
Volume 50

Issue 2 Winter 2000: *Symposium - Civil Litigation and
Popular Culture*

Article 11

A Novelist's Perspective

Marianne Wesson

Follow this and additional works at: <http://via.library.depaul.edu/law-review>

Recommended Citation

Marianne Wesson, *A Novelist's Perspective*, 50 DePaul L. Rev. 583 (2000)

Available at: <http://via.library.depaul.edu/law-review/vol50/iss2/11>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized administrator of Via Sapientiae. For more information, please contact mbernal2@depaul.edu, MHES88@depaul.edu.

A NOVELIST'S PERSPECTIVE

Marianne Wesson*

Novelists are liars who are, nevertheless, very big on the truth. Specifically, novelists hunger to tell the truth, a curious circumstance when you consider that fiction is precisely a pack of lies. Writers who also happen to be lawyers place a high premium on accurate information when they write about the legal system. Truthfulness is not, however, the equivalent of factual accuracy; otherwise we would all be writing journalism. As a participant in both law and fiction, I am interested in how we aspire to, and judge the honesty of, fictional portrayals about the law.

How do writers understand what truth means in fiction? You might say our aim is telling the truth, but not necessarily the whole truth (for then imagine the poor editor) or nothing but the truth (for then where is the field for invention?). As Carl Sandburg reminded us in his great poem, *The People, Yes*, any witness who swears to tell the whole truth has just told his first lie.¹ This is what Sandburg's witness said when asked the familiar question:

Do you swear solemnly before the everliving God that the testimony you are about to give in this case shall be the truth, the whole truth, and nothing but the truth?

No, I don't. I can tell you what I saw and what I heard and I'll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and the mystery of it.²

As a writer of fiction in the legal context, I want to embrace both parts of that honest witness's oath. I will do my best to tell you what I know, truthfully, and I will do my best to "burn your insides with the pity and the mystery of it," or at least warm them up a little. If necessary, I may even trade one goal against another.

* Professor, Wolf-Nichol Fellow, and President's Teaching Scholar, University of Colorado School of Law; J.D., University of Texas School of Law, 1973; A.B., Vassar College, 1970.

1. CARL SANDBURG, *THE PEOPLE, YES* 193 (1936).

2. *Id.*

Some may wonder how a well-trained lawyer or scholar of the legal process could find any mystery (never mind pity) in what she already knows. How can the law, as depicted in a story, be both recognizable and mysterious? I believe the aim of the novelist is the same as the anthropologist's: to make the strange familiar and the familiar strange.

When I write for the non-lawyer reader, my goal is to make the strange familiar. I hope to acquaint him with certain things that may seem unfamiliar. I also want to be legally accurate, because he may otherwise absorb and believe inaccurate propositions about the legal profession and the justice system. My belief in the existence of this obligation to the lay audience was confirmed during a recent conversation with a colleague who teaches classics. It seems that much of what we now know about Attic law, the laws and legal processes of classical Athens, comes from the work of the Athenian playwright Menander.³ Menander's plays were lost until the late 1950s, when they were printed from a papyrus codex discovered in Egypt.⁴ As far as is known, Menander sought only to entertain and enlighten; he wrote comedy, with broad strokes and intriguing characters.⁵ He was perhaps the John Grisham or Carl Hiaasen of his time. But, with the passage of time and the destruction of other sources, Menander has become a central source of our understanding about the Attic legal system. Indeed, many scholars have argued that Menander's plays, if carefully scrutinized, may prove the incorrectness of some conventional understandings about Attic law.⁶

For example, consider one of Menander's most important works: *Aspis*, or *The Shield*.⁷ In *The Shield*, one of the characters, Khairestratos, has a daughter but no son. Khairestratos has a stepson, his wife's son from an earlier marriage, but according to the accepted view, a man could not leave his property to his stepson, unless the stepson were adopted.⁸ Khairestratos also could not leave his estate to an unmarried daughter, but if she were married, her father's prop-

3. ADELE C. SCAFURO, *THE FORENSIC STATE: SETTLING DISPUTES IN GRAECO-ROME NEW COMEDY* 1 (1997) ("Legal historians and philologists use New Comedy as a source to illustrate, and sometimes prove, the existence and functioning of particular laws in Athenian and Roman society.").

