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Bodies of Literature, Bodies of Law

BODIES OF LITERATURE, BODIES OF LAW*

BY SIMON FODDEN**

Those That Tremble As If They Were Mad

In a recent novel by Fay Weldon — *Letters to Alice: on first reading Jane Austen*¹ — she explains literature to her niece, a freshman in college, by an extended metaphor in which writers are builders of the City of Invention. I thought of lawyers, as I often do, and how it used to be said in more sanguine times that lawyers are social engineers.² Builders and engineers. Siblings, surely. But what a difference and how different are their cities.

I live with a foot in each city.³ It might be more accurate to say that I live here and drive to work there, daily commuting sentences. I feel a great difference between these cities — the City of Invention and the City of ... what shall we call it? the City of

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¹ London: Michael Joseph, 1984.

² Although this view was current perhaps twenty or so years ago, it is at least as old as Roscoe Pound's, *Interpretations of Legal History*, which was published in 1923. See the reprinted edition: (Gloucester, Mass.: Peter Smith, 1967) at 152: "Let us think of jurisprudence for a moment as a science of social engineering...."

³ The world is so wide and I am so unlike a colossus that it can be a painful stance. Moreover, Coke's description comes to mind of "the law's grave study," and gives me at times at least one cold foot.

Convention, perhaps — and at the same time have a sneaking sense that they are the same place, or at least twin cities, the Minneapolis and St. Paul of some state.

Weldon sites her city on the road between Heaven and Hell. Some prospects! It is harder to say where the City of Convention would be found, but it probably would exist where, after all, most people convene; and that, I think, might be more modestly described as somewhere on the road out of Hell. And not so far out of it, for I find that we denizens of the City of Convention have a tendency to stand around in nervous groups and gaze with fascination at the old country. Our walls and our windows are generally built to face in that direction. Our work, when we are not building these structures, tends to consist of sending raiding parties back rather more often than it does of sending exploring parties ahead. Can it be that we know that, while there might be literature, there will be no law in heaven?⁴

Perhaps I ought not to have teased out of the city-on-a-road metaphor the possibility of travel, or at least, migration; for whether law or literature can "improve" with time is a difficult question. For me, to the extent that the road is called Science or New Knowledge, neither of these cities can be moved but can only at best engage in urban sprawl. Rather, it seems that Weldon's metaphor is intended to suggest a static scheme of relationships. I think of those medieval paintings of fortified cities atop middle-ground mountains: on the roads which wind from the front to the distant back of the picture there are a few travellers — pilgrims, perhaps — who venture between redoubts; but the cities are forever as fixed as the mountains upon which they are constructed.

This becomes clear when we understand from her location of the City of Invention that Weldon sees it as a salient of civilization: she says as much, before she begins her metaphor: "Would you

⁴If the state is to wither away at some point short of the last trump, then it seems to follow that law will disappear even before that lightening for the generalized apotheosis. Indeed, Grant Gilmore leaves us in no doubt:

In Heaven there will be no law.... In Hell there will be nothing but law, and due process will be meticulously observed.

The Ages of American Law (New Haven: Yale University Press, 1977) at 111.

prefer me to say," she asks Alice, "more safely, 'Literature stands at the gates of civilization, holding back greed, rage, murder, and savagery of all kinds?'"⁵ Well, lawyers, as they used to say, can relate to that.⁶ Indeed, it seems rather to be turf belonging to the city I have twinned to the city she creates. An exaggerated claim by her? Surely. A foolish claim? A stolen claim?

It is, at least, a claim which places literature and civilization in the most intimate of relationships in her schema. Where does law stand in this not-quite-yet-round world? She nowhere mentions law within her city or around it, which is understandable; it is, after all, hers and she is a writer. But I find it unnerving how infrequently law figures in the lists of any of those who extoll those civilizing institutions of our society. Literature is invariably on the list, and law is beyond the pale; and this must be a difference between law and literature. But what does it mean?

It is worth keeping an eye open for this phenomenon, and if I am right about the law's lowly estimation by culture-minded listmakers, it is worth asking why that should be so. The good Northrop Frye does not entirely neglect law. In *The Educated Imagination*⁷ he invents a whole culture on a desert island, step by step to civilization; but it takes him until his recapitulation to remember law: it lies in the second of three levels of language, that of "practical sense," spoken by engineers, doctors, farmers, architects, teachers, preachers, politicians, advertisers ... and, oh, lawyers. "Then there's the level of imagination, which produces the literary language of poems and plays and novels."⁸ We lawyers exist because Frye was, after all, a clergyman; and lawyers are lapsed theologians, as someone once said. But we are firmly in our place, outside the

⁵See *supra*, note 1 at 10.

