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Where Is Law & Literature Headed? Roundtable Discussion

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WHERE IS LAW & LITERATURE HEADED?

ROUNDTABLE DISCUSSION

Participants:

Susan Ayres

Michael Hyde

Susan Sage Heinzelman

Ian Ward

Melanie Williams

PROFESSOR SUSAN AYRES: Welcome to our last panel of the conference. This is a roundtable that will discuss the question “Where is Law and Literature Headed?” I’m going to give a brief introduction. At the far end of the table is Professor Michael Hyde, who is The University Distinguished Professor of Communication Ethics at Wake Forest University. He is a Fellow of the W.K. Kellogg Foundation and has written many articles and five books, including *The Call of Conscience: Heidegger and Levinas, Rhetoric and the Euthanasia Debate*.¹ Currently, his work involves the rhetoric of medicine.

Next to Michael Hyde is Professor Susan Sage Heinzelman, who is in the English Department at the University of Texas in Austin. Her scholarship focuses on how women are represented in law and literature and she has co-edited a book entitled *Representing Women: Essays in Law, Literature, and Feminism*.² She has also written articles in this area that consider both contemporary and historical contexts. She is President-elect of the Association for the Study of Law, Culture, and the Humanities, which is a great organization to join and get involved in.

Sitting next to Susan Sage Heinzelman is Professor Ian Ward, who is Professor of Law and Director of Research at Newcastle Law School at the University of Newcastle upon Tyne. He has published many articles and books that take an interdisciplinary approach to legal studies. For instance, he authored *Law and Literature: Possibilities and Perspectives*³ and *Shakespeare and the Legal Imagination*.⁴ His recent work considers public law and European Community law.

Finally, we have Melanie Williams, who is Professor of Literary Jurisprudence at the University of Wales School of Law at Swansea. Professor Williams was just appointed to a personal Chair and her

1. MICHAEL J. HYDE, *THE CALL OF CONSCIENCE: HEIDEGGER AND LEVINAS, RHETORIC AND THE EUTHANASIA DEBATE* (2001).

2. *REPRESENTING WOMEN: ESSAYS IN LAW, LITERATURE, AND FEMINISM* (Susan Sage Heinzelman & Zipporah Wiseman eds., 1994).

3. IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995).

4. IAN WARD, *SHAKESPEARE AND THE LEGAL IMAGINATION* (1999).

book, entitled *Secrets and Laws—Collected Essays: True Tales of Law, Ethics, and Literature*,⁵ was recently published. So congratulations.

(Applause)

We are just going to start. Let me briefly mention that shortly before this conference, an article by Julie Stone Peters about law and literature appeared in the *PMLA*,⁶ and the round table participants were all sent this article as “homework” for the conference. Each person will talk for about five minutes and then we will open up the floor for questions.

PROFESSOR MICHAEL HYDE: As somebody who is not a lawyer and tried to attend every session that I could, somebody whose home—at least one of their homes—is in rhetoric, it always makes a rhetorician feel good to hear people talking about rhetoric in an authentic way, as opposed to it being a “harlot of the arts,” as it sometimes has been called. It is good to hear lawyers deal with it in a way that it has not been dealt with throughout history, at least going back to Hippocratic texts. In the Hippocratic Corpus, *The Art*, it is a rhetorical argument when a Hippocratic physician went to a Sophist to be trained. The argument from the physician is, “Look, people believe what they see more than they hear, so let’s get rid of rhetoric.”

Rhetoric has always been in search of a home, in a way. Coming here and seeing what was going on, there was an accommodation that was kind of wonderful. One thing that I do find interesting, however, is that in 1915, the Department of Rhetoric and Communications split from the Department of English, because rhetoricians wanted to study actual public address and not just works of literature. They started with British public address, to look at eloquence and how it builds into society, and I think they never got the credit for that. Along came deconstruction and continued the claims about rhetoric. Thus, there were people like Paul de Man who read Nietzsche absolutely incorrectly. But yet professors in literature departments thought, “Oh yes, de Man is right: for Nietzsche it’s all tropes and figures.” Nietzsche never said that. He surely didn’t teach it, and he didn’t write it that way either. Rhetoric is the practice, the everyday practice of discourse, attempting to move people to ideas and ideas to people, for the benefit of society. And for me as an outsider, it was wondrous to see that.

