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THE GOOD, THE BAD AND THE UGLY: JUDICIAL LITERACY AND AUSTRALIAN CULTURAL CRINGE

Percy Bysshe Shelley, while claiming poets to be the 'unacknowledged legislators of the world',[1] had little to say on the subject of noteholders' voting rights. He is, nevertheless, invoked at length by Mr Justice Brooking in a recent case in the *Australian Company Law Cases*, in *ANZ Executors & Trustees Ltd & Anor v Humes Ltd & Anor*,[2] and the same judge's *penchant* for literary allusion is further revealed in his subsequent invocation of William Shakespeare on the subject of the 'clean hands demanded by equity', in *PS (Enterprises) Noms Pty Ltd v Humes Ltd & Anor*.[3] In this, even in the context of commercial law, there is nothing extraordinary. Literary allusion has always flourished, even on the 'bleak prosescape'[4] of Australian legal writing, and even the most cursory review of our judicial prose soon reveals it as liberally seasoned with quotation, ranging from mere literary 'springings to mind' and the odd apt phrase to extended quotation and the use of resounding literary overtures, as in Legoe J's opening invocation of Virgil's *Georgics* on the subject of beekeeping in *Stormer v Ingram*,[5] and French J's recent use, in the Federal Court, of Coleridge's *Kubla Khan* to introduce 'Perth's own pleasure dome, the Burswood Resort Complex', situated, in this instance, not on 'Alph the sacred river', but on the foreshore of the Swan.[6]

Allusion of this kind, marginally relevant but of sound aesthetic provenance, lightly inserted but suggesting vast allusive reserves, certainly enhances the texture of judicial prose, and may even contribute in useful ways to sustaining a learned and authoritative judicial tone. But what the allusions do not do, in the instances given above, is to add either useful information to the judicial narrative of the facts or even rhetorical weight to the legal argument. And while some legal readers may appreciate almost any intrusion of literary colour into Australian legal discourse, it is suggested, for future forays of the kind, that the true destinies of judicial literary allusion are higher than these instances suggest: that allusion of the kind has been known, even in the spare traditions of Australian judicial literature, to run far beyond mere decoration towards the provision of essential social, legal and lexicographical information. It has assisted in important ways towards judicial disposition of the facts — significantly structuring the particular 'narrative' to be adjudicated — and it has even been an important and authoritative ploy in legal argument, with judges drawing on the power of authoritative literary texts to insert a potent metaphor, to evidence the strength and tenacity of community feeling on

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1 From 'The Defence of Poetry', in ED Jones (ed) *English Critical Essays: The Nineteenth Century* Oxford University Press, Oxford 1971, p 138.

2 (1989) 7 ACLC 933 at 937.

3 (1989) 7 ACLC 944 at 950.

4 See AR Blackshield on the literary deficiencies of the Australian Constitution: *The Financial Review*, May 18, 1987.

5 (1978) 21 SASR 93 at 93.

6 *Famel Pty Ltd & Anor v Burswood Management Ltd & Ors* (1989) ATPR 40-962.

a certain issue, or to assist in establishing, on the basis of long-standing literary evidence, standards of reasonable behaviour and reasonable legal expectations.

Who quotes whom, and how often? The basic answers are, with computer assistance, easy to supply, and there are few surprises. South Australian judges are the most given to literary allusion. Western Australian judges are the least. Dr Johnson and William Shakespeare are, predictably, the authors most frequently cited in judgements (with Dr Johnson gaining, as lexicographer, an unfair edge), to be followed at some considerable distance by Alexander Pope and John Dryden, drawing away from a field which includes Horace, Juvenal and Virgil, Spenser and Milton, Burns, Crabbe, Byron, Coleridge, Wordsworth and Shelley, Tennyson, Matthew Arnold and Browning. In general, the literature that appears in Australian judgements is classical, neoclassical, and preponderantly 'pre-settlement', with a light representation of Romantics and Victorians. Roman authors are the only non-anglophone presence. Women writers do not figure.

Even in so brief a survey, coherent attitudes and values begin to appear, and it is in examination of these that the real interest of this article lies. It lies in the ways in which this literary evidence at the legal periphery — on the very 'fringe of law'[7] — may point back towards the centre. The wealth and character of allusion in Australian judgements tells us something about the literary culture of Australian judges. It also tells us much about legal culture in general, and the relationship of the *culture of the law* to the general culture of the community. For one further quantitative fact ascertained is that, of a hundred-odd allusions located, there have only been two references to the works of local writers.

Certain basic questions thus become insistent. Are lawyers, as lawyers, *permitted* to participate in a local and living literary culture? Or is there some decorum which demands that they must, when in the throes of advocacy and adjudication, retreat to a literature that will have the force of precedent, that has somehow been judicially processed elsewhere? Is allusion only permitted to a literature of which the judge can say, 'Allusion? but this was literature from another country — and besides, the poet is dead'?[8] Have our judicial authors been inhibited, in the past, by the fear that their taste in literature would be overturned on appeal? If so, then Australian legal culture languishes in an unfortunate contradiction. The aesthetic cast of Australian judicial discourse is, whether by conscious affiliation or not, distinctly neoclassical in character; in tone, in its strict observance of the principle of decorum, in its professed cautiousness in

7 The phrase is from the poem 'Outback', by Henry Lawson: see Colin Roderick (ed), *Henry Lawson: Poems* (1979), pp 90-91. The 'evidence' offered in this survey is not comprehensive, as the legal data-base from which much of the informatiion has been retrieved still vary in coverage from state to state. The author is grateful to all those who drew attention to further instances of judicial allusion, and to the Department of Law at the University of Adelaide, which provided the computer facilities.

8 Apologies to Christopher Marlowe and his *The Jew of Matla*, IV, i, 41-42; Fredson Bowers (ed), *The Complete Works of Christopher Marlowe* Vol I (1973), p 309.

> 'Fornication? but that was in another country:
> And besides, the Wench is dead.'

employing the 'dangerous tools'[9] of imagery and metaphor, in its insistence upon imaginative restraint;[10] in its preferred allusive garniture and in the very cadence of its sentences, that discourse reaches back, over the heads of the Romantics and Victorians, to the rhetorical models and poetic values of English Neoclassicism, of Pope and Johnson, Blackstone and Burke. And the irony is that the particular distinction of the literature of the neoclassical era — only superficially deflected by its own wealth of classical allusion — lay exactly in the intensity of its contemporaneity, and in its profound and passionate involvement in the social and political affairs of its own time.[11] In allusively harking back and harking elsewhere in this way, Australian judges exactly betray the best spirit of the literature they most aspire to emulate.

What this article offers, initially, is a poetics of judicial allusion in Australian legal writing: a critical survey of forms of judicial literacy and an analysis of the role, sometimes important, that allusion has played in Australian legal argument and legal judgement. Thereafter, it will return to the wider question of Australian judicial 'cultural cringe' — an ugly but serviceable term, concocted in the context of Australian literary criticism in the 1960's, that has recently found its way into legal commentary.[12] Is it possible that those higher destinies of literary allusion would be more effectively achieved through a greater attention to the indigenous literature; to its capacities to shape judicial narrative, to offer 'local knowledge'[13] and, after two hundred years of Australian writing, to testify to long-standing community attitudes? Or is it essential in judicial writing (for purposes of maintaining an authoritative judicial voice[14]) that all such allusion and

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9 Hutley AJA in *Perpetual Trustee Co (Ltd) v Commissioner of Stamp Duties* [1972] 2 NSWLR 752 at 759. For a further instance of Australian awareness of 'the strictures that have been placed on the use of metaphors in the law', see Walters J in *Goldsborough Mort & Co Pty Ltd v Federal Commissioner of Taxation* (1976) 14 SASR 591 at 595. In some instances, before launching into a conscious use of metaphor, Australian judges dutifully genuflect in the direction of a more sober literalism *via* Cardozo J's reflection in *Berkey v Third Ave Railway Co* 155 NE 58 at 61 (1926), that 'metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end by enslaving it': see Windeyer J in *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) 127 CLR 62 at 76.

