MEMORANDUM

To: Students of Law, Literature and Philosophy

From: Dean Joseph P. Tomain and Professor Michael Cioffi

Date: August 2009

Re: Introduction to *Law in Literature and Philosophy*

Law in Literature and Philosophy is a seminar that will meet each week from 4:00 to 6:30 p.m., on Tuesdays throughout the semester in Room 203 of the College of Law. A class schedule and list of readings are attached.

Grading for the course will be based on class participation and an oral examination.

This introductory memorandum is intended to begin exploring relationships between and among law, literature, and philosophy by posing questions such as: Is the intersection of law and literature limited to stories about law and methods of interpretation? Or is law and literature a movement to reclaim law as part of the humanities rather than as a social science such as economics as Judge Posner questions?[1] Or, does literature, as Professor Martha Nussbaum has written, help us refine our capacities for critical examination of our tradition, seeing ourselves as global citizens, and developing a narrative imagination?[2] What is the relationship of philosophy and literature? Are both truth-seeking and truth-revealing as philosopher-novelist Iris Murdoch argues?[3]

As lawyers, words and language are to heart of what we do and are central to the world that we create. The late literary critic Northrop Frye noted that there is a tendency for us to conform our language to the sentiments of the mob rather than speak individually. Clearly, we must fight against this tendency if, following Frye, we are to take the "side of genuine and permanent human civilization." Frye continues the thought:

> "This is the world revealed by philosophy and history and science and religion and law, all of which represent a more highly organized way of using words. We

[1] Richard A. Posner, *Law and Literature* 5-6 (rev. ed. 1998).

[2] Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* 9-11 (1999).

[3] Iris Murdoch, *Existentialists and Mystics: Writings on Philosophy and Literature* 11 (1998).

> find knowledge and information in these studies, but they're also structures, things made out of words by a power in the human mind that constructs and builds. This power is the imagination, and these studies are its products. When we think of their content, they're bodies of knowledge; when we think of their form, they're myths, that is, imaginative verbal structures. The whole project of the use of words revolves around this constructive power itself, as operates in the art of words . . . ." [4]

Law in Literature and Philosophy engages us in the imaginative power of the art of words. We approach this course as a "Great Books" course in the Western Tradition and invite your participation in the Great Conversation of that Tradition. Yale University President Richard Levin explains:

> Why then are the Great Books great? They are great precisely because they challenge us to think for ourselves. They wrestle with the deepest and most difficult questions concerning human experience and moral behavior, and they are so rich in their characterization of that experience and behavior that they are open to profound differences in interpretation. They challenge us, each individual and each generation, to reinterpret them so that they become part of our own view of humanity and the world."[5]

We concur with President Levin's sentiment without adhering slavishly to any notion that there is a strict set of canonical texts. In this regard, we draw inspiration from a principle character in our readings — Socrates — and we "question everything."

The assignments consist of readings from literature and philosophy largely from the Western Tradition. *Law in Literature and Philosophy* (LL&P) is directly related to your education as lawyers in two significant ways. First, the readings represent attempts of other cultures and other societies to define and to articulate what constitutes authority that must be obeyed. In this way, the readings look at social institutions that societies construct to maintain order. We will compare these constructs to law as the central social ordering institution in contemporary society.

Second, LL&P directly impacts your lives as lawyers because the readings involve human behavior and what it means to lead a good life. Further, the analysis of the readings is fully consistent with the development of a lawyer's analytical skills.

In short, LL&P looks at the social institution that we call law and looks at ways of being a lawyer.

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[4] Northrop Frye, *The Educated Imagination* 154-55 (1964).

[5] Richard C. Levin, *The Work of the University* 85 (2003).

Although most of the readings come from the Western Tradition, these readings transcend any particular point in time and any particular society.

> Philosophy's powerful influence on the formation and development of the cultures of the West should not obscure the influence it has also had upon the ways of understanding existence found in the East. Every people has its own native and seminal wisdom which, as a true cultural treasure, tends to find voice and develop in forms which are genuinely philosophical. One example of this is the basic form of philosophical knowledge which is evident to this day in the postulates which inspire our national and international legal systems in regulating the life of society.[6]

These readings will never perfectly describe universal values because perfection is not part of the human condition. Instead, the conversation about values derived from these works adds to our understanding, to our lives, and is palpable. More directly, these readings have meaning for us as lawyers, as law students, and as law teachers. As readings about society, its order, and its authority, they teach us about the institutions of the law. As readings about human action, its nature, and its relationships, they teach us about how to behave as lawyers. The promise of LL&P is large, the payoff is real, and the payoff is guaranteed with the investment of your engagement with the texts.

In addition to addressing questions about how lawyers should behave and about law as a social institution, we can put a very grand question to LL&P: *What does LL&P have to say about Justice?* I am sure that we can offer a working definition of justice but let's leave that for class discussion. Questions for initial reflection follow.

PHILOSOPHY

Most of us come to philosophy in the way described by the philosopher Jose Ortega y Gassett: "The first thing, if any, which we the living encounter is the series of terms, book titles, and individual names that were involved *philosophizing*."[7] This approach appears quite commonsensical, i.e., one learns philosophy by reading philosophers. Yet, on reflection, the approach of reading original texts is not the only approach. Rather, you can read books *about* philosophy which are often histories of philosophy,[8] or you can read excerpts with commentary by textbook editors. This latter approach is often used in introductory philosophy courses. Our preference is to engage original texts and then we can all provide our own commentary. Thus, for this course, we assign as much of the original texts as reasonable.

