

Introduction

The life of the law has not been logic: it has been experience.

Oliver Wendell Holmes, *The Common Law*¹

There's something the matter with people. It seems they're unable to take in their experiences or else to wholly enter into them, so they have to pass along what's left.

Robert Musil, *The Man Without Qualities*²

Between these quotations from Oliver Wendell Holmes and Robert Musil there lies a gulf. For Holmes, experience is everything; for Musil, it is nothing. Holmes sees the history of law as being identical to the history of experience. Musil declares experience to be resistant to intellectual assimilation. Most emphatically, for Holmes, law is alive – the history of the law is a history of its life precisely because it is based in experience. But, for Musil, experience is exactly what life no longer contains, refers to or enters into. This chasm does not indicate an irreducible difference between the disciplines of law and literature. Nor does it exist because Holmes is writing in an American context, while Musil's novel is firmly set within the borders of Austrian culture. Rather, these towering figures are separated only by the time in which they wrote. Holmes's treatise, published in 1881, is in many ways a modern classic of legal thought – but it is also the product of a century which believed in experience. Musil's novel, the first volume of which was published in 1930, and which is set on the eve of the First World War, forms a perfect expression of its dissolution and fragmentation. What happened in the period between these figures? What were the various formations in which the loss of experience manifested itself? What did the life of the law, of literature and of individual consciousness look like when their basis in experience was being relentlessly undermined?

To ask these questions is to read legal and literary history in a way that goes against much recent criticism. In his 1992 study, *Strong Representations*,

Alexander Welsh claims that from the late eighteenth century to the end of the nineteenth century a certain form of narrative dominated the discourses of law, literature, science, philosophy and religion. These narratives, described as ‘very much of the Enlightenment’ are ‘strong representations’: collections of circumstances connected in such a way as to prove the existence of unseen events.³ Welsh’s theory allows him to group, amongst others, Fielding’s *Tom Jones* and Tennyson’s *In Memoriam* with the Shakespearean criticism of A. C. Bradley and the legal theory of Sir James Fitzjames Stephen. In his final chapter, Welsh suggests that in its literary form ‘strong representations’ were weakened by texts such as Browning’s ‘The Ring and the Book’, Collins’s *The Moonstone* and James’s *The Golden Bowl* (all of which he refers to as ‘stories of experience’). Indeed, the pivotal scene from James’s novel in which the supposed ‘proof’ that the golden bowl forms is smashed by Fanny Assingham is interpreted as symbolising the destruction of strong representations hold on narrative construction. The advent of modernism then marks the end of circumstantial evidence’s hallowed position in the novel. Welsh’s final words make this plain: ‘James’s novel is not so different, in this way, from Woolf’s *Orlando* or Joyce’s *Ulysses*; and in its entertainment and rejection of proof from circumstantial evidence, it is quite like Forster’s *A Passage to India*. But no one even begins to study those works as strong representations.’⁴

Welsh’s analysis is both wide ranging and incisive, and *Strong Representations* has proven to be an influential contribution to law and literature studies. The subsequent works of Jan-Melissa Schramm and Lisa Rodensky have, in particular, enriched Welsh’s text by utilising a similar method and operating within a comparable time frame yet suggesting important qualifications to its argument.⁵ What all three of these works share is their reading of modernism (which is, indeed, a common reading) as a period in which an authentic experiential subjectivity came to take precedence over a sense of objective truth, and that this severs the connection between law and literature. Welsh writes that no one begins to read modernist novels as strong representations – this is quite right. But the nature of his final chapter suggests that while these texts move away from strong representations towards what he terms ‘stories of experience’, the law remains firmly emplaced within them. Likewise, the legal and literary connections evinced by Schramm and Rodensky are seen to cease with the advent of modernism.

In contrast to these claims, the initial argument of this book is that significant connections continue to exist between novels and trials in the modernist period. The issue is, in this sense, a question of degree. It is

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not the intention to suggest that novels and trials are, in the modernist period, identical. Nor is the purpose to argue that trials in the early twentieth century cease to have anything in common with realist novels. Rather, the argument is intended to indicate that the early twentieth-century trial is more like a modernist novel than has thus far been presumed.⁶ But, to understand how this is the case involves not simply a question of degree but an active reconfiguration of the accepted historical interpretation that Welsh articulates. Modernist novels should thus not be defined as stories of experience and placed in opposition to strong representations precisely because this is not a true conflict. Strong representations though they may claim evidence of ‘things unseen’ are actually ‘very much of the Enlightenment’ precisely because they rely on Enlightenment conceptions of experience for their authority. Realist novels are therefore both strong representations and stories of experience at one and the same time.

