Law and Literature for Legal Historians

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Greig Henderson, Creating Legal Worlds: Story and Style in a Culture of Argument (2015).

Creating Legal Worlds, a new book by Greig Henderson, an English professor at the University of Toronto, is about rhetoric and the law and how story-telling is intrinsic to the law. Henderson revisits famous cases (and introduces readers to new cases) in which judges use a variety of rhetorical techniques to engage in persuasive (and, it turns out, at times, not so persuasive) story-telling.

Legal scholars will find value, especially for teaching, in Henderson's analysis of judgment-writing as craft. However, I think the book has especial purchase power for legal historians, who can contrast Henderson's approach to cases with the way they generally approach cases and their context. Rather than emphasizing the details of a case and its surrounding circumstances, Henderson emphasizes the technique of the judge as a writer. He explains the literary and rhetorical techniques that judges use (consciously and unconsciously) in order to paint a scene, play on a presumption or prejudice, generate empathy or reassurance that the right result has been reached with cool, clear and unemotional speech.

Consider, for instance, Henderson's discussion of the famous *Palsgraf* case. *Palsgraf* has been a favorite object of study by legal scholars from John T. Noonan (in *Persons and Masks of the Law* (1975)) to Richard Posner (*Cardozo: A Study in Reputation* (1990)). Cardozo, the author of the majority opinion and often considered to be the father of law and literature, is the usual focus of attention – charged with dehumanizing Mrs. Palsgaf (Noonan) or defended against the charge (Posner). Henderson's chapter offers a completely different perspective. He focuses on Judge Andrews's dissent, which is filled with analogies, and considers "the perils of analogy" (in which, as Henderson puts it, "there is always the danger of lurking antithesis." (P. 64.)) Henderson collects together Andrews's examples, listing "a reckless driver on Broadway, a boy throwing a pebble in a pond, a stream of causation, a murder at Sarajevo, an overturned lantern that burns all Chicago, a negligent chauffeur." (P. 69.) According to Henderson, the "overall effect of these metastasizing analogies is to deconstruct the very concept of causation he [Andrews] relies on, making everything a question of expediency and common ense." (P. 69.) Henderson argues that the strategy confuses but then ultimately succeeds "in fashioning an appealing judicial self … a fair and reasonable person grabbling as best he can … trying through analogy after analogy to arrive at a pragmatic criterion." (P. 70.) Hence, the rhetorical technique (the piling on of analogies) is connected to the judicial solution Andrews offers. What we mean by proximate cause just is "practical politics … [i]t is all a question of expediency … [t]here is little truth to guide us other than common sense." (P. 71.)

Henderson refers at many points in the book to decisions by the English judge Lord Denning. (He even offers a re-writing of Andrews's *Palsgraf* dissent as if it were penned by Denning, offered in the style of Karl Llewellyn's re-writing of another famous Cardozo decision, Wood v. Lady Lucy Duff-Gordon. (P. 70.)) We are treated to an analysis of how Denning elicits sympathy for "Old Herbert Bundy" in *Lloyd's Bank v. Bundy* and hostility toward those enemies of cricket who bring an injunction against a cricket club in *Miller v. Jackson*. In *Miller v. Jackson*, Henderson describes the way in which the judge, writing in the 1960s, develops "a nostalgic pastoral vision of an England that is disappearing before Denning's very eyes." (P. 54.) He then ties that vision to the trouble Denning got in over racist comments he made during the 1980s about immigrants and black jurors. (Pp. 54-55.) As someone who teaches a lot of Denning's cases in my first-year contracts class, I find this discussion helpful in identifying a troubling ethnocentric strand in what would seem to be pretty innocuous breach of contract cases. In *Jarvis v. Swan Tours* and *Jackson v. Horizon Holidays*, for example, he expresses a special sympathy for travelers in far-away lands who fail to find food, accommodation and even English-language skills up to British standards. The rhetoric in Denning's decisions can be very persuasive, and

it helps to have a way into putting one's finger on what seems to be happening in these cases, especially where something is slightly off.

The book includes a discussion of *Buck v. Bell* and Oliver Wendell Holmes Jr.'s famous statement that "[t]hree generations of imbeciles are enough." (Pp. 33-37.) Henderson uses this infamous case to weigh in on a debate among law and literature scholars as to whether bad or immoral cases can ever be spoken about as aesthetically great. Henderson believes that technique can be kept separate from morality: "Eloquence, as *Buck v. Bell* illustrates, is no guarantor of virtue." (P. 37.) He does not refer to Paul Lombardo's work on the case, which shows how it was feigned and rigged against Carrie Buck from the very beginning. Especially shocking is the role Buck's own lawyer played in enthusiastically losing her case in a flagrant example of collusion with the doctor and hospital seeking to have her sterilized and the sterilization statute constitutionally upheld. However, this is a good example of the way that a legal case will be of interest to scholars in different sub-fields for different reasons. Henderson uses it as a way to discuss the question of how morality intersects with issues of greatness and literary technique. The historical investigation shows it to be a thoroughly irredeemable and morally bankrupt case.

