

## **Ethical Sentiments and the Role of Literature in the Jurisprudence Seminar**

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### **Abstract**

This article focuses on a typical law and literature jurisprudence seminar and the use of literary texts in this type of class to foster the development of “ethical sentiments” in future legal practitioners. While the majority of jurisprudence courses within a standard law curriculum tend to use political theory, philosophical, or socio-cultural approaches to the fundamental questions considered in this type of course (what is justice? what is fairness? what does ethical conduct mean for a lawyer?), this course uses literary texts to foreground basic questions relating to ethics and professional responsibility in the practice of law. Whereas a Professional Responsibility or Professional Ethics course often deal with the precise rules and regulations of a specific jurisdiction’s ethical code, the law and literature jurisprudence seminar seeks to broaden the experience of law students through juxtaposing fictional narratives (novels, short stories, plays, poetry) with and ongoing ethical questions future lawyers will undoubtedly face throughout their careers.

### **Ethical Sentiments and the Role of Literature in the Jurisprudence Seminar**

*All respect for the law is a product of the social imagination, and the social imagination is what literature directly addresses....If the law were to be completely absorbed into the internal discipline of honest men, there would be no more law and we should all be living in the Garden of Eden. We are not there, but in the meantime law still depends upon the imagination, and the fostering and cherishing of the imagination by the arts is mainly what makes [the] profession honourable, perhaps even what makes it possible.*

Northrup Frye

As a long-time lecturer in the Faculty of Law at the University of Alberta, I typically teach a yearly seminar in Jurisprudence, one of the required law school courses for LLB graduates seeking admission to the Law Society of Alberta as a Barrister & Solicitor after completing Articles of Clerkship. Jurisprudence has typically been considered by the Faculty of Law as a “paper course” requiring a written research paper rather than a final examination. And as the seminar title suggests, the jurisprudence course typically deals with those questions where law and philosophy traditionally meet: what is justice? what is fairness? what is truth? what is ethical conduct? As law students move through their training, all these larger-than-life questions, which first-year students usually give as a major reason for deciding to study law in the first place (desire to promote justice, ensure fairness, seek the truth, conduct oneself

according to the highest ethical/moral standards) have often become buried beneath a morass of knowledge required for handling the down-to-earth practicalities of everyday legal practice: rules of court, binding precedents, statutory provisions and regulations, and the like. Yet of course since it is precisely those big questions of justice and fairness that remain the bedrock of a legal system, it is important (even required) to reconsider them at the moment when law students are poised to become legal practitioners.

There is another course in the Faculty of Law called Professional Responsibility and it is in that course where law students study the rules and regulations contained in the Law Society of Alberta's *Code of Professional Conduct*. Yet the simple edict of "follow the rules" or risk disciplinary action as a professional does not go very far in terms of the larger questions taken on by students in Jurisprudence. In other universities, the two types of courses are combined (the theoretical aspects of a jurisprudence course with the applied aspects of a "professional ethics" or professional responsibility course), but here we separate them into two individual term-length courses of 12 weeks each.

While the majority of jurisprudence seminars in the Faculty of Law focus on a more traditional political theory, philosophical or socio-cultural approaches to jurisprudence, I have always taught my own seminar using only literary texts to foreground basic questions relating to "ethical sentiments" and professional responsibility in the practice of law.

In the preface to *Poetic Justice: The Literary Imagination and Public Life*, Martha Nussbaum describes her own experience teaching a course in law and literature at The University of Chicago. Describing the long discussions surrounding Richard Wright's *Native Son*, an often selected text for law and literature courses and set in Chicago, the very city in which students were studying law, she wonders what the role of a novel like Wright's might be in conveying to future judges and lawyers an understanding of a Supreme Court decision that instructs courts to treat defendants not "as members of a faceless, undifferentiated mass" but "as uniquely individual human beings" (Nussbaum,xv). She goes on to state (from the perspective of a scholar who is a comparative 'outsider' to the study of law) that although she had initially been surprised by the legal profession's interest in the relationship between philosophy and literature, she gradually "had come to see that what was being sought from such teaching was the investigation and principled defense of a humanistic and multivalued conception of public rationality that is powerfully exemplified in the common-law tradition" (xv).

