

## Law & Humanities Syllabus (1.7.12 version)

### Will Terpening

#### Contact Info

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#### A Word on the Reading

You will have no problem with the volume of the reading if you read ahead. If you do not read ahead, you probably will struggle. So, lay off the Facebook and reality TV for a couple months and read the materials discussed below for entertainment instead. You might find you like and benefit from it so much that you will permanently abandon your TV, and rethink what you use social media for (*i.e.*, strategically, not mindlessly).

If I call on you in class and it is obvious to me that you have not completed the reading, I will deduct 10% of your grade (for each infraction). More on class participation, below.

#### Objectives

I want you to prepare your own list of questions you would like to consider and information you would like to learn from this class. What are you taking this class? What do you hope to learn? How can you consciously situate all of the reading below within your developing framework as a lawyer? For everything you read – why are we reading it, and what can we take from it that applies to a legal education? Make your questions clear and specific, and revise them often as you work through this material.

Here are some of my course goals for myself and for you. Think through how they do or do not overlap with your course goals.

***Cultivate a broader perspective of law: A complete legal education is not limited to “black letter” legal texts and case reasoning and holdings. We will learn how to look beyond cases, statutes, treatises, etc. - to the humanities – for –***

- Additional perspective on law, and, more broadly, related (and ambiguous)

concepts of justice, morality, and the human needs that drive law (need to resolve conflict, economic and emotional needs, etc.). We talk about these lofty words all the time as lawyers. How can literature tell us what they are for us and for our legal system?

- A better understanding of what laypeople expect (positives and negatives) from their lawyers and the legal system. A/k/a using literature for professional self awareness.
- Information about how to improve/ change our legal system, particularly by understanding that **our legal system is merely one device of limitless possible options for regulating people** and resolving people's conflicts and other problems. Use literature (along with law) to understand how we can repair, change, or dispense with parts of our legal system if they do not function to best serve our social goals for law. For instance, what does the bureaucracy in Kafka's Trial tell us about the shortcomings in our own law process and how we might address them?
- Understand that law is a moldable concept that means different things and serves different functions for different people and cultures.
- To understand how to practice law, we must understand the bigger context: Why is the system there (social, political and historical context)? Who has an investment? What are the players' underlying motives and goals? What is the genealogy of the general system, and the specific dispute, that we are working within? Look to literature/ humanities for answers to many of these questions.
- Develop empathy and "servant's heart" by, among other steps, seeing through others' eyes - a perspective that is central to all good lawyering. Using literature for study of innumerable character types – both to see how they may behave and think, and as a reminder to appreciate the primacy of the client in our work.
- We will see how the humanities can serve as a lifelong source of passion and inspiration that will constantly replenish our ability to derive meaning and purpose from the practice of law.

**Practical lawyering skills: *Practical ideas for improving legal writing, advocacy, and other legal skills by drawing upon such diverse sources as attorney biographies to creative/ dramatic writing tools –***

- Biography/ philosophy: Learn from lives and thoughts of other attorneys.
- Writing skills: Draw upon diverse resources to make writing more dynamic and persuasive.
- Trial skills: Appreciate that, for lay juries and client, as well as judges and

lawyers, trial is a spectacle that is powered by dramatic confrontation and basic human emotional and intellectual realities, which we can study from literary sources. The humanities can make us better trial strategists, better able to think like a jury, better able to examine witnesses, etc.

- Client skills: As stated, law is a human game, and to practice fully, we need to understand people. A working definition of “humanities” is the critical study of the human condition.
- Consider that creative lawyering a/k/a “thinking outside the box” is compatible with (if done thoughtfully), and even necessary for, successful lawyering.

**Appreciate an interrelated academic discipline**: As we will learn, “law and humanities,” or “law and literature,” are emerging disciplines within the field of law. Study of the area, as we will conduct it during this course, will sharpen your ability to assimilate and analytically discuss law from an academic, interdisciplinary perspective. In addition, this type of work will refine your research, legal writing and investigative skills, and hopefully teach you to follow your lawyerly curiosity.

### **Course Overview**

Law is a system for organizing and working through human social problems - the most significant to the most mundane. So is literature, and so are the humanities in general. There are reasons to distinguish them, but why should attorneys ignore the wisdom of the humanities? Unlike other professions, like medicine, our work begins and ends with social and human contacts, constructs, and covenants. Humanities are the study, in broad terms, of these core underpinnings of law.

