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The Cultural Background of *The Legal Imagination*

I want to speak in this essay about one aspect of the origins of what is often called the law and literature movement in the United States,[1] namely, how it got going. I shall do this by explaining the aims and assumptions of my own early contribution to it in the form of *The Legal Imagination* (first published in 1973). What I say will thus have some of the features of autobiography, but I hope it will be plain that this story is not really about me but about the state of the culture in which modern law and literature emerged.

At the time this book was written there was very little that connected the law with the literary humanities in a self-conscious way. But any claim that law and humanities began in 1973 would obviously be ludicrous, for the connections between law and the arts of language go all the way back to the beginnings of law in European history. The lawyer was, for the Greek and Roman alike, in large measure a rhetorician. Rhetoric was the center of European education until at least the seventeenth century, and long after that it was believed that a good education in the humanistic past was essential to excellence in law. The institution of the university began with schools of law, in Bologna and elsewhere, and law was seen to be

naturally connected to philosophy, history, philology, and theology (e.g., see Gilmore).

In the nineteenth and much of the twentieth century, it would have been obvious to most lawyers that they were speakers and writers by occupation, that law itself was a branch of the larger culture (see Ferguson, *Law*). One need look no further than Justice Frankfurter's famous advice to a twelve-year-old boy who wished to become a lawyer:

> My dear Paul:
>
> No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.
>
> With good wishes,
> Sincerely yours,
> [*signed*] Felix Frankfurter
> (qtd. in E. London, *Law* 725)

It is really only in the rather odd intellectual climate of the mid–twentieth century and beyond that it would have been possible to think that the law had no connection with the other arts of language and disciplines of thought we normally think of as constituting the humanities. In my view, this blindness to the obvious was produced by a convergence of a set of influences: in philosophy, the kind of logical positivism that wanted to reduce meaning to the empirically testable; the more general view that science simply eclipses the value of other forms of thought (and with it the desire to claim the status of "science" for the study of social, political, and economic phenomena); a widespread desire at a time of international peril to affirm the masculinity of science against the perceived femininity of the humanities; and the self-conscious turn to what is called social science in the law, first in the form of sociology and psychology, then of economics. The assumptions here were that these fields could produce knowledge of a

sort that the humanities could not; that this knowledge was testable; and that it could be the foundation of law—law based upon social realities that were accurately represented by disciplines that shared the name, and hoped to share the prestige, of science. The idea that law could be seen as one of the social sciences became prevalent in the 1930s, under the rubric of legal realism, and it has since grown more intense.

I will return to this way of thinking in just a moment. My point now is a simpler one, that when I and others began to think of connecting the law with the world of humanities and literature, what we were doing was not something new and shocking, though that is how some saw it and perhaps how it felt to us, but something very old-fashioned indeed. We were seeking to make conscious a tradition that went back to the beginnings of legal thought in the West. But this was a tradition that took itself largely for granted, and there was very little that addressed it directly. By the time I was in law school in the early 1960s, for example, there were only a scattering of contemporary pieces explicitly about the connections between law and literature: an essay by Justice Cardozo ("*Law*" 3–52); a fine article on judicial style by Walker Gibson; a popular anthology compiled by Ephraim London (*World*); and important work by Owen Barfield (see Tennyson 56), an English lawyer (of whose work at the time I was unfortunately not aware). But it is fair to say that there was no widespread drive to connect the activities of law with what could be learned from our humanistic past. Thus to look at the law, as I wished to do, as an art of thought and language, with its own characteristic concerns and methods, was simultaneously old-fashioned and newfangled, surprising to almost everyone.

I was often asked—as you may want to ask—What can literature possibly have to do with law? This question, repeated over and over again as I began my work, and indeed since then too, reflects in my view a deep misunderstanding of the nature of both literature and law, sometimes on the part of those who profess one or the other.[2]

In order to speak about the way in which connections between these two fields of activity can be drawn, by showing how they were in fact drawn in my own early work, I shall need to speak about my own education, in law school and before. For my ways of imagining the law and the literature that I was interested in connecting were to a large degree shaped by the ways in which I was taught these things both at the university and in the practice of law. My vision of law and literature, that is, was based upon a particular idea of what *law* is, or can be, as well as a certain idea of

what *literature* is, and what can be learned from it. I shall begin by trying to explain these two ideas, tracing them out in terms of my education—an education that made it both surprising to connect these apparently different things and at the same time, by a sort of paradox, quite a natural thing to do.