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[6] John Paul II, *Fides et Ratio* 11 (1998).

[7] Jose Ortega y Gasset, *The Origin of Philosophy* 56 (Toby Talbot trans. 1967). (Emphasis in the original.) *See also*, Kwame Anthony Appiah, *Thinking It Through: An Introduction to Contemporary Philosophy* xiii-xvii and ch. 9 (2003).

[8] *See e.g.*, Bertrand Russell, *A History of Western Philosophy* (1972 ed.).

Choosing a starting point to focus on philosophy is difficult. However, two questions that come immediately to mind are: "What is philosophy?" and "Why do philosophy?"

WHAT IS PHILOSOPHY?

"What is philosophy?" is an interesting question and not one free from ambiguity. Dame Iris Murdoch offers us two clear answers to precisely this question: "Some might say that philosophy is certain arguments in certain books, but for Plato . . . philosophy is talk."[9] Furthermore, this question seems to occupy contemporary philosophers who find it difficult to offer a fixed definition.[10]

One tried and sometimes true method of defining any word is called dictionary usage. Lawyers, by the way, often use this method to interpret contracts and statutes and a fairly extensive jurisprudence has developed concerning when to use dictionaries for these purposes.

Two frequently used dictionaries define philosophy as:

> The "pursuit of wisdom"
> *Webster's Ninth New Collegiate Dictionary* 833 (1984).
>
> "The love, study, or pursuit of wisdom or of knowledge of
> things and their causes, whether theoretical or practical"
> *The Compact Edition of the Oxford English Dictionary* 2155 (1971).

These are by no means the only definitions of philosophy nor are these the only dictionaries to consult. Surprisingly, the popular *Cambridge Dictionary of Philosophy* avoids the question and does not define "philosophy" directly. Instead, it defines narrower topics such as "philosophy of law," "philosophy of mind," and "philosophy of science" and the like.[11] The definitions above are useful and contain the root idea that philosophy involves the love and pursuit of wisdom. Not surprisingly, this definition only begs more questions.

Notice in the above definitions that philosophy is neither the love of knowledge nor of learning, but rather a love of wisdom, we are then led to ask, "What is wisdom?" Using dictionary usage again, wisdom is:

> "The ability to discern inner qualities and relationships: INSIGHT"
> *Webster's Ninth New Collegiate Dictionary* 1354 (1984).

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[9] Iris Murdoch, "The Fire and the Sun: Why Plato Banished the Artists" reprinted in Iris Murdoch, *Existentials and Mystics: Writings on Philosophy and Literature* 404 (1998).

[10] See e.g., Andrew Lawless, *Plato's Sun: An Introduction to Philosophy*, ch.1 (2005); *C*.P. Ragland & Sarah Heidt, *What is Philosophy?* (2001).

[11] Robert Audi (ed.), *The Cambridge Dictionary of Philosophy* 668-706 (2nd ed. 1999).

> "A capacity of judging rightly in matters relating to life and conduct; soundness of judgment in the choice of means and ends; sometimes, less strictly, sound sense, esp. in practical affairs"
> *The Compact Edition of the Oxford English Dictionary* 3794 (1971).

These are neither complete nor the only definitions of wisdom and, like philosophy, there is no settled definition but this is a start. Clearly, wisdom is something other (more than?) knowledge and it is distinguishable from it. T.S. Eliot helps us note the distinction:

> Where is the wisdom we have lost in knowledge?
> Where is the knowledge we have lost in information?[12]

Don't we "know" this distinction? By way of example, is it information, knowledge, or wisdom to know that the speed limit in front of a school is 20 mph? Surely, that information constitutes knowledge, but is any wisdom contained therein? Or does wisdom require the posing and answering of yet more (perhaps deeper) questions, such as "Why is there a low speed in front of a school?" We can, of course, pose deeper questions. We "know" (or do we), for example, that our minds are separate from our bodies. After all, we can point to and touch our bodies, but not our minds. Again, though, does this knowledge constitute wisdom? Or is further inquiry necessary?

Has dictionary usage given us satisfactory answers to the question: "What is philosophy?" It should not take much reflection to recognize that if most philosophers and philosophical texts continue to pose the question, then dictionary usage cannot really be the last word. If dictionary usage is inadequate, what answers do philosophers give? Here we move from dictionary definitions to epigrams which are short sayings often contained in larger texts and we offer the following for your consideration:

> "This sense of wonder is the mark of the philosopher. Philosophy indeed has no other origin."
> *-Plato*[13]

> "The reason why the philosopher can be compared to the poet is that both are concerned with wonder . . .."
> *-St. Thomas Aquinas*[14]

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[12] From "The Rock" in T.S. Eliot, *The Wasteland and Other Poems* 81 (Harvest Book ed. 1958).

[13] As quoted in Brian Magee, *The Great Philosophers* 7 (2000). Magee also quotes Aristotle to the same effect: "It is owing to their wonder that men now begin, and first began, to philosophize." Twentieth century philosopher Jose Ortega y Gasset writes that philosophy has another origin — *aletheia* (truth). "This is philosophy's original name." Ortega y Gasset, *supra note* 5.

[14] As quoted in Josef Pieper, *Leisure the Basis of Culture* 2 (St. Augustine's Press ed. 1998).The Aquinas quotation opens an essay by Josef Pieper entitled "The Philosophical Act."

