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Sarah Krakoff

University of Colorado Law School

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DOES "LAW AND LITERATURE" SURVIVE LAWYERLAND?

Sarah Krakoff*

There is a literature in place in the world of lawyering. But it is often unpleasant, unseemly, even disfiguring. We are transfixed by it, perhaps transported by it, even as we are appalled. This is notable and troubling because this literature surrounds us, and though it offers many of the balms of other literatures—humor, distraction, rhythm—it does not offer one crucial thing: redemption. This is one of several possible readings of Lawyerland, and it is one that threatens the demise of two positions that have arisen from within law and literature scholarship. The first position, contended with varying degrees of nuance and reservation, by Martha Nussbaum, Robin West, and others, is that literature, by cultivating the literary imagination and thereby inducing empathy, can have a salutary effect on judging and lawyering. This position can be summarized as follows: Literature can help law become more humane and just. The second position, espoused by James Boyd White in many different works, is that law is inherently literary, and that law can become its best self only if we fill its gaps with a cultivated comprehension of our literary heritage. White argues that law is best seen "as a set of literary practices that create new possibilities for meaning and action in life and in doing so enable us to constitute human communities in distinctive ways." This position is more difficult to summarize, but at its essence is the belief that law’s salvation lies in the liberal arts educated, literary sensibility. As shorthand, we

2. See generally Robin West, Narrative, Authority and Law (1993). While Professor West does express support for this position, her view of the role that literature can play is more complex than it might appear from including her in this camp. Professor West has expressed appropriate and astute concerns about the "empathy" aspect of the law and literature project. See, e.g., Robin West, The Literary Lawyer, 27 Pac. L.J. 1187, 1202, 1208-11 (1996) (questioning use of canonical texts, which are limited by the very same exclusions as law, to improve law, and drawing attention to law and literature’s possible inherent limitation—its focus on, and use of, words over action and power).
3. See, e.g., Christine Bell, Teaching Law as Kafkaesque, in Tall Stories?: Reading Law and Literature 1, 17-18 (John Morrison & Christine Bell eds., 1996) [hereinafter Tall Stories?] ([S]tories can be used to generate empathy.); Katherine O’Donovan, Identification with Whom?, in Tall Stories?, supra, at 39, 48 ("The literary account of law . . . offers a critique of law’s injustice.").
5. See White, Justice as Translation, supra note 4, at 1978.
might describe this position as follows: Law is already part of, and should be informed by, the literary canon.

Can one book pose such a significant challenge to these academic positions? In writing about Wallace Stevens's poetry and what it can say to lawyers, Thomas Grey points us towards John Keats's attempt to describe the essential nature of the poetic. Grey describes Keats's "negative capability" as: "The ability to hold conflicting generalizations in mind at the same time . . . the ability to be 'in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason,' capable of 'remaining content with half-knowledge.'"7

Most of the lawyers in Lawyerland are incapable of Keats's negative capability. As characters, they are in this sense anti-poetic.8 Yet when we hear them en masse, forming a chorus of anti-poetry, they are not just provocative and vivid, but also oddly lyrical and elegaic. And if Lawyerland is a prose poem for our era, then the "literature can help law," and the "law is or should be canonical literature" positions are in trouble. As to the former, one hardly steps away from reading Lawyerland with a more acute sense of empathy for any particular group. Rather, the overwhelming feelings the lawyers in Lawyerland engender are alienation and despair. Regarding the second claim, when considered collectively, the qualities of the lawyers in Lawyerland are such that they (truthfully) blur the boundaries between law, life, and art, making it impossible, or at the very least unworkable, to claim a distinct aesthetics for law-as-literature from which societal norms can be gleaned.

First, I will discuss the anti-poetic qualities of most of the individual lawyers in Lawyerland. Their simplistic profanity and crassness, their barely (or not so) repressed violence, and their dissociative tendencies render most of them incapable of Keats's negative capability. Next, I will explore how, nonetheless (or as a result?), their cacophonous voices create a strange, compelling, almost dadaist prose poem that, as a work of literature, captures the essence of real life lawyering.

