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Juris-fiction:

Literature and the Law of the Law

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Juris-fiction:

Literature and the Law of the Law

The poem is the cry of its occasion,
Part of the res itself and not about it.

WALLACE STEVENS

“An Ordinary Evening in New Haven”

Lauding editors on these occasions is rightly suspect, but here it is simply unavoidable. Gary Boire’s pathbreaking, of course, conspectus and analysis of colonial law and postcolonial literature provides not only a point of departure for my paper but also its generative orientation – a continuing on the path broken.

Briefly, for now, Boire draws on representations of law in postcolonial literatures to reveal a disruptive ambivalence in colonial law. Bluntly, for now, I will try to show how that ambivalence also constitutes law, and not just colonial law, and try to show how this constitution of law can be derived from a quality of literature, and not just postcolonial literatures. All of which will not involve minimizing or marginalizing the postcolonial in its relation to law or to literature. On the contrary, the postcolonial will provide the focal opening to these perceptions of law and of literature more generally conceived. And, it will transpire, the postcolonial does this with an apt irony, an irony

that can be summarily derived from Hardt and Negri's criticism of postcolonial positions. They perceive, with some accuracy, that the postcolonial is derived from colonialism. For them that derivation containedly limits the utility of the postcolonial to "rereading history" (146). Not for the first time, Hardt and Negri fail to see the point of what they are criticising. The very force of the postcolonial comes from its integral yet resistant relation to the colonial, and from its thence revealing what is constitutively of, and yet denied by, that selfsame colonial condition. This is not the revelation of some marginal matter but, rather, the disclosure of the very structuring (if the word may still be allowed) of the colonial. It is this efficacy of the resistant within imported by the postcolonial that is brought to bear now on the constitution of law generically.

I. On the Immodesty of the Supplement.

In a way that captures its pretensions, Boire sees colonial law as the dominating figure of colonial settlement and authority, as a hierarchized and monadic ordering that would encompass indigenous reality (e.g. 203, 209, 212). More pointedly, law enacts an interpretation of the social that "continues monologically throughout the entire social order by hegemonically drawing other areas of production into the perimeters of its own field" (203-04). This acquisitive movement of law is bolstered in its claim to neutrality and generality, even to universality (204, 209-10). Inevitably, there results an "implosive ambivalence" in law, and this entails a "repression" of what

insistently remains counter to law, of what transgressively opposes yet constitutes it (202, 204, 207, 211).

Obviously we must return to these rich insights, but continuing in a synoptic vein, Boire finds in postcolonial literatures a tangible reflection of this ambivalence, and that reflection is the colonized subject who “is *both* the site of imperial legal inscription *and* that which threatens this very inscription” (204). The threat has something of a patinated quality, however. It is manifested as irony, mimicry, as a resistance dependent on “its own oppression” (212). Rather more exuberantly, that situated threat evokes the carnivalesque and the Saturnalia. Yet the Saturnalia must end, the carnival is over for another year. There seems, in all, to be some primal efficacy given to the colonial and to a colonial law whose “heterodoxic potential...is always subject to the exercise of hierarchical orthodoxy” (204). That this accurately depicts an impelling element of colonial law, even of law more widely understood, can hardly be denied. But what I want to begin putting in place now is something of a reversal of emphasis, a putting of “heterodoxical potential” before “hierarchical orthodoxy,” and to do this in the spirit of Tuitt’s brilliant depiction of the ability of the postcolonial text, literary or legal, to surpass the containment of the colonial, “to go outside the source that is presupposed by its very existence” (76). And a beginning can be derived from the extension of carnival in a way that Boire would want, in the company of Bakhtin, so as to celebrate, as carnival would, the “liberation from the

prevailing truth and from the established order,” and so as to elevate what always opposes the “immortalized and completed” (see 206).