The modernist period, on the other hand, ventures into a different realm of inexperience or non-experience. The three texts that will form the basis of this study – E. M. Forster’s *A Passage to India*, Ford Madox Ford’s *The Good Soldier* and Marcel Proust’s *In Search of Lost Time* – all thus display a marked turn away from experience as the subject matter of their writing. From the blank space of Adela Quested’s experience in the Marabar cave to the duplicity and absence from his own story of Ford’s narrator Dowell to the ‘crepuscular states’ of Marcel, a common link is formed.⁷ As they are no longer of experience, these novels, in ways that mirror developments in the law, build narratives on new foundations. Without an authoritative and neutral experience to rely on, judgement becomes an issue of prejudicial belief or subservience to an expert authority, identity becomes fragmented into traces and abstract images, and repetition, as a reliable site of experimental method and judicial review, becomes an unstable compulsion to repeat a trauma that never took place.

Undertaking such a project does imply that a degree of commensurability between the legal and the literary is assumed. This is, however, not an assumption without academic precedent. The notion of law as, in James Boyd White’s words, ‘a kind of rhetorical and literary activity’ in terms both of its formal structures in statute and prior judgments, and in the narrative construction of ‘cases’ presented in court has, in the last twenty-five years, inspired a range of interdisciplinary writing.⁸ But the more interesting work in this burgeoning field of scholarship has, in the main, developed from Robert Cover’s oft-cited statement that ‘no set of legal institutions or prescriptions exists apart from the narratives that

locate it and give it meaning.⁹ Not restricted to legal narratives, the creation of what Cover terms a *nomos*, or normative universe, comprises all of the numerous narratives by which a culture defines itself – with literature, of course, being a prime example. This has opened the door to a variety of scholarly work that has attempted to explicate the precise interrelations between the two narratives, tracing their influence, one upon the other.¹⁰ It has also created the opportunity for what Brook Thomas calls a ‘cross-examination’ of legal and literary history: a method which can illuminate aspects of ‘cultural history that our tendency to concentrate on only one field of study has consigned to a realm of silence’.¹¹ Nan Goodman similarly argues that ‘taken together, legal and literary narratives can illuminate the way the culture constructs itself through narrative.’¹² As the present study sets out to study law and literature’s ‘narratives’, it can, therefore, elicit understanding of something beyond either of them: the cultural milieu in which they exist.

Two details as to the content of the present study will serve to clarify its methodology still further. Firstly, the period of study, in terms of the novels’ publication dates (Forster, 1924; Ford, 1915; Proust, 1913–1927), is fairly compact. The legal context, however, stretches this time frame considerably. The analysis of colonial rule in British India, for instance, involves the use of sources from as early as the 1870s, while certain works of legal theory, most significantly those of Jerome Frank, will move the field of study into the 1930s and 1940s. The fact that the novels under consideration lie in the middle of this elongated time scheme should suggest a central feature of this work: it is not a study in influence. Certain developments in the law, such as the anxiety over perjury in British India or the rise of fingerprinting as a system of identification, while preceding the novels in question, are thus not to be thought of as directly influencing the authorial process. Likewise, legal texts written post-1930 should not be considered as responding to the work of Ford, Forster, or Proust. As Rodensky writes of her own work, ‘The legal texts are neither subordinate or superordinate to the literary, and the literary functions neither as supplement to nor master of the legal.’¹³ This is not to deny that Forster was influenced by his knowledge of colonial trials (which he probably was) or that Jerome Frank was interested in modernist fiction (which he may well have been). It is, rather, to avoid the infinite regression that can befall the investigation of influence. The aim is not to determine what came first but to elucidate, with as much clarity as possible, the ways in which an experiential loss manifested itself in the narratives utilised by law and literature at this time. As such, the task at hand falls very much in line with Austin