Joseph's lawyers speak for themselves, literally. Joseph's fictionalized-but-real conversations include little to no description or editorial comment.9 The chapters of his meetings with these lawyers-variés read a

8. As characters, and not as poems themselves. As characters, the Lawyerland lawyers are by and large frustratingly lacking the kind of nuance and ambiguity required to remain content with half knowledge. They would be bad poets. But the disjunctive, contradictory, and mysterious things they say may, themselves, be seen as poetry. So, not surprisingly, Joseph is the poet. I take this to be Robert Weisberg's point about the character Wylie. See Robert Weisberg, Civic Oratory in Lawyerland, 101 Colum. L. Rev. 1782, 1787-88 (2001).
9. David Luban and David Skeel surface the notion that Joseph-the-narrator is, inevitably, as fictional as Lawyerland's lawyers. See David Luban, The Art of Honesty, 101 Colum. L. Rev. 1763, 1764 (2001); David A. Skeel, Jr., The Lawyer as Confidence-Man, 101
good deal like transcripts. We learn what we know about them simply from hearing them talk. And what they say reveals the following: They are often crass and crude. Many of them speak with an undercurrent (at least) of repressed violence. They engage in a good deal of dissociative behavior. These are hardly the marks of poets.

Examples of their crassness include the following. In the first chapter, Robinson, a criminal defense attorney, describes this conversation with a prosecutor:

I was dropping my usual "fuck-this's" and "fucking-that's," when he says to me, "I'd appreciate it if you wouldn't be so vulgar," This piece of shit—he's, like, twenty-eight years old, some Harvard former Second Circuit clerk, whose daddy, who's a partner at Ellis Parkman, got him the job. The little twit interrupts me—he'd appreciate it if I wouldn't be so fucking vulgar. (P. 12.)

Robinson's vulgarity is at least rather self aware. Like many criminal defense attorneys whom I know, he spices up every sentence with "fuck" in part to counter the vulgarity he sees every day. As Robinson himself concludes, "I live in a society where there are how many? Twenty thousand murders a year? That's two hundred thousand murders a decade! Two million murders a century. Now that's not vulgar, is it?" (p. 12).

Many of the examples of crassness, however, are not nearly so context driven. Rather, they seem the product of a juvenile, sophomoric sensibility that our profession either fails to check or, more worrisomely, encourages. Wylie, a partner at a big New York law firm, describes Romer v. Evans¹⁰ as "[t]he [case] that says no preferential treatment for queers, no legislation privileging queers" (p. 31). Voorhees, a thirty-something associate at another big firm describes a former colleague as "[c]litless . . . Clitless Cobb. The iguana . . . Slimy. Bulging eyes. Do you think female iguanas have clitorises?" (pp. 45–46). Then later, upon mention of another colleague's name, Voorhees shouts "Stone! What ever happened to that Negro?" (p. 47).

Sometimes, the juvenile name-calling begins to blur into barely contained violence. Singleton, a malpractice insurance defense lawyer, tells a story about his encounter with a Bengali salesman in a shoe store, referring to him as "[o]ily head" (p. 110), and recounting how he threatened to report him to the INS. On his way out of the store, Singleton proudly reports that he turned to the salesman and said, in a seething whisper, "Fuck you, you fucking illegal, fuck fucking you!" (p. 112).

Singleton's own behavior escalates. And he is not alone. Most Lawyerland lawyers either reveal their own violent tendencies, describe those of

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Colum. L. Rev. 1750, 1758 (2001). I agree. But Joseph-the-writer's decision to let everyone, including his own fictional self, do his or her own talking makes this distinction, for my purposes, unimportant. As Skeel and Weisberg point out, "Joseph" becomes just another character to ponder. See id.; Weisberg, supra note 8, at 1791.

others, or both. Singleton, in the same episode just described, begs the Bengali, in Clint Eastwood, make-my-day fashion, to hit him:

"Please sir, please," I say—I've got my voice as low as I can get it. "Please, sir, please, please, please, please, sir—right here. Hit me. Take your fist and hit me. Here. In the face"—I've got my face right next to his—"please hit me as hard as you can. Please, sir—make my life—hit me. Please!" (P. 111.)

Then Singleton makes the above described threat to turn the Bengali in to the INS, and walks out in an eerily calculated rage.

