Jeanne Gaakeer
(Erasmus University Rotterdam)

European *Law and Literature*: Forever Young
The Nomad Concurs

1. Introduction on a Personal Note

It was not until the day that I became a judge that I fully understood the importance of what my doctorate research in the field of Law and Literature taught me, i.e. that success in practicing law depends to a large extent on the legal imagination in its various guises. I specifically mention the legal imagination because my view on the bond between law, language and literature is informed by the works of James Boyd White, important as they are for legal practice because White has remained true to the original aim of Law and Literature, i.e. to provide nourishment to the legal practitioner, and that is precisely what, in my view at least, contemporary scholarship has lost track with.

Nevertheless, as I continued my parallel education and began to find my own topics for further research in the expanding field, I began to see the implications of the fact that as European scholars' interest in literary-legal studies developed, homage was paid almost exclusively to American models and topics, disregarding the European roots of the bonds between law and literature and perpetuating the canon(s) given by Anglo-American scholarship.

So it should come as no surprise that I wholeheartedly agree with Greta Olson's observation in her contribution to this volume that American Law and Literature scholarship tends to present its research on American politico-legal and cultural issues as the images to be mirrored.

While over the years I have kept finding many exciting things in what is being done in American *Law and Literature*, I do not turn a blind eye to the impossibilities when it comes to importing the results or translating the recommendations found there to European *Law and Literature*, given the specificity of the (historical) development of law in what we now call Europe. The agonistic structure of the American legal process[1] and the political aspects of

[1] Or, as Greta Olson and Monika Fludernik wrote in their "Introduction" to *In the Grip of the Law: trials, prisons and the space between*, eds. Monika Fludernik and Greta

constitutional interpretation are prime examples in this respect when compared to the inquisitorial approach dominant in most civil law countries, one that favors a process of verification of evidence. So Greta Olson is right to rattle the cage a bit.

Having said so, I aim to explore some topics pertaining to the project of 'Europeanizing' our way of engaging in *Law and Literature.* In doing so I cannot – and will not as the literary-legal nomadic judge that I am who has internalized the principle of 'hear the other side' – always escape opposing the European situation to the American. There is good reason for that, too, because, on the one hand, American *Law and Literature* scholarship definitely invites cherry picking, not only given the wealth of strands or approaches but also when it comes to discussing essentially European canonical works with classical Greek tragedy as the case in point, and, on the other hand, given the tendency perceived in European civil law countries today, in criminal law at least, to move away from a predominantly inquisitorial trial in the direction of distinctly American and/or common law adversarial features, such as equality of arms with respect to hearing expert-witnesses.

So, paradoxically perhaps, this speaks for a thorough study of and a dialogue with American *Law and Literature* if only when it comes to (implicitly) importing features of other legal systems to preclude the repetition of mistakes made. This is especially pertinent because European Union member England shares with America the common law system while the rest of the European countries are civil law countries and, as Greta Olson so rightly observes, now that England is part of the European Union it has to deal with the influence of European supranational law, and subsequently, with the continental tradition of codified law.[2] And then we have not even spoken about such aspects as the demarcation of political and geographical space – what is that thing called Europe? –, the idea of a national history (in the example of England: the development from England to England plus Wales, and later on Scotland to the United Kingdom of Great Britain and (Northern) Ireland), the differences as far as (written) national constitutions are concerned, or the effects of the delegation of national sovereignty to "Brus-

---

Olson (Frankfurt am Main: Peter Lang, 2004), xiii-xiv, 'The battle to define literature's significance to law may reflect the adversarial nature of Anglo-American law itself' (xxxi).

[2] The question whether England looks upon itself as a part of Europe is closely connected to this issue. An advertisement for a Bradford UK-based poetry magazine in the *London Review of Books* (5 August 2010): 26, distinguishes between domestic subscriptions, "Europe" and "rest of the world". Note: not domestic and "rest of Europe".

sels". These things speak for more attention within European Law and Literature to differences and similarities.

Now that interdisciplinary movements originating in the Unites States have these past few years been incorporated in European legal education and embraced by European scholarship, with *Law and Economics* as its most prominent example to date, I want to emphasize that this development occasions at least two lines of research. First, an investigation of the various forms that disciplinary co-operation may take, from the trans-disciplinary via the multi-disciplinary to the inter-disciplinary, i.e. one more thorough than has been the case to date, for all too often the terms are mixed up or used indiscriminately without giving the conceptual implications any further thought. Secondly, and building on the former, this development speaks for an elaboration on the methodological aspects of law itself, especially if we also consider that legal methodology and hermeneutics inescapably have to deal with the influx of modern technology, e.g. in the form of results of blood or DNA tests on a defendant's body materials, and with other disciplines in various fields of law, varying from the behavioural sciences to environmental sciences, and, last but not least, with the broad range of studies of law in the humanities.

Arguably this also pertains to the ongoing debate about the place of law as an academic discipline on the spectrum of the sciences, i.e. the question whether law as a verbally oriented discipline is part and parcel of the humanities or whether it should be considered one of the social sciences on the view that law is (also) a technique of problem solving at the individual and the societal level and a means to create social structures. This debate is as much guided by the morphology of the legal system that is brought to the discussion, as it is by the methodological dispute in the social sciences themselves, i.e. whether their methods focus on explaining human behaviour in terms of the natural science model or on understanding human behaviour in the manner of the humanities. Its outcome or, more modestly, the scholarly position taken, of course directs and delineates disciplinary co-operations.

2. American and European Law and Literature: Two Cultures?

2.1. Prolegomena on the Rise and Fall of American *Law and Literature*

When Owen Fiss voiced the fear that the disintegration of public values he perceived in society would threaten law, he pointed to *Law and Economics* and its presumed negative effects given its instrumental view on law as a tool to bring about a specific goal decided beforehand. Fiss warned that law 'with-

out inspiration' would mean the death of law, as we knew it.[3] His proclamation was not directed so much against the development of interdisciplinary legal studies *per se*, but rather against the emergence of the economic model as the exemplary model for law with wealth maximization, calculation, risk assessment as the main elements of the process of exchange as the method of determining (human and legal) value. Fiss later challenged *Law and Economics*' claim for the centrality of the market and lauded the restoration to legal studies of 'a proper place for the question of values'.[4]

Law, though perhaps not the autonomy of doctrinal law, survived the rapid growth of interdisciplinary legal movements that marked the 1980s and 1990s, and *Law and Literature* flourished, also as a counter movement to *Law and Economics*. Today, the institutional evidence indicates that *Law and Literature* has gained prominence over the years. The fact that its position is now under critique, if not under attack, both from the side of legal and literary studies, is proof of its maturity.

Paul Heald recently even proclaimed the death of *Law and Literature*, albeit in an optimistic vein.[5] Distinguishing between the strands of 'law as literature as language' with James Boyd White as its pioneer, 'law in literature', 'law as cultural movement', and 'law and literature as ethical discourse', Heald dismisses the first three. He claims that the legal profession yawns at the first two for lack of normative content given their focus on legal argument, rhetoric and narrative, and because such research is usually done by non-lawyers and obviously law has a natural resistance to outside influence. The third entails the risk of reducing law to a mere cultural product and that challenges the authority of law as far as dispute resolution is concerned. The litmus test Heald applies is the citation index. The result? James Boyd White, to name just one, is cited over 2500 times in academic articles, but only four times in judicial opinions, and thus he fails to make the grade. The fourth strand, brought to prominence by Martha Nussbaum, is the one espoused by Heald

---

[3] Owen M. Fiss, "The Death of the Law", *Cornell Law Review* 72 (1986): 1–16, 14. In this essay I draw from materials in Jeanne Gaakeer, "O negócio da Lei e da Literatura: criar uma ordem, imaginar o homem", in *Direito e Literatura. Mundos em Diálogo*, eds. Helena Buescu, Cláudia Trabuco, and Sónia Ribeiro (Coimbra, 2010), 13–47; "On the Study Methods of our Time": methodologies of *Law and Literature* in the context of interdisciplinary studies"; "The future of literary-legal jurisprudence: mere theory or just practice?" (forthcoming 2011).

[4] Owen M. Fiss, "The Challenge Ahead", *Yale Journal of Law & the Humanities* 1.1 (1988), viii-xi.