Where are you all going to go? I hope you keep on going in the same direction as far as I am concerned, because I think rhetoric serves a great purpose and I think it is authentic to history, the way it

5. MELANIE WILLIAMS, *SECRETS AND LAWS—COLLECTED ESSAYS: TRUE TALES OF LAW, ETHICS AND LITERATURE* (2005).

6. Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 *PMLA* 442 (2005).

should be, with what rhetoric can be and what rhetoric must be in a civic society.

Finally, I'm a hard-core Ciceronian. Civic republicanism, for me, is the doctrine that I try to live by. It should be the engine of a democracy; if it is not, it is not a democracy. The way it was talked out at this conference was very instructive for me—very instructive—and I hope you continue going in the same direction.

PROFESSOR SUSAN SAGE HEINZELMAN: Let me briefly follow up on the mention of Law, Culture, and the Humanities, I know that there are some people in the audience who are already familiar with that organization and some people were at our annual meeting in Austin last year. If you want more information about it, you can speak to me afterwards or you can just go to the website at www.aslch.org, where there is a call for papers for the next conference; we would love to see everybody there. I want to comment on an article that appeared very recently in the *Modern Language Association*, authored by Julie Stone Peters. The title of the article is: *Law, Literature and the Vanishing Real: The Future of an Interdisciplinary Illusion*,⁷ which gives you some sense of the terms that she is playing with, although it is not quite as desperate as it sounds—we haven't quite disappeared yet—but there is a suggestion that we are engaging in an illusory search for the real subject of law and literature scholarship. She offers us an analysis based upon a tripartite chronological division of the law and literature movement; she starts in the 1970s and moves forward. Let me just read the section that introduces it:

While law and literature has sometimes been considered an incoherent catchall, one might heuristically identify in it three major projects: humanism (dominant in the 1970s and early 1980s and focusing largely on literary texts), hermeneutics (dominant throughout the 1980s and focusing largely on literary theory), and narrative (dominant in the late 1980s and 1990s and focusing largely on legal cases).⁸

Humanism: I think we all recognize the movement began with the attempt by literature to humanize the apparently objective, rational, and abstract nature of the law. Literature was bringing the real—the “real” now is the human condition—to the law, and thereby was somehow speaking truth to power. That would be associated, I think, primarily with the work of J.B. White in his text, *The Legal Imagination*.⁹

The next shift, to *Hermeneutics*, undermines what has happened in that first era of humanism because literary theory now threatens the very reality that humanism itself claims. The claim that literature hu-

7. Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 PMLA 442 (2005).

8. *Id.* at 444.

9. JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1985).

manizes the law is now under threat, and both traditional literature and law now seem concerned to protect themselves from this threat from literary theory, which is a post-modern sense of the loss of the clear object of study: the subject is under attack, protects itself, and is no longer fixed and stable. So literature now turns its traditional authority as an interpretative discipline to reading constitutional analysis or deconstructing contract law, and this was how it reclaimed its authority. And law now insists that it is socially powerful, that its texts have an affective power, which is of course the claim that had been previously made by literature.

The final stage, which Peters defines as *Narrative*, is a stage that developed from feminist theory, critical race theory, and trauma theory. Narrative jurisprudence aims to undermine master narratives with oppositional narratives, and makes a claim about the epistemological reality of the personal story. So the personal and the particular are now the real.

Peters sees the history of law and literature, then, as ongoing search for this elusive goal, this Holy Grail, which is the “real,” whatever seems most real. She claims that this search for the “real” is an illusion because in the end law and literature desire to be the other: not only does law desire literature, but it also desires to be what literature has described law to be, and vice versa—literature not only desires law but it desires to be what law has described literature to be.

