

# Law and Literature: A Dilettante's Dream?

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## I. Introduction

In November 2013 I gave a lecture in Wolfson College, Oxford entitled: “LAW AND LITERATURE: A DILETTANTE’S DREAM?”. It was in two parts. Part A expressed guarded scepticism about ‘The Law and Literature Movement’ (LLit). The thesis was simple: in this context neither ‘Literature’ nor ‘Law’ have one referent. As academic fields, these disciplines are far too broad and internally fragmented to have one coherent set of relations; as phenomena (e.g. literature as a heritage of texts, law as institutions, processes in ‘the real world,’ as well as laws as ideas) they are too varied and amorphous to be reduced to a coherent set of subject-matters that can be sensibly juxtaposed. There are specific, focused topics and themes that have produced illuminating insights, such as Shakespeare’s constitutional ideas and assumptions, but much of the secondary discussion of the ‘movement’ is over-generalized.

In Part B, abandoning any effort to generalize about the movement or alleged ‘field,’ I descended into autobiography. I told some specific stories about how some eclectic engagements with ‘literature’ had influenced my own thought and work: not just as grace notes, or quotation-dropping, or otherwise showing off or frolicking. Part B was more successful than Part A. It suggested a question that each of you may ask yourself: what, if anything, in the heritage of literature or literary studies has significantly influenced *my work* in law? Why?

Part B, with only minor changes, is reproduced here. In this version I have retained the informal style of the lecture, but I have added a few footnotes.<sup>1</sup> It deals with three topics: (i) standpoint; (ii) narrative and argument in fact-finding; (iii) Italo Calvino and Jurisprudence.

## II. Standpoint<sup>2</sup>

My first example of being helped as a jurist by “literature” relates to what is now old-fashioned literary criticism. As an undergraduate my interest in Jurisprudence - indeed in law - had been

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<sup>1</sup> References to works by the author cited in the text include William Twining, *Globalisation and Legal Theory* (Butterworth 2000) (hereafter GLT); *The Great Juristic Bazaar* (Ashgate, 2002)(hereafter GJB); *Rethinking Evidence* (Cambridge University Press 2<sup>nd</sup> edn 2006) (hereafter RE); *General Jurisprudence* (Cambridge, 2009)(hereafter GJP); with Terence Anderson and David Schum, *Analysis of Evidence* (Cambridge University Press 2<sup>nd</sup> edn 2005) (hereafter AN); and with David Miers, *How To Do Things With Rules* (Cambridge University Press 5<sup>th</sup> edn 2010) (hereafter HTDTWR).

<sup>2</sup> William Twining, ‘The Bad Man Revisited’ (1975) 58 *Cornell Law Rev.* 275 (reprinted in GJB Ch. 3); ‘Other People’s Power’: The Bad Man and English Positivism 1897-1997’ (1997) 63 *Brooklyn L. Rev.* 189 (reprinted in GLT, Ch. 5); and ‘Institutions of Law: Globalization, non-state law and legal pluralism’ in M. Del Mar (ed.) *Law as Institutional Normative Order: Essays in Honour of Sir Neil MacCormick* (Ashgate 2009), and HTDTWR, ANj, RE, GJB (indexes under ‘standpoint’).

inspired by Herbert Hart, especially his inaugural lecture, delivered in 1952.<sup>3</sup> However, over time I became increasingly dissatisfied by his narrow view of the agenda of Jurisprudence.<sup>4</sup> This linked up with an adolescent worry about belief pluralism that I have never grown out of: how to cope with the fact that there are many belief systems, all claiming to be right? Shortly after I graduated I read, and was enthralled by, R.G. Collingwood's *Autobiography* – surely a great work of literature, indeed of fiction.<sup>5</sup> The key idea for me was that all history is the history of thought: to understand Aristotle, or Nelson's decisions at Trafalgar, one needs to put oneself in the writer's or actor's shoes and try to understand their situation, concerns, concepts, and information in order to reconstruct what they were thinking and what it meant. Reading Collingwood was for me a huge step forward, but it did not quite dissolve all my puzzles.

Soon after being excited by Collingwood, I read E. M. Forster's *Aspects of the Novel*, written in 1927.<sup>6</sup> As a serious-minded auto-didact, I even read some of the works he discussed. Two related, seemingly contradictory, ideas grabbed me. First, Forster praised Percy Lubbock's *The Craft of Fiction* (first published in 1921) and quoted with approval his statement:

*“The whole intricate question of method, in the craft of fiction, I take to be governed by the question of the point of view - the question of the relation in which the narrator stands to the story.”*<sup>7</sup>

I devoured Lubbock and his distinctions between the impartial or partial onlooker and the omniscient author; and seeing everything through the eyes of one or more participants. This developed Collingwood's idea of history by differentiating several different types of points of view and, as we shall see, it had immediate resonance in relation to studying law.

