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# Teaching Law and Literature

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## Free Speech and Free Love: The Law and Literature of the First Amendment

We write this essay as professors, respectively, of literature and law, who have over the years come up with several intriguing (for which, read “eccentric”) ideas of ways to teach what is often a tired conjunction, law and literature. To us, the most exciting and productive of these ampersand courses are those that seem to arise out of a mere, if alluring, coincidence. For can it be only a coincidence that two canonical figures in the history of free speech also penned some of the earliest and most powerful calls for freedom and self-expression in the domains of love, sex, and marriage? John Milton, the great seventeenth-century poet who established himself as the father of free speech in his “Areopagitica,” the first serious polemic against government censorship, wrote another political pamphlet, “The Doctrine and Discipline of Divorce,” in which he argued, movingly, in favor of the right to divorce—an argument astonishingly ahead of its time even as it harked back to the Hebrew bible as the source for its authority. Similarly, John Stuart Mill, the writer of *On Liberty*, still the seminal statement of the value of nonconformism and freedom of belief in the English-speaking world, subsequently wrote “The Subjection of Women.” “Subjection” is, like Milton’s divorce tract, a trenchant and surprisingly prescient analysis of the relations between the sexes; unlike Milton’s, it is also one of the

earliest feminist tracts, championing both the general principle of sexual equality and more-specific individual rights, including the right to freedom of choice (and the freedom to err) in matters of romantic love and marriage. For both Mill and Milton, the marriage question—the idea that the legal institution of marriage constitutes both a form of oppression and the possibility of social reform—loomed large in their thinking about the larger cause of personal freedom. Yet their writings on love, marriage, and the sexes are rarely considered together with their writings on freedom of thought, freedom of speech, and freedom of belief.

Our law and literature seminar is organized as an investigation of the basic question, Where are the deep connections, and where the possible tensions and conflicts, between these two sets of ideas? The history of the idea of free speech in the West is usually cordoned off from accounts of evolving notions of romantic love and sexual freedom. Yet the culture wars that rage over liberalism today are plainly impossible to separate from the liberalization of sexual mores that culminated in the last century in the sexual revolution of the 1960s, the divorce revolution of the 1970s, and the movements for women's and gay rights. The rights of freedom of speech, freedom of the press, and freedom of religious belief—the so-called intellectual freedoms—are enshrined in the First Amendment as our most fundamental constitutional values. Rights to individual freedom in the emotional domains of love, sex, and marriage have a much less secure legal footing, as is made clear by the ongoing debate over *Roe v. Wade's* doctrine of family privacy and reproductive choice and by the never-ending backlash against liberal sexual mores. By focusing our attention on their common doctrinal foundations as well as on the intellectual and cultural legacy that they share, this seminar invites students to consider the parallels, links, and conflicts that exist between the ideas about freedom of choice in matters of religious faith, political opinion, and intellectual thought that we customarily summarize as free speech and ideas about freedom of choice in matters of sexuality, romantic attachment, and family relations—what constitutional law refers to dryly as the doctrine of privacy or what, earlier, more adventurous and more romantic generations imagined as free love.

The students in our graduate seminar come from literature departments and the law school, and we work together with them to forge a common language between literature and law. The class is at once like and unlike any they might get in the individual programs or schools from which they emerge. From the standpoint of the law school, the seminar

looks less like the typical law and literature seminar that adorns many a law school curriculum than like the seminars on the theory and history of the First Amendment offered occasionally in more theoretically ambitious JD programs. (Stanley Fish and Vincent Blasi's jointly taught seminar at Columbia and Virginia in the 1990s is a good example.) Indeed, it might best be regarded as a revisionist version of the First Amendment seminar. In addition to the usual suspects who inhabit such courses—Milton and Mill on censorship; John Locke, James Madison, and Thomas Jefferson on religious freedom; and Oliver Wendell Holmes and Louis Brandeis as the architects of the modern legal doctrines of privacy and free speech—we fold in literary material on philosophical libertinism, Puritanism, Freudianism, first- and second-generation feminism, and anarchism, represented by the likes of Emma Goldman. (Not coincidentally, political anarchists were advocates of free love and also the chief targets of the government suppression that gave rise to modern First Amendment doctrine in the early twentieth century).<sup>1</sup> Our version of the First Amendment course is further distinguished from the usual law school seminar by the fact that we combine political theory and constitutional doctrine with short novels (we vowed not to assign any text longer than roughly one hundred pages—only Sade violated that stricture). Works like Leo Tolstoy's "Kreutzer Sonata" and Philip Roth's *The Dying Animal* contain surprisingly cogent political commentary on the proper relations among law, liberty, and love, breaking down the distinction between the genres of literary fiction and legal and political theory and helping us see the problematics of liberalism more clearly.