So she depicts this relationship as two mirrors, with each discipline, as it were, reflecting the other, but there is no “there” there—just like L.A., there is nothing there; it is an illusion. Each discipline is a reflection of what the other seems to be. I think that much of what Peters says is useful but I would reject the notion of a kind of disappearing point in terms of the interdisciplinary project. Instead of this idea of an illusion, of mirrors facing one another, I would offer the term “*nostos*.” The term has come up in a number of different contexts in this conference—even though the word itself might not have been used. The word *nostos* is the Greek word for homecoming, which gives us the word “nostalgia.” And I think that law and literature reflects a desire for history, a desire to return to history in order to find out where we are and where we might be going. I would suggest that rather than seeing ourselves as simply staring at mirrors and therefore in a kind of static condition, that we are actually constantly searching, and we are searching for a place, a space, a familiar place and space, a discourse that we can name, and that discourse is where the “*realest*” real is, if you like, might be, and that is part history and part myth—like the story of Dick Whittington, which is myth, and Richard Whittington, which is history. I think this is where we find ourselves.

So I would suggest that where we are going is where we have always been, which is to be constantly re-narrating that derivative creativity

that we heard about in the very first session, how a story generates another story. And if we are always doing that, we are always repeating, but not in the way that Peters describes the enterprise—not in a search for an illusion, for something that is not there, but in a search for the connection between history and myth. I think that that is very positive. It is a humanistic endeavour, it is a human endeavour, but it also offers us the possibility of determining constantly the history even as we go forward.

PROFESSOR IAN WARD: I too did my homework for this. The same article, by Julie Stone Peters. I had not read it before and it was very interesting. As ever with these things, you come away with certain things you agree with and certain things you do not agree with. As Susan has already suggested, a primary theme of Peters's article is evolution. I thought I was entirely in agreement with that, and I have always been slightly sceptical of the assumption anyway that "law and literature" is an unchanging discipline. There are those who are defensive about somehow losing "law and literature." I am not.

So I am entirely in agreement with the thesis of Peters's article, which suggests that "law and literature" should be comfortable in evolving into a broader interdisciplinary concern. I think a number at this conference would agree. Indeed, this conference is testimony to the vitality of interdisciplinary work in law and literature, and history, and philosophy, and politics, and economics, and so on. I am not sorry to be involved in this evolution, although at the same time, I don't think people should worry about "law and literature" disappearing either. I agree with Susan. I don't think there is a need for great anxiety.

Another, related, point. There is a presumption in Peters's article that somehow we have a linear history here, a period where "law and literature" was largely humanistic, an aspiration. It then goes through a kind of literary criticism stage and it emerges from this at a last, third, stage of narrativity, with law and politics. You get a distinct sense of this teleology. I am always sceptical of these presumed linear histories; where they start and where they finish. I don't think it is quite that clearly defined.

As a final observation, really. I think it is perhaps unfair, but I also think implicit in the article is the presumption that the future of "law and literature" might lie in more radicalized, political aspiration. I am not entirely sure that it is healthy to assume that something that is radicalized or politicized is a terribly good thing. There is a lot in the article about the role that feminism can play. I think it is quite right to identify the feminist approaches as being amongst the most active and rigorous. But I do not see that as somehow presuming that the future of "law and literature" is going to be so politicized or radicalized. I think there is a message here. There is a great danger in being too

oppositional, too political. I think that would be counterproductive. I would be wary of that. And aside from that, I think my time is up.

PROFESSOR MELANIE WILLIAMS: As we have all been told, this article identifies law and literature as revealing three major projects. Humanism: it suggests that the commitment to the human is an ethical corrective to the scientific and technocratic visions of law that had dominated the 20th Century. It addresses the human meaning of concepts, such as law, criminality, punishment, justice. But I would suggest it is useful not just to gauge the human meaning of these concepts but to actually test and challenge the deployment and credibility of these ideas in the courtroom against other evidence of their meanings in the world.

