
THE CODIFICATION OF WESTERN LAW & THE POETHICS OF DISCLOSURE¹

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Speaking perceptively of the criminal procedure in *The Brothers Karamazov*, Edward Wasiolek points out that the “legal process is an obstacle to the facts . . . [It] brings forth only technique, ambition and triviality.”² Wolfgang Holdheim, writing on the same subject, observes that the legal error at the end of that novel is indicative of the ambiguities inherent in modern literature’s approach to reality.³ These critics have shown a sensitivity to a topic otherwise rarely treated: the use of the legal theme within the modern novel not merely for dramatic effect, but also for thematic, structural and formal purposes not explicitly stated by the writer.

Why is the novel a particularly happy generic medium for the intense development of a legal theme? The answer launches us into a more complicated theoretical realm than we might intuitively expect, but it is one worth entering in an effort to understand the full import of the theme as actually used by these novelists. It involves a three-part response encompassing dramatic, historical and formal elements within the genre.

The “dramatic” aspect indigenous to the artistic use of the law stands out, of course, as a common feature in a variety of literary periods and genres.⁴ Epitomized in the “trial scene,” the legal theme is employed in tragedy, for example, as an almost perfect Aristotelian device for furthering the dramatic “action,”⁵ and for producing the reversals and discoveries that lead to catharsis within the audience. In comedy, the trial provides an excellent medium for “untying the Gordian Knot,” and restoring the characters and their environment to a properly happy, anterior condition.⁶

But these observations about the efficacy of trial scenes for dramatic effect on the stage leave open at least two questions. First, how may we distinguish the law’s dramatic appeal to literary artists from that of other human professional endeavours that are equally as provocative in reality but far less frequently depicted in art? Second, how do we proceed to explain the interest of *narrative* as opposed to *theatrical* art in the law?

If we observe that the law provides by the very structure of its operation a culminating point inscribing all the elements of theatricality otherwise

associated only with artistic productivity, we are helping to answer our first question. For that single element most surely linking the two fields in a unique way is the mutual dependence on *language itself*.

Indeed, there inheres both in literature and the law, as a necessary intermediary toward the ultimate dramatic articulation of their essential components, the task of reconstructing a given and otherwise formless reality into a governable narrative structure. The literary artist implicitly recognizes that the law's most dramatic moments duplicate and metaphorize the literary experience of employing language to bring form to a given experience hitherto inarticulate and unstructured.

But a distinction must still be drawn between the dramatic (or scenic) evocation of the legal theme (usually epitomized in a "trial scene") and the *narrative* interest in the law, which may or may not culminate in a trial scenes. Why would the epic or the novel treat the law with even greater frequency than was the case with tragedy or comedy? It does seem reasonably self-evident that the immediacy of the visual moment is lacking in novelistic trial scene, which are always mediated by some form of narrative voice. This may be why the legal element in epics and novels is sometimes overlooked, or, when recognized, criticized as dull and repetitive.⁷

Yet the 13th century Icelandic epics and the 19th and 20th century novel demonstrate the artistic attraction to the law within narrative genres. Here we must extend our inquiry beyond the dramatic and into historical and formal elements unique to certain generic periods. In the present context, and in light of parallel research by others on the Icelandic epic,⁸ we confine our discussion to the modern novel.

The confluence of several important developments within 19th century law may partially help to explain that same historical period's literary fascination for the legal theme. Perhaps primary among these was the tendency across the continent of Europe toward codification of all major bodies of law. Napoleonic France was in the vanguard of this movement, and the French Codes of the first decade of the 19th century became a model for the rest of

Europe.⁹ In the Alexandrine Russia of Dostoevski's day the laws were being reformed and codified, and the Codes of 1864 became a subject of conversation among literary artists and novelistic characters too.¹⁰ Germany, a late starter (but a fast finisher) in the quest for national self-definition, codified its laws on the Napoleonic model at the turn of the century.¹¹

