Introduction

Kieran Dolin

Questions of law and justice have long engaged the literary imagination. In Sophocles' *Antigone* a tragic dilemma confronts the heroine: If she buries the body of her brother Polynices in accordance with divine law, she disobeys a proclamation of King Creon forbidding that very act. Two millennia later, Ariel Dorfman's *Death and the Maiden* explores the procedures for redressing human rights violations after the overthrow of a dictatorship, as a torture victim subjects her torturer to an impromptu trial. In an after-dinner speech to the Canadian Bar Association in 1970, Northrop Frye explained this preoccupation by saying that "all respect for the law is a product of the social imagination, and the social imagination is what literature directly addresses."[1] The vocabularies and methods of literary studies have changed since Frye spoke, but interest in the social functions of the imagination, and the ideological effects of literary works, has only grown. The practices of both law and literature converge around such fundamental issues as language and interpretation, the formation of subjectivity, and the connection of narrative and authority. The intersection of social ideology and *poesis* or linguistic creation became the focus of sustained interdisciplinary study through a dedicated law and literature movement in the 1980s. That movement has ramified, encountering new influences and taking new forms, but its key insight remains, as Ravit Reichman affirmed in 2009, that "the texts of law and literature jointly contribute to what legal scholar Robert Cover called a *nomos* or normative universe."[2] The range and significance of this dialogue with legal history and philosophy makes law a vital element in contemporary critical discourse.

[1] Northrop Frye, "Literature and the law," *Law Society of Upper Canada Gazette*, 4 (1970), 70–7.
[2] Ravit Reichman, *The Affective Life of Law* (Stanford: Stanford University Press, 2009), p. 5. Cover's concept of *nomos* is explained by Cathrine O. Frank in Chapter 3 of this volume.

Introducing his 1961 anthology of legal prose, *The Law as Literature*, Louis Blom-Cooper wrote of "the harmony of law and literature."[3] That view depended on a traditional understanding of literature and culture as "the best that has been thought and said in the world," and on an acceptance of the justice of the legal system; it offered a celebratory account of law and literature.[4] Blom-Cooper's anthology and others like it remind us that legal writing and oratory are forms of rhetoric, compositions that seek to move their audiences toward particular understandings of events. They are exercises in a specifically *legal* imagination, articulating ideals and circumstances in ways that recall literary texts. Among the examples selected are Gandhi's speech to the court in his 1922 trial for sedition and Albert Camus' *Reflections on the Guillotine*. In the same year as Blom-Cooper's anthology, Robert Bolt's celebrated play about the trial of Thomas More, *A Man for All Seasons*, was published, and the much-publicized trial regarding the publication of D. H. Lawrence's *Lady Chatterley's Lover* saw a more oppositional relationship between law and literature take shape. In this context, literary texts potentially transgress the boundaries of traditional morality and law. As is well known, a parade of distinguished literary critics gave evidence on behalf of the publisher, Penguin Books, testifying to the "literary merit" of Lawrence's novel, and helping the defense to success.[5] Adding to the sense of an altered understanding of law in society was H. L. A. Hart's new work on jurisprudence, *The Concept of Law*. A number of general points may be drawn from this snapshot of cultural history, the first, and most obvious, being that literature as a field of writing is shaped by censorship laws and other legal regimes. As Nancy Paxton shows in Chapter 20 of this volume, such laws may function in constructive ways as well as setting limits to expression. Second, and more broadly, when viewed in the context of legal history, literary study may be seen as part of "the complex history of freedoms," as James Simpson puts it.[6] Third, the relationship between law and literature is a close but shifting one, always significant, but ever open to revision from new social forces. Law, then, is one of the key *interrelations* of literature.[7]

[3] Louis Blom-Cooper, *The Law as Literature* (London: Bodley Head, 1961), p. xiii.
[4] Matthew Arnold, *Culture and Anarchy* [1869]. (New Haven: Yale University Press, 1994), p. 5.
[5] See C. H. Rolph (ed.), *The Trial of Lady Chatterley* (Harmondsworth: Penguin, 1961) for the transcript of the trial.
[6] James Simpson, *Reform and Cultural Revolution*. The Oxford English Literary History, vol. 2: 1350–1547 (Oxford: Oxford University Press, 2002), p. 1.
[7] See Richard H. Weisberg and Jean-Pierre Barricelli, "Literature and law" in Joseph Gibaldi and Jean-Pierre Barricelli (eds.), *Interrelations of Literature* (New York: Modern Languages Association, 1982), pp. 150–75.