10 For impositions of restraint, see Dixon CJ, Fullagar and Kitto JJ in *Fitzgerald v Penn* (1954) 91 CLR 268 at 278, Dixon J in *Franklin v Victorian Railways Commissioners* (1959) 101 CLR 197 at 204, and Kitto J in *Marcus Clarke & Co v The Commonwealth* (1952) 87 CLR 177 at 261, prohibiting too 'loose a rein' to imagination. See also n 96, below.

11 An engagement expressed, in many instances, in monitorings of misuse of law:

> Yes, the last pen for Freedom let me draw,
> While Truth stands trembling on the edge of law.
>
> Pope, *Epilogue to the Satires*, II, 11.248-49; Clive T Probyn (ed), *Collected Poems* (1983), p 337.

12 See MP Ellinghaus, 'Towards an Australian Contract Law' in MP Ellinghaus, AJ Bradbrook and AJ Duggan, *The Emergence of Australian Law* (1989), pp 46-47.

13 The term is used with the inflections offered by Clifford Geertz in his *Local Knowledge: Further Essays in Interpretative Anthropology* (1983), on the role of law, as a 'species of social imagination' in constructing 'local knowledge', and the role of such knowledge in constructing law. 'Wisdom', Geertz cites an African proverb, 'comes out of the antheap' (p 167). Our literature — and this is my assumption throughout this article — is the antheap, the most concentrated form of 'local knowledge' that we possess.

14 One aspect of the 'Law and Literature Movement' in the United States is its detailed critique of the conventional voice of legal, and particularly judicial discourse; see the recent symposium, 'Human Voice in Legal Discourse', (1988) 66 Texas Law Review, 577-645. For an influential history and (disparaging) review of the wider movement, see RA Posner, *Law and Literature: A Misunderstood Relation* (1988).

quotation continue to be foreign in origin[15], and largely pre-settlement in provenance? Does it need to be exclusively patriarchal? Does it need to be classical, in the sense of being drawn from a small approved canon of time-honoured literary monuments? Or might more local and more recent literature also serve the judicial purpose? Is it possible that Archie Weller's novel *The Day of the Dog*,[16] for example, might be more illuminating on the subject of juvenile aboriginal crime than Virgil or Horace? Or that Beverly Farmer's haunting story 'The Woman with Black Hair',[17] or Thea Astley's *The Kindness Cup* (1974) might offer more insight on the subject of rape than Lord Byron's *Don Juan*?[18]

Distinguished analysts of legal culture doubt that the culture of the law will ever accord with the culture of the society it seeks to control. The culture of the legal elite will almost always be assertively distinctive, and aggressively retrospective in character;[19] characteristically, it will seek to enhance its own authority by manifesting affiliations with approved parental cultures elsewhere. As such, the legal historian Alan Watson writes, that culture is a factor of profound importance in practical legal activity, awkwardly interposing itself between 'social input' and 'legal output',[20] obstructing the law-making process and constricting the proper function of the 'legal imagination'.[21] Legal revolution, in Watson's analysis, will characteristically retreat, under the weight of legal culture, into legal borrowing.[22] Legal imagination will collapse into a mere reworking of what has been tried elsewhere. It may be, then, that in an examination of judicial allusion, further evidence may be found to support some of Watson's wider conclusions on the nature and function of legal culture. It may be that in this sometimes playful area on the 'fringe of law', where the judicial guard may be lower than in the substantive areas, some of the more dangerous peculiarities of the post-colonial legal mentality may, in Matthew Arnold's memorable words, be most easily sifted and exploded.[23]

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15 On the increasing 'foreignness' of England in the legal sphere, see Harold Lunz, 'Throwing Off the Chains: English Precedent and the Law of Torts in Australia', in *The Emergence of Australian Law* op cit at p 86.

16 Weller's 1981 novel, exploring conflict between the 'law of the people' and the 'law of the land', was Highly Commended for the Australian/Vogel Literary Award in 1980.

17 Collected in *Hometime* (1985).

18 Philp J in *R v Redgard* St R Qd 1 at 3-4.

19 Lawyers, James Crawford has written recently, are not 'much good at prophesying . . . When asked to predict the future, a lawyer's characteristic response is to look for a precedent. The habit of searching for and relying on precedent itself ensures that the legal issues and problems of the future will tend to be addressed through the approved array of concepts and terms': 'Australian Law after Two Centuries', (1988) 11 Sydney Law Review, pp 466-67.

20 Watson's articulation of this point of view has taken many different forms: see, for examples, the conclusion to his *The Evolution of Law* (1985), pp 115-19, and his *Failures of the Legal Imagination* (1988), pp 22-27, and in particular his chapter 'Some Legal Phenomena' p 113ff.

21 Watson defines this term in the breach rather than the observance, but stresses overall the communicability of law, a direct legal response to 'the input of society' rather than to the dictates of tradition, and an inventiveness in the face of perceived social needs rather than cautious preoccupation with the 'lawness' (by traditional standards) of law; see *The Evolution of Law* op cit, p 115.

22 See Watson's chapter 'Delict in the French *Code Civil*', in *Failures of the Legal Imagination*, op cit.

23 From his essay, 'The Study of Poetry', in *The Works of Matthew Arnold*, Vol IV, (1903) pp 7-8.

The Good

> Who then shall grace, or who improve the soil?
> Who plants like Bathurst, or who builds like Boyle.
> 'Tis use alone that sanctifies expense,
> And splendour borrows all her rays from sense.
> Pope, *Epistle to Burlington*, II 176-180

If the dominant judicial aesthetic is neoclassical — and this will do for a working hypothesis — then its first principle should be that of utility; and the category of 'The Good' includes simply those instances where the 'splendour' of literary reference is usefully and effectively incorporated into the structure of legal argument.