The claim to completeness – to an achieved, universalized truth – is aptly attributed by Boire to the type of imperialism his postcolonial literary representatives inhabit, to the nationalist imperialism of the nineteenth and twentieth centuries. This nationalist imperialism laid claim to the universal, even though it was the product of particular nations. An inexorable logic ensued. The claim was an assertion of an absolute truth, a truth exemplified in the particular imperial nation. And this exemplarity could not be an identity positively conceived, a positive realization of the universal in the particular. This impossibility had two monumental, and contradictory, correlates. For one, the identity came to be formed negatively by constituting, for example, the savages as its antithesis. So much is commonplace. But analysis has to go further if this negative attribution of identity is not simply to reinforce the original arrogation of completeness, as happens in such as Said’s circular seeing of the West constructing itself in an oppositional reference to an Orient also constructed by it (*Orientalism*). So, to continue, the antithesis of the absolute or the universal can only be utterly antithetical. It has to be of a totally different kind of existence. Yet, and this is the further correlate and where the contradiction comes in, the universal has to be all-inclusive. The universalized existence exemplified by the imperial nations was one that all peoples would come to, including the colonized, even if that would take a

conveniently long time. Hence, social evolution. Yet the claim to the universal, to the absolute, has to remain relentless in its exclusion. Since the claim depends upon (for example) a savage condition apart, for the claim to stay in existence, the condition must stay always apart. It has to remain, in an ultimate way, quite unredeemable. Put another way, the claim to the universal can never be achieved in its own terms. It can never be ‘truly’ universal and thence all-inclusive because of its dependence on what must remain ever beyond it. That which is ever beyond, this intrinsic unsurpassability, marks the place of the postcolonial and institutes its “ambivalence.”

To equate this quality of the postcolonial with law may at first seem extravagant. After all, law was at the forefront of the civilizing mission, not just a prime carrier but a valiant enforcer of colonial truth. And, as it came to pass, a blinkered colonial law proved incapable of existing beyond this attributed content. We may, for example, feel some faint sympathy for a colonial governor of Bombay when he remarked on “the perilous experiment of continuing to legislate for millions of people, with few means of knowing, except by a rebellion, whether the laws suited them or not” (see Thornton 181). Yet there are instances, now inadequately memorialized, where colonized people seized a colonial law and shaped it to their purposes in effecting liberatory transformations.¹ Let me now take a more prominent illustration of the contrast between law as liberatory and law as arrogated truth, an illustration that can

carry the remainder of my analysis including a “literary supplement” which is rather less “modest” than the part Boire would allow such supplementing (213).

II. Mandela

The illustration is derived, with Derrida’s considerable help, from the thought of Mandela. The genres involved, autobiography and the speech from the dock, are at least unusual in engagements with postcolonial literatures, but they do have a quiddity which is important for my argument and, in any case, their depictions of law will be connected to more ‘fictional’ genres shortly.

The momentous puzzle which Mandela presents us, and makes present, begins with Mandela as a critic of the laws, a legal realist, in describing his disenchantment with the rule of law and with the notion of equality before the law:

...[M]y career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecture room and what I learned in the courtroom. I went from having an idealistic view of the law as a sort of justice to a perception of the law as a tool used by the ruling class to shape society in a way favourable to itself. (*Long Walk* 309)

And indeed, with the struggle against apartheid, it would be difficult to conceive of a situation where there was less cause for commitment to the laws, or to conceive of a person more intimately justified in refusing such commitment. And Mandela was certainly perspicacious and forthright on the matter of law's pointed oppressions and failings, and not only in its constraining and incipiently deadly effect on him but also, and primarily, in law's tentacular and pervasive subordination of his "people."

All of which could be sharply set against another Mandela, a Mandela existentially identified with the law, a Mandela who in the very midst of a realist critique lauds the court system as "perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply" (*Long Walk* 308); a Mandela who presents himself before the very law he rejects, "rejects in the name of a superior law, the very one he declares to admire and before which he agrees to appear" (Derrida, "Reflection" 27); a Mandela who "regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination which is essentially unjust" (see Derrida, "Reflection" 35). Mandela, it would seem is now of "an idealistic view" and clean contrary to Mandela the realist, but not so.

