

VICTORIANS AND THE LAW: LITERATURE AND LEGAL CULTURE

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‘Notwithstanding the seeming incongruity, there subsists a very intimate connection between law and literature’.¹

Edward Said changed the way readers approached Jane Austen when he argued that *Mansfield Park*, indeed all nineteenth-century novels, could only be understood in the context of imperialism.² How else did Sir Bertram make his money, and why was he absent from his estate for so long, otherwise? The idea that the culture of imperialism was so ingrained in writers and readers alike meant that the colonies and their far-flung subjects could be in the novel even when they weren’t, apparently, *in* the novel. A similar point can be made about the pervasiveness of law in Victorian fiction: there is a kind of legalism at work that makes it possible to read for the law even when legal matters don’t appear to be part of the novel’s immediate subject. ‘Legal Culture’ in this sense might mean the assumed structure that invisibly, or at least unquestioningly, supports social relationships, individual aspirations, and expressive forms, for example, the way coverture informed the structure of the novel’s marriage plot.³ It might mean a way of thinking or reasoning, such as Ayelet Ben Yishai describes in her recent book on precedent, i.e. the way legal attitudes towards the past were used to accommodate change and create a ‘commonality’ outside recognisably legal venues or processes.⁴ To appreciate and understand the reach of law’s cultural network, a cultural critique of law is needed, one that, as Christine Krueger has argued, works best when it strives for historical specificity and applies multidisciplinary tools of analysis to the material conditions of its working.⁵

This issue of *Victorian Network* focuses on Victorians and the Law—two subjects that, daunting in their breadth, draw our attention to an only slightly less formidable pair, law and literature. Legal scholars, particularly those whose institutional home is in the law school, will recognise ‘law and literature’ as the

¹ JCS, ‘Law and Literature’, *The St. James Magazine*, 14 (1865), pp. 194-8 (p. 194). Further references are given after quotations in the text.

² See Edward Said, *Culture and Imperialism* (New York: Vintage, 1993).

³ See Tim Dolin, *Mistress of the House: Women of Property in the Victorian Novel* (Aldershot: Ashgate, 1997).

⁴ Ayelet Ben Yishai, *Common Precedents: The Presentness of the Past in Victorian Law and Fiction* (Oxford: Oxford University Press, 2013), p. 5.

⁵ Christine L. Krueger, *Reading for the Law: British Literary History and Gender Advocacy* (Charlottesville: University of Virginia Press, 2010), p. 3. Further references are given after quotations in the text.

movement that began in U.S. law schools in the 1970s, and they will appreciate the extent to which law and literature, still a vibrant area of study, has given rise to the larger field of law and humanities.⁶ Victorian literary critics, however, don't seem to have adopted the moniker for their own studies. One explanation, perhaps the simplest, is that Victorian Studies already encompasses the substantive breadth, disciplinary representation, and range of analytic tools that law and humanities calls for. It did for literary criticism what law and humanities has relatively recently undertaken *vis à vis* law and literature: a broadening of what ought to be included under the rubric of literature that has led to studies of popular culture, film, and other visual arts, cultural events, and artefacts.

A second, slightly different version of what might be thought of as the superfluity of the term law and literature has to do, ironically, with the dominance of Victorian literature – and of the novel – in the movement's canon. Scholars of law *in* literature have had to think about why their reading list has been so heavily populated by the Victorians, and by the novel, but Victorianists haven't had to explain why they study law.⁷ If law and humanities scholars wrestle with problems of definition, some of their questions are ones that many Victorianists resolved in the turn towards Cultural Studies and later New Historicism, so that it is no more remarkable to study law, legal culture and literature's relationship to them than it is to treat of medical, scientific, religious or political discourses in interdisciplinary ways.⁸

What does remain, however, is to think about the place of literature, and in particular the novel, in this conception of legal culture, for although this issue is

⁶ See Austin Sarat, Matthew Anderson, and Cathrine O. Frank, ed., *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2009), pp. 1-46.

⁷ It would be wrong to suggest that other periods, authors, and literatures, are missing from this list: think Shakespeare and drama; or Kafka, Camus and the modernist novel, for example. What is true is that Western, and in particular Anglo-American literature, has dominated the field, and that narrative fiction has received more attention than other genres in the study of periods following the development of the novel.

