ARTICLES

The Liaison Between Law and Literature

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This article explores the relationship between law and literature with a view to stimulating discussion about the way in which law is taught and practised. Procedural fairness requires that litigants be heard and understood. The article suggests that a fuller understanding of various literary skills by legal practitioners, especially advocates, will ensure that cases are presented to the courts effectively and that the legal system is subjected to a salutary critique.

AT a first glance law appears to have much in common with literature: a concern for the fate of the individual in society, an interest in the truth of any matter in contention, a familiarity with different forms of narrative and argument, an awareness of linguistic skills. Nonetheless, there are significant differences between the two disciplines. In exploring the relationship between law and literature I will indicate the differences and seek to stimulate discussion about the way in which law is taught and practised. I will argue that a clearer understanding of the relationship will be of value to practising lawyers, especially advocates.

The notion of justice and the means by which a legal system endeavours to achieve a just result are usually linked to concepts of rationality and reasonableness. Lawyers

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view adversarial reasoning as the antithesis of imaginative or speculative thought. And yet, procedural fairness, which lies at the heart of respected legal systems, requires that an accused person be heard pursuant to comprehensible rules. The system depends upon stories being told well.

Stories are the raw material from which literature is created. Literature casts light on local circumstances or communal habits that might otherwise seem incomprehensible. Literature illuminates the original experience. Any work of the imagination is an attempt to see things from a standpoint other than your own, a skill which will be of use to lawyers if they are to win the confidence of their clients and put cases to the court. The best advocates know how to tell a story. Subject to the evidence, they draw upon the lessons of literature.

I have always been attracted to Doris Lessing's observation that the role of a writer in society is to be a small personal voice. If such a voice speaks truly, she implies, then consideration of the wider issues is sure to follow. Lawyers who practise their profession imaginatively will help to ensure that the small, personal voice of a client is heard and understood. To that extent, I have always been conscious of an important nexus between law and literature.

THE NATURE OF LITERARY WORKS

Plato condemns literary works. He accuses artists and writers of baseness and moral weakness. They are interested only in mimicry. They accept appearances instead of questioning them. A writer who portrays a doctor does not possess a doctor's skill but simply imitates doctors' talk. This is pernicious because the charm of a literary work may result in simple folk treating the appearance as the reality.

According to Plato, a mature person moves from an uncritical acceptance of sensory perceptions, a childish delight in trivial images, to a more sophisticated understanding of what is true. The just person and the just society are in harmony under the control of reason and goodness. If a poet attempted to visit Plato's ideal state he would be promptly escorted to the border.[1]

Plato's views appear in *The Laws* and other treatises setting out the constituents of a stable society. His views are consistent with the outlook of many, perhaps most, modern-day lawyers; that is, the legal system should be principally concerned with reining in moral weakness and transgression. The system strives for certainty and objectivity. It seeks to develop a consistent body of rules, a series of carefully crafted precepts that bear upon the realities of the day and can be applied to most cases pursuant to well defined categories of right and wrong.

1. I Murdoch *The Fire and the Sun: Why Plato Banished the Artists* (Oxford: OUP, 1977) 1.

Unfortunately, legal procedures, whereby emotional considerations are minimised or excluded, seem unreal to lay observers. The system appears to create methods of reasoning that suppress important instincts. In the words of Joyce Carol Oates: 'The law tries to measure intent, but it cannot measure what you might call the swerve, or the inclination of the soul'. In many cases the justice of the situation requires an understanding of human vagaries that the legal mind is trained to resist or is obliged to ignore – hence the familiar saying, 'hard cases make bad law'. To someone tangled in the net, as Franz Kafka demonstrated in his eerie novel *The Trial*, the legal process can soon take on the quality of a nightmare: what seems to matter is the process, the 'case', not 'me', the litigant, the person likely to be affected (or ruined) by the outcome.

Imaginative writers are invariably sympathetic to the litigant's plight. They are bound to be more concerned about the fate of the individual than about the maintenance for society's benefit of a coherent body of general rules. When it comes to looking for truth, writers are conditioned by their own introspective habits. They are determined to discover, and then express, what they actually feel about a situation as opposed to what they are supposed to feel. They are wary of conventions.

Notwithstanding Plato's views, a great work of literature is commonly thought to deal with some subject which is important to the life of mankind. Such a work employs acknowledged literary skills in order to produce the desired effect. Certain works are regarded as classics because succeeding generations keep coming back to them in the belief that they contain a kind of enduring wisdom. For example, in *Middlemarch,* George Eliot shows the way in which an idealistic young medical practitioner is gradually corrupted by the circumstances of provincial society and loses his edge. We learn something about the diminishing quality of Dr Lydegate's skills, his youthful zeal, which doctors themselves might not fully understand or be willing to talk about.

All of this suggests that literary discourse fascinates, and eventually serves to educate, precisely because it is concerned with transgression, moments of personal dilemma, and the dangerous or pernicious side of things. To understand corruption one turns to Henry James. To get to grips with violence and remorse, one picks up Dostoyevsky's *Crime and Punishment.* The reader follows the swerve or inclination of Raskalnikov's soul from gruesome deed to confession and ultimate repentance. The narrative depends entirely upon what the protagonist feels, and it seems convincing, although the tale lies beyond the scope of verifiable fact.

Practising lawyers are seldom required to say what they feel personally about a particular case. In most forums it would be frowned upon to do so. To be discreet and self-effacing is taken as a sign of competence and strength. In a recent review of an autobiographical work by John Edwards, who was a successful trial lawyer in the United States before being nominated as the Democratic party's vice-presidential candidate, David Pannick QC observed wryly that the Edwards style will not be to

the taste of most lawyers. Advocates should not try telling a superior court that the claimant 'speaks to you through me. Right now I feel her, I feel her presence; she's inside me, and she's talking to you'.[2]

The cast of the legal mind is reflected in Robert Louis Stevenson's portrait of an autocratic judge in *Weir of Hermiston*. To follow the precedents, the well-worn track, seems sensible, efficient. Not surprisingly, many lawyers with literary aspirations, such as Robert Louis Stevenson or W S Gilbert, having dwelt upon the nature of the legal mind, gave up the law in despair. Is it a mere coincidence that Herman Melville, the author of *Billy Budd*, was also the son-in-law of a former Chief Justice of the state of Massachusetts?