In the latter parts of *Aspects of the Novel* Forster seemed to alter course. He sharply criticised Henry James for adhering too rigidly to a consistent standpoint - sacrificing humanity and life to aesthetic form. In particular, in *The Ambassadors* James constructed an aesthetically complete form - like an hourglass:

*“[B]ut at what sacrifice! ... the cost is a very short list of characters, - mainly one observer who tries to influence the action and the second-rate outsider - and these characters ... are constructed on very stingy lines.... Why so wanton with human beings?”*<sup>8</sup>

In short, James' formalism cut out the messy reality of life. That was just how I felt about law and the dominant tradition - only a little less dominant today - of doctrinal

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<sup>3</sup> HLA Hart, 'Definition and Theory in Jurisprudence', (1953) 70 LQR 57., reprinted in various collections. This introduced a naïve undergraduate to some startling ideas: that questions such as 'what is law?' 'what is a right?', can be wrongly or misleadingly posed; that much depends on who is asking the questions; and that attributing different questions to seemingly conflicting texts is one way of differentiating disagreement from mere difference.

<sup>4</sup> William Twining, "Academic Law and Legal Philosophy; the Significance of Herbert Hart" (1979) 95 LQR 557.

<sup>5</sup> RG Collingwood, *An Autobiography* (Oxford University Press 1939, reprint 1970), discussed in GJB Ch 2

<sup>6</sup> EM Forster, *Aspects of the Novel* (Edward Arnold 1927)

<sup>7</sup> Percy Lubbock, *The Craft of Fiction* (Jonathan Cape 1921) 251. I read the 1954 edition with new Preface.

<sup>8</sup> Forster (n.7) 147-8. Henry James, *The Ambassadors* (Methuen 1903). Forster acknowledges that 'There is a masterly analysis [by Percy Lubbock] from another standpoint in *The Craft of Fiction*' (Forster n.7) 141.

formalism (whatever that means). So, I defected from Hart – at least he thought so – to something called “realism” and from then on standpoint and multiple perspectives became key concepts.

I soon recognized that differentiation of standpoint was already a powerful tool in Analytical Jurisprudence and Philosophy.<sup>9</sup> For example, Bentham’s distinction between expository and censorial jurisprudence and Rawls’ claim to dissolve a puzzlement about act- and rule-utilitarianism by assigning the former to the judge’s question and the latter to the legislator’s question in respect of punishment: the legislator asks who should be punished under what conditions? The judge asks: should I punish this person? In Jurisprudence Hart, Lasswell and McDougal, and Holmes were among those who used differentiation of standpoints to advance their ideas.<sup>10</sup>

However, it seemed to me that standpoint analysis should not stop at abstract distinctions between observers and participants, external and internal points of view, and elusive differentiations between subjective and objective – such distinctions often break down. Take, for example, the distinction between participants, observers, and participant-observers. Much of legal scholarship, legal theorising, and legal education is participant-oriented. A central part of Anglo-American traditions of pedagogy involves making students adopt different roles: advise your client; make the case for the plaintiff; decide this case; change the law. We ask them *to pretend to be* different kinds of actors, mainly in the upper reaches of the system: Supreme Court Justices, legislators, Lord Chancellors or Justice Ministers.<sup>11</sup> Less often do they pretend to be lowly actors such as consumers, victims, convicted criminals, or other users of law and legal processes. Subaltern points of view are not well-developed in our tradition of academic law but have been seized on by some members of the Law and Literature Movement.<sup>12</sup>

Nietzsche suggested that the commonest form of stupidity consists in forgetting what one is trying to do.<sup>13</sup> For my students, I have found that the commonest form of stupidity is forgetting who they are pretending to be. So, I make the clarification of standpoint an essential first step for them in a variety of intellectual exercises.<sup>14</sup>

<sup>9</sup> The concept of standpoint is highly ambiguous and means different things in different contexts. Terms such as vantage point, situation, role, perspective, and objectives need to be differentiated – how important each of them is depends largely on context. For example, “clarification of standpoint” is different for a law student preparing to write an essay on causation and a lawyer meeting her client for the first time. See GJB 29-37 and references in n.3 above.

<sup>10</sup> Jeremy Bentham, *A Fragment on Government* (1776; ed. JH Burns and HLA Hart, Athlone Press 1977) 397-98; John Rawls, ‘Two Concepts of Rules’ (1955) 64 *Philosophical Rev.* 72, HLA Hart, *Punishment and Responsibility* (Oxford University Press 1968) Ch. 1 (first published in 1959), H. Lasswell and M. McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’ (1943) 52 *Yale Law J.* 203; O. W. Holmes Jr, ‘The Path of the Law’ (1897) 10 *Harvard L. Rev.* 457 – see generally GJB Ch.3

<sup>11</sup> HTDFTWR Preface xv-xvi

<sup>12</sup> For me, one of the most powerful pleas for ‘subaltern’ voices to be heard and accorded their rights is by an academic lawyer, Upendra Baxi, “Voices of Suffering: Fragmented Universality and the Future of Human Rights” (1998) *Law and Contemporary Problems* 125, reprinted in full in W. Twining (ed.) *Human Rights: Southern Voices*. (Cambridge University Press 2009) Ch.5..

<sup>13</sup> Often translated as “forgetting one’s purpose” (*The Wanderer and his Shadow*, 1880).

<sup>14</sup> Of course, there are many types of historians and many types of observer that can be further differentiated.

There is a standard repertory of stereotypical or abstract roles in legal discourse - the legislator, the judge, prosecutor, defence lawyer, negotiator, adviser, and so on. There are also familiar images like economic man, Hart's internal point of view (mainly of officials), Kelsen's "legal point of view",<sup>15</sup> Dworkin's ideal judge Hercules, Holmes' Bad Man, the puzzled interpreter, a cynical tax consultant, Mutt and Jeff (soft/hard police interrogation), the upright judge.<sup>16</sup> There are many kinds of legal actor and each kind can be further broken down into sub-species. But at some point, especially in socio-legal studies, one needs to focus on particularities. If one is interested in what actually happens, what actual participants are like, and real-life experiences, one needs to think empirically in terms of the actual characteristics of real people - how they in fact think, reason, argue, decide, behave.