[5] Paul J. Heald, "The Death of Law and Literature," *Comparatist* 33 (2009): 20–28, see also University of Georgia Law School Research Paper Series no. 09–006, May 2009, http://ssrn.com/abstract=1407698 <accessed 4 August 2010 >.

himself. Its central argument is that judges should read fiction because the lessons it teaches can directly be applied to decision making.[6] The reason I mention Heald is that his analysis and dismissal of much of what *Law and Literature* aims at is set in the key of any possible influence of any academic field on law. His conclusion that a lack of influence will herald the death of the field, on the one hand, and his conviction that literature itself can have a beneficial influence on the legal professional, on the other hand, merit further thought from the interdisciplinary perspective. His argument is timely for the European context as well given the shift it suggests, i.e. the move away from the original scholarly and pedagogical aim to read literature as a way to understand law toward the idea of the contribution of literature (or the humanities, generally) to legal practice.

So the discussion on whether or not *Law and Literature* needs a fixed agenda or strategy continues. Some rejoice in its pluralistic openness, others aim at more normative and hence possibly more influential projects. All it would seem agree as far as *Law and Literature*'s critical function is concerned. For whether or not one looks upon *Law and Literature* as the starting point for the achievement of the pedagogical aim of learning to do law well (the Whitean project), or as the field to offer new ways to criticize law and its authority, both depart from a distinct view on law's function.

Important to note, if we look at the rise of American *Law and Literature* is that the pragmatic reason for it was said to lie in the fact that a constricted job market for graduate students in the humanities in the 1970s led many to seek refuge from unemployment by entering law school.[7] This obviously did not have a great impact, initially at least, as far as their bringing a clearly outlined view on literature to the field. A focus on the humanizing aspects of literature for law prevailed. Furthermore, or perhaps as a consequence, it took a while before literature departments began to take a serious interest. So Heald may be right in that the plurality and openness of research topics can be seen as a lack of direction and that may well be (one of) the reason(s) of a continued reserve on both disciplinary sides.

Another personal note may illustrate the point. When in 1991 I paid a visit to the English department of Utrecht University where I received my MA in

---

6 See also Paul J. Heald, "Law and Literature as Ethical Discourse", in *Literature and Legal Problem Solving*, ed. Paul J. Heald (Durham [North Carolina] 1998), 3–13.

7 See Harold Suretsky, "Search for a Theory: An Annotated Bibliography of Writings in the Relation of Law to Literature and the Humanities", *Rutgers Law Review* 32 (1979): 727–739, 727; Richard Posner, "Law and Literature: A Relation Reargued," *Virginia Law Review* 72 (1986): 1351–1392, 1353.

1980 and explained that now that I also had my law degree I would like to write a doctorate thesis on that fascinating, and to European eyes new topic called *Law and Literature*, I was hounded out as a traitor to the humanities, for we all knew, didn't we, that law had absolutely nothing to do with (the post-modern study of) literature. So what had gotten into a girl with an MA in British and American literature to see literary interrelations with law? Fortunately, the law department in Rotterdam offered me the opportunity to pursue my goal, but even today I sometimes have to defend my chair in literary-legal studies and explain how important the humanities are to lawyers. This goes to show that even though law and legal theory in the European context are traditionally classified as belonging to Letters – e.g. by the Belgium Royal Academy of Letters, Sciences, and Arts, and the Royal Netherlands Academy of Arts and Sciences –, this classification is not uncontested. As early as the 1940s the famous Dutch jurist Paul Scholten had to defend law against the attack that it did not really belong to the Academy precisely because of its linguistic characteristics.

With the growing influence on law, in the late twentieth century, of instrumentalism of the kind originally promoted by *Law and Economics*, and on the premise that is high time to address matters from a more Eurocentric point of view, I would first like to highlight, somewhat eclectically, a number of elements in the development of law as a background for some proposals for the direction European *Law and Literature* might take.

2.2. European Roots of *Law and Literature*: Unity and Diversity

My starting point is the history of writing, linked as it is to the origin of law, as we know it. The scope of this article forces me to forego the details, but suffice it to say that in the High Middle Ages, the role of the *literati* and *clerici* who were able to read the rediscovered Justinian *Corpus Iuris Civilis* was significant. Philological studies inaugurated at Bologna University formed the basis of the new discipline, as marginal glosses became independent texts aimed at systemizing law.

A *litteratus* possessed letters; he was able to read and write. Here is the root for both the original identification of literature with literacy and the interrelation of letters and the legal profession. This also reminds us that law and literature are cognate human practices although their goals in society are different. Stephen Greenblatt addresses an acute issue for our contemporary discussion on European *Law and Litera*ture when he says, 'I am not at all sure that we have made much conceptual progress beyond Francis Bacon who notes, in the expanded Latin version of *The Advancement of Learning*, that "the

History of *Literature* is wanting".'[8] His main reason for offering this reminder is that Bacon, given his epistemological project, 'appears to envisage a comparative study', and that on this view the study of literature must not only be, 'cross-disciplinary ... [but] also cross-cultural; there is nothing to be gained by staying within one's own national boundaries because a culture's fitness for a particular discursive practice can only be grasped by setting it against another's', and that would include cultural tolerance.[9]

The perfection of the scholastic method of dialectic debate, originated in theology and later prominent throughout academia, was eventually instrumental in incorporating into law elements originally oral and poetical, with the ordeal as a case in point. This verbal orientation also shows in the original symbiosis of law and literature in practice. Thinking of the development of law since then, it is easy to grasp the importance of Bloch's observation that, 'We are used to a sharp distinction between the language of literature and that of law, associated historically with separate and sometimes conflicting spheres of human endeavor. The former has, since the Renaissance, become increasingly synonymous with a discourse emanating from and belonging to a personalized self: the product variously of inspiration, imagination, genius, desire, neurosis, and dream. The latter has, since the age of Montesquieu and Rousseau, come to represent the collective discourse governing the relations between individuals or between the individual and the state.'[10] Furthermore, Bloch also points to an important feature of medieval literary and legal life, if we think of the contemporary development towards *Law and Culture* and/or *Law and the Humanities*, and that is that these were much more than to date perceived as the expression of the collective thought of the community rather than the individual expression of consciousness. Bloch also points to morphological affinities between literary and legal language, for example in language of poetry in comparison to the wording of the legal figure of the 'customal'. Given the formulaic aspect of legal language especially when it came to the accusation in criminal law proceedings, jurists sought refuge in the story in order to give the formula more body.

The etymology of legal terms offers comparable insights. We only have to look at the variety of terms used in Middle English for the function of the ad-

---

8 Stephen Greenblatt, "What is the History of Literature?", *Critical Inquiry* 23 (1997): 460–481, 470 (endnote omitted).

9 Greenblatt, "History of Literature," 472.

10 R. Howard Bloch, *Medieval French Literature and Law* (Berkeley: University of California Press, 1977), 1.

vocate, with 'narrator', and 'counter', i.e. someone who tells a story (counter as sergeant-in-law can be traced back to the French 'countour' from the verb to count, i.e. to plead in a court of law) as the most prominent.[11] Centuries later Jacob Grimm also mentions the etymology in 'Von der Poesie im Recht'[12], so Greta Olson is quite right to refer to Grimm's observation that law and literature arose from the same bed,[13] although I must quibble a bit with her in that she mentions this observation in one breath with the advent of the term Germanist coined by Grimm and the class of Dichterjuristen (poets who also have a law degree), whereas Grimm himself emphasizes the medieval tradition of poet-lawyers, claiming that 'Richter' (judges), are 'finders', i.e. of their decisions just like 'Dichter' (poets), are finders of the right words, 'trobadores, trouveurs' or 'poetai', the ancient Greek term for 'makers', constructors, here, of texts.[14]

When the scholastic method was taken to its logical extreme, and the fifteenth and sixteenth centuries brought the onset and subsequent expansion of the *studia humanitatis* now known as humanism, the rigid division between logic (the reign of theoretical or scientific knowledge) and rhetoric (favoring practical knowledge and context-depending reasoning) dissolved and the result for law was not only the integration with the *artes liberales* in general but also the unity of theory and practice.

