

GRETA OLSON¹
(UNIVERSITY OF GIESSEN)

DE-AMERICANIZING LAW AND
LITERATURE NARRATIVES: OPENING UP THE
STORY²

Abstract. This essay names differences between stories told in American, British, and German legal cultures in an effort to de-Americanize prevailing modes of Law and Literature scholarship. It quibbles with the reliance on American models of scholarship in derivative European Law and Literature research as well as with much American work. The latter assumes the universality of the adversarial trial system, the ubiquity of the debate about how to interpret the Constitution, and the variety of social and civil rights issues such interpretation entails as well as the common law tradition of arguing through precedent. To explore the limitations inherent in prevailing modes of scholarship, the essay compares the story lines that inflect three nations' modes of conducting Law and Literature. It concludes by describing scholarly dead ends in Law and Literature as well as points of expansion. The latter include the move to regard law as a cultural practice and to embrace the visual and the aesthetic in a more generous notion of the literary.

Keywords: comparative Law and Literature; German, American, and British Law and Literature; law as a cultural practice; law and narrative; law and the visual/iconographic

Having come of age in the academy during a period of acute self-consciousness regarding the inherent cultural and historical limitations of the individual's critical perspective, I will begin this essay by placing its author. I am an expatriate American with a background in philosophy, art, and literary studies who has now lived half of her middle-aged life in Germany. I came to the subject of Law and Literature through a research project on law, norm, and criminalization conducted by lawyers, literary scholars, philosophers, and criminologists. In an effort to give our interdisciplinary work a theoretical frame, I read and began to write about the history of Law and Literature research. This initially led to a phase of trepidation about how much scholarship had been done in the interdiscipline and how comparatively little of it I could at

1. My sincere thanks go to Andrew Majeske for suggesting that I submit this essay for review and to the two anonymous reviewers whose critical comments helped to move this story forward.

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first grasp. I then moved on to bulimic reading binges, a period of imitative writing, and, finally, to the now, a sense of discomfort and impatience with what I regard to be limitations in the prevailing narratives of research. (One might call this a *histoire* of phases of learning.) It is from that perspective of discomfort that I write this essay with an interest in moving the stories we tell in our scholarship forward.

My frustration with prevailing models of Law and Literature has to do with my binational and bicontinental identity. I see an inappropriate reliance on American models of scholarship in much derivative European Law and Literature research. This is due, as I will argue, to the relatively recent development of the field. Colleagues adopt the questions, plots, and primary texts of American Law and Literature scholarship while disregarding how these elements are not necessarily in synch with their own very different legal cultures and local literatures. In its most tertiary mode, Law and Literature texts provide yet another reading of equity in Shakespeare, based on a loose analysis of the motifs of adversarial law. This is a derivative form of analysis, I contend, because law is not law in these texts but a trope for justice, and existing assumptions about law and literature are not challenged. Equity, which is modeled in these texts as the antithesis of law, becomes a way of not talking about legal culture or practice but about an ideal of the just. Moreover, this work assumes that the Anglo-American adversarial trial provides the general plotline for all legal narratives; this is hardly the case.

Conversely, I quibble with much American scholarship because it assumes that it is universal in its approach, whereas from my own dual perspective it appears deeply imbued with current preoccupations of American legal culture. American scholarship assumes the universality of the adversarial trial system, the ubiquity of the debate about how to interpret the Constitution, and the variety of social and civil rights issues such interpretation entails, as well as the common law tradition of arguing through precedent.

At this point this essay might end the exposition of its opening gambits and move into offering examples of the problematic kinds of Law and Literature scholarship named above. Yet this procedure would be reductive and would simply enumerate the negative. Instead, I will take a different path.

To explore the limitations inherent in prevailing modes of scholarship, I want to compare the story lines that-inflect three nations' modes of conducting Law and Literature scholarship. This sentence rushes its writer and her potential readers into several areas of controversy. It is controversial to suggest that nations encourage particular types of scholarship to the detriment of others. Such a statement speaks for the balkanization of research and a lack of universality in scholarship; it stresses difference and even raises the ugly visage of potential nationalism. I do not advocate any simplistic essentialist view of nationality or national scholarship. There is great evidence that ideas and scholars travel. As nomads, scholars bring schools of thought to new places where they are in turn adapted and changed. (Consider in this vein: American attorney and law professor Adam Thurschwell, who pursues distinctly continental forms of Law and Literature critique; or Peter Goodrich, a formative thinker in British postmodern jurisprudence, who is now a professor at Benjamin N. Cardozo School of Law and the editor of this journal; or Jeanne Gaakeer, a Dutch judge, who pursues a Boyd-White ethical trajectory in both her adjudicatory and scholarly practice.) Since I will compare only American, British, and German research in this essay, the sentence that begins this paragraph, moreover, speaks for a Western-centric perspective, which ignores the radically different plots of Law and Literature that have emerged elsewhere. This limited perspective arises solely out of the author's limitations: these are the varieties of scholarship about which she presumes to know something. A more comparative view would venture beyond these three legal cultures and their scholarship to discuss other forms of law, as alluded to at the end of this text.

In this essay I borrow some of the tools of narratology to compare Law and Literature plotlines. Narratology—the study of narratives and how narratives, or stories, inform and affect perception—has, according to a pre-eminent scholar in this field, Monika Fludernik, become a “master discipline.”³ It offers us ways to understand how the elements of storytelling pervade our experience and inform not only law but also medicine, psychology,

3. Monika Fludernik, “Histories of Narrative Theory (II): From Structuralism to Present,” in *A Companion to Narrative Theory*, ed. James Phelan & Peter J. Rabinowitz (Malden, MA: Blackwell, 2005), 47.

education, and perception itself. Narratology involves the more general process of how humans make sense of their world through storytelling. Indeed, important research in Law and Literature has been conducted using specifically narratological means. (This includes narrative jurisprudence and, for instance, Peter Brooks's multiple works on confession.) I want to ask, then, what is different about the stories that groups of scholars associated with three nations tell in Law and Literature scholarship and what is similar, and begin to query why this is the case. There is a potential danger associated with my procedure. I will necessarily generalize trends in three types of national scholarship and, in order to offer an overview, leave out significant details.

The American Story: Alternative Ethical Worlds in Realist Prose

Law and Literature is arguably already overdetermined by virtue of the competing histories of its participatory disciplines and the processes by which they became institutionalized. Why then, the reader may ask, bring in yet another methodology to what may already appear to be muddied waters? This need springs from a moment of disciplinary exhaustion that has led to a period of reassessment manifested in a plethora of recent historical overviews. Along these lines is Julie Stone Peters's excellent review of the field published in 2005. She argues that Law and Literature grew out of literary scholars' need to make their work have some material weight in the world, and out of lawyers' wish to re-engage with ethical and humanitarian questions in legal practice, education, and theory. Peters concludes that Law and Literature has outrun the scope of its original questions as well as its binary interdisciplinary character: it may only survive by transforming itself into a variety of more inclusive interdisciplines.⁴ Appropriately, she cites Guyora Binder and Robert Weisberg's quite inclusive *Literary Approaches to the Law* as indicative of this trend. In their introduction, the authors describe the move away from opposing the literary to the legal

4. Julie Stone Peters, "Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion," 120 *Publications of the Modern Language Association* 442 (2005).

through an analysis of the expressive and the aesthetic aspects of “legal discourse”:

While much Law and Literature scholarship has opposed the literary to the instrumental analysis that dominates contemporary legal discourse, cultural criticism of law rejects this dichotomy. Instead, it implies that far from excluding aesthetic or expressive considerations, such instrumental policy analysis has a constitutively important expressive dimension that literary reading can illuminate.⁵

Peters offers a three-phase history of the field. My mini-narrative differs from hers but of necessity recurs to the past in order to highlight current dead ends in scholarship. In its most recent manifestation, the American Law and Literature movement developed during the 1970s out of a frustration with what was viewed as the social and judicial conservatism of the emergent Law and Economics movement. This conservatism was only heightened by the appointment of William Rehnquist as Chief Justice of the Supreme Court during the Reagan era and what were largely viewed as the Rehnquist court’s incursions on more liberal Supreme Court decisions regarding civil liberties and the interpretation of the Bill of Rights.

