

## ***Recherche Sublime: An Introduction to Law and Literature***

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***A Modern Fable:*** Somewhere in the Reign of Victoria, Law decided to attune Herself to the Scientific times. She renounced her Goddesshood to become a tightly-bounded Technocrat, logical, methodical, objective, predictive, neutral. She cast from her Bosom the Knowledges with whom she had been intimate, among them History, Philosophy, Political Geography and Political Economy, shunned her Literary Associates, changed her Ways and emerged a Modern Science, secular, disciplinized, self-defined and self-absorbed. (That Law succeeded was never fully accepted by legal academics. But little is.) Law's transformation did not go unchallenged. Modern Law was attacked by none other than the outcast Knowledge—Sociology. Now also a Modern Science, trumping Law's Logic with Realism, Mathematics and Empiricism, Sociology censured Law for failing to recognize the true nature of legal rules (arbitrary), processes (subjective) and effects (hurtful). But Law, being At The Top, incorporated Legal Realism and its progeny, Critical Legal Studies and Law and Society and, by embracing her own contradictions, became internally and externally coherent: Truly Modern at last.

The End.\*

**L**inkages between law and literature are not new. David was judge and psalmist, the Ciceronians were masters of legal and literary rhetoric, Chaucer's is the earliest extant portrait of a lawyer, Shakespeare has been accused of the study of law, Shelley named poets the "unacknowledged legislators of the world" and the literary canon was replete with works by and about lawyers. By the late 19th century, however, the new wind of specialization was blowing. In 1889 John Skirving Ewart, defense counsel to Louis Riel and himself a noted rhetorician,

wrote to a friend that "the average man is unable thoroughly to equip himself both in rhetoric & logic including premises & so to be really effective must as a general rule adopt & cultivate either one method of address or the other" in order to practice law; by 1896, junior Manitoba lawyers were claiming with their counterparts elsewhere that the "age is too practical" for a lawyer to be known as a poet (qtd. in Willie 278). That Clarence Darrow could quote without apology from A. E. Housman and the *Rubaiyyat* in his 1924 defense of child murderers Leopold and Loeb was more a tribute to his own legal repute (and desperation) than that of literary rhetoric in the courtroom. The poetic utterings of John Mortimer's Rumpole merely magnify his eccentricity, his lack of fit with a modern justice system.

The literary now had little place in the jurisprudence, courts and training programs of modern law. In the age of scientific and secular disciplinarity, the literary was relegated to law's after hours and to one or two much-criticized "literary" judges. Evidence expert John Henry Wigmore exhorted lawyers in 1908 to read novels about law in their spare time in order to familiarize themselves with "those features of his profession which have been taken up into general thought and literature"—the "features" being highly negative (576). The success of Wigmore's humanizing project is uncertain. (A 1993 poll of Canadian attitudes to lawyers, for example, found that 78% of respondents held "minimal" respect for the profession.) Poet/insurance executive Wallace Stevens rigorously divided his life into law (masculine, daytime) and poetry (feminine, nighttime); while a certain terseness and accuracy of language connected these endeavors, the poems are bare of legal theme. Theorists seeking extralegal interrogation of law found it in the new social sciences and not in the arts and humanities which had for centuries illuminated its processes and transgressions.

Wigmore's list was updated once or twice, but only in the past two decades was its humanizing aim taken seriously by the legal academy. James Boyd White, Richard Weisberg, Robin West and others use literary works to examine the ethics of law, and bring that examination centrally into the teaching, analysis and theory of law. Others, most famously Stanley Fish, have gone further, using the postmodernist trickster tools of deconstruction to expose the uses and abuses of language in law and to destabilize law's ultimate claims of coherence and

supremacy. Still others, like Patricia Williams, use the literary forms of personal essay and narrative discourse to express the intertwining of personal, social and legal experience. Challenge to the modern construction of law now comes from the humanities as much as it does from the social sciences which profoundly informed its earlier 20th-century self-critique.