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Sarat's grouping of Welsh, Schramm and Rodensky with the additional names of Jonathan Grossman and Kieran Dolin, all of whom, according to Sarat, 'specify an "anecdote" and read it for its instantiation of the various discourses circulating at its specific cultural moment'.¹⁴ In Welsh's work, the anecdote is circumstantial evidence, and the discourses covered include law, literature, philosophy, science and religion. This book operates at once in a more ambitious and more restrictive fashion. More ambitious because experience is not simply an anecdote: its fundamental role in the constitution of knowledge and subjectivity in the modern period makes this plain. More restrictive because the discourses examined will be limited to the legal and the literary (albeit both by way of a philosophical understanding of experience). This is not because non-experience is not evident in other fields – indeed, it is particularly apparent in the natural sciences – but because literature and law are taken to be exemplary of its cultural impact. The novel and the trial are the primary examples of the way in which, from the late nineteenth century onwards, experience was put on trial.

The second key methodological point to be made is that this study is not concerned with the literary representation of trials. *A Passage to India*, of course, includes a very prominent court case, and the 'Kilsyte Case' is one of Edward Ashburnham's many misdemeanours in *The Good Soldier*, but the way the law is depicted in this sense is not the crucial matter. The argument that will unfold in the ensuing pages is, therefore, similar to Ravit Reichman's *The Affective Life of Law*. Reichman, in one chapter, analyses developments in American tort law alongside the writing of Virginia Woolf, both referring to each other without referencing each other as such. What Reichman picks up on are patterns of narrative which, though operating in a 'contingent relationship', are essentially valuable for the light they shed on their 'mutual historical basis'.¹⁵ It is probably no coincidence that this shared methodology occurs in one of the few other studies to deal explicitly with the idea of a 'legal modernism'. That is to say, many features of the period – most notably, in the terms of this study, its relationship to experience – demand that its explication be made by an intertextual analysis of what may, at first, appear to be divergent disciplines and documents. So, while Reichman posits, and seeks to trace, a relationship of 'necessary complementarity' between law and literature, deals in issues such as tort law and sees a particular manifestation of legal modernism in the Nuremberg war trials (all of which are alien to the present study) it does share with the current work a use of evidence which finds illumination in the specific way that the legal and the literary,

without consciously meaning to, partake of similar forms, produce similar features and create similar effects.

These forms, features and effects have been noted by another recent publication, albeit within a more strictly literary setting and with a still different set of terminological tools. In his *Unknowing*, Philip Weinstein characterises the modern West since Descartes as being concerned with knowing.¹⁶ Modernity strives for knowledge and believes in the human capacity to attain it, even if imperfectly. The modernism that springs up at the turn of the twentieth century, by contrast, is characterised by such deep doubts as to the possibility of knowledge that the age can only be described as one dominated by the opposing principles of ‘unknowing’. Weinstein’s argument holds numerous parallels with the present study and will be referred to repeatedly. Unlike Welsh, and the received logic that his argument demonstrates, the difference in terminology here is not indicative of a conflicting historical interpretation. Weinstein’s knowing and unknowing are, in fact, very closely connected to the terms of ‘experience’ and ‘non-experience’ that will be utilised throughout this book: a convergence of some logical significance, as modernity was precisely the moment when knowledge became a matter for experience to judge and experience became the very matter of epistemology.

What, precisely, is meant by the term ‘experience’ is the subject matter of Chapter 1, where a rigorous analysis of its legal, literary and philosophical history is made. The semantic roots of the word ‘experience’, which indicates its relationship with experiment, attempt and trial, are of significance here. So, too, is the German equivalent – or rather, equivalents, as the German language has spawned two versions of experience: *Erlebnis*, which signifies a raw immediacy, and *Erfahrung*, which connotes experience as it is reflected upon, understood and manipulated. As well as citing figures such as Wilhelm Dilthey, Henri Bergson and Walter Benjamin, Virginia Woolf’s numerous essays and autobiographical writings form an important element in this narrative. Most importantly, her famous statement in ‘Mr Bennett and Mrs Brown’ that ‘on or about December 1910 human character changed’ is to be read in the context established by the first part of Chapter 1.¹⁷ Woolf attacks the realism of Bennett, Galsworthy and Wells because it fails to capture *Erlebnis*, but the immediacy that she wants to capture – ‘an incessant shower of innumerable atoms’ – is, by its nature, elusive.¹⁸ Therefore, ‘we must reconcile ourselves to a season of failures and fragments.’¹⁹ The subsequent chapters are concerned with studying precisely the fragments of experience that Woolf refers to.