The "superior law" which Mandela affirms is not something set apart from or something about the existent law. Rather, it is integral to law as it is. Mandela advances a conception of "professional duty" which operatively respects and admires both the law and its judicial institution, even as the pervasive legal oppressions of

apartheid are being brought to bear on him (Derrida, "Reflection" 15-16, 33-37). The law which calls forth this magnanimous regard is the law that incipiently extends beyond its determinate existence through certain enabling qualities which "tend toward universality," such qualities as the generality of the law, equality before the law, and "the independence and impartiality of ...[the] judiciary" (Derrida, "Reflection" 17, 20-22; Mandela, "Prepared to Die" 9). These qualities are not ideals detached from a contrary legal reality, a reality of which Mandela was only too intimately aware (*Long Walk* 261, 309-10). They are qualities intrinsic to the being of law, to its integral extensiveness.

The dimension of law sustaining these qualities of generality, impartiality and such (and they will be returned to later) could be extracted from the generality of law by way of Derrida's "Force of Law." There Derrida would want to "make explicit or perhaps produce a difficult and unstable distinction between justice and law, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry ...) and the exercise of justice as law, legitimacy or legality, a ... calculable apparatus [*dispositif*], a system of regulated and coded prescriptions" (250). "Force of Law" was prefigured in Derrida's "The Laws of Reflection: Nelson Mandela, in Admiration" where the "superior law" (27) which Mandela embraces can be retrospectively equated with this "exercise of justice as law" in "Force", with justice as it is realized by law, and as it thence and integrally subsists in law. This is a making experiential of a justice which it is impossible to experience in itself, even as that denies justice in its plenitude. For

law to be in such a relation to justice it must be utterly responsive, ‘without history, genesis, or any possible derivation. That would be *the law of the law*’ (“Before the Law” 19—his emphasis, but conveniently for me). It is in the operative combining of the law in its determinate dimension with this law of the law importing law’s vacuity, and hence law’s incipient possibility, that Mandela is in Derrida’s estimation “a man of the law by vocation” (“Reflection” 35). Mandela is then not an idealist. He is a realist but one who sees more in the real, and in the realizable, more than others see.

III. Law like Literature

The affinity between law and literature can illumine this dimension of law, the dimension enabling law to bring possibility into normatively determinate existence. The affine can be a troublesome category, however, and it has proved to be so here. “Law and literature” has become a settled enough field when it entails exploring literary depictions of the juridical, or when it comes to extracting literary qualities from an at times reluctant law (Aristodemou 8, 22). What remains challenging is the identification of law with literature (Tuit 78). This would seem to go against law’s being tied to ‘reality,’ a constraint which would contrast law to literature, a constraint from which literature could liberate law, perhaps (Aristodemou 262-63; Goodrich). In the alternative, as it were, the contrast between law and literature corresponds to a necessary separation. Most notably, of course, there is Plato with his supposed

hostility to the poet – the poet who confounds the laws by calling everything into question by making “the words of poetry similar to whatever he [the poet] happens to be or regards virtue or wickedness” (Plato, para. 656c). Poetry opposes law as imagined worlds oppose what is ‘real,’ as the possible opposes the actual and the established (cf. Aristodemou 18-19, 180). Yet literature itself is often seen as the slave of the determinate, as ultimately serving certain specific and usually oppressive interests (Aristodemou 5-6), and this not just as a matter of its variable contents but in its very genres – a location that has proved troubling on this score to postcolonial writers (Ashcroft, Griffiths and Tiffin 181-87). Can the novel, for example, surpass the bourgeois origins with which Said would saddle it (*Culture and Imperialism* 84, 92-93)?

