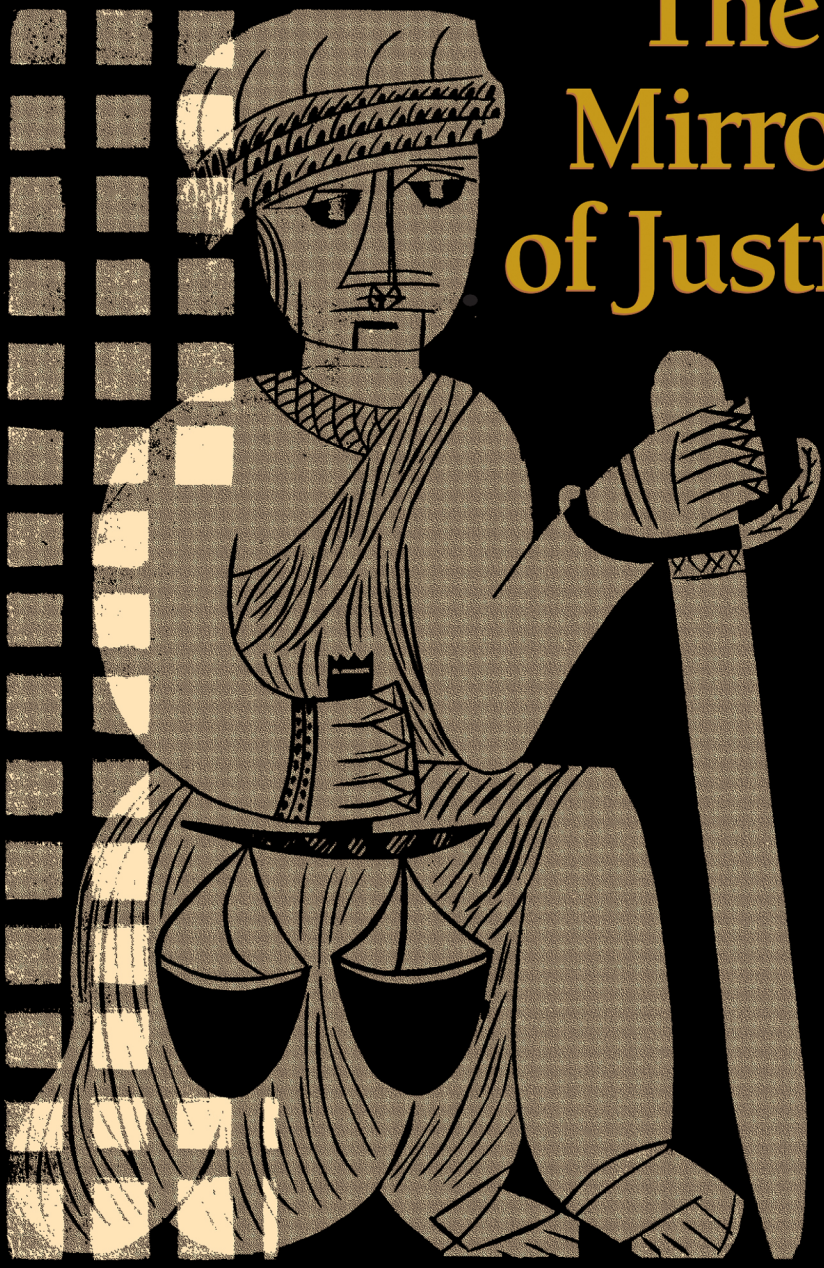
THEODORE ZIOLKOWSKI

The Mirror of Justice



LITERARY REFLECTIONS OF LEGAL CRISES

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FOR

Elizabeth Ziolkowski

Robert Thurston

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CONTENTS

PREFACE

WE LIVE in an age permeated not just by a suspicion of lawyers as a profession but by a skepticism regarding the law as an institution. As lawyer jokes proliferate, applications to law schools decline. The legal fictions of William J. Coughlin, John Grisham, George Higgins, Steve Martini, Richard North Patterson, Barry Reed, Nancy Taylor Rosenberg, Robert K. Tanenbaum, Scott Turow, and many others enjoy their popularity not because they glorify the law but because they expose its moral ambiguities as well as abuses inherent in the legal system. The spectacle of televised celebrity trials has done little to enhance public respect for the institution or its practitioners. Many citizens, and not just those on the radical left or the extreme right, regard every new law as yet another infringement of their personal liberties. The ancient adage *summum ius, summa iniuria*, widely voiced during the turbulent era when medieval customary law was being displaced by a modernized Roman law (see chaps. 5–7 below), might well be the watchword for those members of our own society who believe that the highest law of the land is truly tantamount to the greatest injustice.

In no small measure this situation has arisen because the processes of law and legislation, in the course of time, have become increasingly professionalized and hence more remote from normal daily experience, even as our lives are increasingly subject to regulation. Ours has become a society of externally imposed statutes rather than a community of internalized law known as a *Rechtskultur*. It is no doubt true that the complexities of corporate law, like the intricacies of medical science, require specialization. But the broader issues of human social behavior, as well as human health, should be a matter of vital public concern. The Romans, who laid the foundation for law as we know it in the Western world, regarded an active engagement with the law as the obligation and privilege of every thinking citizen. Jurisprudence is defined in the opening paragraph of Justinian's *Institutes* not in the specialized terms of a first-year law-school curriculum—contracts, torts, felonies, procedures—but as "the acquaintance with matters divine and human, the knowledge of what is just and unjust" (*Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*).

We have relinquished too readily the notion of the jurisprudent—that is to say, the individual who, while not a professional lawyer, is seriously interested in the nature and history of law. Law amounts to more than statutes and procedures: it constitutes the basis and expression of all social order. Many societies,

from the Babylonians to the present, have left us the records of their laws—records that enable us to form an image of their aspirations as well as their organization. But laws, and systems of law, have also changed profoundly over time. The record of that change, of the forces that have produced that evolution, can often best be observed not in the law books but in literature.

What many masterpieces of world literature mirror are not simply the workings of the law but, more compellingly, the moments of crisis when society discovers that its laws have become problematic. This book addresses a group of widely read and influential literary works that reflect momentous crises in the evolution of Western law: the transition from prelegal to legal society, the Christianization of Germanic customary law, the conflict between customary and Roman law, the debate in antiquity and the Renaissance over law and equity, the Romantic disputes regarding codification, and the modern skepticism concerning the nature of law altogether. Thoughtful citizens concerned with the law today can look to the literature of the past to see how men and women of other ages came to grips with similar problems and questions. *Antigone* and *Reynard the Fox*, *The Merchant of Venice* and *Michael Kohlhaas* confront issues that are just as insistent at the end of our millennium as they were in fifth-century Athens, in twelfth-century France, in Elizabethan England, or in Prussia during the Napoleonic Wars, even though those eras observed wholly different legal systems. In this sense, literature provides a faithful mirror of justice that shows, moreover, that the finest literary works (the "canon") more often challenge than support the prevailing ideology.

