A Slightly Polemical Comment on Austin Sarat

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The metaphysicians of Tlön are not looking for truth, nor even for an approximation of it; they are after a kind of amazement.

Jorge Luis Borges

Let me begin by registering three points of emphatic agreement with Austin Sarat’s invigorating remarks. First, like Sarat, I believe that bringing the humanities to, and into, the law is not a matter of “uplift and inspiration,” though it is often so understood. Such an anodyne model of the “Law and Humanities” movement ultimately trivializes the interrogative force of the humanities while changing nothing in the practice of legal thinking. Second, I agree that currently the humanistic study of the law remains very much a handmaiden of legal studies, if not more accurately a scullery maid. Finally, I think an undergraduate liberal arts program that includes attention to the law and legal thinking is in itself very desirable.

Nonetheless, I fear that Sarat’s proposal of a “cultural studies of law” risks giving us a formula for impotence. I say this in part because I believe the cultural studies model offers no panacea. In the humanities, we have seen cultural studies become a kind of hotel lobby where all disciplines can hang out, brought together in a self-satisfied discourse on the implication of knowledge with power, on the marginal and the hegemonic; a somewhat desultory conversation at times because cultural studies as a field or a metadiscipline has not really proposed any powerful new theory or analytic model. I overstate the case—much animating work has been done in the name of cultural studies—because I think there is a mirage effect in the very label of cultural studies, whereas when you get to the field of practice,

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1. JORGE LUIS BORGES, Tlön, Uqbar, Orbis Tertius, in FICCIONES 25 (Alastair Reid trans., 1982).
you find little that provides a unifying and productive paradigm for the field.

I fear in fact that Sarat’s position may unintentionally come to resemble that of Richard Posner, who believes that law and literature should be kept separate from one another, each in its watertight compartment. Posner anticipates an unfortunate contamination of one by the other if we fail to understand that we can and should be “intentionalists” in reading the law and “new critics”—nonintentionalists—in reading literature. Posner’s claim is, of course, entirely valid in view of the different purposes of law and literature. Yet his desire to maintain a separation between law and literature misses the opportunity provided precisely by reading in a different way, otherwise, in an optics created for other purposes.

If law and literature are kept chastely apart—or allowed to miscegenate only in the self-contained sphere of cultural studies—we miss the opportunity for interference and subversion of one by the other. What literary study (to stay with the field of the humanities I know best) can bring to the law has, in my view, little to do with uplift and inspiration. Rather, literary study can propose to the law a kind of slow, close textual reading which at its best can, when trained on legal texts, produce a kind of bemusement or even astonishment: like that amazement sought by the philosophers of Tlön, in Jorge Luis Borges’s tale.²

To suggest in briefest compass what literary “close reading” can bring to the law, let me mention, as one example, the hermeticism of the law. The hermeticism of legal language is, of course, necessary to the law’s internal self-definition and its self-policing. There are carefully crafted and well-defined terms of legal art that are not part of everyday discourse, and indeed are exclusive of it. But as well as terms of the legal techne that do not translate into the language of everyday life, there are words that figure in mainstream discourse that the law uses in a recondite and idiosyncratic way. Where this language concerns the motivations and intentions and mental states of human actors, for instance, the law sometimes professionally deforms the common tongue—and then ends up believing in its own professionally-deformed definitions, treating them as if they were adequate representations of real actors in the real world.

To take an example that I have recently studied in my course, “Narrative and Rhetoric in the Law,” consider Chief Justice Burger’s argument that a Christmas crèche in Pawtucket, Rhode Island, is

2. See id.
merely a "passive symbol." Consider also Justice O'Connor's contention, in the same case, that the symbol has both an "intentional" and an "objective" meaning, and that she can decide what may be "fairly understood" to be the meaning of the symbol. Space permitting, I would demonstrate that Burger and O'Connor offer a somewhat crazed understanding of semiotic communication that shows the law, in this area, to be living in a self-postulated world of definitions that needs to be tested against discourses that have thought more sustainedly about the nature and functioning of acts of communication.

When dealing with human motivation, the law appears almost inevitably to have recourse to a language of intention, often to resolve situations where intention, in our usual understanding of it, seems to be inapposite. Thus we are told, for instance, that the confessions of criminal suspects must be the "product of a free and rational will," and that we can classify a confession as involuntary when it is the product of a will that has been "overborne." Justice Frankfurter, discussing the notion of the voluntary versus the coerced confession in this latter case, noted that the concept of voluntariness is an "amphibian" in that it is used at once to describe a psychic state and to characterize that state for legal purposes. The law is in fact inhabited by many such "amphibians," and it is important that they be identified and subjected to a critical reading. For what may be at stake in such terms is the crucial issue of our conception, as a society, of what we want our criminal suspects to be, as human agents. What do we conceive it means to be an autonomous human actor in the face of criminal procedure? What moral and psychological characterizations do we wish to deploy? What have we learned from Dostoevsky, not to mention Freud, about the "free and rational will"? Has this any relevance? Even without recourse to Dostoevsky or Freud, can we be content with the law's hermetic, impoverished, and sometimes wildly fictional accounts of human motivation, intention, states of mind?

My friendly quarrel with Sarat, then, comes down to my belief that "Law and Humanities," while it may mean many things, ought always to include the idea of interference and interruption; of a practice

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4. Id. at 690 (O'Connor, J., concurring).
5. Id. at 692 (O'Connor, J., concurring).
9. Id. at 605.
whereby the ways of reading developed in one field are used to expose the exclusions and self-delusions of the other. This effort should create some suspicion that the law’s hermeticism does not always provide an adequate basis for adjudication of the large social and human issues that come before it. I must concede to Sarat that I have as yet no evidence that this practice has changed or will change legal “business as usual,” which is singularly immune to contamination from the outside. In this sense, the “law and literature” enterprise could be largely futile. Still, I would argue that it would be a pity if the humanistic critique of the language and rhetorical practices of the law were to give up the humble backstairs position it has acquired in some of our law schools; even handmaidens or scullery maids can sometimes disrupt the dinnertable conversations of their masters.