Towards the end of Melville's novel, Captain Vere is required by the rules of naval discipline to condemn Billy Budd to death for striking an officer, although he is fully acquainted with the provocation underlying the fatal blow. Vere knows that the handsome young sailor is morally innocent. Nonetheless, Vere feels compelled to let the law take its course in order to maintain his authority; to underpin the efficacy of the disciplinary system as a whole. A legal mind understands the reasoning behind such an outcome. A layman might simply be appalled.

THE CONSTRAINTS OF LEGAL PRACTICE

Practising lawyers are well-placed to construct absorbing narratives. They are skilled in the use of language – advocates and conveyancers alike – and their work brings them into contact with all levels of society, not just the names and faces, but the drama that arises from the presence of conflicting interests. This is evident in the proliferation of films and television mini-series based on law firms and courtroom dramas.

Balanced against this is the fact that most lawyers are pressed for time and, in any event, find it more exciting to play a part in the real world than to build a model of reality. The building blocks are close to hand as a consequence of what the lawyer hears and sees each day, but the busy practitioner has little incentive to use them for some lateral purpose or to ruminate about the nature of reality. These factors, in addition to the factors I mentioned earlier, weigh against the lawyer who wishes to bridge the gap between the apparently disparate worlds of law and literature.

There are other factors at work also. To attract a readership, fiction has to be alluring. It should appeal to the senses and cause delight. Even in a portrait of despair such as Samuel Beckett's *Waiting for Godot*, the cogitations of the two down at heel tramps are accompanied by a madcap, exuberant feeling; an echo of the music hall. What lies behind a duel or a love affair? The youthful protagonist in literature seems

2. D Pannick *The Times* 21 Sep 2004.

to act without regard to the consequences. Actions don't seem to have any serious implications, or if they have, they seem forgivable. This is the carefree spirit that most people seek in literature. Lawyers are obliged to think carefully about consequences and to temper their advice accordingly.

Clients appear in a lawyer's doorway, keen to form a partnership, waxing enthusiastic about the merits of some new plan, a project that will pave the way to a reconstituted Camelot. The papers are prepared and signed. Too often, in a year's time, one of the group comes back again, seeking a dissolution, demanding that a writ be issued to curb the villainy of others in the group. The complainant might even wish to know why the lawyer failed to advise against the venture.

Lawyers are sometimes thought to be conservative because they wish to preserve their supposedly vast possessions. Perhaps so, but at least some of the conservatism is the product of experience, an innate caution, or an incurably progressive scepticism, that eventually becomes a cast of mind. This makes it difficult to respond to literature. Made up stories, however alluring, seem unreal, pretentious, irrelevant. Not to be taken seriously. All of this weighs against any attempt to utilise literary skills.

And yet, paradoxically, it follows from my example that lawyers are better placed than many writers to recognise and explore substantial themes. A failed partnership can be viewed as a tragedy of sorts; betrayal is usually accompanied by conflict, drama. The story may contain elements of self-delusion and consequent farce. Unfortunately, what strikes a lawyer as being the crucial story, the point of the dispute, will not always be of interest to the public. The question of whether certain assets of the firm were held in trust might be sufficient to fascinate an appeal court, but, to a wider audience, it will be less than riveting. What's it like to get the better of a villain, or to be a villain? Will the maverick confound the opposing forces and prevail? Will the hero manage to seduce the principal witness for the prosecution, or opposing counsel, or both? Those are the stories most people prefer to hear. But practising lawyers, like Plato of old, find it difficult to take literature seriously. They are conscious of an ever-present danger that art will undermine our sense of reality and make us content with appearances.

LEGAL FICTIONS AND LEGAL STYLE

The dangers described by Plato exist but they should not be exaggerated. They are simply a facet of legal life and can be turned to advantage. As I have indicated, lawyers are constantly exposed to storytelling in the course of their daily work. They are obliged to take account of multiple viewpoints, distortions of time, and ingenious renditions of the same tale, techniques that have come to be associated with post-modern mannerisms. The prosecution puts up one version of the story, the defence contends for another, but in the end the magistrate sees it all in a different way. An appeal court might come up with something else. Lawyers have

the capacity to keep in mind various ideas simultaneously and to view the action through a prism of refracted light.

A legal fiction in the technical sense – something false accepted as true, a corporation treated as a person, for example – is a familiar concept to the legal mind. It is a means of overcoming the inconvenience of an existing rule, a way of suggesting stability while effecting change. Lawyers are not likely to be troubled by the subtleties of storytelling, if they can be persuaded to take an interest in them. Nonetheless, there are comparatively few opportunities for practising lawyers to be inventive or to speculate about hidden meanings and underlying causes. Facts predominate. The legal process favours linear stories, a neat chronology: the main events in the right order. The King died and then the Queen died is not a plot, EM Forster said. The King died and then the Queen died of grief is.[3] Lawyers and advocates tend to accentuate facts and discount the fever that set the plot in motion. That is why the stories told by lawyers over a drink are mostly yarns, looking at what happened from the outside, the comic side. They seldom get to grips with the minds and emotions of the central characters.

This brings me to style. The law in action endeavours to eliminate mystery. Words are chosen with a view to avoiding ambiguity, cultivating a neutral tone, a voice that will echo the lawyer's habit of confidentiality and discretion. Sentences sound logical, authoritative, right. The rigorous, latin based prose, like a phalanx on the march, leaves an impression of unblinking uniformity. As Raymond Chandler once remarked, the kind of mind that is adept at devising coolly thought out plots and stratagems is unlikely to have the fire and dash which make for vivid writing.