Law, literature, and humanities fill in the interstices separating parties from parties, people from answers, and problems from solutions. The disciplines make sense of conflict, transitions (e.g., death, conveying property), transactions (e.g., commerce), family problems and such. They all study and make sense of life for people. These are the key fields that do this work, among a limited handful of other areas (mostly social sciences, like sociology - and, of course, religion/ theology). They have different “rules” and traditions. Law is demonstrably “practical” and “worldly,” while literature and the humanities can be (but are not always) more abstract and esoteric.

Certainly, they require different interpretive techniques. However, skills (interpretive skills; understanding of people, their motives, character, fears and concerns; writing skills; storytelling; social problem solving; others) developed from study of the humanities - particularly given that the subject matter of both humanities and law are people and social systems - will add perspective, insight, and creativity to our practice and study of law. Why wouldn’t lawyers take advantage of the perspective that humanities offer? Law is the system that purports to solve (in dispositive fashion, but unfortunately, sometimes, with heavy hands) the problems that the humanities articulate more abstractly. Put otherwise, literature and humanities present problems that law

solves, and the humanities suggest solutions that the law reifies and implements.

It is easily overlooked (particularly in law school and early in our careers while we are busily focused on simply learning the core law), but being a strong lawyer and legal counselor is about more than just knowing the law – the “rules” in cases and statutes – and learning how to think in the peculiar, restrictive and rigid lawyerly fashion that we initially encounter in law school. Those resources (cases, statutes, and solid reasoning skills) are, of course, the most critical practical tools of our trade. But there is clearly more to being a tenacious and effective advocate and thoughtful counselor. Being the best lawyer we can be requires more than command of the black letter law and reasoning skills connected with “thinking like a lawyer,” the way we are conventionally taught in law school and as young attorneys. Being a superior lawyer requires style, passion, a strong ethical compass, creativity, deeper and broader reasoning skills than can be gleaned simply from the cases, stellar writing ability, compassion, and more.

Very fortunate lawyers will, at an early stage, connect with a good mentor from whom they can glean some of these skills, in varying degrees. But even the best mentors cannot fully develop a young lawyer, and young lawyers should accept responsibility for developing themselves, as well as accepting guidance. Some gaps, experience will eventually fill. But there is an increasingly- forgotten attorney development resource: literature and, more broadly, humanities in general. This course explores the once common view that we can learn about ourselves as lawyers, that we can become better-rounded and wiser (and therefore better advocates, and smarter, more compassionate counselors) by simply reading the advice that others have taken the time to record for us over the centuries, and seeing how we can apply it to our practices and lives.

We might divide our inquiry into three areas:

One: Material that other lawyers wrote down (or that others meticulously wrote about them). Many now- dead legendary attorneys wrote memoirs, essays, or other documents about their experience as attorneys, or shared that wisdom somehow with others, who recorded it. It is a crime to ignore their hard- earned wisdom and advice. We cannot talk with them, and they would probably be too busy for us even if they were still around and practicing. How better can we learn about what made their approach so effective than to just read whatever they wrote? A lot of us wish we could be more like Lincoln, Adams, Edward Bennett Williams, or Clarence Darrow. But almost nobody reads works by or about them, let alone applies their lessons and their life experiences to their practices and lives. In writings by and about them lie wisdom and experience that the case law and statutes, law professors, and mentors we are likely to encounter cannot know how to teach us.

Two: Material that may not directly have to do with our specific legal system or formal law as we know it, but that offers tools that will make us better lawyers. A trial, for instance, is ideally drama. As a lawyer, you tell a story, create tension to retain the

jury's interest, develop characters, worry about plot. Worrying about things like that, not just the rules of evidence, can make the difference between an effective and mediocre trial lawyer. The same goes for oral argument and briefing of any kind. Plays, novels, treatises on creative writing, psychology and sociology treatises, etc., can all teach us that craft. All litigation is storytelling. If that is true, better to be Hemingway. Along these lines, literature that explores broad issues of morality (e.g., Melville's Billy Budd, which we will read) and justice (and what can occur when organized law fails) give us a better appreciation for the purpose and potential weaknesses of our system, as well as other insights.

Third: Fictional media that portrays lawyers and the law. In some sense, we invent ourselves as lawyers. We are not born as attorneys. We have an opportunity to create ourselves as our legal ideal, and to have our style and practices reflect that. From the perspective of clients, and even ourselves and other attorneys and judges, much of how we are expected to be and the role we are supposed to occupy — for good or ill — is determined by how lawyers are created and portrayed in books, films, newspapers, and elsewhere. Those sources are worthy of study for examples of how to develop ourselves: positive and negative.

