Legalities and Literacies
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1. Introductory Remarks

What you are reading is not the rough draft of an article but the rough (and short and dense and written up largely in the form of a grant application) outline - or intimations - of a research project which I hope will begin to take off in the near term. I hope this draft will serve as more than a basis for a talk I give. I hope it will serve as a launching point for a rich conversation during which I will be able to listen as much as speak. As much of my work tends to do, the project emerged out of a phrase that kept coming in and out of my consciousness: “legalities and literacies” (and sometimes “legalities and/as literacies”). Over the last little while I have begun thinking about why and how this phrase comes to me, how it resonates or could resonate with me and with others, what work it does or could do for me and for others. Much of my work consists in accepting invitations offered by others – e.g. in the form of journal (e.g. “No Foundations”), project (e.g. “Genres of Critique”), or workshop (e.g. “Stateless Law” and “Accusation, Criminality, and the Legal Person”) titles – by beginning to think with and through the words of the titles. I begin this rough draft in a similar way but with “my” own phrase… which, of course, is not really my own.

2. Legalities

As I understand things, “legalities,” an infrequently used term (see Braverman 2017 for one use) points to the insight that “law” can be and can be lived in different ways, which sometimes goes by the name of “polyjurality” (Howes 1987). It does not refer to legal pluralism, the claim that several legal orders can co-exist in the same social or territorial space; see e.g. Moore 1978, Merry 1988) though legal pluralism

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may imply polyjurality (Macdonald 2011). Polyjurality – “legalities” in the plural - means that there may be no one criterion that makes law recognizable as “law.” There may not be one “principle of legality” – recall *nullum crimen, nulla poena sine lege* which at once, and paradoxically, appears as a human right and actualizes legal positivism, enshrining the reduction of *le droit* to *la loi* (Nonet 2002, 54-55). And differences amongst legal orders may and do occur at the level of “concept” and not merely “conception” (Mills 2006). What is more, beginning to think about polyjurality or legalities in the plural may bring us to limit understandings and experiences of “law.” For instance, Italian feminist philosopher Adriana Cavarero’s *Inclinations: A Critique of Rectitude* (2016) invites us to think of ethics (and hence law) in corporeal - postural and positional – terms. What is left of *Recht*, of droit, of law (“right”) once the right-hand, standing straight, straight lines (“rules”) and such are called into question? How can “law” be inclined, declined, without being declined? Deleuze and Guattari also point to this kind of thing in their re-visiting of *nomos* in a Thousand Plateaus (1987). They may be read as proposing a “minor jurisprudence” in which “law” is no longer recognizable as law, e.g. as rules, just as Kafka’s “Minor Literature” comes along with limit understandings and experiences of language in which language is no longer so intimately tied to communication (Antaki 2017). It may be that limit experiences and understandings of “law” (or “droit”) are necessary for an openness to other “legalities” (for lack of a better word), e.g. in languages which may not have the words “law” or “droit.” Moreover, the way we experience law and the way we experience language may be closely connected. For instance, Constable (1994) shows that Hart’s “concept” of law presumes law to be as rules writeable (not necessarily “written”) in propositional (and not “poetic”) form. Consequently, Hart fails to grasp both his translation of “law as practices” into “law as propositions” as well as its significance, e.g. the way it pre-supposes “conquest” in its transformation of ‘pre-legal normativity’ (see also Anker 2004, Hussain 1999). Hart’s “legality” thus presupposes “literacy,” indeed a very particular ‘literacy.’
3. Literacies

“Literacy” is usually taken to refer to the ability to read or write text and is narrowly associated with the alphabet. “Alphabétisme” and “analphabétisme,” the French terms for literacy and illiteracy, suggest as much. However, if ever it was this narrow, literacy now also refers to “skills enabling access to knowledge and information” and to much more (UNESCO 2006, 150; see also Mills 2015 for a review of “literacy theories for the digital age”). Thus, one can speak, for instance, of numerical, digital, visual, racial (Twine 2004) and cultural (Hirsch 1987) literacies, many of which have become important to legal scholarship and practice (e.g. Sherwin 2011 on visual literacy, Aldana 2016 on cultural and racial literacy). Illiteracy – as an inability to “read” and decipher alphabetic script - has expanded to a broader inability to make sense of all kinds of signs, social and other. The expansion of the senses of “literacy” is likely tied to the idea that literacy is fundamental to human flourishing, to what we might call active or even responsible citizenship, but also to entry into and qualification for the labor force. The urgency of developing literacy can be heard in all of these registers.

