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Rehumanizing Law: A Theory of Law and Democracy (Preface & Introduction)

Randy D. Gordon

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In Memoriam
Professor Sir Neil MacCormick
(1941–2009)

For My Family: Lori, Breck, Connor, and the Dogs

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Acknowledgments

I've been thinking about aspects of this work for over twenty years, so properly acknowledging everyone who has helped me bring it to fruition is at once a daunting and futile task. But I must try, so let me begin with an apology to anyone whose influence and assistance I have overlooked. Since this book is about narrative, I think it only fitting to order my thanks according to my own personal narrative, but with a twist: told (mostly) backwards chronologically and anchored by place.

In Edinburgh. I researched and wrote the bulk of what follows during a delightful year in Edinburgh. Professors Zenon Bankowski and Neil MacCormick gave me indispensable advice at every step of the drafting process, from concept to completion. I am greatly in their debt and would never have finished this project without their generous guidance. Sadly, Neil passed away just after I finished the manuscript. He was a great man and good friend – we are all diminished at his passing. Professors Neil Walker and Bert van Roermund also gave me helpful comments on the penultimate draft. Having somewhere to read, write, and just contemplate was also important to my work, and for that I am grateful to the Institute for Advanced Studies in the Humanities, where I was housed as a Faculty Fellow during my time in Edinburgh. In especial, I thank the Institute's director, Professor Susan Manning, and her very helpful staff, including Ms Anthea Taylor, to whom I owe a special debt for finding me a flat! I also received considerable moral support while in Edinburgh, and for that I thank the Society of Writers to Her Majesty's Signet and its CEO, Mr Robert Pirrie, and the law firm of Dundas & Wilson, particularly Mr David Hardie and Mr Jim Moser.

In Dallas and other points south. I could not have undertaken this work – or spent the time in Edinburgh – without the generous institutional support of my colleagues at Gardere Wynne. I've also benefited from my long associations with Southern Methodist University (and its law school dean, Professor John Attanasio) and the Dallas Institute of Humanities and Culture (and its director, Dr Larry Allums). I have learned much from my students at SMU and from my fellow Fellows at the Dallas Institute – I thank both groups for listening to and improving my ideas. I must also thank my friend and occasional collaborator Professor Nancy Rapoport (formerly of the University of Houston, now of the University of Nevada, Las Vegas) for sounding out my ideas on interdisciplinary legal studies.

In Kansas. My interest in humanistic theory stretches back to my graduate student days at the University of Kansas, where I had the good fortune to come under the guidance of Professor G. Douglas Atkins, a steadfast mentor and now friend. Sine qua non. I also owe a debt to Professor Amy Devitt, with whom I have collaborated over the years and from whom I have learned much, particularly with respect to genre theory. Environmental historian Professor Donald Worster pointed me to a number of important resources concerning Rachel Carson and her legacy. I also thank Professors Victor Bailey and Michael Hoeflich for giving me helpful advice on studying in the UK. Though it is too long ago for me to remember with certainty, I think that some of the cases and concepts that are threaded through this work first came to my attention via a first-year course in legal method that I took from Professor L. Ali Khan at Washburn Law School – thanks for the memories. Before leaving this Kansas section, I must thank my parents – James and Rosemary Gordon – for indulging my myriad youthful interests in all things literary.

In New York and other points north. My first serious foray into legal theory came in a seminar that I took from Professor Kent Greenawalt at Columbia Law School. In addition to providing me with a solid introduction to legal philosophy, he – and other members of the class – helpfully sharpened my thinking about the relationship between legal and literary interpretation. As we say in Kansas and Texas, this book is my first trip to the rodeo, so I am thankful for the guidance I have received from the University of Toronto Press, especially in the form of helpful comments from two anonymous readers and the step-by-step advice of editor Daniel Quinlan.

Around the house. Above all others listed above, I thank my wife, Lori,

for allowing me to run off to Scotland while we still had two teenagers in the house. Once she got past the 'Have you lost your mind?' phase, she gave me all the support I needed. Thanks, too, to Breck and Connor: to both for being good sports in my absence, and to Breck for graduating early from high school, enrolling at the University of Edinburgh, and eating my cooking without complaint on many a dark Scottish night!