These several codifications brought continental law forcefully to the attention of most educated Europeans of the period. Writers in general, but especially novelists intending to depict influential factors within their society, often assimilated with particular precision the language and values of the developing legal institutions. Sometimes, as in the cases of Balzac, Dickens, Dostoevski, Flaubert, Melville, Zola and (later) Solzhenitsyn, criminal procedures and trials came to be autobiographical realities, through these authors' voluntary or involuntary participation in legal matters.¹²

More subtly, the codification of the laws may have attracted writers to the perception of the innate similarities between legal and literary forms of expression. The emphasis on the continent of Europe upon the codified legal *text* as the source of various complex analyses appealed to hermeneutic problems associated with an increasingly complex and self-conscious literature as well.¹³

In England and America, the common-law system moved far more slowly toward codification of any kind. But the institutions of legality nonetheless advanced into areas of complexity appealing to novelistic sensitivities. As the century produced a highly technical and commercialized society, so there came to be a rise in the importance of the courts to settle disputes resolvable in no other forum.

In every major western literary culture, courts and their emissaries, lawyers, were coming to be perceived as powerful and even threatening presences. But because literary artists particularly recognized *themselves* within certain aspects of 19th century law and procedure, their use of legality as a novelistic theme went far beyond externally-imposed criticism and into a realm of self-conscious association. Like their spiritual ancestor, Hamlet, literary writers lashed out at the spectre of lawyers not so much to take an opposing profession to task as to articulate better their own deepest uncertainties.

For within the novel itself, historical factors were at work. Alive and creating in a period of shifting and even disappearing values, writers perceived the law as the only remaining voice of institutional and social authority. But as artists gradually recognized, 19th century law was far more a procedural system than a body of dictates as to substantive human behavior. As in their own genre, so too in the law, formal complexity seemed to become an end in itself as over and above the exposition of moral, ethical or political values. Epitomized by Flaubert, this tendency evoked in many legalistic novelists a troubling and even self-critical recognition.

Perhaps the best way to articulate what may have been the novelist's basic observation about the law is to register the inclination during the 19th century away from the mode of judgement and toward the mode of wit.¹⁴ This tendency both attracted the writer to, and repelled him or her from, contemporary legality. By this paradoxical response to law, the novelist best managed to express an analogous ambiguity about his or her own endeavour.

The distinction between wit and judgement, central to the comprehension of 19th century legality, serves too as a subtle indication that legality and a form of Nietzschean *ressentiment* are powerfully linked phenomena in the modern novel.¹⁵ John Locke was one of the first modern thinkers, in his *Essay Concerning Human Understanding*, to make the distinction:¹⁶

And hence perhaps may be given some reason of that common observation,—that men who have a great deal of wit, and prompt memories, have not always the clearest judgement or deepest reason. For wit lying most in the assemblage of ideas, and putting those together with quickness and variety, wherein can be found any resemblance or congruity, thereby to make up pleasant pictures and agreeable visions in the fancy; judgement, on the contrary, lies quite on the other side, in separating carefully, one from another, ideas wherein can be found the least difference, thereby to avoid being misled by similitude, and by affinity to take one thing for another. This is a way of proceeding quite contrary to metaphor and allusion; wherein for the most part lies that entertainment and pleasantry of wit, which strikes so lively on the fancy ...

Locke, then, describes wit as an imaginative process of metaphORIZING: one observed phenomenon is cleverly associated with another. Judgement, on the contrary, avoids fanciful reconstructions and seeks, instead, careful distinctions. Resisting personal creativity, the "man of judgement" reasons soberly, and according to pre-established norms. Hence the judge brings the general sense of justice of his society to bear on each particular case which comes before him.

Indeed, to the present day, European judges theoretically look to the written codes as the sole and absolute guide for distinguishing each litigable circumstance. And whereas in the Anglo-American system more dependence is placed on the particular facts of any case, the advocate's urge to reason inductively from facts to authoritative precedents his or her findings of similes¹⁷ is supposedly mitigated by the judgmental insistence that those authorities actually apply to the given disputed situation.