"Philosophy begins in wonder."
-Robert Nozick[15]

These epigrams add another feature to the definition of philosophy — wonder. Webster's Dictionary's first definition is "the cause of astonishment or admiration; MARVEL."[16] Notice these epigrams connect wonder with philosophy and they span 2500 years. In the Western Tradition, while pre-Socratic philosophers existed and wrote, Plato is seen as the first and is among the greatest philosophers[17] and the late Robert Nozick is seen as one of the most recent great philosophical minds.

So far we have identified two features of philosophy — wisdom and wonder. To perceive wonder as the beginning of wisdom makes sense. With wonder, come questions. With questions, answers. With answers, more questions then knowledge then, hopefully, wisdom.

In *Confessions of a Philosopher*, Brian Magee opens his memoir with very specific wonders. The first occurred when he was five years old: "[E]very night there must have come a time when I stopped talking and settled down to sleep. It was incomprehensible to me that I did not experience that and never remembered it." Two or three years later, Magee knew that his thoughts could command his finger to bend, yet wondered: "How could something that was so completely within my command, solely entirely a matter of my own conscious decision, be a nothing for me, just simply no experience whatever, and yet happen?"[18]

You may think such childhood (though not childish) thoughts are not the stuff of which philosophy is made. Yet, such wonders are exactly the stuff of philosophy and of philosophers. This sense of wonder extends to more complex phenomena as Thomas Nagel writes:

> Philosophy, unlike most other subjects, does not try to extend our knowledge by discovering new information about the world. It tries to deepen our understanding by reflection on what is already closest to us — the experiences, thoughts, concepts, and activities that make up our lives, and that ordinarily escape notice because they are so familiar. Philosophy begins by finding utterly mysterious the things that pervade our everyday lives, such as language, perception, value, and truth.[19]

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[15] Robert Nozick, *Invariances: The Structure of the Objective World* 1 (2001).

[16] *Webster's Ninth New Collegiate Dictionary* 1357 (1984).

[17] *See e.g.* Seth Bernardette, *The Argument of the Action: Essays on Greek Poetry and Philosophy* 407 (2000). ("What philosophy is seems to be inseparable from the question how to read Plato.") Attributed to Alfred North Whitehead is the claim that "all philosophy is a footnote to Plato." One wag goes further: "until Wittgenstein.." *See* David Edmonds & John Eidinow, *Wittgenstein's Poker* 11 (2001).

[18] Brian Magee, *Confessions of a Philosopher: A Journey Through Western Philosophy* 3-4 (1979).

[19] Thomas Nagel, *In the Stream of Consciousness*, N.Y. REV. BOOKS 74 (April 11, 2002) (Review of Brian O'Shaughnessy, CONSCIOUSNESS AND THE WORLD.)

With a short leap, the mind-body problem alluded to by Magee and implicit in Nagel moves to questions about reality and about the nature of our existence. Metaphysical questions about the nature of reality and about God or the god(s) are not far behind. So while philosophy starts in childlike wonder, it swiftly aims toward wisdom of self, of the world, and beyond.

Now that the existence of God has been raised, we should address it briefly for two substantial reasons. First, for many philosophers, indeed especially for the first philosophers, God or the gods were integral parts of the societies in which they lived and tried mightily to understand.[20] Thus, philosophers were pulled in two dramatically different directions. They lived in the material world and reflected about the immaterial world. They lived in real societies and wondered about the good life in this realm. As thinkers (or as believers) we are pulled to the beyond.[21] In fact, the central concern of the branch of philosophy known as metaphysics is the existence of God.[22] Whether we look to Zeus, or to the Old or New Testaments, or to other religious or spiritual texts, God lurks beyond the material world. Indeed, understanding, living with, or reconciling Athens and Jerusalem, or as Augustine put it the City of Man and the City of God, is a central aspect of the humanities.[23]

In his essay, *The Philosophical Act*, the Thomist scholar, Josef Pieper, puts the matter this way. First, he defines the philosophical act as an "act in which the work-a-day world is transcended."[24] He then elaborates:

> "What is peculiar and distinctive about a philosophical question is that it cannot be posed, considered or answered (so far at least as an answer is possible), without 'God and the World' also coming into consideration, that is, *the whole of what exists*."[25]

With philosophy, then, ontological and teleological questions are inevitable. The ontological question is "Why existence?" The teleological question is "What is the purpose?" It is no stretch at all to adapt these questions for legal professionals: "Why law?" "What is the purpose of law?" "What is the nature of Justice?"

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[20] *See e.g.* Etienne Gilson, *God and Philosophy* (1941).

[21] In literature as well as in philosophy. "Literature is never the product of a single subject. There are always at least three actors: the hand that writes, the voice that speaks, the god who watches and compels." Roberto Calasso, *Literature and the Gods* 192 (2001).

[22] *See The Cambridge Dictionary of Philosophy supra note* 3 at 563; Peter Lopson, *Reality: Fundamental Topics in Metaphysics* ch. 15 (2001).

[23] Leo Strauss, *Jerusalem and Athens: Some Preliminary Reflections* in Thomas I. Pangle (ed.), STUDIES IN PLATONIC POLITICAL PHILOSOPHY (1983); Jeffrey Hart, *Smiling Through the Cultural Catastrophe* ch. 1 (2001).

[24] Pieper *supra note* 11 at 64.

