LAW IS NOT TURGID AND LITERATURE NOT SOFT AND FLESHY: GENDERING AND HETERONORMATIVITY IN LAW AND LITERATURE SCHOLARSHIP

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Abstract. This essay uncovers a pattern of gendering in Law and Literature research that has contributed to limited understandings of the disciplines, taken singly, as well as to the projection of a heteronormative script on their relations to one another. This includes the troping of literature as feminine and that of law as masculine, and the emplotment of their relationship as that of an initially antagonistic yet ultimately satisfying heterosexual romance. Accordingly, actual forms of discrimination towards women are confused with contradictory images of a feminised literature as an empathetic, eloquent and morally superior woman. This idealised image of literature is figured as initially suffering under the regime of rationalistic, masculinised law but then reforming 'him' through the power of love. To posit law as a man and literature as a woman is to elide their similarities and reify their differences. After assembling evidence of gendering in US American Law and Literature work and to a lesser degree in British critical jurisprudence, the essay outlines historical reasons for why it is problematic to think of literature as morally uplifting and feminine and law as 'brutish' and masculine. Instances of ethical and contingent applications of law speak against any monolithic narrative that suggests that literature is inherently more morally conscious. Literature has proven to be a privileged forum for doing the police work of enforcing the gender binary as well as for maintaining other social divisions. In closing, the essay describes strategies to degender Law and Literature in an effort to move the conversation forward.

1. INTRODUCTION

My subject here is not the feminist critique of law. Rather, I wish to investigate the gendering that has informed past scholarship and continues to prevail in the sub-discipline called Law and Literature. Whereas feminist critique has a significant tradition and has contributed to critical legal studies' extensive analysis of the patriarchal, classist and racist components of law, the latter remains under-theorised. My argument is that the critique of law that has transpired in Law and Literature research has contributed to gendered understandings of both disciplines taken singly as well as to the projection of a heteronormative script on their relations to one another. This

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includes the troping of literature as feminine and that of law as masculine, and the emplotment of their relationship as that of an initially antagonistic, highly tempestuous yet ultimately satisfying (in that it is consummated) heterosexual romance.[1] In the first instance this gendering leads to a monolithic understanding of law as narrowly 'rational', mechanistic and emotionally deficient and of literature as 'emotional', empathetic and thus ethically superior. A simplistic idealisation of literature follows out of this form of identification as does the complementary derogation of law. In the second instance the imposition of a heterosexual romance narrative on the relationship between law and literature limits our capacity to understand them as culturally contingent social practices and institutions.[2]

My title is not an application of narrow Freudianism—the reduction of complex phenomena to genitalia. Instead, it plays on some frequently used euphemisms in contemporary romance fictions that I have found in less explicit forms to pervade much law and literature scholarship: to avoid mentioning the romance hero's erection or the heroine's cunt, one speaks, respectively, of 'turgid flesh' and 'soft fleshiness'. My point in dwelling on these figurations and naming the source domains out of which such imagery arises is to highlight their limitations. In order to think law and the humanities forward, as this special issue proposes, one needs to name current dead ends, including those in Law and Literature.[3] Gendering literature as womanly and law as manly does a disservice to both fields; it ignores how both depend upon the specific cultural moments with which they interact—including these cultures' ideologies of gender. To posit law as a man and literature as a woman is to elide their similarities and capacity to co-influence one another and to reify their differences using the tropes of romance.

Law and Literature in its most recent permutations developed as a critique of the law and economics movement that pervaded law school instruction in the United States during the 1970s. Its first founder is generally identified as James Boyd White, its most important early advocate as Robin West and its continuing and most vocal international champion as Richard Weisberg. In the subsequent decades the nature of the conjunction between 'Law' and 'Literature' has been worried, multiply defined and ultimately thrown over by many researchers; the movement, or 'interdiscipline', has now arguably morphed into Law and Culture, Law and the Humanities and a variety of triadic titles such as Law, Literature and Language. The emphasis of Law and Literature was and still is on bringing an attention to ethics to legal practice and legal training, or, in British

1 I am not the first to notice the heteronormative gendering of the sub-discipline Law and Literature. This essay has been particularly influenced by Künzel, whose work I shall describe below, as well as Stone and Baron: Baron Jane B. 'Interdisciplinary Legal Scholarship as Guilty Pleasure' in Freeman Michael and Lewis Andrew D E (eds) *Law and Literature: Current Legal Issues Vol.2* Oxford UP Oxford 1999 21; Stone Peters Julie 'The Changing Profession: Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion' (2005) 120 2 *Publications of the Modern Language Association* 442.

2 This understanding of heteronormativity recurs to the early work of Adrienne Rich on 'compulsory sexuality' as well as to research by Gayle Rubin, Monique Wittig and Judith Butler. Heteronormativity describes prescriptive notions about appropriate sexuality that work to punish and exclude those who do not comply with them, including lesbians, gay men and the trans-gendered; the 'rules' of heterosexuality also regulate the behaviours of those who do live within their constraints by contributing, for instance, to gendered binary divisions of labour and material resources and to expectations about how men and women should behave.

3 Compare in this issue of the *Australian Feminist Law Journal* Jeanne Gaakeer's essay 'Reverent Rites of Legal Theory: Unity—Diversity—Interdisciplinarity'.

scholarship, on deconstructing law in order to render it more aware of its unconscious practices and lack of monumentality.

In response to what was seen as the reductionism of the law and economics movement that prevailed during the 1970s, Law and Literature provided a more encompassing and context-related form of theorising about, teaching as well as practicing law. It corrected what James Boyd White has described as the evident insufficiency of understanding law as being driven by economic principles, for

> [e]conomics can compare what it describes as different legal regimes, but only on the assumption, which no lawyer would make, that the process by which rules are interpreted and applied is nonproblematic, in fact automatic.[4]

In contrast to the automaticism that White describes as an impossibility in legal process, literary, rhetorical and cultural approaches to law foreground the processual quality, the complications and contingency of every rule-bound legal decision; they also emphasise how these processes are inextricably bound to the contexts in which they take place.

From the beginning of at least US American Law and Literature research, the literary and the legal have been gendered as feminine and masculine respectively. This has led to a reductive view that has limited the acceptance of more variable and generous interpretations of both. Accordingly, law is represented as 'hard'; in Robert Cover's much quoted words, judges in the first place deal 'on a field of pain and death';[5] literature, by contrast, is consistently figured as contingent, embodied and 'soft'. The simplicity of this binarism—with its essentialisation of 'the' feminine and 'the' masculine—causes a disservice to be done in the critical interventions in law (and to a lesser degree in literature) that Law and Literature scholarship has sought to accomplish. The binary and highly anthropomorphised division that is made between 'feminine' literature and 'masculine' law imposes behaviours and qualities upon them that have worked historically to encourage systematic forms of discrimination under law towards individual women, in the first place, and non-normative men, in the second. Further, the pre-eminence of this binary division has occluded other forms of discrimination, for instance, that caused by ethnicity, class membership, or sexuality or a combination of these identificatory categories. Rather than supplying a heuristic tool to comprehend literature's and law's commonalities and their useful interventions in one another, the projection of the gender binary imposes restrictions, reifies difference and reasserts historically limited ways of thinking about the legal and the literary.

