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Endnote: Untoward

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Endnote: Untoward

PETER GOODRICH*

A plethora of readings. Indeed a brace of Readers, two Lecturers – the word a base Latinity for Reader – and a name which is but a double ‘r’ away from Booke. The sum of which is a thoroughly literary endeavour, a bookish event, a series of textual exhalations. The first question to be asked, untoward though it may be, is what have the Readers been reading? The rest will follow from the answer to that question.

The initial answer is that the configuration ‘Law and Literature’ allows for a reading of literary texts. Aside from the innominate marginal scribble that Goodrich reads, the gathering of texts analysed, interpreted, and brought to law are entirely literary. There is a little hedonism, a touch of reverie, as well as an expansive gesture toward accessibility, in the selection of books being read. Melanie Williams turns to W.H. Auden and questions the trauma that motivates specific, nominate, theories of law. Her concern is with the ‘unconscious trends’, the patterns and repetitions that lead from ‘September 1, 1939’, a poem which Auden wrote in New York at the outbreak of World War II, and September 11, 2001. If there is a motif it is a line that Auden changed from ‘We must love one another or die’ to ‘We must love one another and die’.

Melanie Williams conjures a trauma that is perceived as external to law but which is in fact internal to legal thought. The poet’s concerns with crisis, the failure of reason, with love and war can be traced in displaced form in the history of jurisprudence. She offers a reading that is against the grain, a subtle and untoward interpretation that Adam Gearey picks up in analysing the words of Desmond Tutu and of the Truth and Reconciliation Commission. He also plays upon a contrary or untoward grain, a legal

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Editors’ note: Due to missed deadlines, timelags, and delays, Peter Goodrich was unable to read the contributions by Peter Fitzpatrick, Morris Kaplan, and Julia Chrystostalis. The editors regret this inconvenience to the reader, but this chance interruption in the unity and coherence of the volume seems emblematic of the need to resist any final word.

poetics, an aesthetic jurisdiction, a yearning for an outside that finds muted expression, a whisper internal to law: 'And yet/Through glass and bars/Some dream a wild sunset/Waiting stars.'

The paradox of Truth and Reconciliation was that of a law that was not law. Its function was to tell a truth that could never be present. You need in some degree to be a poet to understand an unknowable justice or to glimpse a truth that is untoward or marked by indirection. Adam Gearey wishes 'to tell it slant'. He punctures the normality of legalism with a competing text and law, and the prize – if reading can produce a prize – is a poetic confrontation as much as it is a confrontation with poetry. In Patrick Hanafin's term, offered in the course of a reading of Blanchot, it is an act of insubordination. For him, literature rebels against law in a profoundly political manner. Literature, as he argues here and elsewhere, is the *pharmakon*, both poison and remedy, source and cure of the malady of law. Literature is here the resistance, the residue of failed dreams, the call to arms, the political hope of making law anew. In his version, literature is untoward in that it calls away from the boredom and stasis of legalism, it seduces and garners a literary community that will 'unwrite' and so cure the law.

If Patrick Hanafin is a little untoward, or locally insubordinate, Piyel Haldar provides a trope that offers an epoch and a whole continent of salacious indirection. The jurisprudence of travel literature goes wholly against the grain. He reads a genre of commentaries upon despotism as the oriental mode of law. He portrays a vast myth, a juggernaut of juristic fantasms, a radically subversive look at the inside of Western law as it stares out at Eastern practices. The imperialistic complacency of what Selden dubbed 'dulling custom' and the immemorial practice of common law, is juxtaposed to descriptions of the bedevilled aberrations, the monstrosity, the luxury and excess, the sheer deadly pleasure, the salacious cruelty of despotism.

Haldar's point is that there is as much desire as there is disapproval in the excessively detailed depictions of oriental life. There is as much projection as there is objection. To borrow a wordplay of Hanafin's, the obsession with harems and sudden death does not so much inscribe as describe or unwrite the Western law that so enjoys detailing the pleasures of the East. Suffice to say that in all of this there is a most untoward thread of hedonism, of motive force, of the contrary and cutting. Literature objects to law as it is currently written. The literary can play with law, and in the longer term literature can come to play the law or at least teach lawyers to write differently.