⁸ A more complicated explanation is that, ironically, 'Victorian Studies' doesn't struggle in quite the same way with anxiety about its relevance as 'law and literature' has. I base this generalisation on a single anecdote: A panel I presented on – comprised of papers on 18th and 19th century novels – was asked to comment on the relationship between law and literature, and the premise for this question was the observation that other speakers at the same conference had discussed poetic responses to the September 11th attacks on the World Trade Center. The question implied a particular function for literature (perhaps that it does, or ought to, enable people to process traumatic events or to create communities out of personal accounts of tragedy). Like the trope of rescue, this expressive or cathartic framework relies on a particular conception of the function of literature that could be historicised itself. However, I mention this example because it points up a concern not just with the relevance of literature, but with literary history. If literary concerns are felt to be remote from the practical everyday with which law, and certainly legal training is concerned, then that feeling seems likely to increase with the remoteness of the period. No good Victorianist, however, would doubt the importance of that era.

about Victorians and the law, its attention to printed, verbal texts makes it more specifically about how Victorians *read* the law in their own. Christine Krueger reminds us that the phrase ‘reading for the law’ is the British locution for studying law and calls on scholars to approach ‘law as literary history’ (p. 1). Rather than reading law as literature, in the sense that either is transcendent, she argues, we should situate law’s forms and assumptions alongside literary forms and conventions in an historically sensitive way, using whatever tools are necessary to illuminate their relationship. And although thus far I have suggested that we might find the law at work in unobvious ways, I’d be remiss to gloss over the ways law entered the collective Victorian *conscious*.⁹

The attraction of the law for writers and readers alike is readily visible, after all, in the novels which *do* take legal practice and procedure, the profession, professionals, and their texts, for their subjects (e.g., to drive their plots, supply their realism, influence characterisation, and to experiment with form). George Eliot consulting Frederic Harrison, Collins playing with narrative and testimony, Dickens’ depictions of lawyers and the business of law, as well as the trials and testaments that spilled from Victorian periodicals and courtrooms alike: these are among the most familiar images of Victorians and the law. The nature of both the legal and literary professions goes some way to explain this preponderance of legal matter. John Sutherland, for example, puts the number of male Victorian novelists at 411 with one out of every five having failed as barristers: What else to do with all that free time and insider knowledge but narrate it?¹⁰ Yet even for those who succeeded, literature and literary pursuits retained some fascination.

American jurist John H. Wigmore’s catalogue of ‘legal novels’, first printed in 1900, is perhaps the most familiar jumping-off point for studies of law in literature, just as Benjamin Cardozo’s 1931 essay ‘Law and Literature’ outlined a program for improving legal writing by treating it *as* literature.¹¹ However, long before Wigmore made his list and Cardozo reflected on the literariness of law, writers for a variety of nineteenth-century periodicals were already referring to law and literature as a familiar conjunction of terms. ‘JCS’, writing for *The St. James Magazine* in 1865, remarked on ‘the seeming incongruity’ of their relationship, but was quick to point out (in an amazing feat of professional hubris, or nineteenth-century exaggeration, or both) that the ‘magnitude and splendor’ of literature was owed to the legal profession (p. 194). Thirty years after *The St. James Magazine* had formalised their union,

⁹ For an historical analysis of the way literary criticism has, at particular historical moments, characterised the relationship between the novel and law, see Susan Sage Heinzelman, ‘Imagining the Law: The Novel’ in Austin Sarat, Matthew Anderson, and Cathrine O. Frank, ed., *Law and the Humanities: An Introduction* (Cambridge: Cambridge University Press, 2009), pp. 213-40.

¹⁰ John Sutherland, *Victorian Fiction* (London: Macmillan, 1995), p. 162.

¹¹ See John H. Wigmore, ‘A List of Legal Novels’, *The Brief* (2 Jan 1900), pp. 124-7, and Benjamin Cardozo, ‘Law and Literature’, in *Law and Literature and Other Essays and Addresses* (New York: Harcourt, Brace, and Company, 1931).

Ernest W. Huffcut, Dean of the Cornell University Faculty of Law, sought to halt ‘the divorce of law and literature’ he feared was imminent.¹² In an essay for *The Green Bag*, that ‘Useless but Entertaining Magazine for Lawyers’, he treated readers to some very useful musings on law, legal writing, and the scope of legal culture. Focusing on the dramatic elements of legal procedure and the historic use of poetic form to convey substantive law, Huffcut acknowledged that no ‘professor of literature in our polite schools of learning’ was likely to point to ‘legal literature’ for examples of good writing, but it was this very oversight – their failure to appreciate that law *was* literature – that he wanted to correct (p. 52).