I shall begin with what "literature" meant to one educated as I was. In college I studied mainly Greek and English literature. Greek exposed me to the wonderful works that are available only in that language—Homer, Plato, Euripides, and Sophocles—and introduced me to the reality of language difference itself. One does not and cannot think the same way in Greek and in English. In each of these languages one can do and say things that one cannot in the other, for each expresses its own culture—its own values, its own sense of what should count as reason, its own way of imagining or constituting the social and natural worlds. The study of other languages has always been central to the humanities, and for good reason: it teaches us that the ways we think, our ways of imagining ourselves and the world we inhabit, are not the only ways. The study of other languages puts into question our own language and the assumptions implicit in it; in doing so, it makes possible a certain kind of cultural criticism, one that holds out the possibility of growth beyond the taken-for-granteds of our own world.[3] For me the study of Greek held this kind of promise, and when I turned to law, it was natural for me to regard law as a language too, as one way among many of doing things with words.

As for the study of English literature, I was trained in the close reading of literary texts, especially poems, a kind of reading sometimes spoken of as the New Criticism. The main idea of this kind of work is that what happens in language, especially in artful language like that of the best poems, can be enormously complex and important, and this in several dimensions simultaneously: aesthetically, intellectually, emotionally, ethically, even politically. We learned that the meaning of a literary expression is not statable in the form of a proposition or an idea but lies in the complex experience of engagement with it, an experience that has its own shape and significance and that can be apprehended only by a mind and imagination trained to observe and respond to such things.[4] We believed that understanding a literary expression of the best kind requires the highest and most complete intelligence. In this sense, learning to read and judge the best literature was thought to be an education of the whole mind, and a worthy goal for a whole life.

Built into this process was the activity of judgment. We would argue endlessly about the merits of a poem or novel or the style of a prose writer. Is this a really good poem or story or sentence, or is it flawed, defective, weak? Is it somehow great despite its flaws—or even because of them? This judgment was not merely an aesthetic one: the question mainly had to do with the quality of thought and imagination, its comprehensiveness and truthfulness, its openness to contrasting truths, its capacity for new and living speech, and this on the most important of human topics: war and death, love and art, truth and knowledge, meaning and meaninglessness.[5] The literary judgment was thus also an ethical one, sometimes a political one.

It was a premise of our work that to read well required one to write well. The quality of our own expressions mattered supremely, we were taught, for it is in the quality of one's expression that one demonstrates, for good or ill, the quality of one's mind, of one's imagination, of one's education; this is where one shows how far one has realized, or failed to realize, the possibilities for meaning that distinguish human life.

In this way we came to see that literature was not to be regarded merely as an item of high consumption, like fine wine, or as an elegance of life, but lay at the center of our own imaginative and expressive lives: for we, like the writers we read, could collapse into empty clichés, sentimental slogans, or the vices of advertising or propaganda; or, like them, we could try to find ways to use our language to say things worthy of respect. This sense of the danger and power of language was to be of great help to me when it came to the study of law.

I loved this kind of engagement with language and literature, but when I went to graduate school, with the idea of becoming a professor of English, I found that there (unlike my college) literature was seen as a field of activity set apart from ordinary life, and from politics and ethics as well. To put it in a word, the reading of literature was professionalized, and for me that threatened its value. So I decided not to make my life simply as a reader of literature but to go to law school instead, with the object of becoming a lawyer. I naturally imagined the legal education I sought as learning to read and write well the language of the law, which was of course a language of power. Without quite knowing it, I was discovering that the study of literature needed the law, just as I was soon to discover that the law needed literature.