⁶Consider the discussion of the "bulwark" metaphor for law in M. Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wi.: University of Wisconsin Press, 1985) at 24 and ff.

⁷Toronto: CBC Publications, 1963.

⁸*Ibid.* at 6.

gates, preparing the way for those who would become "really human."⁹

Again, a literary critic can be forgiven. But what about the lawyer-president, John Adams (he of the "a government of laws and not of men" fame, of which more below)? Here is his list of ranked desiderata:

I must study politics and war that my sons may have the liberty to study mathematics and philosophy. My sons ought to study mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce, and agriculture, in order to give their children a right to study painting, poetry, music, architecture, statuary, tapestry and porcelain.¹⁰

Where would he have put the study of law if someone had reminded him of it? Prior to the study of war, presumably.

Although not a lister by nature, Thomas More, too, is the creator of an imagined and glorious, ideal civilization. In his *Utopia*,¹¹ he describes a land "of only a few laws."¹²

Since they [the Utopians] are such a well-educated society, few laws are required.... They exclude from their country absolutely all lawyers since these plead cases with cunning and slyly dispute the laws.... The truth prevails, they feel, when the case is not confused by lawyers' tricks.¹³

⁹*Ibid.* at 5.

¹⁰John Adams, "Letter to Abigail Adams, May 12, 1780," in C. Adams, ed., *Letters of John Adams, addressed to his wife*, vol. 2 (Boston: C.C. Little and J. Brown, 1841). Notice that "sons" turns to "children" when it comes to porcelain etc. He says elsewhere that: "The law ... will not bend to the uncertain ... imaginations ... of men.": "Adams' Argument for the Defence [December, 3-4 1770]," in L.K. Wroth & H.B. Zobel, eds, *Legal Papers of John Adams*, vol. 3, (Cambridge, Mass.: Belknap Press, 1965) at 269-70. We have seen already that according to Frye the law and imagination, even an "educated" one (or perhaps especially an educated one), do not belong in the same category.

¹¹I use the translation by J. Green & J. Dolan, eds, *Utopia and Other Essential Writings of Thomas More* (New York: New American Library, 1984). Weldon, I discover upon re-reading *Letters* while re-writing this essay, also refers to More and his *Utopia*. More than once. See Weldon, *supra*, note 1 at 18, 86.

¹²See Green & Dolan, *supra*, note 11 at 50.

¹³*Ibid.* at 79-80. This passage occurs in Book Two, the actual description of *Utopia*. The same passage makes clear that "[i]n *Utopia*, however, all excel in legal knowledge." But it makes equally clear that this is a simple knowledge, not lending itself to "a subtle interpretation [which] would go beyond the masses." No university law schools, then, in *Utopia*.

For a discussion (and lampooning) of his contemporaries at the bar, see generally Book One of *Utopia*.

It might be noted that the discussion of law in *Utopia* comes under the general heading of *Slavery*, which heading follows those of *The Cities*, *The Magistrates*, *Crafts and Professions*, *Social and Business Relations*, *Travel* (under which the Utopians' "zealous" absorption of the newly introduced Greek literature is recounted with approval), and which precedes the headings of *Military Affairs* and *Religions*.

Of course, this ranking — and my concern with it as such — is the sort of thing that people in the City of Convention talk about on an evening when the cable is on the blink. But just so that my left foot knows what my right foot is doing, let me offer you this comment on listing itself from across the river in the City of Invention from a writer named Borges:

These ambiguities, redundancies, and deficiencies recall those attributed by Dr. Franz Kuhn¹⁴ to a certain Chinese encyclopedia entitled *Celestial Emporium of Benevolent Knowledge*. On those remote pages it is written that animals are divided into (a) those that belong to the emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel's-hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance.¹⁵

How hard is it to see the meat of this as s.21 of some statute?
Draft s.22 when you have time.

This Essay Is Not

a linear assault on a topic. Unlike legal writing, this essay (which means a try, after all) will circle around and allude when it suits me. It is one way of doing things, a way more common in the City of Invention, I believe. However, anyone who has tried to write anything knows this skittish, prey-predator attitude to expressed language. I suspect that in both the cities just discussed, the squares

¹⁴ Surely no relative to the much-cited Thomas Kuhn of *The Structure of Scientific Revolutions* fame (Chicago: University of Chicago Press, 1962). It used to be (and may still be) nearly obligatory in an article on law and language to refer to this work. See, for example, the symposium on law and language: (1982) 60 Texas L. Rev. at 373 - 586, in which four of the eight authors refer to his book. And there ... I too have done it.