On the other hand, works of literature are multifarious, unpredictable, energetic, quirky. They are often haunted by a sense of imperfection, of doubt, of something inexplicable at the core, and these qualities, of course, are the stuff that myths are made of. Here, style aims to enrich, not stifle. Contradictions in the structure of the story and eccentricities in the language used add mystique to the occasion. It was said of Scott Fitzgerald that his subject was despair but his style was hope. In *The Bonfire of the Vanities,* Tom Wolfe describes his protagonist's descent into the maelstrom of the New York legal system with the gusto of a boy scout describing a weekend bivouac. Therein lies part of the book's charm, although the sweat inducing trauma of the tale, overall, is not diminished.

Readers are inclined to associate the law with entertaining, Dickensian characters, and there are undoubtedly many lawyers and clients to be found in reality who would far exceed even the most ingenious novelist's powers of invention. However, on the whole, proofs of evidence, judgments and internal memos all tend to have a curiously flattening effect. The plaintiff. The accused. The vendor … Time is precious and the lawyer has to find his or her way straight to the central issue. It is easier to

3. EM Forster *Aspects of the Novel* (Gretna, Louisiana: Pelican, 1962) 93.

use short-hand tags and generic terms than to labour over graphic descriptions. If one is minded to devise legal fictions in the literary sense, or to put a litigant's story to the court in a compelling way, then the tendencies I have just mentioned will have to be surmounted.

The combination of the various matters I have just mentioned means that many lawyers, perhaps most, at an early stage of their careers, conclude that literature is not likely to be of much use to them. It is out of step with the way in which the law is practised. The purpose of this paper is to test the validity of that conclusion. Let me now proceed further by considering the issue from the poet's viewpoint.

THE INNER VOICE

Clarence Darrow, the most famous American advocate of the between wars period, was once heard to say that inside every successful lawyer lies the wreck of a poet. I took him to mean that lawyers who reflect upon their craft are conscious that the law in action is concerned with the complexities of human nature and the habits of society. It must follow that a lawyer with an instinctive sense of what the situation requires, and an ability to describe the needs of the occasion, is bound to do well. Clients will heed the wisdom underlying his advice. His speeches in court will be remembered.

Poets register the vagaries of their experience. A poet of the modern age, Baudelaire suggested, should be able to recapture moments in his past at will, resorting to the palette of his youth not as a dilettante fumbling for a dash of colour, but as an artist striving to illuminate the here and now. Such a one will see that the revelations of his own experience resemble the misadventures of his fellows. After dark, as the poet wanders the streets of his city, incognito, observing everything – the crowded cafes and glimmering boulevards, the radiant windows and shadowy stairwells, the theatre queues, the barrow boys, the buskers, an organ grinder at the pavement's edge – by an act of the imagination the poet can magnify an aspect of himself or be another. Like a drifting soul in search of a body, the poet, whenever he chooses, enters the lives and characters of those around him, understanding, sharing their doubts, their dreams, their secrets, all their preoccupations. That is the nature of his calling.

But the poet is not content simply to reproduce what he hears and sees. The poet is always looking deeper, searching for the essential truth. He must give appearances a new and enduring energy. His voice should come to us like a wind along the rooftops, a phantom singing on its own, conjuring up an unfamiliar city, a realm encompassing the insights of the mystic and the vagabond, but composed intrinsically of what goes on in the archaic tenements of the world spread out below.

How does all of this bear upon the relationship between law and literature? Here, my argument depends upon analogy. The conscientious lawyer, imitating to some extent

the aspirations of a poet, seeks to enter someone else's life. The lawyer strives to understand the client's problems, to absorb the details of his story. In this case, admittedly, the visitant arrives, not with a vision of boulevards and rooftops hovering in his eyes, but with a briefcase and a notebook, perhaps a laptop computer. One has to concede also that, unlike a poet's vision, the lawyer's transformations of the city scene are effected by compliance with the client's instructions and by a coincidental process of professional self-effacement.

Heinrich Laube had this to say about the poet Heine who was often critical of the outworn forms of society: 'He happened to be a poet who obeyed the slightest congestion or vibration of his nerves; and it was his peculiar fate that with entirely poetic qualities he found himself in an entirely political society. This society rightly demanded political consistency in a man's utterances and inveighed against poetic deviations; he, however, would not and could not allow himself to be denied them, for they constituted his real life, and politics were to him only one theme against many. He was an artist by nature, playing the tribune amongst other roles, and the political world exclaimed indignantly, 'You must not only play the part, you must be what you represent yourself to be; you must be a tribune as well as other things, you must be a tribune and nothing else!' This was something he could not possibly have done, even if he had wanted to, and it was this misconception which brought him legions of enemies'.[4]

It remains true, however, as Clarence Darrow recognised, that in many lawyers lies the wreck of a poet, a sensitivity to that which is inherent in the instructions, a feeling for what the situation requires. An effective advocate reads between the lines. The art of advocacy is underpinned by knowledge of men and women, insights into the habits of society. It is for this reason that politics has been described as the art of getting on with people, and for the same reason that many successful lawyers move into politics.

Persuasion depends upon many hours spent listening and observing. An irrational element is involved in the process. People respond to those who know how to address them at some hidden level. In this way a consummate politician stands revealed. For the poet it is enough to sense these powers. The skilful advocate and the practising politician take account of the insights of the poet and put them to use.

ILLUSION AND REALITY

In earlier discussion, I touched on certain significant differences between the presentation of stories in law and literature, as to both style and structure. Narratives in a court of law are usually constrained by the facts. They are shaped by the evidence. Storytellers in the field of imaginative literature are free to approach what is thought to be the truth of the matter in different ways. Nonetheless, as historians

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4. W Rose *Heinrich Heine: Two Studies of His Thought and Feeling* (Oxford: OUP, 1956) 6.

and biographers are obliged to admit, the way in which facts are ordered, the process of selection, is bound to reflect the outlook of the storyteller. There is a fine line between illusion and reality. Stories that purport to be rooted in fact can hover uncertainly first on one side, then on the other side of the line.