While acknowledging that the rise of legal pluralism and polyjurality have led some legal and socio-legal scholars to worry about no longer being able to distinguish law from non-law (see Tamanaha 1993), and that some scholars worry about losing “literacy” in its ostensibly metaphorical and amorphous expansion (UNESCO 2006), my project is not (or not all that much?) invested in analytic tidiness, nor in language policing. Rather than attempt to “define” and “restrict” legality and literacy. I want to explore the generative potential of attending to the inter-relationship between legalities and literacies (notice the plurals). I wish to explore the relation between how ‘we’ live law and how we read and write, including how we read and write ourselves (Antaki 2013; Martel 2007, 49 playing off of Hobbes).

While I believe the notion of a “theoretical framework” is problematic, e.g., in its privileging of the sense of sight and quite possibly distance (Antaki, Fournier, and Janda 2018) and is itself tied to specific
literacies, what I seek to do in common scholarly parlance is to propose “legalities and literacies” as a frame (Butler 2009, Derrida 2017). “Legalities and literacies” is my attempt to name, to capture, a way of being attentive that may be fruitful in a number of inter-related contexts.

4. Law and Literature

“Legalities and literacies” sounds like a play on “law and literature” and it is. The first context out of which this study emerges is that of the humanistic study of law over the last few decades, perhaps since the publication of James Boyd White’s *The Legal Imagination* (1973). In this seminal work, White turned to literature to help jurists appreciate the qualities of the reading and writing that go into and constitute law. Arguably, by showing the kind of (literary and poetic) literacies the practice, teaching, and learning of law requires, White enriched our understanding of how law might *be* and *be* lived. While White’s work continues to be very influential (for instance, the Association for the Study of Law, Culture, and the Humanities awards “a James Boyd White award for distinguished scholarly achievement”), the pairing of “law and literature” has been more fraught. The singular nouns “law” and “literature,” linked by the conjunction “and,” have been critiqued for the ways in which they reify disciplines, project one discipline’s preconceptions, anxieties and hopes onto another, and inspire fantasies of rescue or completion by an idealized other (e.g. Meyler 2005, Manderson 2011). As with other “law and…”s, we have seen a move to “law as literature” (Tomlins and Comaroff 2011). This move helped to de-emphasize law and literature as reified and separate disciplines. By de-reifying literature, this move also contributed to the dissolution or expansion of “law and literature” into the cultural study of law or the study of “law, culture, and the humanities” (Peters 2011). This expansion paralleled the expansion of “literacy” and involves the “reading” of other “texts” such as film (e.g. Sarat 2011). “Reading” expanded to all “cultural texts” and even to the “world” (see the title of Freire 1985). Recall Derrida’s famous statement that there is no “hors-texte” (1976, 158).
While some take issue with the ostensibly metaphorical expansion of reading whereby everything – from digital media, to courtrooms, to race and culture, to land - becomes a “text” to be “read,” this ‘expansion’ fruitfully invites us to return to the basic, but philosophically and anthropologically fundamental, practices of “reading” and “writing” with fresh eyes. “Literacy” is tied to the Latin “littera” which tracks the senses of the Greek “gramma.” The latter is itself tied to “graphein,” meaning to write but also to draw. Indeed, “write” originally meant to draw while “read” meant to “consider, interpret, discern.” And “text” derives from the Latin “textere” or “to weave” (OED). These etymologies suggest the need for genealogical and phenomenological re-considerations of “literacy.” For instance, the relation of – even the space between “word” and “image” is by no means obvious and is worthy of philosophical inquiry (Schmitt 2013).

Instead of faulting those who would turn everything into a “text,” such re-considerations may lead us to attend to the “texture of the world,” even its “prose” (Merleau-Ponty, 1973). Such re-considerations may lead us to question the divide between “texts” and (other) “bodies,” to see “bodies” as textured and “texts” as bodily, to move towards “literacy” as “sensory” and “sensuous” (Howes 2006), towards hermeneutics as corporeal and “carnal” (Kearney and Treanor 2015). Indeed, things “must be sensed to make sense” (Antaki and Le Guerrier 2018, 11). The push beyond literature to other “cultural” texts can thus be attended to as something other than an unbridled metaphorical expansion. Reading texts differently and reading different “texts” allows one to appreciate “rules” better but also to engage with the way law “rules” with more than rules (Cover 1983, Sarat 2011). “Legalities and literacies” thus brings us to the belonging together of “forms of life” and “language games” (Wittgenstein 1958, aphorism 20) – except that “language... must now be taken to include all the other systems of signs – of architecture, dress, geography, ceremony” (Goodrich 1990, 4). ‘We’ who experience literacy narrowly may be more recent than we thought (Foucault 2001).