In the first part of this essay I will assemble evidence for how the gender binary has been delineated between law and literature in both US American and British work. I will show with one historical example from the German context that the pattern of troping law and literature as being involved in a heterosexual union has had a longer tradition. My point is first to demonstrate how widespread this practice of gendering the disciplines is, and second to illustrate the kind of slippages between categories this practice causes. I want to argue that actual forms of

4 Gaakeer Jeanne 'Interview with James Boyd White' (2007) 105 *Michigan Law Review* 1403.
5 Cover Robert M 'Violence and the World' (1986) 95 *Yale Law Journal* 1601.

discrimination towards women are confused with contradictory images of a feminised literature as a playful yet suffering, silenced but nonetheless eloquent, morally superior woman. This idealised figure of literature is projected as initially suffering under brutish, rationalistic, masculinised law but then ultimately reforming 'him' through the power of heterosexual love. I will then go on in much briefer sections to describe historical reasons for why it is problematic to think of literature as feminine and 'good' and 'sweet' and law as a 'brutish', narrowly rational and masculine. I will close the essay by describing possible strategies for undoing the prevalence of the gender binary. My aim then is to de-Other law and literature from one another by bending their identities as they have been gendered in Law and Literature scholarship.

2. A BEGINNING, IF CERTAINLY NOT THE FIRST ONE, OF GENDERING IN LAW AND LITERATURE

Charting Law and Literature back to one of its many pre-US American traditions, one finds Jacob Grimm (1785–1863)—best known for the Grimm fairytales and his philological work but also a one-time student of law and Friedrich Carl von Savigny—arguing that 'It is not hard to believe that law and poetry arose out of the same bed'.[6] He then fills out this analogy as follows:

> In both of them, as soon as one wants to analyse them, one is confronted with something given and brought, which one could call the something outside of history, even if it attaches itself to the particular historical moment each time. … Both of their origins rest on two essential things, on the wondrous and the wealth of belief. With 'wonder' I understand the far off, in which for every people the beginning of its laws and its songs meets.[7]

The choice of a bed to contextualise the relationship between poetry and law is a marked one. The bed suggests conjugality, the possibility of offspring and quite simply sex. As Christine Künzel follows the metaphorisation that Grimm sets up, law is figured as the man in a traditional heterosexual marriage and thus as the primary legal party, and literature as his appendage.[8] As Grimm writes: 'I like it that our laws also remember a man's wife when they offer something to him'.[9] Given historical legal practices such as *coverture*, this gendering within the context of a marriage inevitably leads to the relegation of poetry to the dependent and minor role. Although Grimm's point is to advocate a poetic understanding of law that is based in the German language

6 Grimm Jacob *Von der Poesie im Recht* (On the Poetry in Law) Hermann Gentner Verlag Darmstadt 1957 [1816] 8. Translations from the German are mine.

7 As above at 8-9. German original: [I]n ihnen beiden, sobald man sie zerlegen will, stöszt man auf etwas gegebenes, zugebrachtes, das man ein auszergeschichtliches nennen könnte, wiewohl es eben jedesmal an die besondere geschichte anwächst … . ihr beider ursprung beruhet auf zweierlei wesentlichem, auf dem wunderbaren und dem glaubreichen. unter wunder verstehe ich hier die ferne, worin für jedes volk der anfang seiner gesetze und / lieder tritt.

8 Künzel Christine "'Aus einem Bette aufgestanden". Anmerkungen zum "Verhältnis" zwischen Recht und Literatur' in Gert Hofmann (ed) *Figures of Law* A. Francke Verlag Tübingen and Basel 2007 p 115 at 118.

9 Grimm above note 6 at 67, explicated by Künzel above note 8 at 119. German original: [E]s gefällt mir daher, dasz unsere gesetze, indem sie dem mann etwas zuweisen, auch seine Frau bedenken.

and common law traditions, he in fact reifies the difference between poetry and law and, through the marriage trope, suggests that poetry is subsidiary to law. Künzel criticises a similarly gendered practice in Law and Literature research. She argues that significantly more publications have been authored by legal scholars than by literary ones and that, particularly in German language research, men dominate the field.[10]

Grimm vacillates in this long essay between bed metaphors and ones of common origins. He contends that because law and poetry are related and come out of the same origin, law is in itself linguistically, metaphorically and in practical terms poetic. Hence Grimm writes that 'In the first place this poetic element of the laws breaks open in their outer form'.[11] This was part of a larger argument about the need to retain Germanic common or folk law practices in the determination of what laws might be able to cover a unity of German territories. At the end of his essay, Grimm moves into a discussion of Germanic folk law's '*Vergnügtheit*', or cheerfulness:

> I have to finally account for the evidence of poetry's being in the old [Germanic common] law: its cheerfulness; in this I understand the tendency to not set up everything in advance for people and to not measure everything so that they can see everything from far away just exactly as it will happen.[12]

Grimm then draws a parallel between the changed nature of law in its current manifestation and the altered nature of making payment: newer forms of law function like the use of currency that has replaced the exchange of physical goods for services. Monetary payment, he suggests, leads to people becoming alienated from their transactions and to a reduction of pleasure. I quote from Grimm's text at length because it sets up a dichotomous and gendered choice for the future of law that can be found in much late twentieth and twenty-first century Law and Literature scholarship.

Grimm was arguing against the development that a unified German law system was to take, towards the creation of a *Rechtswissenschaft*—or a science of law—that could decline in minute detail the reasoning for any legal issue on the basis of a codified text, what he would call to 'measure everything'. Instead, he wishes law to concentrate on its cheerfulness. What strikes me as significant in this 1816 text is that long before US American law teachers began to decry what they saw as the ethical barrenness of a practice that was based on a rational choice, Grimm had made a similar criticism about an economic vision of law. Either law could devolve to counting small change and trying to anticipate the messy business of people's lives or it could recognise its true mate in poetry. Here, the heteronormativity begins—the forcing of law into a narrow and pejorative image of how men supposedly are and the simultaneous troping of literature, or poetry, as its opposite. Either law will descend into a mechanistic rule-driven regime

10 Künzel above note 8 at 122-123.

11 Grimm above note 6 at 17. German original: Zunächst bricht nun dieses poetische element der gesetze in ihrer äuszersten form vor.

12 As above at 65. German original: Ich musz endlich noch zum beweis der poesie, die in dem alten recht, rechnen. seine vergnügtheit; worunter ich die neigung verstehe, den leuten nicht gerade zu alles und jegliches fest vorzustecken und auszumessen, so dasz sie alles gerade so wie es sich ereignet von weitem kommen sehen.

of the legal that will be less than cheerful, or it must admit that the linguistic and aesthetic unity of law and poetry legitimises the claims of the poetic to normative authority. We recognise this Romantic claim more readily in Anglophone circles as it was articulated by Percy Bysshe Shelley: In his *Defence of Poetry*, he claimed that the poet is 'the unacknowledged legislator of the world'.[13]

Grimm's text looks forward to a parallel discussion that occurred in the United States about the merits of an economic analysis of law as opposed to one informed by the moral education that might be found in a study of the literary. I hence want to fast-forward to Law and Literature's (re-)emergence in the United States in the seventies as a response to the prevailing mores of legal realism as well as the law and economics ethos of law.[14] Within this movement gendering was a common practice from the first. For instance, in Robin West's 'Economic Man and Literary Woman: One Contrast' (1988), the gender binary is consciously used in order to delineate law's failings. With recourse to Carol Gilligan's *In a Different Voice* (1982) and Suzanna Sherry's 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986), West posits 'literary woman' as the better person and potential lawyer in contrast to economic man. Whereas her masculine, legal practitioner has been imbued in law and economics and suffers from 'empathetic impotence',[15] her 'literary woman … has a virtually infinite empathetic potential'.[16]

For West, Ms. Literature's superior access to empathy and the claims of tangible others occurs through her access to literature: 'For like the metaphor, narrative literature, when it is good, is the bridge that facilitates empathetic understanding, and the literary person knows this'.[17] In short, literature provides the avenue and space for appreciation of other people's positions, whereas economics leads to a deprivation of a capacity for empathetic understanding. Moreover, womanhood itself provides the metaphorical target domain for literature. In other words, the positive capacities that are learnt through an examination of literature are figured as being womanly.

