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A Culture of Rights: Law, Literature, and Canada, by Benjamin Authers

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Book Review



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A Culture of Rights: Law, Literature, and Canada, by Benjamin Authers

Abstract

The need for a law and literature canon has long been contested. Even the classic book by Richard Posner, *Law and Literature*, engages the question: Although Posner ultimately believes in a canon (having “come to praise Caesar, not to bury him”), he finds any semblance of one currently wanting. Scholars continue to challenge the relevance of literature and literary criticism to a field like law that is sometimes more “science” than art. Regardless of whether “law drives culture or culture drives law,” scholars can at least agree the two relate. If there is anything around which the canon coheres, it is their sense that literature is a cultural form worth unpacking.

Book Review

***A Culture of Rights: Law, Literature, and Canada*, by Benjamin Authers¹**HEBA ISA-ODIDI²

THE NEED FOR A LAW AND LITERATURE CANON has long been contested. Even the classic book by Richard Posner, *Law and Literature*, engages the question: Although Posner ultimately believes in a canon (having “come to praise Caesar, not to bury him”), he finds any semblance of one currently wanting.³ Scholars continue to challenge the relevance of literature and literary criticism to a field like law that is sometimes more “science” than art.⁴ Regardless of whether “law drives

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1. (Toronto: University of Toronto, 2016).
 2. BA (University of Toronto), JD (Osgoode Hall).
 3. See Richard Posner, *Law and Literature*, 3d ed (Cambridge, Mass: Harvard University Press, 2009) at 5-6. Posner observes that:

Law and literature are very old fields, but ‘law and literature’ could not emerge as a field until legal scholarship and literary scholarship were no longer autonomous fields each circumscribed by a body of texts that did not overlap Literary writers and literary scholars, and legal practitioners and legal scholars, are at risk of becoming mutually unintelligible because scholarship in both fields has become so specialized and even esoteric. [Still, he maintains,] I have come to praise Caesar, not to bury him. Law and literature is a rich and promising field

- See also James Seaton, “Law and Literature: Works, Criticism, and Theory” (1999) 11:2 *Yale JL & Human* 479 (with reference to an earlier revised edition of *Law and Literature*, arguing that “[f]or Posner, what literature may seem to teach is unimportant, since literature in any case is largely irrelevant to moral inquiry” at 502-504); Jeffrey Miller, *The Structures of Law and Literature: Duty, Justice, and Evil in the Cultural Imagination* (Montreal: McGill-Queen’s University Press, 2013) (“I found myself agreeing with Judge Posner . . . that the two disciplines didn’t have a great deal to say to each other” at 4).
4. See generally David Howarth, “Is Law a Humanity (or is it more like Engineering)?” (2004) 3:1 *Arts & Human in Higher Ed* 9.

culture or culture drives law,” scholars can at least agree the two relate.⁵ If there is anything around which the canon coheres, it is their sense that literature is a cultural form worth unpacking.⁶

A Culture of Rights: Law, Literature, and Canada represents a worthy addition to this scholarship and should be read by anyone even casually interested in constitutional law or the Novel. For Benjamin Authers, literature has “a *constitutive* role, working to delineate and perpetuate rights discourses, even as it is also responsive to socio-cultural norms and ideas.”⁷ Rather than take up the mantle of the humanists and argue that “the literary representation of rights will [necessarily] make a reader more compassionate,”⁸ Authers instead parallels representations of rights in Canadian novels and judgments and considers whether “literary texts” work, like their legal counterparts, to idealise Canadian identity “even in the breach of rights.”⁹

In this framing, rights are a key part of the Canadian imaginary post-*Charter*. The first point that Authers makes is trite—namely, that the *Charter* has been “held to represent Canadian values.”¹⁰ However, he then argues that the *Charter*, in “reinforc[ing] the ideology behind those values, ... [has been] *complicit* in producing the idea of Canada that it is said to represent.”¹¹ Authers theorises a “‘literary’ rights discourse” through which literature, “[l]ike law, ... contributes to the ways in which rights are understood in Canada, and informs how the subjects of those rights conceive of their individual and collective relationship to a rights-based Canadianism.”¹²

