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Abstract
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The Happy Couple: Law and Literature, is a collection of thirty two papers (plus a quiz on Dickens), most of which were delivered at the second annual convention of the Australian Law and Literature Association, held at Monash University in 1991. In their Preface to the collection, the editors note that this is the first Australian collection of work in law and literature, and explain that it is, in their view, a representative sampling ofAustralian work in the field (xv). The book as a whole attests not only to the range of interests and subject matter, but also of disciplinary expertise and style covered by the Australian Law and Literature movement; as the editors suggest in their preface, there is truly something here for everyone (xvi).

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THE HAPPY COUPLE: LAW AND LITERATURE

Robin West

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The Happy Couple: Law and Literature, is a collection of thirty two papers (plus a quiz on Dickens), most of which were delivered at the second annual convention of the Australian Law and Literature Association, held at Monash University in 1991. In their Preface to the collection, the editors note that this is the first Australian collection of work in law and literature, and explain that it is, in their view, a representative sampling of Australian work in the field (xv). The book as a whole attests not only to the range of interests and subject matter, but also of disciplinary expertise and style covered by the Australian Law and Literature movement; as the editors suggest in their preface, there is truly something here for everyone (xvi).

As a collection of individual, scholarly performances, this book could not be better. These short, lively essays educate, delight and surprise in a thoroughly engaging way. Although I cannot possibly do justice to the depth and breadth of the collection in this review, let me mention the central points of just a few of the essays to give a sense of the scope of issues and types of arguments undertaken. In *The Poetics of Infanticide,* Simon Petch argues that particular texts of Wordsworth and Scott that deal in some way with infanticide reveal an anxiety about, and in some instances, a covert condemnation of institutions such as marriage that legitimise and cabin female sexuality (52-61). In *Dickens and the Law* (one of several essays on Dickens), KJA Asche explores the active roles Dickens undertook as propagandist, entertainer and "purveyor of the colour and interest of legal situations," all in an effort to achieve meaningful humanistic legal reform (81-93). In *Women, Law and Literature: Representations of Women and the Law in American and Australian Fiction,* Elaine Barry explores the reflections of women's changing legal and social status in nineteenth century literature, focusing in particular on that era's "sentimental novels" by and about women (99-113). In a tremendously interesting chapter, entitled 'Literature of the Holocaust: The Testimonial of the Witness', that I will

discuss in slightly more detail in a moment. Sidra Kranz Moshinsky argues that the writings of Jews during the Holocaust, secreted in various hiding places in the ghettos and concentration camps of Eastern Europe, should be understood *both* as literary texts, and, importantly, as peculiarly *legal* texts as well: the writings were often intended to be read, and should be read, as distinctively legal documents (157-166).

In *The Ethics of Meaning*, James Boyd White (apparently an honorary Australian for purposes of the conference and collection), closely reads two political texts, each of which attempt to justify war — Agamemnon's ironic speech to his tired, demoralised, and very likely disgusted Greek warriors, as portrayed in the Iliad, and Abraham Lincoln's Second Inaugural Address, delivered in 1865, and after "three years of unimaginably hideous civil war" — and then goes on to argue that inherent in the work of writing and reading such political texts is a distinctively ethical performance the point of which is to bring the author and audience together in some form of community (269-285).

In *Re-Writing Law as Postmodern Fiction: The Poetics of Child Abuse*, Terry Threadgold deconstructs a set of documents from a particular case in which abuse and neglect were charged against a parent; traces the way in which the abuse itself became increasingly invisible as the case turned to the due process rights of the parent to be heard, rather than the violence visited upon the child. Threadgold attributes that eventual invisibility to a combination of two forces, one destabilising and the other lethal: the postmodern de-centering of 'Truth' on the one hand, and patriarchal attempts to maintain control over both wayward children and the discourse that surrounds them on the other (322-341). Each of these essays, and numerous others, push us to a greater understanding and appreciation of the many possible connections between law and literature, whether it be through close readings of Dickens or Hardy, through examinations of popular culture, or through demonstrations of the possibilities of political critique opened up by postmodern rewritings of conventional legal texts.