Literary sources are most frequently introduced for practical lexicographical purposes. In many instances, this runs beyond mere citation of authority, of the 'in Johnson's dictionary 'transaction' is defined as follows'[24] variety, towards a more extended analytical process, in which the connotative range of words of disputed signification are explored through literary examples, and the tone and context of suggested definitions are subjected to historical and critical scrutiny. Literary instances have always provided persuasive examples of English usage — as in Kitto J's invocation of Spenser's *Faerie Queen Bk II, cl0*, in *Allen v Crane*,[25] on the meaning of the phrase 'male issue'[26] — and judges have found often literary examples an important field for exploring the circumference of the meaning of disputed terms — as in Neasey J's invocation of Alexander Pope's *Essay on Criticism* — via the Oxford English Dictionary — 'So vast a throng the stage can ne'er contain' (1.283), for instruction on whether or not a dead fly on the surface of an iced cake can be said to be 'contained' by the cake, in *Doyle v Maypole Bakery*.[27]

It is rare that so distant a text can be cited without qualification. In relation to Dr Johnson, in particular, judicial lexicographical research frequently slips over into literary criticism, and in many instances, the Johnsonian reference functions more as a rhetorical ploy — as a prelude to the launching of some modification or variant of Johnson's definition — than as a straight invocation of authority. Sometimes, definitions from Johnson's dictionary are invoked less as evidence of consistent English usage than of significant historical change: thus Kitto J, in *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation*[28] used Johnson's definition of 'quarry' as 'a stone mine' merely as a springboard for launching his own definition, and for a general affirmation of the principle that one 'must depend on one's own understanding of the sense in which words are currently used'. Elsewhere, the notoriously personal and

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24 Latham CJ in *Grimwade v Federal Commissioner of Taxation* (1949) 78 CLR 199 at 222.
25 (1953) 89 CLR 152 at 165.
26 'Due weight is given to this conception if the word 'male', when used to qualify 'issue' or 'descendants', is understood to exclude, not only all individuals who are females, but all female lines of descent. This, I think, conforms with usage. In Spenser's lines: 'Next him, King Lehr, in happie peace long rayned, But had no issue male him to succeed, But three fair daughters . . .' (*Faerie Queen, bk ii, c 10*), no one would understand the poet to be referring to the fact that the daughter had no sons. Accordingly a prima facie presumption must, I think, be acknowledged, when construing the expression 'male issue' in a particular context, that the intention shown by the adjective is to refer to males descended through males.'
27 [1971] Tas R 376 at 378.
28 (1956) 94 CLR 509 at 514.

ironic character of some of Johnson's lexicography is exposed to sidestep his definitions. Again on the subject of excise, Latham J thus noted in *Parton v Milk Board (Vict)*[29] that his 'famous definition in his dictionary is distinguished by acerbity rather than precision', and in *Dennis Hotels Pty Ltd v Victoria*,[30] Windeyer J sought to separate the essential definition of the same term — 'a hateful tax levied upon commodities' — from its attendant 'opprobrium'.[31]

Allusion is often just the employment of the 'apt phrase', the piquant aphorism, or the dash of textual colour.[32] To this, it would be churlish to object: colouration of the kind, when truly apposite, can add elegance, rhetorical force, and sometimes even sound information to judicial argument; and a number of expressions originating in poetic contexts have gradually discovered, within judicial literature, almost an independent life. Into this category fall Tennyson's familiar words, on the 'lawless science' of a 'codeless myriad of precedent' and 'wilderness of single instances' (from his poem *Aylmer's Field*[33]), and the Horatian relief that, in certain instances, 'even excellent Homer nods'.[34]

The 'apt phrase' category soon shades, however, into more substantial reference. Literature is drawn upon as a repository of wisdom, an authoritative source of enduring human truths. Here at least, the retrospective character of judicial allusion is thoroughly vindicated, in that it is the very durability of such truths and tendencies in human nature that is at issue. Legal judgement often represents the superimposition of one story upon another (the recognition within the set of facts under adjudication the outline of other stories), other sets of facts on which judgement has been given. Such previous 'sets of facts' sometimes occur in literature as well as in law, and, while such literary narratives and literary adjudications might carry scant authority, they can offer substantial illustrative force. In *Lawrence v Griffiths*, White J thus refined a subtlety in the right to enjoyment of property by reference the most notorious legal subtlety in English literature, with a stern warning attached. To wit:

> 'For their part, the plaintiffs should construct the 'sealed' road and the retaining walls with Portia's warning to Shylock in mind (Shakespeare, *The Merchant of Venice*, Act IV, scene i):
>
> Therefore prepare thee to cut off the flesh
> Shed thou no blood; nor cut thou less nor more
> But just a pound of flesh, be it so much
> As makes it light or heavy in the substance
> Or the division of the twentieth part

29 (1949) 80 CLR 229 at 244.

30 (1960) 104 CLR 529 at 592.

31 At p 592: note also, Dixon CJ's comments on the peculiar 'vigour' of Johnson's language in *Henderson v Henderson* (1948) 76 CLR 529 at 543.

32 For an example of such coloration from Milton, see Windeyer J in *Skelton v Collins* (1965) 94 at 133 from Matthew Arnold, in Wells J, *Pitalis v SA Spastic Paralysis Welfare Association Inc* (1983) 33 SASR 302 at 303, and in two unreported Federal cases, from WB Yeats, in *Re Bell Group Ltd And: Facom Australia Ltd* (No WA 68 of 1985) and Robert Frost, in *Re: Rolf Helmut Scubert And: The Honourable Michael Young, Minister of State for Immigration and Ethnic Affairs* No 6174 of 1987).

33 Deane J in *Mallet v Mallet* (1984) 156 CLR 605 at 640.

34 Powell J quoting Horace, *Ars Poetica*, 1.359, in *Russell Kinsela Pty Ltd (in Liq) v Kinsela* [1983] 2 NSWLR 452 at 462.

> Of one poor scruple, nay, if the scale do turn
> But in the estimation of a hair,
> Thou diest and all thy goods are confiscate.'[35]

Analogy of the kind may even shape the facts. Every legal judgement contains a story, or, as judges prefer to call it, a 'narrative'.[36] The facts may well be selected according to legal principles — it can be argued that the rules of evidence provide, *inter alia*, a handbook in narrative technique — but they are also shaped by considerations that are distinctly literary, in the selection of an appropriate narrative 'point of view',[37] in the 'plotting' of events for maximum narrative effectiveness[38] and legal emphasis, in the choice of temporal parameters[39] and the degree to which details either of external setting or psychological interiority are required to render the narrative adequate to the discussion of legal principle to follow. In all these aspects, the judge will be guided by law — it may indeed be of some legal relevance to know, as in Lord Denning's celebrated curtain-raisers, that 'It was bluebell time in Kent',[40] and that 'In summertime village cricket is the delight of everyone'[41] — but also by such extra-legal considerations as good taste, an intuitive sense of narrative balance and effectiveness, and by the influence of story-telling models of a literary kind.[42]

That such models do exert subtle influences can be seen in instances of explicit literary allusion, as in Bollen J's brief and witty borrowing from Shakespeare in *Condo v South Australia*.[43] 'There was a caravan in Shakespeare Street. There this winter's tale began. The gang assembled at the caravan at about 7.30 am . . .'; or, more significantly, in Evatt J's

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35 (1987) 47 SASR 455 at 465.

36 The term 'narrative' occurs pervasively in legal judgements. For instances showing a particular judicial self-consciousness about narrative form, see Barwick CJ in *Government Insurance Office of NSW v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, at 213, and Wells J in *Woolley v Dunford* (1972) 3 SASR 243, at 245: 'The relevant primary facts are capable of being stated within a fairly narrow compass, but the number of *dramatis personae* is great, and rather than disrupt the narrative of facts by interpolating descriptions of the various persons concerned as I come to them, it will be helpful to identify first the principal characters and their respective roles.'

37 An important part of Evatt J's strategy in his minority judgement in *Chester v The Council of the Municipality of Waverly* (1939) 62 CLR 1, discussed more extensively below, was to shift the narrative 'point of view', and to enhance his readers' capacity for empathy with a mother in a state of 'nerve exhaustion'. See also the varying perspectives in Barwick CJ's smoking narrative in *Dickenson Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 191-92.