¹⁵ Jorge Luis Borges, "Dr. Jekyll and Edward Hyde, Transformed", trans. K. Stolley, in E. R. Monegal and A. Reid eds, *Borges: A Reader* (New York: E.P. Dutton, 1981) at 142.

are full of circling men and women, some moving clockwise, perhaps, because time is money, and some widdershins;¹⁶ and in this state the direction matters less than the bent.

It is also the method of conversation properly practised — not the overlapping lapping at each other with "my turn" words. With a friend it meanders as a river meanders while the water in it seeks its own level. And that is an important point. Not just that *converso* is to turn around, but that *conversari* is to keep company with. In the City of Convention we must and do come together; and when people do that, they talk: company is taken into the parlour. So this is natural (worrisome word — perhaps human, then) and pleasurable. No bad thing.

Yet law ... is come to the point. (How many is one allowed?) Relevance is all. But to what can it be relevant (which used to mean to relieve, to ease, to comfort)?

Law and literature. Literature and law. Why bother circling? The distinction must be evident to some, if not to the majority; the communalities trivial. The one is serious. Important stuff of life as she is lived. The other is a mental game involved with myths that may or may not be harmful.

Adams and Eve

How curious that we should ever have created the dichotomy that permits a distinction between a government of laws and a government of men. How curious, given the dichotomy, that we should genuinely prefer a government of laws to one of people.

God is in part to blame, and more of them below. But we have swallowed the camel (God knows) with some strain, and think this way now. Weldon reports a common response of non-writers to a novelist: "They think if only they had the time, they'd do it themselves. They say, such a life I've had! I really ought to put it all down some day; turn it into a book!"¹⁷ But when confronted with

¹⁶Which means counter-clockwise, from the German *wider sinn* ("against sense"), and is, curiously enough, retained in the Scots version of English. Sense, of course, moves to the right.

¹⁷See Weldon, *supra*, note 1 at 15.

injustice what do people say? "There ought to be a law!" That's what they say. As if a novel is something that could emerge from them but a law comes from elsewhere, elsewhom. As if laws could exist: *fiat lex*. Which is the City of Invention now?

Perhaps the "men" (as in "government of men") is emblematic of the difficulty.

I am privileged to teach family law, a curious subject for a law school. It is not only that money often or usually plays a clearly secondary role in the disputes I examine. It is the nearly oxymoronic nature of the name of my subject that impresses me: think of law, and today one thinks of the individual, of abstraction, rules, rigour, reason; think of families, and one thinks of relation, emotion, sex, love, caring (and not caring), and rigor only in relation to a corresponding softness. Once upon a time (my time, I suspect), students were wont to divide courses into "hard" and "soft" courses; they may still use this language. But whatever the words, the clear fact is that family "law" is a soft subject.

This dichotomy is present, again, insofar as law and literature are concerned. Frye finds a similar mapping applied commonly to the sciences on the one hand and the humanities on the other, and in this context the law is to be seen as a social science. Here it is made explicit that this dichotomy is one based on the stereotypical distinctions between male and female:

This symbology ... says that the sciences ... are rugged, aggressive, out in the world doing things, and so symbolically male, whereas the literatures are narcissistic, intuitive, fanciful, staying at home and making the home more beautiful but not doing anything really serious, and are therefore symbolically female.¹⁸

This whole business of "symbology," to use Frye's term, is difficult, yet it seems to me that at one level, at least, law is commonly regarded as male by us today. Not a novel insight, as anyone who has read Carol Gilligan¹⁹ could say.

For me, a number of things emerge from this polarity. The first and most obvious is that if it is "true" in a deep sense that law

¹⁸N. Frye, *Spiritus Mundi, Essays on Literature, Myth, and Society* (Toronto: Fitzhenry and Whiteside, 1976) at 102.

¹⁹I am thinking particularly of her *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982).

is currently masculine, and I think that it is so true, then we are missing. I mean nothing so simple as the fact that there are numerically more men than women in law, and that "we" will be reconstituted when the proper quotas are filled; for I do not map masculinity onto all and only men and femininity onto all and only women. The me that is a "we" would be devastated thereby; I could not properly convene. And clearly in the City of Invention masculinity and femininity are resources in which we all may share, however literature may be regarded from the outside and by contrast with sciences; for, at the most basic level, we have all read fiction written by men in which women are created, and by women in which men come to life.

