

# Introduction

Not many years ago, I bemused some fellow law professors by allowing a student to receive law school credit for a poetry course. I would not have done that student a favor if I had gone on to recommend him to a law firm as "quite a poet." The profession generally assumes that nothing could be more remote from law's theory and practice than poetry. While accepting that assumption myself, I occasionally used to wonder whether the time I spent reading my favorite poet, the lawyer Wallace Stevens, was really time spent off the job. Then over the last two years, while writing about the place of American pragmatism in legal theory, I felt, again and more strongly, that my attraction to Stevens had something to do with my work as a law teacher and scholar. That led me on to this inquiry into what might connect Stevens's poetry with the concerns of the practicing or the academic bar.

A recent development in legal scholarship has lent some outside support to this unlikely enterprise. The proponents of the new law-and-literature movement now urge that lawyers, or at least legal theorists, can learn from literary texts. For example, in a 1986 article in the *Harvard Law Review*, the legal theorist Robin West used her readings of some of Franz Kafka's stories to attack the tendency of lawyers who take their theories from economics to equate the law's Reasonable Person with Economic Man. Some legal scholars found her project absurd. But the most important of the legal economists, Richard Posner, took the challenge seriously indeed; he both responded to Professor West's article, and went on to write a book-length critique of the whole emerging tendency to base legal arguments on literary works.

Judge Posner insisted that Kafka's training and daily work as a lawyer do not mean that his stories addressed legal issues, and supported his argument with a sentence that seemed to speak



straight to me: "Wallace Stevens was also a lawyer . . . but no one supposes that Stevens's . . . poetry is about law."<sup>1</sup> Actually, with the current law-and-literature ferment, a few legal scholars and teachers now *do* suppose that Stevens's poetry is in some way "about law." Thus, in an article defending the law's specialized professional language, the dean of a major law school quotes extensively from Stevens, whom he describes as "not only a poet but also a lawyer."<sup>2</sup> Another respected legal scholar assigns several of Stevens's poems in a required introductory course in legal theory and method—and these two are not alone in acknowledging Wallace Stevens as a kind of lawgiver.<sup>3</sup>

With this kind of encouragement, I decided to try to articulate the intimations of connection I had felt between Stevens's poetry and my own thinking about law. I knew that Judge Posner was only stating the obvious when he denied any legal significance to the poetry of the lawyer Stevens. On the face of it, that body of difficult lyric-meditative verse has nothing at all to do with the legal world in which the poet made his living, and in which lawyers practice today. Stevens did not, as poets like Auden and Browning have, make law one of his subjects, nor did he, like Shakespeare or Donne, bring legal concepts or imagery to bear on other subjects.

Even if Stevens's poetry did echo his law work, most lawyers and legal scholars would still assign it only a decorative role in legal discourse—something to quote in an after-dinner speech, or to spice up an otherwise prosaic opinion. Thus, the profession finds strange indeed the far-reaching suggestions of the most prominent law-and-literature proponent, James Boyd White. He urges that lawyers should assimilate "the judicial opinion" to "the poem," and that, more generally, we should substitute a "poetic" for a "theoretical" form of writing and reading in legal education and practice.<sup>4</sup>

Professor White believes the study of literature can teach lawyers to reconceive their practice as a craft centrally organized around skills of humane writing and reading, rather than as the calculus of signals and sanctions portrayed by economic models of



the legal system. Other theorists, like Professor West, think literature can make lawyers and judges more empathic, more aware of the varieties of culture and the nuances of individual motivation, than can economics and rational-choice theory.<sup>5</sup> Still others, like Ronald Dworkin, stress the centrality of interpretation to both literary criticism and law, and argue that the study of literary hermeneutics can bring new insights to the lawyer's task of construing contracts and constitutions.<sup>6</sup>

To all these theories, Judge Posner has proposed an across-the-board countermanifesto on the side of professional common sense. He advocates a scholarly wall of separation that he intends as protection for both realms: "The literary should be a sphere apart" from the legal.<sup>7</sup>

In this book at least, I do not want to spend much time debating the place of literature in law, or even poetry in law, at the level of these abstract pronouncements pro and con. Yet without the movement of thought that the manifesto writers dramatize, I doubt that I would have pursued my own inchoate intimations into print. Moreover, an inquiry like this one is naturally seen as contributing a case study to the theoretical debate, and hence weighing for or against the admission of literary texts into the legal canon. So I should at least confess my conflicting initial impulses on the broad theories. These impulses form part of this study's "philosophy," in the lay meaning that William James gave to the word: one's "more or less dumb sense" of "the total push and pressure of the cosmos" as it bears on the issue at hand.<sup>8</sup>

On the side of separation, I feel the stylistic appeal of generic integrity; law is law, poetry is poetry, and efforts to splice or interanimate the two genres are likely to breed ungainly hybrids. Further, anyone who both knows legal academia and cares for poetry must pale a little at the thought of the law professoriate clumping through the garden in search of specimens to be displayed, dried and paraphrased, in law review footnotes. Finally, I think the idea that literature has direct and immediately practical uses for lawyers and judges has been seriously oversold. The rhetoric used for this oversell has then fed the academic tendency to



emphasize law's discourse at the expense of its actions and their material consequences. As a result, law-and-literature study in general (law-and-poetry study all the more) always risks falling into an apolitical and precious legal aestheticism.<sup>9</sup>