Thus, in his formative works J. B. White called for a return to ethics in legal education and legal practice. Intrinsic to this was the law’s necessary recognition of its inherently literary qualities. White’s key terms have included language, translation, rhetoric, and community; and he foresaw a visionary unity of content and form in ethical, performative, legal writing. By embracing the positive rhetoricity of law, he harkened back to Benjamin Cardozo’s 1925 essay “Law and Literature,” which similarly called for a union of substance and form in legal writing.⁶ This includes a positive assessment of Cardozo’s and law’s general use of metaphor. In a more recent formulation of his intentions, White has reiterated his commitment to pursuing “idealism” in all forms of legal practice.

5. Guyora Binder & Robert Weisberg, *Literary Approaches to the Law* (Princeton: Princeton University Press, 2000), 19.

6. For a further discussion, see Monika Fludernik & Greta Olson, introduction to *In the Grip of the Law: Trials, Prisons and the Space Between*, ed. Monika Fludernik & Greta Olson (Frankfurt: Peter Lang, 2004), xxxiii–xxxiv.

This entails an appeal to an ideal of the just: “The simultaneous insistence upon law and justice produces a constant pressure to think and rethink both what justice is and what the law requires. It is an engine for opening the law to our deepest values.”⁷

Similarly, the cofounder of America’s Law and Literature movement, Richard Weisberg, first addressed his legal and ethical critique specifically against Rehnquist’s form of adjudication and generally against formalist applications of law, which he sees as both devoid of ethics and reinforcing of modes of social inequity.⁸ Not only does literature provide “sense and sensibility”⁹ to law in Weisberg’s eyes, but his method of reading narratives about the law, such as Melville’s *Billy Budd, Sailor* (1924, posthumous), provides law with a poetical or creative ethics, as is mirrored in the title of his third book *Poethics, and Other Strategies of Law and Literature* (1984). Remaining consistent with the aims of his initial scholarship, Weisberg has recently positioned himself in relation to his much commented upon opposition to postmodernist readings of law: “[M]ost of it, I think, is that I preserve (as I claim the novelists do themselves) a reverence for law.”¹⁰

In other much quoted texts in American Law and Literature scholarship, *Love’s Knowledge* (1990) and *Poetic Justice: The Literary Imagination and Public Life* (1997), the philosopher Martha Nussbaum looks—like White and Weisberg—to literature, particularly to nineteenth-century novels, to find alternative sources for the study of the good life and ethics. Similar to White, she finds this alternative ethics in the unity of “content and form” that typifies the literary.¹¹ Literature provides, then, a corrective both to the pretensions of scientificism aimed at by individuals such as Richard Posner and to the nihilistic relativism suggested by Stanley Fish’s

7. Jeanne Gaaker, “Interview with James Boyd White,” 105 *Michigan Law Review* 1403 (2007).

8. Richard Weisberg, “How Judges Speak: Some Lessons on Adjudication in *Billy Budd, Sailor* with an Application to Justice Rehnquist,” 57 *New York University Law Review* 1, 19–31 (1982) and Richard Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (Yale University Press, 1984).

9. Richard Weisberg, “Coming of Age Some More: ‘Law and Literature’ Beyond the Cradle,” 13 *Nova Law Review* 107, 110 (1988).

10. Richard Weisberg, “20 Years of Story-Telling on the Law,” 26 *Cardozo Law Review* 2223, 2225 (2005).

11. Martha C. Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990), 22.

analysis of interpretive communities. Thus novels provide a moral philosophy that cannot be found in deontological and utilitarian ethical systems.

These formative thinkers in the American Law and Literature movement look to novels, paradigmatically to nineteenth-century realist novels, to restore an ethical substance and form to law. Important scholars in the American Law and Literature movement, including Brook Thomas (1987), Wai Chee Dimock (1996), Dieter Polloczek (1999), and Robin West (1999), have similarly looked to the novel for those residues of justice or those narratives of victimization that are elided from what are seen as the conventional stories told by law. American scholars react and speak to a legal culture that is centered around the rhetorical and procedural drama of adversarial law. As we know from countless Grisham novels, TV movies, and film thrillers, if not from our own experience, the adversarial trial is at the heart of the American legal ritual. This is in fact a contest, a theatrical rule-driven production in which the competing stories told by the prosecution and the defense are articulated and in which only one story, whether true or false, can ultimately prevail. Accordingly, emphasis is placed on rhetoric; the judge acts as a referee who ensures fair telling and good conditions for audience reception through observing appropriate procedure. Given the common law tradition, legal argument evolves on the basis of precedent from decisions made about earlier similar cases, although there are many unresolved arguments about how to interpret the doctrine of *stare decisis*.

Thus questions endemic to the study of fictional prose narratives such as the reliability of the narrator, here the witness or witnesses, and the conditions and methods of the storytelling are central concerns. Moreover, queries about intention have importance. Intentionality is invoked when describing the culpability of perpetrators, as well as in the interpretation in civil law of wills, contracts, and legislation. Most centrally, the perpetual discussion about the proper interpretation of the American Constitution, whether in the alleged originary sense of its authors or in an evolving form to fit current circumstances, involves notions of intention and remains central to U.S. legal culture.

Why is it important that the alternative stories that are sought in the American Law and Literature movement are found in the nineteenth-century realist novel? Mentioned above, *Billy Budd* is

arguably the paradigmatic literary text in American Law and Literature, having a value in the interdiscipline not unlike the Constitution in American legal debate. Not only was the novella central to Weisberg's first critiques of formalist and legally blind applications of law, but it was also central to Richard Posner's penning a book that many of us love to hate, the best-selling *Law and Literature: A Misunderstood Relation*,¹² a textbook that wholly dismisses the usefulness of Law and Literature to legal practice. *Billy Budd* also was the basis for Posner's debate with Robin West.

The choice of nineteenth-century novels as the model for the literary in Law and Literature bears importance because this type of novel solidified the norms of what we call literary realism and became the model of what readers expect novels to be. Realist novels convince readers of the believability of their complex stories as well as of the societies and social struggles they represent; characters portrayed in them are moreover like people we might meet in the real world; we can imagine knowing them, and we believe in the changes they undergo within the span of 300 to 600 pages or more. Moreover, realist novels preserve a unified notion of the humanist subject: she has a core that remains constant during the course of the novel's unfolding. Such novels perpetuate what the writer J. M. Coetzee has called "the realist illusion" provided by the "word-mirror."¹³ Accordingly, the realist novel, unlike its modernist and postmodernist successors, does not question language or the process of communication. Words in such novels appear to have an inherent and natural connection to the things they represent; there is no hint that such relationships are based on paradigmatic relations and the arbitrary assignments of signifiers to what is signified. Moreover, the conventional realist novel begins like *David Copperfield*, *ab ovo*, or at the beginning of the story: it provides an exposition, a series of complications, and ends with

12. Posner eviscerates Weisberg's and West's readings of *Billy Budd* and critiques the muddled quality of Cardozo's use of metaphor in his early essay. He also assures his reader of the irrelevance of literary study for the normative work of law: "Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods of interpreting and evaluating it are aesthetic." Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, MA: Harvard University Press, 1988), 7.

13. J. M. Coetzee, *Elizabeth Costello* (London: Vintage, 2004), 16, 19.

some form of closed or satisfactory ending. The storytelling is thus, if anything, more complete than the plots we experience in the real world. As long as the reader is engaged in the lengthy reading process, the possible world presented in the realist novel appears to be an actual alternative world.¹⁴

Finally, the realist novel is narrated in such a way that the narrative voice—the teller of the story—appears to have an authority over the events she relates: the right to assume this authority is not contested. The realist novel offers a seemingly true, complete world in contradistinction to the problematic one suggested by real life. Actual legal stories show why it may be idealized into a repository of the ethical.