Since antiquity, great writers have been drawn to questions of law and justice, but their works do not necessarily involve lawyers. There are no lawyers in *Antigone*; the only lawyer in *Reynard the Fox* is a minor figure of ridicule; the "lawyer" in *The Merchant of Venice* is an impostor. The message that cries out to us from the centuries that produced Aeschylus's *Eumenides* and *Njal's Saga* is that the law in its most generous sense—as "the knowledge of what is just and unjust"—is the urgent responsibility of all citizens and not the prerogative of specialists. Indeed, the interests of professionals are sometimes so narrowly focused that they lose sight of the broader issues. Most, though not all, of the legal thrillers that have enjoyed a notable success in the United States during the past decade do not deal at all with issues of justice: instead, they are concerned with courtroom tactics, with the lives and careers of lawyers, and with crimes that do not challenge the law but can be accommodated easily within its existing framework.

Daniel J. Kornstein, the lawyer-author of one of the liveliest and most original books on Shakespeare, wrote recently that "culture has been delegated too much to the experts" (*Kill All the Lawyers? Shakespeare's Legal Appeal* [Princeton, NJ: Princeton University Press, 1994], xiv). That is certainly true. Literary studies have benefited from the "Law and Literature" movement, which has arisen during the past two decades in analogy to such interdisciplinary areas

as Religion and Literature or Medicine (including Psychoanalysis) and Literature. As practiced today in the United States, the field is represented largely, though by no means exclusively, by lawyers. These critics, approaching literature from the standpoint of law, are concerned primarily with law *in* literature (that is, depictions of law, lawyers, and legal procedures in literary works) and law *as* literature (that is, the rhetorical strategies of legal texts and the hermeneutics of their interpretation). Many law schools, as well as a few humanities departments, offer courses on Law and Literature. The energy of the field has generated such journals as the *Cardozo Studies in Law and Literature* and the *Yale Journal of Law and the Humanities*. Its adherents have developed a variety of methodologies, as exemplified by the anthology *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, IL: Northwestern University Press, 1988). It has aroused its controversies, as attested by Richard A. Posner's *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988)—even its own "poetic ethics," as evidenced by Richard Weisberg's *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992). So flourishing is the enterprise that it has recently prompted a critical survey: Ian Ward's *Law and Literature: Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995).

This interdisciplinary activity (like Religion and Literature or Medicine and Literature) is too fascinating and important to be conceded to the lawyers. Issues of law are so central to human society that they dominate many of the landmark works of Western literature and thereby have a claim on the attention of all educated people. The approach that I employ is best characterized, in contradistinction to Law and Literature, as Literature and Law and differs from it not in subject matter but in emphasis. The approach is historical rather than theoretical: I am interested in locating each literary work within its own legal context rather than in challenging or revising our understanding of the work in the light of modern legal practices and controversies. It is based on the assumption that the issues in those works, being historically determined, cannot be addressed simply with the principles and methods of modern legal theory or practice. To approach them we need, beyond our passionate concern as social beings with values of justice, enough understanding of legal history to provide in each case an adequate and appropriate context for the literary work.

Second, my interest is substantive rather than rhetorical: although language—in particular the legal terminology of various cultures—is essential for my purposes, I focus primarily on the tensions between law and morality that arise at certain crucial junctures of history. Further, my texts and sources are comparative rather than (as in the case of most, though not all, Law-and-Literature studies) Anglo-American: all but one of the literary works I treat emerge from cultures outside the common-law system. Finally, my interest is

concentrated on the literary work and on historical evolution, not on the theories and arguments of others. I have no desire to engage in the polemics that enliven many of the contributions to Law and Literature (such as the cited works by Posner and Weisberg) because they are largely tangential to the issues central to this book. I do not adduce the literary work in order to enhance a debate about modern law; I consult legal history in order to heighten my understanding of the literary work.

I do not regard my undertaking as a substitute for the project of Law and Literature but as complementary to it. It is, in sum, the mode in which a literary scholar with his particular qualifications and questions approaches the same conjunction of fields that has attracted so many lawyers with *their* qualifications and questions.

THIS BOOK revolves around seven major works (chaps. 2, 3, 5, 8–11) that reflect epoch-making upheavals in the history of law. In each case the literary work is related to its contemporary legal crisis in a conjunction justified whenever possible by biographical evidence concerning its author. (In several cases I have included plot summaries emphasizing the legal aspects of the works under discussion, on the assumption that not every reader will recall the details of the lengthy *Njal's Saga* or, say, the various versions of the legend of Reynard the Fox.) The introduction sets forth the principles according to which I selected those works and organized the sequence of presentation. Chapter 4 reviews the legal history indispensable for an understanding of the works taken up in the following chapters. Since the response to the reception of Roman law was so varied, it seemed useful to include a variety of authors and works in chapters 6 and 7 rather than to focus on a single central one. (Because many of the Latin texts have never been translated into English, I have paraphrased rather generously and cited key phrases in the original. All translations of texts treated, unless otherwise indicated, are my own.) The last chapter, finally, is intended as a representative sample rather than as a definitive survey: I hope that it will open possibilities of further exploration to readers curious about the field of Literature and Law.

MY INTEREST in this topic was first aroused by my studies in German Romanticism. I became aware, some years ago, that a surprising number of German writers in the Romantic era, including such major figures as Goethe, Kleist, and E.T.A. Hoffmann, were legally trained and had often practiced law. I first addressed this curious phenomenon in a talk entitled "Kleists Werk im Lichte der zeitgenössischen Rechtskontroverse" at the 1986 meeting of the Kleist-Gesellschaft in Berlin (*Kleist-Jahrbuch 1987*, ed. Hans Joachim Kreutzer [Berlin: Erich Schmidt, 1987]). The following year I delivered the more general "The Lure of the Law in German Romanticism" at the Seventeenth Triennial Congress of the Fédération Internationale des Langues et Littératures Modernes

(*Proceedings*, ed. G. D. Killam [Guelph, Ontario: University of Guelph, 1989]). That work eventually resulted in a chapter, "The Law: Text of Society," in my *German Romanticism and Its Institutions* (Princeton, NJ: Princeton University Press, 1990). These studies soon persuaded me that the subject deserved a much more extensive treatment, a treatment that needed to be both historical and comparative in scope if I was to succeed in demonstrating the two principles that I gradually came to see as constitutive in the development of literary works concerned with problems of justice: the evolution of law, and the dissociation of law and morality. My readings initially produced a review article, "Literature and Law" (*Sewanee Review* 99 [1991]: 122–32). I also benefited from discussions with various audiences, including many lawyers and judges, to whom I presented a slide-lecture, "The Figure of Justitia in Art and Literature"—a fascinating topic that I decided not to include here as a separate chapter lest it shatter the framework and continuity of this book. As the book assumed tangible shape, I had the opportunity of working through the material with the students in an undergraduate seminar, "Literature and Law," that I taught at Princeton University in the spring terms of 1994, 1995, and 1996. In 1995 I presented "Kafkas *Der Prozeß* und die Krise des modernen Rechts" at a Colloquium on Literature and Law sponsored by the Akademie der Wissenschaften in Göttingen (*Literatur und Recht. Literarische Rechtsfälle von der Antike bis in die Gegenwart* [Göttingen: Wallstein, 1996]). I am grateful to those audiences and to my students for helping me to sharpen my thoughts on literature and law in general as well as my understanding of specific texts. The Kleist-Gesellschaft and the Göttingen Akademie der Wissenschaften and their respective publishers have kindly given me permission to adapt in substantially revised and expanded form material first published in their volumes. I gratefully acknowledge permission to quote two passages, translated by my friend and colleague Robert Fagles, from *The Iliad* by Homer, translated by Robert Fagles. Translation copyright © 1990 by Robert Fagles. Introduction and notes copyright © 1990 by Bernard Knox. Used by permission of Viking Penguin, a division of Penguin Books USA Inc.