Authers offers a number of models of idealist legal literature on the *Charter*.¹³ He reviews scholarly and policy panegyrics by the likes of Michael Ignatieff and

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5. See Edward J Eberle & Bernhard Grossfeld, “Law and Poetry” (2006) 11:1 Roger Williams U L Rev 353 at 355. Eberle and Grossfeld go further, arguing “[t]he words (or ABCs) of law ... gain real meaning only from interaction with the culture in which they operate” (*ibid* at 354). See also Miller, *supra* note 3 (arguing “the notions informing law and justice in western culture share patterns and assumptions that inform every other way we express ourselves culturally” at 3).
 6. Eberle & Grossfeld, *supra* note 5 at 355.
 7. Authers, *supra* note 1 at 22 [emphasis in original].
 8. *Ibid* at 22. See e.g. Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995); Martha Nussbaum, “Poets as Judges: Judicial Rhetoric and the Literary Imagination” (1995) 62:4 U Chicago L Rev 1477; Lynn Hunt, *Inventing Human Rights: A History* (New York: WW Norton, 2007).
 9. Authers, *supra* note 1 at 25.
 10. *Ibid* at 22.
 11. *Ibid* [emphasis added].
 12. *Ibid*.
 13. *Ibid* at 10-15.

Jean Chrétien, as well as the Supreme Court of Canada's decisions in *Pepsi-Cola*¹⁴ and *Vriend*.¹⁵ Authers's main point of departure, however, is the case of *Oakes*¹⁶ and the "idealized abstraction" of Canada it presents.¹⁷ "Canadian society is to be free and democratic," wrote Justice Dickson for the majority in *Oakes*, and these values are to be realised through the *Charter*.¹⁸ Affirming this vision in *Keegstra* a few years later, Justice Dickson further found that section 1 "articulates Canada's 'fundamental values and aspirations.'"¹⁹ In this way, the values of section 1 at once prescribe the limits that can be imposed on *Charter* rights and give these rights content.²⁰

Canada, as the Court describes it, seems both to aspire to and "somehow presently [manifest] those fundamental values."²¹ For Authers, a "complex temporality" is what makes this dynamic possible; he notes that while "[t]he Canada 'we actually live in' may not represent a place of rights perfection, ... at the same time 'we know' such a place, because we have already imagined it as *Canada*."²² This idea of a complex temporality, pervasive in Canada's law and literature post-*Charter*, is essential to Authers's argument, and is a big part of what makes it so compelling.

I. A NOVEL APPROACH TO THE PROBLEM OF RIGHTS

A 'temporally complex' rights framework poses obvious practical problems for the individual claimant: claims require resources, court cases can run years, and all the while the claimant's reality remains the Canada 'we actually live in.'

Here, Authers argues, the novel can offer resolution. He takes Joseph Slaughter's work as a guide. Slaughter understands international human rights

14. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156.

15. *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

16. *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

17. Authers, *supra* note 1 at 23.

18. *Oakes*, *supra* note 16 at para 67.

19. *R v Keegstra*, [1990] 3 SCR 697 at 735, 117 NR 1, cited in Authers, *supra* note 1 at 24.

