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Literary Nature of the Law

James K. Weeks*

The Muses look at him a bit impatiently and wearily at times. He has done a good deal to alienate them, and sometimes they refuse to listen and are seen to stop their ears.¹

THE ABOVE WORDS, written by one of the most literate judges this nation has ever known, describe succinctly the current estrangement between lawyers and literature. It is not so much that members of the legal profession are Philistines, but rather that interest in literature as a working tool of the profession has been eclipsed by the complexities and technicalities of modern specialization, which leave little time for following the seemingly prosaic pursuit of reading. In view of the plethora of strictly legal literature which should be read if the practitioner wishes to keep his knowledge and skills current, the opportunity for extra-curricular reading is seldom present, although the inclination may be there.

Some attempt has been made to correct this situation by such devices as the Lawyer's Literary Club of Washington, D. C., which is an esoteric "Book of the Month Club" for lawyers. This organization has culled the vast literature of the law, and literature dealing with law, in an attempt to offer each month some work, outstanding from the literary standpoint, which will not only be of interest to the lawyer-reader but will be useful to him in polishing his already extant skills. Whether this has been altogether successful remains to be seen, and it is not known how many lawyers have taken advantage of it.

However, it is not the practitioner alone who suffers from a type of literary anemia. The same affliction is found in the student bodies of most law schools. This lack of interest in literature, or the lack of opportunity to indulge reading tastes, whichever it is, is caused at a much lower level of educational development than law school. While the blame of "why *can't* Johnnie read" is most frequently laid at the door of the country's secondary schools, in all likelihood the answer for "why *won't* Johnnie read?" has the same basis. While neither problem is able to be

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¹ Cardozo, *Law and Literature and Other Essays and Addresses*, 40 (1931).

totally remedied by institutions of higher learning, the latter problem is the one that is simpler to resolve.

There is then a dichotomy in the problem of sufficient *interest in* and of *realization of the sheer importance of* the literary aspects of law, beyond mere acceptance of the idea that a lawyer must be capable of a high degree of communication, which capacity requires a certain adroitness in composition and presentation, whether written or oral. The neglected ingredient of that adroitness is the appreciation of *all* forms of literature as a basic tool. Literature then can be used first by the practitioner to polish and enhance his already existing skills as a lawyer, and, secondly, the importance of literature for the lawyer can be impressed upon the law student in order to bring into better focus his incipient skills. It is to this latter end that this writer is directing his attention.

Literature in Law School

It has been suggested by one observer of legal education that the current law school curriculum "frightens the students to death the first year, works them to death the second, and bores them to death the third."

The absolute validity of the above statement is not conceded, but if there be any truth in the third portion of the adage, it is toward the alleviation of that problem of boredom that this paper is directed.

Not only will the amelioration of boredom be achieved, but some other positive results may occur by injecting into the law school curriculum some cultural bonuses, which at present are frequently absent.

Reintroduction of a form of cultural education after two years of intensive and concentrated law study will serve not only as a refreshing pause, but should more clearly emphasize the interrelation between law and the humanities, as part of the total picture of human society, an entity with which the lawyer must grapple daily.

This alleviation of boredom can, and in a very few instances has, taken many forms, including professional responsibility programs, where the student is brought into personal and close contact with the environment from which many of his future clients may come, such as the Skid Rows, mission houses, jails and penitentiaries; or a variety of interdisciplinary seminars in-

volving law and the social and behavioral sciences. The latter type of program most frequently is offered, but generally takes the form of a course in law and psychiatry, or in the legal aspects of foreign trade, or the Common Market, or law and sociology, or psychology, or economics. Only rarely has any attempt been made to relate law to the humanities at the law school level. Since it is readily admitted by all that law is a "seamless web," the necessity for introducing the student to the totality of life, with all its nuances, should be virtually unquestioned. One vehicle for achieving this exists in the use of seminars in law and the humanities, particularly literature.