4. Norma Miller, *Introduction to MENANDER: PLAYS AND FRAGMENTS* 15-16 (Norma Miller ed. & trans., 1987).

5. *Id.* at 3-11.

6. Menander, of Athens, *The Shield [Aspis]*, in *PLAYS AND FRAGMENTS* 23 (Norma Miller ed. & trans., 1987).

7. See *infra* note 13 and accompanying text.

8. Douglas M. MacDowell, *Love Versus the Law: An Essay on Menander's Aspis*, in *WOMEN IN ANTIQUITY* 56 (Ian McAuslan & Peter Walcot eds., 1996).

erty could go to his son-in-law in trust for an anticipated male heir.⁹ So Khairestratos has formed a plan, an estate plan. Khairestratos says to his stepson, speaking of a young woman they both know:

I always used to think
That you would take this girl, and he himself
My daughter, and that I would leave you both
To take control of all my property.¹⁰

The "he" in this speech is another character, Kleostratos, whom the speaker, Khairestratos, had evidently planned to marry to his daughter. The puzzle for classical scholars arises because Khairestratos implies that if his plan had been followed, the stepson and the daughter's husband would share his property. But, the stepson could not be an heir unless adopted by Khairestratos. Some scholars argue that Khairestratos must hence have intended to adopt the stepson to whom he is speaking; otherwise, what he said would have made no sense.¹¹

Until the rediscovery of *Aspis*, the accepted view had been that if a man had daughters but no sons, he could adopt a son only if he married him to one of his daughters. Khairestratos could not have meant to marry his stepson to his daughter; for one thing Khairestratos's stepson and daughter were half-siblings, and such a marriage would have been incestuous. Additionally, in his speech, Khairestratos makes clear that he planned to marry his daughter to Kleostratos. On the basis of this evidence, one eminent classical scholar has claimed that the accepted understanding of the rules of adoption is flawed. Professor Douglas MacDowell argues that there must have been an exception to the rules of adoption that allowed a man with a daughter and a stepson to adopt the stepson, as long as the daughter could also be married off to someone else.¹² Other scholars dispute this interpretation, in part on the premise that Menander should not be read as though he intended his works to be used as a key to the study of Attic law.¹³

I do not have the credentials to weigh in on this controversy, but as a writer of fiction about the law, I find its implications sobering. Would I want my depiction of habeas corpus to inform some unimaginable scholar of two thousand years hence about the legal sys-

9. *Id.*

10. Menander, *supra* note 6, at 125-41.

11. MacDowell, *supra* note 8, at 59.

12. *Id.* at 60.

13. P.G. McC. Brown, *Menander's Dramatic Technique and The Law of Athens*, 33 CLASSICAL Q. 412, 420 (1983).

tem of the United States circa the year two thousand? It would be grandiose for me to imagine that copies of my own books will be unearthed in some post-electronic future and scrutinized for clues. Nevertheless, the case of Menander has induced in me a renewed scruple about the accuracy of my legal plot points. But any commitment to precision I may flirt with is tempered by the certain knowledge that I will fail, for reasons I will address shortly, to produce descriptions of perfect accuracy.

Allow me to digress briefly from this concern to address my relationship to the lawyers among my readers (for writers do, I think, have relationships to their readers, however odd these couplings may be). For the lawyers, my goal is not so much to acquaint them with the unfamiliar, but to make the familiar strange. I want to induce lawyers to see, perhaps for the first time, how strange are customs and beliefs of our tribe.