From the standpoint of an English curriculum, our seminar can perhaps best be seen as a reframing of the standard exploration of the marriage and adultery plot and of the role of law in it. By joining literature's customary focus on the marriage question to the analysis of case law, legal doctrine, and theories of the First Amendment, we enlarge the inquiry to encompass new questions and relations between new terms, bringing into focus the predicament that continually besets liberalism as it tries to navigate between the shoals of libertinism and anarchism, on one side, and puritanism, on the other. Whereas a free-speech seminar at a law school might find itself moving easily from Milton to Locke to Mill, with long meditations over debates in American constitutional law, a traditional literature class would move from the Puritans to the libertines to contemporary feminism, with a long pause over the nineteenth-century novel—most likely Nathaniel Hawthorne's *The Scarlet Letter* or Tolstoy's

*Anna Karenina*—with consideration of Tony Tanner’s brilliant *Adultery and the Novel* and of its nagging interlocutors Michel Foucault and the feminists. We attempt to frame the adultery question much more widely, noting its ceaseless efforts to distinguish itself from both libertinism and puritanism (“liberty, not license” and “no legislation of morality” being liberal theory’s constant, and constantly conflicting, refrains). The debates we would track in the law seminar also haunt the literature seminar, displacing it from its usual orbit.

Our pedagogical challenge is to take a group of students with very different skills and backgrounds, who generally share the defiant prejudice of self-constituting desire, which is the common plot of nineteenth-century fiction, and to move them to recognize a far more complicated dynamic of freedom, choice, and error. In creating this class around the debates over the relation between sexual and political liberty, particularly as they meet in the marriage question, we bring to bear different understandings of how to read legal texts in addition to questions about the role of narrative itself in shaping our seemingly innate desires.

We begin the seminar with the assumption that all the students have some basic knowledge of First Amendment law and that most have read a nineteenth-century novel. (Interestingly, when we asked who had read the assigned literary works before, only one student—a law student who had done his undergraduate work at an evangelical Christian college—answered in the affirmative.) We lay the groundwork by beginning with Milton’s “Arcopagitica” and Mill’s *On Liberty*, the classic free-speech texts, in order to prepare the students to question the relation between free speech and free love. Perhaps what is more novel in our approach is the choice to plunge into the possibilities and limits of free love through a less familiar pairing of Tolstoy’s breathtaking tale of a jealous husband driven to murder, “The Kreutzer Sonata,” and Roth’s exhumation of male sexual jealousy, one of his late meditations on marriage and mortality, *The Dying Animal*. Among the many parallels between the two works, the most striking is that each contains a sustained and well-argued diatribe against marriage. The two texts form a fascinating dialogue. Their differences are obvious: Roth’s antimarriage polemic is easily read as a sexual libertine’s critique; Tolstoy’s protagonist assails libertinism as well as marriage (which he regards as nothing but licensed libertinism or licensed sex) in the name of true (Christian) love. The students are asked to consider whether the distinction between Roth’s libertine and Tolstoy’s antilibertine really holds up. They are asked to consider the possibility that Roth’s

and Tolstoy’s critiques of marriage, and the affirmative ideals of personal liberty espoused by each, bear some relation to the liberal ideas about freedom from censorship and conformism explored in the first week’s readings. The ferocity of the speakers in both texts and their seeming misogyny, even misanthropy, undermine some of our easy assumptions. If this is what the full expression and ambivalence of freedom sound like, how much freedom can any person bear?

In the third pair of readings, presented in the following week—Milton’s “Doctrine and Discipline of Divorce” and Mill’s “The Subjection of Women”—we are able to lay out some of our central questions, as both Milton and Mill posit the freedom to choose in romantic love, the freedom to move from marriage to divorce, as constitutive of the modern political subject. Where Tolstoy and Roth might be read as merely ranting, and Mill’s and Milton’s formulations of the right to freedom of expression might be seen as merely theoretical, here sexual and political freedom come together absolutely. Mill’s statement that “the principle of freedom cannot require that [a person] should be free not to be free,” that “it is not freedom, to be allowed to alienate [one’s] freedom,” becomes the manifesto of not only civil liberty but also romantic choice (On Liberty 103). Milton argues that “those words of God in the institution [of marriage], promising a meet help against loneliness . . . were not spoken in vain” (*Doctrine*). Milton, the Christian, articulates a decidedly romantic ideal of marriage (and divorce), which is interestingly juxtaposed against the critical perspective of the very secular Mill, who claims that under current English law, a wife “is the actual bondservant of her husband” who “is held to . . . a lifelong obedience to him . . . through her life by law” (“Subjection” 147). From this conjunction the students must draw out the question of our course: how the plot of romantic love and the theory of political freedom inform and challenge each other to enhance our understanding of both.