Introduction

'Law is institutional normative order.'[1] Nothing about this statement seems controversial. Indeed, it is hard to imagine any three-word definition of 'law' that would be more accurate. But each of those three words carries a second-order connotation that reveals as much about law's nature as its first-order denotation. To wit: Institutions have walls – sometimes literal, sometimes figurative – that keep things out. Norms are abstractions, distillations, and purifications that leave things out. Orders are systems, and systems seal things out. What are these 'things' that wind up outside the law (or, perhaps more to the point, must fight to get in)? There are many possible answers, but the one that I am concerned to examine in this work arises from *narrative*, which is one of the most fundamental modes of human expression. By keeping narratives at a distance or delay, law loses some of its essential humanity. My project is, then, an attempt to explain the relationship between law and narrative, and – in the end – to suggest ways to (re)humanize law by (re)connecting it to its narrative roots and certain cognates in the humanities.

The process of packaging law as bundles of rules is an exercise in relentless reduction. By the time a common law rule is stated or a statute is codified, it's impossible to tell from the face of that rule or statute what went into the mix that created it. What that mix includes, I submit, is a healthy dose of narrative. Thus, any account of law that ignores or skims over this fact is neither wholly valid nor completely accurate. The contention I will advance is designed to fill this lacuna, not to upend or supplant other descriptions of the law and its operation. In essence, I intend to do nothing more than peel back law's normative veneer just far enough to reveal its narrative foundation. To

do this, I offer four related (and ultimately converging) propositions. First, though law is often posited to be 'autonomous,' that autonomy is not necessarily absolute, though it is quite potent. It is, therefore, a force requiring active resistance. Second, narratives often stand in the formative background of laws. This is true for statutory and common law alike. Third, the ability of a legal system to absorb and digest extrasystemic narratives serves democratic ends. Fourth, educating both lawyers and the general public to think of law 'narrativistically' (i.e., as something more than a system of rules to be extracted from texts) can help ameliorate the dehumanizing effect of the Rule of Law's inherent drive to universalize all that comes before it. This is the case I hope to make throughout the remainder of this book, which is broken into four parts, each of which engages one of the four central themes. The first three parts are essentially descriptive and are designed to show different aspects of the relations among laws, legal actors, and ordinary citizens and to demonstrate the significance of those relations for both law and democracy. The fourth is (at least partially) prescriptive and suggests ways to think, teach, and write about law in democratic ways that can, thereby, improve the entire justice system.

Part One begins with a look across the spectrum between full-blown theories of legal autonomy (like autopoiesis) and humanities-based accounts (like Percy Shelley's belief that legislation has a literary basis). Though it is impossible fully to reconcile the two extremes, narrative is a possible bridge between them because both law and the humanities often take a storytelling form. To illustrate this point, I offer a reading of Camus's *The Stranger*. Taking Shelley as a cue, I next consider whether literature can in fact prompt legislation. I conclude that it can, but the process is neither as simple nor as direct as Shelley would have it. By tracing Upton Sinclair's *The Jungle* and Rachel Carson's *Silent Spring* through legislative history, I am able to show that literary works can figure in the adoption of important legislation. I then take the first step toward explaining the process of literature-becoming-law by looking at an elaboration of Margaret Somers's seminal work on the interaction of personal narratives with higher-order, public narrative forms. This feeds into a discussion of narrative interaction based, once again, on *The Jungle* and *Silent Spring* and the historical record surrounding the principal actors (e.g., Teddy Roosevelt) involved in the legislative offshoots of those two works. Along the way I stop to consider whether the 'factual' versus 'fictional' nature of

a narrative is solely determinative of its potential to impact law-making. (It is not.)

Part Two first considers Bernard Jackson's narrativistic account of rule formation and observes that account at work in specific case law. I follow that discussion with a reading of *Antigone* that cautions against dominant public narratives that – though consistent with a narrow definition of the Rule of Law – do not offer paths along which new narrative material can be absorbed into the system. I then move to a concrete application of my theoretical observations and show how personal narratives can become institutionalized as new rules (or modifications of old ones). The cases I examine to demonstrate this process ultimately suggest a link to Ronald Dworkin's chain novel metaphor and Stanley Fish's attack on it. I conclude that – though Dworkin's metaphor is not a complete description of rule building in all cases – it holds in at least some cases. But Fish is correct as well: law is a conservative institution – and one packed with generic constraints that cause it to lag behind other institutions in the face of change. We can see this at a linguistic level by looking at how slowly Scots law anglicized compared to other genres in the sixteenth and seventeenth centuries or, more recently, how scientific evidence gained currency in legal proceedings much later than when it was considered conclusive in other spheres. This elides into the question of what it means to 'find facts,' and I turn to Robert Browning's *The Ring and the Book* as a tool for answering that question and the related question of what it takes to 'justify' a decision.

