LAW, LITERATURE, AND LITERARY THEORY: THE LEGAL MINDSET AND THE LITERARY IMAGINATION

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Marcus: *[W]e must embrace the whole subject of universal justice and law, so that what we call "civil law" will be limited to a small and narrow area. We must explain the nature of law, and that needs to be looked for in human nature; we must consider the legislation through which states ought to be governed; and then we me must deal with the laws and decrees of people as they are composed and written, in which the so-called civil laws of our people will not be left out . . . Philosophers have taken their starting point from law; and they are probably right to do so if, as these same people define it, law is the highest reason, rooted in nature which commands things that must be done and prohibits the opposite. When this same reasons is secured and established in the human mind, it is law . . . [L]aw is a power of nature[;]it is the mind and reason of the prudent [hu]man;[and]it distinguishes justice and injustice.* (Cicero, *On the Laws*, 111-112)

I dedicate this singe piece of academic writing—and all the time, effort, and comfort that I received from the nice people around whom I surround myself at a slight distance—to the previously mentioned small group of family members, acquaintances, and academic mentors. With their kind nature, and at times nurturing, this project, generally speaking, would not be what it is.

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ABSTRACT

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by Stefan L. Britt

The connection between the law, literature, and critical theory will be developed, and it will be argued that the law, as a social construction, produces texts by which not only humans agree to live based on a system of rules, the violation of which has consequences for life, liberty, and the overall condition for humans but also that contextualizing the discourse fields creates a fresh perspective about a complex and changing world. This perspective does not answer all questions about the world and all social intercourse that humans experience; however, it is one method by which to open the mind's eye and sharpen its acuity. Some scholars, however, claim that the connection between the law and literature is tenuous at best. Reassessing the topic and asserting that strict adherence to principles from more than 200 years ago is both rhetorically problematic and pragmatically defeating for a decent, honorable, and just way of life for civilized humans living in today's increasingly dynamic world that is beyond their control.

The past offers insights and perspectives—particularly in literature—about the law and its relationship with the citizenry: socially, culturally, politically, and legally. Primary literary texts will provide examples to demonstrate the relationship between the literary discourse field and the legal discourse field. Perhaps "the Law" as a socio-legal system focuses on its constitutionally mandated purposes and functions too much and to the detriment of those for whom it is to serve. Accordingly, the artists, the poets ("artists") represent, or give, a voice to which those involved in the legal language game ought to listen: their use of the rhetorician's tricks, the poet's eloquent language use, and the writer's narration strongly support the argument. Moreover, the discourse boundaries need not be conceived of as impenetrable as what some

might claim, for discourse field can provide a context for meaningful intercourse that would improve sociocultural conditions with the language game and practice of each. Moreover, this thesis formulates a theoretical model and methodology, developed through law, literature, critical theory, rhetoric, and linguistics that pragmatically assists in understanding more deeply current issues in the world.

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CHAPTER I

INTRODUCTION

Comparing the Law and Literary Theory is essential for an acutely informed perspective of both a continually and an increasingly difficult social and human condition. The amalgamated perspective of the law, literary theory, and literature refines one's (e.g., the student's) understanding of the previously mentioned discourses that promotes a more ethical, empathetic, and egalitarian social intercourse, which makes a civil society both possible and attainable. When members of a community socially engage one another peacefully about issues pertinent to their lives and other concerns, there is not an issue too complex to solve, especially if there is a community of like-minded, or rather like-educated, individuals who understand that the current social and global ills in the world have a cause and that certain groups tend to benefit from the ills' effects. Issues of justice, decency, empathy—i.e., what it means to be a good person in an increasingly depersonalizing world—are more than words; instead, they are the metaphoric thread or—perhaps more effectively conceptualized—glue that connects and holds the social fabric together.

The social fabric, more formally theorized and discussed as a grand narrative (i.e., an appeal to authority about legitimation), is important not only for individuals and groups, but it is also important for the social institutions to understand. Such an understanding is especially applicable regarding the ones with, regardless of the extent, authority since controlling *the* social thread that binds humans to the power structure's grand narrative reduces the different accounts of history: i.e., different perspectives that are creations, or equivocations perhaps, of "what really happened," so to speak. When it seems, as some assert, that the fabric is being undone, issues in the humanities and seemingly disparate discourse fields are relevant—especially in the

information-focused, globalized market economy. In other words, the discursive, and potentially physical, battle about how the world *is* reflects perspectives about the world in which all humans live. This world, however, is habituated by different people, each of whom with a unique perspective, living condition, and way of communicating

Another equally communicative way to assert the foregoing is that humans *make* facts, which allows them to control the narrative and, consequently, employ their perspective as a way of constructing and ordering the world within which they live—e.g., whether in one's home, office procedures, or, very pertinent to the *world*, one's way of governing as a country's leader. A haunting, and still relevant example, is that of a leadership's prioritizing military spending over domestic needs. To be clear, what is at stake, as this thesis highlights, is articulating a pragmatic, theoretical model that one can apply to current issues in the world. Of particular importance herein is anything that communicates meaning and is used for that purpose, which extends beyond controlling people. In addition, it extends to ordering reality and controlling humanity through "facts" that are constructed and, tragically in many instances, enforced in ways that harm not only human sensibility but also the victims who, quite often (if not always) cry for justice but are either ignored or unheard.

In considering the implications of social intercourse and the influence that power structures exert in ordering, or controlling, interactions and the meanings that are produced, the thesis provides an illumination of a real problem that prevails throughout the world. To uncover the prevalent power structures and their means of continuing hegemonic control, this thesis, in other words, contextualizes a postmodern, cultural studies' interdisciplinary approach to social and cultural awareness creates a theory that provides an antidote against the poison of the uninformed, the uninspired, the unsure, and/or the unjust. Even more, such a theory, when

employed as a perspective in the world, allows one to see through shrouded ideology and agendas that, more often than not, further the interests of a few members of humanity. Even worse, the "furthering of interests (sanitized language for "profiteering") while simultaneously endangering humanity will also endanger the world in which they live; as scientists have shown and nearly all accept, long-lasting effects that will affect more than the current living generations[1]. Today's policies affect the Earth, for example, to an extent that is more far reaching and larger than the elite's ego—even as surprising as *that* may sound. What about all of the melting ice, continually intensifying hurricanes, and the altering of habitats to erect buildings to showcase progress and importance?

Thus, the central issue comes to the fore. What, if any, are the implications of a cross-disciplinary methodology applied to cultural artifacts (i.e., literature), and how can these insights affect the reader and instigate change? When informed by precepts and tenets of legal theory, the law, and other cultural artifact-making, human-effecting discourses and actions, the seemingly discrete and mutually exclusive discourse fields reveal potentially effective insights about the human condition and one of the most powerful elements that surpasses humanity: i.e., a hierarchically ordered epistemology, which, for better or worse, structures current social intercourse. As Noam Chomsky frames the issues throughout *Hegemony or Survival*, American

[1] This is the implication of the socio-cultural and political commentary that pre-eminent linguist and American socio-politic critic Noam Chomsky discusses in *Hegemony or Survival: America's Quest for Global Domination*. Chomsky argues that the U.S.'s foreign policy has been, for decades, militaristically informed for preserving its power. Hegemony provides the colloquial "easy way" for those who stand between the presidential administrations and their global agenda while covertly working toward its goal of global domination to preserve its survival—that is, its survival as *the* superpower who capitalizes on resources throughout the world. The cost, Chomsky argues, is more than to our nation's and government's credibility: i.e., the global environment and its stability and, in essence, well-being ultimately pay the price for such governing, which will make the world less safe and pristine as it could be for our future generations.

society, as an example that is especially pertinent to this thesis, is subjected to policies that are expressed as an overtly noble intent but covertly constitute political maneuvering to implement, without challenge, the policies that it wants. The policies often directly benefit private corporations in which the elected officials have pecuniary interest or friends with pecuniary interests in the policies. These polices, tragically, could affect the world tremendously.

Notwithstanding Chomsky's more general arguments and the implications of the substance thereof, "the Law" is more than police officers, criminals, lawsuits, and verbose puffery; it is a human creation that needs to remain connected to the group by whom it has been created as a means to maintain a civil, peaceful society. For the United States, the foregoing principles are codified in the Preamble to the Constitution:

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure [sic] domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure *the Blessing of Liberty to ourselves* and our Posterity, do ordain and establish this CONSTITUTION for the United States of America. (emphasis added) (qtd. in "Federal Rules of Civil Procedure" 978)

The Constitution's Framers establish the context for the content that would appear in the pages after the Preamble. "The Blessing of Liberty" represents one of the cornerstones of the United States' legal system. Similar to one of literature's defining characters (narrative), "the Law" is a narrative—a "grand narrative"—that seeks other narratives for its legitimation: e.g., "expert witnesses," "special rules of pleading," and a cannon of other written, judicial opinions with which to confer about similar issues to be used as a "guide" to reading, or interpreting, a case. Also material to the discussion is that the grand narrative (e.g., here, "the social fabric"), as a

perspective formulation about the way or ways by which society views the world, is metaphorically an unraveling fabric as some claim, which means that what were once considered foundational facts in the world (i.e., sources of legitimation) are actually metanarratives—narratives about narratives, the function of which is to legitimate the grand narrative (Lyotard xxiii-xxiv). The logical consequence, then, is that a foundational basis that verifies "facts," about which Ludwig Wittgenstein, in *Tractaus Logico-Philosphicus*, claims that the enterprise of philosophy and seeking a universal truth is untenable:

> [T]o understand me[,] you must recognize my sentences—once you have climbed out through them, on them, over them—as senseless. (You must, so to speak, throw away the ladder after you have climbed up on it.
>
> You must climb out through my sentences; then you will see the world correctly.
>
> Of what we cannot speak[,] we must be silent. (145)

In other words, the social fabric as a foundation, grand narrative, is both logically untenable and, consequently, unstable. If this is the case, it amounts to the previously mentioned unraveling metaphor (i.e., an epistemological issue). Also, Jean François Lyotard's The *Postmodern Condition* supports Wittgenstein's claim about the untenable, foundational epistemic means by which societies legitimate claims, beliefs, and other utterances about issues or "facts" in the world. Specifically, when Lyotard sys, "[A]n incredulity toward metanarratives" (xxiv), Lyotard provides his definition for the postmodern, which is one theoretical and evidentiary claim—or "expert witness" to use language from legal discourse—that supports this thesis's claim about a perceived unraveling of the epistemic considerations with which it engages.

The context in which Lyotard writes reflects a move away from industrialism and the chants of "Blessings of Liberty to ourselves" to that of information and the computer age, which is, as Lyotard argues, "the question of knowledge[, which] is now more than ever a question of government" (9). The Internet has exacerbated the scope and the pace at which the "old" grand narrative(s) has/have become information for chapters in history books. What remains, however, is contemporary societies' own engagement with modernity and updating, so to speak, the "old" perspectives to accommodate and make the best conditions possible for humanity (not only "ourselves")—currently. This is not to say all that is "old" is necessarily irrelevant and detrimental to the human condition and human engagement with one another through language but rather to underscore our obligation to learn from "history," as communicated through language, so that a society does not repeat that which either failed or negatively affected the human condition and whatever atrocities and injustices occurred..

In addition to the previously cited portion of the Constitution, the following famous lines ended the narrative of the Revolutionaries' grievances, which, in effect, began the experiment known as American democracy: i.e., the "Pursuit of Life, Liberty, and Justice" ("The Declaration of Independence" qtd. in Dershowitz 167). In addition, the Framers conclude with principles that reflect the grand narrative of American democracy and the attendant hopes: "And for support of this declaration . . . mutually pledge to each other our lives, our Fortunes and our sacred Honor" (The Declaration of Independence, qtd. in Dershowitz 172). Furthermore, the democratic spirit that haunts The Declaration of Independence, and the principles and hopes expressed throughout, are theoretically created grand narratives. How else could the Revolutionaries premise civil disobedience and wage war against those by whom they are ruled and are subject to punishment and even more taxation?

Regardless of whether "the Law" is viewed from, for example, a criminal's perspective or the victim's perspective, the perspectives share a unifying characteristic: "the Law" is a human institution that not only prescribes social intercourse, but it also serves as a textual construct that can either, depending on which side of the scales of justice one is, provide justice while the other perspective, concurrently, is that there has been a miscarriage of justice; defendants, some of whom may be *in actuality* guilty of the crime with which they are charged could have the criminal charges dismissed if, for example, the police violated the defendant's Fourth Amendment rights in obtaining the incriminating evidence needed to arrest and charge the accused. From the preceding, one can surmise that the law has complexities, conflicts with other laws, and a, as Ludwig Wittgenstein classifies it, language game of its own: "[T]he term 'language-*game*' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life" (from *Philosophical Investigations* 252). Law and literature are, in not the same; however, literature, too, has complexities, varying theories that result in different readings of the same work, and a set of phrases and rules of its own. How, then, if they are not the same, can the few similarities between them be useful and why would they matter? To answer such questions may seem at first glance as a simple endeavor. Is it really?

The link for the metaphoric connection between humans creating and interpreting literature and creating and interpreting "the Law" is text. For example, humans use language to communicate with one another. The law, like literature, is something conveyed through language—whether a written statute or a judge's oral decision that includes a statement of the law. Language, the function of which is to provide humans with a mode of communication to make social intercourse possible, not only supports the view that language is central to the text that is "the Law," but it is also the medium through which written cultural artifacts—of which

one contention in this project is that it is—are communicated. One, thus, could consider case law a cultural artifact that represents one type of textual conveyance of language.

Literature, another specific example of a cultural artifact, also provides an example of language use that creates a world in the lexicographical realm analogous to what humans experience: i.e., the human condition—social intercourse within a socio-political economy that with each day, potential (if not actual) hazards may lead to accidents for which someone, or some company, under the law's dictates may be held liable. As such, the deep structure that supports the textually created worlds in literature is also another element of the law. In other words, contextualizing law and literature, as parallel to each other in many ways, provides the textual and metaphoric link between discourses that rely on language. Specifically, the focus herein is on an interdisciplinary relation between literature, literary theory, and the law. Pragmatically, at some point, a reader of this essay could, for the sake of argument, become involved in litigation, the resolution of a dispute, or a trial for alleged criminal wrongdoing. "Going to court" is much like going to a foreign country in which the language spoken is a language that one does not speak. In short, the discussed, and generally presumed different, discourse fields can work together to provide insights not only into each element, but it can also equip one with a perspective that has, until very recently, received cursory and simplistic focus. In this thesis's subsequent chapters, the theoretical frameworks that have structured our law as we currently know it will be discussed along with the connections between the different discourse fields, which will extend an argument that has, until very recently, been largely ignored as a topic of academic scholarship; methodologically apply the theory to legal and literary texts and the connections to argue that a main result of the applied methodology is a critical and literary approach, based in theory but creates interpretations of primary literary

works that are based in new readings of them; and will describe the implications not only for each discourse field and literary study but also for the human condition, both as expressed in language and the general implications in reality, which language, at least arguably, creates.