These events from a year chosen among many possible candidates are indicative of "the intricate and multivalent historical interactions" between literature and law.[8] This volume, through its twenty newly commissioned essays, attempts to reveal something of the range and intensity of those valencies. Part I offers an account of the *origins* of the interdisciplinary project of law and literature, and of how key theoretical shifts, especially poststructuralism, narrative theory, and historicist studies, reshaped the literary-critical study of law. Many of the concepts and arguments discussed in this foundational section of the volume are taken up independently in the later chapters. In the second and largest part of the book, Part II, a survey of the historical *development* of legal and literary intersections is presented in a series of chapters devoted to major phases of literary history, from the classical era to the present. Each of these chapters offers a broad conspectus supplemented by a reading of key texts, or takes a particular trial or idea as representative of larger legal-cultural formations. The risks of periodization are more than usually present in this context, with the ancient and medieval worlds represented by a chapter each, with some periods denominated by century and others by reign or cultural movement, in all of which the particular but representative conflicts and confluences must be tracked in two cultural domains. The collection ends by focusing in Part III on a number of *applications* of the dialogue between literary and legal studies that have practical effects in the contemporary system of law and the institution of literature. Accordingly, it includes chapters on such topics as laws that bear upon authorship and the freedom of representation, the cultural afterlives of trials, and narratives that enlarge the recognition of rights and civil wrongs by the courts.

The latter provide ready answers to the question of contemporary relevance, which is commonly raised in respect of humanities research by university administrators, governments, and others for whom the social utility of knowledge is equated with scientific advances. In this context it is worth noting a controversial review of law and literature as an interdisciplinary field by Julie Stone Peters. Peters argued that the field's practitioners, whether based in literary studies or law, tended to construct illusory images of the other discipline in order to remedy felt limits in their own: "literature's wounded sense of its insignificance, its inability to achieve some ever-imagined but ever-receding praxis; law's guilty sense of its

[8] Gregg D. Crane, *Race, Citizenship and Law in American Literature* (New York: Cambridge University Press, 2002), p. 10.

collaborationism, its tainted complicity with the state apparatus."[9] This strong critique led her to advocate for a broader interdisciplinary field of law, culture, and the humanities; however, her survey had omitted any consideration of historical studies of the changing relations between law and literature at different periods. It prompted robust defences of the law and literature project from Richard Weisberg, Peter Brooks, and Christine L. Krueger, among others. Krueger articulated a feminist account of gender advocacy in the literature and law of Victorian England that explicitly linked her historicist research to ongoing emancipatory movements in modern society, and that emphasis on "praxis" informs her account of historicist approaches to law and literature in Chapter 4.[10] Critics working on law and literature scholarship will frequently draw out their implications for the present, sometimes explicitly, at other times leaving them to be inferred by readers.[11] As this collection of essays adopts a broadly historicist approach to its subject, I suspect most of its contributors would subscribe in one form or other to a sense that the study of the past formations of law and literature will inform our understanding of present issues. Further, such studies may well be informed by the critic's interests, even as he or she attempts to elucidate the different beliefs, values, and intentions of the society being studied.

One benefit of the historical scope of a volume like this is that it affords what Robin Wharton calls in Chapter 18 "a long view" of the history of technologies of communication. Specifically, it enables readers to see the changing interfaces of law, language and society in oral, scribal, print, and digital cultures. This book therefore adopts a broad definition of literature that includes texts in the form of traditional songs from East Africa, forensic oratory, medieval homilies, judicial opinions, long-form television drama, and comics. In doing so, it attempts to encompass some ancient, postcolonial, or non-Western perspectives on law and justice as well as concepts from Europe and America.[12] Equally, just as it has seemed

[9] Julie Stone Peters, "Law, literature and the vanishing real: on the future of an interdisciplinary illusion" in Austin Sarat, Cathrine O. Frank and Matthew Anderson (eds.), *Teaching Law and Literature* (New York: Modern Languages Association, 2011), p. 78.

[10] Christine L. Krueger, *Reading for the Law: British Literary History and Gender Advocacy* (Charlottesville: University of Virginia Press, 2010).

