EDITORIAL

Stella Swain

Throughout the modern era there has been a profound antagonism between legality and fictionality. The philosopher and modern legal commentator Jeremy Bentham, took the view that any degree of invention or 'fictionality' perceived to be at work within the law was to be understood as evidence of corruption and degeneration. Where the language of law has recourse to invention properly to reflect, describe or regulate a particular state of affairs it should be treated as 'diseased'. Legal fictions, Bentham wrote, are a syphilis 'which runs in every vein, and carries into every part of the system the principle of rottenness'.[1] According to Bentham's view, the law creates its generic identity as a discourse of truth, expelling falsehood and delusion. His beliefs accord with the traditional image of law. Legal texts, the body of the laws, maintain their authority, as Peter Goodrich has demonstrated, in relation to religious forms, functioning as a secular version of the materialisation of the divine word in the holy scriptures[2]. It is this sacramental dimension which accords the law its integrity and immemorial truth. To *notice* its rhetorical processes (regardless of whether they constitute truth or falsehood) is to substitute the material for the spiritual, corruption for purity, mortality for immortality, the part for the whole, the human for the divine. Fictionality (rhetoric) is to be subordinated as an unnatural or debased supplement to the realism, totality and truth of law.

1. Lon Fuller, *Legal Fictions*, Stanford University Press, Stanford, California 1967, p2

2. Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*, Wiedenfeld and Nicolson, London 1990, p6.

In this edition of *new formations*, the use of the term 'legal fictions' counters the way it is traditionally viewed in law. This serves to draw attention to the metaphorical status of language itself, to law as language, and to legal discourse as an integral part of the webwork of discourses which position us as subjects and produce the social identities and power relations which structure our realities. A 'fiction' may be a creation or a deception, a fabrication or a misrepresentation. In its strictest sense, a 'legal fiction' is both. It is an assumption made in law that one thing is equivalent to another, an assumption which should, we believe, be open to scrutiny. A 'legal fiction' is an improvisation, a metaphor, a rhetorical device for rendering existing rules or precedents applicable to a case, and for preserving the totality of law. On this level a 'legal fiction' both assumes and supports, in Benthamite mode, the essential and neutral 'truth' of law - the law authorises its own fictions.

Our rhetorically self-conscious use of the term 'legal fictions' recognises the provisional and constructed nature of 'truth'. After Foucault, 'truth' may be seen as operating through 'exclusion, marginalisation and even the prohibition of other competing truths'; as Alan Hunt and Gary Wickham have argued, 'what we need to alert ourselves to is that law is one of the

more voluble discourses which claims not only to reveal the truth but to authorise and consecrate it'. The truth of law, they argue, is 'not to be taken for granted but seen as a problem to be investigated'.[3] The research and debate represented in this collection is informed by this imperative. The true/false dichotomy, as invoked by Bentham, masks the inherent provisionality and metaphorical status of legal discourse; it marks the need to conceal the fact of legislation, naturalises the processes of law and the institution of authority. The effort to suppress recognition of its strategic fictions, to suspend disbelief, is an effort to preserve the processes of misrecognition upon which the authority of law rests.

3. Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law*, Pluto Press, London 1994, p12.

There is presently a good deal more readiness than that shown by Bentham to acknowledge the fictionality of law, and to examine legal texts and legal language for the fictions that the law generates and perpetuates. This arises from developments in cultural and critical theory. Its impetus derives from the recognition that, as rhetoric or 'text', the law enters the domain of dominant theoretical concerns. This expansion of disciplinary horizons has resulted in the growth of the Critical Legal Studies movement which developed in the United States and Britain and is now infiltrating legal education. It has challenged lawyers' perceptions of law, and the extent to which the law can remain insulated from critique and change, or can proceed in terms of fixed rules and their unproblematic application.

At a more general level, postmodernist cultural commentators and academics in the field of humanities have drawn attention to the language games through which we operate as subjects of history, as members of a society, as citizens of a nation. The critique of law may be understood to be symptomatic of our postmodernity, of (as Lyotard proposes) our disposition to be incredulous toward the grand narratives we previously believed in, and of the impulse to suspect 'all that has been received, if only yesterday'.[4] The postmodern ascendancy has sounded the death knell for the political, philosophical and religious grand narratives of the post-enlightenment; the 'rule of law', one of the grandest, most institutionally authoritative of narratives, is not exempt from the postmodern slaying of idols.

4. Jean-Francois Lyotard, *The Postmodern Condition*, trans. Geoff Bennington and Brian Massumi, University of Minnesota: Minnesota, 1984, pxxiv.