The reception of Roman law and its transformation into a *ius commune* in medieval Europe as well as its subsequent development from the classic *mos italicus* to the French, more local case-oriented *mos gallicus*, are also highly pertinent topics for our current understanding of law in context. Furthermore, the explicit emergence of common law in England and civil law in other European countries as 'literatures', before the latter became rule-oriented, deserve more than just the attention of legal and literary historians. My point here is that what today is heralded as contextualisation and interdisciplinarity has a long tradition that has undeservedly been neglected in contemporary literary-legal studies, in my view because of the dominance of the epistemo-

---

11 See also Anton-Hermann Chroust, *The Rise of the Legal Profession in America* (Norman: University of Oklahoma Press, 1965).

12 Jakob Grimm, "Von der Poesie im Recht," in *Zeitschrift für geschichtliche Rechtswissenschaft* [1816], repr. in *Kleinere Schriften* 6 (Hildesheim: 1965), 152–191.

13 Greta Olson, "De-Americanizing Law-and-Literature Narratives: Opening up the Story." in *Law & Literature* 22.1 (2010): 338–364, 353.

14 Grimm, "Poesie," par. 3. See also Lorenz Frank, "Digitales Fundheft 'Recht und Literatur'," http://lorenzfranck.de/dokumente/litrecht.html <accessed 4 August 2010> for an overview of research on 'Dichterjuristen und (Rechts-)philosophen'.

logical *Wissenschaft* model developed in nineteenth-century Germany for the classification of academic fields.[15]

When we turn to literature, the history of the rise of the novel as a genre is important, given that it was first distrusted as the equation of fiction and lies whereupon writers defended themselves by pretending that their novels were histories, i.e. works with a truth claim, as Kieran Dolin has recently argued.[16] It is not for nothing that the rise of the novel as a literary genre coincides with the rise of historiography as an academic discipline. Barbara Shapiro has convincingly shown that historiography became imbued by the concept of 'fact' as developed in the English legal tradition and subsequently spread to the natural sciences. The distinction between matters of fact and matters of law, a *factum* being an action or event in which individuals participate, as contrasted to a *datum*, a given in and by nature, came to the fore in the way common law dealt with the issue of the evaluation of the truth or falsity of evidence by the jury, leaving the facts to the jury and legal doctrine to the judge. Eventually, reciprocity became the key word, 'Fact oriented surveys, reports, and descriptions were so familiar that fictional "matters of fact" imitated real narratives.'[17] The struggle between rhetorical persuasiveness and legal 'truth' as fought out in today's courts, be it in adversarial or inquisitorial criminal law, makes the importance of an inquiry into this part of the history of ideas of law and literature all the more urgent.[18]

This is especially so, because, empiricism and rationalism culminated in a theory of scientific positivism that became instrumental in propounding that law's value lies in its objectivity, and that law as a body of rules exists separ-

---

15 A notable exception when it comes to addressing aspects of medieval law and literature and legal humanism is Peter Goodrich, in, for example, *Law in the Courts of Love. Literature and other minor jurisprudences* (London and New York: 1996), and, Legal Enigmas – Antonio de Nebrija, "the *Da Vinci Code* and the Emendation of Law", *Oxford Journal of Legal Studies* 30.1 (2010): 71–99. Eric Heinze, professor of Law and Humanities at the University of London, Queen Mary, has written extensively on English and French power politics and law in the sixteenth and seventeenth centuries; e.g. "This power isn't power if it's shared': Law and Violence in Jean Racine's La Thébaïde", *Law & Literature* 22.1, (2010): 76–109. See also 'Literature and Law', *Textus, English Studies in Italy* XXI, eds. Daniela Carpi and Ian Ward (2008), 3.

16 Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge: CUP, 2007), 101.

17 Barbara Shapiro, "The Concept 'Fact': legal origins and cultural diffusion," *Albion* 26 (1994): 227–252, 238.

18 See also Peter Schneck, "The Laws of Fiction: Legal rhetoric and literary evidence" *European Journal of English Studies* 11 (2007): 47–63, for a study of the role of rhetorical strategies in law and literature.

ately from those who are called upon to decide cases. In short, once the facts and the rules are clear, the right answer will necessarily be found by applying syllogistic reasoning. Such a view shows an uncanny resemblance to scholasticism's excrescences. It leads to a hermeneutic insistence on the separation of law and morals initiated by the German jurist Rudolph von Ihering's *Begriffsjurisprudenz* and exemplified by legal positivism, both in the Kelsenian version of the pure theory of law and the empiricist variety promoted by H.L.A. Hart. This triumph of the abstract norm, however, can only lead to sterile formalism.

Judges, I would claim, anticipating my argument on the bond between legal theory and practice below in paragraph 4, are like authors in that they select the facts with a view to structuring the world in the decision they take. The epistemological question to be kept in their minds should therefore always be whether there is indeed a chain of circumstance "out there" or whether (some)one carefully fits together the evidence with other established facts. On this view, the notion of the 'laws of evidence' is, of course, a contradiction in terms. This brings us back again to the epistemological debate about the facts and the concept of cognition and knowledge, and the doubtful distinction between the *factum probandum*, the fact which is the subject of proof, and the *factum probans*, the fact from the existence of which that of the *factum probandum* is inferred. Attention to narrative can help us not to forget that claiming truth in law is a way to take on radical human fallibility, in every respect.

If we combine all this with remembrance of the fact that before the eighteenth century the idea of literature as the distinct field was basically nonexistent, the need for a comparative, interdisciplinary angle becomes urgent. Both the terms *letters* and science denoted knowledge and the adjective literary had the connotation of 'the scholarly' including the philosophical and theological in a broad sense. On this view, literature was not thought of in terms of a discourse restricted by national or disciplinary boundaries. English, French or German literature or any other country's literature for that matter, were not looked upon as entities separate from other *letters* as Adam Smith's *Lectures on Rhetoric and Belles Lettres* show. This is important to note in view of contemporary calls for opening up *Law and Literature*.

Put differently, we may say that it was not until the later part of the eighteenth century that local order set in, in the form of a concept of literature as the restricted area of novels, poetry, drama, and essays, and that on the national level. The same goes for law with the formation of nation states all over Europe, after a long period of (civil) wars, turmoil and social upheaval. With the nation state came the demand for national codes of law and consequently, the demise of the *ius commune* as the sole *ratio scripta* for Europe. The

culture, or perhaps we should say the cult of positivism began its rule. The question that arises would then be whether the nation state was instrumental in creating national literature, or the other way around. Here the combined research efforts in the fields of law and literature, especially legal history and literary history, which as yet sorely missed at least in this specific combination, would be called for.

Law is also a case in point as far as the process of differentiation of disciplines and social power structures characteristic of the nineteenth century is concerned. Originally, law and the *Kameralwissenschaften* were one in Germany, before the latter formed the basis the independent discipline of economics. In *Ancient Law* (1861) Henry Maine convincingly argued that anthropology was rooted in law. And when Emile Durkheim and Max Weber founded the discipline of sociology, they did so as lawyers who acknowledged the relationship of the mother discipline and its offspring. When law and literature each went their separate ways as academic disciplines, a natural enmity developed between them, as the German legal philosopher Gustav Radbruch claimed,[19] and concepts that they long shared, such as justice, punishment, and guilt or culpability, began to diverge, and with that their professional languages generally.