IT IS A PLEASURE to express my appreciation to the Rockefeller Foundation for a five-week residency in 1993 in that earthly paradise of the Bellagio Study and Conference Center. It was there, not far from the Lombard cities where around A.D. 1000 the modern study of law began, and a millennium later, that I outlined this book and wrote the introduction. Mary Murrell handled my manuscript from submission to publication with the gracious professionalism to which I have become accustomed through thirty years of association with Princeton University Press. Thanks to her initiative, I benefited from the enthusiasm and insight of two eminently knowledgeable readers coming from their respective fields of law and literature, Daniel Kornstein and Virgil Nemoianu. Authors at Princeton University Press, finally, have every reason to

be grateful to its superb editors and designers. Lauren Lepow sharpened this manuscript through her discernment, punctiliousness, and subtle sense of style; Jan Lilly brought her award-winning talent to its design.

As usual, I am indebted to my family for encouragement and stimulation over the years. My daughter, Margaret C. Ziolkowski, brought to my attention several of the Russian works discussed in the last chapter. My son Jan M. Ziolkowski provided me with valuable bibliographical assistance concerning literature and law in the Middle Ages. My son Eric J. Ziolkowski in numerous conversations catalyzed my thinking on issues concerning law, morality, and religion. My wife, Yetta, whose judiciousness has enhanced my thinking and writing for many years, accompanied me from the Areopagus in Athens to Thingvellir in Iceland, from the former seat of the *Reichskammergericht* in Wetzlar to the isolated castle of Falkenstein in Saxony-Anhalt, where Hoyer II commissioned the German version of the *Sachsenspiegel*. It is a pleasure, finally, to acknowledge through the dedication to a book *on* law three special people who have come into our family *in* law.

Theodore Ziolkowski

Princeton, New Jersey
February 22, 1996

THE MIRROR OF JUSTICE

CHAPTER ONE

Introduction

The Origins of Law

Looming on the threshold of many civilizations, where myth gives way to history, stand the figures of the great lawgivers. In the mythology of India, Manu (whose name is cognate with the Indo-European word for "man") was the first human being, the first Hindu king, and the legendary author of the Sanskrit code of law. Menes, who flourished around 3100 B.C., founded Memphis and became the first ruler of a unified Egypt, which he conquered through military victories and then consolidated through wise administrative measures. Minos, the legendary sovereign of Crete, enjoyed a reputation for harshness among the Athenians because he exacted from their city an annual tribute of youths and maidens with which to appease the Minotaur; yet so just was his reign that, following his death, he was rewarded by appointment to the office of judge in the underworld. Moses—to complete the roster of fabled law-bringers with remarkably similar names—returned from his forty-day seclusion with the Lord on Mount Sinai bearing the two stone Tables of Law that have governed the people of Israel for over three thousand years.

While legendary lawgivers tower at the misty beginnings of civilization, great legal codes often mark the earliest stages of recorded history. We are acquainted with late archaic Sumeria and Akkadia largely through the code that Hammurabi (1792–1750 B.C.) caused to be inscribed upon an eight-foot pillar of black stone in the temple of Marduk in Babylon. The Covenant Code (Exod. 21.2—22.17), generally regarded as the oldest part of the Pentateuch or Torah (meaning "law"), constitutes a catalog of the earliest civil ordinances of the largely agricultural Hebrews following their arrival in Canaan. The Code of Gortyn, chiseled into the circular walls of a court in Crete, has preserved in its more archaic passages our earliest records of pre-Hellenic Greek society. The remnants of the Code of Draco (621–620 B.C.; reinscribed on stone in 409 B.C.) provide one of the primal documents in the history of Athens. The Twelve Tables, on which the early Romans recorded (451–450 B.C.) the customary law of their day, embody the foundations of Roman history.

For these reasons law has been regarded by many thoughtful observers as the most reliable index of any civilization. On the first page of his masterpiece

The Common Law (1881) Oliver Wendell Holmes wrote, "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[1] In the second volume of *The Decline of the West* (*Der Untergang des Abendlandes*, 1922) Oswald Spengler stated that "every legal system contains in concentrated form the worldview of its creators."[2] And A. S. Diamond concluded his comparative study, *The Evolution of Law and Order* (1951), with the conviction that "the law remains the distilled essence of the civilization of a people."[3]

Small wonder that many late-medieval collections of laws were known as "mirrors" because they were believed to provide the truest reflection of their respective societies and of societal values. In one of the earliest of these "mirrors," Eike von Repgow's *Sachsenspiegel* (written ca. 1220–35), the author reminds the reader in his preface that his book is called "Mirror of the Saxons" because Saxon law can be recognized in it just as women regard their countenances in a mirror:

> "Spegel der Sassen"
> Scal dit buk sin genant,
> went Sassen recht is hir an bekant,
> Alse an eneme spegele de vrowen
> er antlite scowen.[4]

In imitation of this widely circulated work, of which over 200 manuscript copies are known, Germany brought forth various other legal "mirrors": the South German "Mirror of the Germans" (*Deutschenspiegel*) of 1260; the "Mirror of Swabians" (*Schwabenspiegel*) of 1270–80, which was circulated in some 350 manuscripts and gradually became the generic term for written laws of any sort; Ulrich Tenngler's "Layman's Mirror" (*Layenspiegel*) of 1510; and Justin Gobler's "Mirror of Laws" (*Der Rechten Spiegel*) of 1550.

That an institution so fundamental to human society also found its reflection in works of literature is not surprising. The Greek preoccupation with law, and notably with legal principles, which is evident in Plato's *Laws* and Aristotle's *Politics*, informs Greek tragedy from Aeschylus's *Oresteia* to Sophocles' *Antigone*. The ancient Germanic obsession with law that impressed Tacitus around A.D. 100 remains broodingly omnipresent in the Old Norse sagas a thousand years later. The satirization of law by the various late-medieval adapters of the legend of Reynard the Fox, by Sebastian Brant in *The Ship of Fools* (*Das Narrenschiff*, 1494), and by Rabelais in his *Gargantua and Pantagruel* (1532–52), mirrors the disenchantment with customary law as well as the ambivalence that characterized the "reception" of Roman law in Renaissance and Reformation Europe. This literary fascination with the law has extended itself by way of Goethe, Kleist, Dickens, Trollope, Dostoevsky, Tolstoy, Kafka,

Camus, and Faulkner unabated into the present, when writers regularly reach the best-seller lists with novels about lawyers, and when television lures viewers to follow, day after day, the continued coverage of courtroom trials and, each evening, the adventures of policemen and lawyers in their quest for justice.