The 2012 reader with an awareness of the history of feminism might criticise my hounding on a moment in the not too distant past when it still seemed plausible to posit woman as the better man. Since then the critical analysis of the category of 'woman' through critical race theory, intersectional studies, gender and queer research as well as transnational feminism has rendered it problematic to refer to 'her' without justifying one's need to be strategically essentialist and to be aware of the many individuals—among them black women, the transgendered and lesbians—whose experience of multiple forms of discrimination this 'her' fails to represent. Nonetheless, the gender binary that West sets up in this essay from the late eighties has remained a regular feature in US American Law and Literature research as well as in that which has been modelled

13 Shelley Percy B. 'A Defense of Poetry' in Adams Hazard (ed) *Critical Theory Since Plato* Harcourt Brace Jovanovich New York 1992 p 515 at 529.

14 For histories of the movement see Binder Guyora and Weisberg Robert *Literary Criticisms of Law* Princeton University Press Princeton 2000; Kayman Martin A. 'Law-and-Literature: Questions of Jurisdiction' in Thomas Brook (ed) *REAL Yearbook of Research in English and American Literature 18: Law and Literature* Gunter Narr Verlag Tübingen 2002 1; Stierstorfer Klaus 'Law and (which?) Literature: New Directions in Post-Theory?' (2007) 5 1 *Law and Humanities* 41.

15 West Robin 'Economic Man and Literary Woman: One Contrast' (1988) 39 *Mercer Law Review* 867 at 869.

16 As above at 872.

17 As above at 874.

after it in other countries, and as I shall argue in British critical jurisprudence that makes recourse to the literary as a feminised Other.

In Law and Literature, the individual who came to be most often personified as a negatively connoted synecdoche of masculine, economically-obsessed law was Richard Posner. An early exponent of law and economics, Posner espoused the promotion of efficiency in jurisprudence on the basis of an argument grounded in rational-choice theory about promoting the public good. In defending the utility of this theory, Posner writes that as a consequence Law and Literature can be of little benefit for actual legal practice:

> Economic analysis of law is critical as well as descriptive. It brims over with proposals for reforming the institutions of the law to make them more efficient, with 'efficiency' defined in cost-benefit terms.[18]

Cost-benefit is thus equated by Posner with 'good' and efficient legal institutions.

Subsequent to the first publication of his dismissive textbook *Law and Literature: A Misunderstood Relation* (1988, followed by subsequent editions in 1998 and 2009), Posner has figured in Law and Literature research as the embodiment of what West termed masculine 'empathetic impotence'. As its Preface informs us, his textbook remains the most widely used one in US American law classrooms. It appears to have been written out of a sense of the simple wrong-headedness of especially White's, West's and Weisberg's work. Particularly dismissive of West, whose readings he categorises with adjectives of dismay, Posner concludes his critique of her examinations of Kafka with a note about their and Kafka's utter lack of value for legal decision making:

> they [legal realists] were not utopian dreamers; they did not believe in the perfectibility of human nature and society. And they had a clear ideal of specific legal reforms that they wanted to and in large measure did achieve. They would have gotten little help from reading Kafka.[19]

Throughout *Law and Literature*, Posner remains committed to an understanding of literature as universally valid and true and thus as separate from the quotidian concerns of legal process. His assessment of literature echoes stylistic evaluations that were pronounced by the aesthetic philosophy of literary modernism. This includes T.S. Eliot's call for a literature that was universal and depersonalised in his 'Tradition and the Individual Talent' (1919). Thus in *Overcoming Law* (1995), Posner again identifies literature's difference from law in that he claims that for

> [a] work of literature, to flourish in a different culture from the one in which it was conceived—to *be* literature, in other words—must not be too local, too topical, in its themes,

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18 Posner Richard A *Law and Literature: A Misunderstood Relation* Harvard University Press Cambridge and London 1998 p 182.

19 Posner above note 18 at 205.

> and therefore we should not expect a work of literature to depict law in a form calculated to engage a lawyer's or a law professor's professional interests.[20]

Not entirely dissimilarly from Grimm or West, Posner projects a vision of law and literature that is based on their difference rather than similarity. In this case law is specific, topical and local, whereas literature is universal. While Posner acknowledges that some legal practitioners do not think in terms of cost benefit but rather wear 'sympathy on their sleeve',[21] he posits literature as an absolute value that is not subject to history. It is then literature's universalisable and formal beauty that lends it value to the degree that its 'moral values are almost sheer distraction'.[22]

In contrasting West's and Posner's discussions of the relation between law and literature, two forms of monolithic gendering become apparent. For West, gendering occurs through the binary identification she constructs between law as an unfeeling male lawyer and literature as a highly morally attuned woman. Her gendering works by attributing qualities of personhood to literature and law. By contrast, Posner feminises literature by insisting on its universal status as the ahistorical locus of beauty and pleasure. His gendering functions by attributing supposedly feminine qualities to literary texts. This involves his making repeated assertions about literature's generic and disciplinary dissimilarity to law as well as its superfluousness for adjudication. In both cases a slippage occurs. Qualities that are historically associated with actual women such as a capacity for greater empathy or, inherent and in terms of cost-efficiency, inconsequential beauty are attributed to literature, and their opposites to law.[23]

As the embodiment of the misguided and legal practitioner, Posner provides the object of critique in a major jointly written text from 1997 by a legal and a literary scholar that reflects on the history of teaching Law and Literature courses in the United States from feminist perspectives. In one of the sections that Carolyn Heilbrun composes, she writes critically of Posner's dismissive stance on the usefulness of law and literature to actual adjudication: 'We are, therefore, to conclude that law and literature, like law and economics, was designed exclusively for the defense [sic]of the free-market, "disinterested," reasonable world of manly law'.[24] The gendering that transpires in this passage needs little explication: 'manly law' favours the supposedly disinterested cost-efficient approach to the legal process.

The feminisation of literature and the masculinisation of law can also be readily found in another frequently quoted work in Law and Literature, the moral philosopher Martha Nussbaum's seminal *Poetic Justice* (1995). Posner also takes on the role of the bad (masculine) lawyer in this text, for the monograph is playfully and admiringly addressed to him in his

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20 Posner Richard A *Overcoming Law* Harvard University Press Cambridge and London 1995 p 482.

21 Posner above note 18 at 125.

22 Posner above note 18 at 332.

23 Recently, Posner has moved away from an advocacy of a neo-liberal economic approach to social policy (compare his *A Failure of Capitalism* 2009). This does not appear to have altered his notion about the usefulness of reading literature in legal practice and education. Yet it is noteworthy that subsequent additions of his *Law and Literature* no longer include the subtitle that adjudges their relation to be a misunderstood one.

24 Heilbrun Carolyn and Resnik Judith 'Convergences: Law, Literature, and Feminism' in St. John Jacqueline and McElhiney Annette Bennington (eds) *Beyond Portia: Women, Law and Literature in the United States* Northeastern UP Boston 1997 p 11 at 23.

argumentative personification as Gradgrind, the hyper-rational and deeply misguided educator in Dickens's *Hard Times* (1854). In the Acknowledgments Nussbaum writes: 'The night before I gave my first Rosenthal Lecture, I had the good fortune to be introduced to the person who was in many ways that lecture's Mr. Gradgrind; and my intellectual adversary throughout the series'.[25]

Nussbaum's explicit point of critique is not law per se, but the distortion of utilitarian philosophy that is used to justify social policy decisions made on the basis of rational-choice theory including those perpetuated through legal practices. Recurring to the rhetorical school of narrative analysis and the work of Wayne Booth, she positions imaginative narrative fiction as a source of ethics, human specificity and non-rationality that should in the best case be used to expand upon current, more limited understandings of 'political economy'.[26] Literary works thus open up other marginalised worlds particularly, it would seem, for otherwise shuttered legal practitioners.

