

## Book Review:

### Subversion and Sympathy – Gender, Law, and the British Novel

Eds. Martha C. Nussbaum & Alison L. LaCroix, Oxford University Press, New York, 2013, ISBN 978-0-19-981204-2

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Law and art is – as this issue of the journal illustrates – a broad and far-reaching discipline. Within this, law and literature seems somewhat conventional as a vast amount of literature has already emerged on the subject and courses are being taught on the subject at law schools around the world.

The contribution found in the form of an anthology edited by Martha C. Nussbaum and Alison L. LaCroix, brings revival and new perspectives to the discipline, proving its continuing importance and the many facets yet to be explored in the law and literature interface.

The purpose of the book is according to the introduction by the editors to “*reinvigorate the law-and-literature movement by displaying a range of ways in which literature and law can illuminate one another and in which the conversation between them can illuminate deeper human issues with which both disciplines are concerned. It makes a substantive contribution, by shedding light on a range of gender-related issues, ranging from inheritance to money lending to illegitimacy; but it also makes a methodological contribution, displaying (and discussing) a range of perspectives that exemplify the breadth and range of this interdisciplinary area of scholarship [...].*”

The list of contributors is long and includes both legal academics (Baird, Ferguson, Lacy, LaCroix, Levmore, Meyler, Nussbaum, Simon-Kerr and Stone), judges (Posner and Wood) and scholars from other fields, namely philosophy (Baron) and English (Claybaugh and Vermeule).

The book is thematically divided into four sections: 1) Marriage and Sex, 2) Law, Social Norms, and Women’s Agency, 3) Property, Commerce, Travel, and 4) Readers and Interpretation.

In the first section of the anthology, an interesting history of obscenity is provided in chapter 3, focusing on the British novel, the background of the protection of free speech in the US First Amendment, and more specifically on American obscenity laws providing exceptions to free speech.

The author, Stone, states that contrary to common belief, laws on obscenity (i.e. the illegality of sexually arousing material) are not particularly old or deeply rooted in Western culture. We are taken through literature of the times (apart from ancient Greek, particularly British literature which is the focus of the anthology) until the 18th century and given examples of fiction and poems which could be written, bought and read freely despite its more or less explicitly sexual context. While such literature may have been perceived as immoral or perhaps just distasteful, the general opinion seemed to be that it was not a matter to be regulated by the State. Even when the first true obscenity prosecution in Anglo-American history took place in 1708, against James Read, a printer, for publishing the poem “the Fifteen Plagues of a Maiden-Head” about a woman desperately wanting to lose her virginity, it ended in a dismissal by the Queen’s Bench Court. The grounds given were that the publication created “*no offence at common law*” and “*It indeed tends to the corruption of good manners, but that is not sufficient for us to punish.*”

The author provides other illustrative examples of cases brought before British courts, most of which were exceptional and led to dismissal or charges only on specific grounds. Stone concludes that the US First Amendment seems not to exempt obscenity from the protection of free speech because of the common law heritage from the British, but rather, despite of it.

Posner’s chapter on Jane Austen, chapter 4, begins and ends with a reminder that the law and literature movement is not only comprised of illustrative jurisprudential issues or specific doctrines, procedures or institutions (as the case is with Billy Bud, the Bonfire of the Vanities and Paradise Lost), but also: “[*t*]he value for lawyers and judges and law students of great literature” which “*stimulates the imagination; increases one’s expressive resources; provides psychological insight; creates a sense of how social norms and institutions (though they are not our norms and institutions) influence behavior and make the reader a better, more careful, responsive reader; increases the reader’s sensibility to irony, incongruity, and folly; and, like philosophy and history and social sciences, broadens one’s intellectual horizons*”.

In chapter 6, a part of the second section of the book, we learn of Tess of the d’Urbervilles’ purity. Hardy’s novel, analysed by Baron, portrays an ambiguity in the distinction between seduction and rape in a story about the young girl, Tess, who comes to work for Alec d’Urbervilles and his mother at their estate and here, loses her virginity to Alec whilst asleep in the woods. Baron quotes many pivotal excerpts from the novel illustrating the deliberately ambiguous setup for answering the “what happened”-question of the plot. On this question, Baron notes that it should “*not be confused with the “was it a rape?” question; the latter requires attending to what it takes for something to count as a rape, whereas*

*the former does not. In failing to give us what we need to answer the first question, Hardy prompts reflection on the second."*

Baron draws a contemporary comparison between the tactics used by Tess' employer and seducer/rape (his role is left deliberately open according to Baron) and the commonly known strategies employed by sexual harassers at workplaces. This is interesting and shows the timeless relevance of the issues dealt with in the novel.