The second thing is that for me it is in some sense *not* true that law is masculine in the way that I have just captured that idea. (Poetry need not be the only place where, as Howard Nemerov puts it, "contradictions do not destroy one another."²⁰) I come at this dichotomy from the very practical job of teaching law. I observe the essential role that feelings and the undeniable uniqueness of each person — better, each relationship — play in the struggle to resolve a family law dispute. I read judges who write about the difficulty of decision in language that is so filled with emotional distress that it bursts past the ratiocinating patterns. I see students become angry, embarrassed, fearful, sad. Law students. And I feel that this, of course, is very like life. Which sets me to wondering where life goes in the law in "hard" areas.

I do not believe that the fullness of life (male *and* female) is simply absent in the law in these areas. For that to be so, I would have to conceive of the law as a coating, a scum, that floats always the same centimetre thick on top of the variegated shapes that (the other thing) human life assumes; such that where tax problems present themselves to the law for example (and by contrast to family problems) life has already been drained away by some mysterious and *non-legal* process so that there is no life for the law to work with, to become. This technical view of the law, this view that sees it waiting in an office for the problem to appear as a *deus ex machina*, is an unsatisfying view. This is the view that says if you

²⁰*Figures of Thought* (Boston: David R. Godine, 1978) at 10.

opened a window in the blank side of a building in the City of Convention, nothing would be there. (In the lawyer's office in Melville's "Bartleby,"²¹ the window does in fact look out onto a bare brick wall.²²)

I prefer to believe that the window can be created, but that we lately have not chosen to make it. This preference is perhaps at variance with that of the proverbial man-in-the-street, who says that there ought to appear from somewhere a law; for, my preference implicates me and you and him in a failure. Choice always carries with it the possibility of failure. But this indictment of failed choice brings with it community, for to be so "implicated" is for us to be "entwined, closely joined" in the way that, for Nemerov, we are all implicated by the confession of the "weak criminal," the poet.²³

The third thing that emerges for me from this male female polarity is the problem of making the window into a door through which we can more freely enter and leave the houses of the law, as with a home to which we all have the latchkey. An imaginative glimpse is one thing, a functioning way is something else. This is no easy problem, even for those minded to perform the re-engineering.²⁴ Start with the window. Imagine a differently-based legal system (or maybe not a system, if it comes to that) in which relation rather than relevance is the point, in which caring rather than rationality is the guide. Or maybe something else again. To the extent that law is St. Paul to literature's twin city, Minneapolis, (had you imagined it the other way around?) we might imagine this more readily than we imagine. Those not minded to admit the feminine in law might be reminded that "it is better to marry than

²¹H. Melville, "Bartleby, the Scrivener: A Story of Wall Street" in W. Berthoff, ed., *Great Short Works of Herman Melville* (New York: Harper and Rowe, 1970) at 39.

²²See generally, B. Schwartz, "A Meditation on 'Bartleby'" (1984) 22 *Osgoode Hall L. J.* 441.

²³See Nemerov, *supra*, note 20 at 7.

²⁴See, for example, F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harv. L. Rev.* 1497. Professor Olsen sees clearly the harmful nature of the dichotomy between male and female that we have created for ourselves and the attendant projections that we employ using this dichotomy; and yet she is almost entirely bereft of suggestions as to how we might, in her phrase, "transcend" the dichotomy.

to burn," as even the great misogynist once said.²⁵ And I feel we are badly aflame right now.

Consider a government of laws. No people, just laws. There could of course be no hearings, for there would be no one with ears to hear. There would only be process — due, it is certain, but process only. *Habeas corpus* becomes a Latin phrase for impossibility, hearsay a double impossibility, *voire dire* something done without eyes or mouth, a deed an unimaginable thing. Contracts would draw together no ones. Property would be proper or improper but certainly not one's own or what one owes.²⁶

The impulse to this dystopia? Understandable, provided there are people who can stand under the influence of the impulse. We are fallible, we are fallen and so not as upright as we ought to be; law, therefore, will be different. It will. And so ...

Syntax

The way literature tells it, you would think it should have been easy — certainly by comparison with our modern-day complexity. Listen:

And the Lord God commanded the man, saying, Of every tree of the garden thou mayest freely eat:
But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die.²⁷

A number of things strike me about this piece of legislation. There is all the usual stuff: it is clear, fairly precise, pleasingly drafted, but lacking, like so much of our own, a purposive section. Once upon

²⁵I Cor. 7:9. For a literary defense of Paul that, in my opinion, does not succeed, see A. Burgess, *The Kingdom of the Wicked* (London: Hutchinson, 1985).

²⁶"Own" and "owe" were once the same word; this suggests the possibility of complex relationship where we now can only see opposition.