Yet it is just this refusal on the part of the realist novel not to lift the curtain on its own illusion-creating properties that has led many twentieth- and twenty-first century critiques to see the novel as an ideal vehicle for class and gender ideologies. I mention in this vein Ian Watt, Raymond Williams, Nancy Armstrong, and Frederic Jameson, who have saliently demonstrated how the novel conveys dominant cultural norms and naturalizes power relations. Thus for the contemporary literary critic, Weisberg's call for Law and Literature to restore “reverence” to law, or White's appeal to an idealism in legal practice and Nussbaum's claim that an alternative form of ethics can be found in the literary, are problematic. One worries that the call to literature to be the ethical “Other” may be a call to an ideological genre, whose very strength lies in its naturalizing, through realist means, its own political and social claims.

By stopping at this juncture, I am arguably doing a great disservice to the heterogeneity of American Law and Literature scholarship. The above description belies the influence of critical racial theory, feminism, and critical legal studies in order to further, arguably more overtly political, developments within the American Law and Literature movement. Moreover, my thumbnail sketch ignores the contributions of overtly deconstructionist American scholars such as Robin West and Drucilla Cornell. Yet, as I argued at the opening of this essay, when scholars new to the field go to Law and Literature for theory or models of scholarship, they recur

14. On possible world theory, see Marie-Laure Ryan, *Possible Worlds, Artificial Intelligence, and Narrative Theory* (Bloomington: Indiana University Press, 1992).

to the foundational work of Weisberg, White, and Nussbaum. This leads to imitative work. When their work issues from another geographical provenance this reliance on foundational models also causes a somewhat forced application of the preoccupations of American legal culture to whatever text is being analyzed.

Poetry and Myth as Law's Other in British Critical Legal Studies

Moving to the other side of the Atlantic, the reader of this essay may be surprised that British Law and Literature practice differs substantially from its American counterpart, given the two jurisdictions' common language and common legal history. This is in part, again, due—I want to argue—to pervasive differences in legal cultures and the kind of scholarship these cultures give rise to. Here, I need to further distinguish between the law of England and Wales versus other parts of the U.K. and general British legal culture. In terms of major structural differences, England differs from the States in that it has an unwritten constitution; periodic movements to codify this constitution have been shot down. This gives English law and jurisprudence, by necessity, a different relationship to questions of writing, interpretation, and legal precedent. The origin of English law, its practicality and flexibility, is then always located in a nonidentifiable text and past: "In effect, the common law knows no origins and has no need of them, since the tradition itself is a sufficiently rich heritage to enable it to draw on its own resources for the authority of its decision-making processes."¹⁵ English law involves an inevitable competition between orality, written records of past judgments, and appeals to tradition. This has also led to a wealth of scholarship concerning how English copyright laws have intersected with theories of authorship and writing.

Besides the difference in the status of the constitutions and the greater obligation of judges under English law to be bounded by precedent, England's common law tradition is currently being challenged by the European Union's rapid codification of

15. Costas Douzinas & Ronnie Warrington, *Justice Miscarried: Ethics, Aesthetics and the Law* (Hempstead: Harvester Wheatsheaf, 1994), 90.

legislation. Moreover, British legal culture is preoccupied by its relation to postcolonial discourses originating out of Ireland, New Zealand, Australia, South Africa, and other African nations whose legal systems were created or influenced by England's imperialist past. Thus British legal culture is perforce more inclusive and broader in its preoccupations than its American counterpart.

The most striking difference in British scholarship, however, is that it would never, to paraphrase Groucho Marx, want to belong to any club of Law and Literature that would accept it as a member. Rather, proponents of British scholarship call their work British critical legal studies, critical jurisprudence, or a postmodernist or an aesthetic philosophy of justice.¹⁶ These descriptors are all-important: first, they demonstrate that British scholarship identifies, if at all, with American critical legal studies and not with Law and Literature, even if it employs many of the same methods. Namely, it uses literary texts in the widest sense to perform a critique on the law. An identifying characteristic of much British work is its dismissal of the undertheorized and relatively apolitical nature of American critical legal studies. Thus a sense of self-congratulatory positive political difference runs through much British work. However, this sense of positive difference is arguably a regular feature of European intellectual life during the late-Bush era; it

16. For histories of British developments see Costas Douzinas, Peter Goodrich & Yifat Hachamovitch, "Introduction: Politics, Ethics and the Legality of the Contingent," in *Politics, Postmodernity and Critical Legal Studies*, ed. Costas Douzinas, Peter Goodrich & Yifat Hachamovitch (London and New York: Routledge, 1994), 1; William Lucy, *Understanding and Explaining Adjudication* (Oxford: Oxford University Press, 1999); Costas Douzinas & Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford & Portland, OR: Hart Publishing, 2005), 230–47; Costas Douzinas, "Oubliez Critique," 16 *Law & Critique* 47 (2005); and Bronwyn Stratham, "Postmodern Jurisprudence: Contesting Genres," 19 *Law & Critique* 139 (2008).

entails the risk of masking opportunities for exercising self-critique.¹⁷

Critical legal studies involve the explicit practice of questioning and undermining the monumental image of the law: “law is criticised as the reification of the world;”¹⁸ it involves creating false images of itself, which are then mistaken for the reality of law. It implies the history of Kantian, Marxian, and post-Marxian critique; it involves a questioning and undermining of assumptions about law as a form of knowing. As “a political philosophy of justice,”¹⁹ jurisprudence goes beyond law to specifically address the object of injustice under law. Finally, postmodernism—a contested word—implies a break with the rational certainties of the Enlightenment and modernity and a break with a belief in any overriding teleological narrative of human history such as Christianity or Marxism, as well as an awareness of the problematic nature and arbitrary nature of communication and language.

Costas Douzinas, the director of the Institute of Humanities at the Birkbeck School of Law, a center for critical jurisprudence in the UK, has offered a history of British critical legal studies: it took off during the 1980s and continues as a strong critical practice today. Like American Law and Literature, it has enjoyed three phases: in its first deconstructive phase during the 1980s, practitioners followed the post-structuralist practice of treating law as a text—or a field of significations—rather than a monumental system or rules; this entailed demonstrating the text’s various

17. In this vein, Costas Douzinas has written that the cause of the demise of American critical legal studies was due to the problematic nature of American legal and academic culture: “They [the reasons for the American obsession with judicial reasoning and interpretation] include the acute *nomophilia*, the centrality of law, litigation and judges in American culture; the constitutional tradition, which has staked the legitimacy of the polity on the claims of reasoned consistency and historical loyalty of judicial discourse; and, last but not least, the desire of academics to be accepted as privileged participants in public discourse and as valuable commentators of current affairs. . . . It has been said, rather unkindly, that America moved from barbarism to decadence without passing through civilization. It is more accurate to say that it has moved from constitutionalism to terminal legality without passing through (self) critique.” Douzinas, “Oubliez Critique,” *supra* note 15, at 59, 60.

18. Adam Gearey, “Ozymandias,” in *Law and Aesthetics* (Oxford & Portland, OR: Hart Publishing, 2001), 1, 1.

19. Douzinas & Gearey, *Critical Jurisprudence*, *supra* note 15, at 40.

omissions, margins, and unconscious qualities, and involved showing that law rested on no ultimate origin or foundation; this was followed during the 1990s by an “ethical turn” in scholarship;²⁰ a new focus was placed on the elided Other in legal practice. In a quote from one of Douzinas’s texts from this period, he writes with Ronnie Warrington that “[t]he law is necessarily committed to the form of universality and abstract equality; but it must also respect the requests of the contingent, incarnate and concrete Other, it must pass through the ethics of alterity in order to respond to its own embeddedness in ethics.”²¹ The third phase of critical legal studies, as described by Douzinas, responds to the present era in which phenomena such as human rights and democracy have been exported by force. Thus Douzinas writes: “Law as an empty signifier that attaches to everything from pavement walking to smoking and Iraqi liberation is auto-poetically reproduced in a loop of endless validity but is devoid of a sense of signification.”²² One notes the enormous difference in emphasis as compared to American scholars. Rather than revering law, or practicing it with idealism, Douzinas proposes to unmask its very emptiness.