We will develop different categories of where how study of the intersection of law and humanities will benefit our practice as the course emerges, and we will refine those above. This is a career-long project. I will teach you how to use this framework and find your sources, and trust that this course will function as a starting point for an inquiry and perspective that will perpetually enrich your ongoing practice.

### **Class Schedule and Reading Assignments**

**If we fall behind this schedule with class discussion  
please remain on the reading schedule.**

**(1) 1.9.12 – Introductory**

Required Reading: Read this syllabus carefully; and read John Ruskin's Traffic and Melville's Bartleby the Scrivener (by 1.11.12 at latest).

**I. The Omnivore's Art: Learning to Learn How to Practice and Analyze Big Picture Client, Career and Legal Problems from Numerous, Diverse Sources.**

**(2) 1.11.12 – Exercise: Looking at Literature for Legal Insight**

Required Reading: John Ruskin's Traffic and Melville's Bartleby the Scrivener.

*1.16.12 – No Class (MLK Day)*

## II. The Framework and Theory of the Discipline: What is the Area of Law & Humanities/ Law & Literature, and Why Do Lawyers Study It?

### (3) 1.18.12 – Intro to Judge Posner

Required Reading: Posner, Law & Literature (3d Ed.) (hereinafter, “Posner”), “Critical Introduction” (pp. 1- 17); Ch. 12, “But Can Literature Humanize Law” (pp. 456-493).

Suggested Reading: Since the reading for the first day is light, use the extra time to read ahead so that the reading load does not become unduly burdensome later in the semester.

Lecture and Discussion Agenda: Before moving on to course structure, overview, goals, strategies, and expectations, we will consider why we would devote the time to this field of law and literature/ humanities. How do we define the discipline? Who are the key contributors/ thinkers? How do we perform the work of pulling lessons and messages from the arts that make us better lawyers and counselors? As Judge Posner may argue, we probably cannot learn about how to practice law from literature and the other arts. However, we can use literature and the other arts, in many respects, as tools (extrinsic to the typical legal resources, such as cases, statutes, legislative history, treatises, and law reviews) for developing the skills, perspectives, and insights that separate middling, professionally unsatisfied and unsatisfying attorneys from creative, passionate, independent- minded, self- reflective, service- oriented, fulfilled attorneys. Ultimate goal: develop the lifelong habit of turning to these extrinsic texts (those that we offer during the course are merely illustrative examples - you will learn to look everywhere for others and find your own) as substitute mentors; rich reserves of new ideas pertaining to legal substance and style; and internal/ external perspective that many lawyers lack: an honest, varied, and vivid window through which we can read how our clients, juries, adversaries, ourselves, and others anticipate and manage our process, and expect us to behave and assist them with some of their most significant troubles.

### (4) 1.23.12 – Intro to James Boyd White

Required Reading: Introduction and Chapter 1 (“The Lawyer as Writer”) in James Boyd White’s The Legal Imagination (Abridged) (*i.e.*, beginning through page 70).

### (5) 1.25.12 – Posner Continued

Required Reading: (1) Posner, Ch. 1 (“Literary Texts as Legal Texts”) (pp. 21-70 (you can skip the last section on farcical trials)); (2) Posner, Ch. 4 (“The Limits of Literary Jurisprudence,” Section on Kafka), pp. 170-94.

Lecture and Discussion Agenda: This session will suggest background and some theoretical underpinning for our next unit, which will look at how fictional literature

treats law and lawyers.

*(More theory later in the semester.)*

### **III. How Others Imagine and Invent Law and Lawyers: Law in Fictional Literature.**

#### **(6) 1.30.12 and (7) 2.1.12**

A. Camus, The Stranger (1942)

Required Reading: Camus, The Stranger (all of it); Foucault, Discipline and Punish (Chapter 1, but you can skip the last section of Chapter 1).

Lecture and Discussion Agenda: Part I: Literature sets up and describes the human problem. Part II: Law attempts to solve it (and literature describes how it perhaps fails - at least how it can exclude and alienate those who are subject to law). Does law and order prevail? Does the protagonist's state of mind at the end suggest that there are forces more personal and more real than the actions of law?

#### **(8) 2.6.12 and (9) 2.8.12**

B. Kafka, The Trial (1925).

Required Reading: Kafka, The Trial.