So, two 1920s literary critics or commentators inspired some of what for me has been a crucial set of tools for thinking about law. Of course, literary theory has moved on and has become more sophisticated - indeed, often too sophisticated for a mere jurist. From time to time I have dabbled with reader response theory, perspectivism, the intentionist fallacy, deconstruction, and some other fads, fashions, and frolics of academic literary studies. But that has been more like dilettantism on my part and I personally have not found any of them very helpful.

### *A. Standpoint and narrative: The Shakespearean and the Jurist*

The subtleties of standpoint analysis are illustrated by a strange collaboration that I have had with a Shakespeare scholar (and social historian) René Weis of the English Department at University College London. For years, in teaching law students how to analyse evidence and construct arguments about questions of fact in complex cases, I have used the English 1920s *cause célèbre* of *R v Bywaters and Thompson*.<sup>17</sup> Frederick Bywaters and Edith Thompson were convicted of murdering Edith's husband Percy - Freddy for stabbing him, Edith for inciting and conspiring with Freddy to kill Percy. Edith was convicted largely on the basis of some sixty love letters to Freddy, many in a gushing, stream-of-consciousness, elliptical style.<sup>18</sup> I chose the case, because as one student said: "If you can analyse Edith's prose, you can analyse anything." The case, like the *Sacco Vanzetti case* in America,<sup>19</sup> became something of a literary event: it stimulated several plays, at least one very bad film, and a brilliant feminist novel, *A Pin to See the Peepshow*.<sup>20</sup> Opinion is still divided about Edith's guilt.

After some years, I wrote an article using Bywaters and Thompson to illustrate the method of analysis and argument construction that I was trying to teach.<sup>21</sup> Only after the essay

<sup>15</sup> On which see Joseph Raz, *The Authority of Law* (Oxford University Press 1979) .140-43.

<sup>16</sup> For examples see HTDTWR 15-23.

<sup>17</sup> AN. Ch. 7, RE Ch. 12.

<sup>18</sup> The trial record and some other letters are published in full in Filson Young (ed.) *The Trial of Frederick Bywaters and Edith Thompson* (W. Hodge, 1923)

<sup>19</sup> David Felix, *Protest: Sacco-Vanzetti and the Intellectuals* (University of Indiana Press, 1965)

<sup>20</sup> F. Tennyson Jesse, *A Pin to See the Peepshow* (Heinemann, 1934) (reissued by Virago Modern Classics, 1979).

<sup>21</sup> W. Twining, "Anatomy of a cause célèbre" in RE (1990) Ch.8 and 9 (abbreviated in RE 2<sup>nd</sup> edn. Ch.12, Parts 1 and 2.)

was complete did I learn that a colleague in English at UCL had just finished a whole book on the case, passionately arguing Edith's innocence.<sup>22</sup> We compared notes and decided to publish our pieces separately without changing them, but then to write a joint paper comparing our different approaches to the case.<sup>23</sup> For me, this was a fascinating and instructive experience. Here, I will only deal with this insofar as it illustrates the complexities of standpoint. We both reached similar conclusions about Edith's guilt, but by strikingly different routes.<sup>24</sup>

The first point is whether, in considering Edith's guilt, we were addressing the same question. The answer to this is contested. I maintain that we were not concerned with the fairness of the trial, but adopting the standpoint of historians 80 or so years after the event we were asking whether Edith was criminally responsible for Percy's death in fact on the basis of the law at the time. To answer the question a historian would need to know the applicable law of murder, including the murky doctrine surrounding incitement and conspiracy. Weis's perspective, objectives, and methods were different from mine and he produced a lot of new data. The fact that Weis is not a lawyer is irrelevant. Some students disagree, emphasizing our different methods. In my view, they are wrong. Our question was shared.

Our methods were indeed very different and we brought to bear different lenses. I focused on the trial record, mainly Edith's letters to her lover, and subjected it to critical analysis, illustrating the method I was trying to teach. I concluded that the evidence for conspiracy was very weak, but the evidence of incitement was colourable, though not quite strong enough to satisfy the reasonable doubt standard, especially in relation to the question whether Freddy killed Percy *because of* Edith's incitement - on this a reasonable jury and commentators could disagree.

What did the Shakespearean do? First, he set the trial in the context of social conditions and attitudes of the time, the life stories of the main actors, and, most tellingly, the stormy course of their relationship. He dug up a great deal of new material about the trial, the personalities involved, and the romantic novels in which Edith immersed herself --- using all this to construct a theory of Edith living in a fantasy world and never *intending* that Percy should be murdered. Second, he constructed a master narrative of Edith's life and death in the social context of her times. Third, he brought his skills as a textual scholar to bear on a minute and scrupulous examination of Edith's letters as texts. He constructed a detailed, almost day-by-day, account of the 18-month relationship with Freddy and then set each letter in the context of the ups and downs of that relationship. By doing this for each significant letter he was able to infer Edith's mood, the effect of each passage, and that some words and phrases were thematic or part of a lovers' code.

