

## LITERATURE AND THE LEGAL IMAGINATION<sup>1</sup>

In this essay I want to talk about the community, about literature and about education. Above all I want to suggest the extent to which the three are inextricably bound together. I want to suggest that the lawyer is always operating within a community. I want to suggest that this community is a narrative construction, by which I mean one that is constructed by and through language. I also want to suggest that legal education remains somewhat shy with regard to acknowledging the added political responsibilities which such an understanding of law and community demands. In the first part of the essay I am going to investigate further this idea of a narrative community. In the second and third I will take a necessarily brief look at some literature, primarily so as to present an example of how political communities are fashioned. In the final part, I will conclude with certain observations with regard to the related responsibilities of legal education.

### THE NARRATIVE COMMUNITY

It is the loss of a sense of community which lies at the root of presently perceived crises of government. Alisdair MacIntyre suggests that the late twentieth century has "reached" a "turning point" which demands a reinvigoration of the politics of community.<sup>2</sup> The more populist communitarian, Amitai Etzioni, refers to a lost "spirit of community".<sup>3</sup> Most recently, Michael Sandel has suggested that there is a crisis in modern democracy, one that is rooted in our feelings of disempowerment. Public life, both in North America and Europe, is "rife" with a "discontent" which is founded on a shared perception that "we are caught in the grip of impersonal structures of power that defy our understanding and control".<sup>4</sup>

This politics of community is certainly not new. The communitarian commonly seeks recourse to Aristotelian ideas of a virtuous citizenry defined by its participation in government at all levels. The idea of participation is critical. We do not feel part of our democracy, because it appears to be one largely constituted by others. The formalist pretensions of modern liberalism have fashioned a mythological distinction between "public" and "private" spheres, and then sought to legitimate this particular fiction in the modern liberal constitution. In place of "rights" of participation there is a stream of negative "rights" which encourage us to see the protection of our "private" sphere as dependent upon restricting both the scope of the "public" sphere

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1. This article is a revised version of an inaugural lecture given at the University of Dundee in December 1997.

2. MacIntyre, *After Virtue* (1985), p 263.

3. Etzioni, *The Spirit of Community* (1995).

4. Sandel, *Democracy's Discontent* (1996), pp 3 and 201-2.

and, by definition, our role in it. We have numerous rights to opt out, but precious few to opt in.

The reason why the communitarian vision interests us is because, alone amongst reconstructive political theses, it appreciates the irreducible textuality of its narrative constitution. The politics of community is founded on the idea that the community is a narrative conception, fashioned and refashioned by the imagination. The politics of community is founded on the idea that constitutions are active, evolving organisms. It is founded on the idea of our conversational and dramatic participation. A communitarian from an earlier generation, Hannah Arendt, repeatedly emphasised that good citizens can only be good if they experience a sense of civic identity and responsibility for the fashioning of the community in which they live. The good citizen is one who is able to perform government.<sup>5</sup>

The politics of community demands a narrative engagement. The “political community,” as Sandel suggests, “depends on the narratives by which people make sense of their condition and interpret the common life they share; at its best, political deliberation is not only about competing policies but also about competing interpretations of the character of community, of its purposes and ends”.<sup>6</sup> A democratic community is bound together by a shared historical imagination, and a communitarian politics is one that is founded upon this sense of narrative constitutionalism.

Charles Taylor sought to establish a sense of community on the premise that “we grasp our lives in a narrative”. Recasting the classical Platonic injunction, he suggested that a politics of the community is founded on its alignment with the narrative identity of the self. Any good “life” requires our active constructive participation in the political “conversation”, a “necessary condition of cohesion”. The history of modern liberalism, he rightly notes, is a history of the suppression of this political conversation. Modernism, indeed, is defined by this ambition. Yet it is a simple denial of reality. Communities are constituted by their conversation, and literature has continued to preserve the political imagination. The possibilities of a revived politics of community depend upon reinvesting our dormant sense of narrative self-identity. The self is centred as a narrative form. It is its only centre.<sup>7</sup>

Such a conclusion bears striking similarity with that presented by a very different contemporary philosopher, Richard Rorty. Rorty’s postmodern liberalism shares precisely the same commitment to the narrative community and to the romantic and democratic implications of a community that is at once stabilised and destabilised by the contingency of language. The postmodern liberal community is one constructed by a community of conversationalists aware that moral or political truth is merely what they wish it to be. Such is the spirit of romantic “democratic pluralism”. Truth no longer constrains freedom of opinion but is constructed by opinion. “[The] world does not speak. Only we do.” And the appreciation that language is always shared and intersubjective,

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5. For Arendt’s idea of community, see *The Human Condition* (1958).