Part Three is concerned with the relationship between law and democracy. It begins with an exploration of two concepts that are often linked in both popular and theoretical discussions: 'democracy' and the 'Rule of Law.' To show that the latter is not sufficient to the former, I offer a reading of Melville's *Billy Budd* that demonstrates the problematic nature of legal rules untempered by notions of proportionality, mitigation, and a larger sense of morality. This leads to an articulation of what a *democratic* Rule of Law must entail and how that can be achieved. For general insight, I invoke Jürgen Habermas's discourse theory of democracy and show how that 'discourse' can take a narrative form. Specifically, I show how the American jury system adds a democratic dimension to the legal system by ensuring that non-elites participate in matters of public import. Fish's theory of 'interpretive communities' provides the theoretical backdrop for this discussion, which focuses on the famed O.J. Simpson and Rodney King cases. This

part concludes with observations on 'objectivity' in the interpretation of legal narratives and how a proper conception of objectivity can have pro-democratic consequences.

Part Four begins with a discussion of the relationship between legal and moral reasoning. I conclude – as have many others – that legal and moral reasoning are both branches of practical reasoning and that the occasional gaps that appear between their results can be explained by attending closely to how each process creates narratives. To anchor the discussion, I examine several cases in detail to show how legal narratives leave out material that moral narratives might include. I attend in particular to the formal features of appellate opinions (which by design squeeze narratives beyond recognition) and suggest that – because appellate opinions are the primary tool that lawyers use to learn and practise law – they come to define the common boundaries of the interpretive community to which lawyers belong. The lawyerly way of seeing the world is valuable, but it is also constraining. To loosen these constraints, I offer some modest suggestions for opening legal reasoning and analysis through education reforms (in the broadest leadership sense) – reforms that might well strengthen democratic institutions.

This, in outline, is the account of law that I will offer in this work. I stake no claim to a Grand Unified Theory of either law or humanities, but I do believe that storytelling – when considered as a method of arguing – can expand our understanding of how some laws come to be, other laws come to be changed, and how many laws come into democratic institutions in ways that strengthen and perpetuate those institutions. But stories are not everything. Though they help us make the world intelligible by suggesting agency and causation, they suffer the inherent limits of all things metaphoric. Other accounts – physics, for example – often offer more complete and accurate pictures (almost inevitably, another metaphor) of 'how things really are.' Most of us do not, however, have the mathematical skills to understand physics in anything other than an indirect, trope-laden way. So we must do with what works, all the while realizing that our descriptions are incomplete.

And what holds at the universal level holds at the narrative level as well: our law-stories can be incomplete in devastating ways. Let me illustrate and close – appropriately enough, I think – with a story about a story (infected with multiple levels of hearsay and attendant unreliability). A few years ago I represented a number of the defend-

ants in an antitrust class action. The case settled, and – as the law requires – the judge to whom the case was assigned held a final fairness hearing to ensure that the settlement was fair, adequate, and reasonable to the members of the class. Some small detail that I can't even remember now caused the judge to want to modify the proposed judgment that the parties had negotiated; this occasioned a brief delay in the hearing. While the papers were being edited and copied, the judge decided to divert us with a yarn about his first murder trial, which had taken place many years before when he was a newly minted prosecutor. It was an open-and-shut case. The defendant had viciously knifed his victim multiple times, and there was overwhelming evidence of his guilt. The judge told us about his meticulous preparation, masterful handling of the actual trial, and – as a crowning achievement – his brilliant summation, in which he stood before the jury and, in a final flourish, pretended to plunge the knife into his own chest over and over again. He then sat down, at once exhausted and pleased. His opposing counsel slowly rose and – addressing the court – said, 'Move to dismiss the indictment, Your Honor; the State hasn't proved that anyone died.' Alas! Our fearless young prosecutor had forgotten an element of his case and thereby learned a lesson that should serve to caution us as well: a good story is not always a legally sufficient story. (Oh, by the way, the court allowed our young friend to reopen his case and prove that the victim had died, which shows, I guess, that even a good lawyer sometimes needs a good editor.)