Importantly, the phases that Douzinas describes correspond to phases of contemporaneous literary criticism as well as, in part, to the evolution of the late Jacques Derrida’s philosophy. Whereas White and Weisberg initiated the Law and Literature movement in the United States using the novel as a locus of the ethical, Jacques Derrida’s 1989 essay “Force of Law: The Mystical Foundation of Authority” was seminal for the British movement. Here, Derrida historicizes the circumstances under which Walter Benjamin wrote his “Critique of Violence” (1921) in order to demonstrate, one, how philosophy constantly attempts to lend its arguments authority with a logos outside of itself and, two, to demonstrate law’s indissoluble connection to violence, a violence that takes place both in language and in deed—in how the powerless are treated within law. Uncovering these relationships becomes the possibility of and for

20. Douzinas, “Oubliez Critique,” *supra* note 15, at 65.

21. Douzinas & Warrington, *supra* note 14, at 185.

22. Douzinas, “Oubliez Critique,” *supra* note 15, at 66.

justice. Thus, the sound bite that is most often quoted from this text is: “Deconstruction is justice.”²³

Derridean deconstruction dominated critical theory during the 1980s. Deconstruction functions through dismantling categorical certainties by comparing binary terms, for instance, writing and speech or absence and presence, and demonstrating how these terms can only function in relation to each other: they exist only by virtue of their complementary and supposed difference. Deconstruction shows these terms to be arbitrarily related and without inherent essence or foundation. Initiating and practicing deconstructive criticism was followed by a period of greater political engagement. During the late 1980s, the deconstructionist Paul de Man was discovered to have written articles for a Belgian pro-Nazi publication during the war years, at least one of them overtly anti-Semitic. This was cause, among other things, for Derrida to respond to a charge that has been made continuously against deconstructive criticism since its inception: deconstruction dismantles old metaphysical sureties but leaves nothing in their place. A so-called political turn occurred in Derrida’s writings during the late 1980s and “The Force of Law” was part of it. This turn was accompanied by the philosopher’s making of explicit political statements and writing more overtly political texts about law and violence, rogue states, globalization, friendship, and war. Finally, Douzinas’s reading of law in the phase of the present historical moment is not dissimilar from the French cultural theorist Jean Baudrillard’s treatment of the multiplication of images in contemporary life: our culture is so pervaded and dominated by images that they no longer have any meaning other than in themselves; they have no foundation; they no longer refer to the things they represent. This orientation on images speaks for the more aesthetic, rather than literary, orientation of British work. Law is understood to manifest itself not only in legislation, judgments, and public policy but also in images themselves.

Not all British proponents of critical legal studies are as dire in their view as Douzinas is in his portrayal of law as a simulacrum. Moreover, Derrida is hardly the philosopher to which they all refer.

23. Jacques Derrida, “Force of Law: The ‘Mystical Foundation of Authority,’” in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell (New York: Routledge), 3, 15.

Heidegger, Levinas, Blanchot, Lyotard, Deleuze, and Žižek are also important influences. To restore contingency, an awareness of the Other to law, critics challenge or critique it as being without foundation. One of the manners of performing critique involves using literature, in the widest sense, to deconstruct the monolithic supposed positivism of law. Describing the work in a volume of essays called *Law and Literature*, which was written by Birkbeck-based scholars in 2004, Goodrich writes:

The lawyers in this volume all engage with literary texts as a way of challenging the stylistic, textual, and hedonic limits of law. They argue in variable forms that literature represents a fracture, a crisis, a puncture of the legal restraint of the text.²⁴

Since law is viewed as without foundation—as perpetually justifying its own authority—the texts that British critics use to challenge or undermine it are poetic and mythic ones, rather than examples of realist prose. For instance, Douzinas and Warren read Shakespeare’s Sonnet 87 to show law’s continual performance of itself as a form of mortal combat in which the claims of the Other are elided and destroyed. Melanie Williams reads W.H. Auden’s poem “September 1, 1939” and its reception history so as to unpack the ideology behind Ronald Dworkin’s legal philosophy. Adam Gearey reads Shelley’s sonnet “Ozymandias” in order to initiate an “aesthetics of law”; similarly, he juxtaposes Joseph Raz’s legal philosophy with Philip Larkin’s poetry to suggest that jurisprudence requires a poetics of the Other, and uses Heidegger’s understanding of poetry to unpack Derrida’s work on the law.²⁵

24. Peter Goodrich, “Endnote/Untoward,” in *Law and Literature*, ed. Patrick Hanafin, Adam Gearey & Joseph Brooker (Oxford: Blackwell, 2004), 159, 161.

25. Douzinas & Warrington, *supra* note 14, ch. 7: “As a dream doth flatter? Law (love, life and literature in Sonnet no. 87),” 242–64; Melanie Williams, “Then and Now: The Natural/Positivist Nexus at Truth and Reconciliation: Auden’s ‘September 1, 1939,’” in 31 *Journal of Law & Society* 60; Adam Gearey, *supra* note 17, at 1; Adam Gearey, “The Poetics of Practical Reason: Joseph Raz and Philip Larkin,” 19 *Law & Literature* 377 (2007); and Adam Gearey, “Where the Law Touches Us, We May Affirm It: Deconstruction as a Poetic Thinking of Law,” in *Derrida and Legal Philosophy*, ed. Peter Goodrich (Basingstoke, New York: Palgrave Macmillan, 2008), 201.

Particularly, Maria Aristodemou has been important in bringing myth and fairy tales to readings of the law. Her *Law & Literature: Journeys from Her to Eternity* (2000) could be read as an alternative textbook to Posner's dismissive *Law and Literature* in that it refuses to privilege law's claim to truth or normativity over literature and fantasy. The text of law she traces is discovered in the evolution of the Oedipus myth through Freud and Lévi-Strauss's interpretations of it to the psychoanalyst Lacan's finding a justification for all law in this narrative: the particular Oedipal conflict is generalized by the individual into the acceptance of an order of abstract rules. In this genealogy she finds the forgotten embodiment of law, its bodily nature and its rejection of women, desire, and materiality:

The attempt to keep philosophy and law separate from literature is also, as I suggest in my closing chapter part of the attempt to exclude woman from the legal labyrinth The male lawyer's preference for abstract language, reason, and intellectuality is also an attempt to deny the tactile, the bodily, and the sensual: to suppress, supposedly by overcoming, but instead by imitating with words, woman's capacity to procreate with her body.²⁶

Aristodemou's work, in turn, recurs to Goodrich's argument in *Oedipus Lex* (1995) and *Law in the Courts of Love* (1996), among other texts, that the practice of law requires a constant denial of its metaphoric, unconscious, and literary qualities and a denial of heterogeneity, materiality, and women. For Goodrich then, jurisprudence begins with a recovery of the unconscious:

The other scenes of law—its images, its figures, its architecture, its rites, myths, and other emotions—are potentially the economies of resistance to law. They evidence, I will argue, the possibilities of a jurisprudence of difference, and specifically a genealogy of other forms of law, of plural jurisdictions and distinctive subjectivities, of other genders, ethnicities, and classes of legality and of writing.²⁷

26. Maria Aristodemou, *Law & Literature: Journeys from Her to Eternity* (Oxford: Oxford University Press, 2000), 4.

27. Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995), 15.

As in White and Weisberg's work, British critical legal scholarship involves a moment of retrieval of the forgotten and the repressed. Yet instead of striving for a unity of form and substance that will necessitate a newly ethical realization of law, the forgotten itself is emphasized as an unreachable origin so as to dismantle law's authority and to imagine alternative law(s). Thus the pursuit of the images of law, or its aesthetics, is not a form of law-in-literature, a tracing of how law is reflected in various media, but a form of critique that engages with the various institutions of law by showing how law's authority, truth value, and positivism are all problematic.

The choice of lyric and mythic genres in much British work to complement law is central. Poetry is generally understood to be the only nonnarrative genre.²⁸ Poetry was originally sung and accompanied by the lyre. As with music in general, the genre is thought to appeal more to the emotions and the unconscious than the ratio. In the Romantic tradition, poetry aimed to reproduce moments of intensely felt experience rather than to instantiate a story. Unlike realist prose, lyric poetry rarely offers mimetic illusion. Moreover, due to its compression, often counter-intuitive syntax, and highlighted use of metaphor, reader investment in understanding poetry tends to be greater than in prose. (For those of us involved in teaching literature, this means that it is often easier to get students to embrace the task of reading an 800-page novel than a poem.) Furthermore, the subject of lyric poetry is less easily identified as a constant unfragmented self. If lyric poetry and myth offer no illusion of reality, no plausible alternative world but a moment of intensity, then their interaction with law differs in effect. The fragmentation of experience, the difficulty of communication, the alienation of the modern subject—all qualities of the postmodern condition—are thus arguably better articulated in nonnarrative poetry than in realist prose. Hence, readings of poetry conform more to the “ethics of alterity” that Douzinas and Warrington espouse.²⁹ This notion of alterity rests on philosophies,

28. Although there have been several compelling recent arguments by narratologists for why this should not be the case: See the works of Eva Müller-Zettelmann and Peter Hühn, and see Brian McHale's recent “Beginning to Think about Narrative in Poetry,” 17 *Narrative* 11 (2009).