I cannot make much of that last remark here. This is an endnote, though of course it is neither an end nor a note, just something untoward. So I will fulfill that indirection by looking finally at the Booke. If the topic is law and literature, then there is presumably no reason to exclude the possibility of a contribution from a literary scholar or, as it happens here, from Brooker. In fact Brooker's contribution is emblematic. In one sense that is because he is

assisted by knowing what he is talking about, literature being his discipline, his profession, and his institutional love. In another sense he personifies the untoward. The lawyers in this volume all engage with literary texts as a way of challenging the stylistic, textual, and hedonic limits of law. They argue in variable forms that literature represents a fracture, a crisis, a puncture of the legal restraint of the text. They use poems, fictions, insubordinate acts, and wild writings as a way of getting outside of the norm of legal writing and so bringing to consciousness the politics of law's inscription.

Brooker is wise to all of that, and as a lone literary scholar he holds the mirror to the maundering of law. He takes as his text a literary law and analyses the judgments handed down by a court of voluntary jurisdiction, the invention of Flann O'Brien (or Nolan, or na gCopaleen). His question is: what constitutes a positive law of literature? O'Brien's wit and wordplay produce a satirical law, a better-written and infinitely less inflated text. It is a version of the slanted reading that Adam Gearey sought in the Truth and Reconciliation Commission report, a truth that undoes itself in the very moment of its enunciation, a law that recognizes that it is also lawless, a written judgment that mimics the legal and yet is literary and far from entirely serious.

The crux of Brooker's essay, his most untoward moment, comes in the form of a Menippean instance of satirical play. A defendant confesses to his failure to abscond. The grounds are linguistic. Had he not appeared then 'too well I knew that my bail would not be *confiscated*. Neither would it be *impounded* (Here defendant became moved.) Neither would it be *declared forfeit* – or even *forfeited*. It would not be *attached*. It would be ... (Here defendant broke down and began to weep.) ... My bail would be ESTREATED.' Brooker cunningly comments that the term 'estreat' is *recondite*. No question about that. It is positively untoward and definitely in need of a little explanation.

Estreat, we are told in Rastell's *Termes de la Ley* 'is a figure or resemblance, and is commonly used for the copy or true note of an original writing, as estreats of amerciaments'.¹ So the estreat ironically concerns the truth of a writing that has been misplaced or at least is not available in the original. It is a fiction in the sense that the estreat is legally true and yet in fact unverifiable. Fitzherbert's *Natura Brevium* lists the estreat under the general title of a writ of *moderata misericordia*, or moderate mercy, a writ that seeks to limit the amount of damages. The estreat, and even Flann O'Brien would be hard pressed to concoct quite such a baroque fantasia of juridisms, was used 'where there are many plaintiffs named, and they amerced, the clerk hath forgotten, and cannot shew how the usage hath been to make the estreats against them ... For it cannot properly be said that a man hath mercy shewed and offered unto him if he shall pay, or shall be put to more charge for the offence of another person, which himself hath not

1 J. Rastell, *Les Termes de la Ley* (1566, 1812 edn.) at 208.

done.² It is lost in translation, but broadly means that the party estreated is legally proven to be the party amerced, or the one who owes the damages.

O'Brien's defendant might well weep at being estreated. He is being named, interpellated by the law. Estreatment, in other words, is the punctum, the moment when the law leaves the Booke and interrupts life. In its more modern definitions, the estreat is precisely the moment of collection, the instance of leaving the chain of records and enforcing the fine.³ The estreat, however, also testifies to the imperfection of the record and the necessity of mercy or equity because of the failure of memory, and the infinite regress of writing. A record only ever refers to something absent but noted and in a similar vein what is written will always refer to other writings, and here to absent texts. By the same token, this precariously literary quality of law provides the possibility of interruption, whether pathological, hedonistic, serious or satirical.

So here is my hypothesis and envoi: the function of the literary is that of estreating the study of law. Literature does not treat law, it estreats law, which means that it plays with the law so as to reinforce or subvert or amend or destroy as occasion warrants. Literature moves beyond the law, it makes a fictional, and so, imperfect copy and then indicates or alludes to the fact that copies are all that we have. The estreat is a reference to the necessary disjunction between record and recollection, and the estreatment of law by literature means travelling beyond the record, taking law outside itself, so as to go back in. In the jargon of Hollywood you need a treatment to pitch a movie. The treatment gives you the basic image of the movie: let's say Atlantis filmed in the Arctic to which the studio types would say 'no way, there would be white out'. The estreatment is a similar accounting of the image of a law: let's say the Irish Constitution, and O'Brien, the head of fiction, calls it 'desperate and dark of hue' or simply terribly written. If that is the case, if it is poorly inscribed, then tear it up, whether text or law or constitution and write it anew.

2 A. Fitzherbert, *Natura Brevium* (1514, 1793 edn.) at 75–6.

3 As, for example, *Black's Law Dictionary* (1999, 7th edn.) at 572.