On the other side, the blurring or mixing of genres has its renovative attractions; there might be a *fisherman's* version of Wallace Stevens's observation that to a poet "moon-vines are moon-vines and tedious [but] moon-vines trained on fishing-twine are something else."<sup>10</sup> And as for the fragility of poetry, most of the time I doubt that there is any protected poetic garden for the lawyers to violate; the poets seem always to have been out of Eden, with the world all before them. A similar point bears on the central question of the practical and political consequences of studying law from a literary perspective; I cannot shake off the sense that we lawyers should be able to learn something useful from poets, those ultimate specialists in language, about our own inescapably linguistic business.

Thus, urges both to sharpen and to blur (or cross) the genre-boundary between law and poetry coexist for me, and this fact brings me to my third guiding impulse, one that is linked to my intuition that Stevens's poetry bears on law by way of the concerns of the American pragmatists. A pragmatist bias toward the importance of situation and context makes me suspicious of giving central focus to broad pronouncements on the Relation of Law to Literature (or Law to Poetry), whether assimilationist or separationist. My main interest is in what the poetry of Wallace Stevens has to do with law. I pursue that question largely animated by my own "dumb sense" of the conflicting impulses noted above—while recognizing, also in good pragmatist fashion, that even the most abstract theories can modify dumb sense when they give it voice and submit it to critical reflection.<sup>11</sup>

Thus, I undertake this study with impulses toward keeping law separate from poetry (common sense), toward exploring their connections (those intimations), and against overgeneralizing on the subject (pragmatism)—"of three minds, / Like a tree / In which there are three blackbirds."<sup>12</sup> Quoting these words of Stev-



ens's brings me to still another motive, the pull of his poetry itself. In pursuing my study, I hope to carry with me fellow unprofessional poetry readers, lawyers and others—even some who may in the past have been put off by this particular poet's provocative inaccessibility.

In my experience the poems eventually do yield up many of their secrets, while always keeping something back. Part of Stevens's lasting appeal is his capacity to evoke, in a wholly secular world, moments of wounding and healing mystery when "Intangible arrows quiver and stick in the skin / And I taste at the root of the tongue the unreal of what is real."<sup>13</sup>

Let me offer a sample, concededly law-unrelated. In what may have been his last poem, "Of Mere Being," Stevens wrote of a "gold-feathered bird" in "a palm at the end of the mind"; the bird sings a song "without human meaning . . . a foreign song," and so teaches "that it is not the reason / That makes us happy or unhappy." The poem ends thus:

The bird sings. Its feathers shine.  
The palm stands on the edge of space.  
The wind moves slowly in the branches.  
The bird's fire-fangled feathers dangle down.<sup>14</sup>

If this hits home to you, you might also be tempted by some of the questions it raises for me. The last line, its gaudy diction standing out from the plain of its predecessors, suggests a bird on the verge of fiery death, with a hope of rebirth further off. Does this connect it to Shakespeare's vanished phoenix, the center of another mysterious poem?<sup>15</sup> The static verbs ("shine," "stands," "moves slowly," "dangle") seem to give an offsetting glossy print or freeze-frame quality to the scene's tropical luxuriance. How does this relate to the hint of flame to come? And I also wonder about the precise location of Stevens's palm tree ("at the end of the mind . . . on the edge of space"). Is it the boundary between the imagined and the real? And what does *that* mean here? Such questions, and more, leave me on edge myself, always ready to fall back into the poem again.



Still, as eager as I am for companionship in reading this poem and others, my main aim is neither to promote Stevens by introducing new readers to his poetry, nor to add some amateur explication to the splendid body of expert criticism already available. Rather, I intend first to show poetry-reading legal scholars and theorists that this poet can add to our understanding of law. Second, I reach out to literary scholars and those interested in interdisciplinary cultural studies, and to general readers as well, with the hope that my legal theorist's angle might admit a distinctive light on this poetry.

My point for legal theorists, stated briefly, comes to something like this. We traditionally see legal disputes as posing binary choices: one side or the other wins; conduct is lawful or unlawful. The form of the judgment tends to induce in lawyers and legal theorists a matching binary approach to legal thought. Thus, we treat opposed legal principles and theories as if we must choose between them to maintain intellectual consistency, as if they were mutually contradictory mathematical theorems or scientific hypotheses. But plausible legal principles and theories are rarely precise enough to play such a role. They are better seen as guidelines, reminders of matters to be taken into account in judgment. They can thus readily coexist in useful tension, without contradiction, bringing to mind the opposed factors that the decision-maker should consider.

But legal thinkers resist this pragmatist middle way. Official jurisprudence favors the scientific or mathematical model, which has correct legal judgment following deductively from exact and impersonal principles. Given the usual binary character of legal thought, this official line then generates a jurisprudential opposition party that portrays legal judgments as entirely the result of individual intuition, creativity, or political will—this simply because those judgments are *not* dictated by the law's intellectual apparatus of principle, doctrine, and theory with the promised inexorability. Legal theory is too often characterized by absolutists and disappointed absolutists shouting past each other.

