, its appreciation of the creative possibilities of metaphor as a constituent of any text, together with its willingness to supplement established theoretical texts with narrative fiction. Rorty's own metaphor, which he uses to describe the role of language in defining communities, is that of a 'conversation', and the ambition of any community can only be to 'continue the conversation', and in doing so, to strive towards an ideal of 'human solidarity'.[8] Literary forms and theories of analysis are not, of course, new, either to legal philosophy, or to

philosophy in a more general sense. Ricoeur uses Aristotle and the idea of the 'fable' as the starting-point for his analysis of metaphor.[9]

More pertinent to legal theory, perhaps, is Aristotle's metaphor of the Golden Mean as the keystone of chapter 5 of the *Ethics*, whilst the column metaphor remains one of the most effective ways of describing form and substance, still used in contemporary legal formalism.[10] Aristotle consciously integrated both the analytical and the metaphorical in his writing – both were recognised as having an interpretive and descriptive value, or *phronesis*; analysis for assertion, or *telos*, and metaphor for persuasion, or *mimesis*. In Aristotle's opinion, legal scholarship, like everything else, employed this integration.[11] The extent to which widespread awareness and use of metaphor, and more especially perhaps, narrative fiction, remains somewhat alien in contemporary legal theory, is very much a consequence of the dominance of what Ricoeur describes as 'scientific' discourse, itself the legacy of the Enlightenment project.[12] Other legal traditions have continued to concentrate on metaphors, parables and fictional narratives as the primary form of legal text. Amongst the native peoples of North America parables remain the essential source of jurisprudence.[13] The same is true in Islamic and Jewish law, where both the Sharia and Talmud are constructed around a series of metaphors and parables.[14] The reason for this, of course, being that Islamic and Jewish jurisprudence, like indeed, that of the native peoples, is very much generated by a theology. To the extent that the western tradition has remained tied to the Socratic–Thomist synthesis, it has inherited not only this theological approach, but also its application of metaphor and parable. Aquinas' theory of law was very much influenced by that which he perceived in the Judaic tradition, more particularly in the writings of Maimonides.[15] Maimonides' *Guide to the Perplexed*, the essential jurisprudential text in medieval Jewish philosophy, is a patchwork of various metaphors and parables, one of which dominates, as it does in Aquinas' *Summa* – the Creation.[16] As will be seen in chapter 2, Maimonides' account of the Creation bequeathed a paradox which has haunted western jurisprudence since the thirteenth century, and which reveals an early concern with the nature of language and discourse. Only decades before Hobbes and Locke were to proclaim the ascendency of analytical jurisprudence, Bacon was using the

Creation 'story', and its determination of truth and virtue, in law and government as in everything else, as the centrepiece of his philosophy.[17]

To use metaphors or parables or narrative 'fiction' as a means of describing legal issues is not, then, new; and perhaps unsurprisingly the law and literature debate has spawned strong defences of both the need to study the nature of metaphor and the virtue of using parables as a teaching medium in law schools. According to John Bonsignore, citing Kierkegaard, 'insensitivity to the grand questions of law cannot be approached directly, no matter how well intentioned the teacher might be'.[18] However, previous usage of literary form, or indeed present usage amongst certain legal scholars, does not, of course, make it correct. And it is this question of appropriateness that has generated some of the most fierce debate in recent law and literature scholarship. At one extreme, for example, Stanley Fish suggests that:

> Legal texts might be written in verse or take the form of narratives or parables ... so long as the underlying rationales of the enterprise were in place, so long as it was understood (at a level too deep to require articulation) that judges give remedies and avoid crises, those texts would be explicated so as to yield the determinate or settled result the law requires.[19]

Fish's initial position is similar to that taken by James Boyd White, one of the most committed advocates of the importance of law and literature. As we shall see in chapter 3, White's central concern is with the method of reading and understanding, and it is this concern with method which not only places White in the mainstream of critical theory, but at the same time unavoidably relates the twin projects of the law and literature movement – law *in* and law *as* literature. When we read narrative fiction, according to White, we do so with a more immediate sense of style and rhetoric, and it is rhetoric which, in many ways, is the keystone of White's thesis.[20] The texts that White has used to exemplify the power of rhetoric – such as Homer's *Iliad*, Thucydides' *History of the Peleponnesian War* and Plato's *Gorgias* – have tended to be pre-modern and not as immediately 'legal' as those used by others, such as Richard Weisberg. As narrative fiction presents itself as rhetoric, it also impresses upon us its unavoidable contingency, because it builds upon various contexts: social, historical, political, ethical and so on. In turn, narrative texts, much more obviously than legal

or political texts, present to us a greater sense of community. It is the peculiar nature of language which defines our relationship with others – and indeed, our relationship with the text.[21] In emphasising this contingency and the historical nature of fiction, White presents the same kind of arguments as Rorty and Ricoeur. He is stressing the 'storytelling' function of narrative, and giving it a central role in the creation of 'community'. So, again, it is method which lies at the heart of White's thesis and which makes it so similar to those of other writers who share his concern. At the same time, this dominant interest creates a hierarchy in White's writings, so that it is 'law *as* literature' which clearly emerges as the primary interest.[22] In his recent *Justice as Translation* particular discussion of narrative texts is reduced to a minimum. Law *in* literature is then, for White, in a sense subsidiary; most useful insofar as it can illustrate the nature and style of discourse used by the author. Jane Austen's *Pride and Prejudice*, according to White,