The venerable association of literature and law has hardly gone unremarked. Hegel famously oriented the discussion of divine and human law in his *Phenomenology of Spirit* (*Phänomenologie des Geistes*, 1807) around Sophocles' drama *Antigone*. In an early essay on poetry in the law ("Von der Poesie im Recht," 1815) Jacob Grimm observed that "law and poetry arose together from the same bed," the foundations of which were "wonder" and "faith."[5] Grimm went on to demonstrate, with copious examples from Roman as well as ancient Germanic law, that many of the technical terms in law and poetics are etymologically related and that much ancient law is characterized by such striking poetic devices as alliteration: *quod felix faustumque sit* and *aqua et igni interdicere*; or *eigen und erbe* and *gut oder gelt*. Henry Sumner Maine began his classic study, *Ancient Law* (1861), with the observation that "our best sources of knowledge [for ancient jural phenomena] are undoubtedly the Greek Homeric poems."[6] Rudolf von Jhering, in his influential tract *The Struggle for Law* (*Der Kampf um's Recht*, 1872), a widely translated argument for legal activism, illustrated his notion of justified legal claims with reference to Shylock in *The Merchant of Venice* and found his understanding of the instinctive sense of right (*Rechtsgefühl*) exemplified by the hero of Kleist's story *Michael Kohlhaas*.[7]

Law as the foundation of civil society and as the embodiment of a people's ethical values resides explicitly or implicitly at the core of many of the world's greatest literary works, either as their theme or as their condition of being. That being the case, how is a study of literature and law, or more specifically the reflection of law in literature, to make any selection without appearing arbitrary? How is it possible, to cite specific examples, to embark upon this topic without coming to grips, say, with that governing classic of German literature, Goethe's *Faust*, to whose jurisprudential issues one legal scholar has devoted an entire book?[8] Or with the "forensic fictions" of William Faulkner, in which lawyers play such a conspicuous role?[9] How can we avoid the appearance of the unselective catalog, which characterizes earlier works on this topic?[10] Or the random assortment of examples, which determines many recent works on the subject, both German and English?[11]

I believe it possible to establish rational criteria of organization that enable us to make a plausible selection of examples from the wealth of Western literature and to undertake comparisons that amount to more than the casual associations sometimes justified as "intertextuality." We can do so by drawing upon two basic principles of legal anthropology: the evolution of law, and the dissociation of law and morality.

The Evolution of Law

It has been understood since classical antiquity that systems of law can and do vary from society to society and at different stages in their development. Friedrich Schiller, in his lectures on the legislation of Lycurgus and Solon, regarded it as Solon's greatest insight "that laws are only the servants of culture [*Bildung*], that nations in their adulthood require a different guidance from that of their childhood."[12] Aristotle based his *Politics* on an analysis of the constitutions of 158 different city-states, which he classified according to several types (the positive forms of kingship, aristocracy, and polity in contrast to the negative forms of tyranny, oligarchy, and democracy). In these types and their various subtypes, in turn, he saw reflected the history and development of the individual city-states. The Romans restricted their law, which according to at least one widely accepted understanding of that ambiguous term was known as *ius civile*, exclusively to Roman citizens.[13] To regulate their extensive commercial relations with non-Romans, the jurists developed what became known as the *ius gentium*, an international law synthesized from practices and procedures common to the various systems of the foreign peoples with whom they dealt.[14] During the late years of their empire, moreover, the Romans were exposed directly to the laws of foreign peoples because the Germanic tribes that invaded and conquered the Italian peninsula brought their own laws with them but, in accordance with their policy of legal autonomy, allowed the Romans to continue to be governed by Roman law. In the Middle Ages it was proverbial that travelers moving across Europe were compelled to change laws more frequently even than they changed coins, and the late-medieval reception of Roman law was motivated in no small measure by the desire of rulers to establish a legal system common to all inhabitants of the emerging modern states.

However, interest in the history and evolution of law, as opposed to recognition of the differences among existing legal systems, did not begin in any meaningful way until the Age of Reason and the gradual emergence of what we now know as the modern historical consciousness.[15] Locke and Hobbes developed radically different theories on the origins of government, yet both presupposed an evolutionary process underlying those origins. In *Leviathan* (1651) Hobbes viewed men and women as essentially selfish beings who adopted certain covenants and established an external power to enforce them, not from any social impulse, but simply to protect themselves against one another in a life that is "nasty, brutish and short" (chaps. 13–14). Locke, in contrast, argued in the second of his "Treatises of Government" (1690) that government is only a "fiduciary power" established through a voluntary social contract by a free people living in happiness. In both cases, primitive man was seen as evolving from a prelegal condition into a state of contractual government.

It was Montesquieu who first came to grips with the circumstances controlling the evolutionary processes of law. In *De l'esprit des lois* (1748) Montesquieu dealt mainly, as his subtitle suggests, with the "rapport que les loix doivent avoir avec la constitution de chaque gouvernement, les moeurs, le climat, la religion, le commerce, etc. . . ." The book is remembered today principally for its rather Aristotelian distinction among republic, monarchy, and despotism; for its defense of the separation of powers, which exerted a powerful influence on the framers of the American Constitution; and for its theory of the political influence of climate. In the last five of the massive work's thirty-one books, however, Montesquieu turned his attention to the history of law and traced its development under differing circumstances in different countries.

In Germany of the Romantic era the scholarly historiography of law was firmly established and even appropriated for political purposes.[16] Gustav Hugo, inspired by Gibbon's *The Decline and Fall of the Roman Empire* (1776–88), turned away from the purely systematic treatment of Roman law that had prevailed for centuries and sought (in his *Lehrbuch der Geschichte des römischen Rechts*, 1790) to understand the "inner" development of that law, from the Twelve Tables to Justinian's great *Corpus Iuris Civilis*, as a reflection of the mentality of the Roman people.[17] Friedrich Karl von Savigny, the great historian of Roman law in the Middle Ages and the founder of what we now know as legal historiography, used his vast knowledge of medieval jurisprudence to oppose the codification of German civil law during the Napoleonic era. In his compelling polemic *Of the Vocation of Our Age for Legislation and Jurisprudence* (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1814), he argued that law is an organic institution that cannot be modified or systematized by legislation. Holding that the talent for legislation emerges in different peoples at different times, he maintained that the Germans of his day were not yet mature enough to undertake anything as sophisticated as a codification. Rudolf von Jhering, while appropriating the evolutionary ideas of Hugo and Savigny, rejected their vague notions regarding a "spirit of the people" informing Roman law. Instead, he concluded in his own study of "the spirit of Roman law" (*Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 1852–65) that it was essentially a product of the constant struggle of practical jurists seeking to mediate among competing interests.[18]

The Romantic sense of history also characterized the study of Germanic law. Jacob Grimm, a legal historian by training, was inspired by his teacher Savigny to collect the legal antiquities of the Germanic past—not the laws themselves, but legal practices and beliefs—in his still indispensable *Deutsche Rechtsalterthümer* (1828). His contemporary, the distinguished reformer, patriot, and statesman Karl Freiherr vom Stein, initiated the still standard collection of *Monumenta Germaniae Historica* (1828–), the second part of which comprises the primitive legal codes of the early Germanic peoples.