Law: In Theory

By litigation, I do not *literally* mean the goings-on of a legal dispute in a courtroom. Instead, I use the term—albeit playfully—to denote Law. "Law" with a capital "L" refers to a socio-legal structure that, generally speaking, affects humans. To define "the Law," however, is as difficult as it is futile. Must one be able to define "the Law" in order to understand its functions and effects? Ask the pervert, maybe the one who left his DNA *in* the victim, now spending every day—and experiencing what little is to come in the subsequent days—in prison about whether "the Law's" effects are understood *and* what the definition of "the Law" is. Another perspective, but about the same issue, is to ask a victim who hears the judge dismiss the charges against the defendant because the police violated the Fourth Amendment in obtaining the evidence that led to the arrest of the person whom the victim knows is guilty. From the preceding, one should infer that "the Law" is a means by which a victim of a crime (or a tort, for example) and society (read: "potential victims") enact retribution for harms inflicted on another human or group of humans, their property, or for not keeping a bargained-for promise; however, it also works inn another way—e.g., judges who ensure that the legal disputes and prosecutions conform to the law as well. In short, "the Law" is a means to preserve a peaceful and functional society through a system that has built-in protections so that the justice system stays in balance. The previously mentioned "means," however, is not a built-in (as opposed to the "checks and balances" to maintain the system's balance) or obvious element of the law; instead, it is a source of contention about which theorists for centuries have debated. For the United States,

specifically, the documents within which its governing and jurisprudential ideals are first enshrined and codified into the Declaration of Independence and the Constitution echo, to an extent, the legal philosophies of philosophers ranging throughout history.

One legal philosopher, Thomas Aquinas, for example, argues that the law's authority over the citizenry comes from a power higher than humans—that is, God. Specifically, Aquinas defines law as "an ordination of reason for the common good by one who has the care of the community, and promulgated" (6). Who promulgates the law becomes the material issue. Is it a social contract? Or is it something else, and if so, what? John Stuart Mill argues, premised on Utilitarian philosophy, that individual liberty (80) is "that something else" that promulgates the law. Conceivably, one could inquire about whether the previous theorists' principles, if juxtaposed, could offer an alternative to the source of the law's authority, especially as it relates to the United States and its political, legal, and social creation. One may argue that this is the case, for Aquinas uses the phrase "common good." Closer inspection reveals that Aquinas articulates a principle that vitiates the validity of such a premise: "And so it shares in the eternal plan whereby it has its natural inclination to its requisite activity and end. And we call such participation in the eternal law by rational creatures *the natural law*" (emphasis added) (9). With hindsight at one's use, breaking from England's rule and the King's authority, how could those feeling politically aggrieved without recourse and representation make a claim that would make the King understand what and, more importantly, why the Revolutionaries seek dissolution from England. In other words, what, or who, has more authority than the King? Jefferson and the other "Founding Fathers" answer through making the following rhetorical choice:

> When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to

> assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature's God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation." (capitalizations original) (qtd. in Dershowitz 167)

In short, the Revolutionaries resort to a rhetorical trope on the power and perceived misuse thereof and argue that the King is not the authority to whom they answer; instead, it is an unchangeable entity that predates humans: i.e., "Laws of Nature" and "Nature's God." Thus, Aquinas's *Treatise on Law*, and the claims therein, provide rhetorical and philosophical support for their physical revolution against, and from, England. Even more, how could England reject the ideas of a man who incessantly refers to Aristotle as "the Philosopher?" Or a man who contends that law is from the divinity?

According to Aquinas, the authority for the law as a system of rules that orders rational beings' (i.e., humans) interactions with one another is premised on a "common good" principle; however, the *authority* of such a legal theory is vested in, and from, the divine—which, to be more specific, would be the *contextual* conception of God at the time that Aquinas writes his *Treatise on Law*. The word "contextual" is crucial. For example, Alan Dershowitz discusses, among other issues, that the Constitution's Framers' conceptions of a "Creator" is *not*, for example, the same as that of ("many," to be safe and not hyperbolically state the claim) evangelical Christians today[2]. By way of an anecdote, this writer once, in jest, told a retired nun that "nothing is illegal—until you get caught." Thankfully, the former nun retired her much

[2] "Not since the medieval church baptized, as it were, Aristotle, as some sort of early—very early church father has there been an intellectual hijacking as audacious as the attempt to present America's principal founders as devout Christians. Such an attempt is now in high gear among people who argue that the founders were kindred spirits with today's evangelicals, and that they found a 'Christian Nation'" (Will 1.).

mythologized, and probably used, ruler. Moreover, the anger-inspiring quip about "get[ting] caught" as what makes an act illegal illustrates at least one person's (perhaps unwittingly) understanding of a defining characteristic of Natural Law theory: i.e., there are commands that forbid humans from engaging in certain acts, and the authority and justification for those commands is God. Burning in Hell comes to one's mind upon closer inspection of invective jurisprudence.

Other theories reject the law's preceding source of authority. Instead of a "natural" source from whence or from whom the law's legitimacy and authority originate, some contemporary conceptions of the nature of, and authority of, law articulate a less natural (or more artificial, so to speak) source of jurisprudential legitimacy and authority. For example, H.L.A. Hart argues in "Separation of Law and Morals" that "law" and considerations of the common good, vis-à-vis morality, are separate and that morality is not part of a legal system's jurisprudential considerations:

> The connection between law and moral standards and principles of justice is…as little arbitrary and as "necessary" as the connection between law and sanctions, and the pursuit of the question whether this necessity is logical (part of the "meaning" of law) or merely factually or causally can safely be left as an innocent pastime for philosophers. (35)

Hart's arguably arrogant appraisal of Natural Law theory is important for jurisprudential considerations, which function similarly to the methodology applied to primary literary texts discussed in this project. Notwithstanding Hart's ethos, he characterizes Natural Law theory less caustically than his snarky "an innocent pastime for philosophers" statement by claiming that Natural Law theory is an exaggeration of humans and their interaction(s) with one another in

society. In other words, Hart contends that social interaction as a basis for the law's authority, known as "social contract theory," must realize the pragmatic considerations, which, as he understands Natural Law theory and how it relates to human, social interaction is that

> [n]atural-law theory … in all its protean guises attempts to … assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival, and these dictate a further necessary content to a legal system (over and above my humble minimum) without which it would be pointless. […] But it seems to me that above this minimum the purposes of [humans] have for living in society are too conflicting and varying to make possible such extension of the argument that some fuller overlap of legal rules and moral standards is 'necessary'.
>
> ("Separation of Law and Morals" 36)

In short, the (legal) positivism that Hart espouses provides another theory to consider. The theory's precepts reject extra-legal considerations of a case, much like the New Critics' rejection of considerations not within the four corners of the page on which, for example, the poem is written. Surely, this is not the only parallel regarding specific literary theories with legal theories. Importantly, here, the language, and the use thereof, is informed by the perspective that one applies (or as colloquially phrased, "has"). Although a legal positivist/literary formalist perspective represents a black-and-white, so to speak, rigid binary formula for language use and understanding of it, positivism/formalism, like other theories, is idiosyncratic in its merits and demerits. For case law, a bright-line rule, as many judges say, would make the adjudication of legal disputes less difficult: i.e., there is one of two choices—"either X or Y." The limitation with such a theory, however, is that it encapsulates humans' interactions—children fight; adults

fight; civilized adults file lawsuits; and some civilized adults even "take the high road," as colloquially stated, and do not engage in the dispute. Regardless, something complicates human interactions, especially when it comes to legal cases in which one's liberty, money, or property are at stake. That previously mentioned "something," although one cannot state to a certainty what it is or need to for this thesis, can safely assume that the nature of lawsuits informs, and perhaps answers the question, about what that "something" is. Succinctly, that "something" is an allocation of burden, or apportionment, of liability and a way of quantifying and reifying, for pragmatic purposes, the importance of litigating lawsuits: to compensate a harmed person and make him or her, as the legal jargon expresses, "whole again"—that is, to put the harmed party *status quo ante* (before the harm) and thereby making the aggrieved party "whole again." How, then, does our system of jurisprudence theorize and legitimate the pragmatic purpose and function of the preceding American law?

Hart, in the above critique of Natural Law theory, discusses legal theory implicitly, which is one method for engaging in abstract, difficult theoretical concepts. Specifically, Hart's discussion about "natural" and humans' conflicting interests refers directly to what one could conceivably label as an alternative to Natural Law, which would be a social contract (or something quite similar to it), much like what Thomas Hobbes describes in *Leviathan*. Hobbes argues that the idea of a natural law as a means to ordering and preserving a peaceful society does not capture *the actuality* of humans' living circumstances. The raison d'être that motivates rational beings, upon which Natural Law in Aquinas's concept of law is presumed, is self-interest, for, as Hobbes states in *Leviathan*,

> [W]here every man is enemy to every man, the same consequent to the time wherein men live without other security than what their own strength and their

> own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth . . . and the life of man, solitary, poor, nasty, brutish, and short. ("Of the Natural Condition of Mankind as Concerning Their Felicity and Misery" n. pag.)

Hobbes, then, discusses human nature and defines "natural" in a way that is diametrically opposed, in perspective, to Aquinas's. Instead of a society ordered by divine reason, a social contract is the more pragmatic approach, which is based on *human nature*. In other words, Hobbes argues that law is indeed a means to maintain a functioning, peaceful society and through a means that allows for proper allocation and agreed upon terms:

> If a covenant be made wherein neither of the parties perform presently, but trust one another, in the condition of mere nature (which is a condition of war of every man against every man) upon any reasonable suspicion, it is void: but if there be a common power set over them both, with right and force sufficient to compel performance, it is not void. For he that performeth first has no assurance the other will perform after, because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other passions, without the fear of some coercive power; which in the condition of mere nature, where all men are equal, and judges of the justness of their own fears, cannot possibly be supposed. And therefore he which performeth first does but betray himself to his enemy, contrary to the right he can never abandon of defending his life and means of living.
>
> But in a civil estate, where there a power set up to constrain those that would otherwise violate their faith, that fear is no more reasonable; and for that cause, he which by the covenant is to perform first is obliged so to do.

[. . .]

To make covenant with God is impossible [. . .]. ("Of the First and Second Natural Laws, and of Contracts" n. pag.)

For pragmatic purposes, the issue of whence, or from whom, the law's authority stems is important; however, for this thesis's purposes, it is particularly interesting to note the parallel between—or perhaps the parallel "created"—the source of the law's legitimacy and authority juxtaposed with those same issues regarding literature. For law, one could reasonably argue that not one of the preceding theories—neither Natural Law theory, Social Contract theory, nor Legal Positivism—is a *sine qua non* of the law's legitimacy and authority. If, however, one were to grant, for the sake of argument, that more than one theory combined, to some extent each, contributes to the legitimacy and authority of the law, an example of law—in practice—could dispel theoretical questioning, which is important; however, it is not dispositive to the main purpose of this project, which is to show the intertextual, cross-disciplinary approach to different discourse fields that are linked together by the same human element: language—and how that realization can be applied in many contexts to enrich and improve the human condition generally and, even more hopefully, specifically to the individuals whose rights are either non-existent or are abused nearly as badly as the individuals themselves are physically abused. Is there, however, a "best" way to achieve this outcome? Although an answer is not readily available, there is one possibility.

Currently, some law schools and English departments teach a hybrid course that parallels the general focus of this project. Depending on the context—i.e., whether a law department's course or an English department's course—the focus and the manner in which the course materials are contextualized will differ. For example, distinguished electronic privacy lawyer,

Daniel Solove, holds both a Bachelor of Arts degree in English Language and Literature and a Juris Doctor degree; he currently teaches an array of courses at George Washington University's law school. Unlike the "traditional" law school course in which the professor requires a case book, certain cases to be both read and "briefed," and then question students using the Socratic method, Solove structures a "Law and Literature" course that, as the course's title reflects, discusses the topics—perhaps using the more "traditional" law school methods (e.g., the Socratic method). The students, upon receiving the course syllabus, immediately learn that they will not be purchasing a casebook; instead, Solove distributes a more than 60-page syllabus—electronically, thankfully— in which he discusses the course in general terms that not only mention the primary literary texts that he assigns students to read, but he also specifically describes under each week's heading a description about how the literary texts can apply in law school, legal thought, and in the profession generally. In short, a glance at Solove's syllabus alerts its reader that the course will cross disciplinary fields—and for both the students' and the profession's benefit.

Law: In Practice, from Theory

When peace is disturbed, "the Law" prescribes society's recourse: i.e., punishment for the harm, which puts potential criminals or tortfeasors on notice that there are consequences for any wrongs that they commit. Moreover, the law functions to *deter* criminal activity and *compensate* for the resulting harm—either through jail (or death) sentences for criminals or compensatory and, if available in the jurisdiction, punitive damages[3] paid by the tortfeasor to the

[3] Michigan Law does *not* allow for punitive damages to be awarded in a case.

tort victim or the victim's beneficiaries[4]. The other people whom the legal system affects—the "criminals," for example—are not only entitled to a fair and impartial trial comprised of a jury of their peers, but they are also entitled to the justice system's benefits—albeit, in a limited fashion. Specifically, American jurisprudence is, as mentioned, informed by the idea of deterring and punishing wrongdoing; however, it also seeks to rehabilitate the "wrongdoer," as some colloquially refer to the "criminal." The reason that the "criminal" retains Constitutional rights and a chance at rehabilitation is because it is more beneficial for society to rehabilitate the person so that he or she can positively contribute to society instead of spending the remainder of his or her life in prison—and potentially then having the State execute the "criminal" (him or her) after the pecuniary cost to society has continually accrued and been paid by, in part, federal and state taxes.