[11] See for example Robert A. Ferguson, *Law and Letters in American Culture* (Massachusetts: Harvard University Press, 1984), pp. 9–10 and Brook Thomas, *Civic Myths: A Law-and-Literature Approach to Citizenship* (Chapel Hill: University of North Carolina Press, 2007), p. xi.

[12] For an internationalist sampling of contemporary law and literature writing, see special focus in the *World Literature Today* 86:6 (Nov–Dec 2012).

essential to address both popular and elite cultural forms of past eras, so also it has seemed important in this volume to explore the effects of visual as well as print narrative media in the dissemination of concepts of law in contemporary culture.

Contributors to this volume are drawn from universities in several nations, including Australia, Canada, Denmark, England, Germany, Ireland, and the United States, and this relative diversity allows for a degree of variation in their critical methods and voices. An editorial recognition that "the field of law and literature research . . . has become increasingly differentiated" – as Klaus Stierstorfer, the author of Chapter 1, put it in a review article on the field – seemed an important counterpoint to the volume's overall commitment to a historical account of legal-literary relations.[13] Consequently, different approaches to the relationship between literature and the history of legal and social ideas will be found in the various chapters: For example, Ioannis Ziogas reads the iconology of the body in the trial of Phryne through contemporary theories of sovereignty; Mark Fortier draws on intellectual history to produce a complex history of equity in early modern literature; Cheryl Nixon offers a feminist historical account of eighteenth-century fiction and the law of family; and Stephanie Jones brings poststructuralist and postcolonial concerns to the analysis of an East African case from the 1920s. This methodological pluralism aids in the discernment of those "constellations" of literary discourse and legal forms that help us to understand the past and shed light on current configurations of *nomos* in our own or other societies.[14] Indeed, Benjamin speaks of the historian's work as "grasp[ing] the constellation which his own era has formed with a definite earlier one." Brook Thomas concludes his *Cross-Examinations of Law and Literature* by invoking these words.[15] Such knowledge may assist in addressing the discrepancy "between reality and vision" in our normative worlds, and therefore Benjamin's description serves as an appropriate final note on which to introduce this collection.

[13] Klaus Stierstorfer, "Law and (which?) literature: new directions in post-theory?" *Law and Humanities*, 5 (2011), 41–51.

[14] Here I draw on Walter Benjamin's idea of cultural constellations, with acknowledgements to the anonymous reader for Cambridge University Press who suggested this term. See David Cerniglia, "Constellation" in Michael Ryan (ed.), *The Encyclopedia of Literary and Cultural Theory* (Maldon: Wiley-Blackwell, 2011), www.literatureencyclopedia.com/subscriber/tocnode.html?id=g9781405183123_chunk_g978140518312 35_ss1-6.

[15] Brook Thomas, *Cross-Examinations of Law and Literature* (Cambridge: Cambridge University Press, 1987), p. 254.

PART I

Origins

CHAPTER 1

The Revival of Legal Humanism

Klaus Stierstorfer

The chapter title rightly implies that the connection between law and "the humanities" is not a recent invention. It is prominent in classical antiquity, most notably in Aristotle,[1] and intimately tied in with the Western origins of rhetoric;[2] it can be traced in Hebrew cultural history, where the central, closely allied corpora of the *halachah* and the *haggada* could be translated as "law" and "literature" respectively, as P. G. Monateri points out;[3] and wherever an inclusive definition of "literature," following the Latin meaning of *litteratura* as "use of letters, writing, system of letters . . . writings, scholarship,"[4] has been applied, law texts of all kinds would automatically fall within the wider purview of literary or textual scholarship. Thus, when the first complete narrative history of English literature appeared in 1836, Blackstone's *Commentaries on the Laws of England* or Jeremy Bentham's writings on law were, as a matter of course, presented in their respective periods under the category of "Miscellaneous Writers," and hence as part and parcel of that literary history, just as with major works in historical scholarship or in science (such as Newton's *Principia*).[5] The historical depth, but also the conceptual as well as quantitative scope of this tradition, especially in the connection between literature and the law, has been

[1] See for instance Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton: Princeton University Press, 2014).

[2] Michael Gagarin, "Rhetoric and law in Ancient Greece" in Michael MacDonald (ed.), *The Oxford Handbook of Rhetorical Studies* (Oxford: Oxford University Press, 2014). See www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199731596.001.0001/oxfordhb-9780199731596-e-002 (accessed October 7, 2016).