The Lyotardian suspicion of 'all that has been received' has annulled Bentham's generic divide. It is endemic to our postmodernity that we have become cognisant of the inseparability of legality and fictionality. Investigations of the processes of law are of key significance to the work of feminist, historicist, cultural-materialist and postcolonial literary critics. Theories of the creative role of the *reader* have combined with a recognition of the interpretative indeterminacy of texts to revolutionise how we read, and how we view authors and authority. Feminists, most notably, have taken up the challenge to examine the languages of law using the tools of hermeneutics and deconstruction. To approach law and fiction as related categories is to respond to the contemporary principle that there is no one discourse, discipline or story which can claim to be founded in truth at the expense of others. Goodrich has pointed out, for example, with reference

to the languages of law in Britain, that the authority of law is itself founded in myth: 'The constitution, the invisible and unwritten law of laws which founds the English state, can only properly be said to exist in the realm of legal fiction';[5] that is to say, in the domain of symbolism and allegory. In this edition, the origin of law in myth and narrative is explored by Peter Fitzpatrick as he investigates the 'poetic truth' about law which emerges from Freud's account of a parricide *Totem and Taboo*. Fitzpatrick argues that thfough this allegory Freud positions himself as a modern secular prophet, revealing or modelling law's function as the impossible union of individual and society, of self-determination and fictional possibility. Predicated on the law of the father, modern psychoanalysis provides fertile soil for an exploration of the concept of 'legal fictions' and Fitzpatrick demonstrates the way in which 'Law' is positioned as that which is in between fiction and truth and 'that which accords with our putative position in modernity'.

5. Goodrich, *op. cit.*, p227.

The analysis of literary texts undertaken in this collection begins from the removal of the aesthetic boundaries between text and world as articulated by Foucault; the 'frontiers of the book are never clear-cut; beyond the title, the first lines, and the last full-stop, beyond its internal configuration and its autonomous form, it is caught up in a system of references to other books, other texts, other sentences: it is a node within a network'.[6] The essays show how the rhetorical forms and languages of law and literature are related to and participant within this broader network of cultural discourses. Ian Ward's essay argues that the division between law and literature is cultural and historical, rather than foundational. In modernity they have become distinct, yet there have been historical moments, for example during the flourishing of Renaissance drama in Britain, when this was not the case. Law bears an intertextual relation to literary discourse. There is a level on which, as Hayden White suggests elsewhere, many kinds of narrative in western culture *need* law, and have a consciousness of the contours of legality which is central to their processes. He argues that we cannot but 'be struck by the frequency with which narrativity, whether of the fictional or factual sort, presupposes the existence of a legal system against which, or on behalf of which the typical agents of narrative militate...where there is no rule of law, there can be neither a subject nor the kind of event that lends itself to narrative representation'.[7] This issue of *new formations* examines the part played by law in the narrative fabrication and re/construction of literary and historical events; forms which have traditionally been privileged and widely circulated. Narrative is central to both law and literature, and taking them together affords new ways of appreciating self and world as text.

6. Michel Foucault, *The Archaeology of Knowledge*, trans. A.M.Sheridan Smith, Pantheon, London 1972, p23.

7. Hayden White, *The Content of the Form*, Johns Hopkins University Press, London 1987, pp12-13.

Beyond, or anterior to, the impetus from theory to scrutinising the law, we now live in an era in which the law is charged with an unprecedented task. In Britain the law bears the burden of our most pressing moral and ethical decisions, in the absence of a supporting mythical and religious framework, a shared tradition or a general sense of organic social cohesion

and consensus. Bill Bowring recently argued, in *Soundings*, that 'in the absence of any other means of collectively deciding right or wrong, law becomes the only framework for human judgement'.[8] The functions of 'the law' are kept constantly under the public gaze by the media. Both the monolithic power of the legal system and its intermittent visible apostasy from popular paradigms of justice have accrued immense significance and become the focus of a great deal of public anxiety. We recognise with increasing urgency the extent to which law and legal discourse have played, and still play, a crucial role in the construction of our geographies, communities, histories, and identities. It is also becoming apparent that the law is in fundamental ways anachronistic and inadequate to the demands currently placed upon it. This lends more urgency to the requirement that we pay close attention to the evolution and operation of its techniques of truth.

8. Bill Bowring, 'Law and Injustice: Is There an Exit from the Postmodern Maze?', in *Soundings*, 2, 1996, pp213-224, p213.

Under such critical conditions the innate provisionality of law becomes apparent, its mystique is challenged, its 'fallen' corporeality more evident. As Lon Fuller has said, 'only in illness...does the body reveal its complexity. Only when legal reasoning falters...do we realize what a complex undertaking the law is'. He suggests that the exposure of law as rhetoric is equivalent to the appearance of 'a rent in the law's fabric'; at such moments we may begin to 'trace out the patterns of tension that tore the fabric and at the same time discern elements in the fabric itself that were previously obscured from view'.[9] The essays in this collection examine such critical moments. Josephine McDonagh takes the case of Caroline Beale, the British woman who allegedly murdered her new-born child in New York in 1994, as the basis for a discussion of points of conflict between the British and American legal systems; disputes which function to undermine the totality and 'truth' of each. McDonagh explores the ways in which legal formulations of child murder can function to construct national identities. Looking further back, David Glover examines the rhetoric of early twentieth-century 'anti-alien' legislation in Britain, viewing it within its political, cultural and literary contexts, and focusing upon the conflicts that arose as a result of the conflation of the idea of the 'alien' with that of the 'anarchist' in the move toward this legislation. Ruth Robbins investigates the legal problem represented by the figure of Oscar Wilde at his trial in 1895, and the extent to which his indeterminate status (or crime) revealed fissures in the discourse of a law which tries to appear seamless. In a related way, Sally Munt examines the implications of the liminal positioning of the lesbian in relation to the law of the 'heteropatriarchy', exploring in the process the psychology of sexual outlawry.