The lawyers' violence sometimes seems to be a direct result of their professional roles or obligations. Robinson, the criminal defense attorney, describes a district attorney's behavior, upon finding an intruder in his home, as follows: The D.A. lies in wait for the burglar, grabs him, pulls out clumps of his hair, and then bashes his head against the wall several times, seemingly going well beyond what would be needed for defense of his home and family (pp. 8-9). This is crazy behavior, as Robinson himself might say (p. 22), but it is simultaneously completely planned and rational, and therefore frighteningly sane. The D.A. not only knew what he was doing, but knew how to keep it within the limits of any laws that might apply to him (p. 9).

For some, the violence embedded in their jobs has colonized their entire personality. Wylie, a partner at a big firm, describes another partner's encounter with his psychiatrist. The psychiatrist has told the partner that he suffers from "schizogenesis," or "splitting," which means that "as a lawyer, he has to be capable of deep moral compromise" (pp. 40-41). The effects of "splitting" are that lawyers then act out by committing acts of violence against themselves or others (p. 41).

Crudeness and violence alone would not necessarily make the lawyers incapable of being poetic. But the accompanying dissociative thinking removes the crass and seething behavior from the realm of the intentionally artistic. These lawyers, most of them, are unable to synthesize the duplicitous lives they lead. They are not "content with half-knowledge." Rather, they are boiling over with dissonant facts.

Wylie's tale of his law partner's "split" encapsulates this phenomenon. Upon considering his psychiatrist's assessment of his "split" condition, the partner, unable to process this in any productive way, turns on the psychiatrist. Lowering his voice to a whisper, and staring at the "quack," the partner asks, "What you are saying, in effect, is that because I am a lawyer, I am a pathalogue—that is what we're saying, isn't it, doctor? Well if it is, then, doctor, please, I want you to tell me . . . ." (pp. 43-44). The psychiatrist, apparently feeling threatened by the lawyer's menacing tone, shows him to the door (p. 44).

11. Grey, supra note 7, at 7 (quoting Letter from John Keats to George and Thomas Keats (Dec. 21, 1817), in The Selected Letters of John Keats 92, 92 (Lionel Trilling ed., 1951)).
Cerriere, a management-side employment lawyer, responds to a labor lawyer’s characterization of what he does by launching into a weird diatribe about fascism and terror in Bosnia and Cambodia (pp. 138–39). Robinson, the criminal defense lawyer, also exhibits tendencies one would more readily associate with a sociopath than a poet. For example, Joseph describes Robinson’s sudden change of mien: “Then, with an unsettling quickness, his whole demeanor changed . . . . I’d noticed this kind of transformation in lawyers before” (p. 4). Robinson does not change into an unidentified, cockroach-like insect, but the allusion is clear.12 The characters themselves do not know what they are, nor are they in control of their morphing identities.

Judges are no better off. One of Joseph’s lawyers is a federal district court judge whom he calls Judge Day. Judge Day contends that all lawyers are liars; that to be a liar is inherent in the profession. “I don’t think it can be disputed, do you? . . . It’s inherent in the process. . . . Lawyers know too much. If you know too much, how don’t you lie? Everything you say has another meaning” (p. 72). The judge then describes her own angry interaction with a political philosopher at a party. In the end, the judge describes getting the best of the academic because she knows something about “the real world” (p. 73). What she knows, it seems, is how difficult it is ever to know anything. The one certainty she articulates about the legal system is a principle of violent retribution. But wait, even about that, she cannot be sure. The lawyer who spelled this out for her might have been lying (p. 75). Judges are supposed to assimilate our lies into something like truth. But Judge Day’s character demonstrates the absurdity of such an expectation. Much to the chagrin of litigants and the legal academy, judges are “split” too.