If this suggests some similarity with law’s determinate dimension (a similarity taken up later), a reversal of the comparison suggests another. Returning to “Force of Law,” Derrida’s initiating engagement with Montaigne would equate “historical or positive” law with what is “fictional,” with what is “artifice” (240). Likewise, it would seem, with Nancy’s “juris-fiction” the law is that which is “modeled or sculpted (*fictum*) in terms of right:” “Since the case is not only unforeseen but has to be so, and since right is given as the case of its own utterance, so judicial discourse shows itself to be the true discourse of fiction” (*Finite Thinking* 156-57). Put in another perspective, if the situation of the case were entirely foreseeable or stilled, it would be given ‘fact’ and there would be no call for decision, for determination, for

law. There would be no fictive making the case speak. What is always involved with law, then, is the creative reaching out to a possibility beyond its determinate existence, a beyond where law ‘finds itself’ in being integrally tied to, and incipiently encompassing of, its exteriority. For Nancy, again, this would be the “law of the law itself [which] is always without law. The law overhangs all cases, but is itself the *case* of its institution;” hence “the law is able to be *here*, there, now, in this case, in this place...” (*Corpus* 48).²

Taking now a condign account of “literature” from the many that Blanchot would offer, this one being apt because it is a prelude to his conception of right, we find that literature is an “opening” to what is beyond, to alterity and possibility, to “what is when there is no more world,” or “to what would be if there were no world,” to “the void” (“Literature” 388).³ But this void is of the kind encountered by Blanchot’s protagonist in *The Madness of the Day* for whom it was disappointing, a void which inexorably becomes “a presence” and protean: “one realizes the void, one creates a work” (*Madness* 8; “Literature” 395). Between the realized and the unrealizable, between the appropriated and that which is still “ours for being nobody’s,” there is a “shifting,” a “passing,” a “movement” impelled by “a marvelous force” which is the impossibility of the movement being otherwise. This is an activity always situated, an emplaced “affirmation,” “an operation” which cannot be separated “from its results” (*Unavowable* 29; “Literature” 363, 365, 369, 387, 389).

Literature for Blanchot, then, is a work like any other – he instances building a stove – even if it is such “to an outstanding degree” (“Literature” 371). Law and literature, it could now be said, share the same ambivalence between existent instantiation and what is ever beyond yet incipient in it.³ The comparison between law and literature more usually points to their opposition of course. Literature’s realms of the imagined and the possible oppose the all-too-solid certainty of law – that law-confounding power of Plato’s poets for example. Yet it is exactly the aspect of literature to which Plato would putatively object, to its illimitable inventiveness and its quality of fiction, which impels law’s making. And despite the incessant jurisprudential efforts to render law as ‘positive’, as posited, or as fact, society, economy, and so on, it refuses being in “a world sapped by crude existence” (“Literature” 395, for the phrase). Peremptorily, the legal fiction can illustrate the formative location of law beyond existence, for with the fiction the enounced content of the particular law remains the same whereas operatively, and by way of the fiction, that content has changed to its opposite. So, and for example, in Roman law certain litigation could only be initiated by a Roman citizen but foreign litigants were able to do the same because of a fiction deeming them to be citizens for the purpose (Maine 21). Thus, in Blanchot’s terms, a fiction is “truth and also indifference to truth” (“Literature” 396-97).

IV The Law of the Law

Paralleling, and the culmination of, this engagement with “literature,” we find that for Blanchot the law of the law is inseparable from law and right (“Literature” 375-78). Law ‘in’ and of itself is quite uncontained and unsubordinated, a self-affirmation made “without reference to anything higher: to it alone, pure transcendence” (*The Step* 25).⁴ This law takes its instituted existence from its being beyond. “Let us grant,” says Blanchot, “that the law is obsessed with exteriority, by that which beleaguers it and from which it separates via the very separation that institutes it as form, in the very movement by which it formulates this exteriority as law” (*Infinite Conversation* 434). This exteriority which is yet of the law, this law of the law, entails for Blanchot “a responsibility...towards the Other” that is “irreducible to all forms of legality through which one necessarily tries to regulate it,” but which ultimately “cannot be enounced in any already formulated language” (*Unavowable Community* 43).