6. Sandel, *supra*, n 4, pp 350–51.

7. Taylor, *Sources of the Self* (1989), particularly pp 25–52, 376–78. For a related thesis, on the rise and fall of conversational and imaginative politics, see Murdoch, *Metaphysics as a Guide to Morals* (1993), particularly pp 10–18, 51–77 and 147–84.

fashioned by a never ending sequence of contingencies, is both liberating and empowering. Life is indeed a narrative, and we are the “poets” of our own contingencies, the “poets” of our own histories.<sup>8</sup>

The imagination is not, accordingly, a merely literary phenomenon. Because it is narrative it is also, at once, historical. Sandel concludes that “without narrative there is no community between present and past, and therefore no responsibility, and therefore no possibility of acting together to govern ourselves”.<sup>9</sup> Such an insight has been shared by a series of contemporary intellectual historians.<sup>10</sup> For Isaiah Berlin, history was always a “descriptive skill”, and the historian is one who understands that history requires the “imaginative projection of ourselves into the past”. Rather than searching for immutable scientific historical truths, the “imaginative” historian appreciates the essentially narrative nature of history, and uses this appreciation as inspiration for grasping the political and moral responsibilities which an imaginative politics demands of its citizen. To understand our community, and its constitution, in this way — as something the mutability of which is ensured by both its history and its textuality — is indeed liberating. It could be said that the revival of democratic constitutional morality is founded upon it.<sup>11</sup>

For liberals such as Rorty or Berlin, then, the political community is a critical construct. Another, more immediately jurisprudential example of a liberal communitarian accommodation is Ronald Dworkin’s “empire” of “integrity”, an empire that is at once textual and historical, founded on the idea of narrative community. Dworkin suggests that legal interpretation is a hermeneutic exercise, constrained only by the narrative construct of the community in which the interpreter interprets. Accordingly, the community of “integrity” is both creative and evolutionary, constrained only by its textuality and history, and the political morality so described. A liberal community is one which protects the intrinsic rights of its citizens whilst also promoting their democratic participation; “integrity expands and deepens the role individual citizens play in developing the public standards of their community”, whilst at the same time it “insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decisions”. The integrity thesis thus “fuses” the political, the moral and the narrative experiences of life, and in doing so fashions an imaginative “attitude” towards our constitution.<sup>12</sup>

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8. Rorty, *Contingency, Irony, and Solidarity* (1980), pp xiii–xvi, 5–6, 23–43, 50–54 and 60–61.

9. Sandel, *supra*, n 4, pp 350–51. Similarly, Taylor refers to our ongoing “conservation” with our “immediate historic community”. See Taylor, *supra*, n 7, p 37.

10. Karl Popper challenged the formalist presumptions of historical determinism. History is not predictable, he countered, precisely because it is written by different communities in different contexts. See his *The Poverty of Historicism* (1991), pp v–vi, 47–53, 64–70 and 151–61. Thomas Kuhn, explicitly approving Popper’s thesis, affirmed that history never “proves” anything. The historian is an interpreter responsible for choosing between “paradigms” in order to make sense of radically contingent constituents of given situations. See his *The Structure of Scientific Revolutions* (1970), pp 146–73.

11. For the most compelling discussion of Berlin’s theory of history and its relation with liberal democracy, see “Historical Inevitability”, in Berlin, *The Proper Study of Mankind* (1997).

12. Dworkin, *Law’s Empire* (1986), pp 189–90 and 413.

The very word constitution, of course, implies a process or activity of constituting. It implies narrative formation. It implies history. In such terms, a constitution should be understood as a product of the imagination; a constitution which seeks to encapsulate the political and legal morality of a community by the very fact that it is a written text which both describes and prescribes a particular legal imagination. Understood as a text, the law of the constitution becomes only a part of the constitution itself; a part that is supplemented by the creative and active role of the audience of citizens which read it and interpret it, and fashion the context within which that interpretative process is conducted. A constitution tells a story of the historical evolution of a political morality. Such a hermeneutic idea of constitutionalism liberates and empowers the democratic participation of the citizen, whilst demanding that such a citizenry participate under the conditions established by the narrative political morality which defines them, and which they define.<sup>13</sup>