20. See Authers, *supra* note 1 at 23, citing *Oakes*, *supra* note 16 at para 67. In Justice Dickson's own words:

The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

21. Authers, *supra* note 1 at 24.

22. *Ibid* at 24-25 [emphasis in original].

as straddling “both what everyone already knows ... and what everyone should know,” a formulation that recalls for Authers the “temporality” of *Keegstra* and *Oakes*.²³ Slaughter looks to the *Bildungsroman* genre as a case study for the problem of bridging this gap; he argues the integration of individual and society is the genre’s chief conceit.²⁴ The individual at the heart of the *Bildungsroman* often resists this process.²⁵ Authers, too, looks to novels centering cultural assimilation and its growing pains. For his own study, however, he picks Canadian novels that reject “incorporation into society as it presently exists.”²⁶ The rare novel that sanctions such incorporation tends also to foreground any “histories of rights violations” complicating the process.²⁷ Authers’s first chapter is representative. In it, he revisits Canada’s 1988 Redress Agreement—a legislative *mea culpa* for the federal government’s “policy of dispersal” of Japanese Canadians following Pearl Harbour.²⁸ Joy Kogawa’s novels *Itsuka* and *Emily Kato* form Authers’s literary complement,²⁹ and he carefully unpacks the problem of “belonging” to a nation that has tried hard to expel you. The concern of Authers’s chosen novels, then, is not the “visible moment of integration” but the “futuraity of a ‘what will be’ that is nonetheless presently conceivable.”³⁰ In other words, their protagonists hope to assimilate into the “rights-based free and democratic society” that Justice Dickson described in *Oakes*, and they are not at all interested in integration with the Canada they actually live in.³¹

To what end, though, does Authers make this case? What meaningful understanding of the law can be drawn from a work of fiction? Jeffrey Miller has made an eloquent case for studying law’s meaning in (and through) literature. The case for law *as* literature, though, had been easier for him to build as a budding

23. *Ibid.*

24. *Ibid* at 26. See also Joseph R Slaughter, *Human Rights Inc: The World Novel, Narrative, Form, and International Law* (New York: Fordham University Press, 2007) at 2-3. The *Bildungsroman* is essentially a coming-of-age novel.

25. Authers, *supra* note 1 at 26.

26. *Ibid.*

27. *Ibid.*

28. *Ibid* at 31 (Japanese Canadians were offered the “choice” of internment in camps “east of the Canadian Rockies” or removal to Japan).

29. Joy Kogawa, *Itsuka* (Toronto: Viking, 1992); Joy Kogawa, *Emily Kato* (Toronto: Penguin Canada, 2005).

30. Authers, *supra* note 1 at 26.

31. *Ibid.*

academic,³² and Miller confesses in his *Structures of Law and Literature* that their links *in* literature seemed at first “ephemeral, coincidental, [and] strained.”³³ He even worried Posner had been right, decades earlier, to conclude “the two disciplines didn’t have a great deal to say to each other.”³⁴ For his part, Posner seems more concerned that we not ask them to say too much. He rues the “literary turn in legal scholarship”³⁵ and identifies himself as “a formalist in literature and an antiformalist, a pragmatist, in law.”³⁶ It is hard to imagine any scenario in which Posner might appreciate Authers’s selection of books in *A Culture of Rights*, however sincerely he praises Caesar. Posner has argued forcefully that “[t]he proper criteria for evaluating literature are aesthetic”:³⁷ For the same reason a novel’s morals have no relation to its merits, he writes, “a mediocre work of literature is not redeemed by expressing moral views of which we approve.”³⁸ He makes clear that the job of literature is not to be ethical, and that we must not assess it in those terms.³⁹ Assuming “[t]he law and literature canon must not be defined by reference to a political ideology,” it follows that “[p]olitical correctness, whether of the Left or of the Right, should not be a criterion for inclusion or exclusion.”⁴⁰ It is not likely that Authers’s “preselection” of books by writers traditionally absent from the canon would pass muster here—particularly given the books that he has selected deal squarely with questions of social inclusion and exclusion. Isn’t Authers’s “choice of ... novels” just an “acknowledgement of the ‘right’ of

32. It is hard to pin law and literature’s beginnings to a year, but a number of scholars suggest it first really came to be in the 1970s. Richard Posner, in an earlier edition of *Law and Literature*, identified James Boyd White’s 1973 textbook, *The Legal Imagination*, as a clear pioneer. See Richard Posner, *Law and Literature*, revised ed (Cambridge, Mass: Harvard University Press, 1998) at 4 [Posner, revised ed]; James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1985).