²⁷Gen. 2:16-17.

a time that was *all* the law and the prophets;²⁸ a true government of law and not of men; and we still mucked it up. Notice that like many modern legislators Jehovah failed to carry out his threat, at least in quite the way it might have been fair to imagine Adam interpreting it. Simple rule, but slippery in its enforcement. We all know how the story goes from here: sorrow and obedience for the woman, sorrow and work at the land for the man, curses all round — what, with some minor changes, we might call life, rather than death.

But what is most striking to me is that Eve was not yet in existence when the original edict was passed.²⁹ I do not make a case that she was ignorant of the law, because the transcript clearly shows from her discussion with the serpent that she knew the law.³⁰ Her knowledge must have come from her man. I do remark on the fact that She was not part of the society — one cannot really call it that — in which the law was made. Perhaps it is simpler to say that there was no society when the first law was made. And that is one of the things that might have made it go wrong.

The word used for "sin" in the Bible implies a missing of the mark, in the way that an arrow might miss the bullseye.³¹ It is easy to miss the mark in both legal and literary writing: sin in this proper sense is one thing both cities have in common. And concomitantly, a striving to get it right in language is a shared trait.

²⁸By contrast, I read today that the Law Reform Commission of Canada has released a report which numbers the provisions of federal laws capable of being violated at 90,000: K. Makin, "Most Laws Not Used, Report Says" *The [Toronto] Globe and Mail* (11 September 1986) 1. This says nothing of the laws made in the various Provinces. If I take the date (4004 B.C.) that appears at the top of the pages of Genesis in my Authorized King James Version of the Bible (a figure arrived at by Bishop Usher in the 1600's, I believe), I calculate that Canadian federal laws alone could have been created at the rate of fifteen a day since the dawn of time and still not amount to our current total. (The rate would be even steeper if one were to adopt the Jewish calendar, which dates creation at 3760 B.C.E.)

²⁹Eve was not created until at least five verses later, Gen. 2:22, and after the work of naming all the animals had been performed. She herself was not accorded a name until even later: Gen. 3:20. There is some difficulty here, however, in the record, which might lead one to believe that the report has been tampered with: In the verse in which she is named Chavah (Eve, meaning "life" or "living") she is described as "the mother of *all* living." (emphasis mine)

³⁰Gen. 3:3.

³¹In the Greek, the word is *hamartia* and means to miss the mark; in Hebrew *lachto* (to sin) and *lehachiti* (to miss) both derive from the root *chet*.

The marvel for me is that there is a *right* we can imagine which we do not possess, but which the getting of is important. Plato marvelled at this too and I am afraid I am not sure he got it right. (That itself is not an easy idea.) He objected that poetry and fiction falsified the forms,³² a very peculiar notion for a writer, at least, for whom falsification and fiction are different ideas.

There are times in writing literature and law when the attempt does become one of "effing the ineffable," when an ideal is felt to be present in the thoughts that the stubborn words will not depict no matter how they are cast onto paper. More often, however, my own concern for rightness does not manifest itself as an unsatisfactory comparison between an imagined ideal and the shape on the paper. It is rather a felt judgement that the words simply are or are not right, and I will have at the time of creation no extrinsic guide worthy of the name against which to measure their rightness. They sound right or they do not, they look right or they do not. They feel right or they do not. These are sensory matters. And if I do project out of myself a touchstone, it is most curious to me that it is the words themselves and their just-fashioned neighbours that perform self-judgment as it were.

If my feel is a Platonic form, so be it. It does not seem so to me. Nor, I think, does it seem so to writers at least of fiction and to poets. Rather it seems to be a concern to render a concrete, specific object or situation in all its warts and nubble: not ideal nubble or nubble itself, but that very nubble over there that I see or see in my imagination.³³ Indeed for a writer of fiction or poetry the fascination is with the unique, or as Hopkins put it, with:

³²Plato: *The Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1974) Book II, 377; see also Book X, 599b: "If he [the poet] truly had knowledge of the things he imitates, he would much rather devote himself to actions than to the imitation of them."

³³Compare R. Demos, ed., *Plato, Selections* (New York: Charles Scribner's Sons, 1927) at xxv:

[A]rt is unique among all the mental attitudes; unlike them, it brings the concrete to the foreground, by regarding the universal as *constituted in the particular....* To the extent then that he denies the ultimate reality of the particular, Plato is consistent in his attack on art. One may go so far as to say that art supplies the touchstone by which Platonism may be judged.... (emphasis in the original).

[A]ll trades, their gear and tackle and trim.
 All things counter, original, spare, strange;
 Whatever is fickle, freckled...