Friedrich Schlegel, writing at the beginning of the literary period under discussion in these pages, grasped the penetrating reliance on innate wisdom that theoretically differentiates the adjudicator from those (like the poet and advocate) whose enterprise is defined by wit:¹⁸

For in all such cases the decision invariably depends upon an immediate feeling of propriety, which, though first called forth and developed by the social intercourse of life, is in truth original and innate. Such, indeed, it must ever be. For where it does not exist naturally, it can never be learned nor artificially acquired. The original want of this inward feeling can never be replaced by any varnish of external culture, however brilliant. And the case is also the same even in the sphere of science; for instance, in the shrewd, searching glance by which the skillful physician makes his diagnosis of disease; or in the clear, perspicacious sagacity which enables the judge, in some highly complicated suit or doubtful criminal trial, to seize the right point on which truth and justice hinge. For in judicial cases, with much that admits of demonstrative proof, or which, as matter of fact, is unquestioned, there is still more where nothing but this psychological penetration, long practices in such matters, and to which past experience has given confidence in itself, can immediately see through all the sophistical wiles not only of the pleadings and the skillful advocate, but also of the litigant parties themselves, or of the crafty criminal.

With the acute observational skills at the heart of their craft, modern storytellers soon perceived that contemporary law was dominated by wit and not by judgement. It fell short of the intuitive ideal of justice that many novelists perhaps over-ingeniously still identified as the law's ultimate purpose. Only in more "simple" times (such perhaps as Locke's own, for he was able to say that "judgements of probability are rooted in our faith in the ultimate rationality and morality of the universe"¹⁹) would a society's general sense of how to act invariably assist the good judge (or the jury) to sift out that aspect of each case indicative of the "just" solution. But those very writers who were most interested in the law were also aware of the prevalence in their own society of relativism and even *ressentiment*, instead of any universal sense of justice.

In place of judgement, modern law too frequently substitutes sophistry, artfulness and wit. The cleverest lawyer - the one who best manipulates procedural strictures, or who most convincingly re-creates a particular fact pattern in order to append it to prevailing authorities sympathetic to his or her position - will "win," unimpeded by the quickly disappearing Solomonic sense of the over-riding wisdom. More stress is placed on the creative process of re-formulating reality to suit a subjective end than on making certain that society's articulated position is applied faithfully to each appropriate case.

But does not the novelist, too, display the same tendency in the 19th centu-

ry? Nietzsche in fact forcefully indicts many storytellers of that period (perhaps especially Flaubert), more concerned with their particular artistic premises than with faithfully rendering a healthy, already assimilated reality:²⁰

A born psychologist instinctively avoids seeing for the sake of seeing . . . Such a man never works "from Nature"—he leaves it to his instinct, to his camera obscura to sift and to define the "fact," "nature," the "experience." The general idea, the conclusion, the result is the only thing that reaches his consciousness. He knows nothing of that willful process of reasoning from particular cases. What is the result when a man sets about the matter differently? When, for instance, after the manner of Parisian novelists, he goes in for notebook psychology on a large and small scale. Such a man is constantly spying on reality and every evening he bears home a handful of fresh curios. . . . But look at the result!

Because of the modern novelist's self-conscious participation in the stance of relativism and wit, storytellers proceed to emphasize in their work the legal tendency toward artistic falsehood as opposed to substantive truth. Indeed, if they cast their eyes upon the "wittiest" figures in the legal world, it is because storytellers see reflected in such characters their own proclivity to create falsely in a social environment totally void of generalized positive values and increasingly imbued with *ressentiment*. In the same way, the novelist may see in the law's procedural complexities a fair barometer of modern literature's own self-conscious formal concerns in an historical period that can no longer locate enduring substantive goals.