Literature, narratology and interpretive theory, history, drama, poetry, film and the trivia of popular culture are used extensively by scholars in a wide variety of disciplines to explore and expose constructs of law. Is Law and Literature a "movement"? "What has happened," wrote James Boyd White in 1989,

is that many minds, to some degree independently from each other, and moved by somewhat different hopes and interests, have turned from the language of social science that has so dominated legal thought for the last fifty years to the humanities, and in doing so have expressed a widespread sense of the inadequacy of our current languages (and texts) to our experience of law and legal criticism. (2026)

Literature offers a plurality of visions of the operations and constitution of law equally accessible to lawyers and non-lawyers. White's 1973 work, *The Legal Imagination*, explored a rich variety of associations between legal and extralegal texts, drawing from stories, case law, philosophy, rhetoric and language studies to explicate the processes of law. To White properly belongs the credit for introducing literature studies to the law-school curriculum and for setting Law and Literature firmly on the map of interdisciplinary study.

Neither the literary canon nor the legal canon has a monopoly on quality or relevance. Law and Literature remains a multidisciplinary endeavor mining the limitless motherlodes of the arts and humanities, popular culture and formal law, seeking connection over closure. This is its strength. As Ian Ward wrote:

Of the many intriguing characteristics of the Law and Literature movement, one of the most exciting and most valuable, is the fact that, unlike many other theoretical approaches to the problems of law, the ambition of Law and Literature is firstly educative, and only then, secondarily, social and political...the political manifesto is supposed to emerge from the educational force of literature. (323)

One might fairly ask whether “educational force” constitutes a political agenda, where a teacher or a literary or any other canon controls educational content. A more immediate question, however, is whether a Law and Literature “manifesto” may be already emergent.

The ambitions of Law and Literature are reflected in the title of this collection, *ADVERSARIA*. Despite a shared etymology with “adversarial” and the adversary system which is the hallmark of the common law, “adversaria” are mere textual marginalia, notes written in passing, brief commentaries on one’s day. The title is a tribute to the intimate and experiential (as opposed to Top-Down and Grand Theory) aspirations of Law and Literature. It is these aspirations which make Law and Literature (“Truly”) postmodern (“At Last”). Disciplinary critique is a modernist concern; intimate destabilization is something different. If there is an emergent social and political agenda, it is one which reflects and respects a plurality of visions and experience. It avoids canonical closures. In its investigation of law, social structure and social control, language and meaning, it draws upon legal and extralegal literatures which illuminate or challenge the operations, constructions or ethos of law. Its practice values disciplinarity while its field of study crosses disciplinary boundaries in search of connection. The descriptive may become the prescriptive but this is not its aim. Perhaps Law and Literature is less a “movement” or a field of study than a critical methodology—and an intimate one, at that.

Law and Literature is practiced primarily but by no means exclusively within the boundaries of law. Arts faculties and law schools use law-related literature to study images of law and draw on critical theory to unpack legal processes. Scholars of literature and film have undertaken legal historical research while legal academics have moved beyond cannibalizing poetry to adorn articles in law journals, into serious engagement with extralegal texts and new ways of reading legal texts. These endeavors—the literary analysis of legal texts (“Law as Literature”) and the legal analysis of literary texts (“Law in Literature”)—constitute the two branches of Law and Literature. Many works elude such pigeonholing. Although the distinction that was once cherished by advocates of Law and Literature and indexers of periodical literature has become simplistic, it still has some explanatory value.

“Law in Literature” invites speculation about law as a regulatory device and explores social constructions of law. Literature, whether popular (as were Dickens’s novels in his day) or classical (as his novels have now become), discloses ideologies of law contextualized in place, culture and character; such literature offers discourses which enrich both literary and legal study. “Law in Literature” offers the practical spinoff of exposure to style and precision of language which (arguably) can improve writing and analytical skills. Any literary, musical, filmic, dramatic or popular work which engages with law, social control or social construction of the experience of law is a candidate for such interrogation.

“Law as Literature” promotes speculation about the meaning of law as written or spoken word. Techniques of literary criticism aid understanding, evaluation and analysis of legal materials, expose the indeterminacy of legal language and critique the interpretive processes of the courts. Narratology has proven an invaluable tool in legal analysis and is widely used in race and gender analysis. The literary criticism of law is contentious. The pen may be mightier than the sword, the argument goes, but legal judgments are backed by sanctions of more than metaphorical or morally suasive force; further, their treatment as literature is specious, as judges do not intend them to be “literature” (a claim, at least in view of judges like Benjamin Cardozo and Lord Denning, that is itself specious). Literary analysis has made significant contributions to understanding legal reasoning, language and symbology and the construction, narrative and rhetoric of legal argument.