#### A NARRATIVE CONSTITUTION

Having suggested that the community and its constitution should be understood as literary or narrative constructions and, moreover, constructions of the imagination, it is incumbent to suggest examples of this. The example I want to use, albeit only briefly in the context of this essay, is Shakespeare. I do this in the certain knowledge that use of such a canonical source is immediately controversial. Shakespeare, it is often suggested, is part of the intellectual establishment, someone who wrote in order to entrench a particular social and political vision during a period of constitutional crisis. But this is precisely what I want. The relative merits and demerits of Shakespeare, and the attached virtues and vices of literary canons, are not our present concern. By definition, a canonical text is one which is situated within the narrative construction of a cultural community. What Shakespeare wrote about the constitution is of infinitely greater importance, certainly in terms of audience reception and comprehension, than any textbook on constitutional law which we might care to cite.

There can be little doubting the extent to which Shakespeare recognised the power of the imagination as a political dynamic. Duke Theseus in *A Midsummer Night's Dream*<sup>14</sup> famously aligns the art of magistracy with that of the poet. Both are dedicated to the "tricks" of "strong imagination".<sup>15</sup> Perhaps the sharpest alignment between magistracy and poetry is described in the figure of Prospero in the *Tempest*. Prospero, like Theseus, recognises that the control of a polity is dependent upon control of discourse. As the Epilogue to the play affirms, a magistrate is an actor whose success depends upon his or

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13. See Dworkin, *Freedom's Law* (1996), pp 1–18.

14. V.1.12–18.

15. Almost certainly written for a specific court audience, Louis Montrose has suggested that Elizabeth's "cultural presence was a condition" of the play's "imaginative possibility". See Montrose, "'Shaping Fantasies': Figurations of Gender and Power in Elizabethan Culture", (1983) 1 *Representations* 62.

her ability to “please” the audience.<sup>16</sup> The art of government is the politics of the imagination.

The text that I want to concentrate upon in a little more detail is *Henry V*, and the concept upon which I also want to concentrate is that of the national community. Shakespearean England was the last in which constitutional discourse was described in terms of a narrative community. The events of 1649 and 1688 may be more famous for the demise of particular monarchs and the rose-tinted portrayals of democratic investment in parliaments, but in reality they are more important for signalling the liberal assault against the residual politics of narrative community.<sup>17</sup> By the end of the seventeenth century the idea of the national community has been rewritten, such that in its place stands the defining political measure of modernism, the nation-state.<sup>18</sup> The iconic Shakespeare has played a material part in confirming this particular history. His elevation to the position of national poet was premised on a presumed nationalism culminating in *Henry V*. During the eighteenth and nineteenth centuries Shakespeare “took over from God and King and became the deity of the secular Enlightenment and the guarantor of the new imagined community of the nation-state”.<sup>19</sup> The idea of Shakespeare as a national, distinctively English, protestant icon remains.<sup>20</sup>

*Henry V* must be read in the context of late Elizabethan constitutional anxiety. This anxiety had many forms, not least the potential crisis of succession, the feared breakdown of law and order in the provinces during the 1590s, puritan sectaries echoing the voices of Calvin and Knox. At the centre, however, was an anxiety with regard to the Anglican settlement. The idea of a Christian commonwealth was, of course, the central political construct of Thomist political theology. The Henrician reformation was founded upon a particularly incestuous alliance of church and state. If one fell, they both fell. The publication of Richard Hooker’s *Laws of Ecclesiastical Polity* revealed a defensive Anglicanism, sensitive, perhaps oversensitive, to an imagined theological revolution.<sup>21</sup> The fate of the settlement, as Hooker appreciated, lay in effecting a convincing image of a godly prince at the helm of a settled godly commonwealth. Within the frame of a distinctly Aristotelian model Hooker prescribed an expressly English national community, described by an elision of church and state in the form of the Church of England.<sup>22</sup> If ever a

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16. Epil 13.

17. Taylor, *supra*, n 7, pp 275–89.

18. In her recent study, *The Poetics of English Nationhood* (1997), Claire MacEachern has even gone so far as to suggest that the English nation was prescribed by the time Shakespeare died.

19. Bate, *The Genius of Shakespeare* (1997), particularly chaps 6–8. In turn Shakespeare became the “national poet” of England, Scotland, Germany and America.