Wallace Stevens can speak to the lawyer or legal theorist as a



kind of therapist for the habitual and institutional rigidities of binary thought. Poetry is commonly seen in terms of an interactive opposition between romantic and classic: a dialectic, that is, between what Stevens called "imagination" and "reality," between creation and mimesis, between pride in the poet's power of invention and humility in the face of forces no power of invention can evade. The ability to hold conflicting generalizations in mind at the same time is one aspect of the special poets' virtue that Keats (speaking of Shakespeare) called "negative capability"—the ability to be "in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason," capable of "remaining content with half-knowledge."<sup>16</sup>

In this century, Wallace Stevens has carried forward perhaps more than any other poet in English the Shakespearean and Keatsian tradition of negative capability. This makes him a unique spokesman for that philosophical middle way that in modern thought has come to be called pragmatism, a form of thought that in my view is especially suited to law and legal theory. Although poetry will never be *necessary* to legal education, the lawyer with access to Stevens and certain other poets has at hand a unique cultural resource—a reinforcement of the slender body of legal theory that emphasizes theoretical tolerance and flexibility as a significant professional virtue.

What can looking at Stevens in this way do for those of his readers and students who are not professionally concerned with the law? My hope is to at least test the bounds of the ivory tower in which Stevens's unfriendly critics, in collaboration with some admirers, confine him. When compared to the work of modern poets such as Yeats and Auden, Neruda and Milosz, Rich and Lorde, Stevens's poetry quite naturally seems hermetic. Yet to the extent it speaks to central issues of legal theory, it is not irrelevant to social and political concerns.

My argument divides roughly into two parts. In the first three chapters, I bring out the stark gap between Stevens's poetry and the usual concerns of lawyers; in the last three, I try to show how, despite that divide, the poetry nevertheless helps to articulate a



pragmatist vision that contributes distinctively to legal theory. Chapter I considers Stevens's involvement with law in his own life. He was trained as a lawyer but worked for an insurance company. Did he do so as a lawyer or a businessman? I will examine why this question has mattered to some of his literary commentators, and conclude that any connection between his poetry and law does not turn on how he made his living. Stevens did indeed literally practice law, at least in a way, but the real question is whether his poetry should bring us to treat him as a lawyer in some more metaphorical sense—a "law-related" writer, a legal authority, an acknowledged legislator.

I then proceed to examine two approaches used by law-and-literature proponents to bring literary works into the legal canon, and I conclude that Stevens's poetry fails on both counts. From the unpeopled world of his verse he does not, so I argue in Chapter II, teach otherwise hard-hearted lawyers or judges the equitable virtue of fellow-feeling, in the way imaginative writers are often especially good at doing. Nor does he in his own life or writing promote Professor White's conception of law as an enterprise that is literary and even poetic because centrally involved with the untranslatable, nonpropositional aspects of language. Rather, as I show in Chapter III, Stevens sharply distinguished between a prosaically utilitarian, masculine, and coercive world of law on the one hand, and a shadowed imaginary, ambiguous, and androgynous world of poetry on the other.

Having rejected various likely connections between Stevens's poetry and law, in Chapter IV I turn to consider the other side. Stevens's poem "The Motive for Metaphor," which I examine in some detail, seems at first to confirm his belief in a separation between a poet's imagined land of metaphor and a harsh real world of power and literal speech. But a further look, both at the poem's words and at their context in the poet's life and times, suggests a breach in that wall in the capacity of language and imagination to contribute through metaphor to the construction of reality itself—an idea central to Stevens's poetry. In Chapter V, I widen the perspective by considering more generally whether



Stevens writes as a philosopher, and implicitly a legal philosopher, when he addresses his central poetic theme of the relation between imagination and reality by way of language. I conclude that his poetry on this theme embodies a philosophical (and specifically pragmatist) portrayal and account of the mind's workings—one that can be of special interest to the theoretically inclined lawyer. In Chapter VI, I further suggest how Stevens's poetic version of pragmatism bears on the debate between legal theorists who stress the (classical) rule of strict law and those who stress the (romantic) virtues of equitable discretion. I close by reformulating some important limits on my claims, and by arguing that there is a paradoxical affinity between pragmatism, with its mundane stress on the centrality of practice, and the expression of its theories in the form of poetry.

The balanced structure I have sketched here may suggest a balanced contribution to the law-and-literature debate: three chapters for separation, three for assimilation, bracketed by an introduction and conclusion judiciously giving fair weight to both sides. While not inaccurate, this description seems to me to miss the improbable character of the inquiry itself. My hypothesis is not the plausible claim that studying, say, *Billy Budd* or *The Trial* can contribute to our understanding of law; what I am talking about is the legal implications of *the poetry of Wallace Stevens*. It was with a sense that I had been sent on a most far-fetched and unpredictable venture that I set out to pursue my intimations of connection between Stevens's poetry and legal theory. I hope to have preserved some of that feeling in the following report on what I found in my explorations.