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Literature, Culture, and Law -- at Duke University

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What is the relation of “law” and “literature”? Relatedly, why study literature, or study about literature, in law school? Participants in the “law and literature movement” of the last quarter of the twentieth century explored three logically possible relations, each of which grounded a different pedagogical as well as scholarly project. First, law might sometimes be the subject matter of great literature, and when it is, literature should be read for the value of its insights into the nature of law. Second, literature might sometimes have the force of law, or might sometime in the past have had the force of law, or might have it in the future, and if so, then in order to know the law as it is, once was, or could be, we need to know its literary narrative root. There may not be a firm distinction, in other words, between the law that is, was, or could be, and the various products of our literary imagination. Third, law might be enough “like” literature that we can better understand how we glean meaning from legal texts, if we attempt a better understanding of how literature is read and interpreted. These quite different interdisciplinary projects – which I will call, respectively, the literary, the jurisprudential, and the hermeneutic -- taken collectively, are what we typically refer to as the “law and literature” movement in law schools. That movement, defined by reference to those three projects, is still thriving, but it was at its most robust in the 1970s and 1980s.

In the last fifteen years or so, the law and literature movement, so defined, has been increasingly overshadowed, at least in the legal academy, by the “law and culture movement.” Some of the initial theorists of the “law and culture” movement presented
that movement as a critical response to, and perhaps an alternative to, the “law and literature movement” of the earlier decades.\textsuperscript{1} Despite this initial adversarial relation, however, the law and culture movement, as it has developed, now seems more an outgrowth of the law and literature movement than a critical alternative to it. Legal-cultural scholars have for the most part embraced the various relational possibilities canvassed above, but have simply expanded them to reference culture, defined capaciously, rather than just imaginative literature within its scope. Thus, and tracking the three possibilities canvassed above, law is sometimes the subject-matter of culture (and culture is sometimes the subject of law); second, culture might sometimes have (or sometime in the past might have had, or might in the future have) the political and normative force of legal authority; and third, law might itself be best understood as a culture and therefore best studied in the same way one would study culture. With one notable exception, discussed below, the contemporary law and culture movement in the law schools consists of the scholarly projects premised on these three possibilities. To the degree that “culture” encompasses “literature,” this obviously represents an overdue and welcome expansion of the definitional premises as well as the ambitions of the law and literature movement.

There is, though, one stark difference between the “law and literature” and “law and culture” movements that cuts the other way. One of the central scholarly and pedagogical projects of the law and literature movement described above -- to read literature for its substantive contribution to our understanding of law -- has no real analog in cultural-legal studies, at least to date.\textsuperscript{2} The law and culture movement seeks enriched descriptive understanding of the various relations of law and culture, so as to better
understand law and its dissemination and reception. Cultural-legal theorists do not, though, for the most part, examine the products of culture to unearth and then reflect upon truths they may contain, regarding the nature of the law that is its subject. This is unfortunate. As our focus in humanistic studies of law shifts -- and broadens -- from literature to culture, we should be careful not to lose our attentiveness to the critical perspectives contained within imaginative literature and culture both, and no matter how each of those terms are defined.

In the first two sections following, I’ll quickly survey these two interdisciplinary movements by expanding a bit on the definitional relations suggested above, highlighting their continuities and then their discontinuities with each other. I’ll also venture a brief explanation for the relative marginalization of what I called the “literary project,” both within law and literature and in law and culture. In the last two sections, I’ll look at a still unfolding legal drama and its aftermath – a now thoroughly discredited allegation of rape, made in the spring of 2006 by a young woman in Durham, North Carolina, against three Duke Lacrosse student-athletes. The African-American woman who brought the charge (the “prosecutrix”) had been hired as a stripper by the students to perform at a lacrosse team party, and it was during the party, she initially alleged, that the gang rape occurred. This allegation of rape – which has since been contradicted by the prosecutrix herself, and the charges brought pursuant to it now dropped – triggered a bout of both soul-searching and incrimination at Duke and in Durham, among and between the various town and gown communities implicated by the accusation. In the last two parts of this essay, I will suggest that both of these interdisciplinary projects -- cultural-legal and literary-legal analysis -- may have something to offer our understanding of what did and
did not happen at Duke in the Spring of 2006. From this single exploration of the role of both culture and literature in creating the law that emerged from Durham, I’ll finish with a quick moral for interdisciplinary legal studies quite generally.