20. The idea that Henry is the ideal, specifically English, prince enjoyed considerable popularity during and in the years immediately following the Second World War. Laurence Olivier’s film portrayal of Henry was famously dedicated to soldiers of the British army. Forty years later, the Shakespearean critic Wilson Knight made a similar alignment of Henry’s campaign in France and the Falklands war. For a commentary, see Holderness, *Shakespeare Recycled* (1992), chap 1 and pp 180–83.

21. The publication of the Marprelate pamphlets in 1587–89 articulated an open opposition to the 1559 Elizabethan settlement.

22. Hooker, *Of the Laws of Ecclesiastical Polity* (1989), pp 70 and 85.

political ideology was prescribed in narrative form it was protestantism.<sup>23</sup> The early modern Englishman lived his life “in the pages of the Bible”. Sovereign, church, community, all lived, and only lived, in the theological imagination.<sup>24</sup>

Along with the godly commonwealth comes the godly prince. Only a godly Englishman can belong to Hooker’s commonwealth, and only a godly English prince can lead it.<sup>25</sup> The ideal of the godly prince enjoyed a considerable authority in early modern political thought. For Erasmus the education of a good and virtuous prince necessarily implied the education of a godly prince.<sup>26</sup> Henry VIII fancied himself as precisely such a prince and sought to justify his reformation in just these terms. For Erasmus the foundation of a Christian education lay in a proper “understanding” of Christ and of the “spirit” of a godly commonwealth. The primary duty of such a prince is to ensure that the constitution and the laws of the commonwealth are in accord with “justice and honour”.<sup>27</sup> At the same time Erasmus fully appreciated that such an ideal constitution is imaginary. The godly prince is both a “real king” and an “actor”, whose performance will be “imitated” by the “common people”.<sup>28</sup> The performative nature of magistracy was certainly not lost on Elizabeth, who famously declared: “We princes are set on stages in the sight and view of all the world.”<sup>29</sup> Her incessant royal progresses were designed to put her and her court on public show.<sup>30</sup>

Shakespeare’s “model” sovereign is one who comes to appreciate that government is a form of art, the ability to fashion the political imagination by describing the present as an evolved function of an imagined past. In the two parts of *Henry IV* the young Hal enjoys a distinctive theatrical education, learning these arts of the political imagination. As Warwick observes in *2 Henry IV*,

“the Prince but studies his companions  
Like a strange tongue, wherein, to gain the language  
'Tis needful that the most immodest word  
Be look'd upon and learnt”.

23. It also finds voice in the more puritan writings, such as Richard Baxter’s *Holy Commonwealth* written half a century later. Aylmer put it bluntly, “God is English”, and England is the “Israel of Old”. The puritan divine William Whateley described an England that was “God’s signet, God’s jewel . . . the one only Nation almost, that doth openly and solely profess the true religion of God”. See Collinson, *The Birthpangs of Protestant England* (1988), pp 7–10.

24. Collinson, *supra*, n 23, pp 12–17.

25. Hooker, *supra*, n 22, pp 133–36, 142, 167–68 and 217.

26. The duty of such a prince, as Erasmus’s pupil, Charles V, acknowledged, was to effect the “salvation of all Christian people”. See Charles’s letter to Erasmus, in the “Introduction” to Erasmus, *The Education of a Christian Prince* (1997), pp xx–xxi.

27. Erasmus, *Education*, pp 13–17, 26, 46, 52, 79.

28. Erasmus, *supra*, n 27, pp 17, 21–22 and 26–27.

29. In Greenblatt, “Invisible Bullets: Renaissance Authority and its Subversion, *Henry IV and Henry V*”, in Dollimore and Sinfield (eds), *Political Shakespeare* (1985), p 44.

30. With the progresses came rituals and pageantry. On arriving at the city gates, she is recorded to have joined in the theatrical descriptions of magistracy which accompanied her ceremonial entry. The people of York, it was recorded, were “wonderfully ravished” by their sovereign’s “loving gestures”, whilst at Warwick she thanked the Recorder for “putting me in mind of my duty, and that [which] should be in me”. In Talbert, *The Problem of Order* (1962), pp 83–84 and 88.

In time, he will "Cast off his followers", but

"their memory  
Shall as a pattern or a measure live".<sup>31</sup>

The future Henry V's political imagination will be fashioned by memory.