29. Douzinas & Warrington, *supra* note 14.

such as that of Emmanuel Levinas, that attest that the self can only be realized through the call of the Other.

Consistent with the use of poetry to challenge and critique law is the use of autobiographic, confessional, and journalistic forms in many British Law and Literature texts to dismantle the pretensions of law as rational and positivistic. This form of Law and Literature has a performative character, which Bronwyn Statham dates to Douzinas, Warrington, and Shaun McVeigh's *Postmodern Jurisprudence: The Law of Text in the Text of Law* (1991). The final chapter of this work, "Suspended Sentences: A novel approach to certain original problems in copyright law," enacts the story—in letters and judgments—of the rejection of the authors' essay by an English law journal and a student's claim that his dissertation was the basis for this text and that copyright law was breached; a third text comments on the others.³⁰

In a similar vein Douzinas and Gearey conclude each chapter of *Critical Jurisprudence* with a journal entry about events in the lives of the authors, presumably during the writing of the book. Goodrich supplies a highly self-ironic essay to his contribution to the Birkbeck collection of essays called *Law and Literature* that concerns his musings on a highly critical, obscene comment about himself written in the margin of a library copy of his first book. This break with the typical rationalism of scholarship bespeaks, on the one hand, an awareness that personal narratives are an intrinsic part of politicized scholarship; cf. the feminist writings of Rachel Blau DuPlessis, or, more recently, Kenji Yoshino's interspersing of autobiographical episodes in his indictment of the current demise of American civil rights in *Covering: The Hidden Assault on Our Civil Rights* (2006). On the other hand, it recalls Derrida's early experimentalism in texts such as *Glas* (1974) in which the history of metaphysics is questioned through the mirroring of a text about Genet and one on Hegel in two columns of continuous text, with various other quotations interspersed throughout.

To avoid the binarism that deconstructive criticism has taught us to be the crutches of self-legitimating thought, let me introduce yet a third legal system and its attendant legal and Law and Literature narratives.

30. Costas Douzinas & Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1991).

From Analytic Drama to Legal Phenomena: The Two Stages of German Scholarship

Continental Europe has a civil law, rather than a common law, tradition. According to this tradition, legal reasoning proceeds through a process of deduction from the abstract norms of codified law to the particular case at hand. Moreover, the inquisitorial system of civil law determines that the court and thus the judge or judges determine the “objective” facts of a case as well as passing judgment over them. Since no jury but rather a judge or judges decide the outcome of a trial, judges have a prosecutorial as well as an arbitrating function. They are merely assisted by lawyers. Trained in Germany according to a legal science tradition to consider every possible legal side of a case, German judges eschew rhetoric and are taught to formulate their outcomes with a maximum of objectivity.

Based originally on pan-European Roman Canonic law, or *ius commune*, the German Civil Code did not emerge until the end of the nineteenth century and was the result of an effort to unify a variety of German territories, city states, and kingdoms. In order to articulate a German civil code, Friedrich Carl von Savigny countered the Germanist tradition that argued for the importance of Teutonic legal traditions. Instead, Savigny advocated ridding contemporary law of its local accretions and returning to the Digest or *Pandectae* of Roman legal sources in order to articulate an internally consistent and logical system of legal argument. This Pandectist practice, with its effort at completion, remains central to the development of German legal study and practice.³¹ It informs the BGB or the Civil Code that was adopted in 1900 and continues to be used today. An exercise in “legal formalism,”³² the first General Part of the BGB consists of generalized rules applicable to the other four books of law covering contract, obligations, property,

31. Reinhard Zimmermann, “Characteristic Aspects of German Legal Culture,” in *Introduction to German Law*, ed. Mathias Reimann & Joachim Zekoll (Munich: Beck, 2005), 5.

32. Zimmermann, *supra* note 30, at 11.

domestic matters, and inheritance.³³ Learning how to relate these various parts of law to one another through a process of abstraction is thus a major part of a German law student's training:

The BGB is not addressed to the citizen at all, but rather the professional lawyer; it deliberately eschews easy comprehensibility and waives all claims to educate its reader; instead of dealing with particular cases in a clear and concrete manner it adopts throughout an abstract conceptual language that the layman, and often enough the foreign lawyer as well, finds largely incomprehensible, but that the trained expert, after many years of familiarity, cannot help admiring for its precision and rigor of thought.³⁴

The Civil Code has faced two kinds of substantial revisions. The first of these was caused by the adoption of the *Grundgesetz* or Basic Law in 1949. This constitutional document was not called such because Germany was divided at the time, and composing a constitution was put off until after reunification. Responding directly to legal abuses and the horrors of the Nazi period, the Basic Law guarantees civil liberties, including first and foremost the inviolability of human dignity (a Kantian concept). Another change in German legal culture and a potential challenge to its traditional hermeticism has been caused by the country's integration into the European legal community. Both the Council and the Parliament of the EU communities' directives and the European Court of Justice's decisions have challenged the preeminence of Germany's legal system and have brought about modifications in contract law. Although the principle of subsumption from codified law remains central to German legal practice, judges also now refer to precedents and to commentaries on statutes in their judgments. Hence German law has become more of a mixed case.³⁵ Whether Europe will eventually return to an *ius commune* remains to be seen.

German Law and Literature scholars proudly cite a long tradition of interdisciplinarity. This includes the Grimm Brothers, who are famous for their philology and fairy tale collections. Unlike Savigny, the Grimms stressed the importance of Germanic legal

33. Gerhard Danneman & Basil Markensis, "The Legacy of History on German Contract Law," in *Making Commercial Law*, ed. Royston Miles Goode & Ross Cranston (New York: Clarendon Press, 1997), 1.

34. Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law*, 2nd ed. (1992), 150; quoted in Danneman & Markensis, *supra* note 32, at 14.

35. Zimmermann, *supra* note 30, at 25.

traditions during debates about codification. Jacob Grimm wrote that “law and literature arose from the same bed.”³⁶ Moreover, he coined the term *Germanist* (or German scholar), which meant, in contradistinction to a Romanist, both a teacher of German law and a scholar of the German language. Proud mention is also frequently made of the many *Dichterjuristen* who have written in the German language.³⁷ This term translates roughly as legal scholars who are also poets or who write literature. *Dichterjuristen* include—to name only a few of the most prominent examples—Goethe, Novalis, Kleist, E. T. A. Hoffmann, Heinrich Heine, Kurt Tucholsky, Franz Kafka, and most recently, Bernhard Schlink. Schlink’s novel *The Reader* (*Der Vorleser*, 1997) has become famous outside of Germany due to its recent film adaptation.