5. Colonialism and Decolonization
This brings me to the second context of my study: how a “narrow” literacy is tied to colonialism and what implications a broader set of literacies, including “indigenous literacies” (Rasmussen 2012) may have for decolonization and reconciliation, notably the recognition of “alternative” legalities (Pue 2016, 433). “Lawfare” (Comaroff 2001, 306) and not just warfare is essential to colonialism and may be its “cutting edge” (Merry 2003 referring to Chanock 1985, 4). The Canadian Truth and Reconciliation Commission seeks to stop “lawfare” with its calls for the recognition of Indigenous laws and traditions, including the repudiation of “concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius” (call 45). A problem with “recognition,” “reconciliation,” and associated efforts is that Indigenous legal traditions may be rendered “cognizable,” i.e. that Indigenous peoples’ (political and legal and not simply “cultural”) differences may be attenuated if not erased in order to recover a (romanticized?) unity that never was (Antaki and Kirkby 2009, Markell 2003). We see this erasure of difference happen in much section 35 jurisprudence (Dufrainmont 2000) and, more broadly, in other colonial contexts of “transitional justice” such as South Africa (Antaki 2013). The effect is that Canadian law undermines the “mutuality” of recognition the TRC calls for (call 45), performing what it disavows and re-enacting the violence of colonialism in so doing. The work of scholars such as Robert Meister suggests that the legality at work in “justice as a reconciliation” cannot be apprehended in terms of liberalism but requires a literacy in genre - as combining prescriptions for cognition, perception, and affect (Antaki 2013) – to be identified and articulated. He suggests South African TRC documents perform a “social melodrama” allowing beneficiaries to hold onto to what they have by feeling good about feeling bad (2011, see also Mutua 2001 on “savages, victims, saviors” as structuring human rights).

As part of a broader attempt to erase indigenous literacies, residential schools participated in this lawfare against indigenous legalities. Simply disavowing colonialism as “a conflict between literate civilization and illiterate savagery” (Rasmussen 2012) is an insufficient response. Addressing the legacy of residential schools requires actively confronting the “tyranny of the alphabet” (Mignolo 1989, 53) and its central
contribution to the colonial imaginary and practices. Colonial legality’s war on “orality” is a more familiar part of the story (Bryan 2011; see also Delgamuukw 1997) but may also obscure the “alternative literacies” (Boone and Mignolo 1994) that were part of the colonial encounter. Attending to non-alphabet based indigenous forms of writing such as “Mayan pictoglyphs, Iroquois wampum, Ojibwe birch-bark scrolls, and Incan quipus,” scholars have been able to better account for the “racialization” of literacy and enrich and complicate the orality-literacy distinction, or at least some of its versions (Rasmussen 2012, 29). Doing so may also allow one to better appreciate and articulate colonial hierarchies of legal subjectivity – and their persistence. Efforts to (re-)situate the Royal Proclamation within the Treaty of Niagara (Borrows 1997) suggest that it might be fruitful to, in my words, treat “wampum” as a text requiring a literacy and instantiating a legality. The tyranny of the alphabet may be tied to a specific form of seeing, of rendering legible with the aim of re-writing (Scott 1999), to specific instruments or technologies of knowledge such as maps and encyclopedias (Mignolo 2003), surveys and grids (Blomley 2003), and also to specific forms of Indigenous resistance (Lopenzina 2013, Cole 2006).