In *Henry V* Henry assumes his ultimate role as prospective godly prince. Henry, as the Archbishop appreciates, is fully equipped to portray godly magistracy. He can

"steal his sweet and honey'd sentences;  
So that the art and practic of life  
Must be the mistress to his rhetoric".<sup>32</sup>

Of course, the Archbishop is a man we cannot trust, one who articulates one of the great set-piece speeches of natural order in Shakespeare, the "honey-bees" speech, but who is prepared to destroy the economic fabric of the commonwealth in order to further his clerical ambitions.<sup>33</sup> This does not add or detract from the nature of government as an exercise in the political imagination. Shakespeare is not casting moral judgments. Rather, he is affirming the necessarily fictive form of magistracy. At all times the politics of *Henry V* is cast in imaginary form. As the Prologue affirms, the play presents a "kingdom for a stage, princes to act".<sup>34</sup> Kingship as a form of politics is a performative and imaginative art. As he muses on the night before Agincourt, it is "ceremony" which defines magistracy.<sup>35</sup> Time and again, from the uncovering of the conspirators, Cambridge, Scroop and Grey, to the wanderings amongst the common soldiers on the eve of battle, to the wooing of Katherine, Henry performs his magistracy.

Henry, then, is king and actor, from first to last, just as was Elizabeth. Throughout *Henry V* the ambivalence inherent in the performative nature of magistracy is repeatedly emphasised by the Chorus, an epic voice dedicated to affirming the ideal whilst undermining the reality. Most importantly, it constantly seeks to affirm the essential constitutional fiction of the king's "two bodies", the elision of divine sovereign and civil magistracy. When a soldier suggests that Henry's godliness will ensure victory, he counters that "the king is but a man, as I am".<sup>36</sup> It is a difficult but critical compromise.<sup>37</sup> Throughout, the play provides a textual foundation for the imaginative recollection of a distinctively English crusading commonwealth and putative nation-state. It is about the *respublica* of England on crusade, an entire nation unified by a common godliness, chosen by God and so determined.<sup>38</sup> The idea of a unified nation can only be realised in the political imagination by a determination that is forged as an alternative to "others". Henry's English commonwealth is

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31. IV.4.67-71, 74-78.

32. I.1.47-52.

33. I.2.183-204.

34. Prol 3.

35. IV.1.245-46, 253.

36. IV.1.100-2.

37. The Elizabethan monarch, as Sir Thomas Elyot affirmed, had to be "human, but not too human". For a discussion of the medieval thesis, see Kantorowicz, *The King's Two Bodies* (1957), particularly pp 42-78.

38. Iser, *Staging Politics* (1993), pp 27-29.

ultimately described and determined by its ability to slaughter thousands of French Catholics.

#### FICTIONS OF NATIONALISM

This may seem to be rather arcane. But *Henry V* is not just a period piece, a study in Elizabethan constitutional theory. It is a text read by thousands of school and university students every year, a film watched by millions. If Shakespeare is indeed “our contemporary”, so too is his “constitution”.<sup>39</sup> In times of constitutional crisis, or even just reform, such as ours, it is important to remember that the strength of a constitutional order does not rest in textbooks or cases or courts, but in the popular imagination. The evolution, and the future prospects of the “British” nation-state and its constitution depend far more on the reception of Shakespeare and *Henry V* than on Bagehot, Dicey or Hart.

The commonwealth which Elizabeth and Henry represent, and its intrinsic protestant Englishness, is a figment of the narrative imagination. This is not to somehow diminish Henry or England or the ideal godly commonwealth, but it is to suggest that Shakespeare’s constitution is an imagined one, just as ours is today. All political communities are imaginary, and so is their legitimacy. One of Shakespeare’s greatest fans was Sir Walter Scott. Writing during the period of Shakespeare’s canonical elevation, Scott situated the “Bard” as one of the great fashioners of the British nation. Of course, it is immediately ironic that Scott should seek recourse to the great canon of English literature in order to prop up his own attempt to preserve a narrative Scottishness. But, by the late eighteenth century, Shakespeare was also very much the Scottish national poet.

*The Heart of Midlothian*, Scott’s most concerted attempt to write the Hanoverian constitutional settlement, is riven with Shakespearean allusions. Caught by the seemingly contradictory desire to maintain a distinct Scottish cultural identity whilst accommodating the distinctly English Hanoverian constitution, Scott sought recourse to the historical imagination. Scotland, he realised, was an imaginative feint which could only, and need only, be preserved in narrative form. The Waverley novels, accordingly, wrote precisely such an imaginary nation: the Scottish equivalent of Shakespeare’s fictive English commonwealth.<sup>40</sup> For both Shakespeare and Scott the idea of nation became elided with the ideal of community. Both wrote at a time when the identity of the political community was in doubt, and both recognised that the possibility of reinvigorating that community lay in the fictive potential of nationalism and its constitutional imagination.