I started writing my first book, *Render Up the Body*,¹⁴ after returning home from a perplexing and upsetting visit with a client at San Quentin Prison. I had just agreed to represent him on his appeal from a conviction for a double murder and a sentence of death, and had gone to meet him for the first time. I could not get the experience of that afternoon out of my mind. In part, it was the sight and sound and smell of the prison. It was the way the guards stamped "CONDEMNED" on the back of my hand in an ultraviolet-sensitive ink before I was admitted (as though I had just paid the cover charge to get into some chic and decadent nightclub with a capital-punishment theme). It was the way the guards took all of my belongings, except for my money, which I was allowed to bring with me in a plastic Ziploc bag, so (I later realized) I could purchase a picnic from the vending machines that lined the walls of the visiting room. But mostly it was the conversation I had with my client in which my co-counsel and I explained to him the various arguments we planned to make in his appeal. Many of the arguments had to do with various deficiencies in the jury instructions, arguments so subtle and intricate that I was rather proud of them. One, if I recall, had to do with the erroneous use of the word "or" instead of "and" in a jury instruction.

My client, Jerry, listened politely, but eventually broke in. "These are all very good," he said. "Very smart. But when do you get to the one about how I didn't kill those two people?" I tried to explain that whether he was factually guilty was not really a promising issue on

14. MARIANNE WESSON, *RENDER UP THE BODY* (1998).

appeal. "It's about the process," I explained to him. "Whether someone made a mistake at trial."

"The jury made a mistake," he said. "They said I was guilty when I wasn't." My co-counsel shot me a look. He had met Jerry earlier and warned me it would be like this: his exasperating perseverance on the irrelevant question of guilt or innocence. But an odd thing happened: the longer I tried to explain to Jerry that whether the judge said "and" instead of "or" was more significant to the law than whether or not Jerry had really killed two people, the stranger it seemed to me. I had just experienced an anthropologist's moment: the familiar made strange. I started writing the book in the hope that I could convey this strangeness to the reader, and have kept writing with the same hope.

Lawyers revel in generalization; the abstraction and manipulation of principles from untidy stories is the first skill taught new law students. But we sometimes need to be confronted with the world our principles have wrought. Stories—in books, movies, on television—can arrange this confrontation. But only if we trust the stories to be true, not like journalism, but in a different way, can we see that the world they depict, however strange it may seem, is recognizably one that our principles have constructed. So, for my law-trained readers, I also desire to be accurate, if perhaps for a slightly different reason.

Obviously, much of the material that describes or sets itself in the world of law and lawyers does not aspire to tell the truth in this way. A story about a Supreme Court Justice who discovers that his law clerk is an extraterrestrial (or perhaps more interesting, vice versa) may be very entertaining and even thought-provoking without having much tendency to burn our "insides with the pity and the mystery of it."¹⁵ But suppose a writer has more serious ambitions of the viscera-toasting variety. I think a number of obstacles confront the writer who aspires to create a story that surprises and disturbs, and could also be true without doing violence to what we are prepared to recognize and acknowledge about our profession.

One obstacle to accuracy is the frequent need, which has both artistic and commercial aspects, to wedge a story about the legal process into a much shorter time frame than strict verisimilitude would allow. Suppose one wants to write about a lawsuit. Lawsuits take years, and few artists have the talent to sustain suspense, or the reader's interest, over such a time period without compressing or omitting a great deal. A genius like Charles Dickens could make the interminable quality of

15. See *supra* note 2.

a lawsuit part of its fascination, but most of us are not Dickens.¹⁶ An exacerbation of this problem for the writer of a series is that the form does not permit a story that extends over many years (as most lawsuits would) because the repeat protagonist would age too much in the course of each book for her career to be sustainable through a lengthy series. As a result, we cheat a little on the aging of the protagonist (Carolyn Heilbrun says that her heroine Kate Fansler ages in “dog years”¹⁷), and a little more by making events progress much faster in our books than they would in life.

In my first book, for example, I compressed the entire course of federal habeas corpus proceedings for a death row inmate, including appeals and denial of certiorari, into fifteen months. A fifteen month period may unfortunately become the norm for habeas corpus proceedings if Congress has its way, but it was not realistic for the period in which the book was set, the early 1990s. Had I not accelerated the pace, the story I wanted to tell, which extends from the lawyer’s appointment to represent the inmate on first appeal to the eve of his execution, would have occupied an entire decade, an interval too lengthy to be compatible with other narrative necessities.