38 Narrative theory often distinguishes 'story' (the 'facts', the simple sequence of events) and 'plot' (the structure in which they are arranged to achieve particular artistic or emotional effects): see Viktor Schlovsky, 'Sterne's *Tristram Shandy: Stylistic Commentary' in LT Lemon and MJ Reis (eds), Russian Formalist Criticism: Four Essays* (1965).

39 See Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law', *Stanford Law Review* 33 [1981], 591-673 on the legal construction of 'fact patterns', and in particular (from p 600), on 'time-framing'.

40 See *Hinz v Berry* 2 QB [1970] 40, at 42.

41 *Miller v Jackson* [1977] 1 QB 966 at 976.

42 I write only of 'procedural' or 'formal' narrative influences: for an influential discussion of the influence of popular and traditional narratives on the construction of legal meanings, see Robert Cover's 'The Supreme Court 1982 Term. Foreword: *Nomos* and Narrative', *Harvard Law Review* 97 (1983), pp 4-68. 'No set of legal institutions or prescriptions exists', Cover writes, 'apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for every decalogue a scripture (p 4)'. Analysis of instances where extrinsic (historical or literary) narratives may have shaped the construction of meanings in Australian law would run, except in my brief reference below in relation to *R v Redgard* op cit, far beyond the range of this article.

43 (1987) 47 SASR 584 at 585.

invocation of Joseph Furphy on the subject of lost children, in *Chester v The Council of the Municipality of Waverly.*[44] The Evatt judgement — a minority judgement, but one that is still closely perused by all Australian students of Torts — is important on a number of grounds, but perhaps principally by reason of the default of his judicial successors, in that it remains, after half a century, the one brave instance of the quotation of an Australian writer, and the integration of literature as 'local knowledge', in an Australian legal judgement.

In this case, the small son of the plaintiff had fallen into a water-filled trench. The plaintiff was present at the recovery of the boy's body, and was sueing the defendant council for damages in respect of the shock and subsequent impairment of health resulting from that event. The Evatt dissent turned, in part, upon a more forceful reconstruction of the narrative, and upon an extensive emphathetic exposition of the 'state of nerve exhaustion' of the plaintiff. The facts, in Evatt J's opinion, were 'summarily but insufficiently set out in the Full Court's statement that 'the discovery that her son had been drowned caused her a severe shock',[45] and he proceeded, with literary assistance, to invest those naked words with a greater 'sufficiency', in a judicial narrative that sought to recreate in the most forceful manner possible, the 'very terrifying setting of the tragedy', the 'most grievous character' of the shock, and the special cultural resonances that the loss of children must import in the Australian context.[46]

Even Evatt J — it must be said — indemnified himself to a degree. His quotation from *Such is Life* is preceded by an invocation from the canon, from the 'imaginative genius' of William Blake, from the *Songs of Experience*:

> 'Tired and woe-begone
> Hoarse with making moan
>
> Rising from unrest
> The trembling woman prest
> With feet of weary woe:
> She could no further go.

'The passage from Furphy that follows is more extensive, but — by virtue of its bold singularity in our judicial literature — merits a full quotation, without too close a questioning, perhaps, on the point of relevance. Furphy — whom Evatt J cites under his *nom-de-plume*, Tom Collins, 'also described the agony of fearfulness caused by the search for a lost child:

> 'Longest night I ever passed, though it was one of the shortest in the year. Eyes burning for want of sleep, and couldn't bear to lie down for a minute. Wandering about for miles; listening; hearing something in the scrub, and finding it was only one of the other chaps, or some sheep. Thunder and

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44 (1939) 62 CLR 1. Although in a minority, Evatt J's judgement has increased in significance with the 'change in approach' towards a 'more ready acceptance by Australian courts in the last half-century of the foreseeability of shock-induced psychiatric illness': see Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549 at 565. See also Lord Wilberforce on the 'powerful dissent' of Evatt J in *McLoughlin v O'Brian* (1983) AC 410 at 422, and for a recent Australian exposition on the law in this area, *De Francheschi v Storrier* (1988) 90 FLR 95.

45 Ibid, p 18.

46 For instances of this heavily entrenched theme in our literlature, see Marcus Clarke's story 'Pretty Dick', Henry Lawson's 'The Babies in the Bush', and the thirtieth chapter of Henry Kingsley's *The Recollections of Geoffrey Hamlyn.*

> lightening, on and off, all night; even two or three drops of rain, towards morning. Once I heard the howl of a dingo, and I thought of the little girl; lying worn out, half asleep and half-fainting — far more helpless than a sheep.'

At a later point, in the same novel:

> 'There was a pause, broken by Stevenson, in a voice that brought constraint upon us all. Bad enough to lose a youngster for a day or two, and him alive and well; worse beyond comparison, when he's found dead; but the most fearful thing of all is for a youngster to be lost in the bush, and never found, alive or dead.'[47]

Literary influence is, however, often more evident in formal than substantive terms, in the very *genre* that the judicial narrator adopts. Judges, in recounting the facts, repeatedly slip into literary and dramatic modes, structuring their tales with the aid of *dramatis personae*[48] actors and parts,[49] with dramas,[50] stages,[51] scenes[52] and *denouements*.[53] In such instances, the allusion is to literature itself rather to any particular text, and to the methods sanctioned by literary models for establishing adequate models and analogues,[54] however lightly touched upon in judgements, served as a recurrent reminder of the shared enterprise of literary and judicial writing, and the profoundly intertextual nature of their authorial forms.[55]

Simple truths, grown contemptibly familiar, take on renewed force when sound literary authority can be found. Poets like Virgil, Horace, Shakespeare and Pope offer judicial authors an expanded temporal

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47 Ibid, 19.

48 See Menzies J in *Mayfield v Commissioner of Taxation* (1961) 108 CLR 303 at 309, Windeyer J in *Investment & Merchant Finance Corporation Ltd v Federal Commissioner of Taxation* (1970) CLR 177 at 183, Menzies J in *Truesdale v Federal Commissioner of Taxation* (1970) 120 CLR 353 at 363, and Windeyer J in *Federal Commissioner of Taxation v Casuarina Pty Ltd* (1971) op cit at 64.

49 'Actor' is not in its usual legal application a theatrical term, but for extended and self-consciously theatrical usages, see Fullagar J in *Kain & Shelton v Virgo* (1956) 97 CLR 230, at 242, Dixon J in *King v Wilkes* (1948) 77 CLR 511 at 517, Wells J in *Woolley v Dunford* op cit at 245, and Jacobs J in *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124, at 199, who writes of the 'different parts played by the various actors'.

50 See Fullagar J in *War Assets Pty Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 53 at 69, and in *Kain & Shelton v Virgo* (1956) 97 CLR 147 at 242, Windeyer J in *Ryan v The Queen* (1967) 121 CLR 205 at 237, and Barwick CJ in *Vocisano v Vocisano* (1974) 130 CLR 267 at 273.

51 See Fullagar J in *War Assets Pty Ltd v Federal Commissioner of Taxation* op cit at 216.

52 Windeyer J in *Federal Commissioner of Taxation v Casuarina* op cit at 65. Windeyer J's narrative in this case offers a particularly tenacious employment of what he calls 'the theatrical metaphor'.

53 For one such 'Shakespearean *denouement*', see Barwick CJ in *Hungier v Grace* (1972) 127 CLR 210 at 216.

54 For the facts as a 'story' and as an 'epic story', see Fullagar J and Webb J in *Poulton v The Commonwealth* (1953) 83 CLR 540, at 551 and 593. On the facts as good material for satire (together with intimations of a sound knowledge of Kilbert and Sullivan's Savoy operas), see Fullagar J in *War Assets Pty Ltd v Federal Commissioner of Taxation* (1954) op cit at p 69.