Entirely apart from the quality of the individual performances, however, the publication of a volume such as this one prompts a "coming of age" question for the law and literature movement: Is there, evidenced by these essays, a shared thesis, a common theme, a set of common disciplinary constraints, or even a common point of departure, for those engaged in law-literature interdisciplinary work, either in Australia or elsewhere? Has the Law and Literature movement, either in the United States or in Australia, revealed its own raison d'etre? Has it put forward an ideal of legal practice, a jurisprudential account of the nature of law, a conception of justice, or any other unifying claim, which might guide future work in the field? The editors' comments in their preface suggest some ambivalence about the

desirability of identifying some such common "agenda." On the one hand, following suggestions made by James Boyd White several years ago,1 they applaud the diversity and eclecticism of the movement's participants (xvi). But on the other hand, they begin their preface with the clear suggestion, and perhaps the hope, that there is indeed such a common theme. In the opening sentences of that preface, the editors describe an exchange between "Counsellor Pleydell," from Sir Walter Scott's *Guy Mannering,* and his client, the novel's hero. When the hero expresses surprise that his lawyer's bookshelves contain books of literature rather than law reports, the editors explain, Pleydell responds:

> These [books of classical literature] are the tools of my trade. A lawyer without history or literature is a mechanic, a mere working Mason: if he possesses some knowledge of these, he may venture to call himself an architect." (xv)

The aphorism does indeed supply a *possible* understanding of (and justification for) law-literature studies. Pleydell's quip quite directly suggests the contours of an idealized form of "good" lawyering, where "good" is understood in both the craft and moral sense of the word, and to which a mastery of literature and the skills required to read it critically are both obviously essential. The "literary lawyer," as we may call this idealized Pleydellian type, turns to great literature (rather than conventional legal texts) in a quasi-authoritative way to actually resolve, or at least elucidate, legal issues. The "books of classical literature" on Counsellor Pleydell's shelf, such a lawyer might believe, should be understood and used as the "secondary authority" which "fills in the interstitial gaps" in the common law, provides the wisdom necessary to guide interpretation of otherwise open legal texts, and more generally can be called upon to enrich and deepen the sound "situation-sense" the good lawyer must possess in order to assist clients. Pleydell and his literary sensibility might, then, constitute an ideal toward which lawyers ought aspire. If so then "law and literature" scholars do indeed have an essential mission: to convey to lawyers and law students a common culture, and a set of cultural and critical skills, which can be and should be used in such a way as to enrich, ennoble, and, more simply, complete legal argument and legal education.

However, while a good deal of American Law and Literature" scholarship — such as, notably, the scholarship of both James Boyd White2 and Martha Nussbaum3 — might be fairly characterized as originating in this conviction, and although the editors quote and refer to Pleydell's remarks at several points in their preface (xv/ xvi, xvii), it nevertheless seems fair to say that virtually none of the essays collected in this volume is moved by the faith in literature, and its centrality to good lawyering, to which Counselor Pleydell gives voice. Whatever may be the driving conviction of

other law and literature scholars, none of the authors in this text seek to use literature so as to convert the mason into the architect; to transform the craft lawyer into the artist-lawyer; to elevate the legal argument to the status of a literary text. None uses literature, either narrowly or broadly understood, so as to elucidate a particular legal issue, or complete an otherwise open-textured legal argument. If this volume is representative, the construction, elaboration, and defense of the "literary lawyer" alluded to by Counselor Pleydell and described above, does not seem to be the driving motivation, the final cause, or even a peripheral interest, of the Australian Law and Literature movement.

If not a common quest for an idealised form of lawyering, is there anything at all that unifies this "movement," or these papers, or these authors? I think the answer is clearly "no" – there is no discernible thesis, or shared agenda that even comes close, for example, to the centrality of both normative and descriptive claims regarding efficiency to the Law and Economics movement. On the other hand, it does seem to me that there is a "family" of common concerns that drive some of these essays, at least some of which are also reflected in American law and literature studies as well. I want to mention two, both of which have little to do with the "literary lawyer" of Pleydell's remarks, but both of which also, I think, not only partly account for the turn within legal studies toward literature, but justify it as well.