Law school curricula, however, should not be viewed as static entities, for the currents of change are always at work and by a process of reliction and accretion are constantly changing the face of legal education in this country. There has been no lack of variegation in proposing, planning and trying various courses, except in the area of the relation between law and literature. If any reason for this lack can be found, it probably is due to a certain assumption on the part of law school administrators and faculties that such a course offers nothing for the development of practical skills or for the acquisition of legal knowledge, and therefore the idea is relegated to the scrapheap as unworthy of the aspirations of lawyers. Another attitude is that such courses lack intellectual content and offer little opportunity for the development of intellectual breadth. These attitudes, though typical, are by no means correct. They lose sight of what must be one of the law school's main purposes, that of "joining hands with the other humanities which inquire into the nature of man and his responses to the universe."²

It is saddening to note that proposals are made that law students should concentrate on the study of theoretical materials instead of practical ones, or vice-versa, or that courses in jurisprudence, Roman Law, legal history and comparative law should be offered, or that the law should be developed "as a science subject to systematic research," or that the social sciences should be woven into the fabric of the law course.³ Yet, only one school, the University of Southern California, has turned considerable attention to the literary aspects of the study of law.

² Montrose, *Law, Science and the Humanities*, 4 Soc. P. T. Law Jour. (New Series) 61 at p. 68. (Dec. 1957).

³ Russell, *Liberal Education and the Law*, 11 J. Legal Ed. 6, 19 (1958).

In 1954 that institution offered a course in Legal Literature, which was taught by a faculty member of the English Department.⁴ This was consistent with the prevailing attitude that, where interdisciplinary courses are to be taught, they should be staffed by members from other campus faculties and not remain solely in the province of the law school. New York University has utilized this concept in many of its specialized seminars of an interdisciplinary nature⁵ where political scientists, psychologists and sociologists are used. It is preferable for these individuals to have some legal training, but that requirement is not inflexible. The University of Pennsylvania,⁶ in the conduct of its Law and Behavioral Science Project, has used joint teaching appointments—one law school professor and a professor from one of the other faculties. This co-teacher was appointed to the law faculty on a half-time basis.⁷ The close contact that this arrangement provided facilitated the learning of new intellectual concepts by both, and overcame in large measure the difficulty of communication, which frequently is present when non-lawyers attempt to delve into the intricacies of the law.

At the University of Southern California, the course as initially established concentrated primarily on the interrelation between law and literature, in the hope that such a course would be useful in "making a better lawyer of the man and a better man of the lawyer." As the course developed successfully, it was planned to expand the content and coverage to include the other humanities.

The intention of the instructor was two-fold: first, to show the student the "practical" value of learning the law informally through primary use of non-legal materials (though this seems of dubious value), and secondly, to inculcate in the student an appreciation of the cultural value to be derived from the study of literature as it bears upon the "social struggle of man."⁸ This latter aim would appear to be the essence of a course in law and

⁴ Davenport, A Course in Literature for Law Students, 6 J. Legal Ed. 569 (1954).

⁵ For example, the Law and Economics, Law and Psychology, and the Urbanization Seminars, which are usually staffed by joint teaching appointments.

⁶ Watson, The Law and Behavioral Science Project at the Univ. of Pennsylvania, 11 J. Legal Ed. 73, 77 (1958).

⁷ *Ibid.* at p. 77.

⁸ Davenport, *op. cit. supra*, n. 4, at p. 570.

literature, and should be the principal reason for developing such a course.