When we think about hermeneutics, we are told of the dominance of literary theory and the fact that it is “preoccupied with challenges to the identity of the human subject”—as Susan has already mentioned—“presumed by traditional humanism and to the identity of the humanist text as the central agent of human meaning.” That is the argument put forward by the article.

I would question the notion of the humanist text because of the plethora, the diversity, of materials that we encounter. I would also question the notion of the central agent: this over-reifying totemises the sources when their roles can be more naturally placed.

In relation to narrative, the article is interesting because it tells us about the narrative “movements,” particularly in the U.S., which have colonized the links between the idea and territory of narrative, with critical race and psychotherapeutic approaches, though citing a view that many legal and literary scholars writing about narrative jurisprudence were critical of presuppositions about the inherent truth, exemplarity or ethics of stories, and though legal story-telling “appealingly clothes its truth claims in a revived humanist rhetoric, rendered palatable through a transfer to the sphere of oppositional politics and the psychology of oppression.”

But I think this under-reifies or undervalues the practical application for narrative in jurisprudence. Though “stories” may lack credibility, though “law” may render its account into artificial form, the fact is that law is telling stories and that the insights of narrative scholarship can give us insights into those processes.

I think my main conclusion, then, is that the history of law and literature so far has been a highly politicized one. That is something I picked up, obviously in harmony with Ian. The impression you get from the article is that it has been a dramatically politicized one, and certainly when you look at the whole politico-legal movement which allowed law and literature to flourish, there were hugely dramatic political claims made about the power of these fringe activities. It is as if the scholarly proponents are fired by the passionate potential of the sources into making grand postures.

For me, law and literature is really just cultural anthropology. Both law and literature are simply cultural artefacts. They are things that we produce and engage within our existence on the planet. Surely, it is the process of interaction which helps test the boundaries, not necessarily the quest for a particular political outcome but the knowledge that the natural challenge posed by different epistemological sources is in itself a quiet political critique.

PROFESSOR MICHAEL HYDE: I apologize to the audience, I want to make something clear. Before this roundtable we were saying how tired we all were and we would speak just a few minutes. But I did my homework too! Let me add one thing. If you want to advance, there are so many gaps in Peters's piece dealing with critical theory, feminist theory, hermeneutical theory. I will give you an example. For those of you who might follow Heidegger, next year the first translation of Heidegger on Aristotle's *Rhetoric* will be published. It has never been published before. What you are going to see there, and what readers will see if they know the rhetorical tradition, is that so much was left out by the majors of phenomenology and critical theory and post-structuralism. Why was it left out? Because they took a literary view and not necessarily a rhetorical one.

RESPONSE FROM THE AUDIENCE:

FROM THE AUDIENCE: [K.C. Sheehan, Southwestern University School of Law] I have learned so much just in the last couple of days that I have started to think about this link between law and literature generally, and narrative in particular, and radical politics. Law and literature is humanizing, it seems to me. Narrative as applied to law is humanizing. It is constantly flinging up stories about people, persons, flesh, and blood.

There is a danger, or a development, depending on your politics: people are no longer really the primary actors in law; arguably, corporations are. And while people act in corporations, corporations do not act like people. They are amoral and they do not have consciences—at least not in the United States; American multinationals are what I am talking about—and they dominate a good deal of litigation. Insurance companies completely dominate the litigation that does involve people and then there is a huge amount of litigation that does not involve people. They are increasingly dominating the formation of positive legislation. So I wonder if the more we tell stories about law and humans the more we throw up a screen behind which our corporate masters can do whatever they want; that we are in a sense a conservative operation, rather than a radical one, by insisting on focusing on increasingly irrelevant people at the top.