The audience for this book is first and foremost judges interested in being more self-conscious about their craft. Henderson is involved with the Judicial Writing Program for the Canadian Institute for the Administration of Justice. His message for judges seems to be: Be careful because an "understandable desire to inject humanity and concreteness into judicial writing is sometimes misguided and sometimes impairs rather than enhances its persuasiveness." (P. 16.) The book discusses at length an infamous 1998 Canadian sexual assault case (*R. v. Ewanchuk*) in which the judge described a complainant as not wearing "a bonnet and crinolins" when she met the accused, a statement that elicited a firestorm of controversy for the way that it traded in problematic myths about women in rape and sexual assault cases. Henderson offers a range of examples in other chapters drawn from homicide and sexual assault cases, Canadian and American, in which competing accounts of reality by judges involved in trial-level and appellate-level cases undeniably shaped and created that reality; the *legal worlds* in the title of the book that judges create for themselves; and the "legal worlds in which others must live, worlds that reinterpret the past, delimit the present, and shape the future." (P. 153.)

The second audience is legal scholars generally interested in a very practical approach to law and literature. Henderson *teaches* a lot in the book, especially about a range of literary and rhetorical devices. Learning about rhetorical techniques – even familiar "thinking like a lawyer" stock-in-trade devices such as example or analogy, explained from a formal point of view – will make any legal scholar a better reader and teacher of cases. How to see, for instance, the trajectory in a line of cases and what facts and issues are necessary to the legal principle and which are superfluous. Henderson tells us that Cicero called "the heightened capacity to see similarity and difference," so important in deciphering precedent and evaluating example or analogy in legal reasoning, *ingenium*. (P. 150.) I usually talk about this to my students in terms of the song "One of these things (is not like the others)." Henderson includes a quote about "analogical reasoning," as it is called, from a literary critic, who writes that "patterns of opposition and connection [are] probably the basis of thinking itself." (P. 157.) Thank goodness for Sesame Street!

Law and literature scholars such as Bernadette Meyler have recently called for greater communication and cross-fertilization between legal scholars who are interested in literature and in history.[1] Certainly, legal historians often turn to the cases, especially the great cases, which make a kind of common law of the law school curriculum. Henderson approaches cases in a different way, as texts serving a variety of purposes, carefully and often quite subtly crafted by their creators to elicit in their readers certain kinds of reactions. The reaction aimed at can be as various as eliciting sympathy for a plaintiff or invoking nostalgia for a by-gone world that is no longer (if it ever was) shared. England was home to many people who were not reared on a love for and allegiance to cricket. Henderson's point is that the world in which that person felt unwelcome or the world in which a determination of whether or not a sexual assault took place was influenced by the clothes a woman wore, these are the worlds that judges helped create, a reality they played a role in manufacturing and reinforcing with their words.

A third audience of Henderson's work is legal historians, who can find here cases that have had their fair share of

historical investigation. However, these cases do something different in the hands of a literary scholar, who emphasizes different things than a historian would. Henderson's focus is less about what is true and false and more about persuasiveness—learning how persuasiveness works, how to recognize its various forms in action, and how to evaluate it. Why is this important for legal historians? Well, literary persuasiveness plays a key role in the reception of a case, what kind of uptake it enjoys, and that in turn influences historical as well as legal assessments of the significance of the case and the larger story the legal historian wants to tell. This is especially true when dealing with a concept like greatness – great cases (e.g. *Palsgraf*) or great judges (such as Cardozo, Denning, and Holmes). Neither legal nor historical training usually includes training in rhetoric, so learning more about this is helpful, especially when the literary scholar offers a fresh perspective on familiar cases.

I am reminded of the *New Yorker* cartoon in which a man is out for drinks with a woman to whom he says – "You seem familiar, yet somehow strange. Are you by any chance Canadian?" And it is good for us to shift perspective and see these familiar (and new) cases a little differently. Both history and literature approach the law from an external perspective on the assumption that this will reveal something that it would otherwise be difficult to see. "[S]tory is inescapable," as Henderson puts it. (P. 29.) This is true for both history and literature. And, as scholars like Meyler have emphasized, it is important for fellow humanities-oriented scholars in law schools to travel together. This means learning how to adopt the lens of the other, at least sometimes and for some purposes. This means being open to analyzing legal cases as literary texts where that is appropriate and to see legal cases as in their historical context where that is important and useful. I recommend Henderson's book to legal historians as a salutary perspective-shift in which they will find much that is new and much that is "familiar, yet somehow strange" – and worth thinking about.

1. *See* Bernadette A. Meyler, *Law, Literature, and History: The Love Triangle* 5 **UC Irvine L. Rev.** 365 (2015), available at SSRN. [?]

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