55 The term 'intertextuality' is now common coinage in literary criticism, meaning, in MH Abrams' definition 'the multiple ways in which any one literary text echoes, or is inextricably linked to, other texts, whether by open or covert citations and allusions, or by assimilation of the features of an earlier text by a later text, or simply by participation in a common stock of literary codes and conventions': *A Glossary of Literary Terms* (1981), p 200.

perspective, the wisdom of ages, 'the best', in Arnold's terms, that is 'known and thought in the world'.[56] Lord Byron thus reassures us that truth is often stranger than fiction,[57] Browning exhorts us that 'a man's reach should exceed his grasp',[58] and Robert Burns, less ebulliently, (and, in judicial recapitulation, far more laboriously) 'has pointed out, in appropriate language, some two centuries ago' something that 'has always held good, and holds good today', that 'very few purposes are implemented exactly as expected. This is well understood by the community, in general, and jurors in particular'.[59] Pope, whose epigramatic style and concentrated wit lend his verse in a special way to a more direct judicial incorporation, provides good authority for the fact that there are those who are willing to wound, and yet afraid to strike,[60] that 'hope springs eternal in the human breast',[61] that decision-making is sometimes difficult,[62] and that bias is dangerous, as 'All seems infected that th' infected spy, As all looks yellow to the jaundiced eye'.[63] And on the subject of the admissibility of dying declarations, it is Shakespeare's *King John*, Act V, Sc VI that provides perhaps the best-known authority:

> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here, and live hence by truth?[64]

In all, 'good' literary allusion seems to have served two opposing functions in Australian legal argument. On the one hand, it is invoked to strengthen our sense of affiliation with the past. On the other, it is summoned up to attenuate those same links and even to mark the need for judicial innovation. It achieves the latter objective by distancing certain meanings, attitudes and precedents, as in *Barton v Walker; Barton v O'Brien* where Samuels JA could invoke Dickens to dispose of an argument — 'I do not find the submission persuasive. I can hardly think that the procedure in Chancery in 1852 — it was between 1852 and 1853 that Charles Dickens produced the serial numbers of *Bleak House* — will serve as a useful guide to the powers vested in a judge of the Supreme Court of New South Wales in 1979'.[65] In this instance, in judicial reviews of legal history[66] and in many lexicographical contexts as well, literary allusion has

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56 From 'The Function of Criticism' in *The Works of Matthew Arnold* op cit, Vol III, 42.
57 Legoe J in the Supreme Court of South Australia, in *In the Estate of Pantelej Slavinskyj* (Unrep: Supreme Court of SA No 245 of 1987).
58 In *Re: The Commissioner of Taxation of the Commonwealth of Australia And: Ampol Exploration Ltd* (Unrep Federal Court: No 649 of 1968).
59 Walters & Wells JJ in *R v Miller* (1980) 25 SASR 170 at 245.
60 Wells J in *Reid v Kerr* (1974) 9 SASR 367 at 374.
61 Keely J in *Squires v Stephenson and Others* (1979) 53 FLR 164, at 171.
62 Legoe J thus opens his judgement in *R v Kiltie* (1986) 41 SASR 52 at 62 with a quotation within a quotation; to wit, Professor Sheldon Glueck's choice from Pope's *Epistle to Bathurst*, 11.1-2.

> Who shall decide, when doctors disagree,
> And soundest casuists doubt, like you and me?

63 David Hunt J in *Gwynvill Properties Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (Unrep) Supreme Court, NSW, Tuesday 29 January, 1985.
64 Quoted by Burbury J in *R v Savage* [1970] Tas LR 137 at 145.
65 [1979] 2 NSWLR 740, at 752; see also Dixon CJ in *Henderson v Henderson*, op cit at 543.
66 For references to the writing of Henry Fielding in this respect, see Wells J in *R v Moss; ex parte Mancini* (1982) 29 SASR 385 at 409-10, and Zelling J, in *Hoban's Glynde Pty Ltd, Hoban's Freeholds Pty Ltd and the superintendent of Licensed Premises* (1973) 4 SASR 503 at 520.

served as a device to distance the past and distinguish unwelcome precedents.

More frequently, it has served the purpose of contracting history, and strengthening our sense of affinity with the past, by evidencing through Spenser, Shakespeare, Dryden, Pope, Johnson and others, the essential sameness of human nature through the centuries, the durability of certain meanings and connotations, and the strength and tenacity of communal feeling on important issues. In *R v Lawson and Forsythe*[67] McGarvie J thus drew on John Dryden to establish the sanctioning of self-defence 'in any civilized community': 'Over three hundred years ago Dryden wrote 'Self-defence is Nature's Eldest Law': Absolom and Achitophel, *The Poems and Fables of John Dryden*, 1961, at p201'; and Dixon CJ in *Parker v The Queen*[68] drew on Othello for support on the question of provocation.[69] On the question of assessment of damages for cosmetic injuries, Kirby J, in *Ralevski v Dimovski*[70] in an impressive catalogue of literary citation, offered testimony from Aristotle, John Ruskin and Shakespeare, on the extent to which physical appearance has always been considered an important and valued attribute, and for instances of how 'Beauty itself doth of itself persuade the eyes of men without an orator'. And in a rare judicial reference to Australian writing, Mr Justice Murphy drew, in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)*,[71] on Marcus Clarke's *Civilization without Delusion*, on Henry Lawson, Joseph Furphy, Manning Clark, Patrick White, AB Facey 'and many other Australians', to illustrate the continuity, in Australia, of a strong strain of religious scepticism.

The Bad

Legal writers wishing to exploit the benefits of literature should expect to feel the shafts of a literary, as well as a legal critique. The main objection that can be made to the more innocuous forms of allusion is simply that of irrelevance. There are many instances where the quotation of literature in judgements appears as little more than garniture, and where the literary allusion looks more intently inwards to the writer's own personal culture rather than outwards towards the facts or the law at issue. While allusion of the kind may be amusing and even gratuitously informative, and while it may go some way in enhancing the judicial voice in terms of stylistic elegance and historic resonance, the instances reviewed in the preceding section indicate that better things are possible. Mere literary seasoning leads to a trivialisation not only of law but also of literature, which begins to figure less as information than as decoration, and less as an integral and evocative dimension in legal argument than mere loose verbal associationism, and as the parading of a series of stately and sometimes,

67 [1986] VR 515 at 547.
68 (1963) CLR 610 at 628-9.
69 'That at all events is a view which the jury were entitled to adopt. They might, if properly directed, have considered that (again to use Othello's words) 'passion having (his) best judgement collied assayed [sic] to lead the way': (1962) 111 CLR 610 at 628-29.
70 (1986) 7 NSWLR 487 at 492-92.
71 (1983) 154 CLR 120 at 150.

formidably inaccessible[72] monuments at the legal periphery. Illustration and light relief can readily transmute into mere distraction[73] and, in general, the pursuit of red herrings into mare's nests.[74]

Our judicial literature does incorporate some self-criticism in this area, and Zelling J's correcting of Griffith CJ's Juvenal in *R v Industrial Court of South Australia; ex parte Pipeline Engineering Pty Ltd*[75] might be forgiven for the accompanying critique of Griffith's poor sense of relevance. Elsewhere, the South Australian judiciary, while the most insistently literate in Australia, scores poorly in terms of allusive relevance. Wells J's inclusion of 'an analogy from literature that springs to mind' from Wordsworth's *Ode: Intimations of Immorality* in *Arnold v Samuels*[76] raises more questions than it resolves, and Legoe J, an inveterate and witty judicial *literateur*, also falters at times, in point of relevance, in his various invocations of Virgil,[77] Pope,[78] Shakespeare[79] and Tennyson.[80] And while it would be graceless to object too strongly to the odd learned aside, it might be noted that writers themselves generally monitor carefully what merely springs to mind, and there are times when lawyers should perhaps follow suit.