Law/Literature

Let me begin with the Law and Literature movement, and its three defining understandings of the relation of law and literature. The first posited relation between “law” and “literature” is the most commonsensical: literature and law are distinct enterprises, but literature does, often, treat law as its subject matter.\(^3\) We ought to attend to the descriptions or depictions of law we find in imaginative literature, for the simple reason that great literature may contain truths about law that are not easily found in non-narrative jurisprudence. Sometimes literature’s treatment of law or the Rule of Law is unabashedly celebratory -- *A Man for All Seasons* or *To Kill A Mockingbird* are examples. Sometimes – perhaps more often – our canonical literary authors have been harshly critical – think of Mark Twain’s compromised lawyer-protagonist in *Pudd’nhead Wilson*, or Melville’s depictions of vindictive, *ressentiment*-driven adjudication in *Billy Budd Sailor*, or his account of nineteenth century law and equity in *Bartleby the Scrivener*, or Morrison’s accounting of the Fugitive Slave Act in *Beloved*, or Susan Glaspell’s rendition, in *A Jury of Her Peers*, of legally sanctioned patriarchy at the turn of the century, or even Aeschylus’s at-best ambiguous endorsement of the Rule of Law over clan or family justice in *The Oresteia*.\(^4\) All of this narrative, imaginative literature arguably tells us something that law itself cannot and that other forms of legal scholarship likewise do not, about the meanings of law in the lives of its subjects, its agents, and its
adjudicators, and the meanings of law in the lives of those that law willfully ignores, subjugates, marginalizes or excludes as well. The reason to read or study such literature – sometimes called “legal novels” for short -- in law school is straightforward: literature contains substantive insights into the nature of law not readily found elsewhere. Those insights are not, however, either obvious or uncontested --- their unearthing requires serious scholarship as well as pedagogy. Thus, the literary project: to read and interpret great literature that is in some way about law, and to do so for its contribution to our understanding of law.

The second possible relationship between the “law” and “literature” assumed or argued by some law-lit scholarship, is quite different, and in some tension with the first. Literature, or at least some literature, might be law, and law, likewise, might, sometimes, be literature. This seemingly absurd claim needs immediate qualification: it is generally understood that at least today there is a quite real difference between positive law, enacted by sovereigns in accordance with a rule of recognition, and imaginative, narrative fiction. Literature, whatever else it might be, doesn’t seem to have law’s political power, whatever its normative force. It has no capacity for command. Nevertheless, one of the earliest and most significant lessons to be learned from the various law/literature studies of the 1970s and 1980s is that this firm distinction between positive law on the one hand and imaginative literature on the other is at best a (slightly overdrawn) contingent truth about the law, and the literature, of our times, and not a necessary truth about the essence of either. The various distinctions that seem clear and intuitive to us between law and imaginative literature were likely not always so clear, and might not always be so in the future.
Let me just give one example of the various ways in which the seemingly clear jurisprudential distinction between law and literature has been fruitfully questioned. In his award winning classic *Law and Letters in American Culture*, published in 1984, Professor Robert Ferguson of Columbia University argued that in the Jeffersonian and pre-formalist era of American law, elite lawyers viewed “law” as part of a seamless web of cultural authority: a web that included not only Blackstone, the Common Law, and the emerging jurisprudence of the Supreme Court, but also the literary, religious, political and even scientific classics of the western canonical tradition. The “Man of Law and Letters,” Ferguson showed, in the century before Christopher Langdell attempted to – and largely did -- sever the connection between “law” and “letters,” and before the realists sought to replace it with a web of ties to the social sciences, viewed legal authority – Blackstone’s Commentaries, the United States Constitution – as of a piece with other authorities – the Bible, the Greek tragedies, authoritative histories. The common law cases of property and tort, standard legal treaties, and the emerging opinions from the State and United States Supreme Courts, *could* and *should* sit side by side, in a well-educated lawyer’s law library, with Sophocles’ *Antigone*, Aristotle’s *Politics*, Shakespeare’s tragedies, King James’ Bible and the wisdom of Ptolemy and Copernicus regarding the natural laws of planetary motion. The “law” should and did – at least for elite lawyers -- *contain* the “laws” of nature, of society, of rhetoric, of poetry, and of philosophy, as well as the positive “law” of consideration, contract, and the negligence rule. The law contained the classics of Western thought, and the classics contained the wisdom necessary to the decent governance of the young republic. A lawyer who truly knew the law – and there were only a handful – had studied it *all*, viewed the law so
studied capaciousness. Knowledge of high culture should be imparted, as a seamless part of our law, to an elite class of men, who could then be trusted, as lawyers, with the reins of governance.

However we regard him, the “man of law and letters” thus exists as an important historical counter-example to our contemporary insistence that “law” and “literature” are separate spheres, requiring some sort of interdisciplinary bridge to connect them. To the contrary: the worlds of “law” and “literature” – of political authority on the one hand and intellectual, moral and cultural authority on the other -- have not always been so separate. Contrary to the spirit of the modern split between law and letters, “law” and “literature” have, in the not-so-distant past, constituted a seamless web of elite cultural authority.

The implication is pretty clear: nor need they be in the future. 6

Finally, the third relation: law might be sufficiently like literature that we can profitably view them both as exemplars of something still larger. And of what are they exemplary? One answer (among others) suggested by hermeneutic scholars, literary critics, and literary theorists, and eventually by scores of “interpretation” theorists in American law schools as well, is that both law and literature are similar, or alike, in that they both habituate the world of texts. 7 Law, like literature, is textual. Law, like all texts, literary and otherwise, therefore requires interpretation. And, for there to be interpretation, there must, in turn, be a community of to some degree like-minded interpreters. Positive law of all forms – statutory, common, and constitutional -- and imaginative literature share enough of a “to-be-interpreted” textual essence that it is fruitful to think of law and literature as forms of the same thing – texts requiring interpretation -- at least with regards to how we distill meaning. If that is right, then
whatever we might know, or posit, about the nature of interpreting literature, might be 
usefully applied to the task of understanding the interpretation of law, and whatever 
might be true of the relation of author, reader and text in literature might likewise be true 
of the relation of author (whether contract drafter, constitution writer, opinion writer, or 
legislator) reader, and text in law.