As Nussbaum realizes, of course, the law and literature "movement" today is nothing new. Scholars who combine both research and teaching interests in both areas can be found all over the world. Scholarly journals are devoted to publishing the latest research in the area, and even the general reading public remains interested in the use of law and the legal system as a subject for literature, both in a traditional sense (Harper Lee's *To Kill a Mockingbird*) or in more popular texts (Scott Turow's *Presumed Innocent* ). However, when I first encountered it myself as a law student in the late 70s, it was a still rather esoteric idea, this juxtaposition of law (Truth with a capital T) and literature (Fiction with a capital F). And the story of my first encounter with the duo is one that resonates even today.

My own jurisprudence professor happened to be C. R. B. Dunlop, a lawyer and a specialist in Labour Law. However, interestingly enough, after his law degree Professor Dunlop had also done an MA in English literature, writing on the American author, Theodore Dreiser. The story goes that as a young professor in the Faculty of Law he had thought it would be an interesting idea to offer a course where literary texts could be used to study the ways in which the law, the legal system, and lawyers were depicted and through such a course make students more aware of “larger issues” that they would inevitably encounter in the practice of law. A junior professor at the time, he approached the Dean of Law about proposing such a course to Law Faculty Council, which, after consideration the Dean thought not likely to be successful. However, since the Dean himself thought the idea of the course was first-rate, he did give permission for Professor Dunlop to use his “Jurisprudence” section as a kind of pilot, using “law and literature” as a kind of subtitle. Of course the course was extremely popular, and the rest, as they say, is history. When I arrived at the Faculty of law, having already finished doctoral studies in French literature and beginning the study of law as a second career, I opted for the “law and literature” jurisprudence section unhesitatingly. I believe I wrote my final paper on Albert Camus’s *La Chute (The Fall)* and after I received my LLM several years later was delighted to team teach Jurisprudence: Law and Literature with Professor Dunlop for a good many years before his retirement.

Indeed one of the clearest basic expositions of an interdisciplinary course in law and literature remains Professor Dunlop’s 1992 essay published by the Cardozo School of Law in *Cardozo Studies in Law and Literature*, itself one of the earliest academic journals devoted to what is today certainly considered a sub-speciality of legal studies. The journal continues to be published today by the University of California Press under the title *Law and Literature*.

In his essay Dunlop provides a useful distinction between “law *in* literature” and “law *as* literature”, defining the first as “the study of representations of the legal order in fiction usually novels and plays” and the second as a study where the focus is on the law, not literature: “law as literature draws insights from literary criticism and theory to assist in the reading and interpretation of legal texts, particularly judicial decisions” (Dunlop, 63).

Dunlop asks two major questions relating to law and literature, both of which still resonate today, almost two decades later. The first question is “whether literature can ever be an appropriate field of study for law professors and a legitimate course for inclusion in a general first degree in law” (Dunlop, 64) and the second is whether the field of law and literature “is held together by an underlying theory of law and legal studies” (Dunlop, 64).

His answer to the first question, after delineating some problems with adding another non-doctrinal course to an already extensive professional training curriculum, Dunlop does come down in favour of a law and literature course as part of the law curriculum, but remains somewhat non-committal in terms of literature’s efficacy in teaching “legal ethics”. As he says: “Whether or not literature teaches ethics in any sense is a hotly debated question in 20<sup>th</sup> century literary criticism. (...) My position is that fiction often raises and examines, usually without resolving, ethical and political issues about the legal order. Literature can suggest the

complexity of an ethical question. It can conjure a variety of possible solutions. The reader can explore the problem through the eyes of various characters living through a concrete situation, and her sensitivity and understanding will be enriched as a result” (Dunlop, 71).

Using Dickens’s *Bleak House*, *Oliver Twist*, *Hard Times*; Orwell’s *Animal Farm*; Anthony Burgess’s *1985*; the *Oresteia* of Aeschylus; Camus’s *The Fall*; Shakespeare’s *Merchant of Venice* and *Measure for Measure*; Melville’s *Billy Budd*; Kafka’s literary parables; Brecht’s *The Caucasian Chalk Circle*; Balzac’s *Ursule Mirouet*, and Dreiser’s *An American Tragedy* to illustrate the ways in which literary texts can successfully increase awareness of political and cultural differences in the ways in which the legal order is understood, he argues successfully that the inclusion of such a course does at least in some small way make students aware of “ethical sentiments.”