Suggested Reading: Posner, Ch. 8 ("Two Legal Perspectives on Kafka")(pp. 229-250).

#### **(10) 2.13.12 and (11) 2.15.12**

C. Melville, Billy Budd (1924).

Required Reading: Melville, Billy Budd; Posner, "Billy Budd, The Brothers Karamazov, and the Law's Limits" (pp. 211- 228).

#### **(12) 2.20.12 and (13) 2.22.12**

D. Coetzee, Waiting for the Barbarians

Required Reading: Coetzee, Waiting for the Barbarians (entire text); Foucault, Discipline and Punish (Chapter III.3 on "Panopticism").

*2.27.12 – No Class (Midterms)*

#### IV. Law in the Public Imagination – Films and Pulp Fiction

##### (14) 3.5.12 and (15) 3.7.12

Required screening: A Civil Action. Required reading: A Time to Kill

Lecture and Discussion Agenda: The Woburn litigation provides an opportunity for a comparison of the legal reality with its “non-fiction” treatment by the media. Where is the film accurate, and where does it gloss over, omit, or change details? Why? The many reasons could range from making the text more entertaining and comprehensible for laypeople to promoting certain individuals and beliefs (propaganda). How do we compare the lawyering styles?

In addition to suggesting other topics, A Time to Kill juxtaposes a very different ideal of law and lawyers with A Civil Action (i.e., the To Kill a Mockingbird model with the cynical model). What can we take from each? What are the strengths, weaknesses of each? What is the reality? What is the reality we want to construct? What does the public think lawyers are? What does the public think motivates lawyers? Then, what does the public think *should* motivate lawyers, and who *should* lawyers be?

#### V. The Historical and Philosophical Ideal: Cicero’s Teachings, Plato, and Trial of Socrates.

##### (16) 3.12.12 - *Socrates’ Trial*.

Read all of: Plato, Apology (available at <http://classics.mit.edu/Plato/apology.html>).

Lecture and Discussion Agenda: Socrates’ contribution (as recorded, primarily, by Plato) to any law and humanities program, as well as the overall field of legal education (e.g., the “Socratic method”) is unavoidable, so we will encounter him today. In addition to touching upon his influential thoughts on rhetoric and ethics, he is noteworthy for the famous trial that resulted in his execution. Significantly, he could have avoided being put to death following the trial, as he had an opportunity to escape. However, he opted to remain based on his impressive commitment to his personal beliefs.

The trial, beyond being such a cornerstone of the law and humanities inquiry that it must be considered, raises interesting questions about the true purposes underlying what is often disguised and dressed-up as “justice.” For instance, he was tried for “corrupting the youth,” a charge that is sufficiently ambiguous as to suggest that the trial was merely a device for eliminating this notorious “troublemaker.” In similar fashion, the trial may serve as a basis for examining the role of the jury, or jury- like entity, and the risks and considerations inherent in them.



(17) 3.14.12 – *Cicero and the Philosopher-Lawyer.*

Read: Selections from Cicero, to be provided.

Suggested Reading: Do some background reading on Cicero. There are a number of good biographies online. As both a writer/ philosopher and a successful and influential attorney, Cicero is uniquely interesting as an example of a period where “law and humanities” were more commonly and smoothly intertwined.

Lecture and Discussion Agenda: Although the Roman “lawyer” during Cicero’s historical era (106 B.C. to 43 B.C.) would be defined very differently from how we would define a “lawyer,” Cicero was a successful example, and we can learn a great deal from him. We will devote the course to the forensic work, and then the analysis, of how he blended law and humanities, and what impact that had, if any, on his general “lawyer” role, which I loosely define not only as a prosecutor and trial lawyer, but as an influential advisor. How did his philosophy reflect or influence his legal work, and how did it help place him in a position where he could apply that influence? Next week, while thinking about Cicero and his role, consider our discussion of Said and the public intellectual. How does Cicero add to that analysis?

**VI. Humanities as a Model of Service to Profession, Community, and Cause: Lawyers as Public Intellectuals, and Public Intellectuals as Teachers of Law.**

(18) 3.19.12 *and* (19) 3.21.12

Required Reading: Said, Representations of the Intellectual (entire text).

Lecture and Discussion Agenda: What is an intellectual (definitions vary, we can start with the definition provided by Said and those others that he cites in his lectures)? What is a lawyer? What is the lawyer’s role? Are we merely functionaries who orchestrate transactions and manage the procedural aspect of dispute resolution? Are we merely technicians? Clearly not. But, our ability to state our beliefs is sometimes harnessed by ethical and tactical considerations. As such, Said would argue that we are not true intellectuals.