[25] *Id*. at 95 (emphasis in original).

The second reason to contemplate the transcendent is slightly more subtle. To do philosophy, one must have some appreciation for the connection or tension between faith and reason. We can also describe this as a tension between myth and justice. You will hear us extol the virtues of reason throughout the course. What role does faith or belief play in our philosophical speculations? How do faith and reason address the most important philosophical questions: What is the good life and how does one live it? This exploration is appropriate for the examined life at least in the Western Tradition.[26]

We intend to use words like myth and faith broadly. Surely believers in God link philosophy to their faith in God as do Augustine and Aquinas although both Augustine and Aquinas can and do separate theology and philosophy. Equally clearly, religious faith need not be a part of philosophy and Nietzsche may well be the most notorious exemplar. Nevertheless, even as devout an atheist as Bertrand Russell recognized the need to address the connection between faith and reason. "Philosophy, as I shall understand the word, is something intermediate between theology and science."[27] Hopefully, our intent is clear: We must be sensitive to the roles that faith or belief and reason play in philosophy.

One further note on faith and reason -- both have been under attack during the last century. The attack on faith should be familiar. Faith, often meaning religious faith, is too soft, too sectarian, too unknowable, too partisan. The attack on reason may be less familiar and is somewhat more modern. The simple, and simplistic, premise is that reason, as defined and understood since the Enlightenment, is a cover for political power. The attacks have been Continental through such writers as Foucault, Derrida, and Gadamer. On this side of the pond, the attacks started with literary critics, they then spread to critical legal studies and its progeny. You may recognize the critique of reason in the form of the attack on the Western Canon, the cry for multiculturalism, and the like. Our position is fairly straightforward. We are not done with reason yet. Further, it is impossible to use reason to attack reason.[28] Instead, the philosophical

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[26] Anthony Gottlieb, *The Dream of Reason: A History of Philosophy From the Greeks to the Renaissance* (2000); Robert Nozick, *The Examined Life: Philosophical Meditations* (1989).

[27] Bertrand Russell, *A History of Western Philosophy* xiii (Touchstone Book 1972). The continuation of the quotation is worth considering:

> "Like theology, it consists of speculation on matters as to which definite knowledge as, so far, been unascertainable; but like science, it appeals to human reason rather than to his authority, rather that of tradition or that of revelation. *Definite* knowledge — so I should contend — belongs to science; while *dogma* as to what surpasses definite knowledge belongs to theology. But between theology and science there is No Man's Land exposed to attack from both sides; this No Man's Land is philosophy."

[28] For a critique on the modern attack on reason, see Thomas Nagel, *The Last Word* 3 (1997) ("Whoever appeals to reason purports to discover a source of authority within himself that is not merely personal, or societal, but universal — and that should also persuade others who are willing to listen to it."); Robert Nozick, *The Nature of Rationality* xiii (1993) ("It would be ironic and tragic if the current widespread criticism of standards of rationality had the effect of removing or undercutting one of the major ways through which humanity is able to correct and rise above personal and group bias.") *See also* Stephen Toulmin, *Return to Reason* (2001); John R. Searle, *Rationality in Action* (2001).

method, by which we mean the use of reason, can be used profitably to understand and learn from the critiques.

WHY DO PHILOSOPHY?

Most philosophers address the question, "What is philosophy?" at some point in their work and most philosophical textbooks start with such questions even when specific answers are not forthcoming. For example, one influential philosophy text opens by saying "The word 'philosophy' has no clear and unique meaning at all in its everyday usage. . . . The wisest procedure may well be to . . . leave it to the student to define philosophy at the end of the course . . . ."[29] The authors' idea was that we can learn what philosophy is by "doing philosophy" — by reading about and discussing it.

To properly discuss "Why do philosophy?" it is appropriate for us to ask what philosophers do? Two basic answers are given. First, philosophers try to solve "philosophical problems" such as "What is knowledge?" or "Does God exist?"

The second response denies that philosophical problems exist and that people "do philosophy" to understand the world better. As Emerson wrote, "Philosophy is the account which the human mind gives to itself of the constitution of the world."[30] Or, as Wittgenstein once said, the function of philosophy is to untie the knots in our thinking.[31] Contemporary philosopher Michael Dummett offers this reason: "Philosophy aims to explore the structure of human thought and by doing so clarify our conceptions of reality."[32] Two French philosophers answer by saying that "philosophy is the art of forming, inventing, and fabricating concepts."[33] Isn't it the case that we are indeed doing philosophy simply by the act of identifying issues and asking questions? Once questions are asked then answers must be sought and debate ensues.

Another way of looking at what philosophers do is to ask how they do it. Robert Nozick has identified two approaches to doing philosophy. Philosophers can either argue and battle each other with proofs, each one trying to trump the other until one submits to the other's argument. Or, philosophers can, less confrontationally, attempt explanations of philosophical questions and phenomena.[34]

We are now led to ask: To what end(s) do we do philosophy? More concisely: Why philosophize?

We will give our favorite answer first — because it is pleasurable! We easily can add because it is rewarding. Philosophy strengthens the mind. It makes life, as Plato and Socrates

[29] Paul Edwards & Arthur Papp (eds.), *A Modern Introduction to Philosophy* xi (rev. ed. 1967).