Apart from the fast-forward problem, there is another difficulty. As we have been told, the law grinds not only slow, but exceedingly fine. Even briefer events, such as trials, contain an amazing amount of tedium. I was lucky enough to attend much of the trial of Timothy McVeigh, surely one of the most dramatic and closely-watched trials of our time. There were many moments of high drama and wrenching emotion. I witnessed some hardened journalists put their faces into their nicotine-stained hands at times, especially during the testimony of mothers whose children had died in the Murrah Building’s day-care center. But I think some of the journalists, covering a lengthy trial for the first time, were less shocked by these moments than by the discovery that so much of the event was stunningly boring. This is a challenge for a writer of even average talent.

A few writers have the gift of describing tedium with astonishing skill, making it vivid, fascinating, and somehow interesting. Consider, for example, this excerpt from Rebecca West’s reportage from the Nuremberg trials. She describes the courtroom in which the trials were, by then, in their eleventh month as a “citadel of boredom.”¹⁸ The

16. CHARLES DICKENS, *BLEAK HOUSE* (1853).

17. Comments of Carolyn Heilbrun (aka Amanda Cross), Barbara Aronson Black Lecture Series, Columbia University School of Law, March 6, 2000.

18. Rebecca West, *Greenhouse With Cyclamens 1*, in *TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES* 254 (Fred R. Shapiro and Jane Garry eds., 1998).

defendants, who by then realized they were nearly certain to be convicted, wished the trial to go on forever. But, she wrote:

The nerves of all others present in the Palace of Justice were sending out a counter-prayer: the eight judges on the bench, who were plainly dragging the proceedings over the threshold of their consciousness by sheer force of will; the lawyers and the secretaries who sat sagged in their seats at the tables in the well of the court; the interpreters twittering unhappily in their glass box like cage-birds kept awake by a bright light, feeding the microphones with French and Russian and English versions of the proceedings for the spectators' earphones; the guards who stood with their arms gripping their white truncheons behind their backs, all still and hard as metal save their childish faces, which were puffy from boredom . . . [t]his was boredom on a huge historic scale. A machine was running down, a great machine, the greatest machine that has ever been created: the war machine, by which mankind, in spite of its infirmity of purpose and its frequent desire for death, has defended its life. It was a hard machine to operate; it was the natural desire of all who served it, save those rare creatures the born soldiers, that it should become scrap. There was another machine which was warming up: the peace machine, by which mankind lives its life. Since enjoyment is less urgent than defence it is more easily served. All over the world people were sick with impatience because they were bound to the machine that was running down, and they wanted to be among the operators of the machine that was warming up. They did not want to kill and be grimly immanent over conquered territory; they wanted to eat and drink and be merry and wise among their own kind.¹⁹

If I believed in prayerful petition, I would pray for the skill to do for the tedium of my courtrooms what West has done for Nuremberg's: rendered a trial, in all its excruciating monotony, in writing that is not for a second boring or repetitive, and linked it flawlessly to a larger theme.

Most of us are not, however, Rebecca West. We also tell ourselves (in further extenuation of the misleading pace at which our narratives proceed) that our audience is not hers. In order to avoid losing our more impatient audience, we shorten some details and skip others. We tell ourselves that our accounts are true in the way of fiction, if not in the way of transcription. Just as we speed up the law's slowness, for similar reasons we tend to produce a coarser grind than the genuine superfine espresso.

Consider how the process of researching the law, an essential part of any attorney's daily work, is depicted in fiction (if it is at all). In life, courts, legislatures, and administrative agencies produce great

19. *Id.* at 257-59.

mounds of material from which the lawyer must arduously extract “the law.” The fictional description of this process of lawyering, if strictly precise in its portrayal, would resemble those Andy Warhol films in which one watches a building from sunrise to sunset, or observes a man sleeping.²⁰ I know some of us once found those films fascinating, but current circumstances do not allow us to achieve the unusual mental states required for such audience endeavors. Today’s reader is, by contrast, under the influence of caffeine or worse, and looks for a synthesis of the legal materials to arrive sooner rather than later.