This brings me to the myths and allegories conjured up by the South American writer Jorges Luis Borges. At a first glance, Borges seems to reduce everything to mystery. It then emerges that many of his stories take the form of detection, an inquiry in which the narrator looks for a pattern in the clues and seeks to uncover what is secret. Eventually, by degrees, the storyteller's process of detection casts fresh light on the world around us.

This is the fascination of a well-told detective story. It undertakes a gradual reconstruction of an event that has already taken place. A picture emerges through the eyes of the investigator of the milieu in which the victim lived. This information helps to identify the assailant. It may turn out that the initial mystery is not mysterious after all. With the benefit of hindsight, with a clearer understanding of the scene, the movements of those involved, the key event seems predictable, all too human. It is the way things happen in this neighbourhood.

There are elements of all of this in the way a prosecutor sets out the case in his opening address to the jury, especially when the prosecutor is obliged to rebut a defence case based upon an alibi.

In essence, the person relying upon the defence of alibi sets up a story in opposition to the story being presented by the prosecution. It is a story that stands in contradiction to the official or supposedly authentic narrative. The trial must end before observers in the courtroom can determine whether the alibi is simply a fiction, a story made up by the accused, or whether it represents the reality: that the accused, as he contends, was somewhere else when the crucial events occurred.

If the alibi is accepted, it seems to follow that the prosecution line was flawed. It was based on error or even falsehood. In such a case, the story represented by the alibi becomes synonymous with innocence and authenticity: the truth of the matter. On the other hand, if the alibi is rejected, the story told by the accused will quickly be characterised as counterfeit, a fake. The explanation offered in answer to the official line has been found wanting.

Thus, the accused person who seeks to defend himself by reliance upon an alibi is caught up in what is essentially a Borgesian situation, the problem of illusion and reality. The story presented in the alibi, the narrator's contention that he was somewhere else at the crucial moment, is brought to light in response to a preceding, official narrative. The story told by the person trying to clear his name will eventually be characterised as a fake or as the real thing. The alibi will have to be tested, inquired into, probed.

The lawyers involved in the case are required to embark upon a process of detection. They must determine the truth of the matter. Which is the authentic story? To what extent is the alternative tale made up? Has it been shaped by the storyteller's imagination and self-serving fictions? Answers to these questions will be influenced to a large degree by the tenor of the evidence. However, in the end, the mystery created by two competing accounts has to be resolved.

In seeking to persuade the jury not to speculate but to attend to the evidence, a prosecutor will undoubtedly be assisted by an understanding of the way in which stories are constructed, and how the constituents of a story can be misconstrued. Defence counsel, of course, will employ the same knowledge in raising doubts about the prosecution evidence and in putting the case for the defendant's story.

ESSENTIAL TRUTHS

The presence of two competing narratives is a useful reminder that however intricate the rules of evidence, the legal system, ultimately, cannot disregard the essential truth, the reality at the heart of the matter. In certain cases one question leads to another and eventually to a search for underlying causes. What, if anything, can we learn from literature in this area of inquiry? Such a question brings me to the notions of allegory, symbol and satire – oblique approaches to the truth.

Allegory is one of our most natural and effective methods of expressing subtle truths. It is the art of expressing a link between things that is not ordinarily perceived. It is a way of illuminating aspects of society that are commonly disregarded, or of placing what is familiar in a setting or atmosphere that will reveal an unexpected facet of the real world. An imaginative writer will have recourse to an allegory when misgivings about the law are elusive and can only be conveyed in a dramatic form.

I mentioned Franz Kafka. His critique of the law was brought to a terrifying conclusion in his masterpiece *The Trial.* The story is presented in an allegorical form, and is therefore open to various interpretations. Nonetheless, the feeling of estrangement he evokes seems true of legal systems throughout the modern world.

The story opens with the arrest of Joseph K, a 30 year old, mid-career bank official. The arresting officers bustle into his bedroom without warning and without making clear the nature of the complaint against him. The tone of doubt and apprehension that permeates the entire tale is established by the book's famous opening line: 'Someone must have been telling lies about Joseph K, for one fine morning, without having done anything wrong, he was arrested'.

Joseph K never learns the nature of the charges brought against him, or the identity of the prosecuting agency. He can only guess at the mysterious forces that propel him from one forum to another as he tries to unravel the complexities of his 'case'. He ascertains from the supposedly knowledgeable advocate who is engaged to

advise him that there are only three possibilities open to a litigant in his position: definite acquittal, ostensible acquittal or indefinite postponement. To insist upon any of these at the wrong moment, or without the aid of an 'influential intervention', could prejudice the case irretrievably.

K attempts to bring about an influential intervention by enlisting the aid of various functionaries including the Court's official painter, Tintorelli. He flirts with a maid in the advocate's house. This, and other initiatives, peter out. While undergoing these misadventures, K's mood ranges erratically from defiance to submissiveness. He begins to give credence to a thought put to him by others that if a person is under stress and behaving strangely, he is probably guilty of something.

Towards the end of what has become an increasingly surrealistic legal saga, Joseph K finds himself left alone with a priest in a dimly lit cathedral. Curiously, like many others, the priest claims to have some knowledge of K's case, and feels obliged to inform the demoralised litigant that his trial is going badly. When K attempts to confide in the priest as one of the few people mixed up in the affair who seems to be trustworthy, the priest promptly informs K that he is deluding himself about the nature of the court in which his case is to be tried.

The priest underlines his point by embarking upon a parable. It concerns a man from the country who seeks admission to the law but is forced to wait for decades outside the entrance. When the litigant eventually asks the gatekeeper why no one else has sought admission, the gatekeeper provides an explanation. The door in question was meant for the man from the country. It is now about to be closed. This sombre parable sets the scene for K's subsequent execution by two sleazy court officials – they seem more like assassins – in an old quarry on the outskirts of the city.

A bizarre story of this kind will strike many (perhaps most) practising lawyers as simply a satire aimed at some familiar grounds of complaint about the law: legal procedures are convoluted; court cases bring with them intolerable costs and delay; litigants are likely to become dispirited as the proceedings run on. Nonetheless, if forced to argue the point, an able lawyer could quickly make out a compelling case that irritations of this kind – most of which are capable of reform – are outweighed by the merits of the legal system.