[30] Ralph Waldo Emerson, *Representative Men: Seven Lectures* 28 (Modern Library ed. 2004).
[31] Quoted in Anthony Kenny, *The Unknown God* 205 (2005 ed.).
[32] Michael Dummett, *The Nature and Future of Philosophy* 36 (2010).
[33] Gilles Deleuze & Felix Guattari, *What is Philosophy?* 2 (1994 trans.).

[34] Robert Nozick, *Philosophical Explanations* 4-18 (1981).

both said, worth living. And, quite instrumentally, it helps people act in the world,[35] especially for haggling in law courts. Pleasure, however, is sufficient.

Not surprisingly, there are other answers. Ortega y Gasset notes that we do philosophy to bring unity to divergent thoughts.[36] Bertrand Russell makes the same point:

> "Philosophy, like all other studies, aims primarily at knowledge. The knowledge it aims at is the kind of knowledge which gives unity and system to the body of the sciences and the kind which results from a critical examination of the grounds of our convictions, prejudices, and beliefs."[37]

While Russell notes a specific form of knowledge, he also notes that philosophy has not had "any very great measure of success in its attempts to provide definite answers to its questions."[38] Dame Iris Murdoch makes a similar point: "It is sometimes said, either irritably or with a certain satisfaction, that philosophy makes no progress." She goes on to say that philosophy appears to move forwards and backwards as a "movement towards the building of elaborate theories, and a move back again towards the consideration of simple and obvious facts."[39]

Other philosophers make the opposite point that "philosophy" is historically contingent, consequently "[t]here are philosophies, then: there is no philosophy . . . the history of philosophy has no inner, necessary unity."[40] Bertrand Russell once grouped approaches to philosophy as either jello (a unitary or holistic approach) or a bucket of shot (a multiplicity or atomistic approach).[41] Which do you prefer: jello or a bucket of shot?

Hannah Arendt, who considered herself a political scientist rather than a philosopher, believed that philosophy, "thinking" in her vocabulary, might be a way to distinguish good and evil. "Might the problem of good and evil, our faculty of telling right from wrong, be connected with our faculty of thought?"[42] Without giving too much away — not necessarily.[43]

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[35] We can also list that doing philosophy also provides valuable exercises in: analysis, comparison, logic, discrimination, categorization, choice, relevance, distinction, and the like.

[36] Gasset, *supra note* 5 at ch. 4.

[37] Bertrand Russell, *The Problems of Philosophy* 154 (1997 ed.) (1912).

[38] *Id.*

[39] Iris Murdock, *The Sovereignty of Good* 1 (1971).

[40] Wilhelm Dilthey, *The Essence of Philosophy* 2 (Stephen A. Emery & William T. Emery trans. 1954).

[41] Arthur Danto, *Connections to the World: Basic Concepts of Philosophy* (1997).

[42] Hannah Arendt, *The Life of the Mind* vol. 1 at 5 (one vol. ed. 1978).

[43] *See* Mark Lilla, *The Reckless Mind: Intellectuals in Politics* (2001); Richard Wolin, *The Seduction of Unreason: The Intellectual Romance with Fascism from Nietzsche to Postmodernism* (2004).

Finally, and most importantly, is Plato's reason for doing philosophy — to learn how one should live one's life.[44]

Like all of the questions raised in this memorandum and all of the questions we raise in the course, you must provide your own answers. This direction is not to say we do not have answers of our own. We are not shy about sharing our thoughts, nor are we shy about expressing opinions. Nevertheless, there are questions about which we differ between ourselves and there are questions to which our answers are unsettled and questions for which our answers are revisable. The trick of course is knowing which are which.

LITERATURE

Defining literature may be even more difficult that defining philosophy. Still, we will consider "What is Literature?" and "Why do literature?"

WHAT IS LITERATURE?

Having attempted to locate philosophy, we move to literature and ask: "What is Literature?" Earlier Gasset noted that we become acquainted with the nature of philosophy through familiar texts and authors. So too literature — we all know the names of many of the great authors and their books. The common sense definition is that literature is the recognized work of great writers. At the other extreme, literature can be defined as a: "certain use of words or other signs that exists in some form or other in any human culture at any time."[45] This definition does not reveal much even though we may have a sense of what the author is getting at.[46]

Yet, again we are led to other questions. What are examples of great literature? What counts as literature? Does literature include poetry and drama as well as the novel? Modernists or post-modernists may ask whether movies, television, or rock lyrics constitute suitable texts for literary study. Surely any list of great literature would include *The Iliad* and *The Odyssey*, *The Divine Comedy*, and Shakespeare's Comedies and Tragedies as well as his sonnets and Joyce's *Ulysses* as well as Eliot's *The Wasteland*, Pound's *Cantos*, and O'Neill's *Moon for the Misbegotten*. Do Dylan lyrics count? Reality TV? The game of lists is enjoyable but not free from debate.

E. D. Hirsch, Jr., for example, wrote a bestseller entitled *Cultural Literacy*[47] listing 5000 things Americans ought to know. He was both praised and attacked for this project. The praise

[44] Allan Bloom (trans. and ed.), *The Republic of Plato* ¶352d (1968 ed.).

[45] J. Hillis Miller, *On Literature* 13 (2002).

[46] See also, Edward W. Said, *Humanism and Democratic Criticism* 60 (2004) ("[Richard] Poirer notes simply but elegantly that literature is words put to more complex and subtle uses, both by convention and originality, than any other place in society.").