Money does not wholly dictate the system and the issues decided daily in court. People can change with time, which would even, at least arguably, include the ability perhaps to atone for one's criminal wrongdoings and disavow any further nefarious behavior. Moreover, would it not be in society's best interest, then, to "make room," so to speak, for the more recent offenders—especially the ones who commit "violent" crimes—and allow those who have "paid their debt to society" a chance to seek services that would allow them to engage in acts and rehabilitative programs that could benefit society while making themselves more civilized simultaneously?

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[4] Illinois, for instance, by law, prescribes that punitive damages are awardable; however, the plaintiff does not have a property interest in them. The award is split, on a percentage basis, and is distributed among certain entities: e.g., the State, M.A.D.D. (as an example if the losing defendant in a civil suit for wrongful death were charged to pay punitive damages; however, the plaintiff does collect—to the extent possible—the whole amount of the compensatory damages.

Moreover, the preceding is a rhetorical exercise informed by the very method and argumentation employed throughout this interdisciplinary, cultural studies' amalgamation of law, literature, and critical theory, a point that legal scholar Kieran Dolin articulates in *A Critical Introduction to Law and Literature*. Specifically, Dolin argues that judges and lawyers resort to metaphor and narrative—rhetorical strategies—as a way to "clarify their pronouncements and arguments about the law . . . They do so because law is inevitably a matter of language. *The law can only be articulated in words*" (emphasis added) (2). According to Dolin, the rhetorical nature of legal discourse conceptually, at the least, connects law and literature and in a way that would persuade a reasonable reader to accept general considerations about the law's relationship with literature and literary theory because the three share, as mentioned, a linguistic feature that is central to their place in a humans-constructed world—both in the sense of "construction by physical labor" and construction as in "interpretation of one's surroundings" as communicated through language. For the sake of argument, this premise relies on an anthropocentric world-view that privileges humans; however, getting outside of such a world-view would make me not-human and thus unable to have begun this project. Be that as it may, if one employs linguistic skills involved in close, critical readings of works—e.g., written language—informed by some particular theory or theories, it follows that if the law is a text, the same reading strategies can be applied to the law, whether a written or an oral rendering of the law. The consequence of which, hopefully, is a bringing together of the human condition and a diversity of perspectives to the discourse. Implicit in this characterization of "text" is the idea that anything that conveys meaning through the use of language—regardless of verbal or non-verbal, written or spoken—is text.

Text, thus, is more than words. Linguist Norman Fairclough combines linguistics and sociology to uncover what the chosen language used by a speaker *actually* reflects. Fairclough argues that language "is an irreducible part of social life, dialectically interconnected with other elements of social life, so that social analysis and research is through a focus on language" (2). As applied to daily life, people use language in many ways. For example, when someone dies, many—if not most—people say "passed away," "gone home to be with her savior," or some other similar phrase. For brevity's sake, the example illustrates what George Carlin has argued vehemently throughout his stand-up comic years: i.e., that people have softened and created a version of reality by tailoring their language use. "Die" is a monosyllabic, strong-sounding word. A "funeral" is a sad event that forces people to realize that the decedent really is dead and will, after the funeral (or as many say now, "the celebration of _____'s life), be buried six feet below the ground's surface or be cremated. Thus, many have altered how they speak about such an occasion, perhaps as a human way of coping. In the context a loved one's death, however, "celebrate" and "life" are not terms that accurately convey *the actuality* of the context—unless the decedent were a wealthy person during his or life and made me, for example, the *sole* beneficiary of his or her estate. Notwithstanding the preceding rhetorical illustration, the language of "celebrate the life of…" in the context of a *funeral* is both a denial of reality and an offensive communication to those who feel strong, uncontrollable feelings that death arouses in a decedent's survivors. "Celebrate the life of" semantically vitiates the decedent—which, is, after all, the physical result (both literally and figuratively through language use). In other words, language is, as Kenneth Burke contends, a powerful human symbolic tool that humans use and create symbolic perfection (507-513), which, when applied to the legal context, relates to a trial's outcome. Stated another way, Burke says the following, which connects the analogy:

> A perfect ending should promise something. In this regard, I guess the most perfect ending is provided by sermon in which, after a threat of total loss unless we mend our ways, we are promised the hope of total salvation if we do mend our ways. But even though, today, we stand as close as [hu]mankind ever has stood, in secular regards, to a choice precisely as radical as that, I can build up no such perfectly urgent pattern (partly because, as we generally recognize now, it is impossible for us truly to imagine the next day, no matter how earnestly some writers try to help us by inventing imaginary accounts of it, accounts which even they can't believe, despite the enterprise of their imaginings). (512-513)

In other words, Burke's argument, when applied to an argument about a cross-discipline, intertextual relationship, and the benefits thereof, provides theoretical support for the actuality that the world is an antifoundational space, which includes, among other things, lawsuits that are decided and recorded by a judge—or his or her underpaid law clerk—for the public's record: i.e., history. Moreover, rhetorical theory, and one of its useful tools, the ways in which language is used, provides a multifaceted and articulable method that makes tenable contextualizing the law, literature, and literary theory: i.e., different discourse fields that are part of a more general, symbolic action that "exists," so to speak, in humans' minds (and can be communicated) through/in language.

Applied to this interdisciplinary discussion of the law, a critical theory with a shrewd linguistic sense informed by an understanding of discourse, and the analysis thereof, can inform the educated—and "educated" is defined here as someone who is literate, can think critically, and can formulate conclusions from relevant evidence ascertained through critical reading and thinking—person about the underlying "current" of a text. The importance of which is that one

acquires and hones a skill that will, nevertheless, provide more than a good paycheck. Instead, one will provide one's *own* ability to reading and understanding texts—communications—as an educated citizen, which benefits society as a whole because each perspective is inimitable and adds to the diversity of perspectives—something vital in a world that is far more complex than an "either…or," for example, way of understanding the world. Even more, one can understand the world that many have dictated to them—but through their own perspective, interpretation, and reasoning. Individual agency is thus retained. As applied to the law, not many people without a license to practice law in a jurisdiction fully understand the law's potential effects on their personal lives; that a case in court *may* (or perhaps does not represent "the actuality" of what happened) result in a record, as determined by the jury (or the judge if the defendant has waived his or her right to a jury), which becomes the "official record" of *facts*; and, as stated above and effectually problematizes (but often is not recognized as such) many individuals' world view, fact is a creation—often the result of interpreting circumstances and occurrences (legal cases) or interpreting text and using literary devices as textual cues for interpretation. Moreover, this project generally seeks to highlight the importance of juxtaposing the seemingly different discourse fields to equip readers with an understanding of preceding effects, considerations, and implications of a human-created institution. The law, and its potential effects and how if one were ever subjected to a court proceeding as, for example, a defendant (or "respondent") could then apply that understanding in contributing to one's defense—even if one employs a lawyer.

The stakes are significantly elevated in the criminal context as compared to the civil context; the former is subject to court proceedings to determine whether to deprive the defendant of his or her freedom, and the latter is for the plaintiff (or "petitioner") to obtain a civil judgment

that allows the plaintiff to proceed with acquiring real or personal property or other assets to compensate the plaintiff for the claimed damages, which are assessed and "translated" into a monetary value through receipts and expert testimony that establishes the reasonable—or as close to the actual amount claimed—amount that the trier of fact (the jury, or the judge if the defendant/respondent waived a jury trial) should assess given the totality of the case's circumstances.

The law, as text, also exists as a corpus of works: the work would be the printed statutes. Conversely, the text would be "Language," from which one chooses the appropriate words to convey the meaning—"the Law." One could also consider "the Law" as *a* text, which would constitute a postmodern approach. If applied to this project, the implications would be far-reaching: i.e., "the Law" would be a grand narrative, legitimated by the sources of authority previously discussed. Such a move in the "law and literature" language game would, however, make many of the "old" sources of legitimacy illegitimate. For example, Roland Barthes's "The Death of the Author" and "From Work to Text" supports such an argument. Both works support the contention about the legitimacy of the previously mentioned "old" based on his argument and the relatedness of it to the issue here. Specifically, Barthes contends that the author is "a modern figure," a recognition of the "prestige of the individual [arising out of] capitalist ideology, which has attached the greatest importance to the 'person' of the author" ("Death of the Author" 143). Barthes detects a problem with such a focus because to understand a work—within the Author paradigm—is to understand it "as if it were always in the end, through more or less transparent allegory of fiction, the voice of a single person, the *author* 'confiding' in us" (emphasis original) (143). Consequently, by eliminating "the author," the work is thus understood through its language, not through the person whose name is on the work's cover.

After metaphorically killing the author (which one could define, accurately, as writing the author off the page), Barthes offers a solution, so to speak, or, perhaps more accurately, a reconceptualization of the author(ity) issue as discussed in "Death of the Author." Barthes then contends in "From Work to Text" that the author created a/the work, which "is a fragment of substance, occupying a part of the space of books (in a library for example), [sic] *the Text is a methodological field*" (emphasis added) (157). Text, then, refers to a process in language: that is, one that "cannot stop (for example on a library shelf)"[5] (157). Conceived as such, text represents more than the elements of language that one uses to communicate a message; instead, it is the medium through which one communicates a message—generally, although neither necessarily nor always—in written language. Also significant, here, is that although the theorists discussed throughout this project communicate within specific discourse fields that differ from the fields of other theorists discussed, both the different discourse fields and the theorists are connectable and consequently, which is articulated herein, benefit both the human condition and academics'/students' engagement with the articulated schools of thought. In other words, the foregoing communicates a possible methodology that not only enhances one's intellectual ability and understanding of the human condition, but it can also be a pragmatic method for students, scholars, lawyers, and people generally engaged in social intercourse to understand one another and communicate more effectively and perhaps provide a brief treatise about a social institution vested with the authority to affect our lives, liberty, and property. Thus, combining Roland Barthes's (post-) structural argument to the law would suggest that "the Law" is a text that, as Dolin describes, flows through language. Metaphorically, then, the law, as compared to a

[5] Britt, Stefan. "Defining 'Text': Roland Barthes's Structuralist Method—Not Theory." ENG 535, *History of Literary Criticism*, Central Michigan University. 25 February 2009. Presentation Essay

human, is human not only as a human conception but also that it is organic and continues to grow within, and perhaps to an extent by, the surrounding environment—which is a more biologic definition of "context."

Additionally, if one accepts the premise that "the Law" is human, then the preceding allows one to expose the tenets upon which laws are based. For example, a portion from my "Proposal for Independent Study" that was submitted to Central Michigan University's English Department illustrates the type of theory, and one application of it, presented herein:

> [O]ne could arguably uncover ideological influence. [. . .] [T]hink about an analysis . . . [of a] legislative action viz. statutory laws: [. . .] [P]roducts Liability law in Michigan has been statutorily modified to the extent that a harmed plaintiff seeking compensatory damages in a products liability claim has to overcome a statutorily made presumption—a (albeit, rebuttable) presumption that the product was *not* effective. By codifying the presumption against the product being defective, the legislature tipped the scales of justice in favor of manufacturing instead of humanity—those who buy the products and off of whom the manufacturers profit. Just to emphasize the point, Michigan law does not allow for Punitive Damages. Thus, in the products liability example, if the manufacturer knew that it were distributing a defective product that could harm consumers, and even in the worst case it *knew* that the product would cause damages, punitive damages would not be recoverable, [nor could they be assessed by the trier of fact] (at that point, the matter becomes criminal, provided that the government pursues charges). In short, one could argue that current Michigan [tort] jurisprudence seems skewed [. . .]—"prejudice." (n. pag.)

The cliché that "knowledge is power" applies here: i.e., knowing the deep structure under an element of society that can garnish one's work wages, allow a bank to evict a family from its home for defaulting on a mortgage, and even command that one be put to death as punishment for murder is a powerful insight that sharpens one's mental acuity and socio-cultural awareness about an institution whose function is to preserve order and a peaceful society—notwithstanding, of course, the completely arbitrarily[6] picked consequences that the "law" can enforce on individuals, which would seem to tilt the scales of justice not in the citizenry's favor.

Knowledge and power are like language: they can be used for "good," or they can be used for "bad." Regardless, knowledge is the power to define—and recognizing who defines is powerful because it makes one aware of whom one, or society, needs to confront when it comes to issues of, for example, human rights, corporate interests favored at the expense of those who can barely afford to purchase the gasoline to get to work and to pay for the food that will feed the family. If one does not have the according knowledge of the earlier referenced deep structure, then one is, as the preceding example highlights, at the mercy not only of the government and its resources but also those who have the monetary means to hire someone who does understand the insight. In addition, the proposed cross-disciplinary, intertextual methodology—incorporating legal philosophers, literary/critical theorists, a linguist, and a rhetorician—does not make *certain* what one concludes based upon a critical, linguistic analysis of textual evidence. That, in short, raises intentionality issues. Written language—"text"—as it exists on the page represents the only communicative mode that readers have to ascertain the meaning of the (written) communicated message. Certainty, as a concept, is a misnomer—or speculative, at best.

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[6] Which is veiled by the phrase "sentencing guidelines;" since they are "guidelines," they are technically not "rules" that *must* be followed exactly, which allows the judge some discretion.

Articulated in jurisprudential terms, the issue, then, is whether the law is a set of human-made rules to be followed accordingly, something handed down from a Creator, an agreement between humans as a society in order to preserve peace, or some combination of the preceding. Whichever it is, if it is just one of the preceding, one cannot summarily reject a connection between literature, literary (and even linguistic) theory and the law, for language is the (metaphorical) God-corpus of the law, literature, and literary theory. What remains, however, is to consider what, if any, implications there are to such a theory and to see instances of the three elements' interactions and how one can read literature through the earlier formulated theoretical model. Legal scholar Gregg Crane adds to the preceding when he says the following: "[T]he complex and slippery historical interactions of law and literature that shape and are shaped by an everchanging [sic] cultural idiom of justice remain for others to explore" (773). This project, moreover, constitutes the exploration about which Crane contends "remains" for others to explore.