Nussbaum then offers an extended reading of Charles Dickens's *Hard Times* and its damning portrayal of rationalists. Like the misguided educator Gradgrind, rationalists warp their children by insisting on an elision of the imaginative and fanciful in preference for a narrow understanding of facts and figures as the basis of knowledge. Accordingly, the Gradgrinds—or the lawyerly Posners—are troped as 'hard' and those who embody the positive values of fancy are figured as 'soft'. I will dwell on this text somewhat at length because I believe it is exemplary for the gender binarism that is constructed in much Law and Literature scholarship. This scholarship fails to be sufficiently self-reflexive about the reductionism involved in the division it draws:

> It is by no means accidental, then, that the utilitarians are depicted throughout with language at once phallic and military, as aggressive weapons conducting a remorseless assault on all that is sensuous, playful, and in manner of the circus, musical. ... By contrast, the approach of fancy is depicted as musical and sensuous, as delighting in the dexterity of speech and gesture, the intricate rhythm and texture of words themselves. Gradgrind language sounds hard, intrusive, its cadences fierce and abrupt. ... By contrast, the speech of fancy has, so to speak, a flexible and acrobatic circus body, a surprising exuberant variety.[27]

Note the antimonies that are set up: utilitarians are presented as militaristic and violent, fancy as embodied, sensuous and playful. Traditional associations of women and femininity with nature, irrationality and embodiment are reiterated as are the co-dependent attributions of aggression and hardness to men. Nussbaum thus reinforces the gender dichotomy that she detects as a positive feature in Dickens's fiction. Thus: 'Literature is in league with the emotions',[28] and law patently is not. Nussbaum then demonstrates that Posner is less of a rationalist than he might admit in her analysis of his legal reasoning in *Mary J. Carr v. Allison Gas Turbine Division, General Motors Corporation* (1994). She points out his use of 'imagining' to describe the asymmetry and patriarchy

25 Nussbaum Martha C *Poetic Justice: The Literary Imagination and Public Life* Beacon Press Boston 1995 p xi.
26 As above at 3.
27 As above at 40.
28 As above at 53.

of the situation in which the plaintiff Ms. Carr found herself as the object of sustained sexual harassment.

Nussbaum's understanding of literature as a repository of the ethical as well as the emotive mode is not confined to this work in which she overtly addresses the connections between law and the literary. In *Frontiers of Justice: Disability, Nationality, Species Membership* (2006), for instance, Nussbaum suggests that through the imaginative sympathy aroused by narrative literature we may be best able to feel our ways into the needs and capabilities of beings unlike ourselves such as animals:

> All of our ethical life involves, in this sense, an element of projection, a going beyond the facts as they are given … As J. M. Coetzee's imaginary character Elizabeth Costello, a novelist lecturing on the lives of animals, says, 'The heart is the seat of a faculty, sympathy, that allows us to share at times the being of another'.[29]

If US American Law and Literature has responded critically to the rational-choice theory that underlines an economic understanding of law, then it is in the appeal to the irrational and ethical in literature that law, in its current permutation, should take its lessons. This has meant asserting a vision of law as an unfeeling masculine bully along the lines of Dickens's gruesomely rationalistic Mr. Tulkinghorn in *Bleak House* (1852-53), and troping literature as a morally superior if materially and physically imperilled woman. Thus Richard Weisberg entitles a chapter of *Poethics, and Other Strategies of Law and Literature* (1992)—a monograph that has been foundational for Law and Literature—as 'Law's Oppression of the Feminine Other: Mr. Tulkinghorn v. Lady Dedlock'.[30]

On the one hand this opposition responds to the historical reality that lawyers were men in the mid-nineteenth century.[31] It also accurately picks up on Dickens's many damning portraits of lawyers. On the other hand it posits the masculine as formalist, cruel, indifferent to pain, and the feminine as all that is complex, morally compromised and—like Lady Dedlock—beautiful and doomed to perish. The Other to the negative qualities of law, as embodied by the blackmailing Tulkinghorn, Lady Dedlock is law's potential teacher of equity. 'She' is law's better conscience. Thus when Weisberg writes about Tulkinghorn's lack of empathy, he sets up an agonistic relationship between the legalist actor, with his repression of his own access to feeling, and those he harms using legal means. Lady Dedlock then serves as a metaphor for the novel and what it may teach—feeling—as well as for a critical supplement to masculinised law:

> The lawyer tries to make formal everything that gives life meaning, and in the process he represses love, sexuality, affection. Woman relishes these, but she must often seek them in secret, for the male-dominated forms will not permit such overt behaviour [sic]. ... Dickens presents her [Lady Dedlock] almost as a blueprint for a more humane and understanding law, as one who can give order to what is good; the contrast with Tulkinghorn, who

29 Nussbaum Martha C. *Frontiers of Justice: Disability, Nationality, Species Membership* Belknap Press Cambridge and London 2006 p 355.

30 Weisberg Richard H. *Poethics and other Strategies of Law and Literature* Columbia University Press New York 1992.

31 Schotland Sara Deutch 'Defiled and De-Sexed: Dickens's Portrayal of a Woman Waging Law in Victorian England' (2007) 49 4 *American Journal of Legal History* 438.

> establishes order on a misogynistic base of repressed violence, heightens as this scene progresses.[32]

Woman is associated with the good, the humane and the ethical. Law in the person of Tulkinghorn is violent and in denial of its own needs. Only if masculinised law can embrace a womanly 'more humane and understanding law' will it be reformed. Note the slippage between types of categories that occurs in this passage. Woman (the literary character) at once suffers under the hands of rationalistic, unfeeling law (the lawyer), and at the same time 'she' (now understood as literature itself) may teach law by absolving it of its/his tendency to commit acts of injustice.

Similarly, in Weisberg's *The Failure of the Word* (1984) it is the 'legalistic proclivity' of highly verbal protagonists, lawyers and non-lawyers alike, that masks their repressed violence.[33] In this characterisation law and the legalistic are, once again, troped as male and as violent. It is not law itself that is the perpetrator of injustice but the fidelity of those who follow the dictates of legal institutions who damage those who are already in disadvantaged positions.[34] Again and again, the illustration of law's formalism is performed through recourse to a gender binary. Thus we find Weisberg in a recent publication describing the lessons to be learnt in Katherine Ann Porter's short story 'Noon Wine' (1937). Mrs. Thompson learns through experience to doubt her prejudices and to look deeper into character. This is not the case for her husband who has killed a man in the mistaken belief that he was threatening him. Weisberg describes the difference between their fates—hers to a greater humanity, his to a confrontation with the absolutest qualities of law as it is practiced—as follows:

> It is precisely here, at the end of the mere three paragraphs devoted to Burleigh and the trial that we are made to see and feel the difference in the face of success that divides the sweetness and justice of Mrs. Thompson from the hard pragmatics of the law.[35]

Once again, we find an antimony being set up between 'sweetness and justice' and 'the hard pragmatics of the law'. These gendered categorisations attribute negatively connoted masculinity to law and positive personal qualities to literature.

My argument is not with Weisberg's finding the locus 'of a narrative judgment about characters, values, and institutions represented in fictional works'.[36] Neither do I wish to question the value of experiencing empathy through alternative story telling that is at the centre of much narrative jurisprudence including Critical Race Studies. Scholars such as Suzanne Keen, Richard

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32 As Weisberg above at note 30 at 71-72.

