

Lawyering Skills in Law and Literature

By Deborah Luyster

Professor Larry Dubin's discussion of the value of storytelling in legal education in last month's column highlights one aspect of the law and literature movement, the use of narrative in literature to illustrate the reality and meaning of law in society and the use of storytelling in law to present evidence, organize confessions, present victim impact statements, and buttress closing arguments and statements of fact in judicial opinions.¹ This column is a brief overview of the law and literature movement and a discussion of its importance in legal education and practice.

The law and literature movement encompasses both law in literature and law as literature.² Simply stated, the former analyzes literary texts for what they say about law, how legal issues work the plot, or what the text and the characters say about what law is and what it should be. Additionally, literature forces reconsiderations of such concepts as the infusion of sympathy in legal decision-making, the meanings of justice and mercy judicially and extrajudicially, and the tension between natural law and positive law. The latter division of this interdisciplinary study applies literary analysis to legal discourse and texts and demonstrates how literary strategies can participate in legal interpretation.³

Some law and literature proponents argue that it looks back to and restores the image of the lawyer as "men (and women) of letters" possessing a broad liberal education and being well versed in languages, rhetoric, and literature, who view law as an aspect of the humanities and the public life, not a science or a business.⁴ These are worthy arguments that lawyers should consider relevant professionally.

However, another benefit is the movement's ability to set aside theory and abstrac-

tions and to confront the pragmatic reality and meaning of law in lawyers' and clients' daily experiences.⁵ Not until we have examples of the concrete or the actual operation and thinking about law in society can we juxtapose it against any theory or abstraction. The significance of this confrontation is it teaches better lawyering skills that equate to professional fulfillment and a more successful operation of the lawyering business.

This way of thinking about law and literature studies does not deny its inherent humanitarian, moral, and ethical implications; it couches them and vitalizes them in another framework that achieves the same results. For example, the lawyer most often eulogized as the ethical ideal is literature's Atticus Finch. But Harper Lee's *To Kill a Mockingbird* teaches readers that Finch lost his case by trying to elevate the jury to his high moral level and because he confused concepts of morality with concepts of being a gentleman.

If Finch had argued the empirical evidence that the hardworking men of the rural Southern soil and woods could understand and spoken to them in their language, the jury might have acquitted Tom Robinson. Finch might have obtained the verdict he sought by using a different approach from a moral appeal.

Instead, he preached to the jury about something undeniably good and right but in a language containing ideals its members either could not grasp or would not accept. Calpurnia, Finch's housekeeper, makes one of the most profound statements in the novel when she replies to Scout's question about

why Calpurnia speaks one way in the black community and another to those in the white community:

It's not necessary to tell all you know. . . . [F]olks don't like to have somebody around knowin' more than they do. It aggravates 'em. You're not gonna change any of them by talkin' right, they've got to want to learn themselves, and when they don't want to learn there's nothing you can do but keep your mouth shut or talk their language.⁶

Calpurnia's wisdom and Finch's idealism reveal much about effective lawyering and successful communicating within and outside one's community. This example is only one aspect from a novel that is more instructive than many hornbooks.

This is not surprising since the birth of "literary hornbooks" coincided with the birth of literature in antiquity and has continued through all literary and historical periods. Many scholars, particularly James Boyd White of the University of Michigan School of Law, have demonstrated the wealth of legal learning accessible in the Greek tragedies and the Greek and Roman poets. Most lawyers are aware of the extensive school of lawyering found in Shakespeare's plays.⁷ One of the skills literature teaches lawyers is the power of the imagination so that lawyers learn to place themselves in the shoes of the client, the opponent, the witnesses, the judge, and the jury in order to anticipate reactions to their pleadings, presentation of evidence, arguments, and settlement proposals.

Nineteenth-century British novels are rich sources of thinking about law and lawyers and offer insight to our legal heritage mainly because the novelists Charles Dickens, George Eliot, Anthony Trollope, and others participated in the debate about the best way to implement legal reform. Their

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novels contain echoes of Sir William Blackstone's *Commentaries on the Laws of England* from the eighteenth century, which cautioned against rapid change in disregard of the gradual and natural progression of history through custom and tradition, and Jeremy Bentham's counterarguments in both the eighteenth and nineteenth century to reform the legal system through the "art and science" of legislation. These novels become timeless when we think about the U.S. Supreme Court's decisions in terms of evolutionary versus revolutionary change.

The Woman in White (1860) by Wilkie Collins uses the format of the presentation of evidence as if at a trial to tell its story while undercutting the tradition of rational logic, the rules of evidence, the standards of burden of proof, the methods of discovery and presentation of evidence, and the reliability of storytelling in legal documents and litigation. The novel also addresses denial of access issues and provokes thinking about self help, as does Franz Kafka's "Before the Law."

Many scholars have addressed the portrayal of strict adherence to positive law in *Billy Budd, Sailor* by American author Herman Melville. Additionally, the conflict between the narrator, who inserts extralegal considerations, and Vere, the ship's captain, who insists on adhering to the law and the evidence, demonstrates the skillful anticipation and deflection of attempts to convince the trier of fact, both those in the novel and those reading the novel, to nullify the law.

I touch upon only a minute portion of the value of law and literature studies to law students and practicing lawyers. We tend to think that most literature in which law plays a major role concerns only criminal law, ignoring the many disputes in literature over inheritance, contracts, divorce, and real property. I also have not mentioned the participation of poetry, such as that of the insurance lawyer Wallace Stevens or W. H. Auden's "Law Like Love."

Neither have I cited the implications of the ubiquitous popular fiction today written by and about lawyers or the use of science fiction and children's literature as a teaching tool in legal studies.⁸ And I have not explored here the many revelations that emerge from a literary analysis of a judicial opinion or the

use of fictional devices to persuade and to imply authority and truth in legal writing.⁹ I hope we can continue this conversation in the State Bar's Town Hall on the Internet.

A 1994 survey of 199 North American law schools indicated that 84 offered some variation of a law and literature course.¹⁰ The websites of Michigan's six law schools show three offer courses relating to law and literature. I am certain that we have only begun to discover the innumerable lessons for lawyers and law students from combining legal and literary studies. ◆

Deborah Luyster is chair of the State Bar Legal Education Committee. She is a graduate of Goucher College, (BA), Western Michigan University (MA), Michigan State University (PhD), and the University of Baltimore School of Law (JD). She has been admitted to the State Bars of Maryland, Virginia, and Michigan and has taught in the English Departments of Western Michigan University and Kalamazoo College.

FOOTNOTES

1. See Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*.
2. See Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*.
3. These skills are in addition to the close reading and critical thinking skills that are the obligatory tools of both students of law and of literature of every age and stage of development.
4. See Robert Ferguson, *Law and Letters in American Culture* and Carl S. Smith et al., *Law and American Literature*.
5. See Richard Sherwin, "Lawyering Theory: An Overview: What We Talk about When We Talk about Law," 37 NY L Sch L Rev 9 (1992).
6. Lee, Harper, *To Kill a Mockingbird*, New York: Warner Books, 1982, p 126.
7. See Daniel J. Kornstein, *Kill all the Lawyers? Shakespeare's Legal Appeal*.
8. See Bruce L. Rockwood, *Law and Literature Perspectives*, particularly the editor's introduction "On Doing Law and Literature."
9. Judge Richard Posner, Seventh Circuit U.S. Court of Appeals wrote an opening volley in the law and literature movement in *Law and Literature: A Misunderstood Relation*.
10. Elizabeth Villiers Gemmette, "Joining the Class Action," 29 Val U L Rev 665 (1995).