PROFESSOR IAN WARD: One response, which may actually be slightly tangential to what you are saying. I entirely agree with you. The audience here, being largely American, will know this quote if I can grapple towards it. I know that Eleanor Roosevelt once said,

“you have to remember that politics is done by somebody who lives down the street.” It is a very personal experience, it is not something really done by governments or done by corporations. It might seem that way, but the really relevant politics is involved within our own environments. That is essentially what you were saying. Sometimes there is a misconception about what politics really is. What I was perhaps suggesting when I was being critical of allowing something to become too politicized is if perhaps something becomes too ideological, rather than too politicized, it gets captured by people who claim to have some greater insight into politics than the person who lives down the street.

PROFESSOR MELANIE WILLIAMS: I think there is a difficulty too, that if you have any movement, whether it is politico-legal studies or law and literature or whatever, that makes large critical claims about itself, then that is a kind of comfort zone it can occupy for as long as it likes. That is more dangerous, for the reasons you cite, in failing to address the “real,” if you like, than actually admitting its own humble, slowly encroaching role. I think it is too easy to create counterfeit ideological positions that just pay the mortgage and yet do create a kind of smokescreen to hide behind.

PROFESSOR MICHAEL HYDE: Let me ask the question: did you say earlier that narrative is always humanizing?

FROM THE AUDIENCE: [K.C. Sheehan] I should not have said anything that absolutely, but I think I probably did!

PROFESSOR MICHAEL HYDE: And I would say that that is not the case because of the narratives of corporations—I mean, there are narratives everywhere. We are *homo narrans*; we are the story-telling animal. And part of the reason for that is the way our existence is structured. It is open-ended. There is always a beginning, a middle, and an end. We reflect an order that we had nothing to do with when it got here. I don’t know where it came from—Big Bang or God, that is up to you—but we have no say in the structure of space and time and the way it unfolds. From that, we have become story-tellers. It does seem to me that—and in this I would credit the post-structuralists and I am very influenced by that—whoever controls the discourse has the power. That is very important, you define the terms. Coming to terms is understanding something. You define the terms.

So I think where you all are as a group, it can become very self-satisfying and very comfortable, but the very discourse that you study is literature, but when you are all looking at the literature you are looking at the rhetoric, it seems to me. You talk about rhetorical comments when you talk about literature. What is literature? A use of language in a certain way, structured in a certain way. If this group could come up with ways where you would find out how to better educate the public about social, political, civil processes, public policy, that would be outstanding. Otherwise, you retreat into the ivory

tower. But a lot of what I heard throughout the conference suggested the opposite: if you have the guts to go public on that, you might make a difference.

PROFESSOR MELANIE WILLIAMS: I think the other difficulty we are up against, too, is the fact that the formal institution of law is not going to be very willing to take our kind of observations as evidence. We all understand that. But nevertheless, examining these alternative sources is a perfectly credible, perfectly legitimate way of engaging with what is happening in the courtroom, because to a large extent the authority that that institution claims is fiction.

FROM THE AUDIENCE: [Nanette Clinch, Department of Marketing, San Jose State University] Just on that, practically speaking, if you want to introduce us to a law school, in other words, to a new group of lawyers, lawyers are very vocal and a lot of lawyers, even lawyers that are currently in practice, do want to take advantage of any idea that will further their particular cause. But it seems, practically speaking, that when you are talking about ethics, talking about the power of rhetoric, talking about other moralities of rhetoric, that in the law schools themselves they do not now really incorporate much of the dialogue or focus on the kinds of issues that we have been engaged in. And this is the kind of work that can be done in persuading law schools to introduce more of this type of subjectivity into the curriculum and to be proud of it instead of embarrassed by it.

PROFESSOR SUSAN SAGE HEINZELMAN: Actually, this is not an answer directly to the question, "Where are you in terms of institutions?" The University of Texas Law School has a law and literature seminar. I want to actually ask why one always has to go to the law school? Why do we always have to take it to the law school? Does that mean that Departments of Literature have nothing to learn about this? My suggestion is that we still have this, it seems to me, a privilege. The law, corporations, they are out there in the world, they are public, they are powerful, and they don't know anything, they don't really understand about narrative, about literary theory, about any of the various approaches about rhetoric, its history and so on. So we have to take it to them, because they are somehow deprived. Whereas, Departments of Literature, they already apparently have everything that they need, so they don't need to import anything, because they are somehow privileged, already filled with whatever it is that makes them so important to the human condition. I just wanted to sort of throw that out. I see the comments developing in that way, that we have not moved very far if that is the case. We are still dividing the world up into the good, the bad, and the ugly, and we know where the bad and ugly are—in the business school and the law school!