*Lawyerland* ends with an almost sublime moment of unrelatedness by a lawyer. Joseph is talking with a woman who has been described to him as one of the most successful prosecutors in New York. Joseph has just told her about the murder of a high school classmate, a black man who was stopping by an apartment to transact a minor drug deal when a violent burglar broke in. The burglar shot at the classmate and at the resident of the apartment. Joseph’s classmate was killed, but the resident was spared because the shot went through his large Afro and did not penetrate his skull. The upshot of the story is that the murderer’s conviction was ultimately reversed due to an error in the court’s instructions at trial. Rather than exhibit any empathy or acknowledge the tragedy involved, the prosecutor responds as follows:

“The Afro. . . . There are three ways of looking at it,” she said—her voice was soft, but every word distinct. She held her hand up in a fist. “First,” she said, counting off her thumb, “what looks large may, in fact, be large. Second”—she put her index

finger in the air—"what looks small may not be as small as you think. Third," she said, counting off a third finger, the slightest trace of a smile on her face, "what looks large may, in fact, be larger than you think. What looks large may actually be larger than you think!" (P. 225.)

This weirdly unresponsive response epitomizes the anti-empathetic nature of the lawyers in Lawyerland. Confronted with a tragedy of both human and legal proportions, her reaction is an enigmatic joke. One suspects, however, that Joseph put these particular words in her mouth precisely because they paradoxically capture the larger poetic quality of the book: What looks large—the world of lawyering—may be larger than you think in that it permeates every inch and strata of our culture. The prosecutor's anti-poetic response hints at the qualities that make the work transcend its component parts. Collectively, there is something oddly poetic about these characters. But individually, by and large, they are often simply strange. The reader feels compelled by them, and the book induces a compulsive, voyeuristic read-in-one-sitting response (at least in me), but not because the people talking are lyrical, profound, or metaphorical; rather, because they appear to be so transgressive. It's similar to feeling transfixed by stories about autistic people or watching films like Titicut Follies.13

Their crassness, their suppressed (and not-so-suppressed) violence, and their weird dissociative tendencies (what, post-Monica, we described in Clinton as "compartmentalization") make them the opposite of poetic. In Lawyerland, both the book and the actual place,14 most lawyers hold conflicting things in their heads, but without the poet's negative capability to remain content with partial understanding. Rather than assimilate the conflicts into ambiguous mysteries, as poets do, they simply alternate their realities. At one moment, one thing is true, and at another, the opposite is true. Like the best first year law students, Joseph's lawyers have overcome the sentimentalization of their own beliefs in order to be objective: "I care about the environment. I facilitate the placement, irrespective of environmental concerns, of toxic waste"; "My client is an avaricious fool whom I dislike. My client is a worthy business person who deserves the best defense"; etc. No wonder the lawyers in Lawyerland are so crass and violent. It would be impossible to be so "split" without having large amounts of toxic spillover.

In addition, individually, many of the lawyers refer repeatedly to their own self image as tradespeople, like mechanics or plumbers, rather than leaders or scholars. Even the federal court judge describes herself as someone with very limited power and discretion. She's just applying the law to the facts. She, and the others, disclaim insight and trumpet their

13. This once-banned documentary film chronicles the brutal treatment of patients in a Massachusetts mental institution.

14. By the "actual place," I mean the world described truthfully, if not factually, by Joseph. See Luban, supra note 9, at 1765 n.5.
lack of negative capability. These are hardly the words of muses; though they may be the insights of fools (in the Shakespearean sense).

There are, in my reading, two exceptions to the nonpoetic nature of the individual lawyers in *Lawyerland*: Tharaud (pp. 115–41) and Shumate (pp. 145–70).

Tharaud is an over-sixty labor lawyer, and Shumate is an African American securities lawyer. Tharaud is one of the few lawyers in the book who is not “split.” She is an old fashioned “cause lawyer” who believes that her work is a bulwark against the injustice that permeates our society. That her politics are aligned with her work make her, ironically, more capable of complex and expansive thinking. She, more than most, speaks lyrically about her physical surroundings. She, much more than most, exhibits empathy for and curiosity about the people around her. Perhaps because professionally she does not “split,” she has the negative capability of which Keats spoke.

Shumate, by contrast, is literary apart from his lawyering. In fact, he is the least interesting, and interested, when talking about his work. But he apparently has other things—the moral legacy of his uncle the union man, his kids, and, as he puts it, his “Negro Lawyer” perspective, which allow and afford him distance from his profession. Shumate’s real life, it seems, is external to the practice of law. He is not steeped in lawyering and therefore, contrary to Tharaud, for Shumate law is just a dayjob. He is not “split” by his profession because he simply isn’t very involved in it. In other words, he possesses negative capability because he doesn’t let his lawyering get in the way.