You can imagine that this prosaic lawyer was made goggle-eyed by this scintillating performance. I learned a lot about the case and how to read love letters, but almost nothing

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<sup>22</sup> R. Weis, *Criminal Justice: the True Story of Edith Thompson*. (Hamish Hamilton 1988; Penguin, 2001).

<sup>23</sup> William Twining and René Weis, "Reconstructing the Truth about Edith Thompson: The Shakespearean and the Jurist" in W. Twining and Ian Hampsher-Monk (eds) *Evidence and Inference in History and Law* (Northwestern University Press, 2003) Ch. 2 ; reprinted in RE (2006) Ch.12

<sup>24</sup> The claim that the Sacco Vanzetti case was the only literary event in America between two world wars is sometimes attributed to H.L. Mencken. I have not yet been able to trace the original quotation.

about Shakespeare. There was one flaw. Weis's argument was that Edith lacked criminal intent. At least a dozen letters could be construed as acts of incitement - some subtle, but some crude: "I wish we had not got electric light - it would be easy."<sup>25</sup> "What exactly would be so easy, Mrs. Thompson?" "I used the "light bulb" three times but the third time - he found a piece - so I've given up until you come home."<sup>26</sup> "I'll risk and try if you will." It stretches the imagination that none of these passages involved intent to kill Percy and incite Freddy. Weis did not focus exactly on what the prosecution had to prove and on the several material facts, as we lawyers call them. A better line of defence would be that Freddy did not take Edith's letters seriously and that his knifing of Percy was spontaneous rather than premeditated, so that he did not kill Percy *because of* Edith's incitement or in pursuance of a conspiracy.

It is tempting to say that Weis used a narrative approach and I used a logical one. But this is misleading. Each of us used both. Weis tested key elements in his grand narratives and sub-plots against evidence - especially the evidence of the letters. I used narrative to imagine possible scenarios, to construct hypotheses, and to wrap the strongest case for and against Edith in a coherent story that made sense of the case as a whole. By the time I came to write about the case, I was already convinced that both narrative and logic are necessary in reconstructing past events. There was however a major theoretical problem: in this kind of approach to reconstructing particular past events, what is the relationship between evidence, narrative, and argument?

### III. Narrative

#### *A. Uses and abuses of narrative: stories as necessary, but dangerous*

This brings us to another story. Once upon a time, in the early seventies, the French philosopher, Paul Ricoeur, visited the University of Warwick. His legacy was a series of seminars on "Narrative as an instrument of culture", which was interpreted as academic culture. The organizers divided academic disciplines into three rough categories: 'Not Obvious', such as economics, the philosophy of science, physics, and geography; 'Obvious', such as literature, history, and theology; and 'In-between', including law, anthropology, and sociology.<sup>27</sup>

They began with 'Not Obvious' and invited scholars from disciplines in that category to discuss the role of narrative in their own discipline or sub-discipline. Whether or not they had thought about it before, all of the contributors found story-telling playing various roles in their field.<sup>28</sup> For example, a philosopher of science, Rom Harré, reported how scientific journals rarely give a realistic account of the story of an experiment ('Milly sneezed and

<sup>25</sup> Trial Exh 17, AN p.189..

<sup>26</sup> Trial Exh. 18, AN at p. 185.

<sup>27</sup> Christopher Nash (ed.), *Narrative and Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature*. (Routledge, 1986). An extended version of my paper is in RE (2006) Ch. 10.

<sup>28</sup> A striking example is Donald McCloskey, who went on to write *The Rhetoric of Economics* (University of Wisconsin Press, 1985) in which he showed 'the "hardest" of the social sciences to be literary even when mathematical, rhetorical even when nonverbal. In general argument and detailed case studies he reveals the extent to which economic discourse employs metaphor, authority, symmetry, and other rhetorical means of persuasion.' (Cover synopsis).

knocked over the Bunsen burner’, or ‘how we coped when the grant ran out’), rather working in accounts of the contributions of the principal researcher, thereby lending authority to the findings, and writing up scientific research projects as if they were heroic quests, with heroes, villains, and magic helpers.<sup>29</sup>

When they turned to law, the organizers invited Lord Denning, the most famous judge of his day, who was well-known both as a raconteur and for vivid evocations of the facts of cases in his judgments. The invitation did not scorn flattery. It read in effect: ‘Dear Lord Denning, We believe you to be the greatest legal story-teller of your generation. Will you please come to Warwick to tell us your secret(s).’ Lord Denning is reported to have replied along the following lines: ‘Dear Warwick, I am indeed the greatest story teller of my generation, perhaps of the twentieth century, but I am too old to travel to Warwick. Yours sincerely, Denning.’