And what is to be learned from the comparison? Primarily, what legal scholars 
gleaned from the great critical theory of the late twentieth century was that the task of 
interpreting a text to discern its meaning cannot be a matter of simply delving into the 
mental state of the text’s author. The meaning of a text – any text, from *Moby Dick* to a 
Pepsi commercial to a contract to a judicial opinion -- cannot be simply equated to what 
the author of the text intended. But if the meaning of a text is not the meaning intended 
by the author, then what is it, and how does one, or how should one, ascertain it? 
Crudely, if intent does not hold the key to meaning – what does? From the various 
schools of hermeneutics, interpretation, and related inquiries in literature departments, 
legal scholars borrowed capacitiously, and eventually incorporated into their own studies a 
plethora of alternatives: the meaning of a text, in law as elsewhere, is to be found not in 
an author’s mental state, and not in the text itself, but in the community of readers that 
generates it, or in the reader’s mind, or in some holistic or interactive process between 
text and the interpretive community. Wherever one locates it, the process of generating 
meaning, according to the new wisdom, is governed, not by restraining conditions 
 implied by the author’s corporeal historical being, but rather, by the interpretive 
community’s norms and principles governing interpretation.
Those were, I believe, the three major “wings” or projects, of law-and-literture, by the end of the century. It is clear, in retrospect, that by the end of the 1980s, what was sometimes called the “law and interpretation” wing of the law and literature movement had almost entirely supplanted the literary and historical projects both. By 1990 or so, within law and literature studies, attention had turned decisively away from the content of the legal novels, and away from either the historical or utopian possibility of literature sometimes having legal or political force, and instead was lavished on the hermeneutic project. The process of interpretation, in law and elsewhere, became the primary subject of inquiry for law/lit scholars, while the meaning or content of literary jurisprudential classics – what were sometimes called the “legal novels” – became secondary.

Why? Perhaps it is simply a more worthy project, but I think it’s worth noting a more local, and more overtly political explanation: the “interpretive turn” in law schools and legal studies (whatever might have motivated it elsewhere) served the political needs of the liberal legal academy of the 1970s and 80s. The “interpretive turn,” as understood in law schools, essentially suggested that the meaning of a text cannot reside in either its “plain meaning” or in its author’s intentions. Constitutional scholars conversant with or participatory in law and literature studies quickly drew the clear inference: the meaning of the *Constitution* likewise is not – cannot be – simply identified with what its language apparently demands, or what the framers might have intended. The “interpretive turn,” taken seriously, freed not only the liberal constitutional lawyer, and theorist, and visionary, but also the Constitution’s authoritative liberal readers, the Warren and Burger Court, away from the Constitution’s literal language – language which, of course, says a great deal about protecting property, contract and commerce, and says nothing at all
about privacy, contraception, homosexuality, or integrated schools. Likewise, it freed constitutional theory from the authoritarianism seemingly embedded in originalist constitutional interpretation.

This turn from author or plain meaning to living community, as the source of meaning of texts, was of more than academic interest. The United States Supreme Court, in interpreting the text of the Constitution in *Brown v Board of Education,* had famously declined to decide the case by investigating whether the framers of the Fourteenth Amendment did or did not intend to cover the specific instance of state-sponsored school segregation. By so declaring – that history is bunk, with respect to constitutional meaning – they set off a long-fused interpretive and even constitutional crisis. Over the decade that followed the *Brown* decision, it became increasingly apparent to commentators and courts both that either the Constitution means something other than what its framers meant, or *Brown* was wrongly decided. Neither alternative seemed palatable: *Brown* was decided unanimously and in a way that justice and the country clearly required, yet if the Constitution’s meaning is unhinged from its framers intent, it isn’t clear how it can mean anything at all – and hence, it isn’t clear that it has the constraining force of law. *Brown,* then, was either wrong, or if right, it was lawless. The interpretive turn, in effect, promised to resolve the crisis suggested by *Brown.* The Constitution does indeed mean something other than what its framers meant – but not because crass politics demands that it be. Rather, the Constitution means something other than what its framers meant for the more basic reason that it is, after all, a *text.* All texts have meanings untethered from their authors’ intents. Intentionalism is discredited everywhere as a theory of meaning. Likewise, then, with respect to the Constitution.
What did the sudden prominence of the interpretive project mean for law-literature studies generally?\textsuperscript{9} Minimally, this: if the relation between law and literature is best described by reference to their shared textuality, or their shared status as objects of interpretation, then the striking and non-obvious relevance of the study of literature to law is not the criticism it may hold, but rather that of a case study: if we want to understand the processes of interpretation, we might profit from understanding literary interpretation. What the law and literature participant should learn from literature is not substantive, but methodological: one learns from the example of literary interpretation what it means to interpret texts. One then takes that knowledge and applies it to law. The content of the literary text – whether critical or celebratory of extant law – is neither here nor there. By the end of the 1980s, the “interpretation project” had swamped the literary and historical, simply in terms of its promised significance.