Despite this divorce of law and literature, however, traces remained of their old allegiance, albeit in a new coat provided by criminologists and literary authors in the late nineteenth and early twentieth century. Remarkably, these European law in/as literature *avant la lettre* studies are forgotten while Wigmore and Cardozo are held before us as exemplary of the twentieth-century start of whole movement. To complete this short history of ideas, then, of the European bond of law and literature, I want to mention the debate initiated by Cesare Lombroso in *L'Uomo Delinquente* (1876). Lombroso is best remembered for his methodological insistence on a theory of atavism combined with biometrical research focusing on the supposed criminal's bodily features to found his claim that criminals could be differentiated from non-criminals on a scientific basis. Less known is his argument that his theory also formed an explanation of great works of art in which artists of genius have intuited the archetypical criminal, with Michelangelo and Mantegna as prime examples in the plastic arts and Zola, Ibsen and Dostoevsky in literature. In the same breath, Lombroso argued that those literary works that proved fundamentally criminological in outlook were a valuable object of scientific study. This crude and circular methodological point was taken up

---

[19] Gustav Radbruch, *Rechtsphilosophie*, eds. E. Wolf and H.-P. Schneider (Stuttgart: 1973), par. 14, 201, 'einer natürlichen Feindschaft'.

by literary authors such as Zola when writing *La Bête Humaine* (1890), and Dostoevsky who acknowledged criminal anthropology's influence on his work (with Raskolnikov in *Crime and Punishment* as the case in point). Lombroso's disciple Enrico Ferri published a study on criminals in art in 1898, *I Delinquenti Nell'Arte.* In it, he describes the three types of criminals that Shakespeare gave us: Hamlet the insane criminal, Othello the criminal out of passion, and Macbeth the born criminal. When Ferri's book was translated into Dutch in 1905, the Dutch author Querido followed suit, arguing that before Dostoevsky it was only Shakespeare who deeply felt the dramatic beauty and mystery of crime and its origins. August Goll (1866–1936), Danish jurist and criminal law theorist (as well as chief of police in Copenhagen), entered the debate and defined Macbeth as an example of the occasional criminal who deliberately chooses to do wrong.[20] The Dutch theologian and criminologist Van Dijk then took Goll to task for his instrumentalist view on literature. Van Dijk's surprisingly modern premise was that in interpreting Shakespeare we should pay attention to the interrelation of narrative perspectives. Later on the renowned Dutch criminologist Röling concluded the argument when he wrote a literary-legal study of Shakespearean criminals analyzing them against the background of the development of the explanatory science which criminology by then had become.[21]

So while for obvious reasons given the institutional origins of *Law and Literature*, the European focus of attention has almost exclusively been directed towards the US and the UK, I think that that the history of ideas, with divergences and convergences of methodologies in the humanities and sciences, shows that there are reasons enough to address matters from a broader European point of view and at the concrete level of practice(s). This is especially acute given contemporary developments such as the move away as Greta Olson would delineate it, from a binary to a triadic or multiple discipline.[22] Given the European historical development, one might argue that the current move to look upon law as a cultural practice as well as the call to include philosophy and the visual arts including movies as legal "texts" is a return to the diversity of old.

---

20 August Goll, *Forbrydertyper hos Shakespeare*, translated as *Criminal Types in Shakespeare* (Honolulu [Hawai]: University Press of the Pacific, 2004).

21 See Jeanne Gaakeer, ""The art to find the mind's construction in the face': Lombroso's criminal anthropology and literature: the example of Zola, Dostoevsky, and Tolstoy," *Cardozo Law Review* 26.6 (2005): 2345–2377; "Strange Matters, Macbeth and Dutch criminology," *Shakespeare Yearbook* 15 (Lewiston [New York]: 2005), 251–266.

22 Olson "De-americanizing" 359.

Furthermore, the question behind any definition of law as a cultural discipline presupposes an inquiry into the societal and conceptual conditions of law and legal practice, and such cultural inquiry is in itself a practice guided by the epistemological characteristics of an era. On this view, we need to be able to combine both the internal and external standpoint, i.e. we are in and of that practice as much as we investigate it from the outside. We need to address such aspects of our venture, for not only does the development of the humanities as academic disciplines show that the human connection, originally at the heart of these disciplines, has in itself become problematic, the term culture too suffers from a semantic ambiguity that makes it suspicious to many jurists today in that it is easily linked to the ethnic arguments – it's *my* culture, stupid – in controversies about the role of multiculturalism (including religious issues) in contemporary societies.[23]

3. The Nomad Concurs

My proposal for our further conversation is comparable to Greta Olson's. Rather than remaining derivative of American scholarship European *Law and Literature* can and should reflect European cultural and legal preoccupations. I would also argue that simultaneously we should enter upon a dialogue with American *Law and Literature*, not in order to imitate, as Greta Olson quite rightly warns against, but in order to probe its qualities to find inspiration for future development of European *Law and Literature.*

I say so given the development at the supranational level of the European Union, one that transcends national law. Furthermore, we would all do well to learn to think more comparatively in *Law and Literature* and be mutually informed, if only to clear away possible mutual misunderstanding. Serving as a judge in a continental European civil law system, I would disagree with Greta Olson where she says that 'legal reasoning proceeds through a process of deduction from abstract norms of codified law to the particular case at hand'[24] and that the judge partly has a prosecutorial function. To start with the latter,

---

[23] The current politico-legal debate on whether or not to accept visible features of Islam in the form of the traditional female dress in the public sphere is a case in point. Here too a venture into the rich European past would be called for. Think of the influence of Islamic culture via the philosopher Averroes (Au'l-Walid Ibn Rushd 1126–1198) whose importance for law is that he unlocked Aristotle's *Nicomachean Ethics* with its concepts of *epistèmè* (scientific knowledge), *phronèsis* (practical wisdom) and *technè* (practical art). Averroes' influence on Christian thought reached well into the fourteenth century, as Dante's *De Monarchia* shows.

[24] Olson "De-americanizing," 352.

the position of the judge between the prosecuting government official and the defendant in criminal cases, or as the arbiter of the dispute between two civilian parties, is that of the neutral third who indeed connects the relevant statutes and principles of law to the case at hand (I am hesitant to use the term 'rule application' given the expectation it raises of an unproblematic existence and use of norms *in abstracto*) and who functions as a check, either against the abuse of government power in the asymmetrical relationship between the state and the citizen, or against a comparable abuse of power between civilian parties. But she does so, ideally at least, not by means of a deductive methodology (only), but, as I will discuss in more detail below, by a combined effort of grasping together what may be called relevant facts and the legal norms. And what is more, she is able to make law. Or, as the website of the Dutch judiciary says under the heading 'The Judge', 'In case the law is not clear and decisive [i.e. on a specific question of law], then the decision of the judge generates the new rule.'[25]

Another aspect that comes to the fore in supranational law is that the word law itself leads to a semantic issue within the European Union and shows the relevance of our attention to the problems of translation. In the legalistic, nineteenth-century idea of law as the sum total of a nation's codified rules in statutes, 'law' is just that. That is to say, law in the sense of just decisions or justice is identical with law as rules, denying the possibility that there may be legal principles that do not have the binary quality of the legal rule but work by giving weight to specific arguments, and refusing to incorporate elements of morality. Contemporary concepts of law within the European Union and without, i.e., at the national level, all include legal principles.

Think also of the semantics of the combinations of 'law and the laws' in English, 'Recht und Gesetz' in German, and 'het recht en de wet' in Dutch. The same aspect of semantic ambiguity crops up in the official texts of the European Convention on Human Rights (EHCR), for example in the immensely important article 6, the right to fair trial. In English it reads, '… everyone is entitled to a fair and public hearing …', but the French text has, 'toute personne a droit …'. So we have 'entitled' rather than 'everyone has a right' in English and 'droit', 'a right' in French, and not only are these concepts dissimilar as far as the place in their legal systems are concerned, they are also culturally dissimilar in that the idea of a legal right in French thought is deeply connected to the history of the demise of the *Ancien Régime* and the French Revolution.

---

[25] www.rechtspraak.nl <accessed 1 September 2010>, my translation.

A remembrance of things past in the form of renewed attention to the importance of literature to legal practice is what I would advocate for European *Law and Literature.* In doing so I acknowledge our human tendency to select from available and/or culturally determined alternatives, and realize that the hermeneutic position from which to offer such proposal is inescapably formed by the circumstance that without some fore-understanding of history we can make no sense of the past while our fore-understanding itself is constructed from our present understanding of the past, and that the same goes for our view on legal practice. There is always the danger of our partisan perspectives. But, put differently, perhaps we should be more like Molière's monsieur Jourdain in *Le Bourgeois Gentilhomme* who, in middle age, suddenly realizes that he has been speaking prose all his life, i.e. we should do more of what the bond of law and literature has shown for so long. I draw support for my argument from the proceedings of the symposium The Power of Stories: Intersections of Law, Culture and Literature (Gloucester, 2005). Melanie Williams argued that a dominant connection of narrative with critical race and psychotherapeutic approaches 'undervalues the practical application for narrative in jurisprudence', claiming that what matters most in literary-legal studies is ' ... not necessarily the quest for a particular political outcome but the knowledge that the natural challenge posed by different epistemological sources is in itself a quiet political critique', and Ian Ward pointed to the importance of *Law and Literature* for legal education.[26] Both arguments are closely connected to legal practice.