In teaching and writing about Law and Literature, the traditional literary canon has been inspirational. The most common choices for courses are *Billy Budd*, *The Merchant of Venice*, *The Trial*, *The Stranger* and *Bleak House*. Shakespeare, Dickens and Kafka have generated a respectable mountain of legal commentary. The legal canon—the elegant and slippery judgments of Cardozo, the cannibal seamen case of *Dudley and Stephens* and the United States slavery cases decided under the law of property—has been similarly inspirational. In both areas, the non-canonical (or, if you like, the “new” canon) has also been used to explore intersections between law and society in the context of feminism, race, childhood, legal ethics, oppression and colonization, rights and reformation. Sources here include song

lyrics, film and television ("We Are the World," *Witness for the Prosecution*, *LA Law*, *Top Cops*), popular novels (the courtroom genre is a current top seller), Harlequin Romances and Superhero comics (subjects of essays submitted for my course last year), law-school casebooks, relatively obscure legal judgments and archival materials of every description. Given their alternative-society premise, the genres of fantasy and science fiction are fruitful areas awaiting further exploration in the context of law.

Does literature belong in the law school? The training of plumbers to fix legal leaks (the "trade school" approach to legal education) is not antithetical to training the profession's Portias. Shakespeare's gifted transvestite retains her imagistic power in gender/race/class critiques of law; conversely, her argument is a model of legal reasoning. An education which combines case law and practitioner concerns with perspectives gained from other disciplines vital to an informed, creative and ethical bar. The 1983 Arthurs Report on *Law and Learning* in Canada stressed the importance of interdisciplinary and multidisciplinary legal scholarship, arguing that legal scholars "should make a conscious effort to diversify the approach they take in their research" and "turn to more fundamental studies using historical, theoretical, comparative and empirical approaches" (57). Similar arguments have been raised in reviews of legal education in the United States, and the American Bar Association has devoted considerable resources to supporting linkages of law and the humanities.

Law and Literature engages students in the exploration of relationships between individual, culture and law, through extralegal images of law and social control, legal processes and lawyers. For those trained in lawyer's law, works which raise direct questions about law will reflect and expand understanding of legal doctrine and encourage broad critical thinking about the place, processes, meaning and impact of law. The primary attraction of Law and Literature, however, is that it is (sometimes) fun, (mostly) interesting and (possibly) healing. Literature is accessible at a primary experiential level. Direct exposure to literary materials can be a powerful impetus to reconceptualizing law and overcoming boundaries set by the intensive focus of doctrinal or disciplinary study.

Law and Literature is an invitation to consider other ways of

approaching texts and other ways of seeing law. It is a search for new ways of thinking about law. It introduces other disciplines—sociology, biology, economics, history, penology, psychology, criminology, philosophy, linguistics, political science, economics, race and gender theory, interpretive theory, or whatever might illuminate a particular work—into the study of law, whether that study is undertaken by lawyers, English professors, historians or criminologists. Interpretive strategies developed in psychoanalysis or critical criminology may impact on historical studies, enter literary studies and wind up in law-review articles. Law has always been a prolific borrower. It is fair to say that "Law and Literature" no longer necessarily implies a central concern with, or origin in, either. Many of the articles in this issue of *Mosaic* would be welcomed by mainstream law, law and society, philosophy, literary, sociology or history journals.

Law and Literature represents an attempt to overcome disciplinary boundaries in conceptualizing legal research, reinterpreting law and understanding literary texts which reflect or critique legal process and the social order. In a passage which seems to invite literature into legal research and teaching, the Arthurs Report distinguished *recherches ponctuelles* ("isolated, narrowly focused and rather random research") from *recherche sublime*, the search for "higher levels of explanation and integration through conceptual and empirical analysis" (75). It is to the "sublime" level of analysis that the Law and Literature enterprise aspires, and to which the present collection *ADVERSARIA* now makes its contribution.

\* Excerpted from Anne McGillivray, "Law and Literature: An Immodest Proposal" (Viewpoint). *Canadian Law and Society Bulletin* #13 (1992): 2-4.

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