\textit{Law/Culture}

Let me now turn to law and culture. What is the relation of “culture” and “law”? What projects does that relation imply, and what justifications does it suggest, for the study of culture in law schools? Scholars of “law and culture” have begun, over the past decade, to develop a theoretical apparatus with which to explore the relations of law and culture, and hence the ways in which cultural studies might inform our understanding of law. The three possibilities that have emerged as most salient roughly parallel the three relations of law and literature canvassed above, but again with this difference: the literary project – reading literature toward the end of appreciating its substantive insights regarding the nature of law – has no clear corollary.
First, culture and law might be, or sometimes be, or best understood as, distinctly different sorts of phenomena, and if so, then they might exist in any number of relations to each other. On occasion, law and culture might be oppositional: law does after all sometimes seek to contain, minimize, censor, or neutralize culture -- particularly low culture that is debased or threatening to mainstream values, such as violent television and video games aimed at children, or pornography, or Goth clothing styles, or headscarves signifying religious difference. At the other end of the spectrum, law might seek on occasion to accommodate cultures or subcultures that we value, by protecting them against the machinations of ordinary law -- by carving “exceptions” to general rules so as to protect the insularity and identity of a preferred cultural subgroup, such as the Amish, or by giving professional baseball an exemption from antitrust regulation, solely because of the distinctive role played by the sport in our country’s “culture.” But whether law seeks to oppose or accommodate it, it does it as an outsider: the “law” that censors, minimizes, counters, or accommodates culture is not itself culture. On the other side of the coin, culture, whatever it is, is not law. Sometimes culture – either popular or high brow – acts as the color commentator to the legal world of action. Culture – television shows, movies – undoubtedly convey legal norms to law’s subjects. Studying culture, then, can give us a window into the popular acceptance or rejection of legal norms – and give us a sense of which norms are being popularly accepted or rejected. Again, though, culture is not itself law.¹⁰ Culture may disseminate law, convey its norms, or challenge those norms, and in doing all of this, it may well pervert its meaning, but whatever culture does to law, culture is not itself law.
The second possibility, we might call the Geertzian turn, and is largely a critical rejection of the position spelt out above: rather than view law and culture as different social forms, law might itself be profitably understood as a culture, and in a way that directly parallels – and quite explicitly expands upon -- the claims of the interpretation theorists regarding the relation of law and literature. Law is text, the interpretation theorists pointed out, and therefore whatever we know about how we interpret text ought to also be the case for the interpretation of legal texts. Whatever we know about interpreting literary texts is germane to the issue of how we ought to interpret legal texts. But – we can understand all sorts of cultural practices as “texts,” in a post-Geertzian anthropological world, not just those texts that are identifiably “literary” and not just those texts that are written. Cultural texts need not be narrative, or written, in order to be texts. Law is one such cultural text: partly written, partly a matter of practice, but either way, law is a cultural text. Therefore, whatever we have learned, about how to understand culture generally should be applicable to the specific case of law as well.

Likewise, if legal culture is a subculture, then to understand it we need to understand the relation of subcultures and dominant cultures – an inquiry that cultural studies should assist.

The third, and I believe most promising suggestion to emerge from law and culture studies to date, however, is that culture might, sometimes, be law, or profitably understood or read as law. In a justly influential article specifying a possible set of foundational claims for the Law and Culture movement, Professor Naomi Mezey argues for this third possible relation (albeit among others): culture, Mezey argues, oftentimes is law. Law and culture may be sometimes distinct, and it may make sense to sometimes
think of law “as” culture. But neither captures the full inter-relatedness of law and culture – both miss the degree to which culture can itself be law (and the way law can itself be culture). It is that relation, furthermore, that culture sometimes is law, that most clearly requires lawyers and legal scholars to engage cultural-legal analysis. Law’s very positive commands cannot be even understood unless we include as our understanding of what law is – unless we somehow embed within its rule of recognition – a substantial space for cultural realities. Likewise, we cannot understand what “culture” is without including the law that partly constitutes it.

The “culture as law” claim articulated by Mezey is a surprising and I think quite profound echo of the “literature as law” view attributed by Ferguson to the Jeffersonian man of law and letters – but with this difference. It is not, Mezey can be read as claiming, the society’s “high cultural” texts that constitute the seamless web of communal authority with the “high positive law” (such as the Constitution) that in turn regulates the lives of an elite class of republican citizens in a civic empire. It is not Sophocles’ Antigone, Aristotle’s Politics, Shakespeare’s Merchant of Venice, Blackstone’s Commentaries, and so on that form the web of cultural authority that can have the force of law. It is rather culture of all descriptions, high, low, and mid-brow – Law and Order, Perry Mason, LA Law, CSI, Alley McBeal and so on -- that constitute an irreducible if often ignored or unseen part of our law. And, it is all of our law, not just the higher law of Constitutions or the common law of antiquity – from Miranda warnings to speeding limits, to gun rights– that exist, often against the apparent command of conventionally marked legal texts -- in that seamless web of authority with the culture that constitutes it. The content of the law that truly emanates from the people can only
be understood by reference to the culture that law incorporates – the law and order shows in which *Miranda* rights are firmly embedded, the car culture of the open plains that yields Montana’s discretionary speed standard, the felt entitlement to weapons in an individualistic and somewhat lawless subculture, and so on. The culture is a part of the law, and the law cannot be understood or known apart from it – and the law in turn generates a culture that incorporates its dictates. As “law” is democratized and fragmented and popularized – and simply multiplied -- from the Jeffersonian period to our own, so the literary culture with which the law is seamlessly webbed is likewise: not *Antigone*, but *Ally McBeal*, not *The Oresteia*, but the *Sopranos*, not high culture, but high-school culture, explains the contours of our criminal and family laws of violence, murderous revenge, and intra-familial, or inter-tribal feuds, spats, and gang wars. The seamless “web” that was the object of the study of the man of law and letters remains – but the webbing consists of culture, not high literature, while the law is that which we squabble over and enact, and not that which we inherit to maintain our ties with ancestors, while we act out our lives in a heterogeneous and populist democracy, rather than an homogenous and civic republic.