Students are surprised that Milton argues that “to grind in the mill of an undelighted and servile copulation must be the only forced work of a Christian marriage . . . [from which one] mourns to be free” (*Doctrine* 712) or that Mill claims that “all women of spirit and capacity” in Victorian England would prefer doing “almost anything else, not in their own eyes degrading, rather than marry, when marrying is giving themselves a master” (“Subjection” 145). This conjunction prepares them for the larger issues we wish to raise: What is the relation between romanticism and liberalism? between Christianity and liberalism? between liberalism and

libertinism—and antilibertinism? Does a person have a right to a change of heart? If so, what are the theoretical foundations of that right? What is the proper relation of love to law, of liberty to law, and liberty to love? Does liberal freedom, which encompasses freedom of thought, freedom of speech, and freedom of belief, extend to desire, and if so, where might be the limits to desire? How are romantic and sexual freedom linked to the intellectual freedoms? If free love and free speech are not linked, what keeps them apart?

We needed to offer a historical approach that was neither reductive nor idiosyncratic and to keep the students focused on the skills of close reading and interpretation, which are central to any intelligent pursuit of either literature or law. As in any interdisciplinary course, we needed to show how a few central issues emerged in interesting dynamics as the course progressed. We describe three of these briefly.

The first is the question of puritanism, desire, and the law. We juxtapose *The Scarlet Letter* with long excerpts from Milton's *Paradise Lost*. Hester Prynne's challenge to Puritanism, that "what we did had a consecration of its own" (195), usually rings in such a course as a challenge to repressive puritan ideology; but paired first with *Paradise Lost* ("I made him just and right / sufficient to have stood, though free to fall" [3.98–99]) and then with Locke's and Madison's essays on toleration, Hester's plea has a more ambivalent resonance. Far from being opposed to Puritanism, her antinomian language draws on the Puritan tradition of the inner spirit, of the higher law any individual can find in biblical text and injunction—as Milton found and used to ground his pleas both for toleration of speech and freedom to divorce. We try to increase students' awareness of the tension in Puritanism between repressive and antinomian impulses by pointing to the unexpected lightening of the law that Hawthorne depicts—that is, the Puritan community's decision not to exact the letter of the punishment by killing Hester for adultery but to allow the spirit of the scarlet letter to carry out its office.

The second unexpected landing place in our inquiry into the relation between freedom of belief and freedom of desire lies in the space between feminism and libertinism, which we explore through the conjunction of the Marquis de Sade and Angela Carter and through a more general discussion of anarchism. Early-twentieth-century anarchists, such as Goldman, drew on the texts of previous anarchist writers like Tolstoy, seeming enemies to feminism and liberty. Their common concern with the woman question, sexual freedom, and critiques of marriage was prefigured by the

eighteenth-century libertines. Carter's emphasis on Sade as a potentially "moral pornographer" and her idea that one

might use pornography as a critique of current relations between the sexes . . . [whose] business would be the total demystification of the flesh and the subsequent revelation, through the infinite modulations of the sexual act, of the real relations of man and his kind. (19–20)

in turn prefigure the radical feminist legal theory of Catharine MacKinnon, who challenged the idea that a free marketplace of ideas offers real freedom to women (itself an echo of ideas put forward by Tolstoy in his "Kreutzer Sonata").<sup>2</sup> Highlighting the ambivalence in Sade's "Philosophy in the Bedroom" between the words "prescribe" and "proscribe," Carter anticipates the question of narrative and law that would obsess feminist legal theory of the 1980s. Is Sade, like so many libertine writers, using literature and the imagination to open up a path to freedom, or is he reminding us of the dangers of utter and violent lawlessness, which includes the lawlessness of an unlicensed and uncensored press?