Another comparison is, of course, to the recent and current rape laws. Attention is given to the US rape laws and cases (although the same is true for many other jurisdictions as well), according to which verbal refusal generally is not sufficient for persecution and physical resistance is expected unless circumstances are such that resistance would be deemed dangerous or the victim is in a state of shock.

According to Baron, Hardy challenges the assumption that lack of resistance to the utmost inevitably leads to responsibility for the incident and that a women in such a situation cannot properly be viewed as a victim of rape. The powerful and current points in the chapter make it one of the very best contributions to the book.

Another particularly interesting chapter in the same section deals with illegitimacy, chapter 7, "The Stain of Illegitimacy: gender, Law, and Trollopian Subversion", by Nussbaum. Through reference to various writings, the chapter deals with the difference in how illegitimacy affects a child depending on its gender. Specific mention is given to two of Trollope's novels: *Ralph the Heir* and *Doctor Thorne*. Nussbaum shows how Trollope challenged the conventional description of the bastard child (male/female), a person with leanings towards lying, cheating and indecent behaviour; he did not do so by making his characters the exact opposite, but (and this is specifically true for *Doctor Thorne* dealing with the life of a girl born out of wedlock), by providing the reader with an understanding behind the anxiety of the Victorian society towards illegitimacy. The Victorian spirit of prohibition and control reacted forcefully against anyone embracing pleasure, play and jokes in a self-expressive and uncontrolled manner, anyone being "*in effect, the free human being*", as the illegitimate children in Trollope's two novels to a large extent represent. The novels, thus, confronted conventional thought of the time, in an artistic and subtle manner.

Braid's contribution, "Law, Commerce, and Gender in Trollope's *Framely Personage*" is the first chapter in the third section of the book. Braid's contribution is based on the novel *Framely Personage*, described as a "*cautionary tale of what happens when a man [...]*

*seeks relationships outside those constituted by marriage and family*". Baird's analysis tells us that Framely Personage was a work of fiction meant to be the utopian dream for the professional class of the Industrial Revolution, oddly enough not mentioning commerce or industrial progress – the fundamental pillars of the Industrial Revolution – but instead reverting to traditional family values. The novel features female characters foreseeing the misfortunes of the male protagonist upon his attempt to act in the outside world of commerce where he is met with legal fraud and disloyal acquaintances.

LaCroix gives insight into "The Lawyer's Library in the Early American Republic" in chapter 12, part of the last section of the book. Taking up some of the points raised by Posner in the earlier chapter, LaCroix explores the role of fiction in the profession of lawyers and judges – specifically lawyers and judges in the late 18th and early 19th century US.

The importance of fiction in this circle and this period was no different than (and, indeed, a contribution to) the importance of a "*civilized environment of learning, culture and Enlightenment sensibilities*".

A part of the chapter focuses on lawyers and writers. Much of the analysis is concentrated on the Supreme Court Justice, Joseph Story's poem "The Power of Solitude". The poem, according to LaCroix, represents acknowledgement of the fact that individuals need to express their emotions and sentiments in order to live healthily within the Republic. Furthermore, these very individuals form a crucial part needed to improve the Republic: for scholars and practitioners alike "*involvement in literature was a symbol of natural virtue, progress, and membership in the community of civilized nations*".

The remainder of the chapter focuses on lawyers and readers. Here in particular, the importance of female literary contribution is highlighted in Story's letters and speeches. LaCroix states that "[f]or Story, *the shining practitioners of the novelistic craft, with their virtually unlimited potential to awaken kindred sympathies, were women*".

Overall, the book provides excellent insight – both to those familiar with the novels, the literary genre and/or the law-and-literature theme and those introduced to either part for the very first time.

Although each chapter in its own right sheds light upon the importance of the British Victorian novel in order to gain a deeper understanding of gender and law, Wood summarises the importance quite accurately in the preface to the book: the most important

contribution of these novels is their ability to put a judge into a different world where she lives in an alternate place and time for a brief moment. This helps the judge, according to Wood, to distinguish between what is fixed and what is culturally dependent.

The same, of course, is true for all lawyers. Practitioners (in law firms, governments or organisations) and academics alike need to have the ability to understand factual circumstances in depth and go beyond their conventional horizon whether writing a memorandum to be presented to a client, litigating a case in court, examining the need for new legislation or exploring interdisciplinary research. The mutual enrichment of law and literature has long been appreciated by writers and lawyers alike and still holds its significance, as proven by this anthology.