However, some attorneys share important attributes with intellectuals, at least as Said defines them. Many of us are cause- oriented. Many advocates became a particular type of advocate because of a strong belief, whether in the “system” or the Constitution, or the more general “rule of law,” or a more specific interest group. Many lawyers are more tethered as advocates by day, but are outspoken “public intellectuals” during their free time (and many lawyers face consequences for that, whether through loss of clients or media scrutiny later in their careers). Many lawyers start in more traditional “lawyer” careers, and then use their experience and legal training to migrate to more of a “public intellectual’s” role. Certainly, we have already reviewed models of outspoken attorneys who are publicly, and importantly, committed to a cause, movement, or concept.

Ultimately, we will use Said's work as a point of departure for discussion of what our individual goals and purposes as attorneys are, whether we want to (or should/ should not) devote energy to the public intellectual role, and whether/ how we could even do so (and, if so, how we would need to alter or interpret a definition of "public intellectual").

*3.26.12 – No Class (Spring Break)*

*3.28.12 – No Class (Spring Break)*

## **VII. Drawing Upon Fiction to Infuse Focus, Life and Movement into Our Legal Writing and Insight into Our Interpretation of Legal Texts.**

**(20) 4.2.12 – All your careers, always read fiction outside of your professional reading to continually train yourself to understand how you use your chief tool as a lawyer: the written and spoken word.**

Required Reading: James Boyd White, *The Legal Imagination* (Abridged) (Chapter 2).

**(21) 4.4.12 – Posner's Take on Language for Lawyers**

Required Reading: (1) Posner, Ch. 8 ("Interpreting Contracts, Statutes, and Constitutions"), pp. 273-328; (2) Posner, Ch. 9 ("Judicial Opinions as Literature"), pp. 329-385.

Suggested Reading: Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West (1st Ed. 2008)).

Lecture and Discussion Agenda: We will consider how what we have learned to draw from literature and the other humanities can help us look more critically and clearly at legal authority, legal writings by our adversaries and other lawyers, and our own writing. Lecture will include suggestions for writing good law school exams and writing for your clients/ partners after you graduate. Slides: WRT "Rules" for good legal writing.

## **VIII. Further Focus on Posner's "Cast of Characters" in Literature – Using Literature to Study and Understand the People You Will Work With.**

**(22) 4.9.12 – How the Law Talks About Clients and Other People, and How Fiction Talks About Them.**

Required Reading: James Boyd White, *The Legal Imagination* (Abridged) (Chapter 3).

**(23) 4.11.12 – TBD/ Catch Up**

We will have covered a great deal of ground during the semester. I am leaving the remaining class sessions open so that we have flexibility to either spend more time during the semester on texts and questions that particularly interest us, or so that we can agree upon and discuss additional texts.

(24) 4.16.12 – TBD/ Catch Up

(25) 4.18.12 – TBD/ Catch Up

(26) **4.23.12 – Concluding Remarks**

### **How I Calculate Your Grade**

Class Participation – 25%

Midterm – 25%

Final – 50%

### **Absences**

When people skip class, the discussion suffers. Everyone gets two absences, no questions asked.

After that, unless you email me ahead of time to instruct me that you have a medical, family, or other legitimate problem or emergency (i.e., not “I had to be at home to let the bug guy in” or “I was badly hung over” (unless you were drinking with a famous lawyer or author)), I will deduct 5% from the class participation grade.

### **What (About) the Dickens (and Dostoevsky)?**

#### The “Second Track” Experiment

As a “second track” running, background assignment over the course of the semester, you will decide to read *either* Dickens’ Bleak House *or* Dostoevsky’s Crime and Punishment. Both appear long but you will find whichever you choose to be a quick read (particularly Bleak House) once you become accustomed to the author’s tone.

Your final exam will ask you to discuss what we have learned over the course of the semester by reference to Bleak House or Crime and Punishment. In other words, rather than having you regurgitate ideas from ground we covered together in class, I will ask you to use one of these “second track” novels as a source of examples to (in the context of your own thesis) generally discuss your views on what the humanities can teach lawyers (if anything). Do not wait until the end to read these books.

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FORGET FACEBOOK AND REALITY T.V. FOR A FEW MONTHS –

READ AHEAD.

*Good luck – I am available any time to help you work through the material.*