[3] Pier Giuseppe Monateri, "Diaspora, the West and the law" in D. Carpi and K. Stierstorfer (eds.), *Diaspora, Law and Literature* (Berlin and Boston: De Gruyter, 2016), pp. 7–22, 13.

[4] "literature, n." *OED Online*, esp. "etymology" and meanings 1, 2, 4, and 5. See www.oed.com/view/Entry/109080?redirectedFrom=literature#eid (accessed October 7, 2016).

[5] Robert Chambers, *History of the English Language and Literature* (Edinburgh: William and Robert Chambers/London: Orr and Smith, 1836), pp. 185f, 263f.

impressively documented in recent bibliographies.[6] Moreover, myth-like founding figures and events have also emerged. In the German tradition, there is Jakob Grimm's famous assertion that law and literature had "risen from the same bed,"[7] and the fact that the first meeting of *Germanisten*, which memorably took place in 1846 in Frankfurt, was convened by a law professor and emphasized in its denomination not its object of study in a body of texts in the German vernacular, but an orientation toward Germanic as opposed to Roman law.[8] Further instances can be traced in the past where legal scholars or practitioners, such as C. K. Davis or James Fitzjames Stephen in Britain or John H. Wigmore and, most notably, Benjamin N. Cardozo in the United States, had literary leanings and hence frequently figure in a pre-history to the developments described in the following.[9]

For all this long and chequered relationship throughout the course of Western cultural history, however, the renewed emphasis on the necessity of exchange between law and the humanities with the aim of "rehumanizing" the law is recent. The revival of legal humanism is now regularly identified with a particular moment in American academia in the 1970s: the rise of what has come to be labeled as the "law and literature movement." Although the developments in that particular phase of legal scholarship are steeped in a long tradition of humanist approaches to the law, their specific impact was incisive and had a long-lasting influence on what has since been done in the rich and blossoming interdisciplinary scholarship between law and the humanities worldwide.

Two main lines of explanation, which are not mutually exclusive, have been established to answer the question about the causes for the renewed interest in the humanities in the American law schools at that point in recent history. First, and perhaps less intriguingly, it is seen as a consequence of the academic job market in the United States. Student numbers in the humanities had risen exponentially in the 1960s, with a consequent surge in the numbers of doctorates and hence aspiring new academics

[6] Christine A. Corcos, *An International Guide to Law and Literature Studies* (Buffalo and New York: William S. Hein & Co, 2000); Thomas Sprecher, *Literature und Recht. Eine Bibliographie für Leser* (Frankfurt: Vittorio Klostermann, 2011).

[7] Jakob Grimm, "Von der Poesie im Recht," *Zeitschrift für die geschichtliche Rechtswissenschaft*, 2(1) (1816), 25–99. §2: "Dasz recht und poesie miteinander aus einem bette aufgestanden waren, hält nicht schwer zu glauben."

[8] See Klaus Röther, *Die Germanistenverbände und ihre Tagungen: Ein Beitrag zur germanistischen Organisations- und Wissenschaftsgeschichte* (Köln: Pahl-Rugenstein, 1980), pp. 15–16.

[9] Apart from the bibliographies listed in n. 6, see Richard Posner, *Law and Literature: A Misunderstood Relation* (Massachusetts and London: Harvard University Press, 1988), p. 12 (and footnotes 24 and 25).

in the humanities far beyond the needs generated by the expansion of the studentship. When the rise in student enrolment numbers flattened out in the early 1970s, the job market quickly became tense, a development exacerbated by significant budget cuts in the humanities in the late 1970s.[10] Hence, graduates from the humanities had to seek employment elsewhere. Looking back from 1985, Martha Minow described the impact of these developments on the law departments:

> [T]he job market for Ph.D.'s [sic] constricted dramatically in the last 15 years. Bluntly put, people who in the past would join academic departments instead went to law school and joined law faculties. These people brought with them questions and methods of inquiry common in nonlegal disciplines, and subjected law to scrutiny.[11]

This view may reflect aspects of the academic job market at the time, even if it is currently still more a claim than an insight drawn from sustained analysis and research. As an explanation for the reorientation of legal studies toward the humanities it carries, however, a potentially pejorative undercurrent. It presents the humanist revival in law as an accidental contingency of market developments, and, moreover, carries the implication that the inspiration for the revival was itself less inspired than it was driven by dire (economic) necessities and spearheaded by academics who could not find employment in their field of choice, and hence did not constitute their discipline's elite who, even under constrained circumstances, would get the few tenured positions on offer in their own fields.