Although Dunlop does answer that first query in the affirmative, he remains a fairly traditional upholder of the study of doctrinal law as the principal object of professional legal education as well as a supporter of doctrinal research “in” law. The space occupied by various kinds of “law and...” courses within the curriculum should never overwhelm or displace what some would call “black letter law.” However, he does conclude that “[i]f law curricula should include research about law, a useful and exciting candidate is a law in literature course. Like other interdisciplinary courses, literature studies raise important and interesting questions unlikely to be considered in narrowly doctrinal courses. (...) [Fiction] challenges assumptions about rationality and the rule of law underlying much of substantive law teaching, and it emphasizes, narrative, myth and ritual as neglected but important aspects of the legal process” (Dunlop,77).

Dunlop’s second question, whether there is within the field of law and literature a underlying theory of law and legal studies, is answered with less clarity, although it is only fair to mention that in 2010 his answer would most probably be a different one, as I think it safe to argue that the law and literature area has managed to handle its various interdisciplinary complexities with much more flexibility and with much greater appreciation of what the various contributing “disciplines” (philosophy, literature, education, sociology, psychology, political science) can bring to the table. With the enormous growth of Internet capacities for doing interdisciplinary and cross-disciplinary work over the course of the past two decades, we have also seen the possibilities for researchers working in one or another of the contributing disciplines to law and literature to discover the work of others that echoes or responds to their own. Interdisciplinary studies have matured in step with the enhancement of technological research tools.

In the concluding section of his article, Dunlop addresses what he calls three “pitfalls” in literature studies in the jurisprudence seminar: (1) the overuse of the Great Books model; (2) the vice of Procrusteanism; and (3) the passion for theory (Dunlop, 92-97). Although the Great Books model is still often used in many law and literature courses offered in today, the difficulty of properly contextualizing them for current law students (who have not necessarily studied the literature and/or history of Camus’s France or Algeria, Kafka’s Germany, or Shakespeare’s

England) remains. The dangers of generalizations based on stereotypical cultural “readings” may be less helpful in developing any kind of “ethical sentiment” in law students than a straightforward philosophical approach to questions of legal ethics. Yet whereas a Great Books approach may lead to the problem of decontextualization (a risk that instructors must recognize in planning a reading list), the “vice of Procrusteanism” leads to a different syllabus dilemma, what Dunlop refers to as “a regrettable desire to cram literary works into a theoretical or political framework, thus cutting down the complexity and richness of the works themselves (Dunlop, 93). Both Richard Weisberg and Richard Posner, long-time law and literature author/commentators, come in for criticism here in that they “advance elaborate and controversial historical-cultural theories needing more extensive defence than the authors give” (Dunlop, 94) and which for a literary scholar leaves much of the value of the literary text unexplored. The third pitfall identified by Dunlop, which he calls “the passion for theory”, can be summed up in his statement that “what Law and Literature studies needs now is not more theory, but more detailed, descriptive, contextual research into the background of specific works of literature, and more close reading of the literature itself” (Dunlop, 96).

Twenty years after the publication of this article, it would appear that Law and Literature studies have probably done exactly that. Even a cursory glance at Christine Corcos’s massive two-volume *International Guide to Law and Literature Studies*, published a decade ago, is sufficient to convince today’s legal educator that along with a continuing “passion for theory” there has been an explosion of interest and scholarly publication dealing with both aspects of law and literature—law in literature and (although to a somewhat lesser extent) law as literature. Corcos has organized her bibliographical reference work (almost 1300 pages in length) into sections dealing with the topic generally, by historical period, as well as by specific countries, languages, and literatures. She includes sections dealing with law in mystery and detective fiction, law in film, law in the arts, and then devotes over 1000 pages to itemizing works relating to specific authors, works, subjects, and characters ranging from Peter Abelard, abortion, Agamemnon, and Isabel Allende to unmarried women, François Villon, James Boyd White, and Arnold Zweig. Elizabeth Villiers Gemmette’s 1998 annotated bibliography, *Law in Literature*, also remains a wonderfully useful resource for those embarking on a quest to sensitize law students to professional ethics through the study of literary texts and through the study of narrative.