The law is the cornerstone of a civilised society, the able lawyer will contend. In the modern state, an effective legal system is the means by which order is established and maintained. Such a system is based on reason and objectivity. It follows that the surrealistic picture painted by Kafka, absorbing as it might be as a piece of literature, is fundamentally flawed. It should be disregarded as a gross distortion of reality.

Some remarks by Winston Churchill could be recalled to reinforce this line of argument. While serving as Home Secretary, Churchill said that the mood and temper

of the public in regard to the treatment of crime and criminals is one of the unfailing tests of the civilisation of any country. A calm dispassionate recognition of the rights of the accused against the State; a constant heart-searching of all charged with the task of punishment; tireless efforts towards the discovery of regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man: these are the symbols which in the treatment of crime and criminals make and measure the stored up strength of a nation, and are sign and proof of the living virtue in it.[5]

A summary of this kind seems to assist the demolition of Kafka's surrealistic ramblings. Judgments are usually made in a calm and impartial way. Those appointed to the Bench are presumed to have appropriate qualifications to sift out inconsequential titbits of information and to weigh up judiciously all the factors truly bearing upon the matter in dispute. They will be conscious that the colour of the defendant's hair or the style of his shirt have little bearing upon the formation of a precedent. Clearly, there is no place in all of this for court painters to undertake 'influential interventions' on behalf of bewildered litigants, or for sentences to be carried out by furtive apparatchiks in some distant quarry.

There can be no guarantee, of course, that judges will interpret the law and customs of their day more wisely than other people. Judges are bound to be influenced by habits of mind that will change with the passage of time and should always be open to reconsideration. What was once the exception becomes the rule. The dissident cause becomes the orthodoxy, until that, in its turn, succumbs to change.

Nonetheless, as Churchill's dictum presumes, someone must act as the interpreter for the community of its need for the sense of law and order, and it is generally thought that experienced lawyers, with some capacity to put aside personal predilections and the suggestive powers of the herd, are best equipped to perform an essential task. Judges strive to strike a balance between the requirements of an effective legal system and the rights of the individual, with due weight being given to individual conscience.

Democratic legal systems, for all their faults, offer a prospect that such a balance can be achieved. Public scrutiny and inward questioning by judicial officers themselves contribute to an atmosphere of fairness. In the countries where the system is working well the judgments of the courts are generally respected.

KAFKA'S SCENARIO

When the matter is presented in this light, one begins to wonder why Kafka is treated with awe in modern literature. His notion that the law in action reflects a

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5. L Blom-Cooper (ed) *The Law as Literature: An Anthology of Great Writing in and About the Law* (London: Bodley Head, 1961) 369.

mystery, that it tends to be simply a frustrating hotchpotch of ambiguous procedures (rendered additionally unworkable by the vagaries of obtuse officials) begins to look unconvincing. Even a disgruntled litigant, if obliged to survey the broad picture, would probably be willing to concede that a legal system based on a tradition of reason and impartiality has much to commend it. A structure of that kind is certainly to be preferred to a despotic maze within which judgments are arrived at arbitrarily, or prompted by fits of rage or demands for vengeance.

And yet, Kafka's perception that an accused person drawn into the legal labyrinth, whether by design or misadventure, will, in some inexplicable way, and almost as a matter of course, be treated unjustly, continues to intrigue us. We sense that readers of *The Trial* are responding not only to the satirical qualities of the work but also to its more deeply rooted allegorical power, and for good reason.

The principal advocate employed by Joseph K purports to be acquainting his client with the remedies available in a rational structure, but wherever K goes he is confronted with empty rhetoric, parables and delusion. Moreover, Kafka makes no attempt to press home a case based on the standpoint of a victim of the system. Joseph K fulminates occasionally abut the wrongs being done to him, but on the whole, and certainly by the end of the book, he seems to accept the inevitability of what is happening to him, as though it is natural for a litigant to be condemned without a hearing and for his case to be entirely misunderstood. Joseph K is an accomplice in his downfall, not a prisoner of conscience.

From the moment of his arrest Joseph K seems to accept that nowhere within a secular legal system will he be able to find anyone who truly understands the complexity of his personality or of his case. There will be no one who is able to respond sympathetically to his innermost fears and apprehensions. He senses that his attempts to challenge the legal process will ultimately be futile, for a system of man made rules depends upon the pronouncement of authoritative but possibly fallible judgments. These rulings will simply reflect the prevailing orthodoxy.

THE EXPERIENCE OF LITIGANTS

Kafka's scenario is reflected in the experience of real litigants. Socrates found that his socratic skills were not only insufficient to confound his accusers but also, to add insult to injury, formed part of the prosecution case. The wit of Oscar Wilde contributed to his conviction. His business as an artist was with Ariel, Wilde contended in *De Profundis*, but in the end, by suing the Marquis of Queensbury, he finished up wrestling with Caliban. There are many other accounts of legal proceedings in which the protagonist at the centre of the drama has been overwhelmed by the ordeal, unhappily aware that his essential nature has been entirely misunderstood or used against him.

Let me turn to Harold Laski's well known description of his day in court while pressing a claim for libel. Laski refers to the cross-examiner performing a war dance about the witness like a dervish intoxicated by the sheer ecstasy of his skill in his own performance, ardent in his knowledge that, if you trip for one second, his knife is at your throat. Laski speaks of the judge delivering his lines to the jury with a winning smile. He argues that the litigant is part of a drama in which the end is known to all the players before even the litigant entered the theatre.