4. The Importance of *Law and Literature* for Practice and Education

4.1. The Literary Judge

I would argue – and beg to differ from Greta Olson perhaps – that the value of the word remains *Law and Literature*'s unique selling point[27] to legal practitioners, because jurists have always been and are still today verbally oriented. The impetus for the legal turn to literature originally found in the observation that the legal profession was in need of a broader cultural foun-

---

26 Susan Ayers, "Where is Law&Literature Headed? Roundtable Discussion, participants: Susan Ayres, Michael Hyde, Susan Sage Heinzelman, Ian Ward and Melanie Williams," *Texas Weslyan Law Review* 12 (2005): 485–495, Williams 490 and 491, Ward 494.

27 Early on Robin West pointed to the fact that as a movement *Law and Literature* lacked 'a *point*' ("The Literary Lawyer," *Pacific Law Journal* 27 (1996): 1187–1211, 1187).

dation in the humanities, to me, means that a combined study of legal and literary theory and practice in the European context would be called for. Not with a focus on the abstract Herculean judge that Ronald Dworkin holds before us, or Lon Fuller's Rex, but rather with a reflective one on what real judges actually do, i.e. without ending up in an empirical, sociological study.

On the view that the jurist's perception of the case at hand is neither purely deductive nor inductive but rather a combination in the sense of going to and fro, from the act of deciding what can justifiably be called 'the facts', to the legal rule(s) and principles applicable, legal methodology always necessarily focuses on the combination of norm and fact. Such methodology acknowledges that both the norm as it is given by the lawgiver and theoretically cultivated (that is to say that the norm includes theory in the sense of legal doctrine or the academic propositions made for law), and the perception and assessment of the facts are never 'just there' but are always in need of interpretation. That interpretation itself is, of course, guided by existing interpretive frameworks (that are themselves subject to ongoing debate as law responds to new societal, environmental, and technological developments and challenges), theoretical knowledge and the individual jurist's practical experience. This characteristic feature of legal methodology is at the same time the opening to critique in that by its very nature the language of the law is open-textured and legal meaning therefore can always be challenged. In short, the primary object of legal interpretation is never the legal text only.

Now that the intertwinement of theory and practice has its focal point in adjudication of which the judge is the exponent, this speaks for the combined study of law and the humanities generally, and law and literature more specifically. Why? Because, first of all, judges configure. They grasp together the facts and circumstances of the case and decide what is relevant and what is not. In law as in literature, constructing a plot is not just arranging events in a (dramatic) sequence. It is determining what (and who) is to be included and what will be left out. That act is already a judgment and because it should be the result of thorough judicial reflection rather than an automatism, it needs to be informed. That is essential for a just outcome because, secondly, judges are the producers of sentences in at least two meanings: they decide the lives of others and in writing down their decisions they have to state the grounds the decision is based on, so that others can form an opinion about its correctness.[28] As in narrative fiction, a story is presented in a judicial deci-

[28] For an early European reference to *Law and Literature*'s potential as legal methodology, see Christian Armbrüster, "'Law and Literature – Movement' in den USA – eine Herausforderung von 'Law and Economics'?" *Juristische Rundschau* 2 (1991):

sion in that someone tells us as readers that something happened, and what it means. It is therefore imperative for judges to gain insight in how narratives work in the world. Attention to narrative can also be translated into a meaningful vantage point from which to resist the reification that is the result of a one-sided, positivist attention to the language of legal concepts. Furthermore, narrative knowledge can also be thought of in terms of self-knowledge, i.e. knowledge of the activities of which the judge as the knowing subject is the author. This in my view is an important feature for professional ethics. For if the judge's deliberation is oriented at choosing the correct legal ends and means, and at translating these into the appropriate legal action, this implies judicial integrity that transcends the obvious demands of clarity and coherence of the judicial decision in that it includes the ethical aspect in the sense of the judicial disposition to keep probing her inner motives and to reflect on the tensions that arise when one has to get a grasp of two conflicting views (on the facts of the case or the point of law, or both).

This is especially in order if we think of the inquisitorial approach in civil law countries that favors a process of verification of evidence in which participants run the risk of falling into the trap of the confirmation bias and/or belief perseverance.

If at the end of the chain of gathering evidence, the case comes to trial, what a judge does is go through the process of verification of evidence rather than the falsification process that Karl Popper would have us do. It is here, then, that insights in narratology can make an important contribution to judicial practice, because the legal professional is not exempt from the psychological processes that he or she is called upon to interpret and judge.

Recent findings in the behavioral sciences, as well as the interdisciplinary field of Law and Psychology suggest that our psychological make-up cannot but fail to live up to the idea of recognizing all incongruities in the case at hand. As humans we are inclined to search for or interpret (new) information and evidence in such a way that it confirms our existing convictions, even in the face of contrary evidence. As a result, there is always a tension between the reconciliation of contraries and our psychological make-up. When in a specific case this leads to cognitive dissonance, the solution most often sought, once cognitive dissonance is literally felt as a problem, consists of explaining and reasoning away these opposites and then the trap of the confirmation bias is wide open, as is that of belief perseverance that reinforces it, for sometimes humans misjudge what they see, or they miss part of

---

61–62. See also Christian Hiebaum, "Recht-Schreiben. Über das Wahre, Schöne und Gute in den juristischen Begründung," *Juridikum* 1 (2004): 52–55.

the information before them. When the judge has read the file, it is the information of that file that will direct her attitude during a trial, during an oral hearing. So what do you do as a judge when chunks of evidence diverge, and, as is the case in law, the environment is always dialectical? The dangers to judicial emplotment are obvious.

All this speaks for a reflection on our evidentiary standards, our interpretive assumptions, the nature of motivation and the grounds stated in judgments, the weight of hearsay evidence, physical and eyewitness evidence, in short, the power of a variety of epistemologies, the visual included, to prevent miscarriages of justice. Because resistance to prejudices of the kind mentioned here presupposes recognition and understanding first, the judge needs to be connected to the broader cultural framework of which law is a part. Or, to come back to the disputed idea of *iudex deductor* and the positivist separation thesis: should the outcome of a lawsuit be equated to the result of the deductive process of the application of objective legal norms, why then bother to have judges at all? The lawgiver might as well codify the desired outcomes of specific legal disputes and/or assign the act of deduction to an automaton. Such line of thought would suggest that human attention is to be dispensed with when it comes to saying what the law is. This would have dire consequences for justice, I would contend.

One recent example of the kind of work I would strongly recommend to judges and *Law and Literature* scholars is that done by Miranda Fricker in the field of philosophical hermeneutics. In *Epistemic Injustice, Power and the Ethics of Knowing* she offers an illuminating discussion of two types of epistemic injustice from which discourses can suffer: testimonial injustice, i.e. when prejudice causes a hearer to give a deflated level of credibility to a speaker's word, and hermeneutical injustice, i.e. when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their own social experiences. Frick illustrates the problems resulting from such injustice by means of Harper Lee's *To Kill a Mockingbird* and Patricia Highsmith's *The Talented Mr. Ripley*. The idea that judgment is perceptual also holds true for our dealing with testimonial (in)justice because it depends on 'the virtuous hearer's perceptual capacity (be) understood in terms of a sensitivity to epistemologically salient features of the situation and the speaker's performance.'[29]

---

[29] Miranda Fricker, *Epistemic Injustice, Power and the Ethics of Knowing* (Oxford: OUP, 2007), 72.

4.2. The Humanities and Legal Education

We should also note the educational differences that influence the enterprise of *Law and Literature*. European universities offer four-year courses in law as an academic discipline, with students starting their studies right after having finished their secondary school. That means that neither the aspect of vocational training prevalent in American law schools, nor the discussion whether law is or should be included in the liberal arts curriculum is on the European agenda to the extent that it is in the US. While continental European higher education since the late nineteenth century was previously modeled on the German system which strictly distinguished between vocational and academic higher education, however, today, after the Bologna Process, we also witness the implementation of the major and the minor after the American model in addition to the introduction of the bachelor-master form of the academic curriculum. Furthermore, the call for the introduction of a liberal arts type of education, with a three-year curriculum that allows students a broad range of choices as far as academic subjects are concerned, has already lead to the foundation of a number of "colleges", for instance, in the Netherlands, University College in Utrecht and Roosevelt Academy in Middelburg.