As one of the preceding "others" who, herein, explores interdisciplinary and cultural exchange between the two discourse fields and argues from an interdisciplinary perspective that not only are the two dialectically informative but also that by injecting critical theory into the discussion leads to a two-pronged conclusion: for the interests of justice in an increasingly changing democratic society, the "rulebook," that is "the Law," should be more aligned with the circumstances to which its dictates are applied; also, pedagogically, the further exploration that scholars have claimed is necessary truly is exigent because the rigidity of the legal system can dehumanize the humans for whom the law seeks to ensure justice—and even protect.

Opening Statement's Conclusion

By reading literature and contextualizing it in a legal-theoretical perspective, one ought to see that literature—one type of cultural artifact—can function to warn society about the implications of governmental and legal power and to problematize the reduction of life to a prescriptive, rigid set of laws that (under this project's methodology in general not only warn but also alert to possibilities for catalyzing change) neither consider individual circumstances nor the effects of such on the human condition or the individual. Not all humans, however, ascribe to such egalitarian ideals, especially when analyzing the current context within which this project is written. Accordingly, the motivating intent of this project is to persuade that law and literature need not be mutually exclusive discourse fields and that literature, when contextualized with "the Law," can provide rhetorical and social discursivity that can improve the human condition—even if only for one person.

CHAPTER II

THEORETICAL FRAMEWORK: CROSSING DISCIPLINARY BOUNDARIES

The previously mentioned deep structure of both literature and law relates to what legal scholar and English Language and Literature Professor Emeritus James Boyd White describes as "the poetics of the law," about which he expostulates the following:

> [C]onnections between two branches of our culture that are often thought to have little to do with each other, and claiming that these connections teach us something about the way each branch can and should proceed. With particular reference to law, I mean to suggest that it can be best understood as *a set of literary practices that create new possibilities for meaning and action in life and in doing so enable us to constitute human communities in distinctive ways*. (emphasis added) ("The Judicial Opinion and the Poem" 1669)

Boyd White conveys the argument that the "the Law" is human *and* enlightening to the human condition when considered within a framework of law and literature. In addition, the law does "not so much 'say things' as create the conditions for a complex process of thought and conversation, highly dialogic in character; it is this process of thought that we learn, and teach, and practice as lawyers; this process is, in an important sense, the law itself" ("Writing and Reading" 12). Jurisprudentially, Boyd White argues that law is an organic, human creation. He does, however, raise an important issue, one that is a central point of contention between those who see the two fields as disparate discourse fields with different methodologies and those who see intellectual, moral, ethical, and pragmatic reasons for considering the discourse divide a fiction: i.e., a created fiction that is equivocated and considered as "fact." The issue, as Boyd White articulates it, is that society "demand[s] that the law be clear… We in fact want to . . . say

the same thing always. We do not want law to be dialectical or controversial; we want clarity, fair notice, obedience, [and] equal treatment" ("Writing and Reading" 8). In other words, society would prefer a legal system that is fair, treats *all* people subject to its jurisdiction fairly and equally, and, perhaps even more, something foundational—almost Biblical.

Although some would contend that a foundational, Biblical methodology for "the Law" and how it is administered is very convenient (e.g., "strict constructionists"), the argument fails to account for *context*, which would make positivistic interpretation—"strict constructionism"—impracticable. Put another way, the United States of America in 2011 is not, to name a few examples, culturally, socially, and epistemologically the same now as it was when the "Founding Fathers" drafted and executed the Constitution in 1774. Succinctly, echoes of Stanley Fish swirl throughout the current context: "[T]here is no other aperspectival way to see and no language other than a *situation-dependent language*—an interested, rhetorical language—in which to report" (emphasis added) (212). Moreover, the antifoundationalist-foundationalist binary seems as though it would mitigate the present project; however, it does not. According to legal scholar Paul Heald, a different perspective neither engages the antifoundationalist-foundationalist binary nor necessarily limits the intercourse between the discourse fields. Specifically, Heald argues that law and literature, either taken together or singularly but aware of one's influence on the other for the reader, may provide pragmatic value to both society and a system of jurisprudence:

> If James Boyd White is right about the closeness of the relationship between law and art, then it naturally extends beyond our own discrete selves to the world and, more concretely, to the question of how we should constitute ourselves in a community with others… [T]he whole corpus of literature, and indeed all art, is potentially relevant to making ethical choices, including legal decision. (11)

Whereas Boyd White's theory focuses on how lawyers and judges maneuver and communicate within legal discourse and its constitutive practices through language and writing, other legal scholars articulate different formulations of how, or whether, law and literature are related, can inform one another, and/or whether applying the theory in practice and contextualizing them methodologically benefits academia, the legal system, and society.

Pre-eminent legal scholar Ronald Dworkin addresses the preceding contention; however, he articulates the argument about the interdisciplinary relationship in different terms. Dworkin formulates an "aesthetics of interpretation," which he discusses as follows:

> [A]n interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools or traditions of interpretation disagree, on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of literature better than another. (376)

From a critical theory perspective, Dworkin articulates what it is that literature students *do* when reading a text—whether for an assignment in a literature course or whatever reason. The point is that different "lenses" through which a work can be read will provide a different reading. The difficulty, however, is discerning which reading is best, if it is either possible or advantageous to do so. For literature, the issue arises when questions of the author's intention are raised. According to Roland Barthes, the author is dead, and, by extension of his argument, what readers read when reading literature is an intertextual weaving of language that a "modern scriptor" [sic] connected, which exists within a book's binding and is known as "the work"—i.e., the book on the shelf. ("Death of the Author"; "From Work to Text").

Regarding law and literature, Dworkin implies more than a hermeneutics of legal reading. Specifically, Dworkin says that he "want[s] to use literary interpretation as a model for the central method of legal analysis… and … therefore need[s] to show how even this distinction between artist and critic might be eroded in certain circumstances" (382). To what "certain circumstance" does Dworkin refer? Specifically, Dworkin discusses the challenge of an author writing a novel and how the reader will formulate an interpretation of it—sometimes, quite early in the reading. Reasoning by analogy, Dwokrin asks the same question about a judge who is reading a case: i.e., instead of reading a novel, the judge is "reading" a case and must decide it based on his or her reading of it:

> Deciding [difficult] cases at law is rather like this literary exercise. The similarity is most evident when judges consider and decide common-law cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law 'underlie' the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each [reader interprets a text]. (383)

In short, Dworkin raises the legal precept of *stare decisis*, which refers to respect for past legal precedent that binds judges to make decisions in accordance with the laws by which cases of a similar nature (i.e., a similar issue presented to the court) were adjudged. Analogously, then, the reader-as-judge reads literary texts as a judge "reads" cases—that is according to the "precedent" (read: literary theory) that has been canonized. For the law, that is *stare decisis*. Moreover, the

reader-as-judge reads literary texts and interprets them according to a particular literary theory or combination of theories just as the judge "reads" a case and decides it based upon an interpretation of existing case law (*stare decisis*) to arrive at a conclusion about the work or the case, respectively.

Pedagogically, then, the reader-as-judge is bound to the literary cannon—or more accurately and in accordance with the analogy, literary theory canon. Reader-as-judge sounds empowering for the reader. Perhaps it is.

A theoretical, and even arguably pragmatic, issue arises when considering *stare decisis*—or put another way, respect for the (legal) canon of texts—similarly to interpreting works of literature. At this point, Dworkin discusses the problem of authorial intention. For literature, one could cite W.K. Wimsatt and Monroe Beardsley's "Intentional Fallacy" and both of Roland Barthes's previously mentioned "The Death of the Author" and "From Work to Text." Dworkin problematizes the issue in a legal context and claims that to look for authorial intention (e.g., the judge's intention or even legislature's intention) "would treat the particular, earlier judges as legislators and so invite all the problems of statutory interpretation including the very serious problem" of privileging one interpretation over another, premised on one's reading of another's interpretation (386). Dworkin, however, does not definitively answer, which is beneficial for the project at hand. Specifically, Dworkin concedes, "I end simply by acknowledging my sense that politics, art, and law are united, somehow, in philosophy" (388). This writer would respond by adding the following: the philosophy of language, critical theory, rhetoric, and *especially* language.

Michel Foucault also engages the issues of authority (i.e., an "author") and the implications thereof for a text. For Foucault, the "author" is a concept and continues to be

theoretically relevant. Specifically, Foucault argues that a "certain number of notions that are intended to replace the privileged position of the author actually seem to prefer that privilege and suppress the real meaning of [the author's] disappearance" (103). Foucault adds that what readers typically think about an "author" (and notice its being the linguistic root for the word "authority"), serves to characterize

> a certain mode of being of discourse: the fact that the discourse has an author's name, that one can say 'this was written by so-and-so' or 'so-and-so' is its author; shows that this discourse is not ordinary everyday speech that merely comes and goes, not something that is immediately consumable…[I]t is a speech that must be received in a certain mode that, in a given culture, must receive a certain status. (107)

Thus, when thinking about a judge or the legislature that "authored" an opinion or legislative act, respectively, Foucault would contend that the name or names listed as authors or sponsors of a legislative bill functions within a discourse, which he refers to as the "author function"—identifying the writer or writers who function in "the mode of existence, circulation, and functioning of certain discourse with a society" (108). What, then, would a judge, vested with authority by the United States Constitution and, for example, the State of Michigan's Constitution, say about the preceding? Regardless, the judge's answer is immaterial to the issues presented herein and the methodological implications that will be articulated.

Boundary Crossed: The Other Side

Moving from Dworkin's jurisprudential and aesthetic considerations about literature that apply the types of theories he discusses and Foucault's conceptualization of "the author," Ravit Reichman contextualizes legal thought with modernism, especially the legal thought during the

early twentieth century. The specific context of the early twentieth century is significant because of the ensuing ramifications of World War I—not just the specific political implications of the war but also its effects on people throughout the world. "The Great War" has not only affected the political and economic landscape, but it has also affected survivors in the war zone who were and are affected to their very mental and emotional core amid the destruction, loss, and ensuing post-traumatic distress (formerly called "shell shock"). In other words, World War I changed the social and aesthetic epistemé after the war's fog, so to speak, lifted. What did not "lift," however, were the survivors' foundational beliefs and perspectives; instead, they were fractured by the resulting trauma and increasingly commercially responsive nature of the socio-political landscape.

Automobile manufacturing and railway transportation, for example, are two forms of "new" industry that altered the way humans engaged in social intercourse and commerce after World War I. What the newly manufactured made possible, however, came at a cost. Faster, more powerful machines not only provide utility to those for whom the new forms are considered novel, but they also are human creations that are imperfect. Heavy machines in motion can kill those who are involved in "an accident." For perspective's sake, compare a bicyclist who "hits" another person while in motion to a motorized vehicle that "hits" a person who, for example, crosses in front of the moving vehicle without warning, not providing enough time to stop the car before impact. Moreover, the modernist mantra of "make it new!" applies throughout different contexts. The linking factors are the ramifications for making it new.

What, then, results from "making it new!"? One example is that the law must be sought through the court's jurisdiction. In *The Affective Life of Law: Legal Modernism and the Literary Imagination*, Reichman argues that the law, itself, is a strange character. Specifically, Reichman

discusses the implications of mid-1920s jurisprudence, which, for legal historians, is a time in which American jurisprudence changed in many ways. With changes come implications and effects. Reichman makes the following statement about the socio-legal context and the implications thereof:

> In its reassuring guise, the law acts as a steady presence, enabling judges and ordinary citizens alike to tell the difference between an injured party and a legitimate plaintiff. But in a less predictable world, every encounter becomes a potential accident and every person a prospective plaintiff. In this more threatening reality, duty of care becomes a duty to be careful, and people move from being mindful of others to avoiding them. The social imaginary that tort law incites thus represents much more expansive dimensions of what its legal opinions dictate, setting out a set of implied dictates that conceivably structure every random encounter. These directions appear to have the social world at their core but simultaneously, and ironically, also seem to reward antisocial behavior. What we do with these unspoken normative guidelines tells us a great deal about what it means to be part of an ethical community under modernity. (40-41)

The specific context that Reichman discusses, as previously mentioned, is the mid-1920s. Automobiles, for example, were becoming increasingly more common but remained imperfect. Approximately 100 years later, the same statement (probably, but to a different degree) applies.

One jurist, in particular, has shaped American jurisprudence through his written legal case opinions from the early twentieth century. Justice Benjamin Cardozo, a Court of Appeals of New York justice and Chief Justice thereof, and was appointed to the Supreme Court in the 1930s, presided over cases that required a fresh perspective in a changing and often

unpredictable world that provides, even today, American jurisprudence and legal education with both a legal history and telling narrative about the law's humanity—or its inhumanity, depending on one's judicial philosophy and level of adherence to it.

For example, in *Plasgraf v. Long Island RR. Co.*, then-Chief Justice Cardozo asserts in the Court's ruling that "[n]egligence . . . is a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all[.]" (qtd. in Schwartz, Kelly, and Partlett 312). In the case's dissent, however, Justice Andrews claims that "[p]roof of negligence in the air, so to speak will not do" (qtd. in Schwartz, Kelly, and Partlett 313). Thus, the discursive, rhetorical battle between Justices Cardozo and Andrews reflects a rhetorical negotiation of *stare decisis* and the unusual facts of the *Palsgraf* case. Specifically, Cardozo says,

> In an empty world[,] negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm some one [sic], it harms him a mile away as surely as it does those on the scene. (qtd. in Schwartz, Kelly, and Partlett 313)

The point of the preceding is that Cardozo's language reflects the modern condition about which Reichman speaks: i.e., the worry about a duty to others—even those whom one does not know. The reasoning for such an assertion, which one could argue is based on an analysis of the *Palsgraf* case, is not without merit. The facts of the case, in retrospect even, seem as if they are from the pages of a fictive work; however, they are not.

Reading Cardozo's written decision of *Palsgraf* through a rhetorical, linguistic lens reveals more about the nature of American jurisprudence and the reaction to the "new" circumstances necessitating "new" rules and even "new" ways of considering and thinking about cases, which, for a judge, place him (at the time, definitely "him") or her in precarious positions. On the one hand, there are injuries resulting from either faulty machinery or a user's failure to exercise due care in using the new machinery. On the other hand, there are cases like *Palsgraf* that must deal with injury to a third party some distance away from the harm's cause.

As mentioned, the way in which Justice Cardozo discusses the facts of the case are pertinent to this project, for closer inspection of his prose reveals a pragmatic consequence of the theory established herein. Here is Justice Cardozo's statement of the facts as Schwartz, Kelly, and Partlett quote:

> Plaintiff was standing on [defendant's rail platform] after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. [. . .]. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues. (309).