First, it is surely significant that such a large number of the essays in this volume deal either directly or indirectly with the difficulties of "speaking," in any form of discourse — legal, literary, or otherwise — about unspeakable violence. Thus, James Boyd White confronts the possibility that one cannot ethically speak of warfare in any manner other than to condemn it (277); Sidra Manchinsky speaks directly to the well-known difficulties of discussing the indescribable horrors of the holocaust (158); several writers deal in different ways with the too-often unmentioned brutalities visited upon children through the exploitation of their labour and their sexuality (Peter Boss, 41-51; Simon Petch, 52-61; KJA Asche, 81-93; Terry Threadgold, 322-341). All of these writers share with some of the major architects of the American Law and Literature movement an impulse to confront the very general problem of "Violence and the Word," to use Cover's provocative phrase,4 or to interrogate the "Failure of the Word," to borrow from Richard Weisberg's seminal study,5 or in a more hopeful vein, to look at the redemptive possibilities posed by "the Word and the Law," to invoke a recent law/literature study by Milner Ball. 6

This focus on extreme violence and the potency or impotency of the Word as a vehicle for its description or containment, if it is characteristic of law and literature studies, is surely one noteworthy point of contrast with the

Law and Economics movement, which, perhaps because of its preoccupation with "free" markets, rarely centralises large-scale violence as its primary subject matter.

We might very tentatively conclude from this highly unscientific sampling that at least a good many Law and Literature practitioners, in Australia as well as in the United States, are looking to the communitarian promises of words and discourses (and the more multi-disciplinary the better), for a healing of the wounds we inflict on ourselves and each other in our most non-discursive and anti-communitarian moments. Some of us find in those words and discourses "acts of hope," to quote from the title of James Boyd White's latest book,7 and others find acts of legitimation, of hypocrisy, of resentment, of mendacity. But it is surely significant that so many Law and Literature scholars are drawn to search for connections and disconnections between acts of "unspeakable" violence, on the one hand, and words, discourses, and "the word," on the other, whatever the quality of those connection we think we have uncovered. The essays in this volume — some intentionally and some perhaps not — further that quest.

The second "common concern" of these essays is methodological. Like a good bit of Law and Literature scholarship, many of the essays in this volume question, either directly or indirectly, the boundaries between Law and Literature, or between legal discourse on the one hand and literary discourse on the other, either by suggesting that there are no necessary and sufficient conditions for either category, and hence no defensible "boundary" at all, or alternatively, by questioning the traditional placement of a text within one camp or the other. Thus, a number of American law and literature studies aim to show, in some way, that "legal texts" share some set of features with literary texts: that cases can be read as stories; that communities; and that legal texts, like literary texts, constitutional arguments contain more fiction than history; that jurisprudence can be read aesthetically; that legal arguments, like literary texts, create ethical as well as aesthetic communities; and that legal texts, like literary texts, can be "deconstructed" in a way that reveals otherwise hidden political structures.

A number of the essays in this volume share that general goal. To note just two examples, in *Rewriting Law as Postmodern Fiction*, Terry Threadgold argues that legal texts can be re-written and read in just such a way (322-341), and in *The Odd Couple: Statutes and Literature,* Jeffrey Barnes argues that statutes do at least, on occasion, possess what are traditionally regarded as literary virtues (296-309). To whatever degree the Law and Literature movement is committed to illuminating the literary dimensions of legal discourse, this collection significantly furthers that project.

The striking, and to my mind, unique contribution of this collection,

however (to our general and evolving understanding of the raison d'etre of law and literature studies), lies in the number and quality of essays which in effect reverse this traditional concern, and ask not whether law possesses literary attributes, but rather, whether, when, and why literary texts, or texts commonly understood as literary, possess legal (or political, or ethical) dimensions which should be understood as such. These scholars are concerned with what might be called the "legal-performative" qualities of texts which are typically regarded as only propositional, descriptive, informative, or fictive. Thus, in *Dickens and the Law*, Asche examines the effect of Dickens' fiction on the law, rather than the more common in Dickens' scholarship, to wit, the use by Dickens, in his fiction, of law and legal characters (81-93).

In *Comina to Terms with Villainy*, Joe Grixti looks at the stabilising, legitimating impact of fictionalised treatments of serial killers, which, by falsely and perversely suggesting the normalcy and universality of truly exceptional brutality, pushes audiences to accept a repressive state as the price to pay for keeping the beast at bay (187-203).

In a very different vein, in *The Logic of Metonymy,* Roseanne Kennedy looks at the ways in which the rhetorical style of Catherine MacKinnon has, in effect, "policed" feminism, centralising some and marginalising other accounts of women's own sexual experiences (342-359). All of these authors ask, in various ways, what the texts they are studying are doing, rather than what they are saying, arguing, proposing, describing or claiming. And all of these authors, in different ways, have identified attributes of these literary or argumentative texts which are also characteristic of traditionally understood legal or political texts – MacKinnon's metonymic logic polices: the polices: the fictionalised serial killer legitimatises; Dickens' texts reform and humanise. If this collection is representative, then it is fair to expect of the law and literature movement that it will broaden our understanding not only of law, but of the literary works which on occasion at least perform law-like functions, and in often surprising places.