Nevertheless, the idea of the liberal arts as the means with which to cultivate human values cannot be translated into the European curriculum without further thought of the European background.[30] Here, too, dialogue is in order, if only because the American discussion on the combined teaching of law and the liberal arts dates back to the 1950s and 60s, when Harold Berman argued that law students are unable to digest jurisprudence without a basic knowledge of common law, civil and criminal procedure and legal history, and these subjects should therefore be taught in the liberal arts curriculum.[31]

Anthony Kronman recently voiced a concern comparable to Berman's. His main point is that the question of life's meaning, in a broad sense, was once at the heart of university education, but has now been, 'exiled from the

---

30 See, generally, *Law in the Liberal Arts*, ed. Austin Sarat (Ithaca and London: Cornell University Press, 2004).

31 See Harold J. Berman, *On the Teaching of Law in the Liberal Arts Curriculum* (Brooklyn: The Foundation Press, 1956). For a comparable view that a curriculum for lawyers needs to show the numerous vantage points on the whole spectrum of life, see Kenneth L. Knickerbocker, "Talents for the Study of Law," *Journal of Legal Education* 12 (1960): 534, as cited in 'A Gathering of Poets & Writers' in *The Legal Studies Forum* xxxiv.2 (2010): 449.

humanities, first as a result of the growing authority of the modern research ideal and then on account of the culture of political correctness that has undermined the legitimacy of the question itself and the authority of humanities teachers to ask it.'[32] Subsequently, or so he claims, the humanities have been put on the defensive. On this view, the further development of *Law and Literature* would also demand a change of heart in the humanities, or at least, a clarification of their aims, lest our scholarly discussion can be caught only in the metaphor of ships passing in the night. Think also of matters terminological: the liberal arts in the American sense, are they the same as the *Geisteswissenschaften* in Germany, the moral sciences, or humanities in England, or the *sciences humaines* in France? Here too (in)translatability remains an issue we should not hesitate to address given the move away from *Law and Literature* traditionally conceived toward *Law and Humanities* a.k.a. *Law and Culture.*

A good starting point, in my view, for such a discussion is Costas Douzinas' answer to the question 'What are the Humanities?', i.e. that they are ' ... either a set of academic subjects that typically consists of Classics, Philosophy, History, and Literature (the disciplinary approach) or an attitude toward teaching and learning that could be extended to all types of subjects (the humanistic approach).'[33] To him, the very idea of the humanities is a ' ... consummately modern and decidedly American invention', and as an academic institution typical of American education.[34] He criticizes Martha Nussbaum for looking upon the humanities as what he takes to be a mere palliative, for example in her *Cultivating Humanity: a classical defense of reform in liberal education*, in that calling for external help accepts the poverty of legal education. To Douzinas, the limited view of an auxiliary function of the humanities is restricted in its disregard of the historical and cultural background of the idea of the human and humanity.[35] His sketch of the develop-

---

[32] Anthony Townsend Kronman, *Education's End, why our colleges and universities haven given up on the meaning of life* (New Haven and London: Yale University Press, 2007), 7 and 45ff.

[33] Costas Douzinas, "A Humanities of Resistance: Fragments for a Legal History of Humanity," in *Law and the Humanities. An Introduction,* eds. Austin Sarat, Matthew Anderson, and Cathrine O. Frank (Cambridge: CUP, 2010), 49–72, 49.

[34] Douzinas, "Humanities of Resistance," 49–50.

[35] But see her recent *Not For Profit: why democracy **needs** the humanities*, Martha C. Nussbaum (Princeton and Oxford: Princeton University Press, 2010), in which she voices concern that given the profit motive pervasive in modern societies, science and technology seems to have gotten the upper hand and claims that while there is no objection to science and technology other abilities equally crucial may get lost in the competition: 'These abilities are associated with the humanities and the arts:

ment of the word *humanitas* in the Roman Republic (a translation from the Greek *paideia*) as *eruditio et institutio in bonas artes*, i.e. the organized education in the arts and sciences, or *Bildung*, to modern uses of the words humanism and humanity is important for opening up new vistas on the combined effort of law and literature to make an actual contribution to stem the tide of all kinds of instrumentalism on a global scale, hence his call for a 'Humanities of Resistance'.[36] Such matters are indeed too important to leave them to the European Cultural Convention of the Council of Europe. While fortunately we have progressed since C.P. Snow made the (in)famous distinction, or so his critics claim, with F.R. Leavis as the most prominent, between the scientists and non-scientists, and grouped under the latter heading those working in the humanities, thereby diminishing the culture they stood for (given their perceived inability to contribute, at least directly, to a solution of global problems such as the lack of human welfare in developing countries), controversial ideological issues, as well as in 'disciplinary' terms remain and the value of literature and the humanities for the constitution and reaffirmation of our humanity is not uncontested.[37]

5. Sources of Tolerance

My conclusion would therefore be that there is more work to be done, not only in order to remedy law's current lack of attention to the myriad possibilities that the humanities offer, but also to clarify underlying methodologies and epistemologies so that we gain more insight in our disciplinary joint ventures at a foundational level of each contributing discipline. In 1992 Brian Leiter warned us to avoid the risk of 'intellectual voyeurism', i.e. 'superficial and ill-informed treatment of serious ideas', that results from a lack of interest in and mutual understanding of the (philosophical) concepts

---

the ability to think critically; the ability to transcend local loyalties and the approach world problems as a "citizen of the world"; and, finally, the ability to imagine sympathetically the predicament of another person' (7, note 2 omitted).

36 See also Peter Brooks, "Literature as Law's Other," *Yale Journal of Law & the Humanities* 22.2 (2010): 349–367, for a reflection on how the interpretive humanities may stand in relation to law, claiming that ' … the movement [i.e. *Law and Literature*] has more often than not strayed from its most productive paths of inquiry' and suggesting that ' … the humanities can perhaps teach people to read with a fine and necessary suspicion' (350). This view is most congenial to me because Brooks speaks of law as a praxis, a way of doing things, and that, as I argue, is what Law and Literature scholarship has forgotten.

37 See, for example, David Howarth, "Is law a humanity, or is it more like engineering?" *Arts and Humanities in Higher Education* 3.1 (2003): 7–26.

at work in a discipline.[38] Jack Balkin's provoking name for interdisciplinary scholars was 'romantic rebels'.[39] These are powerful reminders of the pitfalls of interdisciplinary work. How are we to serve two masters at the same time and be successful in creating a new third?[40] If we are indeed rebels, then with rather than without a cause, I would suggest.

For lawyers, given the institutional and societal aspects of law, there is another argument that speaks for such clarification. 'As lawyers we cannot simply accept the conclusions of others; we must make them our own, and to do that we must step out of the legal culture and into that of the other one. In doing this we are not picking up "findings" but learning a language', wrote James Boyd White in his 1990 book *Justice as Translation.*[41] It is here, I would claim, that the topic of interdisciplinarity can be connected to the perspective of legal methodology, on the view that it will simply not do for law to lump together all 'Law ands …'. Not too long ago, Karlheinz Stierle asked whether, 'mutual translation of cultures [is] possible without the third instance of a medium of translation as lingua franca?'.[42] This is a good question for a further discussion on interdisciplinarity itself, given that the term 'translatio studii' refers to the transfer of learning and the transfer of subjects of scholarly research. Or, as Thomas Beebee more recently put it, the important question is whether the 'and' in interdisciplinarity is actually operative in the sense that one discipline has a bearing on the other and vice versa.[43]

The subject also pertains to the question of how *Law and Literature* authorizes itself through the (hi)story it tells. What beginning did we choose, and

---

38 Brian Leiter, "Intellectual Voyeurism in Legal Scholarship," *Yale Journal of Law & the Humanities* 4 (1992): 79–104, 80.