To return now to the perhaps more prosaic terms of this paper, how does my particular law and literature jurisprudence seminar actually work? Since I am somewhat less traditional in my approach than my own instructor, Professor Dunlop, I have become perhaps more enthusiastic than he about the place such a course merits in the law school curriculum. Indeed after observing succeeding groups of seminar students over the past decade, my conclusion is that a law course focused on literature is even more important in the 21<sup>st</sup> century than it may have been when Professor Dunlop began teaching his first law and literature course over forty years ago. Students now enter law school from a tremendously varied background, with first undergraduate degrees in everything from biology or engineering to art history or music

performance. Of course there are always students who did an undergraduate degree in a foreign language or in English and who take the law and literature option because in many ways it feels a comfortable fit for them. But other students have never really had much to do with literature at all. Yet it continues to surprise me that they become so quickly engaged, even if naively, with the process of narrative interpretation. Perhaps the fact that they have been so focused on the interpretation of statutes and cases and reading very lengthy opinions by judges from various jurisdictions up to this point in their legal education allows the problems involved in dealing with the ethical concerns observable in Dickens's *Bleak House* to present a new kind of challenge to their interpretive skills. Students' familiarity with popular literature's depictions of the legal system, with film and television versions of the ethical dilemmas lawyers (both "real" and "fictional") face have also added to the energy and enthusiasm found in the seminar sessions.

Although the Great Books syndrome is, of course, still with us to a degree (Shakespeare, Dickens, and Kafka regularly make their appearance on the reading lists), the jurisprudence seminar here has added many more popular (and contemporary) titles to the pool from which annual course outlines draw—*The Bean Trees* and *Pigs in Heaven* by Barbara Kingsolver; *To Kill a Mockingbird* by Harper Lee; *Alias Grace*, *The Handmaid's Tale*, and *The Year of the Flood* by Margaret Atwood; *The Reader* by Bernhard Schlink, and as of 2011 Maurice Sendak's *Where the Wild Things Are*. Perhaps the current problem is not so much a Great Books pitfall but rather the abundance of appropriate texts from which to choose, given the limited time the seminar has to deal with the syllabus (just twelve weekly meetings).

Students who sign up for the law and literature jurisprudence seminar here are advised that there will be a great deal of reading for this course (as well as outside research); consequently many students do much of their reading over the summer (only to realize that once term starts a re-reading often becomes necessary as well!). The seminar group meets weekly for three hours and each student presents on a specific text and on a chosen topic for that week, usually aided by one or two scholarly articles relating to the subject at hand. In this way, discussion is focused not only on the text itself but on one or two critical approaches to it that link an ethical question to a narrative interpretation, both of which are linked to a legal issue or question (ethical conduct of a lawyer protagonist, procedural justice or lack thereof, etc).

Two commonly and heatedly debated points that come up perennially in discussions of Shakespeare's *Merchant of Venice* have to do with the character of Shylock: is he the epitome of a Shakespearean tragic figure and thus the victim of an inappropriate application of concepts of justice and fairness or is he simply a master manipulator of the law in order to attain his own objectives? In a similar fashion, discussions about Grace Marks, the main character in Margaret Atwood's *Alias Grace*, always focus squarely on the nebulous issue of "truth": has Grace been telling the truth and thus been wrongfully convicted or has she completely fabricated a defense in order to avoid execution?

Whether we are reading Richard Wright's *Native Son*, Mark Twain's *Pudd'nhead Wilson*, or discussing the BBC film version of *Bleak House* or Kate Winslett's performance in *The Reader*, the seminar does remain focused on ethical issues that students have often read

about or discussed through “real cases” in their other doctrinal courses (torts, immigration law, family law, property law). It continues to be a critical moment when someone brings up the “best interests of the child” concept in relation to the cross-cultural adoption dilemma presented in Kingsolver’s novel, *Pigs in Heaven*, relating the fictional narrative to a case recently studied in Family Law. Even 19<sup>th</sup> century texts like Balzac’s novella *Colonel Chabert* allow students to juxtapose political and legal issues then and now, to discuss them fairly intelligently, and often to use examples from the text in making sense out of real problems faced by real clients they see at Student Legal Services. The examples of the interrelatedness of a law and literature focus to jurisprudence are numerous—as any conference on law and literature will demonstrate when one observes participants busily jotting down new literary texts or new case citations to bring back to their own institutions and possibly include in next year’s reading list.