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39. See Kott, *Shakespeare: Our Contemporary* (1967).

40. For a discussion of Scott’s constitutional imagination, see Ward, “The Jurisprudential *Heart of Midlothian*”, (1997) 24 *Scottish Literary Journal* 25–39. For the particular affinity between Scott and Shakespeare with regard to the narrative and political imagination, see Gardner, *In Defence of the Imagination* (1982), pp 63–64.



The modern nation-state fulfils the need for an “imaginative community”.<sup>41</sup> As Elie Kedourie perceptively observes, whilst a political constitution might provide political legitimacy, a nation-state is, in the final resort, only as strong as the literature which describes it in the popular imagination.<sup>42</sup> Nationalism today enjoys a rather mixed reputation. For some it prescribes a politics of hatred and exclusion.<sup>43</sup> For some also the age of the nation-state is now past. In our present global world, the idea of nation-state “sovereignty” is no longer appropriate, and without the placebo of unitary sovereignty, considerable doubt must now be cast over the long-term future of the nation-state itself.<sup>44</sup> For others, the nation-state, like it or not, remains the only viable unit of political affinity in the post-modern world. To deny the reality of the nation-state is to deny the force of historical memory.<sup>45</sup>

For many it is fashionable to decry the nation-state, whilst vigorously expounding a political philosophy of nationalism. Thus Scottish nationalists can assert the legitimacy of a distinct Scottish nation whilst denying a British one. One figment of the imagination is made to appear somehow real whilst another is denied. On a wider European context, the European Union plays with notions of political affinity, such as Union treaties and Union citizenship, and creates a Union flag, a Union anthem, and even a Union currency, in order to create the illusion of a European nation-state.<sup>46</sup> Yet Europe, like Britain, enjoys no homogenous cultural or literary identity.<sup>47</sup> Without deep roots in the political imagination, it can never pretend to the kind of essentialism which Shakespeare or Scott can lend their imaginary communities.

The aspiration to constitutionalism is, however, revealing. We pretend to a “British constitution”, and we search for a European one, because we are at root still romantics at heart. We seek to describe the community in which we live in terms of certain irreducible affinities which we can then translate into our constitutional texts.<sup>48</sup> In this way we can deny the alternative, the “chaos of the absurd” which Camus suggested describes the reality of the modern world.<sup>49</sup> As alienated selves we imagine that we share something essential with others, and seek to convince ourselves by writing constitutions which express our narrative political moralities.

The constitution and its law are always context specific. Ethnocentrism is a common criticism of the communitarian agenda, and it is probably apposite. To deny the culturally relative nature of a specific legal order is to deny the

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41. See Anderson, *Imagined Communities* (1983) and Hobsbawm, *Nations and Nationalism since 1780* (1992), suggesting that the ideas of nationalism and the nation-state are entirely dependent on fashioning and then maintaining some sort of “national consciousness”.

42. Kedourie, *Nationalism* (1996), pp 56–66.

43. Kristeva, *Nations Without Nationalism* (1993).

44. MacCormick, “Beyond the Sovereign State”, (1993) 56 *MLR* 1–18.

45. Smith, *Nations and Nationalism in a Global Era* (1995), pp 30–41 and 147–57.

46. See Ward, *The Margins of European Law* (1996), pp 4–9, 101–4.

47. See Derrida, *The Other Heading* (1992).

48. See Rorty, *Objectivity, Relativity, and Truth* (1991), pp 175–202. Rorty’s overt acceptance of “ethnocentrism” as a descriptive constituent of the modern community remains controversial. See Bernstein, *The New Constellation* (1991).

49. Camus, *The Myth of Sisyphus* (1975).

reality of a world of violently different legal cultures. Moreover, to deny the cultural specificity of legal substance, is not to relinquish the idea of legal morality. We are still entitled to require that a legal morality should be founded on the twin Kantian ideas of freedom and equality, without needing to prescribe the precise political translation of these ideas.<sup>50</sup> But when we appeal to such principles, we appeal to a particular intellectual, and narrative, tradition.