Yet as the poem in full purports to argue, the very oddity of these things may point to a universal that ties them together. Hopkins would have it be God; I imagine it is I, my experience of all these things. Either way it is a mystery which Nemerov puts in this fashion:

[H]ow does the particular, in the course of being examined most particularly and for itself alone, as a unique fact existing in the world, become meaningful, become illustrative of general or even universal propositions? ... The exception turns out to be, or proves to be, the rule.³⁴

This is reminiscent of the common law method. By a stern and careful focus on the very facts of this very dispute a decision so reached may prove to have created a rule. Justice in the instant case makes instances from which justice emerges as a rule. Yes, yes, there is the court of appeal breathing down the gown of the trial judge, and yes there are precedents flashing distractingly like strobe lights and which may not easily be blinked. That is why the poetic concrete is only reminiscent of the common law method. But poets have their critics and, too, their conventions which shape and tug.

My experience remains however of language sin, the missing of the mark, as one of not making contact with my feeling, my feeling when I am in contact with what I am writing about. Now, to bring the notion of feeling³⁵ into a discussion of law (which in part this is) is a bit like setting a big, shiny, green frog on the boardroom table while negotiating a business deal: it has a tendency at least to stop the conversation in such settings. But I feel that it is far more bizarre to carry on about law as if we did not have feelings that touch on what we are doing. Marianne More said (and is quoted in almost all high-school poetry texts as saying) that the

³⁴See Nemerov, *supra*, note 20 at 45-46.

³⁵I should clarify the way in which I am using the word feeling here. I mean primarily that faculty of judgment which gives us a "feel" for a situation. This may, of course, manifest itself in "feelings," that is, emotions; but it is not the emotionality itself with which I am mainly concerned.

poet should offer us "imaginary gardens with real toads in them." In discussions of law that proceed without feeling, it is the law that is "imaginary," and the frogs of feeling (I prefer frogs) that are "real."

I say that they are real, even though unacknowledged, because they are more powerful for being unconscious than is the explicit verbal production. Now frogs have always been bewitched critters, as literature has told us³⁶; they are human beings — and typically men — under a spell, brought down (the evolutionary ladder); they have no standing as human beings, but can only squat. Law's feeling power is bewitched, held in a primitive, inferior state. When law speaks without feeling it does not sing, as poets once did, it croaks, an unpleasant sound with unpleasant effects.

Where there is witchery there must be a witch. Who has done this thing to law? That is a complicated matter that cannot be unravelled here. Suffice it to say that myth — literature — would tell us that it is the revenge of the powerful female god, and in this case probably Themis Chthonis,³⁷ whose other self (and daughter) stands atop our courts as Themis Justice, or Dike. Consider her: Woman in the City of Convention is made of stone, as fixed as Lot's wife, unneedful of the blindfold, for those drilled pupils will never truly see. As a punishment for doing that to her, for scorning her earthy side, she has bewitched us.

In the City of Invention woman is not statuary. She is Muse — Erato, most likely — and half-sister cousin to Justice,³⁸ and writers actively woo her, welcome her, make of themselves living homes for her if at all possible.³⁹

³⁶See, M.-L. von Franz, *The Psychological Meaning of Redemption Motifs in Fairy Tales* (Toronto: Inner City Books, 1980) at 58, 60-63, 67, 70-73, 78.

³⁷The genealogy of the Olympians is complicated even for a family law teacher. Themis is a Titan, a daughter of Uranus and Gaea and a wife to Zeus. She has an aspect that is designated with the epithet chthonis, which means "of the earth" (Gaea). (In English we have the word "autochthon," which is used to describe people who have, seemingly, sprung from the land itself, rather than arriving through migration.)

³⁸It is interesting that the Muses and not Justice have Memory for a mother. *Stare decisis* is not so important to myth as it is to us now.

³⁹See J. Fowles, *Mantissa* (Toronto: Collins, 1982) for a metafictional exploration of the relationship between a writer and his muse.

Relatively recently an entire volume of the Texas Law Review was given over to a series of articles discussing law and literature.⁴⁰ I am fairly certain that not once in the symposium was the word feeling used and discussed as representing something important. Here was a seminal opportunity to marry (or engage in courtship at least) two great children of writing, to profit by exogamy, and what happened? The matter of interpretation was beaten to a pulp, leaving some so unhappy that they despaired of the possibility of meaning, despite — or perhaps in careful isolation from — the fact that meaning is daily created by humble readers of law and literature alike. It was as if they were runners paralyzed by hearing Zeno explain that motion is impossible.