Let me close by looking in more detail at one essay which, like those described above, also looks to the legal-performative features of literary texts, but which (unlike those above), does so quite explicitly, and that is Sidra Kranz Moshinsky's short and moving essay, *Literature of the Holocaust* (157-166). Through a close reading of texts authored by Holocaust victims, Moshinsky argues that the authors of these texts intended that they be received as, among much else, specifically legal documents (162-165). Her claim, in brief, is that the authors of these texts meant them to serve as evidence, or testimony, in some future of some sort, in which their captors, tormenters and murderers would be held accountable under the Rule of Law. Moshinsky quotes from several texts to further her argument,

including the following, taken from a wall carving in the synagogue of Kovel on September 15, 1942:

> A chill passes through us ... here come our murderers, dressed up ... their filthy hands adorned in white gloves, they herd us two by two ... tender-hearted brothers and sisters ... O how hard it is to part from this beautiful world forever ... let no one who remains alive ever forget – Jewish boys and girls from our Jewish street, innocent of any wrong-doing. Wreak vengeance on our murderers. (quoted at 163).

Her second example comes from an anonymous source, "written during the deportations from the Warsaw ghetto," and unearthed at the end of the war:

> We want to believe that there is some sense in still being alive among the shambles, among human hyenas and jackals who live by stripping the dead. These documents and notes are a remnant resembling a clue in a detective story. I remember from childhood such a novel by Conan Doyle, in which the dying victim writes with a faint hand one word on the wall containing the proof of the criminal's guilt. That word, scrawled by the dying man, influenced my imagination in the past. The records left by us, whose survival is so uncertain, remind me of that stereotype image that once so moved me. We are noting the evidence of the crime. (quoted at 163)

From these fragments, and others like them, Moshinsky concludes that Holocaust writing "moves in two directions" and belongs to "both the literature scholar and the lawyer":

Although this particular section does not give facts, such as names, dates and places, these details can be found in other parts of this text and they give the whole a documentary value. Lines such as "dying victim," "proof of the criminal's guilt," and "evidence of the crime" reinforce the evidentiary aspect of the text. On the other hand, one could read and analyse this passage in much the same way as one would any piece of literature. One could note the rhetorical devices, the inter-textual references, the narratorial voice ... To approach writing of the Holocaust looking either for literary or evidential information but not for both is, in my opinion, misguided. (163)

What is it about these texts which renders them distinctively legal? It is important to note what Moshinsky is *not* arguing, in order to better appreciate what she is: she is not making the claim that these texts are legal because all texts are in some way performative, or because the line between the legal and the literary is inevitably a blurred one, or because both legal and

literary texts are political, and hence share that common denominator. Rather, she specifically argues that legal and literary texts are indeed distinct genres, and that because they are distinct, when one discovers a text which is in some way both, one has discovered something quite remarkable indeed (163-64). The discovery of a pointedly legal text outside of the predictable legal institutions and structures in which such texts are typically found, in other words, prompts us to ask what it is that renders the text legal, since it clearly is not legal by virtue of being produced during a legal proceeding, or originating in a legal institution. The discovery of a text which can sensibly be called legal, but which is outside of familiar legal-institutional contexts, in brief, prompts a jurisprudential inquiry into the nature of law, and it does so in a quite profound and distinctive way.