In these terms, such an understanding of the community and its constitutional expression demands a radically alternative approach to contemporary legal and political thought. Once we appreciate that the constitution is a figment of the imagination, then we can fashion an alternative understanding of freedom and democracy which, I would suggest, is far more appropriate to an identifiably postmodern world. Democracy understood by the narrative communitarian is not narrowly defined in terms of periodic elections or any other restricted trope of political liberalism but is enshrined in the reality of our shared public lives as conversationalists in a political community.<sup>51</sup> It is for this reason that narrative communitarianism essentialises the narrative constitution of law. The lawyer is engaged in the narrative community, precisely because he or she lives in that community, and the law which he or she seeks to practice is itself precisely such a textual entity, both descriptive and prescriptive of that community.

#### LEGAL EDUCATION IN THE NARRATIVE COMMUNITY

Regardless of its aspirations in contemporary politics, I would suggest that the appreciation of the narrative community, and thus the narrative constitution, requires a complementary reinvestment in the idea of law and legal studies. As Franz Kafka famously observed, studying the law is "like chewing sawdust". The learning of rules does not lend itself to the exercise of the creative faculties. At first glance, it might seem that the ideas of law and the imagination do not enjoy a natural affinity. Law and power, without doubt. Law and money, certainly. Law and justice, perhaps, on a good day. But law and the imagination? Yet, in this essay, I have sought to suggest that law is precisely such a figment of the imagination. Law, in short, only exists in the imagination, and the great irony of law and legal education is the attempt to deny this irreducible truth.

Rather than embracing the fluidity and empowerment that the imaginative qualities of law provides, the lawyer all too readily seeks recourse to the

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50. For a recent and persuasive statement, see Weinrib, "Legal Formalism: On the Immanent Rationality of Law", (1998) 97 *YLJ*, observing at 1011 that in essence, in its "governance of juridical relationships, formalism is universality with a variable content".

51. Another who suggested that a distinctive "post-metaphysical" idea of democracy must be founded on a better appreciation that participation is, first, inherent in the nature of politics, and second, should be enhanced, accordingly, through the facility of "public spaces" for "communicative interaction" is Jürgen Habermas. Whilst not going so far as to reduce the idea of the political community to a narrative fiction, the communicative ethics which Habermas famously expounds enjoys an immediate affinity with it. See Habermas, *Between Facts and Norms* (1996).

pretences of intellectual formalism in order to deny the political responsibilities which the imaginative conception of law demands. In short, from an educational perspective, rather than teaching putative lawyers to be politically engaged citizens, constantly describing and redescribing their legal context, we take potential citizens, deny their imaginative and creative potential, and teach them case after case, statute after statute, rule after rule.

The reason why the law so easily maintains its formalist pretences is simple. Law, our jurists tell us, is a system of rules. The good lawyer, we are told, is the one who will be able to anticipate which rules are best applicable in a given situation.<sup>52</sup> The dominance of legal formalism has come under increasing attack during the last few decades. The critical legal studies movement has risen and fallen, but the crisis in legal studies and legal education remains. Back in 1984 Peter Gabel and Duncan Kennedy famously argued that the force of law depends upon maintaining the "illusion" that it is a necessary expression of the political community, and so legitimate as a kind of self-fulfilling prophecy. The formalist guise that liberal constitutionalism adopts, the related mythologies of rights, equality and so forth, are "shared, imaginary attributes" that the political community is persuaded exist. The continuing legitimacy of any given constitutional order depends upon maintaining this collective "hallucination".<sup>53</sup> A decade later, Jacques Derrida has said much the same. The "force of law", he suggests, depends upon certain "mystical foundations" embedded in the political consciousness of the community. Such foundations depend, for their enduring legitimacy, on a pretence of immutability which necessarily denies the particularity of individual justice.<sup>54</sup>

The ideal of the independent politically disengaged lawyer remains the central myth of modern legal education. In part this can be ascribed to a modern legal training dedicated to the dictates of the consumer society. The lawyer represents the interests of his or her client, never his or her community. Responsibility is professional responsibility, never social. Lawyers take a pride in their professional status, as if it somehow legitimates their fantasy existence in some sort of reified world in which real questions of justice and fairness can be ignored.<sup>55</sup> The legal academy, like the legal profession, spends so much of its time engaged in trying to perpetuate fictions of its own legitimacy. Rather than embracing the political responsibility which legal education should demand of the legal educator, there is recourse to teaching so-called legal "truths". Yet, the real truth is that every lecture, every tutorial is a deeply political, and textual, exercise.<sup>56</sup> The law student is all too easily lured by these

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52. Such a model found its apogee in the kind of law school described by American legal realists in the first part of this century, men such as Langdell and Holmes. See Duxbury, *Patterns of American Jurisprudence* (1995), particularly chaps 1 and 2.