> is meant to teach the reader how to read his way into becoming a member of an audience it defines – into becoming one who understands each shift of tone, who shares the perceptions and judgments the text invites him to make, and who feels the sentiments proper to the circumstances. Both for its characters and readers, this novel is in a sense about reading and what reading means.[23]

The ability of a narrative text to reveal the tensions between alternative discourses, most immediately between the legal and the non-legal, and thus to create something of a bridge between the two, has certainly drawn support. Dunlop agrees with White that 'fiction stimulates the reader's capacity to imagine other people in other universes', adding the suggestion that '[a]fter a lawyer or law student reads Charles Dickens's *Bleak House*, he can never again be completely indifferent or "objective" towards the client across the desk'.[24]

White's wider position with regard to the relevance of literary texts has attracted support from a number of writers. Richard Weisberg, in particular, is keen to stress the complementary nature of 'law *as* literature' and 'law *in* literature'. However, he takes a much stronger position than White with regard to the immanent virtues of using literary texts for legal discourse. In contrast to White, Weisberg's texts tend to be drawn from the modern novel, particularly from Camus, Kafka, Dostoevsky and Grass.[25] Whereas for White the value of such texts lies chiefly in the

style and rhetoric which they deploy, Weisberg suggests that such texts are justified in legal study simply for the situation which they seek to describe and for the social and political contexts which they imply. In *The Failure of the Word* Weisberg examines what he perceives to be the effect of contemporary literature in the writings of lawyer-writers in the modern period. In the much-debated opening to his book, Weisberg commented upon a short article written by a French lawyer during the Nazi occupation, in which the lawyer argued on humanitarian grounds that the state should have the burden of persuasion that a person with only two Jewish grandparents was a Jew. Weisberg ascribes such linguistic masking of a moral crime such as the Holocaust to the enduring influence of Nietzschean *ressentiment*, and 'the failure of the word'. *Ressentiment* is essentially a prolonged sense of injury based on real or imagined insult; in Weisberg's words, 'a full-blown intellectual malaise'. It was this *ressentiment* which, Weisberg suggests, coloured the writings of Camus, whose hero from *The Fall*, the lawyer Clamence, Weisberg suggests is a literary companion to the French lawyer.[26] It is a powerful argument which, it will be suggested in chapter 7, rings true in relation to the wider critical movement of the late nineteenth and twentieth centuries, in philosophy and psychoanalysis as well as in literature. In an essay written two years later, Weisberg reaffirmed the place of literature in legal studies by relating it more closely to the wider movements in critical theory, both 'literary' and 'philosophical', as represented particularly in the writings of Heidegger, Derrida and de Man.[27] Again, Weisberg places the Holocaust at the centre of his work, in a sense representative of the angst and despair which accompanies and develops from Nietzschean *ressentiment*. In doing so, he is not only putting into historical context the philosophical concerns of those like Heidegger and Sartre, he is also making the same nexus as that made by George Steiner, who suggested that the death camps were 'the deliberate enactment of a long and precise imagining'.[28] According to Weisberg, Dostoevsky, Kafka and Camus were presenting a literature which at once both revealed and complemented this 'imagining'.[29]

In more recent work, largely in response to the criticisms of Posner and his namesake, Robert Weisberg, Richard Weisberg has strongly reaffirmed his position, suggesting that, '[w]e must teach

and think about these texts because, here and now, they are the best medium to instruct ourselves and our students about what we do ... we need this learning in order to practice and (more importantly, at least for me) in order to understand what our assumptions are and what we do'.[30] Indeed, in contrast with White, Weisberg now suggests that, if anything, the literary text is of more value to lawyers than literary theory. From their early status in the law and literature movement as the 'fun factor', literary texts have emerged as the vital component: 'My suggestion, speaking from within, is to emphasize from now on the central place of the literary text – more than literary theory – in the debates ... Novels about law, as I have suggested, and particularly "procedural novels", are the path to human understanding.'[31] The end result, the essential accommodation of both branches of law and literature scholarship, is precisely the same as in White's work, but the dynamic is quite the opposite.[32] The divergence between Weisberg and White is most clearly drawn in Weisberg's most recent book, *Poethics*. As we shall see in chapter 3, White's retreat from literature to a theory of 'pure rhetoric' signals, according to Weisberg, a retreat from the ethics, or 'poethics', of texts. *Poethics* serves to re-emphasise Weisberg's own commitment to a Kantian ethical vision, and he analyses a number of texts, not only from modern literature, such as Barth's *The Floating Opera*, but also from previous centuries, such as Dickens's *Bleak House* and Shakespeare's *The Merchant of Venice*, in order to reassert his essentially existential Heideggerian–Kantian thesis. 'Poethics', Weisberg maintains, 'in its attention to legal communication and to the plight of those who are "other", seeks to revitalize the ethical component of law.'[33] I shall return to Weisberg's 'poethics' in chapter 8, where I will suggest a 'poethical' analysis of Ivan Klima's recent novel, *Judge on Trial*.

