Law and Literature

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It is remarkable how many famous works of literature, from all eras, take law as their central theme. While there is relatively little in these works that will help judges directly with the solution of technical legal questions, they can help us to achieve perspective on fundamental jurisprudential issues that pervade our work whether we are aware of them or not. One thing all judges feel or should feel, for example, is a series of tensions between various senses of law as form and rule and technique on the one hand and various senses of law as the rendering of substantial justice on the other. I am referring to the tensions between rule and discretion, between law and justice, between positive law and natural law, between rule and standard, between law and equity, between strict construction and flexible construction, between formalism and realism, and so on. Judges lean toward one end of this spectrum or the other; my own view is that anyone who leans too far either way is a bad judge.

Literature can make us more sensitive to these tradeoffs. I begin with the ancient example of Antigone, Sophocles' play written in the fifth century B.C. Two brothers, who happen to be the sons of Oedipus, though that is a detail, find themselves on the opposite sides of a civil war in the city state of Thebes, which is ruled by Creon. One of the brothers, Polynices, is the leader of the loyalists. The other brother, Eteocles, is the leader of the loyalists. The loyalists win, but both brothers, the rebel and the defender, die in the fight. Creon decrees that Polynices, the rebel, shall remain unburied—a terrible punishment in the theology of the ancient Greeks—and he announces that anyone who violates this decree shall be put to death. The decree has the same authority as would a law passed by Congress today. Antigone, the sister of Eteocles and Polynices, defies the law and buries Polynices. Creon sentences her to death after a brief trial in which Antigone argues, to no avail, that a higher, religious law, which commands proper burial for the dead, should be allowed to trump Creon's earth-bound positive law. Disaster ensues for Creon, including the death of both his son and his wife, and we are led to understand that he has made a terrible mistake.

And yet it is apparent that Creon has a real problem and that the dilemma of natural and positive law that proves insoluble by him remains to challenge modern legal systems. Because both brothers have been killed, and honorable burial for both would fail to distinguish the traitor from the heroic defender, the denial of honorable burial for Polynices is the only method by which Creon can punish the traitor and distinguish between the two brothers. It is a harsh punishment, but civil war is harsh, and must
be deterred. Against this practical and utilitarian argument based on civic values Antigone opposes an argument based on family, religion, and emotion; the discourse of the two antagonists is incommensurable, and no compromise is possible.

Much of positive law has the character of Creon's decree, being rooted in practical, essentially political considerations. It is often open to criticism from a standpoint that asserts transcendent ethical values. Few judges would like to think of themselves merely as Creons, but equally few would feel comfortable in the role of Antigone. Most judges want on the one hand to enforce and comply with laws and doctrines of a humble utilitarian cast at best and on the other hand to render substantial justice unfettered by the petty political compromises and calculations that shape legislation.

Much the same dilemma is displayed in a later work of legal drama, Shakespeare's The Merchant of Venice. As most readers will remember, Antonio gives Shylock a bond in guarantee of a loan by Shylock to Antonio's friend, Bassanio, so that Bassanio can woo the wealthy Portia in style. The bond provides that in the event of a default Shylock shall be entitled to a pound of Antonio's flesh. Antonio does default and Shylock demands judgment for the pound of flesh, making clear that he wants it taken from the region of Antonio's heart, so that Antonio will die. The bond is clear on its face; and Venice, as a commercial society, attaches great importance to enforcing contracts—an attachment that Shylock plays on skilfully by asserting that if his bond is not enforced, it will mean there is no justice in Venice. In the law of the play, there is neither a rule that penalty clauses in contracts are unenforceable nor a concept of equity of redemption. So it looks as if Antonio is a goner, even though Bassanio has come up with the money (it is Portia's money) to repay Shylock and offers to do so—with a huge amount of interest to boot.

At this point in the trial scene Portia, who is by now Bassanio's wife, appears, disguised as a male doctor of laws. She appeals to Shylock's sense of mercy, but he has none, and so this appeal fails. Things are looking really black for Antonio until Portia pulls a pair of legal rabbits out of her hat. First, she points out that the bond nowhere authorizes Shylock to shed Antonio's blood. Second, she reminds everyone that it is a capital offense to attempt to kill a Venetian, which Shylock has already attempted to do, so he will be lucky to get off with his life. Everyone is astonished at Portia's sagacity. Shylock is defeated and withdraws, after surrendering most of his fortune and converting to Christianity, in order to be let off from being prosecuted as a criminal.