39 Jack Balkin, "Interdisciplinarity as Colonization," *Washington and Lee Law Review* 53 (1996): 949–970.

40 See also Jane Baron, "The Rhetoric of Law and Literature: a sceptical view," *Cardozo Law Review* 26 (2005): 2273–2281.

41 James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), 14.

42 Karlheinz Stierle, "Translatio Studii and Renaissance: from vertical to horizontal translation," in *The Translatability of Cultures, figurations of the space between*, eds. Sanford Budick and Wolfgang Iser (Stanford: Stanford University Press, 1996), 55–67, 55.

43 Thomas O. Beebee, "Can Law-and-Humanities Survive Systems Theory?" *Law & Literature* 22.2 (2010): 244–268. Beebee (246, n,5) refers to Domna C. Stanton's article 'Foreword: ANDs, Ins and BUTs', *Publications of the Modern Language Association* 121 (2006): 1518, in which Stanton seeks a *tertium translationis* to link human rights to the humanities via the historical conceptual connections existing between them in humanism.

more importantly, how are we going to adapt or reconstruct the plot for the future? We must probe our own disciplinary pre-judices lest we present academic simulations based on ideas that we already firmly held before our act of cooperation. I say so because the question of a European perspective returns with a vengeance when we broaden the field to *Law and Culture*. Robin West, for example, has recently argued that while these past fifteen years, *Law and Culture* has overshadowed *Law and Literature*, this has not led to a take-over of the critical function of *Law and Literature*.[44] To date, or so West claims, *Law and Culture* is unfortunately more an outgrowth than a successor of *Law and Literature*, with analogous connections between its two constitutive components.[45] She starts by distinguishing three logically possible relations between law and literature as traditionally explored in *Law and Literature*: first, the literary project in which law is seen as the subject matter of literature as a result of which literature is read for the value of the insights it gives into law; secondly, the jurisprudential project that looks upon literature as the narrative root of law; and lastly, the hermeneutic project in which law is seen as literature as far as interpretation is concerned. To West, *Law and Culture* has developed comparable projects in 'law *as* a form of culture' and 'culture *as* law' (italics mine), but not as yet a cultural analog to 'law in literature'. West deplores that 'There has been no systematic treatment, of which I'm aware, of the possibility that cultural products, no matter how defined or conceived, might actually contain distinctive jurisprudential insights into the nature of law that might significantly inform jurisprudential debates.'[46] In short, *Law and Culture* lacks the *paideic* aim that Law *and Literature* promotes. The examples she gives to illustrate her various points are all taken from American *Law and Culture*, from tv series such as LA Law, CSI, The Sopranos and Ally McBeal, to a rape case at Duke University and Tom Wolfe's *I am*

---

44 Robin West, "Literature, Culture, and Law – at Duke University," *Georgetown Law Faculty Working Papers* (2008), http://scholarship.law.georgetown.edu/fwps_papers/75 <accessed 5 August 2010>. Also, *Teaching Law and Literature* eds. Cathrine O. Frank and Matthew Anderson (forthcoming).

45 I tend to agree with West. See, for example, the contributions to, *Law and Popular Culture*, ed. Michael Freeman (Oxford: OUP, 2004).

46 West, "Literature, Culture," 15–16. William MacNeil recently filled this gap with *Lex Populi. The Jurisprudence of Popular Culture* (Stanford: Stanford University Press, 2007), a study aimed at recontextualisation of jurisprudence from the specialist to the generalist interpretive community by means of a new 'intertext' in order to rethink the culture of law and the law of culture (2). Not only does MacNeil propose to read popular culture jurisprudentially, he actually shows that and how jurisprudence is read by popular culture, i.e. different from legal methodologies. Here is the *paideic* aspect that West claims is missing.

Charlotte Simmons. One may argue, of course, that such cultural artifacts are well known in Europe, but here too American *Law and Culture* is held up as normative.[47] So Greta Olson's advocacy of interdisciplinary studies geared to the European background and context deserves equal application in this new field, if we agree that popular culture contributes to the mental frames through which we perceive our (his)tories.[48] At the same time we should both cherish, as Montaigne told us to, the art of seeing things from different perspectives, and, at least as far as I am concerned, think of culture in the way that James Boyd White throughout his works has consistently argued, i.e., as a form of thought and life that deserves our serious dialogue rather than fierce contestation.

On this view, Helle Porsdam who as a cultural historian advocates broadening *Law and Literature* into *Law and Humanities*, offers a timely argument when she asks us to 'wonder what 'Law and Literature' looks like in a civil-law context. What happens when the texts discussed are Scandinavian, Dutch or Polish, and what happens when these texts interact, not with the common law but with the civil law?'[49] In saying so, she opposes common-law to civil-law methodology, but she too runs the risk of reaffirming a false opposition when she continues her argument saying that 'C]ivil law starts with certain abstract rules, that is, which judges must then apply to concrete cases', whereas common-law adjudication focuses on specific cases and emphasizes the judge's practical wisdom. As I argued above, this is an extremely

---

47 The same goes I would say for Richard K. Sherwin, the author of the seminal *When Law Goes Pop, the vanishing line between law and popular culture* (Chicago: University of Chicago Press, 2000) and the architect of the important rising field of law and visual literacy. In his introductory essay on the interpenetration of law and popular culture in the edited volume Popular Culture and Law, ed. Richard K. Sherwin (Farnham: Ashgate, 2006), see also http://ssrn.com/abstract=1004740 <accessed 1 september 2010>, he sketches the development as one going on in law since the heyday of legal realism and includes as elements of the strand of law and popular culture other fields such as Law and Literature, Critical Race Studies, Critical Legal Studies and Legal Feminism, as well as the interrelation between law and journalism, sports, and music. Such an all-encompassing outlook on law and culture is typically US-based – and how can it be otherwise, given Sherwin's cultural contexts? – and it cannot be translated to the European context without modifications.

48 Precisely because, as William MacNeil points out, cultural legal studies have inaugurated 'a free-for – all … in its hitherto decorous law-and-lit debates' (*Lex Populi*, at 6). Why, I would suggest, not take as our scholarly topic films such as the French *L'ivresse du poivoir* or *La dixième chambre*?

49 Helle Porsdam, *From Civil to Human Rights, Dialogues on Law and Humanities in the United States and Europe* (Northampton: Edward Elgar Publishing, 2009), 174.

oversimplified and partly incorrect view on what judges do in civil-law countries. Her discussion of the move from *Law and Literature* to *Law and Humanities* ends on a very intriguing note that may well prove to be a good starting point for our continued discussion, because it deals with justice rather than (just) law: 'Were I to hazard a guess as to what the future may bring ... I would say that we will be seeing more research on legal positivism and its possible effects on culture (and vice versa) coming out of European law and humanities circles.'[50] Porsdam says so in the context of the source of inspiration that (the success of) the European Court of Human Rights and the European Court of Justice can be to scholars who are 'inspired by their American colleagues to see in law the possibility for making the fight for a better world more effective.'[51]

I fully agree with her observation that the case law of European Court of Human Rights is a source of self-understanding.[52] When we address the problems of the unity and diversity of societies and legal systems within the European Union together with those arising from globalization in other ways, from the digitalization of human life to terrorism and everything in between, we are invited to reflect on the demands of legality, the legitimacy of law and judicial decisions and what better way to do that in the European context than by reading the decisions of the Court of Justice of the European Community or the European Human Rights Court as proposals for the shape and contents of the European community at the supranational level, allowing, of course, for local variety within reasonable range.[53] And we can also read how people locate themselves by means of stories, and consequently, what their narratives can mean in law. When a national court refers to the European Community Court for a preliminary ruling under one of the articles of the EEC Treaty, it asks a question on a point of European law, the answer to which will not only be normative for the national court in question, but for the European community at large. And exactly because deci-

---

50 Porsdam, *From Civil to Human Rights*, 180.

51 Porsdam, *From Civil to Human Rights*, 181.

52 Porsdam, *From Civil to Human Rights*, 69.

53 Think, for example, of the different interpretations of the term 'family life' under the articles 8 and 12 of the European Convention for the Protection of Human Rights, including a variety of human relations, not merely the traditional marriage bond, and compare these to art.41.1 of the Irish Constitution which recognizes the family as 'the natural primary and fundamental unit group of Society' and art.41.3.1 which protects the institution of marriage 'on which the Family is founded', thereby dismissing family units consisting of homosexual or unmarried couples.

sions of these supranational courts are proposals for the European community, the question after the judicial ethos that permeates the decision becomes even more relevant when a decision in a specific case is experienced not only as a legal mistake in the technical sense, but as one that is morally doubtful. So research into historical cross-sections of a field of law, both nationally and internationally, will prove most interesting also for purposes of comparative law. Here too a dialogue with American *Law and Literature* is called for if we acknowledge the tendency, perceived as early as 1991 by Mary Ann Glendon in her *Rights Talk: the impoverishment of political discourse*,[54] of American courts to take a turn in the direction of a more dogmatic stance, whereas European courts are well on their way to develop a new and truly European common law. The rise of such a common law strongly suggests its foundation on equitable standards.