Thus – the law and culture movement has developed fruitful analogs to the “law as literature” and the “literature as law” projects: law might be read as a form of culture, or, culture might sometimes be read as – might be – law-like. There has not, however, appeared a cultural analog to the “law in literature” subproject described above. There has been no systematic treatment, of which I’m aware, of the possibility that cultural products, no matter how defined or conceived, might actually contain distinctive jurisprudential insights into the nature of law that might significantly inform
jurisprudential debates. No one to my knowledge has advanced the claim that we should
turn to culture, not only to understand the cultural dissemination of legal ideas, or not
only because culture is so heavily informed by and informs law, but also because the
products of culture might deepen understanding of law. We have not had the cultural
 equivalent of the call to “return to the text” that Richard Weisberg issued several years
 back, urging law and literature participants to examine literature for its jurisprudential
 content, rather than the nature of the interpretive enterprise by which we ascertain its
 meaning.12 Again, I think that is unfortunate. The remainder of this commentary gives
 an example of the opportunity cost of so limiting our scope.

Law, Culture and Literature at Duke, Durham and Dupont

As discerning journalists, bloggers and essayists have discovered, the allegation
of rape and its aftermath in Durham, North Carolina in the Spring of 2006 occurred
within a maelstrom of competing subcultures: the culture(s) of Duke University,
including the academic, athletic, sexual, and feminist subcultures, and their sometimes
warring conceptions of the value or harms of recreational sex, the competing subcultures
of town and gown, including the relatively privileged economic culture of the Duke
students and the underprivileged economic culture of the students at other local colleges,
the black culture with its distrust of the legal system and the white culture with its own
fears, the strippers’ culture, and its relation to its white and black clientele, the women’s
health and rape crisis center culture in the community, with its own presuppositions about
sex and rape, the medical culture likewise, and so on.13 It is entirely appropriate, given
the cultural proliferation, to study the Duke episode as an instance of law-as-culture in all
sorts of configurations: legal culture was sometimes in competition with, sometimes in cooperation with, and sometimes in cooptation with some or all of these subcultures.

Sometimes the contrast between local culture and legal culture was stark. When the rape allegation was first made -- and widely believed -- the norms of “legal culture,” including law’s insistence on individualized stories of agency, responsibility and action, seemed to stand opposed to the grand cultural narratives of race, sex, and class responsibility that dictated so much of the community’s initial responses to the allegation; the legal culture embraced a conception of sex as criminal and wrong when nonconsensual, in tension with Duke University’s alleged sexual culture’s embrace of a more sexually permissive ethic; in the most romanticized understanding of legal culture, the “law” and its representatives in Durham imposed a blanket rule of equal treatment of all regardless of race or class privilege, in the face of the economic and racial privilege of Durham’s various elites. Thus – the charge against the relatively privileged white male athletes of forced non-consensual intercourse was heard, and then aggressively pursued, although their innocence was presumed – and all of this in the face of competing subcultures that either countenanced rape and privileged wealth, whiteness, and masculinity, or assumed both individual and collective guilt. As the allegation became less believable, the story of the relation between legal and local culture changed dramatically: a prosecutor up for re-election had allowed legal norms of individual responsibility to be swamped by cultural narratives of racial oppression and gendered harm, resulting in manifest injustice: the ambitious prosecutor lacked the backbone or the detachment to resist the seductive pull of the cultural, rather than the individual narrative. At still other times, one legal subculture opposed another: the bar association eventually brought an ethics charge
against the prosecutor for failing to comply with basic ethical norms of prosecutorial
behavior, a law school committee investigated the University’s athletic culture, and,
applying ordinary legal and social scientific methods, found it not nearly so debased,
racist, and misogynist as the community’s immediate response to the rape accusation had
led the rest of us to believe. The moral? Whatever else it was, at least in Durham, law
was not something distinct from culture – law was itself a culture, interacting with others.