There were two sequels to this rebuff. First, despairing of finding a single substitute for Denning, the organizers invited two academic lawyers: Professor Bernard Jackson, who had written about legal semiotics, and myself, a former member of staff at Warwick, and known for a dilettante interest in literature.<sup>30</sup> I accepted, but also suggested that if Denning could not come to Warwick, Warwick might go to Lord Denning. We did; it was fun, but that is another story.<sup>31</sup>

Until the Warwick workshops, I had never thought in a sustained way about narrative in relation to law. My previous engagement with law and literature had been mainly in relation to standpoint and to quotations as grace notes. As soon as I focused on narrative, stories and themes popped up from many different contexts: barristers’ “war stories”, lawyer jokes, accounts of *causes célèbres* and miscarriages of justice, Brian Simpson’s wonderful contextual studies of leading cases, lawyer novels, Lord Denning’s famous after dinner stories, and so on.<sup>32</sup> But apart from such frivolities, stories also figure prominently in legal practice. The law reports are a vast anthology of short stories about disputes of every kind. And in the law reports, one may find several kinds of story in a single judgment: the facts of the case (sometimes retold two or three times), the story of the proceedings leading up to the decision (but rarely the end of the story as far as the parties were concerned), and the story of the law, tracing the development of the applicable doctrine through a series of precedents, often stretching back a century or more (Lord Denning was a master of this technique). Or a case may be just one episode in a long-running feud or campaign. In the subject of evidence storytelling is often contrasted with rational argument and logical analysis, and “atomism” with

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<sup>29</sup> I am grateful to Rom Harré for checking this.

<sup>30</sup> B. Jackson who went on to write *Law, Fact and Narrative Coherence* (Merseyside, 1988) and *Making Sense in Law* (Deborah Charles Publications, 1995) and some distinguished works on Rabbinic legal theory.

<sup>31</sup> Recounted briefly in RE (2006) at pp.280-83. A transcript of the interview survives and could eventually be written up.

<sup>32</sup> E.g. AWB Simpson, *Leading Cases in the Common Law* (Oxford University Press 1995) discussed in William Twining, ‘What is the Point of Legal Archeology?’ (2012) *Transnational Legal Theory* 166. In the United States, the *Law Stories* series, published by Foundation Press, brings together contextual studies by leading experts, mainly of landmark cases to be found in mainstream American case-books on Tax, Torts, Property, Evidence, and so on. The series considerably facilitates the integration of contextual approaches into existing mainstream American courses. It could well be repeated in other jurisdictions. ....

“holism”.<sup>33</sup> Psychologists tell us that juries decide more by weighing the plausibility of competing stories than by careful analysis of the evidence.<sup>34</sup> Manuals of advocacy stress the importance of constructing and presenting vivid, coherent, persuasive stories.<sup>35</sup> Even in appellate cases, a standard mantra is: “The statement of the facts is the heart of the argument”.<sup>36</sup>

This introduction to ‘the narrative turn’ had an immediate impact on my approach to evidence. Up to then I had been focusing on the logic of proof and Wigmore’s chart method for constructing and criticizing arguments about disputed facts in complex cases.<sup>37</sup> I was aware that psychologists had shown that American juries choose between plausible stories rather than trying to decide in a mainly logical way, but that suggested a deficiency in jury decision-making.<sup>38</sup> Wigmore had claimed that his logic of proof was a superior *alternative* to “the story method”, which he dismissed as lazy, seat-of-the-pants impressionism.<sup>39</sup> It soon became clear to me that Wigmore was wrong and that stories play a crucial part in investigation, advocacy, and judicial determination of facts and “in making sense of a case”, whatever that means. Less obvious was the fact that story-telling transcends the divide between questions of fact and questions of law and that persuasive story-telling is an important part of determining disputed questions of law in particular cases.<sup>40</sup> The relationship between rational argument and story-telling and between background generalizations and stories became a central concern of my work on evidence.<sup>41</sup>

I decided that stories played an important, perhaps essential role, in investigation, advocacy, and adjudication, but I also realized how dangerous they can be. Of course, this has been a central theme in the history of rhetoric from the sophists through Cicero and Quintilian to Chaim Perelman’s school of new rhetoric. I once tried to use Plato’s *Gorgias* in teaching Jurisprudence, with mixed results. My main concern at the time was with uncritical acceptance of narrative and a failure to see its relevance to the problematic distinction between law and fact. Enthusiasm for the narrative turn led to many excesses: “narrative” became a kind of magic wand for solving problems; the term was extended beyond tightly defined stories, involving temporality, particularity, and coherence, to almost any kind of discourse. In some writings, they were lauded as a *substitute* for evidence: for example, in an empirical study, two American sociologists, Bennett and Feldman, argued that stories serve as aids to selecting from a superfluity of information *and to filling in gaps in that information*. Their argument was that stories provide frames of reference for evaluating and interpreting evidence

<sup>33</sup> Discussed RE passim, esp. 306-11.

<sup>34</sup> N. Pennington and R. Hastie “A Cognitive Theory of Jury Decision-making: The Story Model”, (1991) 13 *Cardozo L. Rev.* 519; further developed in R.Hastie (ed.), *Inside the Juror* (Cambridge University Press, 1994)

<sup>35</sup> See RE pp. 306-320 and references there.

<sup>36</sup> Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960) 238, RE .296-303.

<sup>37</sup> AN passim, esp. 115-7, 124-5, 225.

<sup>38</sup> See n.35 above.

<sup>39</sup> J.H. Wigmore, *The Science of Judicial Proof*. (Little, Brown 3rd edn 1937) s.36.

<sup>40</sup> RE pp. 296-306.