The Ugly

The most notorious instance of allusive ugliness appears in *R v Redgard*, from the Queensland Court of Criminal Appeal, in which an unfortunate couplet from Byron's *Don Juan* finds an even more unfortunate judicial applicatioin. In the circuit court, the jury had found the accused not guilty of rape but guilty of unlawful and indecent assault under section 578 of *The Criminal Code*. The reference to *Don Juan* occurs in the following context, from the judgement of Philp J:

> 'It was suggested that the jury's verdict could be explained upon the basis that they had doubt as to the girl's consent to intercourse but no doubt as to her non-consent to the indecent assault or that they had doubt as to whether the appellant mistakenly thought that the girl was consenting to intercourse but no doubt that the appellant well knew that the girl was not consenting to the preliminary indecent acts.

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72 As in Latham J's wistful noting that there are many who agree with the reflective comment of the Roman poet — 'Tantum religion potuit suadere malorum': *Jehovah Witnesses' Case* (at 123): this Lucretian tag is cited with approval by Crockett J in *Church of the New Faith v Commissioner for Pay Roll Tax* [1983] 1 VR 97 at 110. Untranslated latin phrases are, in these fallen times, inevitably more emblematic than communicative, more symbolically potent in demarcating 'legal culture' than semantically useful in securing a point: Lord Shaw of Dunfermline's comment in *Ballard v North British Railway Company* (1923) SC (HL) 43, quoted approvingly by Dixon CJ in *Franklin v Victorian Railway Commissioners* (1959) 101 CLR 197 at 201-02, that 'the day for canonizing latin phrases has gone past' might well be attended to in the field of literary as well as legal citation. For a commendable exception, see Legoe J translating *and* annotating Virgil, in *Stormer v Ingram*, supra, n 5.

73 For such distraction, see Windeyer J on Crabbe, in *Forbes v Traders' Finance Corporation Ltd* (1971) 126 CLR 429 at 446, and Larkins J using Shakespeare in *Re an Infant, M, and the Adoption of Children's Act* [1973] 2 NSWLR 434 at 445.

74 For judicial approval of 'CS Lewis's brilliant mixed metaphor', see Burchett J in *Windsurfing International Inc v Sailboard Australia Pty Ltd and Another* (1986) 69 ALR 534 at 539.

75 (1984) 37 SASR 275 at 281.

76 (1972) 3 SASR 585 at 608.

77 *Stormer v Ingram* op cit at 93.

78 See *R v Kiltie* (1986) 41 SASR 52 at 62.

79 In *Santos v Saunders* (Unrep) No 1339 of 1988. 8th September 1988, at p 10.

80 See *In Re The Bank of Adelaide* (1979) 22 SASR 481 at 541-2.

> This suggestion does not commend itself to me. It involves as a basic theory that where a woman consents to intercourse her resistance to any indecent touching of her body preliminary thereto can found a charge of indecent assault. I do not think this theory would be acceptable to men and women of the world. Seduction, no matter how immoral, is no crime and yet upon this theory it very frequently involves a crime.
>
> 'A little still she strove and much repented,
> And whispering 'I will ne'er consent' consented'.
>
> That verse does not express mere poetic imagination. It is difficult to put the matter in legal parlance . . .'[81]

Difficult, indeed. In this instance, the literary invocation lies somewhere between a 'springing to mind' and a low judicial snigger. If literature is a store of traditional wisdom, it can also be the store of traditional prejudice, and the couplet in question — and the comic incident from *Don Juan* which it evokes[82] — serves more to debase than advance discussion of the point. Philp J, in the succeeding comments, has it both ways; the point is too real, it seems, for 'mere poetic imagination', but perhaps not quite real enough — or reputable enough, perhaps — to be couched in the disinterested tones of law: though he does (once adequately cautioned by Lord Byron) go on to propose that 'where the preliminary acts and the intercourse are so connected as to form one transaction then the jury should be directed that they should not separately regard each part of the transaction but should regard the transaction as a whole and see if it was, as a matter of practical reality, consented to'.[83] Without reflecting on the result in this case, it may merely be noted that legal meanings do not exist in a vacuum, but are, as Robert Cover has argued, heavily underwritten by extrinsic narratives, by contexts of popular or traditional discourse which supply — as well as prejudices — 'history and destiny, beginning and end, explanation and purpose'.[84] Byron's poetic narratives, if Cover's analysis is accepted, may be more closely and more dangerously connected, genetically speaking, to the tenor of his 'legal parlance' than Philp J is aware.

Literature in law: Australian contexts

That the literary far overruns the boundaries of what is conventionally regarded as literature is the great critical commonplace of our time. While to suggest that judicial writing should be admitted to the canon of our national literature may well raise eyebrows among both lawyers and *literatteurs*, the highly literary nature of much legal writing is undeniable. That literary character can easily be elucidated with the traditional tools of literary criticism. Most judgements contain carefully constructed narratives

81 *Reg v Redgard* ST R Qd (1956) 1 at 3-4.
82 The passage occurs as the long-awaited consummation of young Don Juan and the Donna Julia's trysting: Canto I, cxvii.
83 Ibid, p 6.
84 '*Nomos* and Narrative', op cit, p 5.

of facts[85] and often 'narratives of law',[86] incorporate hypothetical dramatisations[87] and gratuitous 'purple passages',[88] observe strict decorums in terms of tone and style, play richly upon metaphor, metonymy, personification and synecdoche,[89] make wide use of irony and analogy, indulge the occasional flash of wit, and offer literary allusions, in an appropriate aesthetic register, in something of the spirit of a shared linguistic enterprise.

More comprehensively, recent theorists have argued that the whole law-making process is a fictionalising procedure, inventing and constructing (after the manner of poets and novelists) grids or maps to lay across experience, with both law and poetry as manifestations of that 'rage for order' described in the poet (and lawyer) Wallace Steven's 'Order at Key West'.[90] Law and literature are, from this perspective, enabling systems, imaginative projections that enable us to understand and live in this world: the 'business of both is to make sense of the confusion of human life',[91] and the construction of the law, as versions of reality, are no less relative, no less vulnerable to critical deconstruction,[92] and no less testable against other versions than are the visions of literature.

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85 The term 'narrative' is used pervasively in legal discourse: for an authoritative and oft-cited instance, see Lord Devlin in *Lee Chun Chen v R* [1963] AC 220 at 233, on the need for the evidence to support a 'credible narrative of events' disclosing a basis, in this instance, for the defence of provocation.

86 For instances of the term 'narrative' used in relation to law rather than facts, see Gillard J, in *Peter Jackson v Consolidated Insurance of Australia Pty Ltd* [1975] VR 781, on *Pollock and Wright's* 'restatement in narrative form of the existing case law' (p 790), and the Privy Council in *The Commonwealth v The Bank of NSW* (1949) 79 CLR 497 at 638, on a 'narrative of the leading High Court decisions upon s 92'.