33. Miller, *supra* note 3 at 4.

34. *Ibid.*

35. Posner, revised ed, *supra* note 32 at 305-77.

36. *Ibid* at 7.

37. *Ibid* at 306-307.

38. *Ibid* at 306.

39. So compelled does Posner feel to stress this point, that in his revised edition of *Law and Literature* he classes this “aesthetic outlook” as itself moral, taking pains to oppose its “values of liberal individualism” to those of the so-called “edifying [that is, morally improving] school.” See *ibid* at 307 (citing “openness, detachment, hedonism, curiosity, tolerance, the cultivation of the self, and the preservation of a private sphere” as liberal values).

40. Posner, *supra* note 3 at 546.

members of marginalized groups to be represented in the literary canon so that they will feel proud?”⁴¹

Fortunately, Authers does not assess the novels in his study in anything approaching such black-and-white terms. *Itsuka*, for one, was not especially well received by critics,⁴² and *Emily Kato* (essentially an adaptation of that novel) was Kogawa’s response to this reception.⁴³ However, Authers can acknowledge the aesthetic failings of either novel without looking to ‘redeem’ them; he can argue their discursive significance for rights, and for our understanding of them, without labelling them especially ‘edifying.’ Authers engages with work that Miller, too, would likely label “propaganda,” but while he is attentive to “plot and theme,” he does not consequently neglect “language and metaphor, philology and syntax.”⁴⁴ In the book’s second chapter, he highlights Margaret Atwood’s use of analogy in *Bodily Harm*⁴⁵ and reads it alongside early *Charter* jurisprudence on section 2(b) and “state control of pornography.”⁴⁶ Atwood and the Court rely similarly on analogy, he argues: through analogy, both “reveal the manifold aspects of harm” of individual and state representations and trace the

41. *Ibid* at 479-81. As Authers notes, Posner’s charge of “preselection” by Martha Nussbaum is illustrative:

Another feature of Nussbaum’s choice of works to discuss is related to my earlier point that the literary canon must be drastically shrunk if it is to edify: they are preselected. Their take on social issues corresponds to her own (though she is distressed by Dickens’s hostility to labor unions); they were chosen to illustrate rather than to shape her moral stance. If literature were really believed to be a source of ethical insight, the critic would examine works of literature that reflected different ethical stances. ... Instead the ethical position is in place before the examination begins, and furnishes the criteria of choice and shapes interpretation. And is it an accident that *Maurice* was written by a homosexual and *Native Son* by a black? Or was Nussbaum’s choice of these novels [as opposed to, say, *Othello*] a bow to identity politics—an acknowledgement of the ‘right’ of members of marginalized groups to be represented in the literary canon so that they will feel proud?

42. Authers, *supra* note 1 at 30.

43. *Ibid.*

44. Miller, *supra* note 3 at 8.

45. (Toronto: McLelland & Stewart, 1981).

46. Authers, *supra* note 1 at 48-62 (arguing the Court in *Butler* frames “harmful expressive acts ... as somehow excessive to the nature of Canada”), citing *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler* cited to SCR]. Justice Sopinka held that prohibition of the material in issue was justified under section 1, applying a “community standard of tolerance” test. See *Butler* at 476-78. Authers notes that this decision had consequences likely unintended by the Court. In particular, *Butler* was taken as license for a time to more aggressively delimit LGBT expression.

links between “symbolic and material injury.”⁴⁷ Authers parallels the interpretive work of novelists and judges throughout *A Culture of Rights*. In chapter three, he considers the “aesthetic requirements of the trial” (*i.e.*, the evidentiary forms privileged by the trial) and the emic and etic challenges posed to it by “legal storytellers” and literary ones.⁴⁸ In chapter four, Authers draws from law and literature’s “intellectual genealogy ... [and] theorizes legal equality in Canada as a question of interpretation.”⁴⁹ This time he reads Timothy Findley’s *Not Wanted on the Voyage*⁵⁰ alongside the Supreme Court’s *Charter* jurisprudence (in particular, Justice L’Heureux-Dubé’s dissent in *Egan*), again looking to the role of analogy in framing and complicating categories of harm.⁵¹

