Literary Analysis of Law: Reorienting the Connections Between Law and Literature

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Abstract

This special issue on the New Literary Analysis of Law features articles that dispense with the choice between “law in literature” and “law as literature,” to ask how legal and literary forms, methods, concepts, and attitudes can be productively explored in tandem. Conventionally, when scholars ask how legal actors and problems are portrayed in literature, or how hermeneutic theory may shed light on statutory or constitutional interpretation, these questions are meant to help solve a legal problem, at a doctrinal or conceptual level. But once we abandon the requirement that literature serve as an assistant in this fashion, many new possibilities for the literary study of law come into visibility. The essays in this special issue explore some of those directions.

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Various threads connect law and literature in constantly changing ways. Forensic argument and imaginative writing have a common basis in rhetoric, and the dynamic relations between the two fields also leave numerous other traces, as we see in the dramatic performances that link judges and lawyers to actors, and the performative effects of literary and literary language; jurists’ and literary critics’ overlapping concerns with interpretation, demonstration, and proof; the role of narrative schemas as templates (and as deceptive lures to be avoided) in both realms; and the techniques, in legal procedure and literary prose, for managing problems involving representation and representativeness—to mention only a few of the topics that scholars have explored in both historical and theoretical terms.¹ Yet for most of the last four decades or so, it has been conventional to assert (or simply assume) that the connections between law and literature are reducible to just a few varieties: “law in literature” (the literary depiction of legal actors and disputes, usually in drama or fiction),

“law as literature” (the use of literary methods to interpret legal texts, often focusing on hermeneutic approaches to constitutional or statutory interpretation), and “the law of literature” (the regulation of the literary marketplace by laws involving libel, obscenity, and copyright).

Over the last ten or fifteen years, this conventional formula has become increasingly untenable, as scholars have explored a much wider array of questions relating to literary and literary forms, concepts, methods, dispositions, and media. Instead of asking how playwrights portray lawyers or trials, for instance, Lorna Hutson shows how early modern British drama engages with forensic logic and attitudes, in ways that highlight fundamental epistemological challenges in both literature and law. Instead of asking about American novelists’ depictions of corporate personhood, Lisa Siraganian shows how twentieth-century writers and judges grappled with conceptual and representational difficulties concerning corporate personality, impersonality, embodiment, and intention. Instead of seeking to adjudicate the legality of eighteenth-century British writers’ satirical practices, Andrew Bricker considers the complicated interplay between a constantly developing libel law, on the one hand, and poets’ and playwrights’ efforts at evasion through rhetorical and typographical legerdemain, on the other hand. Dozens of other recent books and articles have moved beyond the questions of whether writers portray the law accurately or inaccurately, favorably or unfavorably, turning instead to the philosophical, epistemological, aesthetic, and social conditions that ground legal and literary practices. These new currents of inquiry have come out of law schools, and also out of departments of English, Comparative Literature, Rhetoric, Media Studies, and other disciplines concerned with language and interpretation. The diversity, energy, and methodological sophistication of the field is also evident from the essays in several recent anthologies—most notably, The Oxford Handbook of English Law and Literature, 1500-1700, edited by Lorna Hutson, and New Directions in Law and Literature, edited by Elizabeth Anker and Bernadette Meyler. Two new book series—published by Cornell and Oxford, both set to release their first volumes in 2019—promise to extend these developments.

5 The Oxford Handbook of English Law and Literature, 1500-1700 (Lorna Hutson ed., 2017); New Directions in Law and Literature (Elizabeth S. Anker & Bernadette Meyler eds., 2017).
To inquire into the motivating assumptions that connect the law of evidence with forensic modes in dramatic representation, or that relate literary conceptions of collective agency with corporate personhood, does not simply entail moving the focus from depictions of legal actors and disputes to a slightly more abstract level; it entails a fundamental shift in understanding literature’s relation to law and in the reasons for exploring this relationship in the first place. Although there are various rationales for asking how law is represented in literature, two of the commonest reasons, as we see in the scholarship that has taken this approach, are to understand how non-lawyers perceive the law and to show how literature can illuminate aspects of legal conflicts in ways that judicial decisions cannot. In both instances, the aim is typically to address some of the law’s shortcomings. The law repeatedly ignores certain kinds of claims or dilemmas, and literature can expose the blind spot, indicating the source of the problem and possibly even proposing a solution; literature shows us how people misunderstand the law, leading us to ask whether the law needs to be reformed or the misapprehension needs to be corrected. In different ways, both types of inquiries seek to use literature as an aid to the law: we turn to novels and plays (for instance) to learn how to improve the legal system or certain doctrinal or procedural provisions.

