Legal education runs a risk, more extreme than that run by some other disciplines, of producing, as well as initially attracting, conservative minds. Conservatism—resistance to change—may emerge as an advantage to the development of the law. Legal thinkers appreciate the need to protect and conserve “certainty” in law—maintaining the essential fabric of principles represented and avoiding the more erosive effects of discretionary license or individual interpretation beyond that permitted within existing guidelines. Nevertheless, the balance needed to facilitate the process of justice is fine, and it is clear that the greatest expressions of justice, the most notable judgments, are often memorable for a breadth of vision and creative sensibility. These notable judgments reflect intellectual engagement with the profound questions of human concern not immediately indicated by the strict technical brief of legal principle. Thus, as Ian Ward suggests in his commentary, On Literary Jurisprudence,1 “The past, present and future of legal education should be a matter of ongoing critical contemplation . . . and it should be controversial, even heated.” His endorsement of interdisciplinary studies in general, and of the study of “law and literature” in particular, supports the view that the challenge to compartmentalized thinking posed by such studies broadens the training of the legal mind in wholly constructive ways.

As Ward points out, very few novels utilized by the field address law directly. Yet, there is, all the same, “plenty of law to be found,” explaining the subtle presence of matters not immediately located, but immanent to the text—a “subterranean” literary jurisprudence. He illustrates this point by providing a fascinating account of how the writings of the Brontë sisters reveal impassioned concerns in relation to the subjection of women, a subjection sometimes endorsed or even exacerbated by the operation of law. Ward’s discussion is a fascinating revelation of how “law and literature” studies can supplement and enhance more linear approaches to history generally and legal history. To be sure, historical studies can range across a wealth of sources, from personal letters to popular magazines and pamphlets to newspapers and contemporary government reports. Meanwhile, legal historical research may include a search of many additional sources including law reports and statutory material, for example. Though scholars across the humanities and social sciences, including legal scholars, may regard literary fiction as a less reliable source of information, they may pause to consider its value both in “anthropological” and “motivational” terms. Quite apart from being a philosophically and spiritually enriching source of stimulus, literature has a value as an

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“anthropological” phenomenon. Literature provides evidence, a “footprint” of how individuals thought, spoke and acted, how living within a community or society “felt” to those characters approximating to their “real” counterparts. This is particularly the case for the “realist” literature of the nineteenth century, which for the most part attempts to reflect rather than diversify from the “real.” In what we might call “motivational” terms, literature also has a value. This value ties more particularly to Ward’s discussion of “subterranean jurisprudence” as a means of communicating, trenchantly, the intimate linkage between those “facts” of life as recorded by contemporary official records and publications and the experiences lived by those whom such facts purported to represent. Not infrequently, authors are motivated to write in response to their perception of an “abyss”—an absence of social or political awareness in relation to a particular phenomenon. Authors may also wish to “motivate” political and legal institutions and society to respond to that phenomenon. Official records, reports, and lobbies more often than not reflect the drives of the powerful and the “norms” of a hegemony blind to the harms created by its own system. Ward reveals the relevance of the writing of Anne Brontë to just such a phenomenon. The norms of spousal violence in her writing were tolerated and even endorsed by society and by the courts of the time. Her writing also demonstrates the network of legal and social structures that perpetuated the indulgence of such abuses.

My own research has similarly revealed the “subterranean jurisprudence” to be found in the works of Thomas Hardy, a writer disturbed by both the sufferings of ordinary people and the unrecorded and unsung lives of the invisible. As with Ward’s study of the Brontës, Hardy too depicts the particular vulnerability of women to a social and legal system that belittles, discounts, and sometimes even endorses the harms visited upon them by reason of their sex. In Tess of the d’Urbervilles2 for example, Tess, a young, innocent, and vulnerable girl, is manipulated by a man, socially and economically her superior. He takes advantage of her sexually, leaving her a social “untouchable” as far as respectable society is concerned. Elsewhere I have written about the “legal” implications of this tale, both in relation to this “rape” or “seduction” scenario, and to a later event in the novel, germane to discussions of women perpetrators, “provocation,” and “diminished responsibility” doctrine in murder trials.3 Interestingly, my research into the terms “rape” and “seduction” was prompted, in part, by an earlier paper written by another scholar. This paper forced me to “respond”4 with some vehemence to what I believed to be misinterpretations and misrepresentations of the “evidence” provided by the novel, but it also stimulated me to unearth case law from the nineteenth and early twentieth century regarding not only rape, but also seduction. The resultant analysis nicely reveals the linguistic and cultural terrain—the “sub-terrain” we might say—underpinning difficulties in confronting sexual offenses. Hardy was writing about

4. MELANIE WILLIAMS, IS ALEC A RAPIST?—CONNOTATIONS OF ‘RAPE’ AND ‘SEDUCTION’: A REPLY TO PROFESSOR JOHN SUTHERLAND, 7 FEMINIST LEG. STUD. 299, 301-316 (1999); see also MELANIE WILLIAMS, SECRETS AND LAWS: ESSAYS IN LAW, LIFE AND LITERATURE (2005) (detailing a later version of this reply).
something almost unsayable. An offense regarded by some as hardly an offense at all, by
many as most properly blamed upon the victim, and frequently by the law as an odd domain
where woman was herself a form of property yet had no property in herself.