Many readers have thought Portia's argument about not shedding blood absurdly legalistic, and highly vulnerable to the counterargument (which Shylock does not make) that the bond should be interpreted to grant Shylock the implicit right to shed Antonio's blood, since otherwise the purpose of the bond would be defeated. But it is no accident that Shylock does not make this argument—an argument based on purposive rather than literal construction. It would be open to a devastating counterargument: the fundamental purpose of the bond is to ensure the repayment of Shylock's loan—and there is Bassanio offering to repay it with abundant interest, even though the loan was interest-free. It is Shylock who rejects purposive interpretation and stands foursquare on technicality and literalism, and Portia who, personifying a higher law of equity and mercy, uses Shylock's own commitment to technicalities to lever him out of court.

The use that Portia makes of the forms of law is significant not only in underscoring the difference between her and Shylock but also in demonstrating the practical importance of those forms. It would not do for Portia and the other Venetians simply to say that the bond is ridiculous and Shylock a villain, therefore the bond should be annulled. Venice depended on trade with aliens (such as Shylock—Jews could not be citizens in sixteenth-century Venice), and no alien would trust the Venetian courts if they took such an approach. A court that merely does "justice" can be expected to construe that protean term in a way that gives the locals a big advantage. An impersonal, objective, at times inflexible rule-bound jurisprudence is an essential protection precisely for the outsider, the pariah—a point made recently by minority legal scholars in criticism of the radicalism of critical legal studies. Shylock's positivism, like Creon's positivism, is not entirely devoid of social value.
In both of the examples I have given and others I could give, the spokesmen for rules and positivism and strict construction were men, and the spokesmen for equity and natural law were women. An interesting question is whether more than coincidence is involved. A number of feminist legal scholars, following Carol Gilligan's pathbreaking book, *In a Different Voice*, argue "yes," there is a difference between the way in which men and women perceive law and it is the difference captured by Sophocles and Shakespeare in their assignment of sex roles to their characters. Men, the argument goes, are drawn naturally to an ethics of rights and duties, both defined by rules, while women are drawn naturally to an ethics of care, in which disputes are not so much resolved as dissolved in an overriding concern for ending disputes on mutually acceptable terms. Now this picture does not fit the fanatical Antigone, unless we go further and suggest that impersonal, civic duties, the sort of thing stressed by Creon, are alien to the feminine outlook and carry no weight in comparison to family ties. For certainly Antigone puts family—her duty to her brother—far above state. But the details of the contrast do not concern me, rather the implication of this line of argument that as women come to play a larger and larger role in law the nature of legal thought itself will change, and we will see more standards, more flexibility, more equity, fewer dichotomous rules, fewer "hard" cases (in the original sense of harsh decisions), fewer well-defined rights and duties, less individualism and more altruism. Well, we shall see.

Let me switch gears and say a word about the interpretation of statutes and the Constitution, when examined from the standpoint of literary interpretation. Many literary works are severely ambiguous, creating interpretive problems of a kind that literary critics and scholars have been wrestling with for more than 2,500 years; perhaps there are helpful analogies here to the problems of legal interpretation of which we are so sharply conscious today. A number of legal scholars think so, a prominent example being Ronald Dworkin. Certainly, the radical scholars of the critical legal studies movement think so, and they have succeeded in making the word "deconstruction" a familiar sight in the law reviews.

Deconstruction is the furthest extreme of an approach to interpreting literary and philosophical texts that emphasizes the primacy of the reader over the author in the creation of meaning. Just as there are intentionalists with regard to statutory and constitutional interpretation, so there are intentionalists with regard to literary interpretation. At the opposite pole in the literary domain are those who believe that meaning is created by readers rather than authors. Deconstruction gives a peculiar twist to this "reader response" approach by denying the communicative nature of writing.