Porsdam's sketch of the future project of *Law and Humanities* then ends by suggesting that such development may lead the legalist camp to harden its fight against beliefs in natural law, a fight for which *Law and Humanities* may provide the forum. I would be somewhat hesitant to connect a renaissance, if any, of natural law thought to a theory of law that includes morality generally, even more so given, on the one hand, the development of EHCR case law with an increase of decisions pertaining to the values and ideals of law (think only of the effects of the Salduz decision (EHRC, 27 November 2008, *Salduz v. Turkey*) on the principle of fair trial as expressed in article 6 of the EHRC in democratic societies under the rule of law, combined with the different ideas on what the rule of law contains, depending on the common law or civil law perspective) and, on the other hand, because with the Hart-Fuller debate on the separation of law and morals long behind us, the number of card-carrying diehards of legal positivism in the field of legal theory has dramatically decreased. Nevertheless, Porsdam's suggestion may be an incentive to re-address the topic of how we imagine European identities, legal and other.

Contemporary pluralism in law and society strongly suggest the need for a study of unity and diversity at different levels, with attention to the traditions that brought us where we are. To this end, *Law and Literature* and/or *Law and Culture*, or *Law and Humanities* for that matter, may function as an umbrella concept in that it can function as a heuristic device of translatability of disciplines and cultures, one that allows a contextualist rather than universalist view of human responsibility. In order to reflect literary, legal, and cultural preoccupations, *Law and Literature* would therefore do well learn to think

---

[54] Mary Ann Glendon, *Rights Talk: the impoverishment of political discourse* (New York: The Free Press, 1991).

even more comparatively on the theoretical and the practical level of interdisciplinary findings. For this project I advocate that we take the title of Learned Hand's often quoted address literally and think of the humanities as sources of tolerance',[55] arguing, as Ian Ward does, for a legal humanism which offers 'a narrative supplement in the various practices of law and jurisprudence.'[56] A revival of humanism, whether within or without *Law and Literature*, is indeed called for in my opinion, and the same goes for our continued effort to understand interdisciplinary movements.

A broad project of cultural inquiry encompassing the whole range of humanities therefore seems the best option. I say so also given the current politico-legal issues concerning the way in which to deal best with religious and/or cultural differences within Europe, bringing to mind that behind the foundation of 'Europe' since 1648 there was and has always been the trauma of overcoming religious differences. One form this may take is an interdisciplinary approach with a historical focus in order to enhance our knowledge and understanding of our national past and that of our partners in the treaty that is the European Union, and to provide a space in which cultural translation can take place.[57] Such an approach also leaves ample room for methodological integration and collaboration on the subject of practice(s).

To give just one other example of the kind of research we may embark upon: in the Netherlands, a development of broadening Renaissance literary studies to include interdisciplinary research is in full swing. I had the good fortune to be invited to participate in such a project on the subject of the Dutch playwright and poet Joost van den Vondel. I found that there is a valuable starting point for further comparative literary-legal studies in the civic tradition of research on how literary texts contribute to the foundation of a nation, one that has recently been augmented by Brook Thomas in *Civic Myths, a Law-and-Literature approach to citizenship* where he while, 'not claiming that law is the key that will unlock all of the mysteries of works of literature

---

55 Learned Billings Hand, "Sources of Tolerance" *University of Pennsylvania Law Review* 79 (1930): 1–14.

56 Ian Ward, "Narrative Jurisprudence and Trans-national Justice," *Texas Weslyan Law Review* 12 (2005): 155–187, 185. In doing so he refers to William Twining's argument that the challenge of globalization drives us towards a revitalized notion of *ius humanitatis*, one that deals "with the common heritage of mankind," (157, note 18 referring to William Twining, *Globalisation and Legal Theory* (Cambridge: CUP, 2000), 50–51).

57 See also Brook Thomas, "National Literary Histories: Imagined Communities or Imagined Societies?" *Modern Language Quarterly* 64.2 (2003): 137–152, on how the idea of a cultural nation with a sense of national identity is not restricted to sovereign states.

or that literature is the key that will open up a full understanding of the law', convincingly shows how the "'the Founding fathers of American literary nationalism" created a usable past for a nation that lacked one.'[58] Thomas also shows the importance of a critical attitude towards the past, given the danger of reading teleologically and thereby preserving the very myth that is in need of clarification. A literary-legal interpretation is not supposed to be a denial of the rule of law either; it should dramatise various conflicts citizens subject to law have to confront, explore dilemmas, and interweave legal and literary analysis. And he is right when he says, 'the increased fluidity of national boundaries does affect citizenship.'[59] Especially now that territorial boundaries dissolve, by legal measures or by technological innovations such as the Internet, a shared politico-legal culture can provide the cement for modern nations, moving beyond criteria such as ethnicity or shared religious roots. Furthermore, we lack an overarching discussion of European sovereign power so far, i.e. one comparable with discussions on national sovereignties.

So how, for example, does the literature of a period further exercise the public imagination? Blair Worden's recent study on Milton would suggest a comparative study of Lucifer in Milton and Vondel, the historically salient issue of religious and legal dispute being present in both authors' works.[60] For British law and literature of the Stuart era, Elliot Visconsi has recently taken up the subject of the fictionalisation of law, or *mythopoesis*.[61] He aims to show how a playwright like Dryden helped fashion the nation. Visconsi's suggestion that emotional identification is central to most early modern models of political obligation may be of interest for further research on the narrative ethos of early modern writers, when law and literature are integrated in a cultural moment, as is the case in Vondel. I would also suggest research on the theme of the *auctoritas poetarum*, the authority in matters of truth and fact that the humanists ascribed to poets as much as to philos-

---

58 Brook Thomas, *Civic Myths, a Law-and-Literature approach to citizenship* (Chapel Hill: University of North Carolina Press, 2007), i and 20, endnote omitted. Also of interest is Penelope J. Pether, "Comparative Constitutional Epics," *Law & Literatur*, 21.1 (2009): 106–128. See also Friederike Alvermann Ronge, *To write in defense of the legal constitution* (Hildesheim: Georg Olms Verlag, 1993) on how jurists played a crucial role in fashioning the modern nation in eighteenth century Europe.

59 Thomas, *Civic Myths*, 1.

60 Blair Worden, *Literature and Politics in Cromwellian England. John Milton, Andrew Marvell, Marchamont Nedham* (Oxford: OUP, 2007).

61 Elliot Visconsi, *Lines of Equity, Literature and the Origins of Law in Later Stuart England* (Ithaca and London: Cornell University Press, 2008).

ophers and scholars. The unity of law, literature, and historiography, once presumed to exist, can be an interesting subject for consideration in interdisciplinary studies today now that we are faced with new questions of authority and authorship in the digital world where the idea of 'text' as the product of explicitly volitional authorial design seems to become obsolete, with obvious consequences for such concepts as copyright. This suggests a joint effort to address the broader theme of the dominant epistemology and history of ideas of a period. It also opens up the possibility for a further sophistication of the traditional strand of 'law *in* literature' in the form of attention to the law of fiction in both law and literature and to the fiction of the enterprises of law and literature themselves, so that law *in* literature can be studied not only for its descriptive aspect – an indication of how the law is perceived by those external to it – but also for its prescriptive aspect. In short, we should take to heart that lessons from the past can be taken as *paideic* when it comes to establishing unity and solidarity in Europe and act on that notion in our combined studies in law and the humanities.