This function as law’s assistant, however, does not drive the inquiries into the underlying conditions that foster the development of particular legal and literary practices. Consequently, discussions that proceed in this fashion may seem peculiar—even inexplicable—to those who assume that the point of scholarship about law is to diagnose and respond to doctrinal and conceptual failures in the legal system. So long as those goals are seen as exhausting the domain of scholarly argument, literature (and any other field one might care to enlist) may play either the role of assistant, or none at all, because the very reason for looking to such materials is to see how they can suggest improvements that we miss if we rely only on conventional legal resources. What this recent vein of work suggests, then, is that legal scholarship might have other ambitions, such as not merely showing that the law might be different, in some respect, but understanding the circumstances that have made it what it is—and treating those enabling conditions, rather than a proposed alteration that might flow from them, as the object of analysis. Literature is not the only field that promotes this style of inquiry—explorations in numerous other areas, including psychology, linguistics, and the history of science could yield similar results—but literature has been a particularly fruitful source of such research, doubtless in large part because of the many currents that flow through legal and literary thought.

This issue of Critical Analysis of Law contributes to these new lines of work by offering five articles that examine the relations among law, jurisprudence, legal pedagogy, history, rhetoric, criticism, and imaginative writing from various perspectives. Maksymilian Del Mar’s article, “Emotion Experiments in Legal Thought,” builds on recent work by legal and literary scholars involving affect and emotion. Del Mar starts by looking to the imaginatively rich and emotionally laden controversiae in ancient Rome—declamatory exercises that required students to place themselves in the position of a character in a fictional legal dispute, so as to understand that character’s thoughts and feelings, motives and intentions. Just as
the student-actors were expected to produce _colores_—the creative features that lent force to these simulated emotions—so too were the students who watched these performances, and who sought to improve on them, in a process that required the audience members to move from one position to the next, shifting their moral perspectives as they successively tried out each role. As Del Mar shows, the fictional cases were implausible and highly literary: some featured characters and events one might expect to find in a comic play, and others teetered at the far end of tragedy. For both the students and audience members, these declamatory exercises yoked the emotional perspectives associated with a given character’s position, on the one hand, and forensic concerns, on the other—prompting students to think about the moral arguments that had to be generated in order to translate a character’s thoughts and feelings into a persuasive justification for that character’s conduct, and ultimately showing how emotion and legal justification are bound up with each other.

Del Mar then turns to the use of hypotheticals in common-law reasoning—another device that may be used to explore a range of moral and emotional positions clustered around a narrative, with the aim of testing norms and values. Taking, as an example, the case of an advertising agent who chose to proceed with a three-year contract rather than accept the customer’s repudiation, Del Mar shows how the court’s hypotheticals model the indignation of both the customer and those judges who feel incensed on the customer’s behalf. As the judges add limiting principles and other refinements to modulate the scope and effects of the hypothetical, Del Mar sees the modern analogue of the Roman _colores_: in speculating about what counts as a “legitimate interest” that would justify the agent’s repudiation, the court begins to invent motives that might animate the parties. Another judicial refinement tests the bounds of the settled rule by inventing a transnational voyage for the agent who opts to perform under the contract, and asking if the customer would nevertheless be bound to cover the expense—an echo, perhaps, of the travel narratives in some of the Roman _controversiae_. Once again, these alternatives serve not merely to illustrate the reach of the doctrine, but also to show how the emotions that they express, and seek to solicit from the reader, help to constitute the justificatory resources that the court draws on.

Del Mar’s article opens up a host of questions involving the place of emotion in generating legal argument and evaluation. The imaginative flights in the more contemporary example yield speculations that are more staid and much less emotionally intense, and this seems typical of modern judicial writing—but we might wonder if the willingness to don various guises, on behalf of an existing or invented party, varies with the issues at stake. For instance, do politically charged disputes in constitutional law generate more passionate hypotheticals than commercial contract disputes? And if they do, what should we make of that? The Roman _controversiae_, with their stock characters and bizarre events, exhibit more visibly “literary” features than we see in the judicial example; are there modern instances that display those features—and again, if so, do they typically arise in a few specific contexts? Different legal traditions provide for differing uses of hypotheticals, sometimes invoking them not as a speculative device but as a means of writing off certain avenues as already foreclosed—a tactic that might be associated with its own distinctive set of
emotional responses. Del Mar does not seek to celebrate or condemn the role of emotion as an ingredient in legal justification; he urges us to recognize its significance. In the scholarly writing that considers this issue, little has been said so far about the different rhetorical means of displaying emotion, much less the means of eliciting it from the reader, and Del Mar’s examples might begin to suggest some opportunities for further research along these lines.