Think for a moment of how we imagine the process of communication operates. I see the tree outside my house, and a perception forms in my mind. If I want to recreate the same perception in your mind, I "encode" my perception in suitable words and utter them, and you construct your own perception from your understanding of my words. The communicative medium thus is language. The deconstructionist points out that it is an unnecessarily medium. Most words we use have multiple meanings, and when they are strung into sentences all sorts of ambiguities may be created (as well as eliminated). Suppose we just were not interested in communication, but simply in the medium, in language. Then when you heard me describe the "tree" outside my house, your mind might wander off to reflections on shoe trees, family trees, decision trees, the Tree of Knowledge of Good and Evil, the Versailles treaty, the *Threepenny Opera*, and God knows what else. Deconstruction insists that it is only a convention to value language for its communicative potential, that we can value it for anything we want and therefore if we want to we can focus on its communication-retarding characteristics: its ambiguities, buried allusions, latent puns, and so forth. Deconstructionists note disapprovingly that we tend to think of writing on the model of speech—that is, as something that brings the reader into the presence of the writer—but claim that this is merely a metaphor. The writer is normally absent (often dead) and if we reversed the sequence and thought of speech on the model of writing, we would cease thinking of either speech or writing as primarily communicative.

What I have described intrigues some and revolts others, but the most important thing about it from my

![Macbeth and Lady Macbeth, by Charles Ricketts A.R.A., from a 1923 Folio reproduction](image)
standpoint is that, unlike some other aspects of the effort to relate law and literature, it really has nothing for the lawyer or judge. It is one thing to be skeptical about the possibility of decoding an old or ambiguous or broadly worded statutory or constitutional provision; it is another to decide to treat the provision as an exercise in retarding rather than promoting communication. I think the only reasons deconstruction has obtained currency in academic discussion of law are that it sounds like "destruction," it has shock value, and it is alien to lawyers.

There are indeed wonderful interpretive puzzles in literature, however, and some of them have parallels in law, but here is one that I contend does not, though Ronald Dworkin and others would disagree. For centuries people have been worrying about whether Macbeth and Lady Macbeth, in Shakespeare's play, had children. Although Lady Macbeth at one point refers to having nursed a child, there is no indication that she and her demonic husband have (living) children. Yet when the weird sisters tell Macbeth that Banquo's descendants will rule Scotland, Macbeth is fearfully upset and decides to kill Banquo and Banquo's (only) son. If Macbeth has no children, and therefore does not expect his descendants to rule in any event, why should he be upset about Banquo's posterity? He has nothing against Banquo, who is loyal to him, except the potential rivalry among their descendants. So Macbeth must have (or be planning to have) children. But one just cannot visualize the Macbeths either as parents or as a young couple planning a family. So they must not have children.

Is there any solution to this dilemma? I think not; and although there are certainly insoluble statutory and constitutional questions, I think they are insoluble in a different way. Often we do not have enough information to interpret a provision; with the question of the Macbeth progeny we have too much information. We have equally compelling reasons to believe both that Macbeth does have children and that he does not have children. What is more, though the result seems to be an intolerable contradiction, no normal reader or viewer of the play is troubled. Only scholars parse works of literature for contradiction. A normal audience is swept up in the drama and sets aside its normal expectations of consistency. Readers of statutes and the Constitution cannot do that.

But there is at least one type of literary interpretive problem that has a direct counterpart in law, and that is the deliberate gap. One of the earliest and most famous examples is Homer's omission in the Iliad of any description of Helen of Troy's appearance. Her beauty is conveyed to us obliquely by the poet's description of the reactions of the old men of Troy who watch her walking about the city. We are never told what she looks like. It would be quite absurd to try to draw a picture of Helen from the text, just as it was absurd for Vladimir Nabokov to draw a picture of the bug that the protagonist of Kafka's story The Metamorphosis turns into, when Kafka was careful not to describe it beyond noting that it had many legs and a fat awkward body. In both cases the author had reasons for leaving a character undescibed. Similarly, the draftsmen of legislative provisions frequently make a deliberate decision not to resolve an interpretive question raised by their drafting. Maybe they cannot agree, or just do not want to take the time to redraft the bill, or fear that in closing one gap they will open additional loopholes. If the gap is deliberate, a court may be no better able to fill it by interpretation than a literary critic can describe Helen or Gregor Samsa, and then the question is whether the court shall throw up its hands or decide the case on grounds necessarily not interpretive in a helpful sense.