Laski sums up in this way: 'When you are beaten in the Courts of Law there is a kind of dumb finality about it which I can only compare with the ultimate emphasis of death. Every element in a civil trial goes to deepen this sense of finality. In the proceedings themselves you are almost bound to feel like a marionette. The speeches on both sides seem remote from the events you knew; they are like blood in a test tube compared with blood in a living person. You know, of course, that it is about you the lawyers are talking, but all that they say seems to have lost its colour, its vividness, its sense of life, and to be reduced to a shadowlike skeleton which will never be clothed once more in flesh and blood'.[6]

Like Kafka, Laski suggests that the law seems to be principally concerned with what happens on the surface. A system brought into being in order to keep society intact, to produce well reasoned rules and judgments for the governance of the people as a whole, is bound to strike an ordinary person like Joseph K as remote, mysterious, unforgiving, and blind to the peculiarities of the case in hand. A defendant is not easily convinced that the colour of his hair or the style of his shirt is unimportant.

Why should criticisms of this kind be listened to when, for many centuries, precursors of the modern law reformer have gone to such trouble to devise fair and equitable procedures, an array of safeguards that are supposed to alleviate the apprehensions of any citizen who is under suspicion? Search warrants. Bail. Indictment. Juries. Habeas corpus. Legal Aid … Important procedures have been carefully developed to ensure that a Joseph K, in real life, will know his rights, be adequately acquainted with the case against him, and have an opportunity to meet the case in open court. Why is this not enough? Why bother reading Kafka and hearing about his eccentric concerns?

And yet, the crepuscular world depicted in Kafka's novel *The Trial* still manages to evoke a shiver of recognition. Joseph K's attempts to establish some connection with the inscrutable legal system, to find a foothold in the law, an entrance, continue somehow to ring true.

Kafka is sometimes seen by literary theorists as a postmodernist who depicts the law as an indeterminate text shaped by power relations. The precedents that seem to reflect the wisdom of the law can easily be employed as instruments of oppression.

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6. Blom-Cooper above n 5, 119.

Commentators of this kind echo the ingenious but savage satirist Jonathan Swift who has Gulliver say of lawyers that:

> They take special care to record all the decisions formerly made against common justice and the general reason of mankind. These under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly.

Put shortly, then, one finds a propensity in imaginative writers to make use of allegories, symbols and satires as a means of expressing subtle truths in a short and apparently simple form. Books such as *The Trial* and *Gulliver's Travels*, or George Orwell's *Animal Farm*, may be of use in prompting law reformers and commentators to look at the legal system and the attitudes surrounding it in a new light, to recognise links between causes and effects which might not be ordinarily perceived or given much weight. On the other hand, advocates and adjudicators tend to be understandably suspicious of slanted rhetoric and are generally opposed to storytelling techniques that appear to invite speculation about ambiguities and hidden meanings not covered by the evidence.

Nonetheless, at various stages of a trial an advocate is obliged to sum up, to encapsulate, to reduce the mass of evidence to a comprehensible form. It is always impossible to know which passages in the closing addresses or in the judge's summing up carried most weight with a jury. However, to an observer, it often seems that when an advocate draws together the evidence, and in doing so reminds the jury of a key moment in the case, an emblematic incident, a kind of stillness descends as the jury listens with special care.

If the advocate is doing his job properly the emblematic moment being emphasised will be rooted in the evidence, but it will stand out as particularly significant. It might be a throwaway line by a witness, or a letter that is now known to be insincere, or an alibi that is out of kilter with the chronology. The experienced advocate know how to make a single moment or a few words stand for much else in the same way that a writer will use an allegory or symbol to represent a host of complexities. A skilful advocate is adept at reducing the story to a short but effective form.

OTHER WRITERS

It will be useful now to look briefly at the works of certain writers and literary theorists whose names are principally associated with the process of punishment. Their works point to certain important but scarcely visible features of the legal system. They suggest that upon close analysis there is some justification for opinions that might otherwise be dismissed as simply speculative or allegorical.

The ideal prison, Jeremy Bentham argued, was a symmetrical correction house to be known as the 'Panopticon' (or, to a French audience, the *Panoptique*). It would be

dominated by a central 'hall of reason'. By providing for separation of the inmates and constant surveillance by the prison staff, the *Panoptique* could be employed to enhance both discipline and rehabilitation.

Under Bentham's proposed regime, corporal punishment would be kept to a minimum. Habits of obedience would be gradually encouraged. All the prison cells would face towards the central hall of reason from which improving lectures and exhortations could be delivered to the prisoners. This concept not only influenced the architecture of prisons in the convict era – as may be observed at Port Arthur in Tasmania – but also has been carried forward and is represented in many modern penitentiaries. The prisoner will supposedly emerge ready, willing and able to rejoin society.[7]

During the latter part of this century, the leading French intellectual, Michel Foucault, in his seminal work *Discipline and Punish*, examined the concept of panopticism in detail and said that the *Panoptique* should be regarded as a paradigm for modern society, for the way in which power has come to be exercised subtly and invisibly, compelling habits of obedience, shaping attitudes by indoctrination rather than by direct command. Our society has ceased to be one dominated by pageantry and spectacle, the outward forms of power, but is now one of surveillance. We are all in the panoptic machine, he contends, and are transformed by its subtle exercise of power, a transformation that we inflict upon ourselves since we are part of the panoptic mechanism.[8]

According to Foucault, the process by which the bourgeoisie became the politically dominant class was masked by the establishment of an explicit, coded and formally egalitarian juridical framework, made possible by the organisation of a parliamentary, representative regime. The juridicism of modern society seemed to fix limits on the exercise of power, but its widespread panopticism enabled it to operate, on the underside of the law, a machinery that was both immense and minute, which supported, reinforced and undermined the limits traced around the law.

Thus, like Kafka, Foucault suggests that there are many invisible controls embedded in the workings of the legal system. Often, it will be the creative writer, the Baudelairean or Dickensian commentator with a feeling of what is awry who will be more effective than the law reformer in bringing to light the need for a remedy. It matters not that the commentary may be difficult to absorb or oblique. Influential intellects are frequently characterised by a touch of irrationality, for only a mind that is deeply stirred can call for change in a way that is beyond the power of others.