The form of the novel, in other words, reflects the central theme of the law within these works. In attempting to isolate one or two formal elements unique to the novel as a genre, and then to apply them to the use of legality within several novels, we incorporate the earlier discussion of drama, history and even *ressentiment* on the level of novel theory.

Georg Lukacs has submitted that the novel as a genre stems from the epic, rather than the tragic, because both epic and novel are concerned with what *is*, while tragedy deals with what *should be*.²¹ The 19th century realist novel paints with a broad brush the vast institutions of its day, among these, as we have seen, the law. But the mimetic portrayal within a novel differs from that within a tragedy, and the terminology of drama should probably be avoided when speaking of a novel.

One essential difference between tragedy and novel has been identified by the Russian formalist critics. A novel does not rush ahead with a given action, but rather takes its time, obfuscating and retarding the advance of the story through a variety of formal techniques including the "laying bare"²² of those very authorial devices. It can be said, with Shklovksi, that the *plot* of

narrative art is more "the fashioning of the subject of the story as produced by the introduction of interrupting digressions"²³ than it is any single action performed by the characters within the narration.²⁴

These peculiar characteristics of the novel form are perfectly served by a variety of novelistic uses of the law. The "trial scene" itself, when narrated within a novel, sometimes appears to be a needless repetition of events that the earlier narration has recounted in their original form. For example, many readers become restless during the ninety-page section of *The Brothers Karamazov* called "A Judicial Error", the narration of the trial of Dmitri Karamazov for the murder of his father. The testimony at the trial seems a mere duplication of narrative time, the introduction of prosecutor and defense attorney an irrelevance to the sequential development of the "plot," and the lengthy closing arguments of the lawyers (part of which is called "An Historical Survey," a deliberate invocation of the subject matter of Book One of the novel, called "The History of a Family") a digressory bore only tangentially relevant to the "action" of the novel.

The response of boredom is exacerbated within the reader who has recently completed another large legal section of the novel, "The Preliminary Inquiry." Impatience with the detailed depiction of the criminal procedure (which encompasses almost one-fourth of the text) is indicated by the virtual absence of any detailed analysis of "The Preliminary Inquiry," even by critics sensitive to the legal theme such as Wasiolek and Holdheim.²⁵

Still, there can be no overlooking the fact that Dostoevski made a decision in his greatest masterpiece to portray with significant detail and accuracy a complete continental criminal procedure. We may realize on closer reading that what seems at first to be not a single but a double repetition of a story already revealed by earlier pages of the novel, turns out to be formally and substantively one of the most vital aspects of the work. With a typically keen eye for detail,²⁶ Dostoevski demonstrates that the law (embodied in examining magistrate Nikolai Parfenovich Nelyudov, and deputy prosecutor Ippolit Kirillovich) gradually and subtly reduces the criminal suspect to a creature of its own making. Facts are imaginatively distilled and transformed through the process of preliminary investigation and then trial until the original reality is thoroughly obscured.

The lawyers "create" Dmitri, they create the motives for the crime, they create the "history of a family" and ultimately they create a full-fledged nihilistic theory of social values.²⁷ The lawyers, in short, duplicate the techniques of the writer himself, laying bare his narrative enterprise. Indeed, the criminal procedure almost precisely parallels the literary procedure within the novel. Both move from an exposition of the facts of the crime (the "Preliminary Inquiry" being the equivalent of the novel's early rendition of the events surrounding the crime), to the narrative articulation of a theory of reality predicated on those facts (the trial, which even includes a re-statement

by the lawyer of the Karamazov family situation, providing a duplication of the novelist's own "philosophy" of reality). In this way, the erroneous outcome of the trial attains an immense self-critical significance. If the legal process ends in falsehood by finding Dmitri guilty of the murder, so the novelistic attempt to recreate a given reality into a verbal form may also result in distortion and negativity.