Note that there are no premodern “white guys”⁵² here. This is largely a function of Authers’s subject—self-consciously Canadian (and post-*Charter*) literature—but it is also a function of his approach. Miller in his book feels the need to invoke our era of “assertive personal sensitivity”⁵³ and, anticipating our needs, explains his choice of texts “is a matter of history and context, not politics.”⁵⁴ He would look elsewhere “to understand literature in English,” but

47. Authers, *supra* note 1 at 51.

48. *Ibid* at 80. The novels considered in this chapter are *Alias Grace*, *The Barking Dog*, and *The Way the Crow Flies*. For reference, see Margaret Atwood, *Alias Grace* (Toronto: McLelland & Stewart, 1996); Cordelia Strube, *The Barking Dog* (Toronto: Thomas Allen, 2000); Ann-Marie MacDonald, *The Way the Crow Flies* (Toronto: Alfred A Knopf Canada, 2003).

49. Authers, *supra* note 1 at 100.

50. (Markham, Ont: Viking, 1984).

51. Authers, *supra* note 1 at 101. See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

52. Miller, *supra* note 3 at 9. Miller writes:

[I]f we are going to bring the politics of law and law faculties into the mix—as with, say, the law-and-economics crowd and the critical-legal theorists—where are the live brown girls, so to say? ... If I want to be educated about jazz, I must listen to Louis Armstrong, Duke Ellington, and Thelonious Monk ... If I want to understand literature in English, I have to make my way through the work of a lot of dead white guys from “ethnocentric, patriarchal societies.” It is a matter of history and context, not politics.

For an earlier, more thorough defence of “dead white guys” and their Great Books, see Richard Weisberg, *Poethics, and Other Strategies of Law and Literature* (New York: Columbia University, 1992) at xii. Weisberg argues: “There can be no principled evasion of excellent literature, no matter how worthy the claims of lesser-known artists, in an environment in which few people are being exposed to the traditional texts (*ibid*).” Weisberg further states that: “Shakespeare may have been a bourgeois white Christian male, but he stands as model and precursor for those whose art signifies iconoclasm. ...” (*ibid*).

53. Miller, *supra* note 3 at 19.

54. *Ibid* at 9.

his hands are tied: “[W]here are the live brown girls, so to say?”⁵⁵ Like Miller and Posner, James Seaton has dismissed “the pretensions of those Critical Legal Theorists who deconstruct traditional moralities only to assert their own moral absolutes” (though, like Miller, he agrees with Posner on little else).⁵⁶ Authers is not so dismissive. I raise this because whether the budding scholar elects to read law *in* literature or law *as* literature, she cannot avoid stirring debate over a third issue mentioned at the outset: the question of the canon. Put differently, “who is given voice, who [is] cited, quoted, repeated, and who marginalized, ignored, submerged” is of vital importance.⁵⁷ Evidently, scholars continue to take up the canon question. And Authers, for his part, takes seriously Len Findlay’s call to “always Indigenize” humanities scholarship.⁵⁸ Having begun his study with *Isuka*, a critical text that nonetheless idealises “national identification” and its ties to rights,⁵⁹ Authers closes with a chapter on Indigenous resistance. In this fifth chapter, he considers the varying reactions of Indigenous activists (dramatised by Jeanette Armstrong in *Slash*)⁶⁰ to the arrival of the *Charter* and to legislative and judicial efforts at “constitutional inclusion.”⁶¹