33 Weisberg Richard H *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* Yale University Press New Haven and London 1984 p 7.

34 As Weisberg above at note 30 at 41.

35 Weisberg Richard H. 'Rich, Sweet, and Tender vs. Displeased and Upset: Two Ways of Seeing Things in "Noon Wine" in Simonsen Karen-Margrethe and Tamm Ditlev (eds) *Law and Literature: Interdisciplinary Methods of Reading* DJØF Publishing Copenhagen 2010 p 15 at 19.

36 Weisberg Richard H. 'Law and Literature as Survivor' in Sarat Austen, Frank Catherine O. and Anderson Matthew (eds) *Teaching Law and Literature* Modern Language Association New York 2011 p 40 at 59.

Walsh and Henrik Nielsen have suggested that knowing that a narrative is fictional allows those who learn of it to feel more acutely and empathetically with the characters whose stories the narrative relates.[37] Their work may reveal much that is new about processes of empathising in adjudication. Instead, I wish to point out the limitations involved in projecting prescriptive notions of gender onto law and literature. This gendering of law and literature is simplistic, reifies forms of social difference and does not help the practitioner to take the dialogue about law and literature's interface forward. To treat prose literature as a feminised ahistorical locus of empathy is not helpful to the sustained critique of law, legal practice or literary evaluations.

Finally, taking another recent American Law and Literature textbook as an example of how the relationship between law and literature continues to be troped in terms of gender, I want briefly to look at Thomas Morawetz's *Literature and the Law* (2007). The author opens his textbook by pointing out that students and faculty will regard the study of literature at law school as 'pleasant diversions, a chance to put aside for a few hours the tax regulations or the Uniform Commercial Code'.[38] This is a version of the 'Law and Bananas' argument that any course in law school that is not about code is in fact a form of escapism and—shades of Posner—ultimately unnecessary. Though the term Law and Bananas may be historically dated, it reflects on what Simon Stern has called both a problem of resources and one of presentation of Law and Literature in North American legal training: given that law schools need to impart doctrinal and methodological proficiency, the analysis of literature is viewed as extraneous.[39] This leads to a further othering of reading literature as a form of oppositional practice to studying and applying law. As Stern writes,

> courses in law and literature are often presented—sometime in expressly spiritual terms—as an antidote to the barren, ossified, regimented hidebound abstractions of doctrinal analysis, with its balancing tests, burdens of proof, inventories of elements, and unblinking hostility toward imprecision.[40]

Thus in an apparent effort to persuade reluctant law school students, Morawetz argues that literature will teach them about individuals and their commonalities as well as about use of comparative narratives, and most importantly about justice itself. Here, again, law is figured as formalist and devoid of values:

> Too often, law students say that the implicit (or even the explicit) message of legal pedagogy is that the first of these alternatives [that is to serve any cause regardless of one's own moral

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37 Keen Suzanne *Empathy and the Novel*. Oxford: Oxford UP 2007 at 4 and 168; Walsh Richard *The Rhetoric of Fictionality: Narrative Theory and the Idea of Fiction*. Columbus, OH: The Ohio State UP, 2007. Nielsen Henrik 'Naturalizing and Un-naturalizing Reading Strategies: Focalization Revisited' in Alber Jan, Richardson Brian and Nielsen Henrik Skov (eds) *A Poetics of Unnatural Narratology* (under review).

38 Morawetz Thomas *Literature and the Law* Wolters Kluwer Austin et al. 2007 p xix.

39 Stern Simon, email correspondence from May 2011.

40 Stern Simon, 'Literary Evidence and Legal Aesthetics' in Sarat Austin, Frank Catherine O. and Anderson Matthew (eds) *Teaching Law and Literature* Modern Language Association New York 2011 p 244 at 246.

> objections to it] is dominant and that they learn to put aside their values as distractions and as private matters.[41]

Literature by contrast works quite differently: 'A major point of literature is to wake one's conscience and stir one's sense of justice'.[42] In these passages legal practice is figured as morally deficitary and literature as the realm where an awareness of justice becomes possible. It is in the literary narrative that emotions and the conscience are spoken to. While Morawetz aims to return an awareness of values to the study of law through the contemplation of literature, the binary he sets up between conscience/literature and the lack of moral objections in law serves as a self-fulfilling prophecy.

In both early descriptions of Law and Literature as well as more recent defences, law is described as masculine and deficient, and literature as empathetic and decidedly feminine. Lawyers figure as rationalistic and 'hard' implementers of rules, feminine characters suffer and represent alternative moral universes, and feminised literature teaches non-codified decision making. This discourse is essentialising in that it reifies the supposedly masculinist qualities of law such as being rule-driven and lacking in empathy as well as the feminine qualities of literature, which is according to this figuration empathetic and generous to multiple voices. This binarism also suggests that a personified version of 'nasty law' needs to be educated through the auspices of morally superior feminine literature.

The allegory that underlines this story is that of heterosexual courtship and marriage. Through a happy union, a personified law and literature may both profit from one another. Thus while Christine Künzel's excellent work is extremely prescient about the drawbacks of gendered figurations in Law and Literature, she in the last analysis falls back upon them. Near the end of her essay, she writes that it will not be possible to reinvigorate the sub-discipline of Law and Literature unless law allows itself to genuinely admit its literariness: '… as long as the discourse of law denies its aesthetic qualities, then it will hardly be possible for the hierarchical marriage relationship between law and literature to be transformed into an exciting affair'.[43] Here, I disagree with Künzel, for it is as problematic to posit a preferable exchange between law and literature as an affair as to envision them in a marriage. This requires their being gendered and viewed through the prism of heteronormativity. Given that individuals who do not fit into the twin moulds of woman-who-desires-man and man-who-desires-woman are physically punished and socially marginalized, I do not know that a steamy affair would be better than a legal union.[44]

In summary, I understand US American Law and Literature as arguing for an ethos of legal practice that should be based on an appreciation of fictional narrative as a repository of the ethical. Here the literary stands in for a feminised ethics. This involves a posturing of law as

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41 Morawetz above note 38 at xxii.

42 As above at xxii.

43 Künzel above note 8 at 131.

44 "'Compulsory Heterosexuality" erases lesbian existence and denies the lesbian continuum and serves to hurt all women. It denies the identification of lesbians by seeing them as "female versions of male" homosexuals: "how and why women's choice of women as passionate comrades, life partners, co-workers, lovers, community, has been crushed, invalidated, forced into hiding': Rich Adrienne *Blood, Bread and Poetry* Norton Paperback New York 1994 [1980].

tending towards the mechanistic, absolute and rule driven and of literature as the site of a contemplation of the 'hard' decisions the legal practitioner must make between the conflicting claims of justice and law. The implications of this gendering are as follows. In the first place literature becomes a version of the Platonic Good,[45] only a feminised one. It resembles the Angel in the House, that subsidiary domesticated person whom Coventry Patmore imagined in his poem by the same name, first published in 1854 about his idealised Victorian wife. Patmore's angel was a perfect mother and wife, who put the needs of her family before her own and who symbolized the Victorian ideal of separate spheres for men and women, with the woman relegated to the private domesticated sphere and the man in the public realm. This image belies the ideological complications and indebtedness of literature, about which I shall return to speak. It furthermore continues the practice of positing law as the prior and primary term in its binary relation to literature. In other words, a form of logophallocentrism is perpetuated in what is meant to be a critique of law. Historically, western literature and cognitive patterns have privileged the male as dominant and normative and have assigned the feminine to a subsidiary, subaltern position. In positing literature as law's feminised and corrective other, the hierarchical relationship of domination and subordination remains in place.