53. Gabel and Kennedy, "Roll Over Beethoven", (1984) 36 *Stanford Law Review* 33-34.

54. Derrida, "The Force of Law: The Mystical Foundation of Authority", (1990) 11 *Cardozo Law Review* 295-333.

55. According to Gabel, legal education which fails of emphasise the politics of its imaginative form remained itself an expression of "false consciousness". See Gabel and Kennedy, *supra*, n 53, p 35.

56. See Kennedy, *Sexy Dressing Etc* (1993), pp 34-82. See also Mark Kelman's observations in his *A Guide to Critical Legal Studies* (1984), p 322.

illusions of legal “truth”. Peter Gabel commented ruefully that “because they’re going to ‘become lawyers’”, law students think “they have to somehow transform” their social or political “feelings into ‘good legal arguments’”. Thus, “people start translating their political feelings” into legal arguments, so that a “weird dissociation” takes place as the putative lawyer sheds his or her human visage and instead consciously takes on the guise of the legal automaton.<sup>57</sup>

Such an approach to legal education denies the reality of the political community, and the situation of the lawyer within that community. It requires a fundamental abrogation of moral and civic responsibility. The law can never “tell us what to value”. The political imagination does that. Law is founded on real political experiences and cannot be distinguished from the imagination which such experiences fuel. It is the imagination which tells us what to value, and it is the imagination which, accordingly, describes the law. A legal education which fails to acknowledge its imaginative form is one which cannot hope to equip lawyers for the political responsibilities with which they will be faced.<sup>58</sup> All too often, I fear that as legal educators we still train lawyers, without realising that the “lawyer” is a figment of our collective imagination, just as is our constitution and our nation.

Martha Nussbaum has recently suggested that the insights of a narrative politics demand a fundamental reassessment of legal education. Such an education should be premised on a “particular norm of citizenship”.<sup>59</sup> The ambition of liberal legal education should be one which seeks to liberate the “mind from the bondage of habit and custom, providing people who can function with sensitivity and alertness as citizens of the whole world”, not just as members of the legal profession or – worse still – the city firm. The ability to relate to “stories of people’s real diversity and complexity” is essential if this ambition is to be realised. It is precisely the “narrative imagination” which must be reinvigorated, meaning the “ability to think what it might be like to be in the shoes of another person different from oneself, to be an intelligent reader of that person’s story, and to understand the emotions and wishes and desires that someone so placed might have”. The most important skill that the law student should acquire is this ability to “identify” the situation of the individual within the narrative community, and such a competence is entirely dependent upon that student’s ability to engage in the political imagination which it defines and is defined by it.<sup>60</sup> The communitarian conception of justice is founded on a “compassionate imagination”, and the modern legal community must come to realise that the exercise of law is as much about love and compassion as it is about rules and rights.<sup>61</sup>

It is not, then, simply a matter of returning to literature in order to provide some sort of supplementary jurisprudence. It is a matter of acknowledging the irreducibly narrative form of the community in which we live and the laws by

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57. See Gabel and Kennedy, *supra*, n 53, p 26.

58. Singer, “The Player and the Cards: Nihilism and Legal Theory”, (1984) 94 *YLLJ* 60–65.

59. Nussbaum, *Cultivating Humanity* (1997), p xi.

60. Nussbaum, *supra*, n 59, pp 8–11 and 85–86. In a series of earlier essays Nussbaum has repeatedly emphasised the narrative formation of contemporary political discourse. See her *Love’s Knowledge* (1990).

61. Nussbaum, *Poetic Justice* (1995).

which our community seeks to legitimate itself. Only if we come to appreciate, like Shakespeare or Scott, that our politics is indeed ours, shaped by us because it is read and interpreted by us, can we also come to embrace the responsibilities which such a form of democratic empowerment presents. The jurisprudential insight of narrative communitarianism – that the constitution is indeed a figment of a community's collective imagination – places the lawyer in a position of particular empowerment, and responsibility. The law is simply the prescribed function of the community which it seeks to describe. The lawyer, equally, is an expression of that law and that community. The relation between law, lawyer and community is an irreducibly literary one, and any lawyer who fails to appreciate this cannot fulfil the responsibilities which are incumbent upon the lawyer as a citizen of his or her community. As Montaigne famously observed, "good citizens are made, not found". It is incumbent upon us, as legal educators, to acknowledge the responsibilities which such an injunction demands.

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