[47] E. D. Hirsch, Jr., *Cultural Literacy: What Every American Needs to Know* (1988).

came because he addressed a perceived loss of literacy in the country. The attack on Hirsch was not so much for his thesis that there was a noticeable decline in literacy, rather, he was attacked for what was not included on his list. In short, the critics argued that his list lacked diversity and was too narrow. Such critics often quote Matthew Arnold's dictum, as wrongheaded and arrogant, that a proper education requires study of "the best that has been thought and written."[48] A more academic book making claims similar to Hirsch was Allan Bloom's *The Closing of the American Mind*[49] and predictably Bloom, a classics scholar from the University of Chicago, was criticized for this conservatism.

The debate over the level of literacy in this country has raged for much of the last century under various guises. Earlier in the century people argued about high-brow and low-brow cultures. At mid-century, literary critics debated whether text or context mattered more and rival theories of interpretation took center stage. As the century ended, the debate over the canon and its values and biases took over.

These debates are enduring, revelatory, and worthy of attention.[50] Still, for our purposes, these debates are off center. We believe strongly in the value of the text and the importance of the classics because of their contribution to the Great Conservation. While we are not dismissive of the criticism of and arguments regarding the limitations of the so-called Western Canon, we believe that the canon provides an excellent introduction to the tradition of the humanities,[51] and furnishes analytic tools helpful in evaluating both the conversation of the canon and its criticisms. Further, "In coming to terms with great literature, we discover what at bottom we really believe."[52]

WHY DO LITERATURE?

Having simply stated our preference for reading the Great Books, the question "why?" is fairly raised.[53] We can turn to three authors for answers.

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[48] *See also* T.S. Eliot, *What is a Classic?* (1974 ed.). "A classic can only occur when a civilization is mature; when a language and a literature are mature; and it must be the work of a mature mind."

[49] Allan Bloom, *The Closing of the American Mind: How Higher Education Failed Democracy and Impoverished the Souls of Today's Students* (1987). Bloom and this book have recently been fictionalized in Saul Bellow, *Ravelstein* (2000).

[50] Lawrence W. Levine, *The Opening of the American Mind: Canons, Culture and History* (1996). Levine makes the point that what constitutes the canon is ever evolving. *See also*, James Chandler, *The Battle of the Book*s 16 UNIVERSITY OF CHICAGO MAGAZINE (February 2001).

[51] *See e.g.* Harold Bloom, *The Western Canon: The Books and the School of the Ages* (1993).

[52] F.R. Leavis, *Two Cultures? The Significance of C.P. Snow* 23 (1962).

[53] *See e.g*. Azar Nafisi, *Reading Lolita In Tehran* 94 (2004) ("That first day I asked my students what they thought fiction should accomplish, why should one bother to read fiction at all.")

In *Why Read the Classics?*, Italo Calvino answers by providing fourteen definitions of the classics and within those definitions are contained his reasons for reading them. His definitions include:

> "The Classics are those books which constitute a treasured experience for those who have read and loved them. . . ."
>
> "The Classics are books which exercise a particular influence, both when they imprint themselves on our imaginations as unforgettable, and when they hide in the layers of memory disguised as the individual's or the collective unconscious."
>
> "A classic book is a book which has never exhausted all its has to say to its readers."[54]

Love, influence, and meaning all contribute to a text that we recognize as a classic.

Professor Harold Bloom, a tireless promoter of the classics, offers different reasons including:

> "It matters, if individuals are to retain any capacity to form their own judgments and opinions, that they continue to read for themselves."
>
> "Ultimately we read . . . in order to strengthen the self, and to learn its authentic interests."[55]
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> "To read human sentiments in human language you must be able to read humanly, with all of you."
>
> "Read deeply, not to believe, not to accept, not to contradict, but to learn to share in that one nature that writes and reads."[56]

And, poet Kenneth Rexroth writes: "[A]ll literature that deserves the name of classis does, in a sense, define the consciousness of a particular people and yet is an extension of a moment in the conscience of mankind."[57]

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[54] Italo Calvino, *Why Read the Classics?* 4-5 (1999).

[55] Along these lines, in the recent obituary of modern artist Larry Rivers it was said of him: "Larry had a realistic sense of who he was, so he didn't get caught up in his ego when things failed. At the same time, he was probing. He was a very serious man, an intellectual, always reading." David Levy, Director of Corcoran Gallery of Art, longtime friend and fellow jazz musician. Michael Kimmelman, *Larry Rivers, Artist with an Edge, Dies at 78*, NEW YORK TIMES A1 (August 16, 2002).

[56] Harold Bloom, *How to Read and Why* (2000).

[57] Kenneth Rexroth, *Classics Revisited* 24 (1968).

These authors' reasons for reading the classics are, certainly, if anything, idiosyncratic. This very idiosyncrasy acknowledges a certain freedom for us. Existentialist philosopher Jean Paul Sartre at the end of World War II wrote of literature that it was an "abstract function and an *a priori* power of human nature; it is the movement whereby at every moment, man frees himself from history; in short, it is an exercise of freedom."

As such, literature, we hasten to add philosophy, thus pose challenges and suggest an exercise. Each of us must ask why read in general, but more directly to our purposes, why read literature and why read philosophy? Obviously, you have enrolled in a class that *requires* you to drink from these wells yet to say that you read as a course requirement while necessary is an insufficient answer. Instead, we will repeatedly pose these questions explicitly, and they will be implicit in every reading and in every class.