Noticeably absent from Cardozo's rendering of the "facts" of the case is *who* the plaintiff is. Surely, one can ascertain the plaintiff's name from the case name; however, the case name offers the reader only a surname. Cardozo's prose makes clear that the focus about which he writes is strictly limited to what happened—and what happened as relevant to the rule of law that the Court could/would apply[7]. Reichman makes particular note of the impersonal nature of Cardozo's rendering of the facts: "The opinion's literariness—its terse, bare-bones rhetoric emphasizing only the legally relevant particulars and leaving the rest to the mind's eye—has much to do with its enduring hold on the legal imagination" (44-45). There is another element to the case, and the way in which Cardozo discusses it should alarm readers. It is informed by the theory highlighted herein: i.e., the impersonality of the law, its rigidity, and the consequences on those who are exposed to the rigidity and impersonality.

Reichman, too, notices the law's impersonality. The level of the impersonality, however, is tantamount to an institution that professes to be human and humane while ignoring the very people whom it claims to serve. Regarding *Palsgraf*, Reichman claims that one "of the most obscure and least-discussed particulars of the case remains Helen Palsgraf's injuries" (47). Reichman criticizes the rhetoric and textual qualities of the case: a case that highlights the difficulty of negotiating through not only a changing world and the condition of modernity but also with the ways in which those with the power to make compensation for human harm resulting as a consequence of "accidents" particular to modernity—quite sharply:

[7] The use of the "could/would" is important to note; however, it is tangential—but important because the former term arguably reflects an arbitrariness to judicial decisions, whereas the latter term implies prejudice, which implies that one's proofs and presentation in court are a waste of time for the sake of the Court's legitimacy and authority, which, then, would be as unjust as it were fictional.

Despite its judicial clarity, *Palsgraf* continues to stutter and stammer its way through the terrain of the personal. Each time the case is repeated in the annals of law, and each time these retellings routinely pass over the intimate facts of the case, we are reminded of Helen Palsgraf's presence on the stand—and on the platform of the Long Island Railroad. And we are reminded, too, of how little we know about either of these positions, *save how they fit the hard-edged contours of legal reasoning*. (emphasis added) (47)

If the law is figuratively human and a means by which to preserve a peaceful society, compensate for harms, and be workable, the system—and those of whom it is comprised and empowered—would serve those ends well by remembering why, for example, the United States has a legal system. Since the aim of the present project is to establish that crossing disciplinary boundaries and bringing one discourse's methods to those of another can improve and enhance both the efficacy and focus of the law, and the same applies with the other discourse's methods: i.e., that the constitutive skills of the legal imagination and system can benefit one's literary imagination and practices.

Conclusion: Next Stop—The World of Literature as Seen through the Literarily Legal Lens

With the relevant literature reviewed and the theory through which the primary texts will be analyzed discussed, the next chapter presents the literary and textual components of the project. As mentioned, the specific ways that each of the preceding discourse fields can work together may not be unilateral, nor is it necessarily the case that the forthcoming analyses represent a foundational reading of the cross-disciplinary, intertextual boundary crossing. In addition, the forthcoming analyses through this project's methodology, and how it manifests itself in applied readings, theory, or even pedagogy, are also not a foundational way of reading and interpreting. There is, however, a unifying contention—one upon which the following

chapter is based: language links the discourse fields together, but there are implications for the literary work, literary theory, and the law and anyone who seeks the law's protection and/or authority for one's agenda. Moreover, the preceding informs the up-coming analyses in the next chapter: "A Legal Imagination in English Language and Literature: Law and Literature from Theory to Practice."

CHAPTER III

A LEGAL IMAGINATION IN ENGLIGH LANGUAGE AND LITERATURE: LAW AND LITERATURE FROM THEORY TO PRACTICE

If one considers the law as a textual, social construction by which a power structure maintains justice and order, one should note the implications of conflating some group's ideological agenda with principles of law. More specifically, the Legislative branch, and those of whom it is compromised, (are supposed to) listen both to their constituents and other entities with pecuniary interests in or from the government's business. This, of course, is a polite way of talking about corporations and the lobbyists whom corporations send to Congress, specifically to influence legislation in a way that furthers its/their interests.

Moreover, the reading, writing, and critical thinking skills that one learns and hopefully hones throughout one's academic studies allows one both to see the world not only from one's own perspective but also from other perspectives and to see what really is at stake by what is said—whether in the courtroom by a lawsuits' parties, by the media, or by seemingly well-intentioned people. In other words, education enhanced by critical theory intellectually equips one to ascertain others' perspectives and to formulate the other perspectives because that is what the skillset of critical, academic education makes possible for a student who intellectually engages with the material in a concerted and inspired manner.

Again, "Law" is human, and it is not something confined to the textual creations of judges and legislators. The common denominator, as previously discussed, between law and literature is that of language, rhetoric, and literary devices used in communicating one's message. The interdisciplinary approach discussed herein, in conjunction with both the sub-discourse field of "law and literature" and engaging that discourse to extend the benefits of contextualizing each part of the sub-discourse, represents the figurative lens through which the

primary texts in this chapter are discussed. Furthermore, the lessons and thoughts that the readings evoked, coupled with life's experiences and other academic courses, allow one to describe the connections between the discourse fields, to understand the benefit of crossing the discursive boundaries, and finally to explore the implications thereof. Illustrative examples about how the argument applies and works within the language game of literary studies will be illustrated by application of the constructed theory in the following primary literary works: Herman Melville's *Billy Budd,* Peter Suber's edition of Lon Fuller's *The Case of the Speluncean Explorers,* and Osonye Tess Onwueme's *What Mama Said*.

From a literary standpoint, the texts represent moments, relative to now, in history that have significantly altered the human condition and humans' experience thereof. The preceding texts provide primary cultural artifacts—creations that will be analyzed according to the theory presented and discussed herein. The primary texts establish, enter, and then prepare for exiting the brief literary journey through literary modernism and arriving at a current cultural artifact that shows law in literature—a context through which to show how the interdisciplinary approach highlighted above would read through this project's methodological, theoretical lens. Consequently, one could argue that there is a parallel between the context within what scholars have demarcated as "modernism" and the need to re-examine the texts in a different way: e.g., the way proposed by the theory expressed herein. Lastly, *What Mama Said* effectively locates and demonstrates the power of liberating the marginalized and abused by breaking down discursive and physical barriers. In addition, the work specifically represents an account of modernity for a country that, from the United States' strategic and governing perspective, is less developed but holds promise for its, the United States', oil addiction—or "needs," as some would say. Moreover, *What Mama Said* thus emphasizes the importance that reading law and literature

in an interdisciplinary way provides *and* the implications and inspirations that it makes possible. The law's affective nature and the depiction thereof, and other relevant concerns regarding the human condition and law, will be the focus in the following section—"Law and Literature: A Paradigmatic Primer Portraying Perspective's Power."

Law and Literature: A Paradigmatic Primer Portraying Perspective's Power

"Law and Literature" curricula throughout American law schools use *The Case of the Speluncean* Explorers as a primary literary (or even "literary-legal") text for analysis and discussion about the different approaches and legal philosophies that have contributed to American jurisprudence. With an initial adoption of a Constitutional system, which the government, for the benefit of "we the people," adopted Amendments to supplement the original Constitution, one can surmise that changing the legal system is impossible. Stated politely, the early governmental work of the "Founding Fathers" was to create a legal system that would prevent the same turmoil and injustices that they perceived and ascribed blame to the British crown. Without delving into a superfluous history of the Constitution and the United States Supreme Court, a rule of law for this democratic system was established. In breaking from British rule, one in a Revolutionary's position might wonder how best to serve the people's interests while acting within the scope of a governmental system that would keep the new nation united, thereby creating the conditions to make it thrive. For example, the British Common Law represents a rule of law that barristers employed in arguing cases and to keep peace within the national boundaries. The point, moreover, is that the United States molded its legal system—at least to an extent—on the British Common Law. Early legal disputes in the United States cited, as legal precedent for deciding the case at bar based on the particular facts, British cases—decided in Britain in the context of its jurisprudence and legal system.

The earlier cited *Prosser, Wade, and Schwartz's Torts: Cases and Materials* provides example illustrations that Britain's legal system has contributed to many elements of the law that still apply today or provide the theoretical path for American jurisprudence to develop as it searched for its own epistemic and socio-logico basis for law. In *Prosser*, the first legal opinion is from a case that the King's Bench published in 1466. More than 500 years later, when one thinks about a lawsuit, one typically thinks about one party's name "vs." (or "v.") another party's name. This, however, is not what the "1L" law student encounters in the early pages of, for example, the *Prosser* casebook; instead, *Anonymous* appears where what now distinguishes the name of the parties disputing in court is. In other words, it is the reference point that signals to the court who is suing whom. The next case in *Prosser* resembles more of what one now expects when referencing a legal case: *Weaver v. Ward*, which was also decided by the "King's Bench" in 1616. Moreover, a law student's introduction to civil law (at least the student whose professor uses the affectionately nicknamed "king of torts," Prosser's, *Torts* casebook begins with British cases decided by the King or his appointed agent. Then, finally, a case from an American court, *Brown v. Kendall*, introduces tortious assault and battery. The court, in its decision, premised its reasoning on legal principles articulated in British cases. In other words, the Revolutionaries fought a war to secede from British rule; however, their rules, in part, inform—even today—parts of our legal system and the ways in which American courts settle disputes. Deferring to English Common Law, though traces remain in our legal system as the basis of some applied legal theories, is not necessary, for America's politicians and jurists created laws that represented "we the people" 's interests according to the principles articulated by the "Founding Fathers" in the Bill of Rights and the Constitution.

Thus, the idea of change directly applies to the issue at hand. How can one country break from another's country's rule while building its system of governance, in part, on elements of that from which it (the colonized) revolted? More generally, however, the issue raises an issue material not only to this project but also to both literary studies and the law: intention.

Intention is linguistically multifaceted and contextually dependent—much like many other words. For example, one type of tort is an "intentional tort." The first element of any intentional tort claim is "intent." According to the Washington Supreme Court, "intent," as the court defined it in *Garrat v. Dailey*, is satisfied by showing that the act was either done on purpose or the actor knew to a substantial certainty that harm would result consequently (qtd. in Schwartz, Kelly, and Partlett 17-22). The previous definition is the sense in which the word is ordinarily used: e.g., one can intend to do something, which is to say that one plans to do whatever it is for which one "intended" to do. What makes *Garrat v. Dailey* instructive for this project is the arguably implicit humor in the general context of the case. Succinctly, the "factual" basis involves a dispute whether the five-year old "intentionally" moved a chair so the he could sit on it or whether it was done "intentionally" as a prank, which resulted in an averred back injury from which the petitioner continually suffered. In other words, the child's parents were sued because the petitioner became—figuratively and literally (perhaps)—hurt by a joke: i.e., this was the factual basis for the case that the court considered. Moreover, the preceding suggests the contextual nature of language and the importance for understanding context's importance. The larger point, however, as will be discussed below, is that strict, black-and-white, oversimplified, binary conceptualizations may make matters easier with which to contend but could consequently create an injustice that, at least in theory, if not in practice, undermines the citizenry's confidence in the legal system. The problematic nature of the binary, black-and-

white, interpretation of "facts" is problematic both for the law and literature, as *The Case of the Spelunceanc Explorers* demonstrates.

The Case of the Speluncean Explorers—One Setting, One Act, Several Outcomes

One text portrays elements of literature through a single incident that raises both literary and legal issues. More specifically, Lon Fuller's *The Case of the Speluncean Explorers* offers a fictionalized legal case in which five court justices interpret the same factual scenario. Each of the justices concludes either differently from the others or agrees in part and rejects the other judgments. Interestingly, Fuller's edition is not the only edition of *The Case of the Speluncean Explorers*. Legal scholar Peter Suber released an edition that begins with the text as Fuller wrote it; however, Suber adds new opinions that reflect emerging trends not only applicable in the courtroom but also throughout society. As if the "original opinions" of Fuller's text do not reflect the power of perspective and the individual, internal nature thereof, Suber's edition also does both that and expand on Fuller's text to reflect, as previously mentioned, current issues in American jurisprudence, which leads one to wonder whether there is utility in enshrining laws—i.e., the cliché "set in stone"—by which people conduct their lives, actions, and interactions, or whether, much like we humans are: living, changing, developing, and in-the-moment entities.

In other words, the power of perspective manifests and shows that both the same situation can be interpreted in different ways. Perspective, thus, is a necessary link between law and literature. The two discourse fields can inform each other: e.g., a novel about a legal trial wherein elements of the law are used much like literary devices in a work of literature. Moreover, *The Case of the Speluncean Explorers,* as a work of literature about a jurisprudential dilemma, illustrates that interpretation and language primarily link the discourse fields.

Considered as a literary text, the "Justices" in considering the case would be the characters who contribute to the plot. The conflict with which the characters are engaged is the trapped spelunkers and whether their killing of a fellow spelunker is a black-and-white case of murder, which subjects them to the prescribed statutory penalty: the death penalty. Such a scenario, however, need not be limited to the realm of fiction. Accidents occur in industry, and as Western societies have "made progress," both foreseeable and unforeseeable events have happened. Colloquially, "accidents happen" and harm to one's property, person, or life results. The pressing question is how can the law account for all possible situations that would be subject to its application? The answer seems obvious. It cannot. The *Spelucean Explorers*, moreover, illustrates the point, for the judges in the novel provide judicial opinions about how the facts of the spelunker's case apply according to the relevant statute about killing in the narrative's setting—the jurisdiction of Newgarth.

As one of the Justices, Justice Foster, notes, the spelunkers were not within Newgarth's jurisdiction because they were miles below the Earth's surface, which would put them in another jurisdiction—a state of nature, argues Foster:

> Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of given area of the earth's surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law. Now I contend that a

> case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort. (qtd. in Suber 11)[8]

Rhetorically, Justice Foster's argument reflects novel argumentation that breaks from the standard line of legal reasoning of the time during which Fuller wrote *The Case of the Speluncean Explorers*. Ironically, by arguing that the spelunkers were not within the jurisdiction, he turns the formalist, legal positivist, strict-constructionist interpretation on itself and rhetorically uses it to further the argument. The issue, thus, becomes whether the Court has subject-matter and personal jurisdiction over individuals who are miles beneath the ground. Moreover, the legal reasoning breaks the conventions of the formalist perspective and offers, at the time of the novel's publication, a "new" way of thinking about jurisdiction, statutory interpretation, and the application thereof to an alternative rhetorical approach—especially within a discourse field that gives the utmost respect and conformity to *stare decisis* (adhering to legal precedent).