The second line of explanation understands the revival of legal humanism as a reaction precisely against such approaches of reducing social and cultural developments to market forces, as notably seen in the work that is usually labeled "law and economics." A movement that has evolved into a widely established constituent in American law departments and in the curricula of legal training,[12] the modern origins of law and economics are generally identified in the early 1960s. By most accounts, the credit for this

[10] The funding levels for the National Endowment Fund for the Humanities can here be taken as an indicator. See www.humanitiesindicators.org/content/indicatordoc.aspx?i=75 (accessed October 8, 2016).

[11] Martha Minow, "Law turning outward," *Telos*, 73 (1987), 91. See also Richard Posner, "Law and literature: a relation reargued," *Virginia Law Review*, 72 (1986), 1353; Harold Suretsky, "Search for a theory: an annotated bibliography of writings in the relation of law to literature and the humanities," *Rutgers Law Review*, 32 (1979), 727–39; and Jeanne Gaakeer, "Close encounters of the 'third' kind" in D. Carpi and K. Stierstorfer (eds.), *Diaspora, Law and Literature* (Berlin and Boston: De Gruyter, 2016), p. 66 (footnote 87).

[12] See, for a standard textbook, Robert Cooter and Thomas Ulen, *Law and Economics* (Boston: Pearson Education, 1986; 6th edn., 2012), and Richard Posner's classic *Economic Analysis of the Law* (New York: Wolters Kluwer Law and Business, 1970; 9th edn., 2014).

initial impetus is shared on the one hand by Ronald Coase at the University of Chicago, and specifically his 1960 article "Problem of Social Cost," and on the other by Guido Calabresi at Yale and his work on tort law from 1960 onwards, as presented in particular in his seminal article "Some Thoughts on Risk Distribution and the Law of Torts."[13] As Cooter and Ulen explain, law had of course had some traditional overlap with economics long before in areas such as "antitrust law, regulated industries, tax, and some special topics like determining monetary damages";[14] however, the new movement brought economic expertise to fields of legal concern not usually associated with economic considerations, "such as property, contracts, torts, criminal law and procedure, and constitutional law,"[15] which now, it was claimed, benefited from the strengths of economic reasoning: "Economics has mathematically precise theories (price theory and game theory) and empirically sound methods (statistics and econometrics) for analyzing the effects of the implicit prices that laws attach to behavior."[16]

Richard Posner, another of the galleon figures of law and economics, neatly summarizes the scholarly attractiveness of this approach:[17]

> To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses . . . Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.

Such eulogy of law and economics is strongly reminiscent of the "two cultures" debate popularized in C. P. Snow's Rede Lecture in 1959. It is contemporary with the beginning of the law and economics movement, whose agenda clearly tries to establish law on the side of the sciences, not the humanities.

[13] Ronald Coase, "The problem of social cost," *Journal of Law and Economics*, 3 (1960), 1–44; Guido Calabresi, "Some thoughts on risk distribution and the law of torts," *Yale Law Journal*, 70(4) (1961), 499–553. For a survey, see, for instance, Martin Gelter and Kristoffel Grechenig, "History of law and economics," *Preprints of the Max Planck Institute for Research on Collective Goods* (2014–15); Francesco Parisi and Charles K. Rowley (eds.), *The Origins of Law and Economics: Essays by the Founding Fathers* (Northampton and Massachusetts: Edward Elgar Publishing, 2005).

[14] Cooter and Ulen, *Law and Economics*, p. 1.

[15] Cooter and Ulen, *Law and Economics*, p. 1.

[16] Cooter and Ulen, *Law and Economics*, p. 3.

[17] Richard Posner, "Foreword" in M. Faure and R. van den Bergh (eds.), *Essays in Law and Economics: Corporations, Accident Prevention and Compensation for Losses* (Antwerpen: MAKLU, 1989), pp. 5–6, 5. The quotation has achieved emblematic status through its use as an epigraph in Cooter and Ulen, *Law and Economics*, p. 1.