Building on this base of legal historiography and specifically on the works of Savigny, whom he cites respectfully, the British jurist and scholar Henry Sumner Maine created the field of comparative law with his magisterial study *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861). Maine, working on the premise that social development generates the evolution of legal concepts, interpreted ancient Roman law in the context of the existing Hindu law with which he had become acquainted as a colonial administrator in India. Through his comparison of those two great systems as well as more primitive ones, he reached his famous conclusion that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."[19] Maine's theory appealed to the Victorian era because it was consistent with many of the prevailing ideas of the day, especially in its emphasis on patriarchy and family in the development of legal institutions. But his ideas were also compatible with the theories of evolution that were transforming geology and biology, and they seemed to confirm Hegelian idealizations of a humanity moving ever forward toward freedom.[20]

A profound sense of historical evolution also informs Oliver Wendell Holmes's *The Common Law* (1881), whose principles as set forth in its opening lines are fully consistent with those proclaimed by Savigny (whom Holmes cites):

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[21]

Similar thoughts are evident in the works of several prominent legal scholars of the next few decades, notably the three-volume set of readings, *Evolution of Law* (1915–18), by Albert Kocourek and John Henry Wigmore; Wigmore's own two-volume illustrated *Panorama of the World's Legal Systems* (1928); and Arthur Linton Corbin's *The Law and the Judges* (1914), which emphasizes the role of community in lawmaking. As Dennis Lloyd has observed, "Each society will inevitably see its law, just as it will see its God, in its own image, and even within the same society there will be a constant process of flux and development."[22]

In recent decades evolutionary models and metaphors have again held a special appeal for some of the most creative American and Continental legal scholars, in whose work various approaches can be differentiated: social, doctrinal, economic, and sociobiological theories.[23] A similar evolutionary pro-

cess has been noted by many recent students of justice. David Miller argues in his influential study that conceptions of social justice differ radically among three basic types of human society: primitive, hierarchical, and market.[24]

The evolutionary theory of law and justice yielded a particular usefulness as a tool for scholars in other social sciences, notably sociology and anthropology.[25] In his classic work *Gemeinschaft und Gesellschaft* (1887) Ferdinand Tönnies assumed that a process of legal evolution accompanied the shift from community to society that characterized the history of modern Europe. Emile Durkheim and Max Weber were not interested primarily in the evolution of law; but both took for granted an evolutionary theory of law as the foundation of their sociological thought. Durkheim's *De la division du travail social* (1893) begins with the premise that social solidarity is a moral phenomenon inaccessible to precise observation. Durkheim argues that it is necessary to substitute for the inaccessible inner circumstances an exterior fact that symbolizes the former. "Ce symbole visible, c'est le droit."[26] Since law reproduces the principal forms of social solidarity, he continues, it is simply necessary to classify the different species of law in order to determine the different species of social solidarity that correspond to them. In the course of his book he has recourse to such classic systems of law as those embodied in the Old Testament, the Twelve Tables, and the accounts in Tacitus's *Germania* in order to make his sociological discriminations. Finally, in the seventh part of his posthumously published *Wirtschaft und Gesellschaft* (1922), Weber cites Maine as well as Savigny while establishing a comparative typology deriving legal organization from legal thought. In the chapter on "legal honoratiores," for instance, he characterizes the thinking of such different types of "law-speakers" as judges, priests, and professors, and analyzes the effects upon legal thought exercised by such different systems as the guildlike method of training English lawyers, the rationalization of law in countries based upon Roman jurisprudence, and the limitations imposed by sacred law in Hindu and Mosaic countries.[27]

While the absolute types and patterns proposed by earlier evolutionists are no longer accepted by legal anthropologists in view of the diversity of social patterns in human history, the basic evolutionary principle assuming a correlation between the legal and social order of given societies has become a commonplace in social thought. In *Primitive Law* (1935) and several subsequent works, Arthur S. Diamond combined the history of ancient law with modern sociological typologies and recent anthropological data to generate a theoretically innovative paradigm of comparative law. Using reports on the legal practices of often illiterate peoples of Africa, Australia, and South America, Roman accounts of the early law of Germanic tribes as well as explorers' reports on the practices of North American native tribes, and the recorded history of the great legal codes of antiquity, Diamond proposes a model that enables us not only to understand the evolution of legal systems historically within specific

groups but also to make appropriate comparisons among different peoples who, at radically different points in chronological time, have attained the same relative level of legal sophistication.

Diamond's evolutionary history of law is based on several assumptions.[28] Logic as well as anthropological observation suggest that legal development is related to the growth of social organization. A society that has not advanced beyond the household or the hamlet requires laws of a different order of complexity from one based on such larger units as clans, tribes, or nations—not to mention those that have evolved into states and empires. Nomadic tribes, whether pre-Canaanite Hebrew or early Germanic or nineteenth-century African, need regulations of a different sort than do settled societies with towns, real property, and markets. In general, the sophistication of the legal system corresponds to the size and density of the population, whether in ancient Babylon, classical Rome, or modern states. (Homogeneity of the population also plays a role: the essentially homogeneous peoples of the Greek city-states or the people of tenth-century Iceland shared the moral assumptions upon which their laws were based to a degree unknown among the diversified populations of the later Roman empire or the United States today.)

The evidence is overwhelmingly persuasive that societies at the same level in their evolution, regardless of their chronological position in history, develop laws that display remarkable similarities. Among the most primitive food-gatherers and hunters, wherever we encounter them, the offenses regarded as *crimes* meriting the attention of the community are those that potentially affect the welfare of the group: notably incest, witchcraft, and sacral offenses. At this level one can hardly speak of "law"; we are dealing with customs enforced by community sanctions, usually death. Homicide, bodily assault, adultery, and theft, in contrast, are regarded as offenses with no *public* consequences: affecting only the injured party, they are left to be settled by the individual and his family. Theft is still a relatively inconsequential matter because individuals own hardly anything worth stealing. Homicide is normally dealt with by retribution against the murderer or his family. Adultery in flagrante delicto is avenged on the spot by the offended husband.