The Duke case, though, is also a telling example of Mezey’s more ambitious
claim that sometimes culture is law. Put more modestly, we truly cannot understand the
“law” that framed the allegation in Durham – indeed we cannot make sense of the
allegation itself – without broadening our definitional understanding of what law is, to
include its constituent cultural parts. Remember: one hundred years ago, this charge of
“rape” could not have and would not have been brought, on the facts as initially alleged,
and no matter how strong the evidence that it had happened as she claimed, because it
would have been unthinkable that a white man could criminally “rape” a black woman –
the black woman’s consent would have been either presumed, or its absence would have
been presumed to have been irrelevant. Even thirty years ago, the case could not have
been brought, again, even with strong supporting evidence: it would have been
unthinkable that a man could rape a woman of any color who had consensually entered a
private home for the purpose of stripping, fully intending to sexually excite the alleged
rapist. Regardless of her color, the sex worker’s consent to sex would have been
presumed, or its presence or absence would have been irrelevant, from the moment she
entered the house. These were definitional presumptions about rape law that were fully
embedded – whether or not articulated -- in the law. They were understood and acted
upon by everyone – prosecutors, police, men, women, strippers, lacrosse playing university students, white and black citizens all. These definitional presumptions – and a host of others like them -- formed part of the definition of rape, and hence of the law that criminalized it. Thus, an understanding of both culture, and cultural change, is as essential as North Carolina’s criminal code, to an understanding of even the leanest, most positivistic understanding of the “law” that formed the content and context of the rape allegation. Without an expansive understanding of the “law of rape,” the allegation itself would be utter nonsense.

We can, though, and should, go further. An understanding of culture is not only essential to understanding how the rape allegation of 2006 could have been both made and understood. An understanding of “culture” is also essential to an understanding of why this apparently false charge was so widely believed. Why would the claim that these young men raped this woman be so instantly credible, and to so many people? Other women – sex workers, dates, girl friends, acquaintances -- making claims of sexual assault in private homes or hotel rooms by their johns, boyfriends, or customers, even where the criminality of that which is alleged is understood as theoretically possible, instantly lack credibility: recall, for example, the dismissive reaction to Broderick’s belated claim in the 1990s that Bill Clinton had raped her back in 1972. The credibility of the Duke claim was dependent not only upon the existence of a culture within which it is possible to make sense of an allegation that a group of white student athletes could indeed criminally rape a black stripper, as argued above. It was also dependent upon the existence of a culture within which it would be an intelligible narrative. To believe this claim, rather than simply make sense of it, we had to also have some background narrative within
which we could imagine these that Duke student athletes wanted to do this, were
pathologically capable of it, and were that criminally disregarding of her lack of consent
– that sociopathic, in essence – to pull it off.

What could be the content of such a background narrative? One possibility would
be a “narrative” about the Duke University student undergraduate culture: the rape
allegation looks more believable if it is also the case, that for at least parts of that culture,
sex, including sexual violence, had become, as a norm, unleashed, unbounded, and
uncivilized. The allegation is more believable, in other words, if, in the Duke subculture,
legal barriers against rape had been worn away, at least with respect to high status white
men and low status black women, and perhaps with respect to all women. It’s more
believable if the culture had degenerated to embrace rank sexual conquest as a natural
entitlement of social or athletic success; if male athletes were accorded standing to rape
women. It’s more believable, if the lines demarcating acceptable from unacceptable sex,
at Duke, had been detached not only from love and affection, but from consent likewise.
If all this occurred, then its quite plausible that in the process of creating such a culture
large groups of people – perhaps all women, perhaps all young women, perhaps all young
subordinate women, perhaps young, subordinate women of color who were sex workers –
were utterly and thoroughly dehumanized, in the minds of other groups of people – men,
male students, male student-athletes. If all this had happened, then its far more likely
that these high-performing successful athlete-scholars could have so disregarded this
woman’s humanity as to gang rape her in a bathroom against her will.

And so, was there such a culture? The media reporting on the Duke allegation
coalesced remarkably quickly around the claim that indeed there was a “rape positive”
culture at Duke, with virtually all the attributes recited above, and proceeded to mount the
evidence for it. First, there was the evidence presented by the student-athletes
themselves: an obscenely violent, misogynist, and threatening email sent by one of the
players shortly after the alleged rape; more broadly, the players’ arrest histories of
drunk and boorish behavior. More broadly still, there was the evidence presented
consciously or willy-nilly by the Duke student body. In interviews, Duke students
divided on whether the sexual culture was liberatory or oppressive for women, but there
was a remarkable consensus that there was indeed a culture that tolerated or celebrated
sexual conquest, as well as contempt for constraints on conquest – whether those
constraints be identified as feminist or puritanical. Academically, a queer theoretic
analytic had developed at Duke, that blurred the distinction between consensual and non-
consensual sex – as had radical feminism before it, but this time toward a different end:
while radical feminists had done so in order to restrict the scope of acceptable sex to that
which women welcomed as well as consented to, queer theorists sought to extend the
reach of acceptable sex to that which might have once been seen as harassing or
debasing. Social life, seemingly, followed suit. Constraints on sex – from traditional
moralism to sex harassment laws, from religious conservatism to radical feminism – had
to go. Within such a culture, a rape allegation was more likely than not, true. Given the
culture, the rape allegation was not only intelligible, it was credible. The spring 2006
allegation of rape in Durham, in short, does not simply invite cultural-legal analysis.
Both its intelligibility as well as its credibility requires it.