Without feeling, of course, there is no meaning. Those of us who have trouble seeing that in law can see it when we read literature. (Literary critics who despair may not be so lucky.) The writer who has no Muse, no woman feeling, must "hire" one, with the result that she is a whore and the writing will have all the meaning of pornography, that is, the "writing of whores." Legal scholars have tended not to court and to read and to learn literature but rather to leap upon the corpus of criticism and to take from it what they already have: reasoning bereft of useful feeling. This is for me another way in which we can miss the mark in language.

Bread and Stone

It must have appeared to begin in this way, or something like it: A leader goes off to brood, perhaps up into the mountains, anywhere where his followers cannot get hold of him. He is gone a longish time, enough to make people worry and perhaps plan his replacement. The weather was probably bad while he was gone, adding to their doubts about his survival. Then one day he reappears, bringing something with him that he hadn't taken away. It is what passes for a book, a slab more likely, and there are odd marks all over it. This, he proclaims, is the law; I had it given to

⁴⁰(1982) 60 Texas L. Rev. 373-586.

me, I didn't make it up;⁴¹ I've brought it back for you. And now you belong to the law.

If this isn't the origin of law in any useful, metaphorical way, it is surely nevertheless the mythical junction of law and literature in our history.

When as a young child I first heard the story of Moses and Sinai, all I could think of was how heavy those tablets of stone must have been. I am still today a sensualist. And my sense of law is that we too often offer a stone where bread is wanted, *peine forte et dure* instead of nourishment. (We have just seen how, for law, the female is made of stone.) I certainly feel this way as a teacher in class many times; and I would be willing to bet that the average person's contact with the law leaves him or her abraded rather than fulfilled. Yet stones can be special, and maybe we can make of our hard cases something other than bad law.

Stones have magical properties as mythology will tell us. Jacob "took of the stones of that place, and put them for his pillows, and lay down in that place to sleep. And he dreamed."⁴² All of alchemy was in search of the philosopher's stone, which had the power of transmutation and perhaps immortality as well.⁴³ Treatises on precious stones, called lapidaries, were an important part of medieval literature, and dealt with the curative properties of stones.⁴⁴ The use of stones as images of power and mystery in literature has continued up to today. The novelist Robertson Davies, for instance, placed a stone in the mouth of Boy Staunton's dead father, a stone that the son, a lawyer, carried with him up to the moment of his own transformation (also, as it happens, through dreams).⁴⁵

⁴¹The subjective experience of the writer of fiction is often and ideally that he or she did not make this up but rather that it came to them. When it isn't "coming," writing can be an agony or simply impossible.

⁴²Gen. 28:11-12.

⁴³See M.-L. von Franz, *Alchemy, An Introduction to the Symbolism and the Psychology* (Toronto: Inner City Books, 1980).

⁴⁴Seh, ed., *Funk and Wagnalls Standard Dictionary of Folklore, Mythology, and Legend* (New York: Funk & Wagnalls, 1972) at 603.

⁴⁵R. Davies, *Fifth Business* (Toronto: Macmillan, 1970); *The Manticore* (Toronto: Macmillan, 1972); *World of Wonders* (Toronto: Macmillan, 1975).

Stones can symbolize the stubborn, specific enduring unique nature of an entity. They can stand for the individual, as a gravestone stands for the person who is dead. For law this suggests that we might pay more attention to the unique individual. Yet, is this not what we already do with our concept of the rights-bearing monad, the "in-divid-ual" over and against society? And is this not one of the sources of complaint against law, that it ignores or subordinates community? Yes and no. To respect the individual, we must know the individual; otherwise we merely respect her individualness, her happening to be in a category of one, and this is nothing at all. In much this latter way, protections for the "individual" are wrested from Charter test cases by eager lawyers without any concern whatever to know or understand the very human being who has sought protection. Protections from the mass are amassed in texts, and the human pretexts are written out of the story.

To respect an individual, I repeat, we must know that individual. Not his situation, not his case, not his facts — ideally, not anything abstracted from him other than by another sensible, feeling person. There must be *a* knower. In this relationship of knower and known, one is no longer a monad bearing protective rights. In this view rights emerge from the respect that each accords the other because it is right to do so in their relationship. That is a matter that takes one's all, intelligence, spirit, and feeling. In this sense, the search for justice is the same as the search for *le mot juste*.