LITERATURE AND PHILOSOPHY AS HUMANITIES

We have discussed philosophy and literature separately and it is fair to ask: How do they relate to each other? Another way of posing this question is to ask you to: Compare and Contrast. What do literature and philosophy teach us? How are they similar? Dissimilar? How do they approach specific topics? We will ask these questions in our first class.

We believe that philosophy and literature are valuable for the study of law because both are part of the humanities. As Martha Nussbaum writes, the humanities touch our souls and our souls constitute "faculties of thought and imagination that make us human and make our relationships rich human relationships, rather than relationships of mere use and manipulation."[58] Consequently, both tell us something about ourselves, each other, our society, our common (and distinct) civilizations, our dreams, aspirations, and lives. As lawyers engaged in human problem-solving and social-ordering, the humanities have much to teach us.

When we think of the humanities we often think of Greek and Roman classics as the beginning of humanistic studies. For the Greeks and for the Romans, philosophy and the poetry, together with natural sciences and mathematics, constituted classical education. These studies became more widely known as the humanities only during the Renaissance. Although the Renaissance can claim many achievements in the arts and the sciences on its own, its devotion to Greek and Roman culture gave the Renaissance its grounding.[59]

The development of a humanistic education during the Renaissance has particular relevance for us in law school for two reasons. First, a humanities education was intended to be a boarder and more freeing education than existed during the preceding medieval period which was more practical focusing on professional studies preparing students to be clergy, doctors, and

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[58] Martha Nussbaum, *Not For Profit: Why Democracy Needs the Humanities* 6 (2010).

[59] Ralph Barton Perry, *A Definition of the Humanities* in Theodore Meyer Greene (ed.), THE MEANING OF THE HUMANITIES 16 (1938); *see also*, Jacob Burkhardt, *The Civilization of the Renaissance in Italy* Part III (see especially 148-53)(Modern Library ed. 1995) (1860). *See also*, William J. Bousama, *The Waning of the Renaissance*, 1550-1640 ch. 12 (2000).

lawyers. Second, although consistent with the moral values at the time, the humanities established a secular school curriculum that exists to this day.[60]

The subjects often listed as humanities include: literature, philosophy, art history, music, religion, languages, and sometimes history.[61] We can also say:

> Historically, the humanities are the old subjects, which in many forms and under a variety of names — the nine muses; the liberal arts; quadrivium and trivium; rhetoric; dialectic, and logic; humane letters — were the major part of Western Education for over two millennia.[62]

The object of classical humanities was to understand the natural world and man's place in it.

Later during the Renaissance and more so during the Enlightenment, the humanities were first critical of the divine right of kings, then of the divine itself. We should note that asking people to think and to think critically, questioningly is not without danger. Socrates was sentenced to death for so corrupting the youth of Athens by teaching them to question everything. Socrates is not alone among teachers killed for their thoughts.

From the Renaissance onward, a humanities education for everyone but the occasional and exceptional autodidact, was a process of formal education in universities. Perhaps the best modern statement about the role of a university's humanities education comes from an Anglican cleric turned Catholic Cardinal John Henry Newman.[63] Newman's series of lectures was delivered to persuade the political powers in Ireland that be of the need for a Catholic university. Trinity University in Dublin was always considered British and Protestant, for the liberal education of the intellectual youth of Ireland. Newman believed strongly in the humanities and argued forcefully that they could be taught independently of theology, while arguing equally strongly for the place of theology in a university curriculum. Newman's aim is one we adhere to today. Education in the humanities is essentially about critical thought and analysis. For Newman, the main purpose of a university's liberal education was to help develop a "habit of mind."

> "A habit of mind is formed which lasts through life, of which the attributes are, freedom equitableness, calmness, moderation, and

[60] Craig W. Kallendorf (ed. and trans.), *The I Tatti Renaissance Library: Humanist Educational Treatises* vii-ix (2002).

[61] Alvin Kernan (ed.), *What's Happened to the Humanities?* 3 (1997).

[62] *Id.*

[63] John Henry Newman, *The Idea of the University* (Frank M. Turner ed. 1996); *See also* Jarslov Pelikan, *The Idea of the University: A Reexamination* (1992).

> wisdom; or when in a former Discourse I have ventured to call a philosophical habit."[64]

Thus, it is no accident that the humanities are associated with the liberal arts. Their study should contribute to a person's freedom by cultivating learning, imagination, sympathy, dignity, and civility, ideas traceable back to the Renaissance and forward to today's university.[65]

Until the end of World War II, formal education was largely limited to those better off in society and was regrettably exclusionary on the bases of sex, race, religion, and ethnicity. How truly odd then that the humanities, the study of the human, was so exclusive.

Fortunately, we no longer live in this world. Yet a more open, more democratic, more pluralistic society raises new issues and challenges for the humanities. We can identify and address those issues and challenges during the seminar. We note them here to make another point — the "cultivation of humanity" to borrow Martha Nussbaum's phrase, remains central in the liberal education for citizenship. Further, that cultivation takes place by developing:

> "[T]he capacity for critical examination of oneself and one's traditions . . ."
>
> The ability to see ourselves "as human beings bound to all other human beings by ties of recognition and concern . . ."; and,
>
> A "narrative imagination . . . the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have."[66]

By now it should be obvious that we cannot (and should not attempt to) provide a definitive answer for you to the question of why study the humanities. We probably cannot (and should not attempt to) provide definitive answers for ourselves because these readings and this study change as our lives change. Nevertheless, we all live in a specific historic period with markers, challenges, opportunities, and fears of its own distinguishable from any period preceding. And while we might rest content with an answer we gave earlier that one should study the humanities because it is pleasurable to do so, there is more. As actors in society we believe that our work has meaning in the world, that we have more than a superficial understanding of the world's needs and of our places in it, and that our actions make positive contributions to the lives around us. While nothing, not even deep study of the humanities, can guarantee such outcomes, we doubt that life without the humanities would be better.