FROM THE AUDIENCE: Scott Gerber, Ohio Northern University School of Law. I have learned a lot also. In processing two days'

worth of conference, it wasn't until I heard Melanie's remark and also a marvellous paper that it all made sense to me.

What I felt earlier in the conference was that people were trying to do too much with law and literature. Unless I misunderstood Melanie, she was suggesting that we should be more modest, that law and literature are both important of course, but that we should be cautious in how much we say in front of each other. So my point is simply this. I want to thank Melanie for setting the buzzer off. Modesty, I think, is the direction you should be going in. Don't abandon it altogether, but don't claim that it can do as much as some people think.

PROFESSOR MELANIE WILLIAMS: I would keep some of that modesty for the law and literature project. That is not to say that I don't think, along with Michael, that there is a very big message which comes as well. I do. Michael refers to the link that we find in the discipline of rhetoric, and that clearly signals a big link between the two fields. I am interested actually in the link between narrative in literature and narrative in law through the medium of practical ethics, because practical ethics models what law depends so heavily on, whether overtly, in talking about, for example, how we reason in medical ethics problems like physician assisted suicide, or covertly, through formal legal doctrines, like the doctrine of provocation or the doctrine of diminished responsibility, all of which are intrinsically narrative doctrines actually. Those doctrines are in denial about their own terms and practices, the law is in denial about its own terms and practices, and that is because of the allegedly unhealthy association with unreliable humanistic drives and subjectivity and the world of the emotive and so on. But it is in denial, and we need to keep challenging its position of denial because actually those doctrines are all made by faulty human beings who are themselves the product of particular cultural and historical moments, and they reflect certain prejudices. And if you track any doctrine through time, you can see those prejudices being reflected.

So for me it is an entirely natural connection. In one way the message is quite revolutionary, but in another sense you are quite right in picking up on the fact that I would urge a kind of caution about making big claims about it. I think we can do interesting things by stealth, if you like.

PROFESSOR SUSAN AYRES: I think we need to close briefly. Does anyone else have a closing comment?

PROFESSOR IAN WARD: Just, I think, to go back to Nanette's point, that essentially there is a role for law and literature, which I think was picked up very early on in James Boyd White's first writing about the law and literature in a law school about 20 or 30 years ago. That is absolutely right. I think that is a place to focus on, I am absolutely convinced of that.

PROFESSOR SUSAN SAGE HEINZELMAN: And I do think one of the ways in which you can bring about that educative debate is by actually bringing the lawyers over, bringing the law school as it were to the Departments of Literature where they discover things that they don't think exist. And also sending English professors to the law schools in order to co-teach, because I think that kind of reciprocity creates the possibilities for education. I don't think it happens by each individual discipline simply continuing to teach in the way that it has before. There needs to be some mutual effort there.

PROFESSOR MICHAEL HYDE: I will use my discipline, my field, as a way of commenting on this. I think you should be bold, to tell you the truth. Communication is so essential to your existence. How many communicators do you know who can make a sound argument, who know what reasoning is, who can use empathetic discourse? You have an amazing amount to offer to a public that, in my estimation, is not that competent, and the reason why communication all of a sudden had the revolution it did—two things: the computer revolution, which suggested “Oh my God, I really am illiterate,” and the biotechnical revolution, because there what we see going on is science outstripping its own discursive limits in terms of ethics and law. And ethics—well, that is a fast pitch for a communication person, and that is a fast pitch for people in law, who can study the way discourse is used to transform society. We will be setting the terms if you have the guts!

(Applause)