87 See Barwick CJ's hypothetical smokers in *Dickenson Arcade Pty Ltd v Tasmania* op cit at 191-92 [1974] 130 CLR 177 at 190-92.

88 See *Scott v Numurkah Corporation* [1954] 91 CLR 300 at 316-17, and Rich J in *James v Cowan* 1929 43 CLR 386 at 422, on the vagueness of 'grandiloquence', with a little grandiloquence of his own to follow.

89 See supra, n 9. The cautious 'parenthesising' of conscious metaphors and other figures of speech often seen in judicial writing intrudes oddly (even coyly) in a discourse that is so pervasively, and perhaps often unconsciously, figurative and metaphoric: see for instance, Kitto, Menzies and Taylor JJ in *Schumann v Schumann (No 2)* (1961) 106 CLR 566 at 575, Aickin J in *Wellcome Foundation Ltd v VR Laboratories (Aust) Pty Ltd* (1981) 148 CLR 262 at p 275, quoting Maugham J from *In the Matter of G Farbenindustrie AG's Patent* 1930 47 RPC 289 at 321-22, Sholl J in *Schlieske v Overseas Construction Co Pty Ltd* [1960] VR 195 at 198, and Windeyer J in *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960) 104 CLR 394 at 415.

90 See *The Collected Poems of Wallace Stevens* (1955), p 130. This fine passage unfortunately reappears *ad nauseam* in American accounts of the linked aspiratioins of law and literature:

> Oh! Blessed rage for order, pale Ramon,
> The maker's rage to order words of the sea,
> Words of the fragrant portals, dimly starred,
> And of ourselves and of our origins,
> In ghostlier demarcations, keener sounds.

91 Milner S Ball, *Lying Down Together: Law, Metaphor and Theology* (1985) p 24.

92 For introductions to forms of 'deconstruction' and the law, see, from a literary viewpoint, Jonathan Culler's *Framing the Sign: Criticism and its Institutions* (1988), and for legal perspectives, theoretical and practical, see Gary Peller, 'The Metaphysics of American Law' [1985] 73 *California Law Review*, 1159-1290, and Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine', (1985) 94 *Yale Law Review*, 999-1114.

The common law has always dallied, albeit cautiously, within the realm of a traditionally sanctioned fictionality.[93] What post-structuralist theory has done, however, is to suggest that these acknowledged departures from reality are merely fictions within fictions, and that the whole structure of the law, like that of literature, functions with primary reference to itself; law refers to law refers to law,[94] as literature to literature to literature, rather than to life, which remains dangerously external to both processes, to be known only *in* its constructed versions while remaining irreducible, as a final touchstone reality, to any one of them. From this point of view, the law becomes, against that hostility to 'mere foolish imagination'[95] inscribed in one Australian judgement after another, the greatest 'stretch of the imagination'[96] in all our literary history — the one upon which most of that literary history is founded[97] — though a stretch of imagination substantially achieved, and perhaps somewhat sadly, by others than ourselves.

'Mere foolish imagination', the 'stuff of empty rhetoric', and the 'very fabric of the law'[98] may not lie at quite such a tangent to each other as Australian judges have, in the past, comfortably assumed. And while a literary critique of the law will amost inevitably trace the inroads of 'mere rhetoric' on 'strict and complete legalism' and the 'very fabric of the law' to a point that would make most lawyers nervous indeed, it does at least

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93 Judicial consideration in Australia moves beyond accommodation of sanctioned fictions towards a review of wider fictions at the very basis of common law thinking: see Murphy J in *Dugan v Mirror Newspapers Ltd* (1970) 142 CLR 583 at 609-12, and in *State Government Insurance Commission v Trigwell* (1978) 142 CLR 817 at 650-51, enforcing Bentham, and Austin's critique of 'the childish fiction, employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing I suppose from eternity and merely declared from time to time by judges' (*Lectures on Jurisprudence* 4th ed (1873), p 655)'.

94 For an affirmation of this tendency from a non poststructuralist viewpoint, see Alan Watson, *The Evolution of Law* op cit, p 115: 'But those working with the law estimate the rules by their 'lawness', by their being or not being law. Law has its own standard of existence. Law is a means to an end and cannot be an end in itself, but lawyers — however one might define that term — have an inherent tendency to look upon legal rules as if they were ends in themselves.'

95 Dixon J in *Little v The Commonwealth* (1947) 75 CLR 94 at 109, quoting Williams J in *Cann v Clipperton* (1839) A&E 582 at 589.

96 Supra, n 10. The incompatibility of 'imagination' and responsible legal activity is a theme constantly reinforced in Australian judicial discourse, with 'disordered', 'irrational', 'loose' and 'foolish' imagination seen as a constant source of illegal activity, and 'stretched', 'strained', 'unfettered' imagination as the constant source of faulty adjudication upon it. The term 'imagination' occurs most commonly in the phrase 'by no stretch of the imagination', invoked in most instances to mark the boundaries of credibility either in accounts of the facts or in legal construction. The Australian judicial assault on all such 'stretches of the imagination' demands, for adequate examination and annotation, a survey of its own.

97 For a provocative insight into the 'fundamental' cultural character of the Constitution, and a comment that might apply equally to literature as to life, see Sir Ninian Stephen's Foreword to Michael Coper's *Encounters with the Australian Constitution* (1987), that 'one of the rarely appreciated charms of our Constitution is the capacity of its text, bland enough to the eye, to provide both plot and sub-plots for countless human dramas'.

98 This juxtaposition of rhetoric and law ('unnecessary rhetoric', 'empty rhetoric', 'the stuff of empty rhetoric' and the 'political rhetoric of States' rights', as against the 'very fabric', of the law, against 'practical realities', and against the '*constitutional* [my italics] question of the Commonwealth legislative powers'...) is recurrent in judicial writing. In the light of our increasing understanding of the nature of rhetoric (a *revived* understanding) and of the place of rhetoric in law, it may stand in need of revision. For a provocative account of the rhetorical bases of law, see Peter Goodrich, 'Rhetoric as Jurisprudence', *Oxford Journal of Legal Studies* 4 [1984], 88-122.

properly compliment the authorial, inventive and even imaginative aspects of lawmaking,[99] and go some distance towards restoring one of our most potent and fundamental forms of authorship — and one which a vast literary labour has been expended — to its proper cultural (as distinct from purely legal) status.

Why does Australian literature not appear more frequently? The case against the incorporation of local wisdom, local textual colouration and local narrative in legal writing is, if we can construct an implication from so glaring an absence, clearly a strong one: even alien foolishness, the *R v Redgard* example suggests, is to be preferred. There are a few historical reasons — reasons rather than excuses — that may be given. The threat of exposure to a distant appellate readership must, in former years, have imposed severe constraints. Nor has the local literature, in preceding generations, been extensively taught in schools, or even in our universities, with influential legal voices suggesting that this should continue to be the case.[100] As a result, literary springings to mind will inevitably be of the canonical variety, and such local knowledge as does enter into our legal judgements is unlikely to be of literary provenance. A continuing case against, too, could easily be made out. The celebrated 'unity of the common law',[101] it might be argued, would be sundered if our judgements were seeded with Australian literature (which is parochial and divisive) rather than English (which is not?) — for the English have written 'literature', while Australians still just write books.[102] There is little Australian literature that has, from this point of view, stood the test of time; the true classics of our literary culture are not yet settled. Australian literature, from this perspective, offers mere opinions rather than wisdom, entertainment rather than authoritative truths.