Yet the cosmic implications of the legal theme within *The Brothers Karamazov*, and other similarly structured novels, cannot be faithfully perceived unless readers deliberately *brake* their temporal voyage through the novel's pages. They must, in view of subtly conflicting testimony,²⁸ *delve backwards* into earlier sections of the text in order to test the accuracy of the developing legal theory against the suspect. Without taking this unusual step, which differs from a re-reading of the text after completing it once in full, the reader will fail to see the care with which Dostoevski has treated the smallest details of the legal procedure. I have analysed this phenomenon as regards several seminal "legal novels," for no less insistent analysis of the legal element will do justice to its surprising theoretical ramifications.

The novelist, after all, has presented us with a text almost supersaturated with details. Unlike the dramatist, he appears less concerned with the ongoing development of an action than with the exposition of data that seems to retard that development. But within the retardation lies the significance.

For it is fair to say that the negative implications of thematic legality in literature are furthered by the form of the novel itself. All that is absolute, including the individual's quest for meaningful perception, has broken down in the late 19th century, even the expectations of a reader entering the aesthetic experience of the work of art. Like the jury after the case is closed, readers will fall into error as to the notion of reality presented by the writer unless they make a conscious effort to alter their traditional behaviour *vis-a-vis* a temporal art form. They must force themselves to "re-read" parts of a text before they have even completed the whole.

What Lukacs has said of the short story applies to the longest novel as well: "It sees absurdity in all its undisguised and unadorned nakedness, and the exorcising power of this view, without fear or hope, gives it the consecration of form; *meaninglessness as meaninglessness* becomes form; it becomes eternal because it is affirmed, transcended and redeemed by form."²⁹

Yet, going one step beyond Lukacs, the formal reflection of meaninglessness through the legal thematic ironically serves to disclose the iron-hard fundamental *truth* of the self-annihilating novelistic statement. The novelist first sets forth the crime, *as it "actually" occurred*.³⁰ He or she then has an examining magistrate, conducting a preliminary inquiry, reformulate the events of the crime, now somewhat altered. Finally, he or she has the prosecutor at trial create a lengthy narration of the crime, by this time substantially differing both from the "actual" rendition and from the second-level

exposition of the preliminary inquiry.

In other words, as opposed to most other novelistic storytelling, the phenomenon of the criminal procedure allows the author to establish an absolute (the original narration of the incident) against which the verbally-oriented characters' rendition of the incident can be tested, *in terms of right and wrong*, justice or injustice. However ambiguous the original narration may be, it always - in such stories - occupies an unusually privileged place.

Thus the formal harmony of legal procedure and novelistic structure helps respond to the overwhelming thrust of modern literary criticism, that fictional constructs exist in a sphere of relativized truths based only on the intrinsic play of poetic language itself, while it also challenges those other critics whose idea of truth in the novel anachronistically ignores the utter breakdown of traditional, social, religious and literary values during the modern period. Kenneth Burke's excellent argument that, unlike semantic meanings, "Poetic meanings . . . cannot be disposed of on the true-or-false basis,"¹ fails only in the narrative area in which the novelist purposefully establishes a spontaneous truth against which all subsequent narrative exegeses within the work offend.

The modern writer finally creates a framework of absolutes — or, perhaps better, "contingent absolutes" (although the distinction is of minor importance here) — utterly absent in the surrounding culture. Novelistic meaning, like novelistic form, appears to undermine itself and can be discovered only by the most careful perception of a fundamental "truth" (material, not metaphysical) created deliberately by the novelist in order to generate a self-critical dialectic. The rather vague and safely humanist "filling-out" of the poet's meaning, suggested by Burke,² is contradicted by the concrete association of the storyteller with a legalistic process tangibly embodying truth and falsehood as vitally dynamic notions, the process of the quest for justice in a court of law.

