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What We Know

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The editors of *Cardozo Studies in Law and Literature*, and its contributors too, deserve congratulations for its ten years of most successful life. As a small contribution to this moment of celebration I should like to suggest a particular line of thought about what the reading of literature helps us to see about law.

It is common today, in the academic world at least, to talk as though "law" were simply the set of policy choices made by courts, legislatures, or other legal actors that are expressed in legal rules. From this point of view the key question becomes whether these choices are good or bad. This is the premise, for example, of most work in Law and Economics.

While no one would deny the importance of the policy choices made by courts and legislatures, there is an important sense in which such choices are not distinctively legal. Anyone can contribute to the conversation about them, from nearly any point of view, including those of a great many academic disciplines. If you think about law not so much as the set of choices made by those who manage our institutions, but as our distinctive activities of mind and imagination — as what lawyers and judges actually do with language and each other, as what we teach our students to do — the situation changes. For the lawyer's question is never the simple or abstract one, which rule or choice would be best, but always instead, what choice should be made by this court (or legislature or agency or lawyer) given the existence of a set of authoritative choices made by others, at other times and places, as these are reflected in the body of texts that make up the law — legislation, constitutional provisions, regulations, opinions, even contracts. The essence of law is the separation of powers; it is thus a constant question for the lawyer what authority should be granted the purported exercise of power by another agency, as well as what it means. In a real case one can normally expect vigorous argument on both kinds of questions. These are matters as to which the policy-maker as such has nothing to say; they require particularized judgments of a unique kind; and they are at the heart of law.

In the other direction, the lawyer must face the reality of her client's

experience, and the fact that it can never adequately be cast into the language the lawyer is given to speak: the suffering, the uncertainty, the frustration, the sense of the story from the client's point of view, can never be adequately represented in language, without loss or distortion. Nonetheless, the lawyer's job is to find a way to talk about this experience in the language of the law; this means that she is always thinking about that language itself, what it can do, what it can be made to do, and what its limits are. In this connection the central questions the lawyer asks herself are: "What can we say? What will they say in response? How can we respond to them?" All this is a call to invention, to reimagining the world, not to the routine application of rules or principles. Again, to this dimension of legal life the policy maker has nothing to say.

The lawyer thus thinks constantly not only about the merits of the substantive question before him, but about how he thinks, how he expresses himself. And once he begins to put his own intellectual and expressive activities into question in this way, a thousand issues arise: How should he talk about the courts and legislatures and other public actors in his world, and how should he read their utterances? How should he talk about his client, the party on the other side, the victim if there is one, or about the public? Can he find a way to talk about his client's life that does justice to her experience? Can he find a way to talk about the work of the court that does justice to *it*, and at the same time supports his client's case? Can he find ways to tell the stories of the facts underlying the case, of the development of law, of the passage of this legislation, of the decision made by the court below, that will be coherent and lead to a result he can define as legal and fair? The whole way he imagines the world is put into question, and in highly particular ways.

This is the point at which reading of what we call "literature" has its greatest resonance for the lawyer, for literature at its best is always about the language in which it is written, its ways of imagining the experience of others, its response to the conventions of authority with which it works, and so on. Exactly how the education offered by literature can work for the lawyer is the topic not for a sentence or paragraph, but for a lifetime, and of course there will be disagreements, some fruitful, some less so. But it is worth making here the simple point that the experience of working with literary texts is especially helpful to us as lawyers, for it trains us to focus on the meaning of what is said by particular speakers in

particular contexts; on the way a language, or set of generic conventions (like those of a novel), commit us to one way of imagining the world or another, making certain claims of significance possible, others impossible; and on the way in which the use of language is an inherently ethical and political activity, as we define ourselves and those we speak about in what we say. All of this teaches us that the distinctive life of the law is a life of the mind and imagination.