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[64] Newman, *id.* at 77.

[65] Perry *supra note* 53 at 16.

[66] Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* 9-11 (1997).

LAW AND THE HUMANITIES

Now we must link law and the humanities. As lawyers and law teachers, we may be too close to the study and practice of law to give you one fixed and settled definition of law. In fact, the study of jurisprudence or the philosophy of law is occupied to a significant extent by defining law. However, we can provide a famous definition that is contained in our readings as a useful starting point:

> "Law is nothing else than an ordinance of reason for the common good made by him who has the care of the community, and promulgated."[67]

This straightforward definition may appear simple even commonsensical. Nevertheless, we will examine it in more detail in the course. Suffice it to say for now that reason lies at the heart of the definition.

We see law as both a social science and a humanity. As a social science, law is directly involved with the formal, legitimate processes necessary for the distribution of power and resources in society. In simple terms, the structure of government and the support of markets are sustained through the rule of law. However, the social sciences, especially economics and political science, are only a partial means of understanding law. The humanities also inform our appreciation for law and for the legal profession.

As a humanity, law furthers human aspirations and protects citizens from abuses by public and private powers greater than any individual. Again, in more prosaic terms, law helps people build businesses, enter contracts, receive compensation for injuries, and ensure fair treatment from the state in its civil and criminal activities. In short, law assists people to achieve their dreams and desires and protects them from their fears; law affects the human. It follows then that the humanities can help us understand this dimension of law.

Great works of literature and philosophy open students and seasoned practitioners alike to a deeper understanding of both of these functions of law, here one only need refer to Plato's *Republic*. The great readings also reveal, in transformative ways, underlying professional values. Through the dialectic method and the requirement of close analytic reading, the development of necessary lawyering skills is reinforced. Further, such discussion presents a unique opportunity to explore core professional values.

The humanities not only instill a deeper understanding of important values, they also trigger a profound realization that these ideas can impact and inform the day-to-day ethical and professional decisions of lawyers, judges, and law teachers. In short, the humanities develop legal professionalism hopefully leading to the improvement in the delivery of justice as students develop their professional ethics; as lawyers become recommitted to their clients; as judges see justice rather than case management as the center of their day-to-day business; and as law teachers educate themselves as well as their students in the central values of the humanities.

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[67] St. Thomas Aquinas, *Treatise on Law* 10-11 (Ralph McInerny ed. 1988).

The humanities offer multiple avenues to explore two of the deepest questions we face as legal professionals:

> How does law contribute to a good society?
>
> How does law contribute to a good life?

These two questions are simply another formulation of the two faces of justice — social justice and individual justice.

Although there are no immutable answers to these questions, engaging them is a necessary skill or attitude that a fully competent lawyer must possess. A competent legal professional must possess the ability to live with the dynamism of human life in itself and as reflected in law. At a more realistic level, the fully competent professional also recognizes that answers to these grand questions, provisional by necessity, must be given if society is to function. The process of engaging these questions is the antidote to the growing dissatisfaction with the legal profession.

The question about social justice should play an obvious role in the lives of lawyers. For what else are they about? What is the role of law in society? How does the rule of law enhance justice and how does law enhance the democratic values that we hold dear? How do the rules of law shape a better society?

The question about individual justice is a question with both personal and professional dimensions. It is a question about the examined life. "Can a good person be a good lawyer?" is another way of framing the issue. What is an individual's moral code and how does it fit the role of lawyer? Is there congruency or conflict between our personal lives and our role lives as lawyers? If conflicts do exist, how are they resolved?

The humanities help us acknowledge the timelessness of questions of justice and empower us to answer them, provisional as though those answers need be. To move from one society to another better one, it is necessary for all active citizens, especially for lawyers, to take positions based on their understanding of both the nature of contemporary society and the nature of tomorrow's better one.

Law is in reality the quintessential humanity. Law gives life and voice to the desires and aspirations, hopes and fears of people. Law helps people build businesses, protect the environment, and provide for their children. Law also protects individuals from abuses of public and private power. When all of these activities are agglomerated, a society is constructed and within that society — for better or worse — there exists a legal culture. An excellent way to understand that culture is through the literature and philosophy therein embodied. We say to you as Truth said to Petrarch:

> "You have already spent enough time — more than enough — looking down at the ground with your clouded eyes. Now, if

> mortal things attract you so much what may you not hope for if you lift up your eyes to that which is external."[68]

Thus, we ask you to come to *Law in Literature and Philosophy* as Dante came to his life's work:

In that part of the book of my memory before which there would be little to read is found a chapter heading which says: "Here begins a new life."[69]

We look forward to having you in class and we look forward to a vigorous conversation in the tradition of the Great Books.

[68] Francis Petrarch, *My Secret Book*, 3 (J.G. Nichols trans. 2002).

[69] Dante, *Vita Nuova* 3 (Oxford World's Classics, Mark Musa trans. 1999) (1293-94).