As societies evolve—say, to the level of the first-century Germanic tribes described by Tacitus or the equivalent level among certain African tribes of the nineteenth century—the "legal" practices change. Homosexuality and sodomy are universally added to the list of public crimes, as witness the abominations that bring down the wrath of the pre-Mosaic God upon Sodom and Gomorrah in Genesis 19. As for civil wrongs, with the acquisition of property among these cattle-keepers, theft has become a more common offense and is normally punished by manifold restitution of the amount stolen, or its equivalent. ("Do not men despise a thief if he steals to satisfy his appetite when he is hungry? And if he is caught, he will pay sevenfold; he will give all the goods of his house" [Prov. 6.30–31].) Families begin to prefer compensation in return for

the death or injury of a group member rather than simple retaliation, which all too easily devolves into a cycle of violence. The Early Codes at this level, as evidenced by the Icelandic sagas or as recorded by anthropologists from the still unwritten laws of certain early-twentieth-century African tribes, display a high degree of sophistication in the compensation for various delicts, ranging from the intentional homicide of a man (fourteen cows and one bull) or a woman (seven cows and one bull) by way of unintentional homicide (half of the above) to injuries causing the loss of a finger or an eye (one cow and one bull), loss of a tooth (one goat), or loss of both testicles or the penis (fourteen cows and one bull).[29]

As a sense of national solidarity transcending family, clan, and tribe begins to appear—for example, among the Merovingian Franks of the sixth and seventh centuries or the Zulus of the nineteenth—the situation changes appreciably. Among these migrant peoples the "king" or chieftain is head of the people and *not* ruler of a particular geographical space, but their codes of law show that certain hitherto private injuries are increasingly coming to be regarded as criminal or public offenses. Accordingly the king or tribal leader begins to take an active interest in the judgment and punishment of homicide and similar crimes that affect the group's welfare.

During the next stage—which can essentially be identified with feudalism in western Europe, but also with Hittite society of the mid–fourteenth century B.C. as well as various African peoples of the recent past—pronounced changes take place. In these Central Codes more and more offenses become criminal: breach of the peace on the king's highway or in his palace, treason, murder, robbery, attack on private dwellings, and neglect of military service. Even though some of the sanctions are mild (fines), the fact that they are exacted by the central authority and not by an individual or the family indicates a significant evolution in the notion of law and order.

We reach, finally, the great written codes that stand at the beginning of many civilizations: Hammurabi's Code (ca. 1792–1750 B.C.), the Covenant Code of Exodus (ca. 900 B.C.), the Code of Draco in Athens (621–620 B.C.), the Twelve Tables of Roman law (451–450 B.C.), but also the great codifications of law in thirteenth-century Europe as well as Abyssinian law of 1935. The social and legal similarities among these Late Codes, all of which are essentially collections of case law ("dooms," *themistes*, *mishpatim*), is astonishing. In almost every case we are dealing with late feudal societies divided into three classes—aristocracy, commoners, and slaves—and the laws distinguish precisely among the privileges, responsibilities, and punishments appropriate to each. In these increasingly wealthy families the laws of marriage, inheritance, and property play a proportionately major role; and in the new market society accompanying the emergence of towns the law of contracts assumes a sudden prominence. Because these societies for the first time have a clerical class of priests and scribes, legal transactions begin to be written, and not

merely witnessed with an elaborate ritual. As the feeling emerges that financial payment is no longer an honorable compensation for a death, the normal sanction for intentional homicide is death: "Moreover, you shall accept no ransom for the life of a murderer, who is guilty of death; but he shall be put to death" (Num. 35.31).

It is at this stage that the notorious principle of talion (*lex talionis*) makes its first appearance in most of the codes and enjoys its brief legal life. Thus we read in Hammurabi's Code: "If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye" (§196).[30] "If he has broken a[nother] seignior's bone, they shall break his bone" (§197). "If he has destroyed the eye of a commoner or broken the bone of a commoner, he shall pay one mina of silver" (§ 198). According to the Old Testament: "When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured" (Lev. 24.20). (The appearance of the principle in the much earlier code of Exodus at 21.23–24 is widely regarded to be an interpolation from later times.)[31] Similarly the Twelve Tables provide that "If [a man] has broken a member, unless he makes his peace with him [i.e., through compensation] there shall be like for like." (*SI MEMBRUM RUP(S)IT, NI CUM EO PACIT, TALIO ESTO.*)[32]

The *lex talionis* has often been misunderstood: these dreadful mutilations are not so much an expression of bloodthirsty vengeance as, rather, society's attempt to legislate and restrict the degree of vengeance for specific crimes.[33] The legal prescriptions are generally meant to state a principle of limited reparation in kind in place of specific or ceaseless vengeance. Thomas Jefferson understood this principle well when he wrote, in his "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital" (1779), that a criminal "after suffering a punishment in proportion to his offence is entitled to [society's] protection from all greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments."[34] Solon presumably had something similar in mind when, according to legend, he discarded the harsh measures of his predecessor Draco, who reputedly imposed the death penalty for almost every crime, and replaced them with milder penalties. (It is now widely assumed that Draco was not so bloodthirsty as legend would have it; it is simply the case that he concerned himself exclusively with homicide laws, which were in fact retained by Solon.) Since these societies knew as yet no such institution as the prison, the punitive options were few: essentially death, fines, or exile. From the Early to the Central Codes, as we have seen, the number of crimes meriting death had increased dramatically. But the death penalty now came into conflict with the new religious or ethical view among Babylonians, Hebrews, Romans, and Christians alike that human life is sacred. Mutilations scaled according to the principle

of analogy were devised to provide a state-sanctioned punishment other than death, but one that was still proportionate to the seriousness of the offense.

Our concern is of course with societies that have developed a literature as well as law: those that Diamond calls the Early, the Central, and above all the Late Codes. It is not necessary to accept the economic criteria underlying Diamond's pathbreaking work in order to make use of his evolutionary typology of law.[35] Similar analogies have become a commonplace in the history of jurisprudence. One recent textbook of Roman law notes that the relation between the Roman law of the classical period and English law constitutes "a natural relationship stemming from similarity of national characteristics; the national attributes which enabled the English and the Romans to govern the world are the same as those which formed their law."[36] Another scholar finds a common denominator among the communitarian aspirations for social justice of the German Anabaptists, the American Amana societies, and the Zionist kibbutzim.[37] Similar analogical thinking is common in other fields as well, as when a distinguished French scholar in his *Histoire de l'education dans l'antiquité* (1948) compares society in Homer's time to that of Carolingian, prefeudal Europe and emphasizes the parallels between the development of Athens and that of modern western Europe[38]—comparisons that are precisely analogous to those in Diamond's model. Such temporal relativism, it goes without saying, is implicit both in Spengler's notion of cultural "synchronicity" (*Gleichzeitigkeit*) and in Toynbee's "contemporaneity" of societies.

Along with recent legal theorists, literary scholars can make fruitful use of Diamond's historical typology for their own purposes. Taken not as an absolute rule but as a tendency, it enables us to organize our material in a rational rather than a merely impressionistic or "intertextual" manner. As we shall see, both *The Eumenides* and *Njal's Saga*, though separated by seventeen centuries, are in Spengler's phrase "relatively simultaneous"—that is to say, written by authors looking back from the vantage point of their own Late Code societies at legal institutions just emerging from the stage of Early Codes. We therefore follow a natural evolutionary progression if we move directly from Aeschylus to the author of the Old Norse saga because both share the same assumptions about their legal institutions, which in turn are remarkably similar in their procedures. Sophocles and Shakespeare, in contrast, are both writing at a point in the evolution of their national legal systems when circumstances have caused them to question central provisions of the existing Late Codes. Accordingly it makes sense to consider *Antigone* and *The Merchant of Venice* as relatively simultaneous and, in both cases, as representing a significantly later stage of evolution than either *The Eumenides* or *Njal's Saga*.