One of the most formidable problems encountered in creating a course of this nature is the selection of materials to be used. It is not a scarcity of adequate materials, but the difficult problem of selection, which the instructor faces.⁹ There being no dearth of available materials, the possibilities are virtually infinite.¹⁰

The general experience, at least at Southern California, has shown that the best materials to use are biographies of lawyers and judges, or plays dealing with the law. While almost all of Shakespeare's plays allude to the law in some portions, *The Crucible*, *The Winslow Boy*, and *The Caine Mutiny Court-Martial* are probably among the most suitable. Other good material is writing by lawyers dealing with other writers writing about the law. Into this category would fall such articles as those of Bentley regarding the authorship of Shakespeare's works,¹¹ or articles in legal and non-legal periodicals by lawyers, as well as quips, addresses and essays by lawyers or laymen about the law, and finally miscellaneous material, which would probably include poetry, or fictional novels dealing with the law, such as *The Ox-Bow Incident*, *The Scarlet Letter* and many others.¹² Clearly, such choice of materials would represent a radical departure from the traditional written materials utilized in most law schools.

The teaching method to be used in a course such as this is as wide as the instructor's imagination, and just as flexible. Probably all techniques should be used in varying degrees and combinations. At Southern California, student reports, both oral and written, straight lectures, and informal discussions were all utilized.¹³

One apparent danger to such a course in the law school curriculum is the obvious danger that it may be regarded, since it is totally different from the usual offerings to which the law student is imbued, as an easy way to obtain a few hours of credit

⁹ *Ibid.*

¹⁰ Extensive use can be made of recommended reading lists furnished by Harvard and New York University Law Schools, and Dean Wigmore's list in 17 Ill. L. R. 26 (1922), and the monthly list found in "Books for Lawyers" in the ABA Journal.

¹¹ 45 ABAJ 1160 (Nov. 1959).

¹² See: Marke, Dean's Recommended Reading List (1958).

¹³ Davenport, *op. cit. supra* n. 4, at p. 573.

with the least expenditure of time and effort.¹⁴ This defect, if indeed it is such, is certainly overcome without difficulty, and would not appear to have much validity when raised as an objection to offering such a proposed course. In this respect much would depend upon the selection of the person who is to teach it. Possibly this objection could best be met by the aforementioned joint-teaching appointment, or preferably by selecting a member of the law faculty, who possesses an adequate background in the humanities, particularly literature, or who has a natural proclivity and inclination towards the literary aspects of his profession.

The overall approach to a course in legal literature or law and literature should be threefold. The two terms are not synonymous in this writer's opinion, the former, by definition, is too narrow and seems to envisage only decisions, legal periodicals and the more traditional literature of the profession, whereas the latter is more closely designed to convey the interrelation between law and the whole of human society. Initially, emphasis would be on the writings of lawyers, either in essays, addresses or judicial opinions. Then the course should move into the area of *bona fide* literature dealing with the law and/or lawyers as found in works of fiction, plays, or short stories. Finally the course should deal with "traditional literary and philosophical attitudes toward the law."¹⁵ This generally was the approach utilized by the University of Southern California. With minor modifications to meet the exigencies of available time and preferences and proclivities of the instructor, it should be appropriate for other schools as well.

The problems most frequently encountered in any interdisciplinary effort are that lawyers generally ask too much, desire too much detail, are contentious, and are even obnoxious to the uninitiated, thereby discouraging a non-lawyer faculty member from undertaking the task of teaching this type of course. The other problem is that of method,¹⁶ but this is not as formidable as it might appear and is easily overcome by the joint-teaching appointment or, where only a single instructor is used, by making him a part-time law school faculty member, thereby enabling him better to sense the atmosphere of the law school

¹⁴ *Ibid.*

¹⁵ *Id.* at p. 573.

¹⁶ Levin, *The Law and Behavioral Science Project*, 11 *J. Legal Ed.* 87, 91 (1958).

and to develop a deeper understanding of the uniqueness of legal education. As pointed out previously, the matter of teaching method, being a more or less individual matter, would not appear to raise a very strong obstacle to the undertaking of this type of course.