“[M]oralistic” or “didactic,” however, *A Culture of Rights* is not.⁶² While Authers engages with critical literature, he remains sceptical of literature’s capacity either to transform or *inform*, including in the sense of fostering empathy. Even in their critiques, the novels in his study often “replicate legal aesthetics,” problematising not “the concept and idealized operation” of the law’s structures themselves but rather their reality in the half-formed present.⁶³ Ultimately, he argues, these novels are “involved with law in the conceptual coproduction of cultural-legal ideas of a just society.”⁶⁴ They can acknowledge concrete political or legal gains in the present, or lament the lack of them, but they effect the same sort of “deferral of rights” within their pages, and they share in the hope

55. *Ibid.*

56. Seaton, *supra* note 3 at 503.

57. Carolyn Heilbrun & Judith Resnik, “Convergences: Law, Literature, and Feminism” (1990) 99:8 Yale LJ 1913 at 1936. Resnik herself advocates a “feminist interruption of ‘law and literature.’” See *ibid* at 1940.

58. Authers, *supra* note 1 at 127, citing Len Findlay, “Always Indigenize! The Radical Humanities in the Postcolonial Canadian University” in Cynthia Sugars, ed, *Unhomely States: Theorizing English-Canadian Postcolonialism* (Peterborough, Ont: Broadview Press, 2004) 367.

59. Authers, *supra* note 1 at 44.

60. Jeanette C Armstrong, *Slash* (Penticton, BC: Theytus Books, 1985).

61. Authers, *supra* note 1 at 139.

62. Posner, revised ed, *supra* note 32 at 308.

63. Authers, *supra* note 1 at 99.

64. *Ibid.*

these rights “will ultimately be made real.”⁶⁵ Even Timothy Findley’s provocative reinterpretation of the biblical Noah, Authers suggests, relies in some ways “on the idealized, imagined Canada given shape by section 1 of the Charter.”⁶⁶ While her husband Noah is eager to sight land and, with it, an end to the flood and its subversion of the status quo, Mrs. Noyes prefers a longer, rainier present to the loss of a future where “rights might [still yet] be realized.”⁶⁷ Again and again, then, in *A Culture of Rights*, the “complex temporality” of the Canadian rights framework rears its head. This pattern is broken in chapter five of the book by *Slash*, Jeanette Armstrong’s novel about a young Okanagan man made radical by government inaction in the 1950s and 1960s.⁶⁸ For her eponymous protagonist, however, there is a different temporal logic at work: The Crown has imagined for Slash a whitewashed past, and this past continues violently to dictate his future.⁶⁹ In the end Slash resists assimilation under Canada’s legal framework, but the novel named for him defies resolution.

If even literature critical of the law reproduces its forms, then, what do we gain from studying their interaction? Why not look to a different cultural form? Or a less flimsy foil for law—say, economics? Authers has posited a temporal problem of rights that he cannot, in this book, resolve. However, he does more in *A Culture of Rights* than defer to a more transformative literary future.

II. A CONFEDERACY OF DISCOURSES

We have seen that content and form are tightly knit in *A Culture of Rights*. The “procedural aspects of the trial,” for instance, “produce a specific style of narrative and so produce a truth that is a consequence of that style.”⁷⁰ This is true even of the fictional trial, which offers shaky critical ground for the real thing.⁷¹ While literary representations and legal forms work “reciprocally [to] constitute meaning about rights,” the law often reaps the discursive spoils.⁷² At least, so Authers suggests. Since other scholars disagree, it is worthwhile to review their arguments.

65. *Ibid* at 44.

66. *Ibid* at 101.

67. *Ibid* at 123-24.

68. Armstrong, *supra* note 60.

69. Authers, *supra* note 1 at 142-45.

70. *Ibid* at 79.

71. *Ibid* at 88-89.

72. *Ibid* at 127.