This book will take up its texts, in other words, in a sequence that reflects the evolution of the legal institutions upon which the individual works are based. The feudal customary law satirized in the various legends of Reynard the Fox represents a stage (Central Code) in the evolution of law that is more

advanced than the Early Codes of *The Eumenides* and *Njal's Saga* but still not at the level of the Late Codes attacked by the writers of the Renaissance and Reformation. *Michael Kohlhaas*, though set in the sixteenth century, was written by an author whose legal thinking was determined by the modern codification process of the late eighteenth century, while Kafka's works display all the ambivalence of the heated legal controversies of the fin de siècle.

To establish the principle that law evolves and to take that principle as the organizing criterion of this book is simply the first step. Given the centrality of law in human affairs, legal issues play a very large role in literature. Which works do we single out from the great evolutionary chain for special consideration? Here we need a second principle in order to determine our criterion of selection.

The Dissociation of Law and Morality

It is a commonplace of legal anthropology that, at the beginning of their evolution, law and morality are not yet separated and that the development of law amounts to a process of continual dissociation of those two social forces.[39] In archaic cultures law was essentially an item of faith, and "morality" meant basically "religion."[40] Henry Sumner Maine, in his lecture "The Sacred Laws of the Hindus," recognized that the code of Manu, "though it contains a good deal of law, is essentially a book of ritual, of priestly duty and religious observance," and that this combination is by no means peculiar to the Hindus.[41] "There is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance." Maine adduces the Twelve Tables of Rome to show that several of its rules are religious or ritual in nature; and he might equally well have cited the Ten Commandments, which conflate religious laws governing man's obligations vis-à-vis the deity with secular laws specifying various civil obligations and criminal prohibitions. His lecture "Religion and Law" begins with the claim that the professions of lawyer and priest were essentially identical in the earliest recorded usages of the Celts, Romans, and Greeks.[42] Indeed, the authority and truth of law, its claim to the obligation to be obeyed, derives originally from the belief that all law is God-given.[43] This is made explicit in the Ten Commandments, but the same primitive assumption is attributed to the Cretan at the beginning of Plato's *Laws*. Asked by the Athenian whether the laws of Crete were instituted by god or man, he responds, "Indubitably a god." A similar belief in the identity of law and religion underlies Calvin's sixteenth-century Geneva as well as late-twentieth-century Iran. But the *auctoritas* and *veritas* informing the law are not necessarily religious: they can derive from any moral conviction that is shared by a unified social order of the type that Tönnies called *Gemeinschaft*. To take an example from recent history,

the *Reichsstrafgesetzbuch* of Nazi Germany based its law, in cases not covered by existing statutes, on the "sound sense of the people" (*nach gesundem Volksempfinden*). According to §2 of that code, "Anyone who commits an act that the law declares punishable or that merits punishment according to the basic conception of a penal code or the sound sense of the people, will be punished."

At the other end of the scale, and of the process of legal evolution, many thinkers have sought vigorously to separate law and morality, precisely because of the dangers inherent in the "sound sense of the people," whether in the courts of Nazi Germany or in a lynch mob in the United States. This move toward disjunction had its beginnings in antiquity when community solidarity first began to be shattered by individuals thinking for themselves. It took a major step forward during the High Middle Ages as the new concept of "justice" began to take shape and as professional lawyers began to differentiate themselves from local law-speakers who represented the voice of their communities.[44] But it gained real momentum during the Enlightenment. Thus Kant made a distinction between the juridical and the ethical or between legality and morality (in his *Metaphysics of Morals*).[45] By the end of the nineteenth century Kant's view had been radicalized into an absolute dissociation of law and morality advocated by leading thinkers both in Europe and in the United States. In a talk entitled "The Path of the Law" and delivered in 1897 at the dedication of the Boston University School of Law, Oliver Wendell Holmes confided, "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[46] In Austria, as we shall see, similar views culminating in the so-called Pure Law movement were popularized by the satirist Karl Kraus, who in 1908 published a collection of polemical articles entitled simply *Morality and Criminal Justice* (*Sittlichkeit und Kriminalität*), in which he lampooned any intrusion of law into the domain of private morality.

In practice, of course, the separation is never so absolute as theory proposes: the relation of law to morality is more accurately described as two intersecting circles whose area of overlap varies from society to society.[47] Yet it is precisely the tension between law and morality that produces the evolution of law. As long as the two are in total harmony, there is no need for the law to modify itself in its fundamentals. But when law and morality fall out of phase, especially as the law in modern welfare states has invaded every corner of public and private affairs, then the law begins to be challenged by individuals or by minority groups within the society.[48] The law is an institution whose essential conservatism is symbolized by the wooden tablets or bronze columns or stone pillars upon which it is engraved or the codes and constitutions within which it is embedded. The law is modified only when the sense of the community evolves to a point at which an unbearable tension develops between the law and the

ethos it is supposed to reflect. As James Gould Cozzens has a wise judge put it in his novel *The Just and the Unjust* (1942), the jury protects the court in the ancient conflict between liberty and authority. "It doesn't matter how wise and experienced the judges may be. Resentment would build up every time the findings didn't go with current notions or prejudices."[49] Thus when social and religious morality began to put a higher value on human life, as we saw, the *lex talionis* was introduced as a deterrent to blood vengeance. Our own time has seen similar tensions between the existing law and personal or group morality produce profound legal crises: for example, the debates over civil rights, abortion, affirmative action, euthanasia, gay rights, and the death penalty.

It is at those moments when the tension between law and morality is increased to the breaking point that the law is changed and its evolution lurches forward again. And it is precisely those epoch-making moments that great literature reflects. There are hundreds of works in the history of literature that deal with law: from Cicero's orations and Apuleius's *Apologia* down to the late-twentieth-century novels featuring the figure of the lawyer. But the existing law suffices for the needs of most of those works; they express no sense of dissatisfaction with the system; the pleasure of these forensic fictions arises from their skillful use or abuse of the existing system. In such works, characteristically, it is not the law as such that is at issue but the determination of facts within its framework (for instance, in the traditional courtroom drama).

But there is a much smaller group of legal works in which it is not the facts that are in question but the values by which the facts are to be judged. Orestes and Antigone and Shylock do not for an instant deny or contest the facts of their deeds; they take exception to the values and laws by which those deeds are being condemned. It is works like these that reflect those moments of crisis in the evolution of law when the entire system is being challenged—the moments of tension when a society moves, as in *The Eumenides*, from a prelegal community of blood vengeance to a society of legal institutions; or, as in *Njal's Saga*, from pagan Germanic law to its humanization through Christianity. Similarly in the legends of Reynard the Fox we witness the late-medieval challenge to Central Code customary law.