NOTES:

¹ I am pleased to publish this piece, which dates to 1976, in this forum. A paper offered at the Society for the Humanities of Cornell University and originally entitled "The Literary Lawyer 'Lays Bare' his Novelistic Creator," this slightly revised text has not been previously published. However, I have amended the footnotes to foreground some subsequent writings in which I elaborate a few of the paper's claims. These include *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven: Yale University Press, 1984); and "Law in and As Literature: Self-Generated Meaning in the 'Procedural Novel'", in Koelb and Noakes (eds.), *The Comparative Perspective on Literature* (Ithaca: Cornell University Press, 1987), pp. 224-32. The titular term "Poethics" refers to my *Poethics: And Other Strategies of Law and Literature* (New York: Columbia University Press, 1992), where the present paper's section on wit and judgement is partly elaborated.

² Edward Wasiolek, *Dostoevski: The Major Fiction* (Cambridge: MIT Press, 1964), p. 183.

- ³ W. W. Holdheim, *Der Justizirrtum als literarische Problematik* (Berlin: de Gruyter, 1969), pp. 10-42.
- ⁴ In addition to the modern novel, fifth century Greek tragedy, Medieval courtly poetry, the Icelandic epic, Shakespearean and Jacobean theatre come to mind as genres strongly attracted to the presentation of legal dilemmas.
- ⁵ In *On The Art of Poetry*, Aristotle of course identifies the "Fable or Plot" (the action) as "the end and purpose of the tragedy." (Oxford: Clarendon Press, 1959), p. 37.
- ⁶ See Northrop Frye, *A Natural Perspective* (New York: Columbia, 1963), p. 119ff.
- ⁷ Analyses of *The Brothers Karamazov*, for example, rarely if ever go beyond the mere mention of "The Preliminary Inquiry," a sixty page section of the novel. See, for example, Konstantin Mochulski, *Dostoevski: His Life and Work*. Trans. Michael A. Minihan (Princeton: Princeton University Press, 1967), Chapter XXIII, for the traditional approach to that section of the novel (ie., one line of analysis). Compare Belknap, who, in the midst of his excellent chapter on the novel's narrative structure, devotes only several sentences to the inquiry, p. 92, 99ff, and who makes no specific mention throughout his book of any of the lawyers in the novel. See the only slightly longer analysis of the thematic in Frank Theiss, *Dostojewski* (Stuttgart: Seewald, 1971), 215ff.
- ⁸ See *a propos* of the Icelandic epics, Lee Hollander, *The Sagas of Kormak and the Swornn Brothers* (Princeton: Princeton University Press, 1949), p. 80. For a recent study of law in German epic literature, see Ursula R. Mahlendorf and Frank J. Tobin, "Legality and Formality in *Nibelungenlied*, *Monatshefte* 66 (1974): 225-238. Work is being currently developed on this subject by Professor Alan J. Berger of Cornell, to whom I am indebted for his observations about law in the Icelandic sagas.
- ⁹ For an excellent compendium of articles, notes and cases dealing with the codification phenomenon in 19th Europe, see Rudolf B. Schelsinger (ed.), *Comparative Law* (Mineola: Foundation Press, 1970), pp. 203-267; and Charles Szladits (ed.), *European Legal Systems* (New York: Columbia University Press, 1972), pp. 131-146.
- ¹⁰ For the influence of the Napoleonic codification upon the Russian Codes of the 1860s (and, hence, to some extent, upon the early Soviet codes as well), see, for example, Samuel Kucherov, *Courts, Lawyers and Trials Under the Last Three Tsars* (New York: Praeger, 1953), Chapter One; see also, V. Slucevski, *Ucebnik Ruskovo Ugolovno Protsessa* (St. Petersburg, n. p., 1895), pp. 184-91.
- ¹¹ See Schlesinger, ed., p. 215.
- ¹² Dostoevski's harrowing personal experience with Tsarist criminal law and procedure early in his life (he thought he was about to be hanged, but the Tsar's officers were merely "staging" the event prior to sending him into exile) seemed in part to compel him to follow later developments in the law and even to file pleas in court for a variety of defendants. See Kucherov, p. 168f.; and Linner, *Dostoevskij on Realism* (Stockholm: Almquist, 1967), p. 1137ff.; Aimée Dostoyevski, *Fyodor Dostoyevski*: (New York: Haskell House, 1972) 52-61, for Dostoevski's use of specific trials as the basis for his depictions of legal characters. For Flaubert's famous brush with the law, see the fascinating transcript of the trial of *Madame Bovary* in Flaubert, *Oeuvres completes* (Paris: Seuil, 1964), II, pp. 724-750.
- ¹³ See Gadamer's association of literary and legal hermeneutics in *Truth and Method* 36ff.; 274-278. See also, Weisberg, extended review of J.B. White, *The Legal Imagination* (1973), *Columbia Law Review* 74 (March, 1974): 327-337. Literary