The consequences of this kind of inhibition are not easy to assess. If we follow Alan Watson's analysis Australian legal culture is effectively someone else's culture, interposing itself between Australians and their law. If we follow Robert Cover's analysis, many of our central legal meanings have been written out of someone else's stories: the informing 'context of narrative', from which our legal meanings are constructed has been brought in from outside, our burgeoning local narratives ignored and overruled in a misleading judicial quest for unity (with the law of other nations) consistency (with the past of other nations), and an authoritative voice (a voice, that is, that will sound authoritative elsewhere). The consequences of

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99 Judicial concern at the presence of imagination will perhaps be overtaken by their critics' concern at the lack of it: see Adrian Bradbrook in 'The Evolution of Australian Landlord and Tenant Law', in *The Emergence of Australian Law* op cit, p 104.

100 See John Bray, *The Emperor's Doorkeeper* op cit p 185. In the author's own words, it is 'not that I have anything against contemporary literature in general, or contemporary Australian literature in particular. I hope in a small way to be part of it. But it is not the business of the academy to teach it. It should be introducing the student to the glorious literary heritage of the past and the osseous structure of the language, not substituting for the circulating library'.

101 For a recent attack on the 'special concept of the unity of the common law which has for so long impeded judges in finding new solutions for old problems occurring in the New World', see the Hon Jim Kennan, QC, MLA, 'The importance of plain English in drafting' in David St L Kelly ed, *Essays on Legislative Drafting* (1988) p 80.

102 Much debate took place, in the foundation years of English studies in the universities, over the date at which 'literature' ended, and 'mere books' began: see, in general, DJ Palmer, *The Rise of English Studies: An Account of the Study of English Language and Literature from its Origins to the Making of the Oxford English School* (1965).

this quest may have much to do with that 'relative lack of achievement in the law' to which Australian commentators are increasingly drawing our attention, that legal 'cultural cringe' of which MP Ellinghaus writes,[103] and the general lack, in legal circles, of that 'abundance of intellectual and cultural activity which we find in other parts of Australian life relating to the expression and communication of ideas'.[104] To other great fault lines in Australian life of the kind which Kathy Mack has recently noted, between 'legal' and 'political reality',[105] may thus be added another: between the authorial culture of the law, and that of the wider interpretative and writing community. As the general culture develops — and Australian writing is currently in an extremely diverse and innovative phase[106] — the narrow and retrospective character of Australian intellectual and authorial legal culture will appear to diminish further in comparison.

What is proposed? Firstly, a concept of literature — even in legal judgements — as information rather than as decoration. This is hardly a revolutionary or anti-classical proposition, in that it merely reaffirms the familiar Horatian injunction that the *utile* and the *dulce* should be combined:[107] and there are, in our Australian judicial literature, some fine models to follow. Nor is it an attack on quotation from the canon of British or even classical literary greats, or a demand that we shrink defensively into the 'Crops without Cruppers' post-Bush Ballad school:[108] for as was affirmed above, as one of the most important uses of literature, the evidencing of enduring standards, persistent strength of feeling on certain issues, and convictions that traverse local cultural boundaries. What may be suggested is that, in the post-colonial context, literature-as-information may need to prevail over literature-as-decoration, and the functional and informative capacities of local and non-canonical literature, in offering local knowledge of a distinctive social and physical environment, be at least occasionally preferred to that of an alien literature, of no matter how sound a provenance.

The battle for the recognition of the virtues of an indigenous literature as local knowledge was fought and won in England, in the eighteenth century,[109] in the recognition that a vital literary culture derives from the interleaving of the past with the present rather than simply its imposition, in the name of standards, authority and approved precedent: that the vigour of a cultural tradition depends on its capacity to stimulate rather than simply to intimidate. It was, writers discovered, better to risk parochialism and even mediocrity than to allow one's culture to dissipate into mere allusion to the works of others. The same battle was fought and substantially won in Australian literary (writing) circles in the 1890's, and in literary (critical and academic) circles in the 1960's and 1970's. In 1939, in *Chester v The Council of the Municipality of Waverly*, Mr Justice Evatt

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103 Supra, n 12,

104 Kennan, 'The Importance of Plain English' op cit, p 79.

105 In 'Development of an Australian Legal System', *The Emergence of Australian Law* op cit, p 336.

106 On the current vitality of Australian art and writing, and an invidious comparison with the state of legal culture, see Kennan, 'The Importance of Plain English' op cit, p 79.

107 The doctrine is outlined in the *Ars Poetica*, II.323-46; *Horace: Satires, Epistles, Ars Poetica* trans H Rushton Fairclough (1951).

108 See John Bray, *The Emperor's Doorkeeper*, op cit, p 31, on the works of Charles Jury.

109 For an account of the development of the theories of cultural integrity in eighteenth-century England, see the present writer's *Liberty and Poetics in Eighteenth-Century England*, London: Croom Helm, 1985.

took up the gauntlet in the context of Australian law, in bold endorsement of the utility of an Australian author of then uncertain aesthetic stature, indicating, in his balancing of William Blake and Joseph Furphy, how a traditional human susceptibility takes on new dimensions in the Australian environment. In this, he has had few followers.

This conclusion seeks to open up, rather than close down its subject. Literary allusion in legal judgements runs beyond innocent decoration towards expressing significant cultural and even legal attitudes: it runs beyond mere springings to mind towards shaping judicial perception of the facts and law at issue: it runs beyond mere quotation towards admission of a shared authorial enterprise, particularly in the area of narrative form; and it has long pointed towards a fact that legal analysts are only just beginning to recognise — that law is an imaginative and a creative activity, culturally constructive and itself culturally implanted in ways that invite (and even demand) the attentions of literary criticism as much as of legal interpretation. The points of view offered in this foray from the legal fringe will probably fail to convince sceptics that law itself is a form of literature![110] What they may do, however, is to indicate ways in which an approach to Australian law through its literary aspects, using the theoretical and practical tools of literary criticism, may begin to rescue legal texts from the linguistically impoverished and endlessly circular interpretive strategies of 'strict and complete legalism', and restore them to the wider context of Australian writing, both for purposes of praise — for our culture is more fundamentally written by legal texts than by any other kind — and for blame: for neither physicians nor lawyers are known to be overly effective in healing themselves, and what is bad, ugly and culturally malignant in Australian law should not be denied the surgical attentions of modern literary criticism. Such attention, in Australia, has only just begun![111]

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110 For recent approaches that, while not simply conflating law into literature, explore the possibility of shared reading strategies, see Peter Goodrich's *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987), an English critical and deconstructive reading, and JB White's *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (1984), an exercise in legal apologetics, from the US.

111 For other 'beginnings', see the application of literary theory to legal drafting by Geoffrey Hackett-Jones QC in'The Scar of Odysseus and the role of parliamentary counsel in the legislative process', in D St L Kelly, *Legislative Drafting* op cit, and the critical insight that AR Blackshield draws from parallels with James Joyce's *Finnegan's Wake*, in his 'Damadam to Infinities! The tourneytold of the wattarfalls', in M Sornarajah (ed), *The Southwest Dams Dispute: The Legal and Political Issues* (1983).