So, to retain one’s negative capability as a lawyer, the lesson from *Lawyerland* appears to be either to get a job that is entirely consistent with your beliefs (if you have any), or don’t let your job seep into your life. To stand anywhere in between is to become an advocate in the worst sense of the word—to become someone who is a professional simulacrum, always representing something that is never authentic. This results in a split that is worse than Descartes’s mind-body split.15 Most lawyers in *Lawyerland* suffer a mind-mind split, rendering them alienated from everything at any moment.

The anti-poetic qualities of Joseph’s lawyers may lead one to conclude that *Lawyerland* is not literature; that it’s just a depressingly accurate stenography. Yet, as the prosecutor’s response to the Afro has hinted, isn’t there something poetic about this whole clot of lawyers talking to us at once? Collectively, the characters’ voices and the book’s narrations contain a breadth of exposure to the world that few professions can claim (doctors, social workers, and perhaps housecleaners being the others). From the claustrophobic visiting rooms of state prisons to the high-rise offices where multi-million dollar deals are sealed, as a group,
Joseph’s lawyers see it all. Is their crass, violent, and bizarre behavior a concentration of what is at the heart of our culture? If so, as anti-poetic as it is in its constituent parts, as a whole, law is our poetry. *The Waste Land*\textsuperscript{16} at the dawn of the twenty-first century is *Lawyerland*. Is that what Joseph means by using these lines from Rilke as his epigraph: “Don’t be confused by surfaces; in the depths everything becomes law”?

If my observations about *Lawyerland* are on the mark, then the questions posed by law and literature are potentially obsolete. Law is part of the fabric of our literature, but not in the way White means. It is, the way it is now: crass, vulgar, disjunctive, dissociative. Law, like art, can only be what it is now. If this is the case, then the normative aspirations of Nussbaum and others are also in trouble: Literature and poetry are *Lawyerland*, so what could we possibly hope to educate judges about that they don’t already know? The escape is not in turning to another discipline, but in recognizing that, as Shumate says, “Ev-a-ree-thing is ev-a-ree-thing” (p. 168). Or, to return to the prosecutor’s observation: What looks large may actually be larger than you think (p. 225).

While this may sound rather grim, it is no more so than the pretense that we can save our profession by turning to, or turning it into, some hallowed entity called “literature.” We are not better off selectively looking to Charles Dickens or Richard Wright in the hopes of edifying the profession, while ignoring the anti-poetry in our own backyard.\textsuperscript{17} Nor should we attempt, in an insular fashion, to prettify the internal language of the law while overlooking the ubiquitous evidence of the futility of such an endeavor. The futility is twofold: Law is and cannot be a self-contained aesthetic, and, as such, law cannot be gussied up.

Rather, the promise in my reading of *Lawyerland* is that if everything is everything, then change—if that is what we aspire to—can and should only come through the difficult work of starting exactly where we are. *Lawyerland* informs us that we cannot escape the aesthetics and values (or lack of both) of lawyerland unless we negotiate our relationship to lawyering in the here and now.\textsuperscript{18} This endeavor may not be pretty, and will probably be large. But what looks large may in fact be large.

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\textsuperscript{17} I should clarify here that I have no objection to, and indeed support the inclusion of law and literature in the law school curriculum as well as the academic study of law. It’s just that the Nussbaum variant of law and literature’s aspirations can only, I believe, make a normative difference at the margins. The student whose empathetic capabilities are heightened by reading Charles Dickens’s *Bleak House* is probably someone who came to the book with preexisting sympathies for the working class. I suspect that the student who more resembles *Lawyerland*’s Cerriere (pp. 138–39) will not be moved. Which is not to say, however, that marginal values inculcation isn’t better than none.

\textsuperscript{18} Here, as a former clinical teacher, I must give a nod to the important work that clinicians do along these lines. They are working on the same project as the “literature can help law” folks, but they are doing so as a matter of praxis.