As you can see, I already had an idea of what the law was—an activity of mind and language—and it was not one widely shared in the general

culture. It was and is common for nonlawyers and new law students alike to think of the law simply as a system of rules, sometimes cast in rather technical and arcane terms. On such a view, a legal education consists mainly of learning the rules, including where necessary the special meaning of the terms of art in which they are expressed. The application of the rules is thought to be simple enough: one looks at the world to see whether the rule applies or does not, then makes one's commonsense judgment. What sets the lawyer apart from other people is his or her knowledge of the rules and where to find them. Of course there may be problems in interpretation and application, but these are not very interesting and can be handled by rough common sense. What matters on this view is the system of law itself; its purposes and its coherence, matters that can be thought about largely in terms established by sociology or political science or even economics.

In an American law school of my era much energy was devoted to upsetting this simplistic vision of law. Of course rules can be applied in a nonproblematic way a good bit of the time, we were taught, but that is not where lawyers and judges spend their time. They focus on problems of meaning, and these are constantly before us. In any legal case that gets very far, it will be possible to make competing and contrasting arguments about the meaning both of the facts and of the law, arguments that are rational, coherent, and have persuasive force. The defendant and plaintiff will maintain opposing views, with considerable power; judges will concur and dissent, again often with good reasons on both sides.

The world of law—I speak especially of American law—is thus not a world of authoritarian clarity, not a world in which a system works itself out automatically, but a world of deep uncertainty and openness, of tension and conflict and argument, a world where reasons do not harmonize but oppose one another. This means that it is a world of learning and invention, where a great premium is placed on one's ability to make sense of an immense body of material as it bears on a particular case.

To learn to "think like a lawyer" was said to be the aim of law school. This activity was imagined as highly complex, comprehensive, exploratory and tentative, open to alternatives, subtle, and mature. Learning to think well in this mode was regarded as a proper object of an education, indeed of a life—just as at college I had been taught that learning to think well about literary texts, in literary ways, could be the object of a life. In both cases it was the quality of one's thought and expression that mattered above all.

This is what my legal education was to be like. But, as I suggest earlier, no one seemed to be consciously aware that this education was fundamentally literary and rhetorical in kind, with something to learn from other arts of language and culture. The law was seen as sui generis, its own unique cultural form with its own inherent intellectual and ethical merits.[6]

Much to my surprise, then, my literary training was of real and practical value both in the study of law and, later on, in the practice of law. I was used to the close reading of texts; used to seeing in one composition or expression a range of possible meanings; used to arguing for one reading as dominant, against the reality of other possibilities; and, perhaps above all, used to seeing both in written and oral expressions performances of mind and imagination that could be done well or badly. In other words, there was from the beginning a natural point of connection for me between these two forms of activity and life, the reading of literary texts and the practices of law.[7]

I was prepared too, as I say above, to make judgments, both intellectual and ethical in nature, about what people said or wrote. Just as a poem might be condemned as sentimental and a history as a string of received ideas, so a legal argument might be dismissed as conclusory or a judicial opinion as simply the unexamined reiteration of platitudes. Just as in literature we were trained to judge quality in a poem or novel, in law school we were being trained to see the vast differences between the good lawyer and the poor one, the good judge and the poor one—differences that made themselves apparent especially in what these people said, in the ways in which they thought and spoke, in the texts they produced.

This view of things was borne out by my experience in law practice, where I was faced directly with the questions, What is excellence in the practice of law? How can I best try to attain it? In thinking about these matters I found myself attending, over and over, to what the best lawyers in our firm did and said with language, trying to understand what they were doing and why. The secret of their intellectual and professional quality to a large degree lay there, I thought, in what they found it possible to say, if only I could learn to see it.

It seemed to me that the lawyer was asked again and again to address what I would call a literary moment, a moment in which the very question he or she was addressing was one of meaning: the meaning of the experience of a client or witness or opposing party; the meaning of a piece of

testimony; the meaning of a word or phrase in a statute or contract; and behind all these things the meaning of the fluctuating and uncertain mass of documents, principles, understandings, and conventions we call the law. To a very large degree it was the lawyer who was given the task of making that meaning and doing it well.