Perhaps the writer should cultivate an indifference to whether or not this hypothetical hyper-caffeinated reader finds her work of interest. Nonetheless, many of us who write the legal novel cannot achieve this lofty state. We have been trained as trial lawyers and know that we are in trouble when one of the jurors starts to nod off. We have to pitch our arguments to the fellow in the second row with the plastic Starbucks to-go-cup peeking out of his backpack, even while we wish he were not quite so impatient.

It was for this sort of reader that I invented, in *Render Up the Body*,²¹ a Colorado decision called *Hayden v. Marmaduke*, a fictional 1898 case in which the Colorado Supreme Court held that the remedy of habeas corpus is not available to one who complains only that he is innocent of the crime of which he has been convicted. In *Render Up the Body*, my protagonist must try to persuade the Colorado courts to overrule the case a century later. I was, and remain, quite certain that the rule of *Hayden v. Marmaduke* is a fair summary of the law of habeas corpus in Colorado, and most other jurisdictions (and certainly in the federal courts) at the time. In fact, there was never a real case by that name. It is a convenient invention that allows me to make a point about the relative value our criminal justice system places on finality versus accuracy, without making the reader observe every moment of the very tedious process of research, analysis, and synthesis that I had to perform in order to satisfy myself that this was, indeed, the law. I do not know if in making this imaginary case a prop in my book I failed in my obligation of narrative truth. Troubled by this question, shortly before publication I added an author’s note:

Colorado the geographical place is described here with fair, if not perfect, accuracy . . . Colorado the legal jurisdiction is depicted less literally. The statutes, rules, and cases that Cinda discovers in her researches are not literally those of Colorado, although there

20. EMPIRE (A. Warhol 1964); SLEEP (A. Warhol 1963).

21. WESSON, *supra* note 14.

are many similarities. The unavailability of habeas corpus or any other remedy for those who claim to have been convicted despite their innocence is a feature of the law in most American jurisdictions.²²

Does this author's note discharge my obligation? I am still unsure. To make matters even more confusing, in my next book, *A Suggestion of Death*,²³ I used a real Colorado decision on the question of how the expiration of the limitation period for a suit based on childhood abuse allegedly forgotten, then later remembered, should be calculated.²⁴ Sometimes, on sleepless nights, I think of Menander and the unsought burden of being the author of the Restatement of Attic Law which fell upon him so many years after his death. Suppose he made up parts of the law in his plays, and took pains to describe other parts with precision? Shall we forgive him for leaving us in such a muddle?

One might, I suppose, try to escape this burden by inventing a jurisdiction, as Scott Turow has done with *Kindle County*.²⁵ The trouble is that readers know *Kindle County* is supposed to be Chicago.²⁶ Is Turow then compelled, when he describes the processes of a state grand jury, to conform them to Illinois practice? I do not know.

I think my real criteria for judging the honesty of works about the law have little to do with these sorts of technical concerns. It would be easy and amusing to talk about the bloopers that some writers have committed, like the notorious ending of a highly successful novel by John Grisham, in which an insurance company manages to avoid payment of a judgment based on a claim by filing for bankruptcy.²⁷ Another example is the puzzling, but inevitable, absence of any redirect examination, ever, on *The Practice*²⁸ or *Ally McBeal*.²⁹ My interest is in a different sort of truth, or accuracy. I find it hard to articulate a formula for what I seek, so perhaps some examples will have to suffice.

For me, the greatest truths and falsehoods are to be found in character portrayal. The character of the lawyer and its source, the *deformation professionelle* that afflicts those who choose the profession, is a theme that begs for truth, but often receives only satire. Nevertheless, there are occasional insightful moments, although often enough they

22. *Id.*

23. MARIANNE WESSON, *A SUGGESTION OF DEATH* (2000).

24. *Id.* at 20; *Cassidy v. Smith*, 817 P.2d 555 (Colo. App. 1991).

25. SCOTT TUROW, *PERSONAL INJURIES* (1999).

26. SCOTT TUROW, *BURDEN OF PROOF* (1990).

27. JOHN GRISHAM, *THE RAINMAKER* (1995).

28. *The Practice* (ABC television broadcast).