In Chapter 2, the fragment exists within a Marabar cave, as E. M. Forster’s *A Passage to India* is examined within the context of the

administration of justice in British India. As colonial rule had progressed, magistrates had become increasingly anxious about their ability to accurately judge the event under consideration. The belief in rampant perjury undermined the trial in British India to the extent that the supposed crime at the heart of the inquiry slipped from view and magistrates chose between what they considered the less false of two accounts. That many of the central issues under consideration in the present study emerged within Britain's nineteenth-century colonialism is one of the reasons why *A Passage to India* is the first novel to be examined. But it is not the only reason. Perhaps even more crucially, Forster comes first because his novel perfectly represents the movement from one novelistic epoch to another. Forster, though he wrote throughout the modernist period was, in the main, a producer of realist fiction. However, the incident in the Marabar cave, a moment that in no way conforms to the modern concept of experience outlined in Chapter 1, is precisely the moment when his writing becomes modernist. It was a turn away from realism that, apparently, could not be sustained as, following *A Passage to India*, Forster never wrote another novel. Chapter 2 concludes by arguing that in his theoretical work *Aspects of the Novel* (1927), Forster, responding to anxieties about the novel's experiential loss, attempted to codify the laws of realism. This project had much in common with the acts of legal codification that took place in British India in the 1860s and 1870s, particularly that of Sir James Fitzjames Stephen's Indian Evidence Act 1872. Both Forster and Stephen attempted to set rules which would govern the form that representation could take – something that could only be deemed necessary once the governing authority of experience had been eroded from novel and trial.

Chapter 3 extends this analysis by examining Ford Madox Ford's *The Good Soldier* in light of the way in which judgment, in the early twentieth century, was becoming a matter of expert knowledge rather than common experience. More than ever before, the evidence given at trial was appearing in the form of specialized testimony offered by experts trained to see what the layman could not. Precisely the same phenomenon was occurring in the novel, where the theme, meaning and plot of a modernist novel became factors not immediately discernible to the individual by recourse to their own common, everyday experience. *The Good Soldier* has given evidence of this by inviting critical readings which have offered wildly divergent readings, not just of what the novel is about in terms of meaning but simply on the basis of what has actually taken place. Many of these varied interpretations have revolved around the issue of what kind of identity it portrays. Neither Dowell, the narrator, nor Ashburnham, the 'good soldier' of the title, are given to the reader in the form of a

realist character portrait. This is precisely because their experiences have resisted collection, manipulation and communication. As such, Dowell's intentions become vague and Ashburnham's responsibility unclear – notions the determining of which were also becoming problematic for criminal law.

Proust's *In Search of Lost Time* forms the basis of the final chapter for two reasons. To begin with, Proust's work represents the supreme expression of the disintegrating experience which appears in *A Passage to India* and permeates *The Good Soldier*. Yet, despite writing from, and about, a state of non-experience, a central issue of the novel is a real-life legal case – that of Captain Alfred Dreyfus. But, far from drawing Proust's narrator out of his solipsistic labyrinth, this fact actually serves to highlight the lack of experience in the real Dreyfus Case. In Chapter 4 it will be argued that the Dreyfus Case is defined by its reliance on absent evidence (hence paralleling the superiority of absence in Proust). But the Dreyfus Case is also notable for its continuous repetitions. These come in a variety of forms: from his own appeals to the trials of Esterhazy and Zola to written versions of the case. The discussion of appeals is, therefore, the second reason for Proust coming last in the succession of chapters, as appeals themselves come after the original trials that formed the subject matter of the preceding sections. Utilising distinctions made between a Platonic and a Nietzschean conception of repetition will allow for an analysis of the way that appeals operate, the functioning of *stare decisis* in legal thought, and the issues of rewriting and rereading that are brought up by Proust's texts (which include *Jean Santeuil* as well as *In Search of Lost Time*). It will be seen that repetition no longer involves a conception of the original which is being repeated. Rather, in Proust, and by way of Freudian screen memories, fantasy traumas and repetition compulsion, a Nietzschean world of infinite difference has come into existence – a world in which all repetition is merely a ghostly repeat of something dissimilar.