Alison Chapman, reading John Milton’s writings on divorce, notes the surprising prominence of civil-law sources and arguments in these texts. As Chapman shows, Milton frequently turned to civilian works even when common-law sources could have sufficed. The civilians furnished him with a particular conception of equity—not as the alternative to law, but as a means of modelling flexibility, fairness, and consistency within the law. Chapman describes this form as “internal equity,” by contrast with a canon-law form of equity that stands outside the law and serves a curative function, arriving not to effect justice but to permit exceptions, making accommodations for people’s weaknesses. Milton needed internal equity to argue that divorce should not simply be permitted, as a legal exception, but should be embraced as the just means of resolving marital conflict.

In turning to these sources, Chapman places Milton’s writings in a context that has largely been overlooked, not only in treatments of Milton, but in treatments of early modern literature more generally. A rich and continually growing body of scholarship has explored the forensic culture that fascinated many early modernist dramatists, in particular, but this work focuses almost exclusively on the common law. Although playwrights’ associations with the Inns of Court help to account for that focus, it must also be remembered that during this period, those who studied law as a university subject would have been exposed primarily to the civil law before completing their legal education at the Inns of Court. The civil-law background played a significant role both in forming the conceptual apparatus that lawyers would bring to their later studies and in teaching them about legal methods. Drawing on civilian materials, then, could help to identify some of the basic assumptions governing early modern lawyers’ understanding of the enterprise they were undertaking—and could also help to reveal the ways in which contemporaneous writers engaged with those assumptions.

Monica Huerta revisits the debate about legal formalism and realism, exploring it from a new perspective by considering how metaphors of solidity and fixity operated among realist thinkers. For Oliver Wendell Holmes, the counsel that judges should explicitly take into account the social harms and benefits resulting from different possible outcomes, when rendering decisions, was not simply a suggestion to draw on a larger pool of informational resources, but a proposal to shift the very basis of the judgment—to give it a different relation to the material world by reorienting the “very ground and foundations” on which the judgment relies. In Huerta’s analysis, the probabilistic knowledge that Holmes associated with the lawyer’s “predictions” is similarly informed by material

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6 Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 467 (1897).
considerations: to bring various aspects of social and economic life into visibility, so that they help to guide decision-making, is to make them into legal material, tangible parts of the legal world. Even the “fossil records of … history,” which Holmes disparages as the detritus that occupies so much unwelcome space in the minds and writings of judges, take a material form. Similarly, Roscoe Pound and John Dewey use architectural metaphors to convey their disparaged formalist precursors’ love of symmetry and scientism, and to locate that conception of law in a material structure suffused with what Huerta calls “formness.” The aim was to discredit nineteenth-century thinkers, like Christopher Columbus Langdell, by ascribing to them a mistaken belief about the legal system—namely, the belief that if only law were entrenched in the right form, then the schemes, typologies, and compartmentalizations that followed would resolve all difficulties.

Huerta shows that for the realists, achieving “full justice” required a different relation to the material world, a relation that treated human needs, rather than well-formed structures, as the basis on which law depends. Her account of the realists’ rhetorical campaign might prompt us to look at the metaphors that nineteenth-century legal thinkers actually used, to ask how materiality figured in their writings and whether it operated in the fashion that would later be ascribed to them. Going back further, we may consider the effects of William Blackstone’s architectural metaphors in his Commentaries on the Laws of England (most famously, his image of the law as an “old gothic castle” that has been modified to make its conditions “convenien[t]” for “modern inhabitant[s]”). Historians like David Seipp and C.P. Rodgers have discussed the similar images that early modern lawyers invoked, to demonstrate and elaborate the law’s systematic nature, furnishing an even earlier context for the issues that Huerta considers. Just as her discussion raises questions about the use of material metaphors to specify law’s relation to the world it inhabits and governs, she also implicitly poses the question of what alternative figurations have gained currency at various historical moments.