There is something of this in the celebrated passage from the opening of *Bleak House*. Here, Charles Dickens lampoons the labyrinthine and fog shrouded processes of the Court of Chancery –

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7. J Bentham *The Panopticon Writings*.
8. M Foucault *Discipline and Punish* (London: Penguin, 1977) 195.

> which has its decaying houses and its blighted lands in every shire; which has its worn out lunatic in every madhouse, and its dead in every churchyard; which has its ruined suitor with his slipshod heels and threadbare dress, borrowing and begging through the roundup of every man's acquaintance; which gives to moneyed might, the means abundantly of wearying out the right.

There are many writers who perceive quickly and intuitively that reforms of one kind or another are necessary. I suggested earlier that an independent observer is likely to learn more about remorse by reading *Crime and Punishment* than by listening to the formulaic repetition of that term by countless judicial officers. In the end, however, it is those within the legal system – parliamentarians and lawyers – who are best placed to remedy faults, by legislation or case by case pursuant to judicial rulings. Law reformers and judicial activists should keep in mind that the customs of a community, as revealed by literature, will probably be closer to a lived reality than platonic abstractions framed for an ideal State. According to the South American writer Mario Vargas Llosa, in the workaday world, a nation is simply a political fiction imposed upon a social or geographical reality, by consensus, force or guile.[9]

THE PROCESS OF INTERPRETATION

Foucault and other sceptics suggest that the nature of the 'true' story may ultimately be determined by the power structure that brought it into being. To those in the legal system who are trained to respect coherence and chronology – the right words in the right order – a true story has certain hallmarks: facts that can be substantiated, a narrative that is internally consistent, an ending that fits in comfortably with the situation first described. There must be no blots or unruly meanings left between the lines. All the ends must be tied up neatly.

Aware of this, a sceptic might suggest that lawyers are always living in the shadow of the crime not committed. More so than others, they are conscious of society's propensity for wrongdoing, the need for order. At the same time, lawyers are aware that the line between right and wrong has to be constantly adjusted as habits change. Those at the cutting edge of the law are bound to be flexible in their attitudes. The devil's advocate might go on to argue that lawyers have always been adept at manipulating the meaning of legal texts in order to achieve (for better or for worse) ulterior ends, for language lies at the heart of the legal system.

Classical scholars have suggested that the florid rhetoric used in Roman statutes of the fourth century reflects the uncertainty of the era: the heavier the padding surrounding the ruler's words, the more easily could his inability to enforce his commands be detected.[10] Certain fundamental edicts of the common law betray a

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9. MV Llosa *Making Waves* (London: Faber, 1996) 300.
10. R Bauman 'Language of Roman Statutes' in JN Turner & P Williams *The Happy Couple: Law and Literature* (Sydney: Federation Press, 1994) 6.

similar ambivalence, thus providing an opportunity for later generations to exercise their imaginations and to reconfigure the meaning of the relevant texts.

In 1215 the leading barons of England forced King John to sign the Great Charter. It asserted the important principle that no tax should be imposed 'except with the common counsel of the realm.' Within 20 years inspired word mongers had minted the term 'parliament' to describe the Great Council.

The most famous clauses of Magna Carta declare that no man shall be seized or imprisoned except by the lawful judgment of his peers or by the law of the land. According to Blackstone, 'the right of trial by the jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.' Modern scholars doubt this view, suggesting that the meaning of the relevant words is obscure and various related passages were actually intended to secure feudal privileges. The main purpose of the Great Charter was to entrench the barons' rights. However, as the American Bar Association Memorial at Runnymede asserts, Magna Carta's precepts were gradually received into the common law as an assertion of individual freedom, a recognition of parliamentary sovereignty, and a guarantee of the continuance of the common law of England.

There are many other examples of the way in which apparently solemn texts have been found to contain hidden depths; ambiguities of interest to the imaginative eye. As the famous legal historian FW Maitland noted in his introduction to the Selden Society's edition of 'the enigmatic treatise' known as *Mirror of Justices*, that ancient and supposedly authoritative text bears many of the characteristics of a satire.[11]

The *Mirror* was published in about 1290. Three centuries later it was often cited with approval by the great jurist Sir Edward Coke as he sought to document and shape the basic precepts of the common law. The author of the *Mirror* introduces himself to his readers in this way:

> When I perceive that divers of those who should govern the law by rule of right had regard to their own earthly profit … and would never assent to the rights usages being put in writing … and when I saw them cloaking their sin by the excuses of sin and error, I, the prosecutor of false judges, and falsely imprisoned by their order, in my sojourn in gaol searched out the privileges of the king and the old rolls of his treasury wherewith my friends solaced me, and discovered the foundations of the customs of England as are established as law.

Thus, like many satirists, the author wishes us to believe that he is a decent citizen who has fallen foul of authority, and that while in gaol, as an act of conscience, he has studied charters and other plausible texts and 'for your aid and that of the commonalty of people, I compiled this little summary'.

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11. FW Maitland (ed) *Mirror of Justices* (London: Selden Society, 1920).

Maitland noted that the author's incarceration is a common form literary device which will awaken interest and sympathy. We can see that the man who is going to pose as the prosecutor or sworn foe of false judges has a good deal to gain by pretending that he was imprisoned by their procurement.

The talk of false judges, and hints that the chancery and exchequer are full of perjurers and thieves, were not without point of truth. At about the time the book was written, Edward I, returning from France, heard such tales of judicial malpractice that he set up a tribunal of investigation composed of men of his own household. The result was the most spectacular purge the Bench has ever undergone. The *Mirror* is obviously reflecting this scandal, and the author is conscious that he is sailing close to the wind. He is quick to add praise to censure. In purporting to give a description of contemporary law, freely criticised in the light of a golden age placed in the reign of King Alfred (the Norman conquest being virtually ignored), the author tells a great many wild stories. But this may be part of a preconceived satirical plan. The author is careful not to tell us when he is earnest and when he is at play.