A course in law and literature will not only broaden the horizon of the student exposed to it, but will instill in the student a better understanding of the moods and desires which motivate his fellow man, and the various methods of dealing with these. It will transcend the area of prosaic common sense and raise the student to the level of the poet "in sensitivity to the many colours of life and to the need of judgment of them."¹⁷ The practical usefulness of all this is clearly pointed out by Justice Cardozo in his essay entitled *Law and Literature*, where he stated:

. . . (The) judge or advocate . . . is expounding a science or a body of truth which he seeks to assimilate to a science, but in the process of exposition he is practicing an art. The Muses look at him a bit impatiently and wearily at times. He has done a good deal to alienate them, and sometimes they refuse to listen and are seen to stop their ears. They have a strange capacity, however, for the discernment of strains of harmony and beauty, no matter how diffused and scattered through the ether. So at times when work is finally done, one sees their faces change; and they take the worker by the hand. They know that by the lever of art the subject the most lowly can be lifted to the heights.

Although Cardozo was referring to the literary style of judicial opinions, his statement is appropriate to show that the aesthetic qualities of literature, be they judicial opinion or not, are of importance to the lawyer. Though not every judge can write an opinion, nor every lawyer draft a pleading or other document, through which the strains of "harmony and beauty" may be discerned, all members of the profession should at least develop an appreciation of these qualities. What better way to achieve this than through a course in law and literature?

The Specific Approach

Unless considerable time is available for a course in law and literature, attention must be directed toward what specific facets will receive major emphasis. Will the course be principally one of the "law as literature" or the "law in literature"? Ideally, of

¹⁷ Montrose, *op. cit. supra* n. 2 at p. 68.

course, both areas should receive a proportionate amount of attention, but realistically some arbitrary choice must be made.

Probably the choice that would be most compatible and familiar to the law student would be that of the "law as literature," primarily through the medium of judicial opinion. This need vary little from the traditional case method used in other law school courses, and should prevent the student from feeling alien to the subject. Unfortunately, of the 2,000,000 odd reported opinions, not very many would qualify as meriting the title of literature. But a sufficient number of noteworthy opinions can be found that will be more than adequate for this type of approach.

One good starting point for this course (utilizing only judicial opinion) would be the *Law and Literature* essay by Cardozo, which contains a short discourse on the literary style of judicial opinions, of which there are six discernible types:¹⁸ the magisterial or imperative, which Chief Justice John Marshall typifies, particularly in his opinions in *Marbury vs. Madison*, *Gibbons vs. Ogden*, and *McCulloch vs. Maryland*; the laconic or sententious opinion, and the conversational and homely, regarding which the student is directed to the opinions in the Year Books for examples; "The refined or artificial, which verge, at times, upon preciosity or euphemism" in which Judges Finch and Andrews of the New York Court of Appeals seem to personify the type and finally, the demonstrative or persuasive, and the tonsorial or agglutinative, for examples of which one is left to his own devices.

Such a course, using only judicial opinions, could, and perhaps should, place major emphasis upon the classic opinions. But current advance sheets can be culled with some success for modern examples of the six classic forms, and perhaps for new classifications, as Cardozo's list is not considered to be exclusive or exhaustive. Furthermore, the student will develop skill in reading opinions with more in mind than merely finding the *ratio decidendi*. He will gain, as well, the opportunity to improve his own exposition skills by familiarization with good literary style.

It must be said, however, that all that this course can achieve might be accomplished just about as readily by spending a little more time in individual law courses on the style and

¹⁸ Cardozo, *op. cit. supra* n. 1, at p. 10.

quality of particular opinions, in addition to merely gleaning the rules of law from them.

It would seem that the study of judicial opinions, alone, would be much too narrow to achieve the intention of "making a better lawyer of the man and a better man of the lawyer" which a course in law and literature envisages. Therefore, where time limitations require a careful selection of materials in order to achieve the avowed purpose of such a course, care must be taken to insure breadth. The best combination, in such a case, would be the utilization of some judicial opinions, two relatively short novels dealing with the law, a few short essays, and perhaps a play. The exact selections depend on the instructor's knowledge and understanding of literature, but the following are suggested, inasmuch as most law professors could do justice to their use, and it would not be essential to look beyond the confines of the law school for instructor personnel: opinions of Story, Marshall, Holmes, Brandeis, Cardozo and Frankfurter; as of the novels, probably *The Ox-Bow Incident* and Melville's *Billy Budd* (although that is somewhat dated chronologically but not in substance); and in the matter of essays, portions of Holmes' *The Common Law*, and Cardozo's *Nature of The Judicial Process* are particularly recommended.