artists attracted to the law frequently raise the issue of interpretation of texts within their own works. To cite only two: Shakespeare, by virtue of the “casket plot” in *The Merchant of Venice*, a subtly fitting preliminary to Portia’s “tricksy” handling of the law during the trial scene; and Kafka, who included the puzzling text “Before the Law” in *The Trial*.

¹⁴ See, Weisberg, *Columbia Law Review*, 332ff.

¹⁵ See my *The Failure of the Word* (1984) for the elaboration of this thought.

¹⁶ John Locke, *Essay Concerning Human Understanding* I (Oxford: Clarendon, 1894), p.203.

¹⁷ The American lawyer reasons, with wit, from particular facts to general authorities. He strives to see the presence of a similitude between his client’s version of the facts and some pre-existing authority, usually a similar but rarely an identical case. Thus, he might say to the court, “As in *Smith v Smith*, wherein the court stated that a manufacturer could be held liable to the ultimate consumer for inherently defective goods, so in our case, defendant was negligent and should be held liable to my client.” The court’s responsibility, on the other hand, is to assure that the lawyer’s exercise of wit does not offend against the inherent meaning of the precedent authorities. It exercises its *judgement*, its reasoning *from* the general authorities to the new facts. The high court of New York (the Court of Appeals) put its court’s function this way:

“. . . there is neither need nor desirability to work a wholesale abandonment of rule and principles in order to resolve the issues in this and the cases being decided by the court at the same time. It is not in the grand tradition of the common law to do so. Most important, it is dangerous because abrupt departures in the development of the common law are not likely to be free of policy error and are disruptive of the law’s stability. Evolutionary development of the law continues to be the lodestar for judicial innovation in the law, burdened as it is by the braking process of *stare decisis* and the obligation to preserve predictability. Similar inhibitions, for obvious reasons, do not apply to the legislative process, where error may be summarily corrected.” (*Scurti v City of New York* reported in *New York Law Journal*, 15 July 1976, p.4, column 3).

¹⁸ Friedrich Schlegel, *The Philosophy of Life and Language*. Trans. Morrison (New York: n. p., 1848), p. 440.

¹⁹ Locke, *Essay on Human Understanding*, p. cxxi.

²⁰ Friedrich Nietzsche, *Götzen-Dämmerung, Werke*, VI, p. 109. André Gide quotes this passage in his influential book, *Dostoïevski* (Paris: Gallimard, 1964), p. 138; Gide asserts that “Dostoïevski n’observe jamais pour observer”. Hence, Nietzsche’s relative admiration for Dostoeïvski (except for the latter’s rococo sentimentalism) and not for Flaubert and the French school. Although Dostevski was, very definitely, a “notebook novelist.” (Linner, p. 54). His was a deductive (non-witty) method, *from* his deeply-felt conceptions *to* the specific observations of reality. See Wasiolek, Introduction to *Notebooks of “The Brothers Karamazov”* p.18. Nietzsche’s stance on the existence of a “just outcome” - a surprisingly “unpostmodern” stance - is set forth at II, ii of *The Genealogy of Morals*. See my *The Failure of the Word*, op. cit.