The “riposte” to the “other scholar,” mentioned above, was prompted in part by the
suggestion that Hardy’s original perspective had been exaggerated. It suggested that by the
mid twentieth century what had originally been meant to be understood as a more or less
mutually pleasurable sexual dalliance, had been “transformed” into a cry of “rape.” Yet,
consciousness of the real social motivation behind Hardy’s plangent depiction of the plight
of Tess meant such a suggestion could not be allowed to stand unchallenged, and my “reply” to
him provides extensive evidence drawn from case law and close textual analysis.

In relation to the concept of “subterranean jurisprudence,” there is yet further evidence
germane to this discussion. Evidence which, when shared with my “Law and Literature”
students this year helped to illustrate anew the reality behind Hardy’s depiction of Tess, whilst
at the same time demonstrating that “interdisciplinary” can embrace the interaction of several
disciplines (This seems inherent in the term interdisciplinary). On this occasion, the evidence
shared encompassed not only literature and law but also, as with Ian Ward’s enquiries,
historical scholarship. Law students are often, rightly, resistant to the cultivation of a too-ready
“empathy” with fictional characters, recognizing the need to maintain some objectivity. At the
same time however, the students gain insight upon the contextual realities of lives that assists
in the development of a meaningful balance between distance and engagement with the
circumstances of agency. Although richly descriptive, emotive texts such as Tess convey most
vividly the experience of life lived at a time when vast distances were walked, where darkness
reigned in the countryside, and social differences were absolute. Evidence drawn from
historical accounts may likewise provide contextual power to such descriptions. The source I
shared with my students this year, in thinking about Tess, was an article based upon historical
research into Wales—‘Stolen Goods’: The Sexual Harassment of Female Servants in West
Wales during the Nineteenth Century by Jill Barber.5 Although the article refers to evidence
from Wales, the factors described therein would have been relevant to a significant degree to
life in the West of England (the region relevant to Tess) too. The factors were especially
relevant regarding social hierarchies, rural circumstances, conditions of employment, and legal
policies, all of which were shared by these two regions (the law being that of England and
Wales).

Barber begins her article by pointing out that one of the difficulties involved in
examining the records and history of sexual harassment “lies in the gap between incidence and
prosecution. Most victims suffered in silence, and where complaints of sexual abuse were
made, many were withdrawn before they reached the courts.”6 Barber notes that domestic
service put females at risk of sexual harassment in a number of ways, yet it was the largest

5. Jill Barber, ‘Stolen Goods’: The Sexual Harassment of Female Servants in West Wales during the Nineteenth
6. Id.
employer of single women until far into the nineteenth century. This was particularly the case in rural areas where domestic service would often determine employment choices for women and girls until marriage. At one point Barber makes a direct reference to Tess; she notes an account that an exceptional woman might have steered her own fate in sexual matters more determinedly, but that such authority would have been rare and “quite unlike Tess of the d’Urbervilles or Hetty Sorrel.”

Economic forces, aided by the law, supported the process of disempowerment. As Barber explains:

The laws concerning masters and servants were heavily biased in the employers’ favour. In 1866 the Carmarthen Journal spoke out against the injustice of laws based on ‘old notions which have been handed down from feudal times’. Displayed like cattle at an annual hiring fair, once engaged, servants became their master’s property for the following year. Disobeying an order or absconding were criminal offences for which they could face three months in prison. The inhumanity of these laws is illustrated by the case of Hannah Davies, who attempted to run away from the farm of Cunganewydd, Llandygwydd, one night in 1843. No one asked what had driven her to such desperation that she ran away at three o’clock in the morning, when it was snowing and she had nowhere else to go. She took a pair of clogs belonging to her master’s dead son because she had no shoes or stockings of her own. In the morning her footprints in the snow led her pursuers to a field three miles away where she was vainly ‘concealing herself under the hedge’. Despite her pleas, she was dragged back to the farm, charged with her offence, and sentenced to two months in prison . . . [i]f a master was bent on her seduction, a servant had nowhere to hide. Destitution, or imprisonment were the only alternatives.