Yet despite the emphasis on historical commonalities between law and literature, a first generation of German Law and Literature scholars has been quite dismissive of the importance of literature for law. Perhaps the insistence on the logical rigor of German legal science has given rise to a distrust of the claims made by American scholars for literature’s potential to reform law. Legal scholars such as Ulrich Mölk, Klaus Lüderssen, and Thomas Vorbaum have accused literary scholars of inadequately engaging with the rigors of legal practice when they practice Law and Literature.³⁸ Moreover, by emphasizing law’s clarity and normativity versus literature’s ambiguity, Heinz Müller-Dietz and Bodo Pieroth stress differences between law and literature rather than points of mutual influence. Summarizing a talk given by law professor Pieroth on Law and Literature, a commentator writes: “In legal science one aims to

36. Jacob Grimm, *Von der Poesie im Recht* (1816) (Darmstadt: Hermann Genter, 1957), 8.

37. Eugen Wohlhaupter, *Dichterjuristen*, 3 vol. (Tübingen: Mohr, 1953–1957).

38. Ulrich Mölk, “Vorwort,” in *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart* (Göttingen: Wallstein, 1996), 7; Klaus Lüderssen, *Produktive Spiegelungen. Recht in Literatur, Theater und Film*, 2nd ed. (1991) (Baden-Baden: Nomos, 2002), 10; Thomas Vormbaum, “Die Produktivität der Spiegelung von Recht und Literatur,” in *Produktive Spiegelung. Recht in Literatur, Theater und Film*, 2nd ed. (Baden-Baden: Nomos, 2002), xi, xx; Heinz Müller-Dietz, “Literarische Strafprozessmodelle,” 150 *Goldammer’s Archiv für Strafrecht* 269 (2003); Bodo Pieroth, “Recht und Literatur befruchten sich gegenseitig. Jurist der Universität Münster untersucht Gemeinsamkeiten und Unterschiede zwischen den beiden Disziplinen” 07.08.2000 – (idw) Westfälische Wilhelms-Universität Münster, Oct. 15, 2006, available at <http://www.uni-protokolle.de/nachrichten/id/61658/>.

achieve the greatest possible clarity, whereas literary studies aims to understand different levels of meaning” (my translation).³⁹ In the first monograph-length study of the influence of the law-as-literature movement on Germany, Birgit Lachenmaier concludes that a general scepticism prevails regarding what are seen as the vague goals of the American movement, its limited usefulness for German juridical practice, and its missing methodology.⁴⁰

Traditionally, German Law and Literature scholarship has stressed the dramatic genre. Paradigmatic texts include Friedrich Schiller’s family tragedy *The Robbers* (*Die Räuber*) from 1781, in which an unjust society drives a good man to anarchy and crime, and Heinrich von Kleist’s comedy *The Broken Pitcher* (*Der Zerbrochne Krug*) from 1806. Here, a much-admired local judge is shown to be the criminal in the case he is investigating and presiding over. Without a clear narrating presence, plays forefront conflict and place their audiences in the role of the judge (in the inquisitional system).⁴¹ *The Broken Pitcher* is also an example of a so-called analytical play; this type of play mirrors the courtroom situation by reconstructing a decisive action, which took place before the play began. These plays fascinate German Law and Literature scholars because they were instigated and initially performed during a period when the disciplinary boundaries between law and literature had not yet become rigid and contending legal systems were being actively debated. *The Broken Pitcher*, for instance, demonstrates tensions between traditional German law and contemporaneous efforts to achieve unified codification.⁴²

In what I want to term a second, post-deconstructionist phase of German Law and Literature scholarship, deconstructive analysis has been embraced, as has Foucauldian analyses of how discursive practices affect one another. This turn was in part initiated by Anselm Haverkamp’s analysis of Derrida’s work on Walter

39. Pieroth, *supra* note 37: “In der Rechtswissenschaft werde versucht, eine möglichst große Eindeutigkeit zu erzielen, während die Literaturwissenschaft darauf abziele, verschiedene Bedeutungsebenen zu erfassen.”

40. Birgit Maria Lachenmaier, *Die Law as Literature-Bewegung—Entstehung, Entwicklung und Nutzen* (Berlin: Wissenschaftlicher Verlag Berlin, 2008), 26, 228–30.

41. Anke van Kempen, *Die Rede vor Gericht* (Freiburg: Rombach, 2005), 24.

42. Van Kempen, *supra* note 40, at 67.

Benjamin and its importance for deconstructive legal philosophy.⁴³ Post-deconstructionist scholars include Cornelia Vismann, Thomas Weitin, Michael Niehaus, Florian Hoffmann, Peter Schneck, Manfred Schneider, Anke van Kempen, and Gert Hofmann, among others. Typical of this scholarship in English is Peter Schneck's recent application of Derrida's work on legal and literary genre to an analysis of how literature insists on the superior legality of its own evidence.⁴⁴ Vismann and Florian Hoffmann have published a special issue of the *German Law Journal* on Derrida in 2006 as well as co-edited *Derrida and Legal Philosophy* (2008). A translation of Vismann's German-language monograph from 2000 concerning the meaning of archives and archival techniques for legal systems and legal cultures has just appeared in English (Files: Law and Media Technology, 2008). Given the German Democratic Republic's practice of keeping extensive files on the supposedly subversive activities of its inhabitants and the continuing controversy about how these files should be treated, this is a particularly pertinent relevant topic in the now unified Germany.

It is noticeable that many of the authors mentioned above analyze and deconstruct legal phenomena in large historical studies, such as ones on judging, interrogating, promising, witnessing, as well as forensic speech. On the one hand, this breadth of scholarship bespeaks the particularities of German academia: in order to be eligible for a professorship in Germany one must write monumental historical studies. On the other hand, the change in emphasis from plays to legal phenomena speaks for the movement in Law and Literature away from an analysis of a given literary text to a larger interest in aesthetic texts as elements of legal culture. Thus the paradigmatic literary text in German Law and Literature is no longer the historical play but the legal process itself. German scholarship differs from deconstructive British work in that it is less overtly performative. Scholars generally retain a serious tone and eschew the autobiographical.

Dead Ends and Open Closures

43. Anselm Haverkamp, ed., *Gewalt und Gerechtigkeit. Derrida–Benjamin* (Frankfurt: Suhrkamp, 1994).

44. Peter Schneck, "The Laws of Fiction: Legal Rhetoric and Literary Evidence," 11 *European Journal of English Studies* 47 (2007).

Having described differences in aims, forms, and sample literary texts in American, British, and German work, I wish to turn now to some recent trends in Law and Literature scholarship that are common on both sides of the Atlantic. This would suggest that Law and Literature can be regarded as a historical movement. On the one hand, this movement displays some common general developments. As the last sections have shown, however, this movement has, on the other hand, been variously interpreted depending on where it is being practiced.

One scholarly dead end that persists and arguably weakens the interdiscipline is the reproduction of essentialist visions of law and literature made in the attempt to critique the law. I have already written about American Law and Literature scholars' commitment to a traditional vision of literary narrative as the locus of ethics. Reiterating this commitment, Weisberg has recently commented on how Schlink's *The Reader* demonstrates how novels uniquely create a space in which judgment over a crime can be made while allowing for the comprehension of the perpetrator's actions: "But narrative, *The Reader* proves, *is* the locus of accountability joining a tradition in our novelistic culture that provides where little else does a space in which human behavior can be both understood and (where culpable) accurately judged."⁴⁵ This positive review suggests the overwhelming importance of narratives to human comprehension of the world and thus verifies the findings of much recent cognitive research. It should thus be gratifying to scholars, such as myself, who are committed to narratological readings of literary texts. Yet Weisberg's view reifies an understanding of literature as the good and the ideal in contradistinction to rough-and-ready law and the everyday.

This attitude is by no means exclusive to American scholars who rely more often on realist prose works to interrogate law. In postmodernist British work, a tendency to treat the mythic or the poetic as a Levinasian Other that may call law to a better self also prevails. In the following quote, Douzinas and Gearey allude to Shelley's claim in his "A Defense of Poetry" (1821/1840) that poetic language remakes the world and poets legislate over it: "By

45. Richard Weisberg, "A Sympathy That Does Not Condone: Notes in Summation on Schlink's *The Reader*," 16 *Law & Literature* 229, 233 (2004).

reminding us that writers and artists have legislated, while philosophers and lawyers (some celebrated, others forgotten) have spoken poetically, we suggest the possibility of new ways of thinking and living the law.”⁴⁶ Arguably, a neo-Romantic idealization of the poetic as a reformative force occurs here. Such a view ignores the insights of cultural critics such as Raymond Williams, Michel Foucault, and Fredric Jameson that literature and the literary also reproduce and naturalize prevailing power relations, good and bad. Arguably, the idealization of literature in Law and Literature critiques occurs more readily among lawyers than literary scholars.