Christopher Brown discusses the role of the absurd in African American literature during the Jim Crow era, showing how George Schuyler’s 1931 novel Black No More responds to the legal logic of “separate but equal” by devising a machine that alters skin color and turns racial taxonomies into a reductio ad absurdum. A series of heuristic “racial switch” scenarios pervade the text of the U.S. Supreme Court decision in Plessy v. Ferguson (1896) and the parties’ briefs: on the one hand, Plessy’s lawyer asked the members of the Court to consider how they would view the law if they awoke the next day to find themselves with dark skin, and on the other hand, the majority opinion purports to show that the legislation providing for racially segregated train cars could import no “badge of inferiority” because

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7 Id. at 464.
none would arise if “the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms.”\(^\text{10}\) Schuyler’s novel, borrowing this logic, imagines not a switch but a transformation that makes racial difference illegible. Once distinctions based on racial appearance become impossible, the only people whose appearance can be trusted as the “true” index to their identity are dark-skinned African Americans who have not availed themselves of the Black-No-More machine’s powers, and hence the concept of “racial purity” itself takes on a new meaning. In the course of the novel, racial intermarriage becomes impossible to regulate; white supremacist organizations are infiltrated by people who would once have been their victims; and a doctor breezily proposes a Swiftian regime of baby-killing to destroy the evidence of a dark-skinned child’s parentage.

Brown’s incisive analysis might prompt us to inquire more broadly into the place of the absurd in legal doctrine and in the law’s practical effects. Despite the frequent invocation of the “absurd results” canon of statutory construction, lawyers hardly ever give serious consideration to the law’s experiments in absurdity, let alone to the kinship between these legal episodes and their literary correlates (Bruce Hay’s treatment of the decision in *Brown v. Board of Education* and the theater of the absurd is a rare exception which, notably, deals with another aspect of the law of racial segregation).\(^\text{11}\) If, instead of characterizing various developments as absurd and treating that pronouncement as an argumentative clincher, we devoted more time to the forms and effects of the law’s absurdities, we might find that the pairing of Schuyler’s novel with the case law on interracial marriage points toward a wide array of doctrinal arrangements, offering a new handle on the ways that well-accepted legal methods, structures, and arguments defy common sense, exhibit perversity, and result in self-contradiction.

Bernadette Meyler considers Kazuo Ishiguro’s novel *The Buried Giant* as an allegorical meditation on problems of transitional justice, suggesting an alternative to the usual ways of confronting such problems—namely, by seeking to eliminate all traces of the atrocities preceding the new order, or by creating monuments designed to preserve the memory of those events. Today, allegorical modes are generally regarded as a topic for purely academic inquiry (when anyone thinks of the subject at all), but as Meyler shows, neither monument nor oblivion can produce the kind of closure that each one strives, in its way, to facilitate, and in Ishiguro’s hands, the incompletely resolved allegory provides a way out of this impasse. Set in post-Arthurian Britain, after extended conflict between the Saxons and the Britons, the novel includes a Briton couple traveling to visit their son; along the way, they are joined by a Saxon warrior and Sir Gawain, knight who was once a member of Arthur’s round table. All of the characters are bent on forgetting some aspects of their past, recalling now-imperfectly remembered events, and obscuring others to protect themselves or their loved ones. The buried giant of the novel’s title is responsible for an all-pervading

\(^{10}\) Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

mist that causes forgetfulness, and the characters variously wait for the mist to lift or hope to maintain it. Meyler suggests that the novel’s allegory applies not only to historical occurrences but also on historiographic approaches; she argues that instead of aiming for closure, *The Buried Giant* invites the reader to negotiate its plot without arriving at a normative solution. The particular events, landscapes, and characters in the novel allow for a range of allegorical referents (e.g., to Vichy France, Hiroshima and Nagasaki, and the conflicts in Yugoslavia in the 1990s), without fixing on any of them. The active process of the reader’s scrutiny and comparison thus models a form of ongoing individual engagement that contrasts with the efforts of memorialization and the amnesia of amnesty.

Meyler implicitly reminds us of the many other ways in which legal decisions and processes strive imperfectly for closure. Perhaps most famously, the debate over the death penalty, in the United States, is often framed in terms of the desire to afford closure for the families of those who have been killed in violent crimes. The trial, the jury verdict, and the judicial decision (and their alternatives, such as negotiation, arbitration, alternative dispute resolution) are meant to bring matters to a close, except when the result itself is one that continues into the future (e.g., structural injunctions). A considerable portion of the research on these topics has asked how successful they are in producing closure, and in proposing measures for making them more effective. Significantly, Meyler does not suggest that we look to allegory as a solution to legal problems, as if it were a technique that could be incorporated into the legal system; rather, she shows how allegory provides for a mode of engagement that can help us to understand the *premises* of law’s desire for closure. Like the other contributors to this issue, Meyler is concerned not with how literary texts, or a certain literary technique, can offer a legal salve, but with how literary modes of thought can help us to understand the conditions that have conspired to produce certain legal dilemmas, ideas, and devices.