Miller argues convincingly for the importance of an “organizing principle as to inter-disciplinarity” in approaching either “law in ... [or] law as literature.”⁷³ Often, this organising principle is existential—law and literature is a movement still at pains to define itself. Julie Stone Peters has broken the movement down into three chronological stages: humanism, hermeneutics, and narrative.⁷⁴ As a map of the scholarship and its varied conceits, Peters’s schematic remains useful. The rough lines of its divisions can be seen in Authers’s harking to “hermeneutics,”⁷⁵ for instance, and in Posner’s disparagement of ‘narration.’⁷⁶ Peters herself, however, holds to no clear organising principle. In fact, she has argued that law and literature’s “interdisciplinarity” is actually ‘illusory,’ a conceptual crutch for both disciplines.⁷⁷ She argues that legal and literary scholars share a mutual longing for “the real.”⁷⁸ Jane Baron arrived earlier at the same conclusion, but by a different route. Conceding this mutual longing, she argues their relationship has actually in practice been unequal, with law’s “context” (and its “boundaries”) having been irrelevant to most law and literature scholars.⁷⁹ Per Baron, these scholars emphasise the law’s gaps in order to “make the case for literature,” and they want most for law to draw from literature’s well.⁸⁰ Like Miller though, and unlike Peters, Baron sees a need for *more* “thoughtfulness about interdisciplinarity,” not less.⁸¹

If we are to be more thoughtful about this interdisciplinarity, and more thoughtful about the lines it draws around law’s content, how exactly should we define that content? Popularly understood, “the man of law ... [was once] also a man of letters,” but he is now just as often a man of “science.”⁸² Critics of this conceptual shift have framed law instead as an “instrument for the conscious pursuit of social welfare,” wielded by lawyers who rightly “act as social

73. Miller, *supra* note 3 at 8.

74. Julie Stone Peters, “Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion” (2005) 120:2 PMLA 442 at 442-46.

75. Authers, *supra* note 1 at 100.

76. Posner, *supra* note 3 at 305-307.

77. Peters, *supra* note 74 at 448-50.

78. *Ibid* at 450-51.

79. Jane B Baron, “Law, Literature, and the Problems of Interdisciplinarity” (1999) 108:4 Yale LJ 1059 at 1077.

80. *Ibid* at 1062.

81. *Ibid* at 1082.

82. *Ibid* at 1074.

engineers.”⁸³ The paradigm of the lawyer-scientist persists, however.⁸⁴ David Howarth, for instance, urges that it “not be confused with the idea that lawyers should be ‘social engineers’”:⁸⁵ The law is properly about the everyday, and the balance of “law and” scholarship operates at a far remove from it.⁸⁶ Besides, however constructive literary study may be, “there is an engineering limit to innovation for legal structures and devices,” he argues.⁸⁷ It is not a given that “social structures” even require lawyerly input.⁸⁸

Miller differs on this point. He argues that literature helps to fill the “gap, sometimes huge, sometimes smaller, between law and justice.”⁸⁹ Authers, as we know, sides with Miller, and locates this gap between the lived reality of Canada and the “free and democratic” Canada of the *Charter*. We have seen that (in his view) Canadian law works rhetorically to narrow this gap. Scholars, policy makers, practitioners, judges—legal commentators across the board—celebrate the *Charter*, its place in Canadian identity, and its potential to right present wrongs. Authers can acknowledge literature’s limitations,⁹⁰ but through his literary rights discourse he sees a smoother way forward. The novel has fewer formal constraints than the legal text, he argues, and can ground a more meaningful challenge to the law’s aesthetics and “constitutive processes.”⁹¹ He hopes for literature to inject more of ‘the real’ into rights discourses, even when it reproduces them. Posner, ever the legal pragmatist, would likely balk at this idea. Miller, too, is certain that law, “[u]nlike literature, ... is meant

83. Thomas C Grey, “Modern American Legal Thought” 106 *Yale LJ* 493 at 498-99, cited in *ibid.*

84. *Ibid.*

85. Howarth, *supra* note 4 at 12.

86. *Ibid* at 13.