In the second place literary narrative is feminised less overtly as representing a tribunal in which neglected persons may be heard. Thus the voice of the legally disenfranchised in Dickens's *Bleak House,* the voice of the wordless Billy in *Billy Budd* (1924, posthumous), and the voices of silenced women under slavery in *Beloved* (1987) are articulated and given a hearing in literature. Frequently, the disenfranchised is a woman as in Weisberg's discussion of Lady Dedlock. A slippage then occurs between the troping of the novel as a more ethical female teacher and disempowered, feminised characters within the same novel who do not receive justice. This slippage becomes apparent in the following assessment of *Wuthering Heights* (1847): 'through this examination of a literary text, I hope to have demonstrated how law, and more specifically, women and law issues, can be better understood through the study of literature'.[46] Here literature simultaneously reveals truths about women and their prejudiced treatment by legal institutions and is more ontologically proximate with women. In the equation of literary prose with the voices of the socially repressed and marginalised a perpetuation occurs of what Wendy Brown has saliently described as a representing of oneself as a victim and hence as defenceless and in need of protection by more powerful and thus once again masculinised law.[47] Just as positing literature as law's supplementary and corrective conscience places it in a subsidiary relation to law, so stressing that literature is the forum through which to announce women's victimisation under law reiterates historical patterns rather than challenging them.

In turn the gendering of law as masculine and lacking in feeling appears to disregard the historically variable and constructed nature of masculinity itself. Economic men, the Mr.

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45 My argument here coheres closely with that of Desmond Manderson, including his insightful analysis of the tendency of Law and Literature scholars to read literature with an eye to a normative form of morality or a '*rationes dedidendi*': Manderson Desmond 'Modernism and the Critique of Law and Literature' (2011) 35 *Australian Feminist Law Journal* at 110. Compare also Stern on this point. Stern above note 40 at 246.

46 Abraham Andrew 'Emily Brontë's Gendered Response to Law and Patriarchy' (2004) 29 2 *Brontë Studies* 93 at 101-102.

47 Brown Wendy *States of Injuries: Power and Freedom in Late Modernity* Princeton UP Princeton 1995.

Tulkinghorns and Judge Posners, appear as 'empathetically impotent' brutes who demonstrate an ethical deficiency that is in desperate need of remedy. Moreover, their neediness is troped with metaphors of lack, need and desire. Staying true to Grimm's implicit sexualisation of the relationship between poetry and law, a heteronormative construct is developed that resembles the plot structure of a romance novel: Big burly Law disregards his own unhappiness and loneliness; this has been caused by his depersonalising legal training with its insistence on rationality and his over-ambitious aim to play by the rules. A series of confrontations with lovely Ms. Literature ensues. He initially feels hostile towards her because he cannot admit his attraction and lacks insight into the moral depths of her character. Eventually love shows him his blindness. Overwhelmed, he admits his own deficiencies and is made complete by her love: she in turn shows him how to 'read' her, how to feel and be empathetic.[48] The violins play. In this narrative I am following Janice Radway's still superb account of the narremes that are necessary for the construction of what enthusiastic readers consider to be a 'good' romance plot.[49] Although romance has changed since Radway did her ethnographic research to now include paranormal elements such as vampires and werewolves, basic plot structures remain largely in place.

3. GENDERING IN BRITISH WORK

In a previous publication, I argued that British scholarship concerning the legal and the literary prefers not to be branded with the designator of Law and Literature.[50] Instead, some instances of British critical or aesthetic jurisprudence focus on the mythic, poetic and feminine qualities of the legal in order to provide a critique of law. The point is to deconstruct rather than to return law to some forgotten ethics. While British work also tends to idealise the literary, it more often concentrates on genres other than the novel such as poetry.[51] A common theme is to prove to law its repressed unconscious, metaphoricity and entanglements. Effectively, law goes into analysis.

For instance, Maria Aristodemou offers a counter approach to Law and Literature than Posner and many others in her 'mistressly' *Law & Literature: Journeys from Her to Eternity* (2000).[52] There the masculinist presumptions of both Western philosophy and Western law are offset by a re-telling of Law and Literature from the perspective of Her and Ariadne—heretofore repressed figures. They combat the Cartesian denigration of bodily experience and the foregrounding of masculinist forms of reason in philosophy and law. This retelling of relations between the legal

48 The feminist critic would further argue that the woman character in the contemporary romance is taught to accept her subservient place in patriarchy. The narrative suggests that it is not that her lover/husband is a bully. Rather, she has just interpreted his coldness incorrectly.

49 Radway Janice A. *Reading the Romance: Women, Patriarchy, and Popular Literature.* University of North Carolina Press Chapel Hill and London 1991 at 134.

50 Olson Greta 'De-Americanizing Law and Literature Narratives: Opening up the Story' (2010) 22 2 *Law and Literature* 338.

51 If anything there is a certain distrust of the prose genre due to its formal affiliation with the genre of law. Goodrich Peter 'Courting Death' in Manderson Desmond (ed) *Courting Death: The Law of Mortality* Pluto Press London 1999 p 220.

52 Aristodemou Maria *Law & Literature: Journeys from Her to Eternity* Oxford UP Oxford 2000.

and its repressed Other relies on an understanding of the feminine nature of the literary as a repository for supplementary voices and values that go lacking in law. This involves, for Aristodemou, a conscious association of the literary with the feminine. In her own words:

> [L]iterature (and in particular, I suggest, the 'feminine' qualities associated with literature) has served philosophy (and law) as the repository onto which any untameable aspects of language could be projected, thus enabling philosophy and law to guard their claims to the truth.[53]

Aristodemou aims to return law to its pre-patriarchal foundations, to its fleshiness and femininity. She envisions an alternate quest to the one that is paradigmatically set up in the majority of Western literature involving the hero's journey, adventures and triumphant return. This entails a woman's challenging the generic and disciplinary boundaries of both law and literature. At times this woman, in the form of Her or Ariadne, appears to be symbolic or mythical and in her proximity to maternity goddess-like. Yet at other moments Ariadne closely resembles a late twentieth-century western woman who struggles with the paternalism of legal practice:

> On paper, he has granted her equal rights, equal opportunities, equal pay. In practice she discovers that her male colleagues have long been paid way in excess of her; when she challenges his rulings, she is told she was not aggressive enough when negotiating status and pay, paradox of paradoxes, deceitful woman is told she is not as deceitful as man when it comes to such things.[54]

Once again, a slippage occurs in this text between actual historical women and feminised symbolic ones. A parallel is drawn between the discrimination that a late twentieth-century woman lawyer experiences when she is criticised for not acting more like a man and the mythic, literary heroine who has been silenced in the phallocentric history of law and philosophy. This understanding of the literary as feminine necessarily invokes the gender binary and represents a new form of essentialism.

Thus, for Aristodemou, we find a return to Grimm's bed metaphorics. Mr. Law and Ms. Literature's bed now even includes the possibility of a baby, if a potentially gender-bending one:

> It also holds out the promise that the child born of the coming together of law and literature, of the marriage between 'the lawyer in his labyrinth and from her to eternity', need not necessarily be a boy; that it is a child, boy *or* girl, that, unlike Plato and generations of male philosophers, and lawyers, is not horrified at the idea of dressing up in women's clothes, that is, of performing and reperforming gender roles.[55]

While not wishing to disregard the linguistic and tropic play that informs this text, I find its construction of the literary as a goddess-like personification of the feminine highly disconcerting.