I do not (for more than one moment) believe that people will simply turn to love each other. We are, after all, a nation that markets Wonder Bread and Pet Rocks. I recognize that law has been increasingly a language for strangers, for foreigners, and concomitantly that those who come to law are made strangers thereby. This is something that is not true, perhaps, to such a degree of literature; it is not principally a language for strangers, though, paradoxically, author and reader never meet. With law we have lost sight of the unique tree for the forest:

Foris in plain Latin means outside. In the medieval dog-Latin this has become *foranus*, from which the French 'forain' and the English 'foreigner': in plain terms an outsider. The original has varied little in the countries of the Mediterranean basin

— forastero, forestiero. 'Forest' began as *silva forestis*, the wood outside. The Wild Wood, dark and sinister.⁴⁶

It might be added that he who is sinister is left and thus not right.

Having gone to the Bible — the book — so many times for images, I might be permitted to give you one of Northrop Frye's categorizations of biblical imagery, and in particular that of this section: bread and stone. In *The Great Code*⁴⁷ he is concerned, among other things, to classify images that recur in the biblical canon; he creates a table of apocalyptic imagery and a table of corresponding demonic imagery. Bread and stone, he tells us, are apocalyptic images for the individual, in the vegetable and mineral categories respectively. (As is the city, by the way, in the group form.) But in the table of demonic counterparts,⁴⁸ the vegetative becomes the Earth-Mother,⁴⁹ and the mineral the Tower of Babel. Eve, in her guise as Lilith⁵⁰ at least, is to be a stranger, it seems, with whom we babble in mutually incomprehensible tongues. How might this change?

Pride Without Prejudice

I have managed, I think, to get this far without playing up the mind body dichotomy more than the average writer of my age. It is not easy to talk about bodies as I have done without conjuring up this split and falling deeply into it. My vertigo at that prospect is one of the reasons for my dancing around, I am sure. "*Mens*

⁴⁶N. Freeling, *A City Solitary* (London: Heinemann, 1985) at 40.

⁴⁷N. Frye, *The Great Code: The Bible and Literature* (Toronto: Academic Press Canada, 1981).

⁴⁸*Ibid.* at 16 and *supra*, note 37 and the discussion there of Themis Chthonis.

⁴⁹*Ibid.* at 166-67.

⁵⁰In Rabbinical writings, she is supposed to have been the first wife of Adam and made, appropriately, out of the very mud of Earth. This Earth-Mother has been castigated for thousands of years as the night monster. See, for example, the reference to her in Isa. 34:14 as the "screech owl."

sana, corpus sanum, take your pick" has never appealed to me, even as a bad joke for a camp motto.

But, you object, I have not once mentioned body as such. I have instead talked a lot of myths and of the female. The great and endangered body of the Earth on which we all live is, by every account in Western mythology, female. Out of her body issues all life, all creatures. Out of the bodies of women issues all human life, all pro-creation. Such is the grip of this linkage on human minds that body is woman, and to talk of the female is to talk of body. Yet, since the beginning, humankind has known that Nature cares nothing for civilization, which is the making of cities (*civis* = citizen = denizen of city). It requires a marriage of intelligent human qualities and the gifts of nature to create civilization, two of the finest children of which are literature and law. Intelligence of the sort required has mythically been seen as male, typically the spirit of a sky god to complement, or cover, the earth goddess.

Somehow, intelligence of the male sort has grown ever more overweening in its pride of place through the last few millenia. Concomitantly, the generative forces of earth body have been disparaged, condemned, damaged, and exiled to the night or to those places where "there be dragons," from which places they continue to bedevil and enchant us. This is especially clear to us now in our current social struggle to answer the challenge and demands of what we are pleased to call feminism. While literature has fallen prey to this pride, it seems to me that it has not done so to anything like the degree that law, its sister discipline of rhetoric, has fallen. Law is too often, if not always, now the disembodied voice of rationality, and we know what is written by intelligence without body: *mene mene tekel upharsin*.⁵¹

Anything written out of a one-sided approach — whether law or literature — is crippled. It is lop-sided, as a tree which has had its own limbs lopped. We must recover the ability to feel the base, the ground, upon which law stands and to permit ourselves to

⁵¹ Dan. 5:25-28. It is interesting that it was the Queen who brought Daniel (ie. the means of interpretation) to the King. The meaning, if you are interested, is as follows:

This is the interpretation of the thing: MENE; God hath numbered thy kingdom, and finished it. (27) TEKEL: Thou art weighed in the balances, and art found wanting. (28) PERES: Thy kingdom is divided, and given to the Medes and Persians.

become invigorated with the nourishment that emerges from that ground. We must temper reason. I shall give the last word on that to Fay Weldon with whose love of Jane Austen I began:

A book that has no base in an initial reality, written out of reason and not conviction, is a house built of – what shall we say? – bricks and no mortar? Walk into it, brush against a door frame, and the whole edifice falls down about your ears.⁵²

⁵²Weldon, *supra*, note 1 at 17.