Another Newgarth Supreme Court Justice responds to Justice Foster's reasoning. Specifically, Justice Tatting responds,

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[8] The use of "qtd. in" is used to convey that although *The Case of the Speluncean Explorers* is a work of literature, the text therein is treated as a, albeit fictive, court opinion that appears within Suber's text, which is one logical consequence of this thesis's theory.

> Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, sworn and empowered to administer the laws of that Commonwealth. *By what authority do we resolve ourselves into a Court of Nature?* If these men were indeed under the law of nature, whence comes our authority to expound and apply that law? Certainly we are not in a state of nature. (emphasis added) (qtd. in Suber 15-16)

The single incident that arouses different "readings" and "interpretations" about how the justices should decide the case problematize the very premise of *stare decisis* and its applicability in a progressing (i.e., "changing") world. Even more, Justices Foster and Tatting engage in jurisprudential, philosophical arguments that provide both a unique perspective and a concerted effort to acquit the spelunkers. There is a voice of reconciliation in the court. Justice Keen, very appropriately named, observes that "Justice Tatting struggles manfully to combine his colleague's loose moralisms [sic] with his own sense of fidelity to the written law" (qtd. in Suber 23). Furthermore, Tatting appeals to statutory construction and argues that one "simply cannot apply a statute as it is written and remake it to meet [one's] own wishes at the same time" (qtd. in Suber 23). Thus, the jurisprudential issues and considerations from Fuller's original *The Case of the Speluncean Explorers* reflect that a single entity, "the Law," without considering the different "subjects areas" may not be possible—or practicable.

Linguistically, there are issues within the language use of Fuller's Justices that communicates their perspectives about the case. The Justices are men who keenly maneuver through, or make use of, the legal theories articulated in Chapters I and II of this project. Other Newgarth Supreme Court Justices, in Fuller's version of the case, resort to contract law and even executive clemency. The point here is that each perspective is premised on a "factual"

consideration. The contract theory rests on the fact that, as the Chief Justice reports,

> [I]t appears that it was [Roger] Whetmore who first proposed that they might find the nutriment without which survival was impossible in the flesh of one of their own number. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him…After much discussion of the mathematical problems involved, *agreement was finally reached* on a method of determining the issue… (emphasis added) (qtd. in Suber 8)

Significant to the preceding is the term "agreement"—especially in a legal context. Thus, the spelunkers have entered into a contract: that is, an agreement that the law supports and will enforce if any party to the contract breaches it. The Court makes mention that Whetmore withdrew his consent; however, doing so would be a breach of contract, which *never* means that killing is legal. Given the circumstances, Fuller's partially contrived[9] legal case represents the importance of perspective, critical thinking, and determining what events in the real world ("facts") are most important for making one's argument.

Since the time of Fuller's writing of *The Case of the Speluncean Explorers* (1949), the current year, at least for the United States, presents a state of affairs significantly different than those that informed the Constitution's drafting. Even more specific in its applicability to our place in the world today is that there are state laws that were enforced throughout the nineteenth and early twentieth centuries that are, however, now colloquially referred to as "blue laws" (e.g.,

[9] In the "Introduction" to *The Case of the Speluncean Explorers*, Suber notes that "Fuller based his fictitious case on some disturbingly real ones. The two upper-most in his mind were undoubtedly *U.S. v. Holmes* (1842) and *Regina v. Dudley & Stephens* (1884), two lifeboat cases in which disaster at sea was followed by homicide and prosecution. In the *Holmes* case, the homicides were to lighten a badly overloaded lifeboat. In *Dudley & Stephens*, the homicide was to create a meal for the starving survivors" (1).

in Michigan, "Cohabitation" is considered a felony). If the "cohabitation" example is a blue law, then why is it still part of the "text" that is the *Michigan Compiled Laws* that applies to conduct within Michigan's jurisdictional boundaries? How uncomfortable would it be for a politician to sign legislation that decriminalizes the colloquially termed "living in sin." Within some Michigan Congressional districts, for example, officially decriminalizing particular "old" (read: "blue laws") is the equivalent of playing Russian roulette with one's political career and esteem with his or her constituents.

Hence, the message here is that the law needs to keep pace with the context—that is, the state of affairs for the time. Of course, not all share this view. In Suber's *New Opinions* portion of *The Speluncean Explorers,* the idea that a clearly and succinctly worded murder statute fails to account for very real possibilities is considered. For example, if the spelunkers were facing imminent death—which, from their perspective, one could reasonably make such a claim—is one legally required to allow the death to happen? In reality, if one is threatened with deadly force and kills the aggressor, the threatened person may claim that the killing was necessary. In legal terms, this amounts to raising the affirmative, and complete, defense of "necessity." As Justice Reckon articulates, necessity "establishes that the defendant lacked the state of mind that the legislature wished to punish" (Suber 91). The specific state of mind that the Newgarth legislature sought to punish by way of the wording of the murder statue, as described by Chief Justice Truepenny, is narrated as follows: "The language of our statute is well known: 'Whoever shall willfully take the life of another shall be punished by death'" (qtd. in Suber 9). Thus, technically, the spelunkers "willfully [took] the life of another" (qtd. in Suber 9). The problem, however, is that the world is not so easily prescribed, nor is the world as black-and-white as positivistic, statutory law.

The significance of analyzing *The Case of the Speluncean Explorers* is just as relevant today as it was in 1949 when Fuller's version was originally published in the *Harvard Law Review.* Suber articulates the importance of the work and the reasoning behind it in the "Preface" to the text:

> When reading Fuller's original piece[,]. . . one wonders whether the plurality and incompatibility of these legal philosophies is in itself a clue to the nature of adjudication. Is all judicial reasoning just *ex post facto* rationalization of ideology and interest, politics[,] and personality? This question was an important one in Fuller's day and is, if anything, even more important today. (xii)

Not only are the issues presented in *The Case of the Speluncean Explorers* relevant today, but *The Case of the Speluncean Explorers* raises both issues in legal thought and, in general, the legal system. The latter of which is manifestly of more significance to those who do not have a formal legal education. Since our system of law, justice, and order is premised on the notion that "justice is blind," it is important not to be blind about the justice and legal systems. Fuller and Suber highlight such a consideration, and it is an issue that represents a sub-issue of this project. Although a sub-issue, it is not a less-important issue. One practical reason for considering the issue is that the law affects—or can affect—us. As previously mentioned, the law can incarcerate those found guilty of a crime; it has the authority to garnish wages and attach one's property; and it, among other things, settles disputes, and not necessarily in total accordance "with the truth." Thus, any foundational claim about the "truth" in a dispute and its conformance to the actuality of the original circumstance from which the dispute or case arose is specious. Such a claim does not seek to undermine an entire legal system; however, the purpose is to connect the issues presented herein with literature to articulate different ways of thinking about

something that many do not—but should. What happens, for example, when one suddenly is summoned to court or handcuffed? What is the human reaction to the situation, and what, if any, are the consequences when one finds one's self within the law's language game and jurisdiction—with "facts" that compound the anxiety and problematize our socially adopted laws? Herman Melville's *Billy Budd: Sailor* provides a literary world in which these legal issues arise.

Billy Budd: Sailor[10]— Foundational Positivism on Trial

Herman Melville's *Billy Budd* provides a context suited for this project's methodology—that is, as one way to interpret the work accordingly. *Billy Budd* raises issues not only of the law as a system of prescriptive rules to be followed accordingly, but it also provides a forum and evidence about jurisprudential issues and how they interact in literature. In this section, specifically, the analysis focuses on an incident that creates the context for the discussion about law and literature—and as contextualized and directed by this project's theory and methodology. Regarding *Bill Budd* as an example text, there are peculiarities that make analysis—as in many law cases—arguable, with the facts and the focus on them (or particular facts on which one focuses) becoming the reason for which one makes one's decision about the case and the relevant issues. Moreover, communicating the scene that provides the setting for the legal issues in *Billy Budd* is effectively presented as a judge writing a legal opinion would write the "facts" of the case. Of course, since literature is one of the major components of this project, literary analysis is just as important. In short, the following "reading" of *Billy Budd: Sailor* provides an illustrative example of this project's method applied to literature—and *vice versa*.

[10] The writer uses the title *Billy Budd: Sailor* because it is the settled-upon title for the edition read for this project. In the version's Appendices, further exploration and discussion about the title, and the variances thereof, are discussed in greater detail. Such consideration, however, is immaterial—yet noteworthy—to this project.

Theoretically, one could argue that what is communicated about the literature, as done in the manner just described, represents one's interpretation of the facts and that it is not the "true" story—or "incident." The objection is overruled because, as discussed, the reading that will be presented in what follows is communicated through text. In this example "case" (*Billy Budd*), the text on the pages of the version of *Billy Budd* read for this project represent the work ("facts"—as termed in the legal discourse) on which this portion of this project is based. As a result, the objection is correctly overruled, which allows for the analysis to begin.

Billy Budd, the character, was of a social nature that has been described as youthful and kind. Some, although their characterizations amount to hearsay, indicate that when Billy Budd was summoned by his superior, Captain Vere, he did as he was commanded (Melville 91). One cannot be sure about what Budd's thoughts were as he stood in his superior's chambers; however, one narration is that the "only thing that took shape in the sailor's mind was this: Yes, the Captain, I have always thought, looks kindly upon me. Wonder if he's going to make me his coxswain. I should like that. And maybe now he is going to ask the Master-at-arms [Claggart] about me" (Melville 92). Budd's youth interfered with his attributed perception of the meeting and the reason for it. Captain Vere then announces the reason for the meeting, which does not confirm Budd's expectations: "Now, Master-at-arms [referring to Claggart], tell this man [referring to Billy Budd] to his face what you told of him to me" (Melville 92). There is speculation that Captain Vere wanted to observe Budd's reaction to the Captain's presumably startling statement. Budd, is as averred, neither initially responded, nor did he actually respond after being commanded to respond to the disclosures made during their meeting.

Although not expert testimony, the following reveals, perhaps, Budd's *mens rea* ("mental state") during the meeting:

[The appeal to Budd to speak] caused but a strange dumb gesturing and gurgling in Billy; amazement at such an accusation so suddenly sprung on inexperienced nonage; this, and, it may be, horror . . . of this instance for the time intensifying it into a convulsed tongue-tie; while the intent head and entire form straining forward in an agony of ineffectual eagerness to obey the injunction to speak and defend himself, gave an expression to the face like that of a condemned Vestal priestess in the moment of being buried alive, and in the first struggle against suffocation.

Though at the time Captain Vere was quite ignorant of Billy's inability to vocal impediment, he now immediately divined it, since vividly Billy's aspect recalled to him that of a bright young schoolmate of his whom he had once seen struck by much the same startling impotence in the act of eagerly rising in the class to be foremost in response to a testing question put to it by the master. Going close up to the young sailor, and laying a soothing hand on his shoulder, he said, "There is no hurry . . . Take your time, take your time." Contrary to the effect intended, these words. . . doubtless touching Billy's heart to the quick, prompted yet more violent efforts at utterance—efforts soon ending for the time in confirming the paralysis, and bringing to his face an expression which was as a crucifixion to behold. The next instant, quick as the flame from discharged cannon at night, [Billy's] right arm shot out, and Claggart dropped to the deck. Whether intentionally or but owing to the young athlete's superior height, the blow had taken effect full upon the forehead…that the body fell over lengthwise, like a heavy plank tilted from erectness[,] … and he lay motionless. (Melville 93)

Budd's lethal punch kills Claggart. In addition, Captain Vere sees it, which means that not only is Captain Vere Billy Budd's commanding officer, but he is also a witness to the death.

Since Vere is the commanding officer, one of his affirmative duties is to know the protocol for handling situations. This assumption, when analyzed, illustrates the difficulty for a human being to remain objective—if that is even (humanly) possible. Before summoning the doctor, Captain Vere and Budd move Claggart's lifeless body, which constitutes tampering with a crime scene. The doctor is summoned because of his expertise in medical issues; however, the outcome is easily ascertainable even by someone who is not a doctor. After the doctor arrives, it is reported that the doctor confirms Claggart's death: "The Surgeon looked, and for all his self-command, somewhat started [sic] at the abrupt revelation. On Claggart's always pallid complexion, thick black blood was now oozing from nostril and ear. To the gazer's professional eye it was unmistakably no living man that he saw" (Melville 94).

The doctor, however, acts in a way that nearly makes him a *de facto* medical examiner: "Whereupon the customary test confirmed the Surgeon's first glance, *who now looking up in unfeigned concern, cast a look of intense inquisitiveness upon his superior* [Captain Vere]" (emphasis added) (Melville 94). From a literary standpoint, tension has been mounting, and it escalates almost to a point of unhinging Captain Vere's sanity: "But Captain Vere, with one hand to his brow, was standing motionlessness. Suddenly, catching the Surgeon's arm convulsively, he exclaimed, pointing down to the body—"'It is the divine judgement of Ananias! Look!'" (Melville 95). Not surprisingly, the doctor is startled, but the following is, as text, of high evidentiary value:

> [A]nd as yet wholly ignorant of the affair, the prudent Surgeon nevertheless held his peace, only again looking an earnest *interrogation* as to what it was that

had resulted in such a tragedy.

But Captain Vere was now again motionless standing absorbed in thought. But again starting, he vehemently exclaimed—"Struck by dead by an angel of God! Yet the angle must hang." (emphasis added) (Melville 95)

Legalistically, then, the Captain knows who and what has caused the death. The Captain also knows the protocol and resulting outcome thereof for this type of situation; however, the Captain simultaneously realizes that he must apply the foregoing realizations to someone to whom he refers as "an angel of God" (Melville 95).