What is it, then, that renders these Holocaust texts legal, if Moshinsky is right to argue that indeed they are? Moshinsky's own answer points to their evidentiary, testimonial, character: they are, she argues, "dying declarations," by which she means a well known and highly trusted type of evidence in common law courts (162). As Moshinsky explains by quoting an eighteenth century case, "dying declarations" are declarations which otherwise would be inadmissible hearsay, but when made by homicide victims, "in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth," they are admitted as evidence for the truth of whatever it is they assert regarding the guilt or innocence of the accused (162). The writings of the Holocaust victims, Moshinsky argues, like the declarations of the homicide victim, are made under precisely these circumstances. They ought, then, to be read and received as legal, evidentiary texts, for whatever their value or meaning as literature, they were also intended to be read as such. This answer, though, is incomplete. To return to the definition Moshinsky supplies, we might ask what the Court in question fails to ask, and that is what those "powerful considerations" are, upon either the homicide victim or the Holocaust writer, which render their dying declarations trustworthy "testimony"? Although Moshinsky doesn't fully answer the question, what she does argue clearly suggests one, and it is a suggestion that might bring us to the heart of at least a good deal of Law and Literature studies. To understand Holocaust literature, Moshinsky argues, one must first understand the pragmatic view of language held by its authors, and the circumstances within which that view arose. Holocaust victims who were moved to write of their experiences, almost by necessity, viewed language and words as reliable, sturdy vehicles of communication, and this in spite of the lethal abuse of language which victimised them, and of which they were painfully aware. Their conception of language was, in a word, hopeful.

Moshinsky quotes one author who makes the point directly:

> The desire to write is as strong as the repugnance of words. We hate them, because they too often served as a cover for emptiness or meanness. We despise them, for they are pale in comparison to the emotions tormenting us. And yet, in the past the word meant human dignity and was man's best possession – an instrument of communication between people. (anonymous text written in Warsaw in 1942, quoted at 159).

I want to suggest that one answer to the question posed above — what are the "considerations" which render "dying declarations," both of the homicide victim and the genocide victim, admissible as legal evidence — is that the "consideration" which renders a dying declaration peculiarly trustworthy, hence "testimonial", and hence a peculiarly "legal" text, derives from a sort of "testimonial hope" imputed to the dying victim. One might speak while dying for any number of reasons, but a homicide victim, by contrast, testifies when dying as to the identity of his murderer in the hope that the homicidal act which has been witnessed and suffered, will some day be condemned, and will be condemned in a lawful and civilised manner. The hope of the victim in giving the declaration is the hope that the killer will be apprehended, tried and convicted.

When given by the victim of genocide, such a declaration does indeed rest on the hope that his language will communicate, as Moshinsky explains. But the declaration clearly rests on not only a hope for language, but also a hope for law. It is the hope that civilization will right itself; that it will rediscover its moral compass. It is the hope that justice will prevail, or at least become at some future time more than just an ever-present possibility.

If that is right, then Moshinsky's study suggests a promising analysis of the legality of the Holocaust texts she studies. These texts do indeed seem evidentiary and testimonial, as Moshinsky argues. Furthermore, they seem paradigmatically so: if any text outside of traditional legal institutions is peculiarly legal, these are, and if that's right, then these texts might tell us something jurisprudentially important about the nature of law itself. If these texts are legal, despite the lack of legal trappings, and if their heart lies in the expression of hope to which they give rise and on which they must rest, then the essence of the "legal voice", or the "legal text", must at least in part simply be the hope of future judgment, or the hope of future justice. If this hope — the hope for Law, the hope of legalism, the hope for eventual justice — survived in the circumstances surrounding the writing of these texts, then the hope must truly run deep. One testimonial inference — perhaps inadvertent, perhaps not — which we might be justified in drawing from these searing texts, is that law itself is an act of hope,8 which by necessity

rests on a faith in the will of the human community to some day re-create it.

NOTES

[1] James Boyd White (1988), *Law and Literature: No Manifesto, 39* Mercer L . Rev. *73 9*

[2] James Boyd White (1984), *When Words Lose Their Meaning: Constitutions and Reconstruction of Language, Character, and Community*; *Justice as Translation; An Essay in Cultural and Legal Criticism* (1990); *Hercules' Bow: Essays on the Rhetoric And Poetics Of Law* (1985).

[3] Martha Nussbaum (1994), *Skepticism About Practical Reason in Literature and the Law,* 107 Harv. L. Rev. 714; *Equity and Mercy* 22 Philosophy and Public Affairs 83 (1993); *The Use and Abuse of Philosophy in Legal Education,* 107 Stan L. Rev. 714 (1994).

[4] Robert Cover (1986), *Violence and the Word,* 95 YALE L. J. 1601.

[5] Richard Weisberg (1984), *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction.*

[6] Milner Ball (1993), *The Word and the Law.*

7 James Boyd White (1994), *Acts of Hope: Creating Authority In Literature, Law and Politics.*

[8] With thanks and credit, of course, to James Boyd White, and the book and book's title from which this phrase has been lifted. James Boyd White (1994), Acts of Hope: Creating Authorityin Literature, Law and Politics.