Any of these works, and a good many others, as well, would serve to acquaint the student both with the law and literature, and would expose him to a fairly wide variety of literary style, purpose and quality.

This second approach, in this writer's opinion, would only meet the purposes and goals for such a course in a minimal fashion, at best, but has the advantage of appealing to caution, which some law faculties prefer to exercise in this matter. Further, it allows some exposure to law and literature without a great expense of time.

This second approach, though a vast improvement over the first, which dealt only with the law as literature through the medium of judicial opinions, has the disadvantages of unduly restricting the source materials used. It also curtails the benefit to be derived from exposure to a large array of source material, which enables the student to better judge literary style and quality and differences in emphasis, and which provides a broad base upon which to develop individual judgment and comparison on the part of the student. Even though the second approach

combines both areas which a course in Law and Literature should cover, *i.e.*, the "law in literature" and the "law as literature," the above mentioned disadvantages suggest the establishment of a third course, different from the previously mentioned ones.

The third approach, which, in this writer's opinion, is the only adequate approach, would be designed as a seminar course offered during the third year of law school and carrying two hours of credit on a semester basis, or three hours of credit on the quarter system. The course would be taught by a member of the law school faculty who has an interest in the area in addition to some background in the humanities. Perhaps, where possible, it may be advisable to call upon some member of the English faculty to give one or more lectures on literary criticism, or to develop a deeper insight into some particular author, particularly where that writer's meanings are steeped in obscurity or symbolism. Except for these areas, and perhaps one or two others, one instructor would be sufficient.

It must be remembered that the sole purpose of a course in Law and Literature is not necessarily to turn out a class of literati, but to develop appreciation and understanding regarding various aspects of life as seen through the eyes of others, not exclusively lawyers.

Nor is the purpose of such a course merely to equip the advocate with a number of literary quotations to use in his closing arguments to a jury, in the manner of the old-style advocate who could spice his arguments with appropriate adages from the Bible, Shakespeare or other literary works. It is not that such a result necessarily should be discouraged, but modern trial practice affords little opportunity for indulgence by counsel in impassioned pleas and excursions into the field of literature. Few are the modern advocates who would or could emulate the style of the late C. Stuart Patterson, Jr. He could even refute evidentiary objections by recourse to literature, as was illustrated in his use of the quotation: "'Twas whispered in heaven, 'twas muttered in hell, and echo caught faintly the sound as it fell" to overcome opposing counsel's objection that a witness could not testify as to something muttered by another to the witness, claiming that a mutter was an unintelligible sound. Needless to say, the objection was overruled.¹⁹ But the lack of modern at-

¹⁹ Lewis, *The Worlds of Chippy Patterson*, 168 (1960).

torneys of ability to call upon literature when needed, or for that matter, of more than a slight acquaintance with literature, is occasionally lamented by some observers of the legal scene.²⁰ The disparity between American lawyers and their contemporaries in England, in respect to literary background, is even more apparent. When Penguin Books, Ltd. was prosecuted under the Obscene Publications Act of 1959 for publishing and selling an unexpurgated version of D. H. Lawrence's *Lady Chatterley's Lover*,²¹ the literary background of both opposing counsel was so evident that it showed a deeper knowledge of literature than would have been the result of mere preparation for trial. Few American attorneys could have done so well in this respect.

In the light of that recent case, the necessity to develop a course in Law and Literature seems to have a certain urgency about it. This is not for the purpose of bringing the American lawyer on a literary par with his English counterpart, nor for reviving the old style of advocacy. It is needed before any more law students are graduated who may possess considerable theoretical knowledge of the law and a certain grasp of the practical skills, but who frequently lack insight and understanding regarding the world they are about to enter and the people whom they must defend and prosecute. Literature is the leavening for the loaf of legal education.