Moving from the other direction, a tendency persists, particularly among literary scholars, to equate law with material history, politics, and the real, meant here in the non-Lacanian sense. This is in part due to literary scholarship’s having retreated from an embrace of high theory and deconstruction that marked 1980s criticism. This was followed by a renewed interest in historical conditions and materiality as the specific context in which a text arises and into which it is received. While in themselves sound, these developments may also lead to essentialist thinking about law and literature as opposites. Florence Dore, an Americanist working at Kent State University in Ohio, has traced the trend in American novel studies to address legal history as intrinsic to literature and vice versa. She argues that what was once seen as the novel’s relation to the political has now been reformulated “as a relation between literature and law.”⁴⁷ This trend is marked by “an aversion to linguistic ambiguity”⁴⁸ that tends to reify traditional ideas about literature and the law:

[R]ather than bringing the critical practices that derive from literature’s linguistic richness to studies of the law, literature scholars surprisingly tend to reproduce rather than complicate the assumption that laws present us with hard “truths” that “ring through the literary. . . . It is this turn, it seems to me, that has led to a sense among literature

46. Douzinas & Gearey, *supra* note 15, at 34.

47. Florence Dore, “Law’s Literature, Law’s Body: The Aversion to Linguistic Ambiguity in Law and Literature,” 2 *Law, Culture & Humanities* 17, 24 (2006).

48. Dore, *supra* note 46, at 19.

scholars that law can return us to a “hard” historicity that preceded theory.⁴⁹

In the move to the historical and the material, it appears as though the insights of postmodernism and deconstruction have been forgotten. The law is projected as a concretized absolute. Regarding law as a signifying practice goes forgotten. Law becomes a synonym for violence; law’s contribution to the furthering of civil rights, for instance, goes unheeded.

These mutual trends lead to a gendering of law and literature that is counterproductive for interdisciplinarity: literature represents an intersubjective ethics of care, which may cure law of its violence; it is figured as contiguous and ambivalent. Law is normative and concrete, historically embedded, and without rupture. One finds this gendering of the two disciplines from early on. Indeed, it is implicit in Jacob Grimm’s hetero-normative comment that poetry and law arose from the same bed. It has been commented on by critics such as Jane Baron (1999), Aristodemou, Peters, Martin Kayman, and myself (2007), among others. Yet despite repeated commentary, this tendency remains. Christine Künzel has written explicitly about the conceptualizations of the two parts of the interdiscipline along the lines of gender difference. She contends that without an explicit analysis of this metaphorization of law as masculine and literature as feminine, with all of the attendant cultural baggage this division entails, Law and Literature cannot move forward.⁵⁰ The most traditional binarism in Law and Literature is the juxtaposition of law and literature as analogous to the difference between law and equity or law and mercy. In countless readings of *The Merchant of Venice*, *Bleak House*, and other now canonical texts, “mean” positive law is contrasted with an ethics of care that is suggested by alternative literary storytelling. Law is masculinized and literature or myth is feminized in an essentialist manner. For a contemporary student of literary studies, this is highly problematic, as literature has been shown to be a vehicle for class and gender ideologies. It is not innocent; it is not in

49. Dore, *supra* note 46, at 19–20.

50. Christine Künzel, “Aus einem Bett aufgestanden’. Anmerkungen zum Verhältnis’ zwischen Recht und Literatur,” in *Figures of Law: Studies in the Interference of Law and Literature*, 115–32 (Tübingen & Basel: A. Francke Verlag, 2007).

any sense wondrously material, feminine, and contingent. It informs and stems out of a cultural moment; moreover, as Derrida and others have pointed out, literature enforces, like all genres, the laws of its production, dissemination, and exegesis.

What Dore sees as a trend in literary scholarship to want to disambiguate law may in fact be an instance of a larger cultural movement—a new tendency towards concretion and a mistrust of ambivalence in general. Martin Kayman, a British scholar who has worked extensively on Law and Literature, copyright, as well as the cultural politics of the English language, has noted the increasing preeminence of forensic linguistics in British legal education.⁵¹ Rhetorical study is then being replaced by the priority of a material analysis of language and articulation. Kayman traces this tendency further in an interest in a new empiricism, which affects many aspects of legal culture. Thus the fascination with forensic science made manifest in a plethora of television series is replicated in a desire to return to a body of evidence.

The neofoundationalism that concerns me here is built around a return to the body. This is not any longer the sensual humanist body of empiricism that had been a privileged object of the earlier critique. The body of empiricism was at least one whose sensations required processes of interpretation and validation that, since David Hume, have always been bound to forms of skepticism. In contrast, the body I am referring to would be more accurately called a body of truth, a *corpus verum*, to use the expression of the Eucharist, a body that commands belief.⁵²

Departing from the dead ends, I would like to highlight more forward-looking developments in the study of Law and Literature. The first of these is a change from a binary discipline to a triadic or multiple one. The second is a move from understanding the literary to be a realist novel or a poem to conceiving it as a larger aesthetic text. Both indicate a modernist or postmodernist emphasis on open endings rather than neat closure.

51. Greta Olson & Martin Kayman, “From ‘Law and Literature’ to ‘Law, Literature and Language: A Comparative Approach,’” 11 *European Journal of English Studies*, *supra* note 43, at 1.

52. Martin Kayman, “The Body of Law, the Corpus, and the Return of the Real,” in preparation, quoted here in kind agreement with the author.

Regarding the former development, I wholly agree with Peters's assessment of the current state of scholarship in the States. She describes the plethora of recent histories of the discipline as "signifying law and literature's transformation into something bigger and necessarily more amorphous."⁵³ Common to both sides of the Atlantic is, then, a move beyond an interdiscipline based on the interface and dialogue between two well-established disciplines, to a triadic or a plural venture. Exemplary of this trend is the fact of this essay having first been delivered as a paper at an MLA session on Law and Narrative. Literature was implicitly a part of the session's topic, and indeed readings of literary texts were the basis of analysis in two of the three papers delivered there. Similarly, in collecting calls for papers for the European Network of Law and Literature, it has proven increasingly difficult to locate the appropriate forums by simply typing the key words "law and literature" into search engines. What was once called Law and Literature is now entitled Law, Culture, and the Humanities; or Law, Literature and Culture; Law, Literature and Language; or Law and Semiotics. If "literature" remains in the title of new permutations of the interdiscipline, it is understood as something beyond the traditional written literary text.

Thus a move can be detected away from the supposedly dichotomous, or complementary, projects of law and literature to a more inclusive practice of regarding law as a cultural practice.⁵⁴ Recent scholarship that works along this line includes Paul Raffield's excellent *Images and Cultures of Law in Early Modern England* (2004), which demonstrates the symbolic pertinence of the Inns of Court for an emerging common law culture, or Sue Chaplin's *The Gothic and the Rule of Law, 1764–1820* (2007), which delineates the presence of the Gothic in Blackstone's *Commentaries* and contemporaneous novels. Less accessible to English-language readers but quite similar in intent is the recent German collection of essays, called *Bildregime des Rechtes* (2007), which might be roughly translated as "Law's Regime of Pictures." As the title implies, the collection explores the connections between law and images and

53. Peters, *supra* note 3, at 451.

54. See Guyora Binder and Robert Weisberg's introduction to *Literary Criticisms of the Law* (Princeton: Princeton University Press, 2000) for the theoretical background of these developments.

theorizes whether the loss of monumentality of law has led to a greater meaning of images.⁵⁵

The other move in current scholarship is to embrace the visual and the aesthetic in a more generous notion of the literary than has been typical in Law and Literature. For many of us working in literature departments, this will be a familiar development. Our discipline is now as much about cultural development and the practices of signification as it is about close reading. Writing about this change in a seminal essay from 1989 called “Towards Cultural History—in Theory and Practice,” Catherine Belsey describes the move towards “signifying practice” and the difficulties that inhere in this. As she jocularly states in an attempt to cheer up an imagined disgruntled reader: “But if we can interpret Shakespeare, we can surely learn to interpret fashion and music—and privies.”⁵⁶ Thus while we may—and we do in Germany—still lecture students on how to recognize zeugma and periphrasis in Pope’s *Rape of the Lock*, we also teach courses that focus on representation and ethics using photographs of torture in Abu Ghraib prison. For those coming from an orientation in the law and an education in the legal, the embrace of the visual and the aesthetic as endemic to law may be a less comfortable endeavor.⁵⁷

No Grand Narrative

This essay reviews the plotlines and narratives of some varieties of Law and Literature. In describing three types of scholarship, I have relied implicitly on a differentiation the legal sociologist Lawrence Friedman once made that I continue to find useful in describing some of the cultural issues involved in how we regard law and literature individually and in conjunction. He calls legal culture “the ideas, values, attitudes and opinions people in some society hold

55. Jean Baptiste Joly, Cornelia Vismann & Thomas Weitin, eds., *Bildregime des Rechts* (Stuttgart: Akademie Schloss Solitude, 2007).