29. *Ally McBeal* (Fox television broadcast).

come from non-lawyer writers, writing outside the genre of the legal thriller. The following is a passage from Rosellen Brown's *Before and After*.³⁰ The narrator, Ben, is listening to a conversation between his wife, Carolyn, and their neighbor, Wendell, who is also their lawyer. The girlfriend of the couple's son has been found murdered, the son has disappeared, and Ben has found evidence suggesting that the son may have been responsible for the young woman's death. Wendell has already said that they need a more experienced criminal lawyer, and he asks Carolyn some careful questions. Ben notes the caution in the lawyer's demeanor.

"What"— she seemed to dig around with her toe. Then she sighed and began again. "What about the truth of what happened? Don't you ever ask?"

He looked at her, that navy rep look of his, for a long time. Behind his eyes I could see warning flares going off: No, no, don't complicate things this way! In that split second he understood that we knew things it would make him unhappy to hear. He would probably get over his unhappiness, he's good at that, but would that knowledge hamper the vigor of his defense? This moment must change hands all the time, I thought, between client and lawyer. What a business to devote yourself to such expediency. To build the house of your work on evasion, illusion, intimidation, all for hire to strangers. He will have to ask us now, will have to know what we know, for fear it can be used against us I thought he was too simple a man to really relish perverting the truth, playing the angles. No wonder he was not the lawyer for us, who would need to.³¹

Consider that passage together with another, from Jane Hamilton's *A Map of the World*,³² in which the narrator, a young farm wife and mother who works as a school nurse, has been falsely accused of the sexual abuse of several young boys at the school. She is highly vulnerable because a short time before, a neighbor's child had drowned in their farm's pond. Her lawyer, Rafferty, has done a steady, patient, and ultimately brilliant job of defending her, but in the process has been forced to discredit her chief accuser, a troubled boy named Robbie. The nurse's husband has been entirely supportive and even sold the farm he loves to finance her defense. On their way home after the first day of trial, the couple is talking about Rafferty's successful cross-examination of the boy. She is mostly grateful that it went so well, but he has something else on his mind:

"Why couldn't he have been the one to drown? He might as well have. He'd be better off if he'd died."

30. ROSELLEN BROWN, *BEFORE AND AFTER* (1995).

31. *Id.* at 174.

32. JANE HAMILTON, *A MAP OF THE WORLD* 351 (1994).

"Robbie, you mean."

"Why have we let this go on? The questioning was the devil's version of Simon Says. Rafferty baited Robbie and then trapped him. There must have been something we could have done to keep that poor kid from being slaughtered."

"I know," I said. "I've felt that all along, that he is the one who will suffer more than anyone, more in a way than we have. I still have music and words, our children"—

"Rafferty is—I've never met someone before who made me sick, who made me think I was going to vomit."

"I have to get Claire," I said, "or they'll charge us for the next hour."

"You never listen to me," he muttered. "Do you know that?"³³

I love these two books for many reasons, but most of all for their wise recognition of the ways we construct our lawyers to be persons we do not like. A lawyer we liked would not be the right one for our dire circumstances. For such situations, it would have to be one who makes us vomit. This truth, far from universal, but definitely resonant, is worth more to me than the perfect score I give each of these books when I scrutinize them for technical inaccuracies.

It is perhaps no accident that these two books, which depict the successful lawyer as dislikable, are not authored by lawyers, and the lawyer is not the protagonist. Lawyer-protagonists, usually created by lawyer-writers, may be crusty, eccentric, difficult, but are almost always ultimately lovable. And, they are also successful. For another motif that can be pursued, almost must be pursued, in novels about the law is the theme of victory and defeat. It can be pursued in ways that create genuine suspense, but whatever surprises may await the reader, the protagonist's loss of the case is almost never one of them. This necessity was satirized in the Hollywood film *The Player*,³⁴ in which a film treatment that calls for the execution of an innocent woman is transformed, through the relentless course of pitching, financing, production, and editing, into one where the hero literally snatches the heroine from the execution chamber. It may be true that a writer's decision to make her protagonist a lawyer, coupled with the commercial exigency of making the lawyer a person with whom the reader can identify, creates a commercial imperative: whatever interim setbacks the lawyer may suffer, she cannot, in the end, lose her case (although she may and often does lose her soul, apparently a more commercially acceptable outcome). The opening paragraph of a