Because sovereignty involves not simply conceptual or doctrinal claims but also “literacy for empire” (Brückner 2006), the repudiation of “concepts” and “doctrines” may not be sufficient to “unsettle” (Regan 2010) it. The recognition of alternative legalities may require “alternative literacies” (Boone and Mignolo 1994). For instance, “Richland has fruitfully emphasized the importance of ‘understanding sovereignty as an active undertaking’ expressed within the ‘quotidian matters of everyday legal texts, discourses, and practices.’ Rather than grand ontological claims, one finds in Richland’s work an attention to the ‘microanalytics of legal language’ and how its chains of presupposition and entailment bind specific moments of enunciation to the larger, shifting juridical edifice in which sovereignty is grounded” (Kahn, 2017, 6). Sovereignty – a way in which law is and is lived – emerges as bound up with specific ways of reading and writing, ways that need to be attended to and even de-coded for the “juridical edifice” to be identified and called into question. Moreover, “alternative literacies” may counter the tendency to isolate
law as a separate system in a fragmented life-world (Habermas 1984) by allowing medicine, law, museums, which appear separately in the calls to action, to appear together (see for example Buchanan and Hewitt 2019). “… Indigenous peoples’ laws, legal traditions, legal systems, and legal order might also be understood as Indigenous peoples’ traditions or institutions of governance, education, or medicine” (Minnawaanagogiizhigook 2007, 104). “Alternative literacies” may allow one to see that colonial legality demands to be “read” and “re-written” - unsettled and de-colonized - in such places as museums (call to action 67; on museums as sites of constitutionalism, see Douglas 2017) outside of the ‘traditional’ sites of law. Learning alternatives literacies means that one can no longer ‘live,’ ‘read,’ ‘write’ law the same way and in the same places.

6. Legal Education

These first two contexts thus point to the third context of this study: legal education. Reconciliation efforts (like law and literature before them) face the challenge of “destabilizing “the dominant paradigms of law and legal education and making significant inroads into the core conceptualization of what law is and how it should be taught” (Sarat et al 2011, 13). Indeed, it is likely impossible to be more “tactful” with regard to Indigenous legal traditions without more “proprioception” on the part of the settler legal order (Antaki forthcoming). Such proprioception seems to be lacking. A perennial criticism of North American legal education is that it teaches abstraction and de-contextualization, in some measure because of the “case-dialogue” method (e.g. Carnegie Foundation Report 2007; for Canada see Arthurs 1983, 2000, 2001, 2009, 2014), thus in effect telling students to park certain sensibilities, even literacies at the door. Law students learn to suppress “curiosity” about cases (Simpson 2001, 10) thus further severing the connections between “lifeways” and “textways” (Swales 1998), between political and cultural awareness and “thinking like a lawyer” (Mertz 2007), between doing law and doing justice (Barter 2017). While Canadian legal educators often profess realist ideals, they largely enact and teach formalist understandings of law, because of their pedagogical approaches and the notions they rely on (Sandomierski 2017 on contracts professors),
i.e. because of the narrow literacy they impart to their students. This ‘stickiness’ of legal abstraction largely suppresses the transformative potential of such moves as that from “system” to “tradition” in comparative law (Glenn 2014), which was influential in curricular reform at McGill, as well as the much earlier realist move from “cases” to “cases and materials,” both of which enlarge the notions of a legal text and of how to read one. Indeed, “big-bang” moments in legal education (Menkel-Meadows 2007) can be told as a series of attempts to enlarge legal literacy so as to keep up with or re-shape legality, each meeting with mixed success. The key point is that the narrowness of the legality learned by students may stem not from the professed political commitments of their law professors, nor from their substantive views about whether law is truly a separate societal sub-system or not (Gordon 1994), but from their teaching methods and literacies. This possibility is reminiscent of Victoria Kahn’s argument (2004) that a literary contract with his readers regarding the dangers of romance underlies Hobbes’ *Leviathan*. Hobbes interpellates his readers as ‘readers’ in order to “set up” his political and legal vision. What “literary” contracts do educators propose or impose and what significance do these have for the performance of law in the classroom and beyond?

The idea here is not to replace ‘abstract’ settler literacies with ‘concrete’ Indigenous ones but to invite greater self-consciousness about literacies - not just for the sake of reconciliation but for the sake of legal education generally. Focusing on proprioception would help mitigate the dangers of “importing” indigenous law into the “classroom” without attending to the dangers of so doing, e.g. severing the intellectual aspects of law from its “physical, spiritual, and emotional aspects” in such a way as to “distort or harm the revitalization process” (Askew 2016, 44 referring to an oral presentation by Gordon Christie). It would also help avert the danger of severing the cultural and the technical. Indeed, much important and recent theoretically rich socio-legal scholarship (e.g. Valverde 2009, Pottage 2014, Blomley & Bellot 2015) invites “humanists” to “take on the technicalities” rather than jettison “what is the very core of legal thought” (Riles 2005, 975). Not just “genres” (such as romance) but techniques and technicalities as well
as “instruments have a life of their own. They do not merely follow theory; often they determine theory, because instruments determine what is possible, and what is possible determines to a large extent what can be thought” (Hankins & Silverman 1995). In this age of vocational training for the marketplace, humanistic education for citizenship (Allen 2016) must extend into the most technical and skills-based aspects of learning law. Overcoming the narrowness of legal literacy helps students and scholars better appreciate what is involved in “reading law” (Buchanan et al. 2012), law understood as involving ‘texts’ that are at once cultural and technical. It also helps them better shoulder the burden of “reading for law” (Raja 2016), i.e. of not knowing in advance which “texts” are legally relevant and how. This last point brings us back to one of the core approaches to literacy, i.e. that literacy is essential to citizenship, to full participation in politics, and to human flourishing more generally (UNESCO 2006).