Law rarely operates in a vacuum: despite the hopes and theories of the Pure Law movement, as the influence of religion and morality declines, its authority is replaced by politics and government. Indeed, the relative influence of morality and politics can be charted over time as falling and rising lines on a graph representing the evolution of law on a historical scale.[50] In *Antigone* we sense the stresses of a society in which law and religion have moved apart, creating a space where politics seizes the upper hand. Similarly, *The Merchant of Venice* exposes the anomy of a society in a state of social and legal disarray because, in the absence of religious authority, the competing claims of religious and political criteria come into conflict. In *Michael Kohlhaas* the crisis stems not from any

deficiency in the law, which has been fully secularized, but from the fact that the law is not respected by the very agents charged with its enforcement: the hero's morality requires him, paradoxically, to break the law in order to force its restitution. By the time we reach Kafka's *The Trial* the bureaucratization of the law has become so complete that it represents pure form without content: Josef K. is never informed of the crime that he is alleged to have committed. It is works such as these, works reflecting not the unproblematic functioning of the existing law but the crises that precipitate its evolution, that constitute the focus of the present work.

In one sense—and hence the title of this work—the process reflected in these works is the reestablishment of justice at a new stage following its temporary dislocation. But that claim raises a question concerning the understanding of justice itself. In his *Critique of Pure Judgment* (*Kritik der reinen Vernunft*, 1781) Kant observed that "jurists are still seeking a definition for their concept of right."[51] And the definition of justice is equally perplexing, having been formulated so often in so many different ways.[52] Aristotle recognized in the *Nicomachean Ethics* (5.7.5) that the rules of human justice, in contrast to natural law, are not the same everywhere since the forms of government vary from place to place. No one has discussed the dilemma that "there are justices rather than justice" more insightfully than Alasdair MacIntyre, who has written of "a set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another in a number of ways."[53]

In this wilderness of definitions I propose to understand justice—structurally, of course, and not substantively—as the perfect equilibrium of law and morality, an equilibrium suggested by the balances that Justitia has held in her hand since antiquity. In this understanding I take law to signify the existing legal code in any society and morality to designate the individual's or the community's sense of right and wrong, whether informed by religion or any other value and whether understood as retributive or distributive. I believe myself to be in agreement with Dennis Lloyd, who points out in his discussion of "legal injustice" that "injustice will arise when the law . . . is itself unjust if judged by whatever value system may be applied to test the substantial justice of the legal rule."[54] Similarly, Ronald L. Cohen notes, "Different interpretations of justice and disagreement over the existence of injustice and what it demands have transformed individual lives, relationships, policies, and entire societies, and there is every reason to expect this to continue."[55] If a court's decision is consistent with our sense of right and wrong, we call that decision just; if it is at odds with our sense of right and wrong, we feel that an injustice has been done.

Law and justice are bound in a tension that is almost sexual in its force. This was well understood by the ancients, who envisioned the mythic lawgivers and the great lawmakers and codifiers as male: Manu, Menes, Minos, Moses, but also Draco, Solon, Justinian, and so on down through history. Justice, in con-

trast, is invariably female: the Egyptian Maat, Greek Themis or Dike, Roman Justitia. (A close analogy is evident in the parallel between the fathers of the State—Washington, DeGaulle, Bismarck—and the female embodiments of the Nation: Liberty, Marianne, Germania.)

Justice in the modern sense is a relatively recent concept, one that emerges only when the dissociation of law and morality makes urgent the need for another authority in which we can lodge our appeal for right. To put it another way, justice is a *moral* concept, not a legal one: it can be applied to law and to legal decisions but it is not inherent in them. The earliest deities characterized as goddesses of justice, Maat and Themis, are actually representatives of order in heaven and on earth and only by extension the keepers of justice or right. (Appropriately the very term "right"—which is cognate with the words for "law" in the Romance languages, French *droit* or Italian *diretto*—stems from the Latin words *rectum* and *directum*, which define a spatial order of things.) Similarly Dike, whose name is often translated as "Justice," is in Homeric Greek the spirit of vengeance who avenges crimes against the community and its values. The Romans were not very much interested in justice as a concept: the word occurs in the first sentence of Justinian's *Institutiones*—the famous words *Iustitia est constans et perpetua voluntas ius suum cuique tribuens*—and rarely thereafter.[56] There was no cult of Justitia nor were there temples dedicated to her. Justice in her recognizably modern hypostasis, with the attributes of sword and scales, first came into existence around 1250, just at the point in history when the state was beginning definitively to replace religion as the authority of law.[57] Yet the figure representing that coincidence of law and morality is always represented as a young woman—usually, like Maat, Themis, Dike, and the Roman Justitia, clear-eyed in her vision. (Justice acquired her blindfold for the first time in the woodcuts for Sebastian Brant's *The Ship of Fools* [*Das Narrenschiff*] in 1494.)

Hence it is no surprise that the literary representation of legal crises, the dislocations of law and morality, often take the form of a struggle between men and women—a struggle that usually displays pronounced sexual or gender overtones, as in the battle between matriarchy and patriarchy in the *Oresteia*. In pagan societies, where "justice" still amounts to little more than the thirst for the sanctioned blood vengeance that will set aright the social order dislocated by a murder, it is often the case that the female representatives of justice—the Erinyes in *The Eumenides* or Hallgerd and Bergthora in *Njal's Saga*—must be restrained in their blood lust by the representatives of law (Apollo, Athena, the citizens of Athens, Gunnar and Njal). When law has become institutionalized, in contrast, it is the figure of justice who strains against the law, as in the case of Creon and Antigone. Shakespeare, as we shall see, achieves paradoxical effects in *The Merchant of Venice* by inverting the normal expectations associated with male and female, law and justice (chap. 9). Kafka finds the appropriate image for what he sees as the legal anarchy of his society in a figure of Justice who has reverted to type and become a vengeful huntress (chap. 11). Finally,

the anarchism reflected in Heinrich Böll's novel *End of a Mission* (*Ende einer Dienstfahrt*, 1966) is symbolized by a Justitia who is described as being part whore and part goddess (chap. 12).

In Sum, the following chapters deal in their historical context with literary works reflecting major crises that punctuate the evolution of law in Western civilization. The crises are precipitated in each case by dislocations in the relationship between law and morality as the truth of religion gradually gives way to the authority of the state, as community is increasingly fragmented into a society with different ideologies competing within the bland structures of bureaucracy. This is the trajectory that we see reflected in the Mirror of Justice: a tragic trajectory extending from the trial of Orestes, which constitutes the cornerstone of Western civilization, to the trial of Josef K., which undermines the foundations of that entire noble edifice—from that moment in classical antiquity when blood vengeance is replaced by trial by law to the moment in the twentieth century when law reverts once more to blood vengeance. The evolution of law has come full circle, from a primitive community so totally integrated that law and morality are one to a society so totally bureaucratized that "everything," as Kafka wrote in *The Trial*, "belongs to the Court."