For me, then, the law was above all an activity of mind and language, with all that involved, an activity that invited comparison with other such activities, especially with the best works of our literary tradition, where we might find examples of the most important kinds of success. The center of legal education, as I saw it, was the opportunity it afforded to strive for excellence of thought and expression alike. The good lawyer, the good judge, were marked by a capacity for a kind of whole-minded attention and thought, one object of which was to transform oneself into a wiser and more acute intelligence.

One of the premises of law as I learned it was that good and decent people can respectably and respectfully disagree about the outcome properly required by the law. What this means is that excellence, for lawyer and judge alike, is not to be confused with choosing the right result; it lies instead in the process of thought and imagination by which one articulates one's questions and thinks one's way through to one's conclusions. One could admire greatly a judge with whom one habitually disagreed and have deep contempt for one who normally voted like oneself.[8]

How then are we to think about the set of activities of mind and language the lawyer and judge must master? The answer of the law school in which I grew up was, simply by learning to do them. This was a kind of craft teaching. It was perhaps not thought necessary or even interesting to find a more explicit way of thinking about what we were doing,[9] but that was what I wanted to do and tried to do in *The Legal Imagination*. My hope in this book was to develop a way of thinking about the activities of mind and imagination that lie at the heart of law—at what happens when a lawyer or judge is faced with a real problem in the world, a loss or conflict, and seeks to bring to bear upon it the language of the law.[10]

My method was to use a series of questions and writing assignments to ask the student to function both as a lawyer, speaking the language of the law, and in the other ways in which he or she had competence by education and experience. In the class we then looked at what the student produced with the eyes of the sort of legal and literary critic I had been trained to be, asking questions about the nature and limits of the language

used, the ways in which it has been replicated or transformed, the quality of mind revealed in the activity of thought and writing, and the ethical perils and opportunities it represented.

One persistent question had to do with the language of the law, which the student must as a lawyer both speak and write: is it necessarily dead, formulaic, mechanical, empty (as it surely is in some hands); or is it—can it by art be made to be—alive, full of meaning and significance? To achieve this, the student must make his or her language the object of thought and attention, accept the responsibility for the use and transformation of it, and resist the human desire to collapse uncritically into its forms.

The idea of the book is in this way to set up an internal dialogue in the student's head between the "law" the student is learning and whatever else he or she knows and is. As a way into these tensions I use both literature and ordinary language, but it could be anything of which the student has command, from music to mathematics to baseball or farming.

Using this method, the book considers a range of questions and problems. How in a general way can one compare legal and literary expressions? How does the law work as a system of meaning and social construction? How does the lawyer's argument—the language, the way of thinking—change as he or she addresses different audiences? How should statutes be composed and interpreted? How should the law talk about human beings, especially in the insanity defense, in sentencing judgments, in institutions of various kinds, and in the language of race? How is the law used, for good or ill, to build human relations over time, to structure social expectations, to instill values that will guide discretion? How do judges and lawyers reason, and how should we decide whether a particular act of legal reasoning is good or bad? How can we understand and criticize the form of literature we call the judicial opinion? At the end, I shift emphasis, asking the student to think of the law itself in a metaphorical way: Is it a kind of poetry, of rhetoric, of history? Here the students have to find their own ways of talking.

In all of this the student has been asked to think of legal language and legal education as dangers: of legal language as potentially narrow and technical and dull, as excluding from consideration virtually everything that matters, and as founded on a form, the rule, in which the truth can never be said; and of legal education as habituating the student to this language, making his or her mind the servant of the language rather than the other way round. These are real problems, and worth thinking about. My hope was that as the student came to see that the life of the lawyer is a life of

writing and speech, of expression, of the arts of language, he or she would come to see it also as presenting opportunities of a unique kind—for what can be done with legal language cannot be done with anything else—and to recognize that the life it offers can be one full of interest and importance and value, at least if he or she can make it so.

Notes

Another version of this essay appears in longer form in *Teaching Law in the Mirror of Literature*, edited by Barbara Pozzo (2010).