33. *Id.*

34. *THE PLAYER* (New Line 1992).

rather brilliant novel by D.W. Buffa, *The Defense*,³⁵ describes the track record of the typical lawyer-protagonist:

I never lost a case I should have won, and I won nearly all the cases I should have lost. The prosecution, sworn to do justice, is not supposed to convict the innocent—I spent a career doing everything I could to stop them from convicting the guilty. Winning was the only thing that mattered. It was what I lived for. I had not become a lawyer to lose.³⁶

And who can forget Keanu Reeves as the young protagonist of *The Devil's Advocate*,³⁷ responding with fury to the suggestion that he could have saved himself from Hell if he had just been willing to lose. "Lose? I don't *lose*!" he says, forehead veins bulging dangerously. "I win! I win! That's what I do!"

However, the cliché of the lawyer-warrior, whose victory cannot be denied, obscures an important truth about the justice system and our profession: every time some lawyer wins a lawsuit, at least one other lawyer loses. Where are the loser's stories? In my reading, they are as scarce as redirect examinations. Without aspersing any particular work, I want to ask: how honest is a corpus of literature that obscures the inevitability of defeat? Why is loss of innocence, health, or life an acceptable and moving theme for literature, but the courtroom defeat of a lawyer-protagonist so generally shunned?

There are exceptions, but not many. *A Civil Action*³⁸ depicts defeat and even makes it far more interesting than victory, but Jonathan Harr was constrained by the circumstance that he was writing nonfiction. Harper Lee allowed Atticus Finch to lose,³⁹ but that was a long time ago. In his recent book, *Personal Injuries*,⁴⁰ the talented and nearly bomb-proof Scott Turow depicts a lawyer who loses everything, although even in this story the lawyer loses as the subject of litigation rather than as an attorney.⁴¹ On the whole the closest that the most daring and original writers come to the topic is an exploration of the cost of always winning, like D.W. Buffa's in *The Defense*.⁴²

Yet, Emily Dickinson reminds us that the perceptions of the loser about the contest, and especially about the prize, are more vivid, moving, and instructive than the victor's.

35. D.W. BUFFA, *THE DEFENSE* (1998).

36. *Id.* at 1.

37. *THE DEVIL'S ADVOCATE* (Warner Brothers 1997).

38. JONATHAN HARR, *A CIVIL ACTION* (1995).

39. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

40. TUROW, *supra* note 25.

41. *Id.*

42. BUFFA, *supra* note 35.

Not one of all the purple host
Who took the flag today
Can tell the definition,
So clear of Victory.
As he defeated—dying—
On whose forbidden ear
The distant strains of triumph
Burst, agonized and clear!⁴³

I think the losing lawyer is a story that bears further telling.

Finally, I admire the honesty of novels that do not make ethical and moral commitments easy for the reader. It is comforting to read a book that instructs the reader on how he or she ought to feel: it is always the same way the attractive and ultimately successful protagonist feels. Ambivalence, even uncertainty, may be less pitchable, and certainly less comfortable, but more honest. This sort of truth does not have much to do with technical accuracy, but figures larger in my own judgments about the work than the absence of errors. For me, the best and truest novels have their origins in a process once described by the Israeli novelist Amos Oz:

Whenever I find I agree with myself 100 percent, I don't write a story; I write an angry letter telling my government what to do (not that it listens). But if I find more than just one argument in me, more than just one voice, it sometimes happens that the different voices develop into characters, and then I know that I am pregnant with a story.⁴⁴

To the novelists among you, I wish you a happy pregnancy and a healthy baby. To the readers, I ask you to judge our accuracy with forgiveness, but our honesty without mercy.

43. Emily Dickinson, *Success Is Counted Sweetest*, in *THE COMPLETE POEMS OF EMILY DICKINSON* 35 (Thomas H. Johnson ed., 1960).

44. Amos Oz, *Writing Toward Imperfect Peace*, HARPER'S, Feb. 1993, at 17-18.