Interdisciplinary studies have come a very long way since Professor Dunlop’s 1992 overview of law and literature courses in law schools. Indeed a better taxonomy is probably one provided by Paul Heald in 1998, which is more specific in its description of the variety of ways to discuss law and literature and which is still current today. Heald delineates four basic approaches to the field: (1) law in literature (in the same terms as Dunlop); (2) law and literature as language (subdividing that approach into (a) legal rhetoricians (James Boyd White, Richard Weisberg and Stanley Fish, for example), (b) semioticians (like Peter Goodrich or scholars involved in Critical Legal Studies), (c) narrative scholars [further subdivided into storytellers like Norval Morris or Derrick Bell and defenders of stories like Steven Winter or Milner Ball], and (d) aestheticians (Lief Carter); (3) law as literary movement (citing Robert Ferguson, John Bender, Perry Miller, and John H. Randall as major contributors); and (4) law and literature as ethical discourse (with Martha Nussbaum or David Luban as representative examples) (Heald, 6-17). If we look again at the Corcos or Gemmette reference works cited above, we note that this more complex taxonomy is beginning to make law and literature every bit as significant as other “law and...” areas—law and economics or law and public health, for example.

To return to the workings of the jurisprudence seminar, it should be mentioned that besides the in-class debates, the reading of newly discovered fictional texts, and the presentation of scholarly research, students are also required to produce a 25-30 page research paper, one that successfully demonstrates their ability to (a) interpret a literary text or texts and at the same time (b) describe and analyze a legal problem illustrated within that text or texts. Although very few of these papers turn out to be strikingly original, the ones that are of high quality are truly remarkable examples of how literature can indeed encourage an awareness of ethical sentiments within what is essentially a professional training program.

Justice, fairness, ethical conduct, integrity, conflict resolution—all these issues can be successfully foregrounded in a law and literature course. Indeed I would argue that literature allows its interpreter much freer play of the imagination than many other types of discourse (including legal discourse). Law “in” literature rather than law “as” literature is perhaps a less painful way to juxtapose law and literature in the classroom, but surprisingly as law students move through the readings and seminar discussions, discussions of law “as” literature begins to

creep into the sessions, sometimes quite without seminar participants realizing at the outset where the discussion has led them.

In conclusion I offer two examples of what might be called “aha moments” in my own law and literature jurisprudence seminar. The first example paraphrases a student’s introduction to a seminar presentation on Bernhard Schlink’s *The Reader* several years ago: “I was re-reading this book for my presentation and thinking that it wasn’t all that relevant for Canadians today since it was all about World War II and Germans and maybe we don’t have much of an opinion about whether they feel collective guilt as Germans. But then I started comparing some of the things my family has been through with the Canadian government’s treatment of First Nations people—since I’m Native myself—and then I really got so many ideas about how hard it really is to decide where ‘fairness’ or ‘justice’ is found—and who really decides and when.” The second example is a comment written on the bottom of a student’s final paper on *To Kill a Mockingbird*: “I thought Atticus Finch was the ideal lawyer when I first read this novel in high school—and then I saw the movie with Gregory Peck and was convinced I wanted to be a lawyer just like him. But this time, reading and re-reading the book and doing my research for this paper, it struck me that Atticus isn’t so straightforward in his dealings with ‘justice’ or ‘fairness’ after all. I can’t say I wouldn’t do the same thing Atticus did in protecting his son, but I guess I just held him to a higher standard and maybe that’s unrealistic.”

In her editor’s introduction to a Symposium on law and literature published in the *Fordham Law Review*, Carrie Menkel-Meadow eloquently echoes my own thoughts about the role of literature in the jurisprudence seminar: “Particular stories should not allow us to skip over general moral principles, while concern for achieving systemic or generalized ‘justice’ should also not blind us to particularized mercy and other human values. (...) There are issues of motivations, intentions, deliberations and choices. There are issues of rule drafting and organizational structure. Most profoundly, there are deep jurisprudential issues of system design (is the adversary system still the best we can have?) and whether our legal system produces, in the end, more justice than less. For the storytellers, truth seekers and ethicist among us these are good times indeed to be teaching legal ethics, for as our methods and stories proliferate we have more interesting ways to teach that which it is important to learn—how we may lead good lives in this legal profession we have chosen” (Menkel-Meadow, 816).

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