56. Catherine Belsey, “Towards Cultural History—in Theory and Practice,” 3 *Textual Practice* 159, 166 (1989).

57. Peter Goodrich has written on this topic in these pages: “Now indeed law and literature seems a distant illusion, a remote and unreal academic parlor game, Sunday afternoon conversation. It is equally retro, definitely old school. No question here. Literature survives as part of something more.” “Screening Law,” 21 *Law & Literature* 1, 20 (2009).

with regard to law and the legal system.”⁵⁸ Furthermore, Friedman differentiates between so-called internal and external legal cultures, points out that borders between them are porous, and suggests that law centrally depends on the opinions about it generated in the larger culture in which it is made. His work also implies that legal cultures are ideological, and that external manifestations of law are just as important for internal legal cultures as individual judgments. Moreover, he suggests that despite topical similarities between legal systems—e.g., American and English Law—differences in legal cultures may be far larger and have far greater cultural ramifications than might be initially supposed.

My descriptive critique of how legal cultures structure the subjects, plots, and development of their Law and Literature scholarship has been performed due to what I see as moments of blindness in various types of research. I cannot conclude now with any grand narrative because I am convinced that such a narrative is no longer tenable in a period that no longer believes in organizing historical stories that attempt to explain everything. Thus let me close with several *petit récits* or simply suggestions for further thought.

Regarding the cultural politics of Law and Literature practice, I wish to suggest to my sister and fellow American colleagues that we be conscious that the adversarial, common law legal system with a constitution that is interpreted in the Supreme Court is not the only basis for legal cultures. We need to be careful of a tendency to universalize our scholarly narratives when talking about Law and Literature in general and remember that particular preoccupations are in fact endemic to the American setting. Moreover, I would caution against idealizing the realist novel. This does not mean dismissing the novel from its place in Law and Literature altogether, but being canny about the representational techniques and political agendas that the realist novel tends to render invisible. There are novels that problematize the way in which they are told and seek to undermine the authority of their narration. J. M. Coetzee’s novels

58. Lawrence M. Friedman, “Is There a Modern Legal Culture?,” 7 *Ratio Juris* 118 (1994).

are a case in point. Law and Literature scholarship on these texts exemplifies a new, more critical engagement with novelistic prose.⁵⁹

In a complementary fashion, I would call to my European colleagues to remember that the Law and Literature movement arose in its most recent manifestation out of a frustration with legal training, interpretation, and practice in America. This movement represented an effort to return a performative ethics as well as an idealism and reverence to law. Copying the forms of this scholarship by adopting an adversarial scenario or by assuming similar struggles between, for instance, law and equity within other legal cultures will only lead us into imitative scholarship. Rather, the peculiarities of our own legal systems and legal histories need to be kept in mind as we contest law with the aesthetic and use law to query the literary.

Finally, I need to point out the inherent weakness of my own argument. A recent debate in Britain concerns the validity of adopting sharia law in some situations. My own work evinces a limited familiarity with just three legal systems and legal cultures and a complete lack of knowledge about many others. It also points towards a larger issue of to what degree a populace's faith in its legal system determines the kind of questions its practitioners will critically ask about the law. It is with this limitation and question in mind that I conclude with the wish that we both contextualize and open up scholarly stories in Law and Literature.

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Since this article was first published in June of 2010 it has received a fair amount of critical comment. This fact and the knowledge that it will be reprinted in a volume intended in the first instance for a European audience have led me to venture to suggest a few recommendations for researchers who are interested in furthering the project of European Law and Literature scholarship.⁶⁰

59. Melanie Williams, *Empty Justice: One Hundred Years of Law, Literature and Philosophy—Existential, Feminist and Normative Perspectives in Literary Jurisprudence* (London & Sydney: Cavendish Publishing, 2002).

60. My great thanks go to Martin A. Kayman for his critical comments on what follows here.

1) I advocate the pursuit of comparative work for two interrelated reasons. One, American research paradigms and American legal culture have, in fact, provided the background for much of the Law and Literature research being done today; thus it is vital to name explicit differences in various European legal cultures and literatures and then to actively explore how these points of contrast shape our understanding of how literature and law interact with each other and inform our perception. Pointing out areas of linguistic, juridical, aesthetic, and cultural dissimilarity will create useful interventions in a world where globalization increasingly forces different legal paradigms and their source languages and legal traditions to interact. Two, European countries are in the process of integrating their own laws, legal systems, and courts with those of the European Union. This process is rife with conflict. Consider the controversial decisions by the European Court of Human Rights regarding voting rights for prisoners in the UK or preventative detention in Germany; alternately, criticisms by the German Constitutional Court of the European Court of Justice's overstepping its jurisdiction reveal that European people and sovereignties are not of one mind regarding where the locus of law should be. Our research can help to articulate sources of and reasons for these conflicts.

2) Scholars working within various intellectual and legal traditions across Europe need to address the issue of our different languages. For better or worse, English functions as a *lingua franca* in much international peer-reviewed research. Moreover, English also constitutes the working language in many European legal institutions as well as in much international litigation.⁶¹ One response to this trend is to publish poly-lingual work with summaries in English; this enables those who are less at home in English to reflect on their local legal cultures and literatures. Another strategy is to work in English on non-Anglophone texts, literatures, and legal issues thus making them accessible to a larger readership.

61. María Ángeles Orts Llopis, "The Untranslatability of Law? Lexical Differences in Spanish and American Contract Law," 11 *European Journal of English Studies* 1, 17-18 (2007).

- 3) For those of us who wish to write about literature in the traditional sense, it may – in the spirit of much political criticism – be important to turn to genres other than realist prose fiction and/or strongly narrative poetry. If we do choose to work with the former type of texts, we need to be canny about their representational techniques and the ideologies that shape them.
- 4) We need to question the “literary” per se. Similar processes of selecting, highlighting, and narrating or arranging occur in non-verbal texts as in literary ones. The moves to address mediality, visuality, digitality, and popular culture as well as the social processes these phenomena partake in represent, for me, the most vital areas of research today. Yet in undertaking this work, we need to be wary of perpetuating facile interpretations of law and justice that have been undertaken in some traditional *law-in* literature scholarship. Naming the manners in which different modalities affect our perception and refusing to regard multi-media texts as mere reflections of a prior content in law, justice, and the legal but as active participants in legal culture are integral to this project.
- 5) While the discussion of what the new multiplicity of law-related scholarship should be called may be fruitful and might lead to a more articulate concept of where research is going, ‘Law and Literature,’ ‘Law and Culture,’ ‘Law and the Humanities,’ and ‘Law and Media,’ ‘Law and the Visual,’ or ‘Law and Art’ are in fact related fields. In attempting to promote European work, it may be strategic to also honor our points of likeness.
- 6) Making our scholarly, political and institutional aims as explicit as possible will, I believe, help further European Law and Literature scholarship. In writing the article printed here I followed several aims: The central one was to point out what I perceive as a reliance by some scholars on a short-list of canonical Law and Literature texts written in English as primary source material and the attendant adoption of American legal concepts and paradigms. This appeared to me to be to the detriment of an analysis of Europe’s variety of legal cultures and literatures. It has also fostered a hesitancy to address the current conflict between local and traditional legal cultures and emerging European Union and global ones. A second motivation was to highlight what may be two erroneous tendencies

in much Law and Literature: The first of these is to assume that law is identical with justice or equity. By contrast, I regard law as a social practice. The second is to feminize, idealize or essentialize literature as a panacea to law. Literature is not innocent. It is also involved in social practices and is caught up in the defense and perpetuation of various forms of capital.

With these recommendations and with the article they grew out of, my hope has been to move the conversation about European Law and Literature forward. And this can only happen with you, in dialogue.