I believe a “legalities and literacies” sensibility would allow one to work more productively on the problematic fault-lines of legal curricula (such as the separation of procedure and substance, theory and practice, cultural and technical, skills-based courses and substantive law courses) that result in so-called second-class citizens of legal curricula - such as “theory” courses but also “research and writing courses.” For instance, and along the lines of James Boyd White’s The Legal Imagination, it would be most fruitful to re-imagine and design a research and writing course in a way that transforms it into a first-class citizen of the curriculum (one that bridges or transcends the theory-practice divide) by bringing on board the insights of genre studies, media studies (e.g. Vismann 2008) and making it a class – “Doing” Law? - about the “instruments” of the legal profession and their history.

7. Concluding Remarks

While it may not necessarily be apparent, this project is in part motivated by perennial philosophical questions and concerns regarding the characterization of the human being as the being endowed with speech or logos and as a ‘political’ animal (Aristotle’s Politics). This project, therefore, is about the
relation between *logos* and politics – but translated or adapted as the relation between literacies and legalities. The project is also motivated by related questions regarding the invention of writing (e.g. Plato’s *Phaedrus*) and the distinction between *fusis* (nature) and *nomos* (law, culture) or *tekne* (see, e.g., Kelley 1990). For instance, I suspect that some of the resistance to the ‘metaphorical’ expansion of literacy is related to an insistence that reading and writing ‘belong together’ and that we can read only that which we can write. Literacy here – to which writing is imagined as key - is conceived as artifice or technology or even culture. The expansion of literacy is problematic, then, because it detaches reading from writing, e.g. we can now read the world or ‘the land’ (which perhaps, in principle, we cannot write). But, for instance, in some Indigenous traditions, there may not be a nature-culture divide as in occidental thought (see, e.g., Lyons 2010; Todorov’s account of the conquest of the new world was somewhat attuned to these questions, 1999), thus exploding the possibilities of literacy in the direction of a ‘post-human thinking’ (Hayles 1999). I do not find it to be a coincidence that some compelling work on reconciliation also involves a confrontation with the Western philosophical tradition, or important dimensions thereof (see for example Tully 1995, Coulthard 2014), sometimes inspired by those within the tradition who began that confrontation (Marx, Nietzsche, Heidegger for example).

As the reference to Nietzsche suggests, while this project is motivated by philosophical questions, I am interested in language and knowledge as “performative” (Sedgwick 2003). Inspired by my students as well as Tully’s account of “political philosophy as a critical activity” (2002), my work does not involve developing a “normative theory” to solve problems. Instead of asking what is (fact) or what ought to be (value) questions, I am more interested in asking about how an ‘order of things’ (Foucault 1966) came to be and about its significance for and impact on a given ‘us.’ I am less interested in pinning down “law” or “literacy” so as to achieve an analytical victory and more interested in exploring the significance for ‘us’ of stories we tell – or could tell - about literacy and its relation to law. In many cases, as I attend to what a position I hold does to or for me (Butler 1995), I need not come to a conclusion or arrive at a truth. In
fact, I may be less able to “read myself” if I am too invested in the truth of my positions. For example, in his work on human rights as reconciliation, Meister explores the significance and effects of the belief that the Holocaust is the most evil act in human history for the international legal imagination. He suggests this belief leads to a privileging of bodily pain and death (torture and genocide) at the expense of systemic wrongs that result in massive distributive injustices, and that this belief is also tied to the defense of the doctrine of responsibility to protect - in which “protection” and not “democracy” legitimate the right to rule (2011). That this belief has these effects (for Meister) means neither that it is wrong, nor, I think, that it could not have different effects, e.g. in different contexts or at a different time. The idea behind my project is not to present “legalities and literacies” as an abstract truth of some kind but to begin to explore what it can do to and for us here and now. I hope to do so in part by exploring how our legal ‘positions’ are tied to how we ‘read.’

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