<sup>41</sup> RE Ch. 8-11, AN, Ch. 10; T. Anderson, ‘On Generalizations, a Preliminary Exploration’, (1999) 40 *South Texas L. Rev.* 455; , and ‘Generalisations and Evidential Reasoning’ in P. Dawid, M. Vasilaki and W. Twining (eds.), *Evidence, Inference and Enquiry* (British Academy 2011), Ch 8.



in terms of completeness and consistency.<sup>42</sup> But the idea that stories can be used to fill in gaps in the evidence goes against all legal standards of fact-determination; it means the same as papering over the cracks in the argument. Further enquiry, including into that neglected brand of literature manuals of advocacy, suggested that stories are wonderful vehicles for cheating according to defensible ideas about what is involved in proving facts. Innuendo, confabulation, sneaking in irrelevant or ungrounded facts, focusing on the actor rather than the act, appealing to hidden prejudices and stereotypes, emotive language, and other dubious means of persuasion are commonplace in advocacy.<sup>43</sup> And, of course, good or familiar stories are often more appealing than true stories.<sup>44</sup> It is not just advocates who use stories in such ways. In the opening paragraph in the famous case of *Miller v Jackson*<sup>45</sup> Lord Denning, a brilliant but erratic story-teller, can be shown to have been unjudgelike in about a dozen ways: The opening paragraph reads;

*“In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played for these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer has bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer.*

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<sup>42</sup>W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom* (Rutgers University Press 1981). In their interesting book, H. F. M. Crombag, W. Wagenaar, and P. Von Koppen *Anchored Narratives* (Harvester Wheatsheaf, 1993), three Dutch social-scientists suggest that the main supports for narratives are background generalisations rather than particular evidence, criticised GJB Ch.13.

<sup>43</sup> ‘Lawyers’ Stories’ in RE Ch.10. This drew on a number of English and American books on advocacy up to 1985.

<sup>44</sup> GJB Ch. 14.

<sup>45</sup> [1977] QB 966 (CA), discussed RE (2006) 303-5.

*And all this because of a newcomer who has just bought a house there next to the cricket ground.*<sup>46</sup>

In this passage, extraordinary even by common law standards, the great judge can be convicted of inventing facts, suppressing facts, using emotive terms to characterise one of the parties, and giving a completely misleading impression of the context of the case, evoking nostalgic images of nineteen-thirties village cricket in rural Hampshire in respect of the fiercer game in a depressed Northern mining village.<sup>47</sup>

Of course, there are deep contested issues about the relationship between logic and rhetoric, between story-telling and inferential reasoning, and what are legitimate and illegitimate techniques of persuasion in forensic contexts. The tensions in the study of evidence are particularly acute because evidence in legal contexts is a field that has been invaded by statisticians, especially Bayesians, epistemological sceptics, and post-modernists who blur or deny distinctions between fact and fiction.<sup>48</sup>

### B. *Italo Calvino*

Old-fashioned literary criticism influenced my thinking on standpoint; “the narrative turn” challenged some important assumptions about evidence in law; the writings of Italo Calvino had other important effects. Notice that my concerns and literary influences were of different kinds. Note, too, that each of these examples is a fit topic for socio-legal studies. Clarification of standpoint is as important in empirical enquiry as it is in legal analysis and legal practice; studies of how legal actors in fact reason and use stories are almost as important as normative thinking about how they should and should not reason or use stories; and, I shall suggest, Calvino is at least as relevant to socio-legal enquiries as to some other concerns of the discipline of law.

I undertook to make the case for Italo Calvino’s significance for jurisprudence. My thinking on standpoint and narrative was greatly helped by writings about literature. Calvino tapped into other existing concerns even more. I shall begin with a personal account of three ways in which I have been influenced by him, before making the general case. I shall focus on two books: *Mr Palomar* and *Invisible Cities*.<sup>49</sup>

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<sup>46</sup> Id., 340-1.

<sup>47</sup> RE . 303-306.

<sup>48</sup> On probabilities and proof, a good introduction to the debates is Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press 2<sup>nd</sup> edn. 2010) 148-63. An early example of deliberate blurring of the lines between fact and fiction is Simon Schama, *Dead Certainties (Unwarranted Speculations)* (Knopf, 1991), containing imaginative reconstructions of the Deaths of General Wolfe and a Harvard Professor, claiming to be ‘true to the facts’, but filling in the gaps through imaginative reconstruction, and told as seamless narratives. Richard Rorty is the most quoted post-modern epistemological sceptic, although he denied the label. See especially, R. Rorty, *Objectivity, Relativism, Truth* (Cambridge University Press, 1991) (Philosophical Papers vol. I) esp. Part I and *Contingency, Irony and Solidarity* (Cambridge University Press, 1989) For a brilliantly scathing and persuasive attack on Rorty’s claims to be a “pragmatist” in the tradition of Peirce and Dewey, see Susan Haack, *Manifesto of A Passionate Moderate* (University of Chicago Press, 1998) Ch.2 ‘We Pragmatists... Peirce and Rorty in Conversation’.