Given the preceding discussion, a brief conclusion will address what may appear an obvious question: what comes after experience? By analyzing two contemporary works – Ian McEwan's *Atonement* (2001) and *The Staircase* (2005), a documentary film by Jean-Xavier De Lestrade – alongside John D. Caputo's reading of Jacques Derrida's philosophy, an answer to this question will be proffered: an answer which stresses the ethical nature of doing truth and making reality in the very act of allowing experience to slip away.

CHAPTER I

*The Trials of Experience: From Enlightened
Subjectivity to Woolfian Moments of Being*

‘Experience’, of all the words in the philosophic vocabulary, is the most difficult to manage.

Michael Oakeshott, *Experience and Its Modes*¹

The concept of experience seems to me one of the most obscure we have.

Hans-Georg Gadamer, *Truth and Method*²

Experience has not always been obscure and difficult to manage. Indeed, it is indicative of the historical dimension of Oakeshott and Gadamer’s thought that it should be considered so, for it is only upon considering the diversity of its manifestations throughout time that experience becomes such a slippery concept. During the Enlightenment, and hence considered in more universal terms, experience had commanded a pre-eminent position in matters of epistemology. Modern philosophy, science and theology were all clearly grounded on an individual, specific experience which divulged the nature of a stable reality, was available to repeated experimentation, and in which the modern knowing subject was able to emerge. Lived immediacy could not be doubted; the grasping of its discovered yield was thus indubitable. The modern criminal trial, which took on its distinctive shape from the late eighteenth century onwards, was also based on this assumption. Trials set out to reconstruct the event of the crime. This was to be done by piecing together the recounted experiences of witnesses. In the novel, mythical stories, heroic events and epic narratives were replaced by a commitment to portray life as it really was – fiction was true not because it was real but because it was accurate; it had verisimilitude.

By attending to some of its semantic roots, this chapter illustrates how, during the Enlightenment, experience attained its pre-eminent position of epistemological authority. But by the end of the nineteenth century, this was beginning to change. Wilhelm Dilthey, Henri Bergson and the

American Pragmatists attempted to base philosophy on a lived immediacy untouched by later reflection, while Freud's theories suggested that it was precisely what had never been an experience in the first place which dominated the later psychic processes of the individual. These and other strands in intellectual and cultural consciousness were presciently gathered together in Walter Benjamin's comment that experience had 'fallen in value'.³ Following this claim, many modern commentators such as Hans-Georg Gadamer, Tzvetan Todorov and Giorgio Agamben have agreed that the artistic experiments which blossomed in the early part of the twentieth century were defined by their eschewing of experience: art existed for its own sake and was not to be judged by anything exterior to its own aesthetic.

This chapter culminates in an examination of Virginia Woolf's essays. Connecting the argument of the preceding sections to essays such as 'Mr Bennett and Mrs Brown' (1924) and 'Modern Fiction' (1925), both often referred to as modernist manifestos, serves to illustrate the centrality of lost experience in the radical break performed by literary modernism. From her 'moments of being' as a child to her immersion in the Bloomsbury group in which 'everything was on trial', Woolf's autobiographical writings, especially 'A Sketch of the Past', are significant, too.⁴ In eschewing the strictures of a Victorian upbringing and its literary realism, Woolf, and the Woolfian aesthetic, appears intent upon grasping life as it is lived – experience as it is experienced. But, as will be seen, experience is precisely what Woolf, and modern consciousness, no longer dealt in.

THE EMERGENCE OF EXPERIENCE

In discussing 'experience,' an examination of some semantic roots forms a useful starting point. Experience, as derived from the Indo-European root '*per-', emphasises 'attempt', 'venture' and 'risk'.⁵ The immediate sense is thus created of an activity that is somehow perilous – experience is always a venture into the unknown realm of an outer world which cannot be wholly controlled. The English word 'experience' is, however, more immediately derived from the Latin *experientia*, meaning 'trial, proof, or experiment'.⁶ Again, the connection is made to something that is 'tried', but now an important link is suggested between experience and the modern traditions of jurisprudence and science; a case is heard at 'trial' as the outer world is subject to controlled and repeated 'experimentation'. Martin Jay goes further back, tracing the Latin word to its Greek antecedent *empeiria*, which also serves as the root for the English 'empirical'. As