53 As above at 18.
54 As above at 274.
55 As above at 28.

The idealisation of the maternal appears to me to re-essentialise notions of femininity that have often been used to enforce practices of discrimination against women by insisting on their greater proximity to nature and procreation. This reader has difficulty identifying with the mythic woman of whom Aristodemou writes. With Donna Haraway, 'I would rather be a cyborg than a goddess.'[56] That is to say, I would prefer to attempt to deconstruct traditional binary divisional categories between man and woman, human and machine/animal rather than to reinforce them.
I recognise that I may be doing Aristodemou's work a disservice by insisting upon its essentialisms in that I am performing a kind of gender critique that fails to honour its premises. Like Peter Goodrich, whom she quotes as influential, her writing is strongly inspired by the philosophies of difference espoused by the French feminist philosophers Kristeva and Irigaray and the psychoanalytic theory of Lacan. Irigaray, in particular, has envisioned the body and sexuality to be sites of power struggle that rest on sexual difference. This difference represents the foundation of all forms of alterity, 'of the incapacity of one sex to step into the body, role, and position of the other sex'.[57]

While acknowledging the potential for misreading, I nonetheless assert that Aristodemou's use of the category of woman and one-to-one equation of it with embodiment, desire, the maternal and the literary is problematic. It reiterates the binary division between the feminine and the natural, and the masculine and the rational that so much feminist work has laboured to overcome. Moreover, the woman who is invoked by Aristodemou's feminised literature is one who potentially excludes many specific women's experience. In other words, she cannot necessarily speak for her sisters. One cannot, I want to assert, use 'woman', even in symbolic terms without excluding others. As Rosi Braidotti, herself a representative of difference feminism, writes:

> Crucial to this political process [feminism] is the fact that the quest for alternative forms of social representation of women requires the mimetic revisitation and reabsorptions of the established forms of representation of the post-Woman female feminist subjects (for whom the term *woman* no longer need apply. … The politics of sexual difference is a praxis that consists in activating real-life women's difference from the way difference has been institutionalized in the phallogocentric system as a site of devalued otherness.[58]

As stated above, British aesthetic jurisprudence is not interested in exploring the novel as the repository of positivistic law's forgotten awareness of ethical practise. Instead, it relies heavily on ethics of alterity to critique law with an attention to specific suffering others. In this attention to alterity, frequent recourse is made to the image of the suffering face that has been inspired by the philosophy of Levinas. Frequently, this face is troped as feminine. Thus in one foundational text, Costas Douzinas and Ronnie Warrington write that

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[56] Haraway Donna 'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century' (1986) *Stanford University* <http://www.stanford.edu/dept/HPS/Haraway/CyborgManifesto.html>. (accessed 09 02 2012)

[57] Grosz Elisabeth *becoming undone: Darwinian Reflections on Life, Politics and Art* Duke University Press Durham 2011 at 145; explicating Irigaray's *Thinking the Difference: For a Peaceful Revolution* (1994).

[58] Braidotti Rosi 'Comment on Felski's "The Doxa of Difference": Working through Sexual Difference' (1997) 23 1 *Signs* 23 at 36.

> [i]n Levinas's analysis, the sign of the other in all her vulnerability is the face … It is an expression without an essence and in its very existence the face asks us, and therefore the law, not to judge on the basis of some pre-existing, totalising and denigrating image of a (legally constructed) essence.[59]

The choice of pronoun in 'her vulnerability' represents more than an effort to use non-sexist language. Rather in the many references to 'the face' in British scholarship the Other who calls law to an awareness of specificity is connoted as feminine. Once more a slippage occurs. In this case the face is both an absolute de-essentialised Other and a specific feminised one, who positions the subject as male.

Furthermore, this Other is the subaltern—that person who is not heard in the processes of law:

> As against the moralism of maxims and codes, as against the complacency of established institutional ethics of more properly institutional ethos, the critical concern with the ethical is a return to the political and an embrace of responsibility: for the other, for the stranger, the outsider, the alien or underprivileged, who needs the law, who needs, in the oldest sense of the term, to have a hearing to be heard.[60]

Again, a form of categorical confusion occurs here. Actual socio-historical individuals who suffer under systematic forms of legal discrimination are equated with the feminised Other who calls law to 'an embrace of responsibility'. This gendering involves a similar mixing up of referents as that described in relation to the analysis of *Wuthering Heights*.

The critique of a positivistic practice of law performed with reference to literature or myth or an awareness of the Other's suffering face is certainly valid. However, when the feminised Other of law is equated with those who are denigrated by prevailing legal practices—the voiceless immigrant, the woman who has suffered from abuse, or the homosexual who contends with violence—then the victim is also essentialised. The specificity of forms of harm that are done to individuals is elided. In looking both to a feminised other as the locus of suffering and as the potential teacher of justice and the contingent, one denigrates both individual women and simplifies the notion of legally condoned injustice.

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[59] Douzinas Costas and Warrington Ronnie *Justice Miscarried: Ethics, Aesthetics and the Law* Harvester Wheatsheaf Hemel Hempstead 1994 p 19.

[60] Goodrich Peter, Douzinas Costas and Hachamovitch Yifat (eds) 'Introduction: Politics, Ethics and the Legality of the Contingent' in *Politics, Postmodernity and Critical Legal Studies* Routledge London and New York 1994 p 1 at 22.

4. ON PROBLEMS IN GENDERING LITERATURE—NOT SO SWEET

Posner's description of the universality of 'great' literature and its independence of legal practice points to a problem in connoting literature, and particularly the realist prose novel, with the feminine. Like legal practice, literature is indivisible from the cultural context out of which it arises and in which it operates. Like other distinctions, literary valuations are made at the expense of those whose work is also for social reasons considered to be more or less valuable. Thus the expansion of the literary canon has involved an explicit attention to the voices of those individuals and groups that were historically subject to systematic discrimination.

Because genres of literature have been determined to be more or less valuable on the basis of how they have been constructed as masculine or feminine over time, the novel is anything but strictly speaking 'feminine'. Scholars such as Ros Ballester and Susan Sage Heinzelman argue that masculinist norms of the English realist novel supplanted other genres and forms of writing during what is called the long eighteenth century (the Restoration till 1800). This included the romance, a form that had been dominated by women writers. Romance and romance authors were relegated to the less valued provenances of sentiment and feeling, and these texts were denied their capacity for performing political critique.[61] In other words, as readers and philological scholars we are hailed into a system of literary evaluations and distinctions as much as we are hailed into other forms of ideology. These distinctions inevitably reflect on prevailing hierarchies of power.

As an example of work that deconstructs the binary that Law and Literature has set up between masculinised law and feminised literature, I want to quote Heinzelman on the systematic exclusion of writing practices that were associated with women authors. Her central point is that both the novel and law have contributed historically to discriminatory social practices based on gender:

> I have argued that the official history of common laws and the canonical history of the rise of the novel indulge in positivist versions of discourse formation at the cost of marginalizing other, more complicated, internally inconsistent versions. Both histories depend upon the absence of women's bodies in all but their promiscuous sexual figurations, those sexual excesses being precisely the warrant for legal and literary disciplining.[62]

A similar story has been told about the emerging dominance of 'High Realism' in late nineteenth-century US American novels. Reacting to the enormous popularity of sentimentalist and also as in the case of *Uncle Tom's Cabin* (1852) highly politicised prose, the mores of 'good literature' came to be associated with the distance, dispassion and realism of by and large men authors.[63] My interest here is not in reviving gynocriticism but in reviving the non-innocent complicity of

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61 Ballaster Ros *Seductive Forms: Women's Amatory Fiction from 1684-1740* Clarendon Press Oxford 1996 [1992]; Heinzelman Susan S. *Riding the Black Ram: Law, Literature and Gender* Stanford UP Stanford 2010.