²¹ Lukacs, *The Theory of the Novel* (Cambridge: MIT, 1971), p. 47.

²² The term “retardation” (the Russian formalist use of the word “tormozenie” also implies “putting on the brakes”) and the term “laying bare” derive from Russian Formalist theory. Relevant excerpts on these subjects are given in English in L. T. Lemon and M. J. Reis (eds.), *Russian Formalist Criticism* (Lincoln: University of Nebraska, 1965), pp. 27 and 94.

²³ Shklovski, "Sterne and the Theory of the Novel," cited in part in Lemon and Reis, *ibid.*, p. 57.

²⁴ In his "Preface" to *The Ambassadors*, Henry James furthers the traditional Anglo-American notion that the "story" determines the strength and the worth of any novel. The Russian formalists would dispute this view, and it is at least arguable that James' own novel will survive *not* because of Lambert Strether's utterance to Bilham in Gloriani's garden (James' "central" idea in the work), but because of elements of detail, doubling, and narrative language, none of which the author emphasizes in his Preface.

²⁵ See above, footnotes 2 and 3. A "lengthy" analysis of the preliminary inquiry is the one-paragraph approach of Frank Thiess, *Dostojewski* (Stuttgart: Seewald, 1971), p. 216ff.

²⁶ See Linner, *Dostoevskji on Realism*, p. 143.

²⁷ On the nihilistic approach of defense attorney Fetyukovich, see Holdheim, *Justiizirrtum*, pp. 17-30.

²⁸ Only a reader with a photographic memory could recall, without actually turning back to an earlier part of the book, the subtle falsehoods that Dostoevski brilliantly makes a part of the legal process. To cite but one example among many, the lawyers question Dmitri about the mysterious 3000 roubles, which they claim he took from his father's room after murdering the old man and then squandered in an orgy at the Mokroe Inn. During the preliminary inquiry, they "prove" that Dmitri had previously expended 3000 roubles at a first visit to the inn; he claims that he had saved 1500 of the earlier 3000 roubles, and that the money he has just spent at the orgy came out of those 1500 roubles, not out of his father's money. The issue is vital to the lawyers' case against Dmitri, but it is resolved on a variety of false evidence. To determine this falsehood, which is partially caused by Dmitri's own faulty memory of earlier events, readers have to take the trouble of interrupting their reading and returning to earlier parts of the narrative. Only by virtue of this procedure can the careful and seemingly perfect construction of the lawyers' case against Dmitri be disproved. (See, on the subject of the 3000 roubles, pp. 116, 149, 381, 458, 624 and 634 of the novel, Signet edition, 1957). The latter three citations are from the legal procedures in the case; the first three are from earlier points in the narrative that contradict the legal case, but which are either not discovered in time to save Dmitri or not discovered at all.

²⁹ Lukacs, *Theory of the Novel*, p. 51ff.

³⁰ I call this first narration the "anterior position." See my "Law in and as Literature: Self-Generated Meaning in the 'Procedural Novel'", in Koelb and Noakes (eds.), *The Comparative Perspective on Literature*.

³¹ Kenneth Burke, *The Philosophy of Literary Form* (Berkeley: University of California, 1973), p. 144.

³² *Ibid.*, 145ff. In *Language as Symbolic Action* (cited in Part Two), Burke effectively observes the similarities between rhetorical and poetic expression, but emphasizes, of course, the possibility only in the latter case of concern "with symbolic action for its own sake." (p. 296) A fascinating emanation of the great legal novels, however, is that symbolism (and hence relativism) is transcended by the tangible establishment of truth in the early sections of the work. In a sense, poetry's symbolic essence cedes to the narrator's urge to demonstrate (however subtly) the falsehood of verbal reconstructions. The poet becomes a rhetorician, or an advocate, of anti-narrationism.