Matching this law of the law now with the dimensions derived from law earlier, it could be said that law ‘is’ the settlement in terms of a normative continuity of the existential divide between a determinate positioning and a responding to what is beyond position, and it is in the necessity yet impossibility of such settlement that law is iteratively impelled into existence. In their separation yet inexorable combining, these two dimensions form the horizon of law, a moving horizon – the horizon both as a condition and quality of law’s contained existence, and the horizon as opening onto all that lies beyond this existence. Law’s position within that horizon cannot be at all irenically set.

To give emphasis to this responsive dimension of law is to go against the epochal elevation of occidental law's determinate dimension over the responsive. Yet this emphasis is hardly to deny that, if law continually becomes itself and is sustained in its responsiveness to exteriority, there must nonetheless be a positioned place where this responsiveness can be made determinate. That which is purely beyond is merely inaccessible, and out of responsive range. Law always returns to determinate position, and to sustain position there must be some shielding from an importunate responsiveness. There has, with any law, to be a constant, reductive effort to ensure that "the aleatory margin...remains homogeneous with calculation, within the order of the calculable" (Derrida, "Psyche" 55). So, even though law has to exceed all fixity of determination, has to remain pervaded by the relation to what is beyond, labile and protean to an illimitable extent, there has also to be an accessible ordinariness to law's extraordinary responsiveness. This responsiveness is something commonplace in processes of legal decision-making and in the quotidian claims which law's adherents make on one another. The sense of originating, "the sense/ Of cold and earliness is a daily sense" (Stevens 123).

V Consequences

The affinity I have tried to sketch between law and the postcolonial, by way of the idea of literature, has been in terms of a mutually supportive similarity between them.

That endeavor took its initiating impetus from Boire's configuring of law and postcolonial literatures. Whilst there was agreement that in the colonial situation law embedded the interest of the colonist in a "hierarchical orthodoxy" (202, 204), I sought to amplify Boire's intimations that law, like the postcolonial, surpassed and disrupted such containment. Now, in something of a counter-corrective, I will conclude by implicating law's surpassing as itself a cause of the containment, only then to indicate and illustrate how law's surpassing ultimately does surpass.

To set this closing enquiry, we could return to the disturbing point about literary genres, to their constituent implication with the specific histories and powers that generated them. In an immediate way, that would seem to be at odds with the illimitable openness of Blanchot's "literature" until we remember that literature, like law, is for Blanchot (also) an existent "work" in the world ("Literature" 371), that it is some realization of an unrealizable which is inexorably compromised in the process. With law, the situation is even more stark for, canonical fiats aside, law is unlike literature in its intrinsically requiring an authoritative realization 'for the time being,' a determinative bringing of what is beyond into the normatively determinate. If law is to be able to do this, as we saw, it must be quite unrestrained. It cannot be attached to a past, even its own past, or to anything else (Derrida, "Before the Law" 190). Yet, and here is where the counter-corrective comes in, law's unrestrained responsiveness, its lack of any confining ties, results in its not having any enduring content of its own.

It always depends for its very content and for much of its force on some power apart from itself.

However, what also must follow from law's refusal of any primal attachment is that its taking on of content is always to be mediated through law itself. No matter how seemingly abject law's dependence in this, law will itself endow its borrowed contents with its own force and meanings, meanings which will often differ markedly from their source apart from law.⁵ Also, law will not simply absorb and recreate some singular source but will draw on many such, and even where law determinately elevates one source over another, this is not to exclude the other finally, much less to elevate the included pervasively.