<sup>49</sup> Italo Calvino, *Mr Palomar* (trs. William Weaver; Harcourt Brace 1985) (hereafter MP)); *Invisible Cities* (trs. William Weaver Harcourt Brace 1974) (hereafter IC). This section is based on several sections in GJB (index

I first encountered Mr. Palomar when I was starting to think about the implications of so-called “globalisation” for understanding law in the world as a whole - surely a worthy aspiration for our discipline. Mr. Palomar wishes to understand the universe and ‘reduce it to its simplest mechanism.’ He decides to start with particulars. He tries first to see and fix in his mind one individual wave as a precise and finite object. He fails. He tries again and again and becomes neurasthenic. He tries to work out how to control his lawn by focusing on a single square metre of it. In order to count how many blades of grass there are, how thick, and how distributed he uses statistical analysis, description, narrative, and interpretation. He fails again. He feels oppressed, insecure. He nearly has a nervous breakdown. Maybe describing the moon or a constellation of stars viewed from the earth is easier than describing a wave or a patch of grass. But “this observation of the stars transmits an unstable and contradictory knowledge.”<sup>50</sup> They move, they change, there are faint glimmerings. He distrusts the celestial charts.<sup>51</sup>

Mr. Palomar’s predicament is that of any scholar dealing with a complex subject. It obviously applies to socio-legal enquiries. It is also especially acute for those who try to write histories of the world or to give an account of the universe of law. To be sure, there are patterns to be discerned, but they can be elusive, fragile, unstable, impressionistic, and mainly on the surface. If we are to avoid Mr. Palomar’s neurosis and paralysis, we may have to be content with painting bold selective pictures with fragile, crude, unreliable materials. And, as Palomar realises, there is no closure on scholarly enquiry.

A second inspiration from Calvino concerns legal cartography. In thinking about globalisation, I started to explore the idea of depicting legal phenomena in the world as a whole and significant portions of it in terms of maps: both physical maps and mental maps.<sup>52</sup> I found some help in the literature on urban sociology - for example there are four images of cities recurring in that field: the city as organism, as machine, as bazaar, and as jungle.<sup>53</sup> It immediately struck me that these images or metaphors could be almost equally applied to depicting legal systems or institutionalised normative orders.

Images of the common law as an organic form of law or as a kind of social engineering are commonplace in our discipline. The standpoints of people as users or consumers of law in a bazaar is less developed. The metaphor of jungle is richly ambiguous: we wish to preserve and visit rain forests, but the image of jungle can be alien, oppressive, requiring skills of survival. This is an image of law as a hostile product of other people’s power. This was a helpful counterpoint to the thinking of depicting law in terms of physical maps, but neither

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under Calvino), but extends the analysis in respect of the Great Kahn’s chessboard (below).

<sup>50</sup> MP 47; cf. IC 98: “[T]he form of things can be perceived better at a distance”.

<sup>51</sup> “Oppressed, insecure, he becomes nervous over the celestial charts, as over railroad time-tables when he flips through them in search of a connection.” (MP 47)

<sup>52</sup> GLT Ch. 6. Later versions are GJB 322-328, GJP Ch.3 and Ch 4.4. While I consider physical mapping to be useful for elementary demographic realism about the broad distribution of legal phenomena (e.g. where in the world do common law, Islamic law, Luo law exist in the form of institutionalized normative practices?), the metaphor of mental mapping has a wider application. (GJP 67n 10.) I prefer to treat the idea of an historical atlas of legal phenomena in the world as a virtual rather than an actual project, which in practice might have rather limited utility.

<sup>53</sup> For this suggestion I am indebted to Peter Langer, “Sociology Four Images of Organized Diversity” in Lloyd Rodwin and Robert M. Hollister (eds.) *Cities of the Mind* (Plenum 1984) Ch 6.

solved the problem of depicting immensely complex and varied phenomena in terms of a total picture.

After I had presented my rudimentary ideas on legal cartography to a seminar in Miami, a colleague (Michael Froomkin) came up to me and said in effect: “I thought you liked Calvino. Why on earth did you not use his *Invisible Cities*?” The answer was that I had not read it. When I did I had not only to rewrite my paper, but also to adjust my ideas. It opened up vast new territories of thinking about and seeing law.

*Invisible Cities* is a rich, elusive, wonderful book. If only one member of this audience is stimulated to read it, this talk will have served a purpose. I cannot begin to do justice to it here. But I can pluck out a few themes:

The bulk of *Invisible Cities* is taken up with Marco Polo the world traveller depicting to the great Emperor, Kublai Khan, the places he has seen on his travels. For example, Esmeralda is only one of 55 depictions of different cities, or perhaps 55 depictions of one city, Venice. Esmeralda suggests to me one image of how people inhabit and use legal orders that legal scholarship and even socio-legal studies rarely reach. The 55 depictions are fanciful, playful, amusing, bemusing, cryptic; most are open to different interpretations. Calvino seems to agree with Sir Patrick Geddes, a prominent town planner, that “Though the woof of each city’s life be unique, and this may be increasingly with each throw of the shuttle, the main warp of life is broadly similar from city to city.”<sup>54</sup> Ditto legal systems. Can one imagine a modern state legal system without a constitution, law-making bodies, courts, judges, criminal laws, enforcement agencies, contracts, registers, and so on? As we jet set around the world there is a sameness about municipal legal systems. As Calvino remarks, “Only the name of the airport changes”. Yet for him the variety within each city is infinite, and nearly everything seems to change. Calvino’s central concern is to present universality in an anti-reductionist way. He does this by presenting the almost endless possibility of multiple perspectives on even simple objects; “Cities like dreams are built of desires and fears, even if the thread of their logic is obscure, their rules absurd, their perspectives deceiving.”<sup>55</sup> “Only in Marco Polo’s accounts was Kublai Khan able to discern, through the walls and towers destined to crumble, the tracery of a pattern so subtle it could escape the termites’ gnawing.”<sup>56</sup>

*Invisible Cities* captures the endless difficulties of describing, explaining and generalizing about cities and legal phenomena. It is especially suggestive in relation to comparative law - still in my view a subject that is under-theorised.