87. *Ibid.*

88. *Ibid* at 14.

89. Miller, *supra* note 3 at 10.

90. Authers, *supra* note 1 at 28, citing Lennard J Davis, *Revisiting Novels: Ideology and Fiction* (New York: Methuen Press, 1987) (arguing the novel is “inherently ideological,” a conservative literary form that “by and large preserves the status quo and defends against radical aspirations” at 224-25).

91. Authers, *supra* note 1 at 99. The suitability of other literary forms for this project has been explored elsewhere. For a range of defences of poetry, see *e.g.* Eberle & Grossfeld, *supra* note 5; Michelle Lerner, “Poetry as an Extension of Legal Advocacy: ‘To Pull a Fierce Gasping Life from the Polluted Current’” (2008) 65:1 *Guild Prac* 1 at 9, citing Martín Espada, “Zapata’s Disciple and Perfect Brie” in Martín Espada, ed, *Zapata’s Disciple: Essays* (Cambridge, Mass: South End Press, 1998) 3; Charles Reznikoff, *Testimony* (New York: New Directions, 1965); M NourbeSe Philip, “Notanda” in M NourbeSe Philip, ed, *Zong!* (Toronto: Mercury, 2008) 189 at 192.

primarily to be concrete and practical, to serve a material purpose and to be practised as part of human existence if not experience.”⁹² While literature can be “‘practised’ by writers,” and can have a “practical ... effect, literature would exist (at least orally) without writers.”⁹³ “Positive law in modern, so-called developed societies,” on the other hand, “does not exist without practising lawyers or at least lawmakers” in Miller’s scheme.⁹⁴ As such, his starting point is “archetypal or myth criticism.”⁹⁵ He relies on “sacred texts” like the *Old Testament* to guide him in mapping the “broader ... narrative[s] we tell ourselves about our earthly experience”;⁹⁶ our legal system reflects a “Judaean-Christian ethic,” so the Biblical myth should be our first stop.⁹⁷ But where Miller seeks the mythic, Authers posits the law *as* mythic, at least post-*Charter*. He looks to Canadian authors who have tried variously to bring this myth back down to earth. Authers’s work here is valuable for positing a very different relationship: a law that exists meaningfully apart from the flawed lawyers and lawmakers who “practise” it.

To be sure, *A Culture of Rights* has its flaws. In the first place, Authers might have made his methodology more explicit. We know he picked the books he did because he felt their representations of rights could help to flesh out Canada’s “free and democratic society” and the “temporal discourses” that have proliferated in it with the *Charter*. Certainly, he makes a thorough case for their inclusion in the present study. The case for these books would be stronger, however, had Authers given us some idea of the works he excluded; *Slash* is the only novel in this study to engage directly with the *Charter*, after all, so presumably he had other search criteria (and other books in contention that met these criteria). It feels occasionally like Authers is arguing into the void. Also missing, for the generalist reader, is a surer introduction to law and literature—a closer look at the movement’s schisms and family resemblances would have been helpful. Still, Authers offers an enlightening look at the role of literature in constituting rights (and their discourses) in Canada, “span[ning] ... the aspirational nationalism of the Charter to *Slash*’s resistance to constitutional rights.”⁹⁸ He has aimed in this

92. Miller, *supra* note 3 at 12.

93. *Ibid.*

94. *Ibid.*

95. *Ibid.* at 19. For reference, see Northrop Frye, *Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957).

96. Miller, *supra* note 3 at 19.

97. *Ibid.* at 11.

98. Authers, *supra* note 1 at 149.

book to interrogate the nature and scope of these rights and “the forms that those rights take”⁹⁹—a tall order. Thankfully, he proves up to the task.

A Culture of Rights adds much to Canada’s law and literature canon. Certainly, Authers’s temporal framework is novel. But his biggest contribution might yet be existential. Authers manages to do here what many a scholar thought impossible—find again some element of the real in law and literature.

99. *Ibid* at 28.