Like Richard Weisberg, Robin West has emphasised the value of literary texts as a medium for jurisprudential debate, most famously by using Kafka's *The Trial* to critique Richard Posner's economic analysis of law. According to West, Kafka's characterisations revealed the practical, and above all, ethical unacceptability of a pure scientific analysis, such as that presented by Posner. In West's opinion, what Kafka was portraying was the contradictory nature of authority and submission in the modern world, and the resultant alienation of the human condition:

> Obedience to legal rules to which we would have consented relieves us of the task of evaluating the morality and prudence of our actions ... The impulse to legitimate our submission to imperative authority also has within it, of course, the seeds of tragedy. That impulse is the means by which we most commonly victimize ourselves, and the means by which we allow ourselves to become tools that enable those who use us to destroy us.[34]

The susceptibility to submission and the alienation of the human condition which West perceives is precisely that which Weisberg has stressed in his 'ressentiment' thesis. Posner's world, West suggests, is quite simply too 'happy' – and too rational.[35] Many of the statements made by West betray a sympathy with the political and social expressions commonly associated with the critical legal studies movement (CLS). West's stress on the fundamental contradiction in the human condition between freedom and authority, the alienation of the individual in the modern analytical legal world and most particularly her attack on the possibility of rationalism as a foundation for legal order is very much the rhetoric of CLS.[36] This has become increasingly the case in her subsequent work, which concentrates more than ever on the role of language and literature in the political and ethical re-constitution of communities. In doing so, West quite firmly allies herself with James Boyd White against Posner. However, she also goes quite deliberately further than White, suggesting in the process that White concentrates too closely on the texts as texts, and as such presents a 'social criticism which is constrained and stunted by the texts it criticizes'. Even more damning is West's conclusion that because of this constraint, White is in danger of reproducing the same 'dehumanisation' which Posner's thesis presents.[37]

To avoid doing this West stresses the need to use literature as a means of promoting 'the interactive community', a concept remarkably reminiscent of the 'intersubjective zap' which Gabel and Kennedy advocated as the holy grail for the CLS movement back in the heady days of 1984.[38] In suggesting that '[w]hen we create, read, criticize, or participate in texts, we are indeed engaging in a form of communal reconstitution', West is using precisely the rhetoric with which innumerable CLS writers appealed for a new approach to 'lived experience' of law. We must not simply read a text, we must 'understand how it feels' to participate in the reading.[39] She concludes by urging that '[w]e need to pay attention

to our literary texts about law, as White says, but we also need to produce, listen to, criticize, and participate in the production of narratives about the impact of legal norms and institutions upon the subjective lives of those whom the legal textual community excludes'.[40] West's most recent work has served to re-emphasise her commitment to a more radical political position, and, it is suggested, has contributed to her less enthusiastic subsequent critique of law and literature. In *Narrative, Authority and Law* she explicitly critiques law and literature for being a distraction from real political struggles, and implicitly critiques it by a reluctance to use literature. What is needed, she suggests, is less inter-textual debate, and more of a 'truly radical critique of power'. 'By focusing on the distinctively imperative core of adjudication, instead of its interpretive gloss', she further adds, 'we free up meaningful criticism of law.'[41] Although she concludes by suggesting that there is a place in critical legal scholarship for a literary supplement, West's recent work is clearly less sympathetic to law and literature.[42] Her ambitions are more political, less textual. However, despite West's reservations other critical legal scholars have attempted to employ metaphors and parables in their writing; in other words, to adopt the role of 'storytellers'. Amongst the most notable attempts is Patricia Williams's 'Alchemical Notes'.[43] Allan Hutchinson also has attempted to employ metaphor and narrative as a means of describing legal problems. Yet in general, despite much debate by CLS adherents on the possibilities of alternative discourse, relatively little has been done.[44] Any political or social ambitions which might be harboured in literary texts have been extracted and employed by law and literature scholars rather than by critical legal scholars.

The alternative position to that taken by those who advocate the use of literary discourse in jurisprudential debate is articulated most forcefully by Richard Posner, whose *Law and Literature: A Misunderstood Relation* represents the most substantive attack to date against the positions taken by White, Richard Weisberg and West, and represents a summation of the position which has evolved in Posner's writings since West's initial pre-emptive strike in 1985. In his reply to West's 'particularly eccentric' use of Kafka, Posner suggested that West fundamentally mistook 'the incidents and metaphors' so that the 'fiction became its meaning'. It was, he suggested, 'like reading *Animal Farm* as a tract on farm