A similar ambivalence haunts the third of our more unusual pairings: second-wave feminists and current debates among Freudian, Marxist, and feminist critics. Our earlier section on anarchism and free-love feminists like Goldman approached feminism initially through traditional liberal critiques of law—including Mary Wollstonecraft's *Vindication of the Rights of Woman*, an attempt to create an Enlightenment for women. But our first encounters with feminist thought also included George Eliot's scathing critique of women readers, "Silly Novels by Lady Novelists," which suggests that it is fictions of desire, as much as facts of law, that trap us in dangerously illusory narratives of freedom. Later in the course, we pursue this thread through 1970s feminism—for example, in Alix Kates Shulman's brilliant novel *Memoirs of an Ex-Prom Queen*. We also look at returns to liberal models of the freely contracting individual, such as *Ms. Magazine's* famous marriage contract, which has clear roots in Mill.<sup>3</sup>

Finally, in this section, we look at the critiques of 1970s women's lib and liberal feminism that later emerged through the lens of both radical feminist legal theory (e.g., MacKinnon) and, less predictably, Esther Freud's novel of the post-1970s generation, *Hideous Kinky*, which raises the question that Roth queried in *The Dying Animal*: Whose freedom, and whose choice, will truly matter? Who will speak for the children, the next generation, the victims of an unleashed or an all-too-free desire? Both the child narrator of Freud's *Hideous Kinky* and the aggrieved son of Roth's

narcissistic narrator (who, like Milton's Satan, gets all the best lines), stand as exemplars of the genre of the "revenge of the children" novel that has proliferated since the end of the 1960s.

In closing this essay, we want to reflect on two things: the kinds of assignments we asked of students and the conclusions we drew from the course. We had the students write a great deal in addition to doing the reading: several short papers and a seminar-length paper that focused on interpretation rather than research. The in-class discussions were challenging, both for their diversity of theme and for their great variety of texts and genres. The violence of the material shocked some students; others had difficulty expressing their ideas in class because of the challenges to modern liberal notions about the freedom of consenting adults. A law student was expected to read several books of *Paradise Lost*; an English or comparative literature graduate student was given pages of Supreme Court doctrine—but these modal differences were far less difficult for students to register than the sudden jolt of Sade or Carter or the sheer goofiness of 1970s feminism. We thought that students might feel more comfortable engaging with these texts in a paper than in class discussion, and this turned out to be true: it was the quieter students who wrote the riskier and more inquisitive essays. The chance to write through their doubts was essential. If that was the payoff for them (and several dissertations arose from this class), the payoff for us came at the end, when we turned to sources neither literary nor legal but shamelessly political.

For the final session we paired the Starr report on President Clinton's peccadillo (a text that Adam Gopnik has brilliantly satirized as a nineteenth-century novel)<sup>4</sup> with Jimmy Carter's infamous *Playboy* interview, in which he admitted to feeling lust in his heart. Its dazzling conjunction of political ambition (for such it was that led him to plan this interview); the use of biblical language to speak a seemingly forbidden desire; and its direct confrontation of media censorship, invasion of privacy, and the question of the traffic of desire, not to mention the misogyny at the heart of contemporary American culture, made all the issues of our course jump into bright relief. Is such a document law or literature? What kind of speech is it, and to whom does it speak? What, in such a moment of speaking desire and enacting repression, is the relation of the modern liberal subject to Puritanism (its secret twin) and libertinism (its secret double)? The chance to approach a question of such complexity, while working intensely with a group of very divergent students on so wide a range of texts, is to our mind the best justification of that final uneasy marriage, that of literature and law.

## Notes

1. Readings on libertinism included Diderot's "Supplement to Bougainville's Voyage" and other texts in *The Libertine Reader* (Feher) and such troubling texts as the preface to *Les liaisons dangereuses* (Laclos). Our analysis of puritanism and the founding fathers' debate on religious liberty drew on Walzer's brilliant *The Revolution of the Saints*, a formative text on the complexities of puritanism; Locke's "A Letter concerning Toleration"; and Madison's "A Memorial and Remonstrance." The essays by Goldman included "The Hypocrisy of Puritanism," "The Tragedy of Women's Emancipation," and "Marriage and Love." We also read Bakunin's "Church and State" and Godwin's "Education through Desire." We read significant First Amendment cases, among them *Abrams v. United States*; the texts of the Alien and Sedition Acts of 1798 and the Sedition Act of 1918; free-speech cases through *Texas v. Johnson*; and Frankfurter's *Case of Sacco and Vanzetti*.

2. Among the essays by MacKinnon we read are "Desire and Power," "Andrea's Work and Linda's Life," and "The Sexual Politics of the First Amendment," all in *Feminism Unmodified*.

3. See Judy Syfers's "I Want a Wife" and Susan Edminston's "How to Write Your Own Marriage Contract," in Klagsbrun.

4. As Gopnik stunningly claimed, "The Report" is a classic story about adultery, in which the law and human affection are in tension, and it resolves itself in the usual way. When there's a choice between law and sympathy, the law may take the lovers but the lovers take the cake" (39).