### *C. Confronting post-modernism*

In the 1990s fashionable ideas about “post-modernism” reached legal theory largely through literary theory, after a typical intellectual lag. My reaction was deeply ambivalent. My work on evidence had convinced me that I was a cognitivist in epistemology. Following Susan Haack, I accepted her “innocent realism” which builds on the work of the American pragmatist, Charles Saunders Peirce. There is a real world largely independent of our

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<sup>54</sup> 1969, cited GLT 169.

<sup>55</sup> IC p. 50

<sup>56</sup> IC pp.5-6.

knowledge of it. A description is true “if “something is so...whether you or I, or anybody thinks it is true or not.”<sup>57</sup> How can one make sense of the idea of evidence and inferential reasoning without at least a working distinction between ontology (what exists) and epistemology (how we ascertain what exists)? When I came to confront post-modernism in its many shapes including cultural relativism, Rortyan pseudo-pragmatism, and various kinds of epistemological scepticism, I was both an innocent realist and a fan of Borges, Barthes, and some magic realist novels. So I felt that I was experiencing cognitive dissonance.

Post-modernism has done much to undermine simplistic views of interpretation and to challenge sharp dichotomies between fact and fiction, reason and imagination, objectivity and subjectivity. I thought such ideas to be important, but dangerous. These are healthy challenges, but they can descend into extreme forms of irrationalism, irrealism, or relativism that threaten ideas worth defending. For example, in respect of evidence, how can one talk of miscarriages of justice, wrongful conviction of the innocent, convincing evidence (e.g. of weapons of mass destruction or chemical weapons), reasonable doubt, good as opposed to true stories, or errors of fact without some differentiation of ontology and epistemology, of fact and fiction or falsehood?

Calvino (along with Charles Saunders Peirce and his henchman Sherlock Holmes) rescued me from this deep ambivalence towards post-modernism. He emphasises the elusiveness and complexities of reality, multiple perspectives and multiple descriptions, and anti-reductionism, but he still maintains a distinction between epistemology and ontology, and, on my reading, he is a cognitivist in a way that is compatible with innocent realism, which allows for all of these. Multiple descriptions of the same object are important, often necessary, but incompatible descriptions cannot be jointly true.<sup>58</sup>

Of course, “post-modernism” means many things and Calvino is open to many interpretations. He rejected the label, but he disliked being labeled. I ended up distinguishing between imaginative post-modernism typified by Calvino and irrealist post-modernism, typified inter alios by Richard Rorty. There is much that could be debated on this.

So, I have found Calvino helpful in respect of the nature of scholarship [and enquiry] in legal cartography, in comparative law, on standpoint and narrative, in confronting post-modernism, and for many specific insights. Calvino attracts me personally in many ways: I love his succinctness; his playfulness as well as his serious intentions; he adds new dimensions to the idea of standpoint; he dwells on the limits as well as the uses of language; he stresses history; he is au fond a pessimist, but he is a joy to read. But beyond my personal tastes and particular concerns, he seems to me to offer a lot to the enterprise of understanding legal phenomena. Colleagues will find other themes and particular aperçus. I find that the analogy between depicting cities and legal orders is highly suggestive; he has much to teach about the problems of describing, comparing and generalizing about social and legal institutions and relations as they operate in practice. And he is fun to read. If I had to select one general theme which is central to my discipline it relates to the general exchanges between Marco Polo and

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<sup>57</sup> Cited in Haack, *Manifesto* (n. 51) 22

<sup>58</sup> Haack see above n.51.

Kublai Khan. These are as significant as the descriptions of particular cities. The great Khan is concerned to reduce his empire to order to try actually to control it. He is a systematiser, a reductionist. In a wonderful passage, they are contemplating a chessboard: “By disembodiment his conquests to reduce them to the essential, Kublai has arrived at the extreme operation: the definitive conquest, of which the empire’s multiform treasures were only illusory envelopes. It was *reduced* to a square of planed wood.”<sup>59</sup> Then Marco Polo spoke: “Your chessboard, sire, is inlaid with two woods: ebony and maple. The square on which your enlightened gaze is fixed was cut from the ring of a trunk that grew in a year of drought: you see how its fibres are arranged? Here a barely hinted knot can be made out: a bud tried to burgeon on a premature spring day, but the night’s frost forced it to desist...”<sup>60</sup> And Polo goes on to talk about “ebony forests, about rafts laden with logs that come down the rivers, of docks, of women at the windows...”<sup>61</sup> For Polo, a single square in a chessboard is a launching point for a potentially endless enquiry. Katherine Hume suggests that the exchanges between Polo and Kublai Khan can be treated as a dialogue within a single composite mind.<sup>62</sup> I think that is right about both Calvino and basic tensions within the discipline of law.

That is sufficient.

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<sup>59</sup> IC 131. (signifying nothingness)

<sup>60</sup> IC131

<sup>61</sup> IC 132.

<sup>62</sup> Katherine Hume, “Grains of Sand in a Sea of Objects: Italo Calvino as Essayist”, (1992) 87 *Modern Languages Review* 72), 75; and *Calvino’s Fictions: Cogito and Cosmos* (Oxford University Press 1992)