Moreover, through the literary events depicted on the page, one can see how the situation could correlate to a homicide in life: a person who causes the death of another and in the presence of another person. In other words, there is a killing; however, one must not prematurely call it a murder because "murder" is generally defined at Common Law, for example, as the intentional, premeditated killing of another with malice aforethought. The rule, one of which the Captain is painfully—at least in Billy Budd's case—aware, is that one who kills another is to be hanged for the committed offense. The doctor, because of his professional training, quite possibly could state to a reasonable medical certainty that Claggart's death resulted from blunt-force trauma to his brain. From a literary perspective, however, the presentation of the doctor's perspective—which has been minimal to this point—is craftily employed as a device by which it allows the plot to progress, and in a way that one, in life, could reasonably expect to experience or see. Melville's narrator discusses the doctor's perspective, which, theoretically, is correctly discussed as an interpretation of another's perspective:

The thing to do, he thought, was to place Bill Budd in confinement and in a way dictated by usage, and postpone further action in so extraordinary a case, to such

> time as they should rejoin the squadron, and then refer it to the Admiral. He recalled the unwonted agitation of Captain Vere and his excited exclamations so at variance with [the Captain's] normal manner. Was he unhinged? (Melville 96)

Thus, the doctor realizes, at least from his medically informed perspective, that it would be best to postpone any further inquiry or action. Would doing so, however, be a justified procedural means at, colloquially speaking, "getting at the truth" to reach the most factually accurate decision as possible? Not only would the Captain be implicated for the foregoing reasons, but the doctor also has reasons for concern too—albeit not as severe in consequence as the Captain's. The doctor, as Melvilles's narrator describes, understands his own dilemma: to argue that the Captain was, at the time, "unhinged" would "be insolence[;] to resist him would be mutiny" (Melville 96).

What begins, in sum, as a brief exchange among three men escalates into a homicide. This particular homicide, however, is witnessed by Captain Vere, who is "the accused's" (Billy Budd's) commanding officer. Vere is the sole witness to the homicide—of course, other than Budd, but he cannot be categorized as a witness, because, legalistically, he is involved with the commission of the crime and *not* an observer of the crime. Legalistically, at that moment, it is an instance of the *actus reus* (the act), which is Claggart's death.

The Captain's "unhinging," then, could be interpreted as one authority figure's realization about the issues that a formalist methodology/legal positivist rule can raise or create. When the law's prescribed punishment for a particular crime, especially when the totality of the circumstances is considered, the rule-based, formalist system does not account for the human element. Thus, from above discussion about "the Law is human" would, by extension, allow one to argue analogously that such objective theories of interpretation—aesthetics—are equally

detrimental to humans, but in different ways since, here, they are different discourse fields under examination.

For art ("literature"), restrictions on the interpretive element and what constitute art stifle human creation. Leo Tolstoy relevantly articulates an insight that applies to the seriousness of a legalistically formalist reading and the stifling effects thereof: "Those people who reject all art were obviously wrong, because they reject what cannot be rejected—one of the most necessary means of communication, without which [hu]mankind cannot live" (109). As informing a reading of the discussed *Billy Budd* "crime" scene, Tolstoy's claim highlights an injustice for humanity made possible by inflexible, prescriptive rules that are generally stated in binary terms. The advantage is ease of adjudication; however, the disadvantage is actually that there are disadvantages—each of which are detrimental both to the system that formalistic tenets allegedly preserve and to the humans who, in the case of the United States, live under the protections of the laws as set forth in both a state Constitution and the United States Constitution. *Billy Budd*, however, did not have 200 hundred years of inquiry and debate about the issues presented herein. Had he, perhaps the impending certainty of being hanged would have been less certain—and the Captain would not have (allegedly) come unhinged because of his humanely, personal affections for the technically guilty (of homicide) subordinate whom he personally regarded as "an angel of God" (Melville 95)—one who, in a moment of an intense human emotion, acted in a way that is directly linked to the act and the outcome. Furthermore, the discussed portion of *Billy Budd* reflects a jurisprudential juxtaposition with the human condition and the ensuing dilemmas that can occur when a system based in and for humanity prescribes, in this case, death. Moreover, humanity conflicting with rigid and prescriptively (binary) burdens that legalistic ordering affirmatively places on the Captain provides evidentiary support for the literary interpretation of

the scene: i.e., that the law's prescriptive, formalistic nature—as it is in *Billy Budd*—may be efficient for retribution for when something "against the law occurs." To the detriment of those who witnessed and are socially connected to the accused, the analyzed scene depicts why the law should she be read, interpreted, and applied in a way more in harmony with the totality of the human condition—or at least inasmuch as is possible. In other words, the argument is that the law must remain cognizant of both internal and external factors, each of which corresponds to the perspective and position of the person making the claim *and* the context about which the specifics are stated. Such a methodology could, perhaps at the least, foster a societal-level recognition that the Court's definition of justice is more in harmony with notions of justice and fair play ("Due Proecss") that society, at large, consider as dispositive. Regardless, *Billy Budd* provides insight into important legal and literary issues: interpretation, creation of a case ("facts"—in the literary and legal sense), and the effects of the preceding on those who witnessed the actions that occurred in the setting, and how the reader perceives the narrative and must decide whether to "take" the story as narrated or to consider legalistic standards of evidentiary value and admissibility to come to a conclusion and whether that conclusion is the same as Captain Vere knew all too well.

Although the legal system, in practice, in *Billy Budd* can be read as a miscarriage of justice and the tragedy of legal positivisim/literary formalism, there is hope for the system. Since we live, which would be the on-going daily existence that some refer to as "passing time," one of the elements of time's passing is that circumstances change. Specifically, the following primary text analysis discusses another aspect of the law—one that is both redemptive and inspiring. It is arguable whether American jurisprudence has reached the institutional fortitude that the characters in a work like the following, *What Mama Said: An Epic Drama,* demonstrate;

however, *What Mama Said's* characters, in response to living in a context that has elements within it that (or, in this case, "who") will arrogantly exploit the nation's people for pecuniary profit, which one of the nation's own politicians makes possible by insulating the international corporations from the nation's laws. Such protection comes at a price and in the form of bought protection from the law and the aggrieved citizenry.

What Mama Said: An Epic Drama—Taking Control of the Language Game

Osonye Tess Onwueme's *What Mama Said: An Epic Drama* engages not only African feminism but also on-going political and economic struggles augmented by political and international business intermeddling. Of particular significance to this project is the relationship between one version of African (Nigerian) modernity and a current issue that implicates both the private and public sectors of the United States. When one recalls President George W. Bush's February 2008 African trip ("Bush's Africa Trip" n. pag.) and his pledge for monetary assistance, one is left wondering whether the ambitions behind the trip were disguised as ineptly as his ability to dance and play traditional African drums. Notwithstanding a legal institution's representatives engaging in international business for pecuniary profit and infrastructural interests, at what expense, and, more importantly, at whose specific expense, is the profit derived?

According to Maureen N. Eke, Onwueme's staging of a legal trial at the drama's end punctuates the central message that Onwueme's *What Mama Said* communicates: i.e., multi-national oil companies and a corrupt government wooed by oil executives' pecuniary philandering is tantamount not only to the government's oppressing the very people whom it and its legal system ought to represent, but it also, as Eke specifically contends, arouses public outrage about "[t]hose who have controlled the resources [and] continue to cling to and desire to

exert power over the women and youth whom they have disempowered" (11).

Accordingly, and of particular note to this project is *What Mama Said*'s conclusion, which portrays a legal trial. There is a twist in the dénouement that postpones the reader's anticipated sense that justice will prevail by, or at, the end scene's finale. The scene, in pertinent part, is a legal trial in which the people of Sufferland expose the oil executives—those with the dirty oil and blood of Sufferland's disenfranchised figuratively on their hands—who effectually robbed and pillaged the land. Outraged to the point of explosion, the young women prosecute the oil executives and the obscenely duplicitous national leader, Pipeline, for their wanton, conspiratorial persecution, abuse, and effectual heist of the women and the nation's dignity and precious identity, which Onwueme contextualizes to link together both global capitalistic, neocolonial elements and the effects and bourgeoning sense of injustice for those who see, feel, and even perish without either a voice or a physical means to protect their land, their resources, their people, and their lives.

The criminal trial, for the men whose hands are stained with the land's blood (i.e., the oil) and the people's blood on their hands represent the evidence that Onwueme puts on trial—at the connotative level, which is the globalized, capitalistic exploration and exploitation of nations for their oil. The implications at the more personal level, which is the character level, showcases both the disenfranchised people's collective situation and the motivated individuals who demand justice for the injustices they endured to maintain a standard of living. There are many citable parts of the "trial transcript," so to speak; however, Hadeja's rhetorical and informative dictum presents the reader with the grievances and a paradigmatic example of *la petit récit* (Lyotard 35)*:*

> Since the Sweet Crude was discovered in the land, each one of them has had their own personal tragic experiences. [. . .] Now before all they stand. Helpless.

> Poverty-stricken. Shackled. Mothers, sons, and daughters of this land who have become prisoners of the state, foreign and private investments. [. . .] *They are all living human beings. With equal rights to live. Eat. Make love. Money. And babies and families, just like the rich,* mighty, and powerful interests that stifle them. Look. What separates them from you? The only difference continues to be their drying blood, drilled, sapped, plundered, and sold by you, the powerful state and foreign interests, to ensure your gains! [. . .] Money. Profit. Power. The pandemic! That, my people, is the triple valley separating our world of the poor from the rich. […] [O]ur world is carved, sold, and auctioned by the rich and powerful. And today, only two tribes or races exist in our world—the Tribe or Race of the Rich [versus] the Poor! Our market culture has emerged. And in this culture, the rich are "colorless". Colorless. In this *the poor become imprisoned and sentenced to life by the rich*. (Pause) Fellow citizens of the world[,] I'm only an interpreter of the law. But the people are here. Now. [sic] I cannot speak for them. Let them speak. [. . .] Now it's time. Your time. Speak for yourselves! Speak. Who can silence the drums? Sufferland women, speak! (emphasis added) (Onwueme 193).

Onwueme's message echoes that of Lyotard's, which is that "[t]he subject is concrete. . . and its epic is the story of its emancipation from everything that prevents it from governing itself" (35). The struggle for Sufferland's citizens is to overcome the forces that have taken their property, their voices, and their fortitude so that they can defend their autonomy—which is, at least in part and if not more, mitigated by multi-national power, money, and neocolonial, free-market global enterprising. Thus, Onwueme figuratively prosecutes an element of globalization (the global oil

business) and the individuals who choose profit at the cost of humanity and its dignity, its way of life, and its overall (collective) human condition. Furthermore, the trial creates both a discursive space *and* provides a voice to those from whom it was taken, similarly to how the land and the natural resources were taken and appropriated for multi-national, corporate profits that were and are—pardon the pun—fueled by global demand. In other words, international law has allowed for, premised on utilitarian arguments, sanctioned larceny[11] of a natural resource that belongs to Sufferland. Neither Shell nor Oceana, much like any other multi-national corporation and its representatives, is willing to apportion any percentage of the profits from Sufferland's natural resources (i.e., the oil). If this were the corporation's implemented business plan, the resources could either be fairly shared or traded at fair market value to prevent unjust enrichment. Why, however, would the corporation negotiate when it can obtain what it wants with the least resistance from the government: i.e., it is easier, and perhaps in conformity with the company's "best business practice," to bribe the all-too-eager governmental officials. As Frantz Fanon claims, "[T]he leader will reveal his inner purpose: to become the general president of that company of profiteers impatient for their returns which constitutes the national bourgeoisie" ("National Culture" 122). Through the elite Sufferland citizens and government, the citizenry has the material hopes of mitigating, and one day eliminating, its economic and impoverished living conditions created by international business intermeddling and taking back their own land on which they stand and live. The government, comprised of members of Sufferland's citizenry through their (in)actions allow the international corporation *carte blanche* access and protection, which makes the government official, Pipeline, duplicitous and, as Fanon's argument in *The*

[11] At Common Law, a "larceny," which now varies slightly depending on the jurisdiction, is, by in large, the non-consensual taking and asportation of another person's property with the specific intent to deprive the title holder of possession permanently.

Wretched of the Earth would discursively classify the government, "part of the racket" (Fanon 150).

Moreover, *What Mama Said* chronicles the current, on-going struggle about which many are unaware; however, if they are aware, it reflects an ambivalence—to put it diplomatically—about the corruption and greed that, for profit's sake, dehumanizes the people and the land by means of a multinational, private-sector neocolonialist *modus operandi*. The dirty, not-so-secret secret is that America and other nations (e.g., China) need oil; however, America, as a nation premised on principles of fairness, justice, and perhaps even a nation under a rule of law whose legitimacy is properly checked by incorporated checks and balances, seemingly would do more than a simple "balance of interests" or "cost-benefit analysis," which would bolster its credibility and integrity throughout the world. Even more, for the United States, the judiciary—the Supreme Court—ought to provide that check; however, is it objectively possible for the Justices of the Court to be impartial when the balance on the corporate checks and the commodity for which they are just as figuratively addicted as the citizenry comes to light, it strains credulity even to think that the Supreme Court could remain impartial and provide the type of "checks and balance" with which the Framers are credited as intending. This is not to say, however, that a Natural divinity (i.e., God), or some sort of social contract—or perhaps some combination of the preceding—would remediate the issues for which Onwueme poignantly and rhetorically drills the oil company and its businessMEN. What one can say more confidently is that reading *What Mama Said* through a legalistic lens—i.e., applying the theory articulated in Chapters I and II—enhances an already powerful text and highlights that the law is not necessarily an omnipotent, inherently just system. In other words, the law is one language that applies in America, other countries, and internationally—with each possessing what the other might consider peculiarities.

Notwithstanding, Onuweme rhetorically presents the issue and writes a form of poetic justice that engages jurisprudential issues: e.g., larceny, corruption, contract law, international law, and even NATO's broadly encompassing term "crimes against humanity." From a literary and cultural studies' perspective, human rights issues vis-à-vis the imaginary space of Sufferland come to the fore; however, it would be foolish, most politely stated, to argue that Onuweme's creation is only a creation that exists on the page.

