The eighteenth-century model of the criminal trial – with its insistence that the defendant and the facts of a case could ‘speak for themselves’ – was abandoned in 1836, when legislation enabled barristers to address the jury on behalf of prisoners charged with felony. Increasingly, professional acts of interpretation were seen as necessary to achieve a just verdict, thereby silencing the prisoner and affecting the testimony given by eyewitnesses at criminal trials. Jan-Melissa Schramm examines the profound impact of the changing nature of evidence in law and theology on literary narrative in the nineteenth century. Already a locus of theological conflict, the idea of testimony became a fiercely contested motif of Victorian debate about the ethics of literary and legal representation. She argues that authors of fiction created a style of literary advocacy which both imitated, and reacted against, the example of their storytelling counterparts at the Bar.

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LITERATURE AND CULTURE 27

TESTIMONY AND ADVOCACY
IN VICTORIAN LAW,
LITERATURE, AND
THEOLOGY
CAMBRIDGE STUDIES IN NINETEENTH-CENTURY
LITERATURE AND CULTURE

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Nineteenth-century British literature and culture have been rich fields for interdisciplinary studies. Since the turn of the twentieth century, scholars and critics have tracked the intersections and tensions between Victorian literature and the visual arts, politics, social organisation, economic life, technical innovations, scientific thought – in short, culture in its broadest sense. In recent years, theoretical challenges and historiographical shifts have unsettled the assumptions of previous scholarly syntheses and called into question the terms of older debates. Whereas the tendency in much past literary critical interpretation was to use the metaphor of culture as ‘background’, feminist, Foucauldian, and other analyses have employed more dynamic models that raise questions of power and of circulation. Such developments have reanimated the field.

This series aims to accommodate and promote the most interesting work being undertaken on the frontiers of the field of nineteenth-century literary studies: work which intersects fruitfully with other fields of study such as history, or literary theory, or the history of science. Comparative as well as interdisciplinary approaches are welcomed.

A complete list of titles published will be found at the end of the book.
This illustration from *Punch* depicts the animosity between the Bar and the press in 1845. *Punch* 9 (London, 1845), 128. By permission of the Syndicate of Cambridge University Library.
TESTIMONY AND ADVOCACY IN VICTORIAN LAW, LITERATURE, AND THEOLOGY

JAN-MELISSA SCHRAMM
For Chris
[I]t is a settled rule at common law, that no counsel shall be allowed [to] a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated. A rule which . . . seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?


If an honest man is to be bullied in a witness-box, the barrister is instructed to bully him. If a murderer is to be rescued from the gallows, the barrister blubbers over him, as in TAWELL'S case; or accuses a wrong person, as in COURVOISIER'S case. If a naughty woman is to be screened, a barrister will bring Heaven itself into Court, and call Providence to witness that she is pure and spotless, as a certain great advocate and school-master abroad did for a certain lamented QUEEN CAROLINE.

[W. M. Thackeray], ‘War between the Press and the Bar: Mr Punch to the Gentlemen of the Press’, *Punch* 9 (1845), 64–65.
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Preface

This study has a particularly interdisciplinary genesis. Most Australian universities offer a combined Arts/Law degree programme which enables a student to pursue parallel studies in literature and law over the course of five or six years. Tutorials on the admissibility of confessional testimony in criminal trials could then be followed by a close study of *Tom Jones* or *Adam Bede*, for example, enabling the two discourses to enjoy what Daniel Kornstein in *Kill All the Lawyers?* has called a peculiarly dynamic ‘synergism’. Within this context, there are several educational experiences which have shaped the unusual interface of interests pursued in this text. As an undergraduate student in the Department of English at the Australian National University in Canberra, I was privileged to undertake the course entitled ‘Faith and Doubt in Victorian Literature’ taught by Stephen Prickett, which placed the reception of Biblical narratives and the impact of German higher criticism firmly at the forefront of any engagement with Victorian fiction. The image of John Henry Newman’s eponymous heroine, Callista, giving evidence at her trial, with or without the assistance of supernatural inspiration, has been seminal to my subsequent preoccupation with the status and reliability of human testimony before a secular tribunal.

But my interest in the more formal operation of rules of evidence in the courtroom only arose at a later date when, as a junior practitioner in a common law jurisdiction, I gained some experience in criminal litigation. My work often involved arguments about the admissibility of material which I hoped to tender to the court or which prosecution counsel wanted to adduce in evidence, and such tests of inclusion or exclusion invariably shaped the findings of the court. The practice of the law produced insights into the manipulation and presentation of evidence which could not be gained at Law School.