1. I need to say that this name is itself in question: sometimes people speak of "law and the humanities," sometimes of "law and language," sometimes of "law, culture, and humanities." Whatever term is used, the kinds of work being done under this general rubric vary greatly in genre and intention alike. There is no organized program here, no commitment to an ideology, no plan of conquest. Rather, as is consistent with the nature of literature itself, and of the humanities, the idea is that many flowers may bloom, different in shape and color. This means, among other things, that we cannot talk meaningfully about the promise or limits of something called "law and literature" as if it were a program based on a set of shared assumptions that necessarily shaped its productions. The kind of criticism called for here is not in that sense theoretical, not a global affirmation or rejection, but, like the work in question itself, particular in nature.

2. Richard A. Posner's *Law and Literature: A Misunderstood Relation* seems to me in particular to misunderstand both law and literature. Posner finds that he can learn nothing from his reading of Homer, Shakespeare, and the rest except tricks for manipulating others through language, an unfortunate consequence of his own habits of reading that in my view says nothing about the works with which he finds he cannot valuably engage. See my review of this book, "What Can a Lawyer Learn from Literature?"

3. The view of language and culture I sketch here is elaborated in my book *When Words Lose Their Meaning*. The point about language difference, and the art of reading and translation it requires, is developed in my *Justice as Translation*.

4. For a classic statement of this thesis, see C. Brooks.

5. The common idea that literature is somehow merely aesthetic in character, as though there were no substantive concerns in our greatest literature, is demonstrably wrong. The *Iliad* and *Aeneid* are about war, Dante's *Commedia* and Milton's *Paradise Lost* about the justice of God, Keats's "On a Grecian Urn" about art and time, Herbert's "Pulley" about the creation of man, Dickens's *Bleak House* about social injustice, Austen's *Mansfield Park* about human morality, and so on. What *is* true is that these works have their own ways of treating their subject, which is not that of the modern academic book or article, but in fact far harder to achieve and of far greater significance.

6. How about social science? We were told that social science had much to offer the law, mainly in the form of reliable findings about the world. The idea was that, up until the moment at which modern social science made something else

possible, the law had had to rely on necessarily intuitive judgments about human behavior and motivation, on tradition and culture. Now psychology, sociology, and economics could provide a kind of scientific knowledge of the world on which legislatures and courts could rely in the formulation of rules and judgments. This was, and is, in my view completely unobjectionable. Of course the law should learn what it can about the world, from whatever reliable source. This is no threat to law, because law will in the end be the forum in which the reliability of the findings of social science will be debated and determined, just as is the case with other forms of expert testimony. The law will translate what can be said in these other ways into its own discourse and use them for its own purposes.

7. Let me add a point. To a certain kind of mind, the question in reading is simply to ask what is the main idea. But in law, as in poetry and other forms of literature, the main idea is usually rather simply stated and it is not the real point. The poet is saying I am in love or full of grief or in despair; the First Amendment says speech is a good thing, the Fourth Amendment says people are to be protected against searches, and so on. But you could write a book, or teach a whole course, about the significance of *the ways in which* Shakespeare says in his sonnets that he is in love or despair; likewise, you could write a book or teach a whole course about *the ways in which* speech is protected under the First Amendment. Life and quality are in the style, not imagined simply as a form of elegance, but as all that matters most when one uses language.

8. Contemporary interest in the quality of legal thought is well expressed in the preface to the first volume of the distinguished journal the *Supreme Court Review*: "In many recent comments on the Court and its critics, the point has been made that, in the words of Professor Henry Hart, 'neither at the bar nor among the faculties of law schools is there an adequate tradition of sustained, disinterested, and competent criticism of the professional qualities of the Court's opinions.' It is believed that one of the reasons for this deficiency has been the absence of a publication devoted exclusively to the presentation of such criticism. This annual, then, proposes to fill the gap by providing a forum in which the best minds in the field will be encouraged freely to express their critical judgments. Over and over again, justices of the Supreme Court have announced the desirability of, indeed the necessity for, such critiques of their work. It is hoped that *The Supreme Court Review* will meet that need" (Preface).

9. One important effort to be self-conscious about the law was the fine course taught by Albert Sacks and Henry Hart, The Legal Process. Their materials have since been published by Foundation Press.

10. For more recent reflections on teaching law, see my *From Expectation to Experience.*