"Human rights" and "crimes against humanity" may sound a bit grandiose as phrasings, but the seriousness of particular instances (or "alleged" instances, as the politicians might say) occurs, even daily, beyond the margins of the pages of literary works and legal texts. Even as recent as 16 May 2011, Cnn.com reports that an international arrest warrant has been requested for the capture and incarceration of Muammar Qaddafi. Specifically, CNN's Nic Robetson filed, in pertinent part, the following report on CNN's Web site: "Moammar Gadhafi (CNN's spelling), his [surviving] son[,] and [Gadhafi's] brother-in-law, [say that] there is no evidence Gadhafi has committed crimes against humanity in his efforts to maintain hold over the country in a months-long battle" (n. pag.). Although different in context and content, the point is analogous: law and literature, whether one considers them as mutually mimetic, reveal insights into the human condition. If Lyotard's argument above about *la petit récit* is at least tenable, it provides one way of enacting change within a system that hundreds of years' worth of discussion informs this project and in a way that makes concluding, based on the principles articulated in Chapters I and II and applied in Chapter III, that the purpose of law is not and has not been created and refined so that one interest can dominate and force one side's agenda through the court's and legislature's jurisdiction and power. Instead, that is what concentrated wealth and a profoundly deficient conscience makes possible.

What Mama Said ardently displays the evidence for the claim that the law "can be bought"—figurative and literally. Such an insight is crucial for the project undertaken herein. Although the law for America's citizenry provides, as set forth in the Constitutions of the United States and individual states, "equal protection" premised on "self-evident truths" that "all men" (and one will assume here that the term "men," during that context signifies "human"—although there is an even more compelling argument for a different interpretation; the case law, shortly after this country's inception, challenges and perhaps vitiates such a humanistic, egalitarian usage and understanding of the term as it is used in that context) are created equally. If one needs "proof" of such an American statement, it would behoove one to look at the scales of justice statuette and take note of the blindfold covering the eyes: i.e., justice is blind, which prevents one from seeing difference and premising one's decisions on prejudicial reasons.

Regardless, if a reader can read with the theories, arguments, and discourse-specific methodologies as outlined and discussed throughout this thesis, the reader can also approach a text not only as, for example, narrative with its "meaning" limited to the formal elements employed throughout the work, as the New Critics would argue, but the reader can also achieve a fuller, humanistic reading of the text and referent in actuality to broaden, generally, his or her understanding and develop—and perhaps even refine, specifically—a respect and compassion for others who have their own *petit récit* that may have, as is the case in *What Mama Said*, been suppressed by the grand narrative of globalization and misleading metanarrative of the oil can be Sufferland's positive and helpful contribution to an increasingly complex and needy world: i.e., a small, oil-rich, "third-world country," can help mitigate a global problem and profit from it.

When rhetorically presented in the poetics of the greater good for the world, who would argue against *that*? Here is the central contention to this project: combining the different

discourse fields and their methodologies equips the student (or, more broadly, a reader) with necessary tools for living an honest and informed life while preventing one's self from falling victim to "smooth talkers"—or just assuming that the metanarrative that "justice is blind" applies equally under the protection of the law as, for Americans, set forth in the Declaration of Independence, "The Equal Protection Clause" of the Fourteenth Amendment, and the "Due Process Clause" of the Fourteenth Amendment—all of which are prescriptive, yet the United States Supreme Court, the institution charged with safeguarding the integrity of our legal system, has had to state the preceding *explicitly* and *affirmatively* in cases throughout previous decades.

The Court is (at least supposed to be) both an institution of civilized decorum and honorable protection of a nation's civility. Lest one forget, however, that Americans are humans; Arabs are humans; Asians are human; Africans are human; and the point has been made: i.e., law has the vested power to ensure justice in a complex world with competing interests—interests that are contrived by humans with a different "understanding" of the law. Works like *What Mama Said* not only raise issues particular to the rhetorical situation within which Onwueme writes but also to the world at-large and, perhaps, how a discursive and fictive legal trial might be the catalyst that inspires the change that Onwueme argues as desperately needed. If not, it *is* a discussion—one better to have than not, which would thereby allow the injustices to continue covertly (just as the hegemonic power structure and corporations would prefer).

CHAPTER IV

SUMMATION

Language, text, rhetoric, and theory are the English studies terms that appear throughout this project. Language, as described herein, is what connects the different discourse fields together. According to M.A.K. Halliday, "text" "refers to any instance of language, *in any medium*, that makes sense to someone who knows the language" (emphasis added) (3). In addition, "text," for Halliday, is on-going:

> As the text unfolds, patterns emerge some of which acquire added value through resonating with other patterns in the text or *in the context of the situation.* The text itself is an instance; the resonance is possible because behind it lies [sic] the potential which informs every choice made by the speaker or writer, and in terms of which these choice are interpreted by listeners and readers. We refer to this ongoing creation of meaning in the unfolding of text as logogenesis. (emphasis added) (43)

Moreover, there are traces of Halliday's functional grammar theory of meaning and linguistic analysis that inform this project's general premise. The issue at hand and its applicability herein is, like his theory, *function*. Specifically, Halliday's theory about text and its role within language and communication allow one to illustrate the point of departure from the more accepted point of view. Halliday, in linguistics and linguistic theory, is one of the most cited linguists (Noam Chomsky fits into this category for his linguistic writings), which adds not only to Halliday's credibility, but it also implies a vetted and compelling view about language and how it *functions*—that is, how it operates and what one can ascertain through language use accordingly. Rhetorically, the hyperbolic comparison may shock the reader; however, that is the

intention, which is not gratuitous. Instead, it is to highlight the flexibility of language—especially when the human mind begins crossing the (socially constructed) boundaries to which the rules of each discourse prescribe, among other things, the "proper" way to speak and what is "appropriate" for that—although the word is unlikely to be used—"context."

By way of analogy, like the "Founding Fathers," one of the founding "parents" of Systemic Functional Grammar Theory, which informs Critical Discourse Analysis (hence the reference to Fairclough's argument), allows rhetorical maneuvering and crafty use of a particularly effective trope: that is, to trope a trope about different discourse fields—one of which, the law, is a system of rules that, as defined, helps to preserve a peaceful society, punish those who disturb the peace (whether in criminal law, tort law, or property law, to name a few), and perhaps rehabilitate offenders so that recidivism rates decrease while positive, civic engagement increases. To discuss the law in more lucid, spontaneous, and receptive terms is to bring it back to life. It once lived, which is, for example, why references to Chief Justice Benjamin Cardozo and his famously written opinion in the *Palsgraf v. Long Island Railroad* appear herein.

Much like Cardozo's eloquent judicial opinions, this (much more humble) thesis provides one perspective and approach to changing circumstances through which we as a society currently live. Although "postmodernism" and "modernism" are discussed tangentially, whatever the "-ism" that a society is prescribed by academic theoreticians provides little, if any, consequence for the *polis*—that is, the "average" American who works to achieve the American Dream while remaining preoccupied with, but not limited to, the children's education and needs. Although not an exhaustive list, the cited primary literary works and "readings" of them through this project's theory can (hopefully) humanize theoretical discussions (i.e., to remind the discussants

that theories that look for ways to improve the human condition really are both about *and for* human beings—individuals, each of whom with his or her own perspective and narrative), provide a context and rhetorical strategy for doing what we academics do within the walls of our specific academic institutions. Also significant for this project is a concerted focus to communicate, for example, a different—perhaps even counterintuitive approach—and apply the content of the communication to human artifacts (e.g., literature, "the Law) to learn a different and perhaps deeper understanding of the human condition through language.

Moreover, language is the metaphoric and rhetorical tool that not only allows for this project to be articulated, but it also makes it possible for one to show that even dissimilar discourses—perhaps even entities or even better, people!—really can inform one another and work together to create a situation that transcends the social boundaries that have been created by the dominant, hegemonic power structure. Overall, if one person is persuaded by the methods and examples of the methods applied herein, this project will be successful, for that reader will have engaged in an (hopefully) intellectually stimulating, pedagogical endeavor that, although challenging, is quite rewarding for, after reading the project's final word, the reader will see how law, language, literature, and literary theory are built from the same "thing"—i.e., language.

Language is all around us. Politicians use it (with puffery, of course); lawyers use it to secure a desired outcome for their client; lawyers also use language in a way that effectually buries the reader in page after pager of less than six-point font that communicates the polysyllabic, legalistic terms that disorient even the most shrewd and determined reader—of course, in an effort to, as they say, "comply fully" with the law and the required disclosures; and language is used to construct a reality—sometimes for good, and other times for what some would consider not-so-good reasons. Regardless of one's moral convictions about the preceding

point, one point remains: this project argues about the fundamental nature of language throughout academia and how it vitiates, or overpowers people of the periphery from crossing the boundaries that people artificially make for their own greedy purposes. It also floods the prescriptive nature that the elite gatekeepers would prefer dry and ordered—not disorganized and destroyed, from their perspective. The argument herein is that if one engages in a cross-disciplinary approach to instances of language-based communication, one can potentially uncover the deep structure of the utterance and, consequently, perhaps the motivations behind the specific use of language.

Pedagogically, literature professors could introduce this theory in an advanced undergraduate theory course, or even as one part of "Problems in Critical Theory Course" at the graduate level. Language allows for the creation of what is deemed as fact, and it can do the same for other fields of inquiry. What matters is not only the outcome of such an endeavor but also the intellectual workout that the reader or participant experiences and, more importantly, remembers and takes away from the experience. Furthermore, a graduate student who encounters, for example, Paul Auster's *The New York Trilogy* will understand, intimately perhaps, this project's aim as articulated in the following passage from Auster's *Trilogy*:

> I am tempted to use the traditional language of love. I want to talk in metaphors of heat, of burning, of barriers melting down in the face of irresistible passions. I am aware of how overblown these terms might sound, but in the end I believe they are accurate. Everything had changed for me, and words that I had never understood before suddenly began to make sense. This came as a revelation, and when I finally had time to absorb it, I wondered how I managed to live so long without learning this simple thing. *I am not talking about desire so much as*

> *knowledge*, the discovery that two people, through desire, can create a thing more powerful than either of them can create alone. This knowledge changed me, I think, and *actually made me feel more human*. (emphases added) (128)

The narrator articulates something that resonates quite particularly with this academic by evoking, much like Reader-Response theory describes, personal connections to a text through the language that constitutes the work to which a theory is applied. In other words, the preceding Auster quote, and the emphasized parts thereof, reflect the underlying aesthetic to this project. Notwithstanding the specific discourse fields discussed throughout this project, and through the lens of a created methodology, Auster's narrator captures and eloquently describes the *logos* that structures this project—perhaps even at a metatextual level; however, such a discussion is beyond the scope of this project.

Language, as the thread of the social fabric, is what humans use to connect to one another; it is not the only way humans connect, but it is, arguably at the least, the first element of social intercourse. Language can be used for so much; however, if English studies are to continue as a field of academic inquiry that can procure funds (read: convince the Dean of the Department's necessity and what it does to contribute to the *current* worldly conditions), students who pay for the courses should be challenged accordingly because the social system within which we live, as Louis Althusser argues, makes us "always-already interpellated[12] by ideology as subjects, which necessarily leads us to one last proposition: *individuals are always-already subjects*" (1505) , which one could argue means that the power structure in a society can, colloquially yet effectively stated, get *a lot* by the America citizenry. It would thus seem, that the social fabric is not unraveling, because the hegemonic power structure controls.

[12] This is the correct spelling of the term; it is a specific term that Althusser uses.

Not all elements of social intercourse and language use are employed for greedy ends; however, the more people who understand the connections between the discourse fields discussed herein, the more of a "checks and balances," for example, that the citizenry can—in good faith, of course—present to those who decide (those of the hegemonic power structure) how and on what our hard-working, American work ethic will make possible and to whom it will make possible for someone to come close to attaining the seemingly never attainable American *Dream*. After all, lest we forget, it is a *dream*. Notwithstanding the preceding insight, the mythos of "The American Dream" continues to inspire many, and they share their perspectives, hopes, thoughts, and dreams in language. Hence, language, as conveyed for example, through literature is an art, which, according to Leo Tolstoy,

> [I]s no less central to human existence, for it *makes accessible the feelings of other human beings*. This is vital to human solidarity, because it allows one access to the felt experience of those in circumstances other than one's own . . . [B]y making the best feelings of one age accessible to the next, art furthers the spiritual evolution of humankind" (emphasis added) (qtd. in Wartenberg 102).

Furthermore, each discourse field and the connections between them, as discussed herein, are complex but beneficial. A reasonably educated reader, like the type discussed earlier, would not only realize both the pragmatic benefits of reading a project like this one and understanding the arguments therein, but the reader would also see the broader, that is to say "more general," implications of why read and understand *this* project, which Tolstoy's quoted aesthetic principle eloquently describes.

Now, the hope is that by reading and considering the theory and methodology discussed herein, one will sharpen one's intellectual acuity and, even more, one's sensibilities about what it

means to be a human being among other human beings who have a powerful tool at their disposal for understanding one another and working toward solving, for example, modern social problems—and perhaps remedying them. At the same time, this project—a, so to speak, instruction manual—provides a theory for decoding one of the larger social systems that oppresses throughout the world (as depicted in *What Mama Said*), how fidelity to a system of rules to preserve "the Law" can result in tragedy (*Billy Budd*), and how one event as "factually" depicted by one person can be interpreted in different ways to reach similar, dissimilar, similar in part and dissimilar in part, or even other interpretations that make a larger point from a single case with quite specific "facts" (*The Case of the Speluncean Explorers*). Just as Guyora Binder and Robert Weisberg assert in their introduction to *Literary Criticisms of* Law, this project, like theirs, is "not to repudiate … genres of criticism, but to incorporate them into a more flexible and eclectic understanding of law as a practice that constantly appropriates, reproduces and reshapes a culture" (27), much like, as argued herein, literature can, and does, do. Language supports the discourses' ontological and epistemic elements and communicates something about the communicator through his or her language use. The end product of a project with this project's methodology and its application to literature is, as Binder and Weisberg articulate, a responsive answer to the question "so what?": "[T]he cultural criticism of law is part of the work[,] at once political and aesthetic[,] of choosing what kind of culture we hope to have [and] what kind of identities we hope to foster (539)." Through language and an open mind about the possibilities that language, artifacts that "exist" in language, and other cultural discourses crossing boundaries to create a more humanly aware perspective about the world, our place in it, and the interactions that we maintain through social intercourse, the purpose, as expressed previously, is to cross boundaries and allow people to experience the likely benefits that could result from such an

endeavor. Taking a step toward the boundary is the first move that one must make in order to cross the socially constructed boundaries that have been put in place for reasons that, as we have seen, harm more people than benefit.

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