The final impetus for this study was the response of the general
Preface

public to the representation of those accused of crime. Whenever I was asked what sort of legal practice I was engaged in, this question always came back at me: ‘So how can you justify defending people whom you know to be guilty?’ I would always raise some combination of the following issues in reply – that it is the task of the judge to decide upon the guilt or innocence of the accused on the basis of reasoned argument put forward by the representatives of both parties, that the burden of proof in a criminal case rests upon the prosecution, that an accused may have committed the criminal act but may still lack criminal responsibility, or have a defence which must legitimately be put to the court (such as insanity), that an accused may not have committed the crime with which he has been charged (even though he has been guilty of something else which the public would classify as ‘wrong-doing’), or that much of my legally-aided work involved the presentation of pleas in mitigation after the possibility of a defence had been explored and discarded. But my listeners usually remained unconvincing, and it seemed to be the one topic which aroused public fears of the law’s rhetorical excesses. Does the representation of suspected criminals by lawyers obfuscate truth and generate erroneous or even fraudulent verdicts, and if not, why is the work of criminal lawyers perceived in this way? As I began post-graduate research on changes in the idea of testimony in the nineteenth century, I had little idea that these three interests – in the testimony (either of witnesses or of martyrs) given at trial, in the exclusion of evidence, and in the replacement of the narratives of the accused by the stories of defence lawyers – could intersect so richly in an exploration of nineteenth-century fiction and the conventions of formal realism. Given that law and literature share authoritative (and competing) claims for the representation of ‘reality’, the questions ‘who can speak in a court of law?’, and ‘what is the ambit of their licence to speak?’ become critical for literary theorists as well as legal historians. This study explores the way in which literature positions itself in relation to the law – the way in which fiction seeks to generate assent in the reader and to bolster its claims to authenticity by its appropriation of evidentiary paradigms, but also the way in which fiction must make space for itself by denigrating the narrow, exclusionary emphasis of the law and seeking to recover those stories which the law ignores as inadmissible or irrelevant. In this way, the presentation of testimony in courts of law and in fictional courts illuminates some of the most important issues in nineteenth-century epistemology.
Acknowledgements

My greatest thanks are due to Gillian Beer for the tireless assistance and inspiration she provided over the course of the doctoral research which served as the foundation of this study. I would also like to offer special thanks to Adrian Poole for the thoughtful assistance he has provided in the course of the text’s completion. In addition, I have benefited from the invaluable criticism and encouragement of legal and literary colleagues; John Beer, David Cairns, Stefan Collini, Jonathan Grossman, Stephen Prickett, and Ian Ward have all either read portions of this work or heard various sections at conferences and the text has been enriched by their input. Any errors or omissions which remain are mine alone.

My research at the University of Cambridge was made possible by a scholarship from the Cambridge Commonwealth Trust and additional funding from the Overseas Research Students Awards Scheme. I would like to acknowledge both these institutions for their generosity in facilitating my studies. I am also grateful to Lucy Cavendish College, Cambridge, for electing me into the Alice Tong Sze Research Fellowship which rendered possible the post-doctoral revision of this text. Of the Fellows at Lucy, I would especially like to thank Louise Tee for her advice and her example.

It has been a delight to work with Linda Bree at Cambridge University Press and I am grateful for the work of the external readers, including Alexander Welsh, who commented on the text and suggested various improvements. At the very conclusion of this project I benefited from participation in an inspirational Law and Literature Colloquium organised by Michael Freeman and Andrew Lewis at University College London. Some material from Chapter 3 has appeared in Current Legal Issues: Law and Literature 2 (1999), a collection of papers given at the conference, edited by Michael Freeman and Andrew Lewis, and published by Oxford University Press.
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To Andrew Rae, James Crotty, and to the staff and the judiciary of the Hobart Court of Petty Sessions and the Supreme Court of Tasmania I owe thanks for instruction in court procedure during my time as a lawyer in Tasmania. In addition, a number of treasured family members, friends, and colleagues both in Australia and in Cambridge have offered me the benefit of their instructive conversation over the years, particularly Sally Bushell, Lil and Garry Deverell, Kylie van Dijk, Emma Gunn, Kate Quirk, Leah Price, Jeanine Willson, and my parents Margaret and Mervyn Turner. Jan Caldwell’s friendship has been a support to me at every stage in the composition of this study. I would also like to thank my husband, Chris, for his wonderful sense of humour and for all his good cooking! Without his continuing love and encouragement, the adventures of study and travel which have generated this text would not have been possible.
Abbreviations


Unfortunately, Kieran Dolin’s work *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (Cambridge University Press, 1999) appeared at too late a stage for Chapter 1 of this text to be able to engage with his arguments.
Definition of legal terms

Throughout the text reference is made to the English Bar, a body of legal practitioners who, on instruction by attorneys or solicitors, were able to speak on behalf of lay clients in court. Some of those who practised (either exclusively or in part) in the criminal jurisdiction of the common law courts were nicknamed ‘Old Bailey pleaders’. The term ‘felony’ refers to that class of crime which was regarded as more serious than mere misdemeanours (for example, crimes of violence and crimes against property), which rendered an accused liable to harsh punishment upon conviction. Historically, such penalties included forfeiture of land and goods, and/or capital punishment.