A final consequence, now, of the vacuity that comes from law's intrinsically incorporative regard for what is ever beyond: this regard does not, or does not just, involve a denial of determinate content but involves, rather, the responsive opening of that content to the possibility of being otherwise, to becoming an effect of this possibility. This reflects, in a different light, Boire's telling depiction of how law's "universalizing and neutralizing rhetoric," law's "generality," serves particular imperial interests by elevating them to some absolute condition. Whilst monotonously agreeing with that assessment also, let me extend law's self-subversion to this scene as well. That will involve a quality found in any generative legal concept, but only two will be selected here, those singled out by Boire and, as we saw, exalted by Mandela: the neutrality and the generality of law. As for neutrality, or impartiality as

it is usually put, its legal force could be conveyed, at least obliquely, by looking at an example of its opposite, the political trial. Such a trial is not considered to be legal because some power apart from law determines the outcome. We tend to see this as a subterfuge, as something being presented as law that is not law. But what is it about law that this offends? After all law's dependence on power apart from it has just been emphasized. Yet, as we also saw, at the same time law cannot be ultimately beholden to a power apart from itself. Much of that is conveyed by law's impartiality. The lack of containing ties to the existent that comes with law's responsive dimension orients it towards an absence of attachment in its 'application.' Yet impartiality is not finally feasible since it becomes inevitably compromised in the influence-ridden scene of application, in the judicial decision for example. This inevitable diminishing, however, does not counter the integrity of the quality of impartiality. This much can be discerned negatively in that it would not be an answer to a failure of impartiality to say that one was impartial in part. Within the determinate, within the realized law there would still subsist the unrealized possibility of its opening to, or falling into, being otherwise – the possibility of its being without the partiality of its determinate existence. This possibility always remains anterior to the law iterably made determinate. The incipience of impartiality remains within that law. So positioned, impartiality is a "manner of being" in law (cf. Derrida, "Negotiations" 13).

Likewise with law's generality. Because of the requirement that laws be general, it used often to be said that a putative law effecting a specific determination does not

count as law (Locke 396; Rousseau 82). So, legislating for the specific liability of a specific wrongdoer would not count as law, as opposed to a law prescribing a general standard of liability for all wrongdoers generically categorized. Yet, if the general cannot find itself in that determinate existence of law which would result from a specific determination, it cannot be so general that it adheres to nothing specific and has no operative content. Hence the common and paradoxical requirement that law's "generality must be specific" (Neumann 28). The generality of law will always be countered in its specific 'application,' but within that specificity there is always the incipience of law's extending in its generality and being otherwise. In such ways, as with its impartiality and generality, law moves beyond the assertion of particular power and receptively responds to possibility. Its strength, like the poet's, is the lack of strength, and the lack in strength:

Spender told Auden he wondered whether he, Spender, ought to write prose. But Auden put his foot down. "You must write nothing but poetry, we do not want to lose you for poetry." "But do you really think I'm any good?" gulped Spender. "Of course," Auden frigidly replied. "But why?" "Because you are so infinitely capable of being humiliated. Art is born of humiliation." (Fenton 248)⁶

NOTES

- 1 See, for example, Fitzpatrick ('Transformations' and 'Crime as Resistance'). For an opening out by way of 'law and literature' to other perspectives beyond law, and colonial law, as usually conceived see Manji ("Mask Dancing," "Someday" and "Law, Literature, Labour").
- 2 My translation.
- 3 Significant orientations of works of literature, but not of the idea of literature itself, towards the law of the law are provided by Butler (33-55) and Ramshaw.
- 4 A beautiful elaboration of this conception of literature and a relating of it to law can be found in Foucault ("Blanchot").
- 5 The situation is adroitly rendered in Blanchot's picaresque, *The Madness of the Day*, in which the feminine law emanates from "me:" she is "born of the one for whom she becomes the law," and she is abjectly dependent on this all-powerful, determinate one (14-15). Then that dependence is inverted by the law herself. Having become the law, she then comes from beyond me and denies me a place anywhere and the ability to do anything: "she exalted me, only to raise herself up in her turn" (16).
- 6 The supportive strength that comes with Sara Ramshaw's invaluable research assistance must also be recorded. And returning to the combination of kindness and editors, I am grateful for the thoughtfulness of Cheryl Suzack.

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