62 Heinzelman as above note 60 at 71.

63 Bentley Nancy 'Woman and Realist Authorship' in Bercovitch Sacvan and Patell Cyrus R. K. (eds) *The Cambridge History of American Literature Vol.3: Prose Writing 1860-1920* Cambridge UP Cambridge 2005 p 137.

literature and literary evaluations with social forces of hierarchy and exclusion, including those related to gender. The same cultural mores that have shaped masculinist values in adjudication have also informed evaluations of literature.

Literature has also provided a privileged forum for doing the police work of enforcing the gender binary and attendant forms of heteronormativity. For instance, as the work of Eve Kosofsky Sedgwick and Nancy Armstrong amongst others has shown, an increased anxiety about homosexuality in the nineteenth century led to the British novel displaying a preference for homosocial behaviours. Men bond and interact intimately in the Victorian novel by fighting over a woman whom they ultimately marginalise. Non-normative 'fallen' women in novels from the same period conveniently die. Expectations of 'good' women's sexual mores do not allow these individuals to experience any happy ever after.

5. ON PROBLEMS IN THE GENDERING OF LAW — NOT SO EXCLUSIVELY BRUTISH

While the critique of the misuse of law and legal process as well as a narrow application of doctrine is valid, the troping of law as intrinsically masculine and unfeeling strikes me as just as problematic as the figuring of the literary as ethical and feminine. It creates an image of law as monolithic and ignores the role that emotion, empathy and a tolerance for ambiguity also play in legal practice. Thus when Nussbaum describes Posner's actual adjudication in a case in which he imagines himself into the role of the lone woman in a workplace where she was harassed and demeaned on a daily basis, he hardly appears to be a rationalist Gradgrind or a repressed Tulkinghorn. When White describes the discrepancy between an understanding of adjudication based on economic theory and the actual difficulties of interpreting and applying rules in a legal context, as in the first quotation in this essay, he is delineating the actual complexity of legal hermeneutics and practice.

In a similar line of argument White's student, the judge and professor of legal theory Jeanne Gaakeer has criticised her colleagues in Law and Literature, including myself, for describing the process of adjudication too schematically in a manner that is not attentive enough to process.[64] Hers is not the simplistic criticism that Goodrich discovers in Stanley Fish's work, with its insistence on the absolute autonomy of law and his denigration of 'those who cannot do teach'.[65] Rather Gaakeer asks her Law and Literature colleagues to contemplate what she views as the humanistic process of actual decision making in law more carefully. Following Aristotle, she calls this practice a form of practical wisdom: 'It is specifically a matter of character and morality, a combination of epistemology and ethics'.[66] Ample instances of ethical and contingent

64 Gaakeer Jeanne 'European *Law and Literature*: Forever Young –The Nomad Concurs' in Porsdam Helle (ed) *Dialogues on Justice: European Perspectives on Law and Humanities* De Gruyter Berlin 2012 at 44.

65 Goodrich Peter 'On Law and Forgetting: Literature, Ethics, and Legal Judgment' (1994) 1 2 *Arachne* at 198.

66 Gaakeer Jeanne 'The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice?' (2011) 5 1 *Law & Humanities* 185 at 189.

applications of law speak against any monolithic narrative that suggests that literature is inherently morally superior to law.

6. DEGENDERING LAW AND LITERATURE

What then might be some less sexist and heteronormative trajectories for Law and Literature? In the first case connections need to be made between specific legal cultures and the projections of gendered divisions onto these cultures' laws and literary texts. Indivisible from their socio-historical contexts, law and literature need to be addressed in terms of their discursive and processual interrelatedness. This emphasis on overlaps may be pursued under the rubric of Law and Literature. Yet as the remarks above have shown, the pattern of idealising and feminising literature and derogating law as unfeeling and masculine appears to be a powerful template in Law and Literature. A slippage between categories occurs, and differences are reiterated rather than contested. In the case of much US American work, stereotypes about women and women's better moral character endemic to the nineteenth-century novel are projected onto an anthropomorphised version of literature. In British critical jurisprudence, the feminised absolute Other is confused with gendered subalterns who suffer under prevailing legal practices.

What then might be some strategies for avoiding the limitations of the gender binary? Firstly, Law and Literature need to address literature and its institutions with similarly critical perspectives as those that have been taken to law. The monolithic rendering of law as ethically challenged and manly and literature as a repository of teaching the 'good' and feminine has failed to address the latter's enmeshment in hierarchies of power. One needs to be just as canny about the ideological commitments of literature and literary valuations as one is critical of abuses of law. I contend that the critique of law that has been consistently undertaken in Law and Literature scholarship during the last forty years has not been matched by a similarly critical interrogation of literature from within the interdiscipline. Secondly, I would advocate a move towards understanding both law and literature as cultural practices that manifest themselves in texts. This might help practitioners to avoid resorting to the gendered figurations of literature that have proven to be so dominant. Another strategy for degendering Law and Literature may be to concentrate on medial forms other than the nineteenth-century realist novel. A certain distrust of what might be called the medial and visual turn in legal practice that is amply apparent, for example in Richard Sherwin's work,[67] may absolve scholars from idealising and feminising *The Sopranos* (1999-2007) or *CSI* (2000-) as much as they might be inclined to do a Dickens novel.

In this essay I have sought to uncover two discursive patterns of gendering in Law and Literature scholarship. In the first instance the novel or literary prose is equated with a morally superior woman, or, in more psychoanalytic work, with a more ethical feminine Other. This

[67] Sherwin Richard, Feigenson Neil and Spiesel Christina 'Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law' (2006)12.2 *Boston University Journal of Science, Technology, and Law* 227; Sherwin Richard *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* Chicago University Press Chicago 2000.

pattern necessarily involves figuring law as an ethically stunted man. In the second case the gendering transpires less obviously: the novel becomes the locus of speech for feminised persons who have had injustices done to them in legal practices. Alternatively, in postmodern jurisprudence that is informed by an ethics of alterity, the face of the Other is imagined as a feminised subaltern, an eloquent suffering Other who calls law to a justice of contingency. This gendering works prescriptively to reinforce not only disciplinary divisions between law and literature but also to reify what many individuals experience as the prison house of the man/woman binary. Furthermore, gendering in Law and Literature functions to enforce a heteronormative script that suggests that both law and literature will remain unfulfilled unless they complete one another erotically. Law, I want to argue, is not inherently 'turgid and hard' and literature is not intrinsically 'soft and fleshy': it also partakes in maintaining social distinctions that involve access, privilege and material goods.

I wish to reiterate that my purpose in this essay has not been to equate the feminist critique of law with the heteronormative gendering that transpires in Law and Literature scholarship. Whether a critique of the assumption that the legal subject is a man with property or the sexist assumptions that have been at the basis of many laws and legal cases dealing with abortion, rape, marriage, custody rights and taxation, this work has methodically opened up legal practice to a recognition of areas of former occlusion. Rather I have wanted to show that the gendering of law as masculine and literature as feminine does a disservice to individual men and women and those persons who do not readily fit into these identity assignments. It also fortifies existing disciplinary boundaries within Law and Literature rather than dismantling them. This gendering reifies assumptions about difference that may in turn reinforce forms of prejudice that will enter through another door. We are back to a low point in gender theory that 'men are from Mars and women from Venus'. My suggestion for the future of Law and Literature is that we depart from a reliance on the tropes of the romance narrative, that we acknowledge both law's and literature's different and overlapping histories of gendering subjects in narrow and prescriptive ways. Let us move on then to a degendered form of dialogue. ●