9. Fuller, *op. cit.*, pvii.

The focus upon the limits and provisionality of law as revealed in encounters with subjects of undecidable, marginal or hybrid status is approached from a variety of different perspectives in this collection. Philip Leonard takes Salman Rushdie's *The Moor's Last Sigh* as the focus for an exploration of the challenge that forms of hybridity represent to the system

and authority of law. He traces the multiple transgressions of cultural and textual boundaries at work against the law of genre and the genre of law in Rushdie's text. Adele Wills explores the extent to which subjects of marginal status institute a deconstructive dialogism in relation to the apparent monologue of legality which underpins the narrative trajectory of Wilkie Collins' detective novels.

Law exists *as* language and literature, and literary texts can perform dialogically in relation to the law, as legal and literary languages both contribute to an evolving cultural archive. Edward Said and Michel Foucault argue that literature is always political, that texts are worldly, and that textual criticism should recognise this and strive to be 'secular'; 'a text is a place among other places (including the body) where the strategies of control in society are conducted'.[10] Law and literature are hermetically sealed neither from each other, nor their cultural and historical contexts. *Legal Fictions* recognises the worldliness of law and literature. Maria Aristodemou's contribution emphasises the extent to which literary texts play a significant part in the formation of public attitudes toward law, and also points to the ways in which poetic literature can 'break the back of words' and resist the power of law to construct our realities. She again takes the unsettled and unsettling problem of infanticide as her topic, this time as presented in Toni Morrison's *Beloved,* and uses it as an index to the ways in which literary fiction can create ways of resisting the rigidity of moral absolutes as they are inscribed in law. She sets out to show how 'the law's insistence on the absolute legitimacy of its own classifications distorts individual experience and suppresses otherness'. Steven Connor's paper develops insights into the literariness of law, and the legality of literature, taking the instance of the 'trial' as its focus, and the shared use of the form of the transcript. Connor investigates the extent to which literary trials can function both to support the law as ideal, and to critique the law's self-communing 'autism', its 'maladjustment' to non-legal or worldly language. This latter aspect of the legal trial is also explored by Ruth Robbins, who focuses upon the periphrastic nature of legal language, as it attempts to prevent the contamination of its transcendent status through the articulation or description of bodily acts of desire, which it is nevertheless concerned and able to prohibit. Extending Steven Connor's focus on the 'legality' of nineteenth-century fiction in her account of *The Mystery of Edwin Drood,* Stella Swain illustrates the ways in which this novel draws on the powerful link between modern and premodern law, or law and religion. Joseph Valente exposes, in his analysis of Arthur Miller's *The Crucible,* the untotalisability of justice, insofar as it depends upon a social audience, and so constitutes a literary-dramatic as well as an ethico-political ideal. He shows how, even as Miller uncovers and condemns the tendency of public law to conduct phobic persecutions on behalf of an always contingent social order, he subscribes to (and colludes in the reinforcement of) the similarly exclusionary power of the symbolic law of patriarchy in the private sphere.

10. Edward Said, *The World, the Text and the Critic,* Vintage, London 1991, p215.

This issue of *new formations* includes discussion of ways in which the law has impacted directly and indirectly on the lives and utterances of writers, and on the production and reception of texts through censorship and various forms of discrimination. Our contributors draw attention to the implications for literary criticism of the idea that in western states writers write and readers read within the context of an evolving and pervasive discourse of 'legality'. As Jeremy Waldron has said of legal conventions, they enter into people's consciousness and become the subject matter of reflection and a sense of obligation, they are social facts not abstract principles, because they bind people together into a common form of life.[11] The implications of our living and writing under the rule of law is addressed, as is the extent to which the symbolic and textual modes of law can be viewed as directly and indirectly constitutive in our cultural productions and the formation of our social and psychological realities.

11. Jeremy Waldron, *The Law*, Routledge, London 1990.

Cross-disciplinary debate in this domain generates stimulating and valuable insights. These essays attempt both to 'map the field' at a broad theoretical level, and to offer close analyses of particular texts and issues. They are estimable for the extent to which they are prepared to interrogate and extend the boundaries of current intellectual activity across a range of disciplines, and to experiment with new critical formations.