_Rape at Dupont: Popular Literature as Culture as Law_
The most telling evidence of the debased sex culture at Duke, however, at least for some culturally inclined journalists reporting out of Durham, was popular culture itself, and most revelatory, by far, was Tom Wolfe’s bestselling culture-drenched novel, *I am Charlotte Simmons*.\(^{15}\) Set, seemingly, at a fictionalized version of Duke, Wolfe’s novel tells the story of a virginal scholarship student from Appalachia trying to gain social approval in the midst of a debauched, sexually unbounded, undergraduate social scene at “Dupont University,” an internationally-ranked first-class university also known for its world class basketball team, excellence in lacrosse, economically privileged students, and raucous student parties. Charlotte is ultimately successful in her social climb -- by the end of the book, she has managed to secure the affections or at least the attention of a high status basketball player -- although her success comes at the cost of her integrity, her academic career, and her sense of self-possession. Along the way, though, she is pressured into painfully unwanted and unwelcome sex, described in a hard-to-read ten page sequence, told from her point of view, by a particularly boorish lacrosse student, at a party celebrating the team’s success. The reader feels her pain; this is not an easy scene to read. The reader also though by this point in the story has absorbed the background narrative: Charlotte is pressed into painful sex that she does not want with this lacrosse student in the midst of, and partly because of, an undergraduate culture that both glorifies his athleticism and disregards her interests. She is sexually penetrated by a fellow student rendered sociopathically uncaring of her humanity, and who has himself been rendered as such by a tragically debauched culture.

The parallels between Wolfe’s plot line in this best-selling novel and the allegation at Durham immediately captured the attention of journalists.\(^{16}\) Wolfe, after all,
had researched his book pretty thoroughly, his daughter had attended Duke while he was writing it, and in any number of ways he seemed to have the lacrosse culture, the athletic culture, and the undergraduate university culture both at Duke and other athletic powerhouses down cold. The novel – and even his protagonist’s name, “Charlotte Simmons” -- became a shorthand reference, in some of the media reporting on the rape allegation, to the rape-positive culture of Duke University, or at least, the rape positive culture within the athletic subculture of Duke. The novel, in effect, was reported as presenting the back story of the morally degraded climate at schools such as Duke and elsewhere, thus explaining, in part, how this alleged crime – the rape of a black woman and mother from a local college, employed as a stripper by a group of lacrosse players -- could have been committed. So – to complete this circle, Wolfe’s book, and the book’s fictional world of undergraduates, eventually became a part of the “media culture” that in turn produced the cultural narrative of Duke undergraduate life, within which the rape allegation was heard. The fictional sexual assault of Charlotte Simmons in Wolfe’s novel made more credible, the non-fictional -- and false -- charge of rape in Durham.

We might put Wolfe’s role in this culture-as-law progression harshly this way: Charlotte Simmons and Tom Wolfe were bit players in the production of a sex panic that resulted in a community’s overly credulous acceptance of a rape charge. If so, then the Wolfe novel itself is a clear cut example of a bit of culture producing, or at least being an indispensable precondition, of the culture that itself became a bit of law. The culture that became law, however, was not the sex-drenched culture of Duke University within which athletes are free to disregard women’s will. It was the sex-panic of the larger community, both at Durham and elsewhere, that was the “culture” that produced the community, too
quick to read sexual freedom as oppressive, and way too quick to read Wolfe’s novel as cultural evidence of a rape that never happened.


Where is Charlotte Simmons Now? . . . Pop-Lit as Critique

There is, though, a problem with this indictment of Wolfe and Charlotte for their participation in the creation of a sex panic in Durham: it omits the novel itself, as opposed to the novel’s reception. In point of narrative fact, the fictional sex in Tom Wolfe’s book bears little resemblance to the alleged rape in Durham. The contrast is telling. First, Charlotte Simmons was not raped. Charlotte did not say “no,” she did not resist to the utmost, she did not communicate a lack of consent, and it is not clear that her partner believed her to have withheld consent, or was even aware of her discomfort and pain. Second, Charlotte did not experience the sex as assaultive, although she clearly experienced it as painful – either because she did not believe it to have been, or, more likely, because she realized, rightly, that experiencing, claiming and naming the sex as assaultive would have threatened her social ascent. During this sex-that-wasn’t-rape, Charlotte basically alienated her socially striving self from her injured self, and prioritized the interests of the former over the latter. More pointedly, she identified her social success as dependent upon her endurance of this act of physical intrusion and the physical pain it caused, and she resolved the dissonance by affirming the irrelevance of her own pain – and therefore of the “self” experiencing it. By not understanding, not experiencing, and not resisting this sex she did not want, welcome or enjoy, as assaultive, and responding accordingly, Charlotte compounded her own injury. She undermined not only her academic career but also, Wolfe makes clear, her moral character. The contrast
with the alleged rape in Durham could not be more striking. The victim there most
decidedly reported an assault, that, had it occurred as she claimed, was unquestionably a
rape. The Durham prosecutrix undermined her own integrity, as well as her credibility,
by reporting a rape that did not happen; the fictional Charlotte undermined her own
integrity by not naming, claiming, or blaming: by failing to resist a sexual assault that she
did not desire or welcome, and being complicit in the subsequent denial of its assaultive
essence.