The authorship of the book remains a riddle. Maitland's guess is that the work is that of 'a young man ambitious of literary fame',[15] with suspicion falling principally upon Andrew Horn, a fishmonger and officer of the City of London. However, as it happened, the great jurist Sir Edward Coke obtained a copy of the *Mirror* three centuries after it was published and devoured its contents with uncritical voracity. Through Coke's intervention it was long regarded as an important source of English legal history.

Could it be that Coke was attracted to *Mirror of Justices* because it supported his own views concerning the need for an independent, uncorrupted judiciary and the desirability of restraints upon executive power? According to the *Mirror* (or is it Horn, the fishmonger, speaking?):

> The first and sovereign abuse is that the king is beyond the law, whereas he ought to be subject to it, as is contained in his oath … judges are those who have jurisdiction.

When Coke drew upon medieval law as it was in the Middle Ages he was not proceeding as an historian might, an antiquary determined to produce an accurate description of the past, but as a creative common lawyer making sure that legal principles were developed to meet the needs of a changing society. He interpreted the Magna Carta as a charter of liberty for all English people, not merely as a charter of different liberties for different classes. He took a comparatively insignificant procedural direction addressed to gaolers holding prisoners awaiting trial and, by the use of a legal fiction, moulded it into the writ of habeas corpus almost as we know it today – a final safeguard against the use of arbitrary executive power.

When one reflects upon these examples of legal texts being created and transformed by imaginative thinking it seems that the liaison between law and literature may be more intimate than is commonly suggested.

CONCLUSION

From the trial of Socrates to the misadventures of Franz Kafka law has frequently found its way into literature as a backdrop against which human beings wrestle with a vast array of moral, psychological and political issues. A court of law becomes a theatre in which events enacted in the grip of rage or passion are reconstructed in order to round off the plot or to wrap up the author's critique of the legal system.[12]

In this we glimpse a paradox that reappears in one piece of fiction after another, and is viewed as more than a spectral presence by litigants and legal commentators in the real world to the present day. The common law system embodies a noble ideal – the notion of impartial justice administered by independent courts of law – and yet, if one takes account of literary works, many, perhaps most, litigants emerge from the legal process feeling haunted, wrung out, stripped of their true personalities, reduced to anonymity.

This is where the insights offered by fiction have a part to play. Documents and testimony in a court can establish the facts but they cannot always recapture the mood nurturing the matter in contention. Playwrights and novelists, by reproducing gossip in the barrack rooms and back streets, may sometimes provide a more vivid picture of what went on in the corridors of power at a crucial moment, a more convincing explanation as to why an empire collapsed, or an apparently stable society was brought to the brink of ruin, than appears in the report of a Royal Commission or an official history. It will therefore be useful, as Clarence Darrow intimated, for advocates and others in the legal system to take account of literary skills in presenting a case or a point of view.

If there is one thing the novel offers that no other form of writing can approach, it is the opportunity to know and understand fully the figures caught up in a drama through the fiction writer's omniscient familiarity with the inner lives of the principal protagonists. As E M Forster noted in Aspects of the Novel:

> We never understand each other, neither complete clairvoyance nor complete confessional exists. We know each other approximately, by external signs, and these serve well enough as a basis for society and even for intimacy. But people in a novel can be understood completely by the reader, if the novelist wishes; their inner as well as their outer life can be exposed. And this is why they often seem

12. F Shapiro & J Garry (eds) *Trial and Error* (Oxford: OUP, 1998) vii.

> more definite than characters in history, or even our own friends; we have been told all about them that can be told; even if they are imperfect or unreal they do not contain any secrets, whereas our friends do, and must, mutual secrecy being one of the conditions of life upon this globe.[13]

It seems to follow, then, notwithstanding Plato's strictures, that persuasive reasons exist for encouraging those within the legal system to keep in mind the complexities of any contentious situation and to give proper attention to the individuality of litigants' stories. Literature provides a means of re-imagining, and thus more fully understanding, the nature of their lives, and the nature of the community served by the legal system.

My argument proceeds from the premise that the concept of justice is bound to vary from place to place in regard to substantive matters but a need for procedural fairness lies at the heart of most widely respected legal systems.[14] The precept that a litigant should be heard in regard to any contentious issue brings with it, by necessary implication, a requirement that those charged with the task of presenting and ruling upon matters in contention should underpin their legal skills with an understanding of how stories are constructed and expressed, and of the way in which the inevitable differences between adversarial and imaginative renditions of the story in question may affect the outcome.

An understanding of this kind will ensure that procedural rules are applied in a constructive manner, bearing in mind that on some occasions the rules of evidence, with their insistence upon immediate relevance and verifiable fact, may have the effect of excluding complexities and subtle truths about human behaviour, truths that are set out persuasively in various works of imaginative literature.

The presence of such works, and a determination not to ignore the small, personal voice of the litigant will give rise to an ongoing critique of the law and tend to have a salutary effect upon those within the legal system who are charged with the task of doing justice in particular cases and responding to change. A system that fails to respond to the ever-changing circumstances of communal life will eventually be disregarded or displaced. It is apparent from the works of various famous jurists, and from the subtle transformation of profound constitutional texts, that legal fictions have frequently been used as a means of suggesting stability while effecting change. This is but one example of the way in which fiction can be used to improve the legal system.

In addition to all of this it will be useful to heed the observations of Sir Francis Bacon who was a former Lord Chancellor, a contemporary of Sir Edward Coke's and a famous essayist with a special feeling for the law. He recognised that the legal

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13. Forster above n 3, 54.
14. S Hampshire *Justice is Conflict* (London: Duckworth, 1999) 18.

mind should not be kept continuously at the same pitch of concentration. Given enjoyable diversions, the mind arises better and keener after a rest.

To put up a tale infused by the imagination is to affirm that to be true which is false, admittedly; but of all writers under the sun, Sir Francis Bacon was inclined to avow, the poet and the storyteller are least liars, for they affirm nothing, feigning history simply for pleasure. They range with discretion in the divine consideration of the general picture, and give birth to conjecture about what might have been or could be. They not only open up the way but open up so sweet an entrance to the way as will entice any man or woman to embark upon that tide.