The article notes a number of additional factors that increased the particular vulnerability of young girls and women. Servant girls were vulnerable not only to the sexual impositions of their masters, masters’ sons, but also from men of their own class, especially because girls might be required to undertake outdoor work in the fields alongside men, as well as indoor execution of domestic chores. Barber recounts for example the case of eleven-year-old Sarah James, who, in 1866, “was left alone at the farm of Parkau, in the Cardiganshire parish of Brongwyn, with Evan Davies a fellow servant. While the young cattle she was meant to be minding trampled the potatoes, Davies dragged Sarah into the barn and raped her.” The scenario is deeply evocative of the life of Tess, whose life as a domestic servant involved working on the poultry farm and whose downfall was exacerbated by later employment in freezing fields.

7. Id. at 126.
8. Id. at 124.
9. Id. at 125.
As we might expect, Barber confirms that seduction by a master was extremely unlikely to result in an offer of marriage, yet such girls were often left in pitiful circumstances, dealing with unwanted pregnancies at a time when contraception was unavailable, and abortion illegal. Barber conveys the tragedy of such lives, noting their incalculable suffering, forced to conceal pregnancy and childbirth, often giving birth in silence in a room shared by other servants. Barber notes the case of Mary Ann Rees, the servant of a confectioner at Aberystwyth in 1867:

She gave birth one night, in the room she shared with another servant, silently enduring her agony for fear of waking the other girl. In the morning the other servant saw Mary wiping some spots of blood off the floor, and became suspicious when she carried the slop bucket to the outside privy covered by her apron. The baby's body was found later that morning in the privy, with marks around its neck suggesting that it had been strangled. . . . These girls were not hardened criminals but driven by their circumstances to the edge of despair. The Merthyr Guardian of December 1840 reported the case of Ann Davies, a servant girl who had been imprisoned for a month after leaving her baby on its father's doorstep. On her release she was reduced to sleeping with the baby under a hedge. In begging for relief she told the magistrates she did not want to murder her child, but she could not support it.10

Hardy's depiction of Tess under-dramatizes such tales. Tess might be regarded as more fortunate than most, for she supports her child by being permitted to work in the fields near her family home. The social injustice of her situation is emphasized more subtly by the refusal of the Church to allow the burial of her bastard child—which dies of natural causes—within consecrated ground.

We have seen that, through harsh labor laws, the law contributed to the entrapment of women and domestic servants more generally. In relation to the adjudication of sexual offences, even where they were reported, the law could be equally blind. Barber refers to the “incredible bias” displayed by male judges and juries towards the accused in cases alleging rape. As she recounts:

At the trial of Evan Davies for the rape of Sarah James at the Cardiganshire Quarter Sessions of 1866, G. W. Parry used the much quoted words of Sir Mathew Hale to direct the jury: ‘a charge of Rape is an accusation easy to be made, hard to be proved but harder to be defended by the prisoner accused tho’ innocent’. In these circumstances it is hardly surprising that most defendants were acquitted.11

10. Id. at 128-29.
11. Id. at 129.
To add to this disturbing picture of bias in judge and jury in their attitudes to proof, Barber notes that juries might strive to reduce the charge even in clear cases of guilt.\textsuperscript{12} Barber reported the case of Daniel Davies, who, in 1831, was “a fifty year old man who attacked a young servant herding cows in a field . . . .”\textsuperscript{13} The Grand Jury had, as the case report reveals, “very properly ignored both the charge of attempting to have carnal knowledge of a child under twelve, and the charge of an attempt to commit a rape. Instead they found him guilty of common assault, for which he was sentenced to two months imprisonment.”\textsuperscript{14}

It is little wonder that so few cases ever reached the courts. Women and girls, by virtue of their sex lacked credibility, social standing, and their very identity in the world of law itself. More often than not, women and girls were seen as “fair game.” Their vulnerability to sexual assault was part of a natural order, endorsed, more or less by the law. “Once victim, always victim— that’s the law!” exclaims Tess.\textsuperscript{15} Though “law” in formal terms makes scant appearance in Tess, her story acts as a cry of powerless victimhood at the hands of the law. Tess is a direct challenge to the possibility of justice, albeit that Hardy himself had served as a magistrate.

Demonstrating the links between law and the humanities is arguably a vital source of critical development in the education of law students, whether accessed through Hemingway or Hardy, Brecht or the Brontës. In addition, drawing upon vivid, “real” historical accounts nurtures appreciation of the forces behind the writing of the original literary texts. Drawing on these accounts revives a sense of the acute social and cultural pressures animating the narrative and linking directly to the development of law. Further, such inter-textual journeys advance the appreciation of how such an interplay of factors might map onto our own, modern world and reveal the abyss where certain persons are exploited, disempowered, and yet remain more or less “invisible” to the gaze of the law—a “subterranean” prompt to jurisprudence indeed.

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 129-30.
\item \textsuperscript{13} \textit{Id.}, at 129.
\item \textsuperscript{14} \textit{Id.} at 129-30.
\item \textsuperscript{15} \textit{HARDY, supra} note 2, at 423.
\end{itemize}