The fictional Charlotte that Tom Wolfe created suffered a very real injury, albeit
one that is more amorphous and ambiguous than the rape falsely alleged last spring in
Durham. It is a difference that matters: the sort of injury the fictional Charlotte sustained
may be more prevalent, and far more invisible, in the real world we inhabit, than the
violent rape falsely alleged at Duke. Charlotte suffered oppressive and unwelcome sex
with a partner who felt no imperative, moral or legal, to respect her desires, her lack of
desire, her pleasure, or her pain. So -- why didn’t she resist it? Likely, from her
overwhelming need for status and recognition at virtually any cost. Charlotte came to
Dupont an immature young woman, lacking in character; in Wolfe’s signature
misanthropic style, she is not an antihero, but she is unpleasant and unlikable from the
start. She comes out of Dupont, though, four years later, badly diminished. The
unwelcome, intrusive, unpleasant sex to which she seemingly submitted without
resistance was a big part of the reason why.

The contribution, I believe, of this novel, by this politically conservative,
misanthropic, gay chronicler of American culture, is that it renders a full description – the
fullest I have ever seen -- of the experience of intrusive, unpleasurable and undesired –
but consensual -- sex, and the harm such sex can cause to character, body and emotional life. He does it novelistically, and in a form that allows him, and the reader, to explore the ramifications of that sex to the subjectivity of a woman who endures it. Wolfe’s novel, accordingly, is and should be read as a critique of potent and harmful -- but nevertheless legal -- sex, and the culture that legitimates, honors and encourages it. It is not a critique that one will easily find, in our various scholarly treatments of rape and rape law, feminist and otherwise. Rape -- meaning non-consensual sex -- has its own distinctive harms and contours, well explored in legal literature. But consensual sex is not rape and the sex Charlotte suffers was consensual, as the law understands that term. Consensual but unwanted sex is not a crime and not going to be the subject of law’s scrutiny. But it is harmful, with costs that can endure a good part of an adult life. Wolfe’s pop fictional journalism describes it.

By conflating the painful and undesired sex that Charlotte undergoes with rape, we mis-describe both. And, by constantly pairing Wolfe’s book with the events in Durham -- whether to explain the “rape-positive culture” or the “sex panic” -- we mis-describe Wolfe’s book. Wolfe’s target was neither rape nor a rape-positive culture. Charlotte was not raped. Charlotte’s experience was of undesired, painful, and relentlessly omnipresent sex and the distinctive harms such sex occasions. Regarding Wolfe’s novel as an overdrawn description of a rape-positive culture -- and one which, in retrospect, got it so wrong as to have made credible a false rape allegation in Durham in the Spring of 2006 -- is a disservice to Wolfe. It is also a disservice to Charlotte. It further obscures the many women so like her -- making the quite real injuries they sustain all the more invisible.
Conclusion

Without downplaying the significance of a cultural-legal analysis of the events in Durham, and the role of Wolfe’s novel within it, I want to suggest that treating the novel only as a part of a culture that produces legal understanding, obscures the possible critique the novel itself makes regarding consensual but unwanted sex, both on college campuses and more broadly. We can and should read the book as a part of a popular culture that created a context within which a false rape allegation was heard, interpreted, assimilated into pre-existing narratives, and widely believed. Wolfe’s novel might help us understand both how the rape that was alleged at Duke could have happened, as well as how a false allegation of rape could come to be so widely and seemingly readily believed. We should also, though, read the book as a work of mid-brow popular fiction by an author situated in time and place, which contains a critique, rendered through imagined characters, of both the law and the culture not of rape, but of sex. We might agree with it or disagree, but we won’t even see it, if we only regard the novel as of interest for its location on a cultural-legal map, rather than for the truth or falsity of the description of life, sex, and harm it conveys.

My very limited moral: what is true of Wolfe, Durham, Duke and Dupont, might also be true of popular culture across the board, and its relation to law. If we wish to understand our law, its value in our lives, and the harms it can do, we should read both canonical and popular literature about law for its content, and not only as evidence of our perceptions of law, or of the quality or potency of the culture that literature is producing or is produced by it. Popular narrative fiction, television shows, and films, no less than
canonical literature, may, on occasion, have something true to teach us about law, life and sex all.

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3 Of course, literature is also, often, the subject of law, such as copyright law, contract law, etc.
6 There are other ways as well in which the distinction between “law” and “literature” might be blurred: it might make sense, for example, to regard the lawyer’s task as in many ways akin to the narrator’s. Legal analysis has an explanatory structure that is at least in part narrative, and that can and should be separately studied as such. Also, the legal arts might be fruitfully studied, and practiced, as a literary form, with a distinctively literary set of ethical and aesthetic norms. James Boyd White and Martha Nussbaum’s work explore these and related themes. See, e.g., James Boyd White, The Legal Imagination: Studies in the Nature of Legal Thought and Expression, (Little Brown & Co Law & Business 1973); Martha C. Nussbaum, Cultivating Humanity in Legal Education, U. Chi. L. Rev., Vol. 70, 265-279 (2003).


See, Janet Reitman note 13 supra; Peter Boyer, note 13 supra.

Tom Wolfe, I AM CHARLOTTE SIMMONS (Picador 2004).