The ideal course in Law and Literature, like its University of Southern California prototype, would utilize all available forms of literature, from judicial opinion to poetry, and would give equal emphasis to all types—the ancient and modern, the philosophical and the mundane, the serious and the facetious, and the simple and the sophisticated. Major emphasis should be placed upon developing breadth of coverage for each type rather than merely in one or two examples of each, which affords the student little opportunity to develop a sense and appreciation of the nuances of style and meaning.

Such coverage would seem to pose a problem of some magnitude as regards furnishing the student with sufficient source materials. It would seem that only a mountain of material, which might not only be unwieldy, but probably unproductive, would suffice. Fortunately, such is not the case. Any law library

²⁰ King and Hawkins, *Lady Chatterley*, 48 ABAJ. 43 (Jan. 1962).

²¹ Rolph (ed.), *The Trial of Lady Chatterley: Regina vs. Penguin Books, Ltd.* (1961).

abounds with possible material, which has the dual advantages of not being too lengthy and of being readily available for student use, but which at the same time will afford considerable coverage. In the event that the resources of the law library are exhausted, recourse can be had to the general university library.

Should the instructor's imagination be too limited to devise new materials and approaches, associates on the English faculty should be consulted for further ideas.

In the selection of materials, one should keep in mind the ever increasing abundance of paperbacks, which frequently deal with the law, written both by lawyers and non-lawyers. Many of these paperbacks offer, at a low cost and in manageable form, some of the best of materials for use in the Law and Literature class. Recently, one publisher has been turning them out at a rate of approximately 50 titles per month. Many of them consist of reprints of valuable out-of-print editions dealing with the "law as literature" and the "law in literature."²²

Perhaps the best single source book which can be recommended, and which contains such a variety of material that the instructor need not fear having too little material, is E. London's *The World of Law*,²³ a two volume set costing about the same as a regular casebook. The first volume of this set is entitled: *The Law in Literature* and the second *The Law as Literature*. Utilization of both volumes can give considerable breadth to the course, and amply achieve its primary purpose. The selections for the most part are fairly short and easily read, which affords the student greater opportunity to analyze the author's meaning and purpose without being hampered by excessive verbiage and seemingly endless pages. Furthermore, the shorter selections make possible a great coverage of material per class session if that be desired. Additionally, the format of the two volumes is such that there is a consistent development of general areas by section, thereby eliminating the necessity for jumping from one source of material to another in order to develop a particular theme. This also makes development of specific assignments easier, and allows the instructor to protect himself from one danger inherent where a variety of different sources are used, that of omitting pertinent material.

²² Collier Books, Division of Crowell-Collier Publishing Co., N. Y.

²³ Simon and Schuster, N. Y. (2 vols.) 1960.

All in all, the *World of Law* appears to be the ideal vehicle through which to teach a course in Law and Literature. It is entirely suitable as the sole source of material, or, if it is desired, as the springboard from which to start the search for materials for the entire course, in itself serving only the purpose of establishing guidelines. Or, if the instructor feels that inadequate coverage is given a particular topic by the book, he can locate other materials which will give the desired coverage, again using the book as the starting point for his search.

Naturally, many of the selections in the two volumes were arbitrarily chosen by the editor. Literature being a rather individual matter, these choices may not, in all instances, meet with the instructor's choice. He may desire to substitute his own choices, and can do so without detracting from the usefulness of this work.

Undoubtedly, other works have been published and will in the future be published, which may be better adapted to a particular instructor's taste. The suggested work is not intended to be touted as the only one suitable for use. It was selected solely for the purpose of illustrating the type of single source book which is available.

Regardless of the form which the source material takes, the importance of a proposed course in Law and Literature remains not in its structure, but in its purpose of "making a better lawyer of the man and a better man of the lawyer."