Both writers start from the assumption that law and literature somehow belong together (whether by affinity or through competition), but they part ways when defining literature. JCS means everything from history and biography, philosophy and theology, to the aesthetic forms of poetry, drama, and fiction and maintains that literary study, when ‘made subservient to the business of his profession’ (p. 194), might well benefit the lawyer, perhaps through extra income. His more capacious sense meets its inverse in Huffcut’s narrow view. For though Huffcut observes that ‘law touches at some point every conceivable human interest, and that its study is, perhaps above all others, precisely the one which leads straight to the humanities’, for him, the humanities are literature, and literature means poetry and fiction (p. 54). If there is a history or trajectory of shaping disciplinary boundaries discernible in these early examples, it anticipates that broadening out from literature to other cultural forms, artefacts, and practices characteristic of the move from law and literature to law and the humanities. Yet in their focus on literature, both commentators draw attention to the way law is imagined (unfavourably and inaccurately, if we attend to JCS) as well as acknowledge the institutional processes – the trials, judgments, and punishments – through which law organises its legal subjects.

Essays like Huffcut’s and JCS’s introduce propositions which scholars of law and literature have been pursuing somewhat more systematically for the past forty years and which speak to the present issue’s focus on Victorians and the law in many ways. What do we designate ‘law’ and what ‘literature’? What are their points of connection and departure? How does thinking about law as literature affect our attention to the relationship between style, substance, and meaning in legal writing; but also how does thinking about the conventions of literature draw our attention to those aspects of the novel (e.g. evidence, testimony, representation, motive, character) and those social functions (e.g. of describing and organising human relationships) which are more typically attributed to law? Scholarship in these areas, perhaps taking its cue from Ian Watt’s analogy of the novel reader and jury member,

¹² Ernest W. Huffcut, ‘The Literature of Law’, *The Green Bag: A Useless but Entertaining Magazine for Lawyers*, 4 (1892), pp. 52-54 (p. 52). Further references are given after quotations in the text.

was initially concerned with trial procedure, the criminal trial, and punishment.¹³ More recent studies have moved outside of the courtroom proper to explore aspects of substantive law, including civil law and doctrinal issues, such as those concerning property, women's legal status, and illegitimacy among many others.¹⁴

The essays collected here continue this tradition. All focus on literary texts and offer careful readings of narrative strategy and the formal conventions of genre to explain the way these works work. More specifically, they examine techniques of subject formation. They consider the relationship between speech and space, and they analyze the effect modes of representation such as the broadside, treatise, and novel have on readers, particularly in a bid to use sympathy as a tool of narrative jurisprudence and institutional reform. These are the broad strokes. To examine these issues, however, the contributors have focused chiefly on just two decades – the 1830s and 40s – in a way that allows us to build a chronology, trace the shifting function of literature in relation to legal categories and codes, and to preserve the historical specificity of these relationships.

In “‘Horred Murders’, ‘Int’resting Partic’lars’, and ‘Confessions!’”: Constructing Criminal Identities in the Early Victorian Broadside’, Cécile Bertrand musters a rich array of primary materials, both verbal and visual, to chart the relationship between criminal identities formed via popular media and the way criminality was defined in official legal discourse. Situating genres such as the ballad and execution sheet alongside the forms of capital punishment they usually described – and the scaffold around which they circulated – Bertrand shows how the broadside’s creation of criminality neither uniformly endorsed nor critiqued official versions. Rather, changing sites of punishment and altered modes of publicity evoked different responses from spectators and effected changes in the perception of criminality itself. If the earliest forms of broadside representation seconded the law’s

¹³ See Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson, and Fielding* (Berkeley: University of California Press, 1957), p. 31. See also Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992); Jan-Melissa Schramm, *Testimony and Advocacy in the Victorian Law, Literature, and Theology* (Cambridge: Cambridge University Press, 2000); Lisa Rodensky, *The Crime in Mind: Criminal Responsibility and the Victorian Novel* (Oxford, Oxford University Press, 2003), and Jonathan Grossman *The Art of Alibi: English Law Courts and the Novel* (Baltimore: Johns Hopkins University Press, 2002).

¹⁴ Even if I confine examples to studies of nineteenth-century British literature, this sample, like the one above, will under-represent the field. Nevertheless, see Hilary Schor, *Dickens and the Daughter of the House* (Cambridge: Cambridge University Press, 1999); Kieran Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (Cambridge: Cambridge University Press, 1999); Dieter Polloczek, *Literature and Legal Discourse: Equity and Ethics from Sterne to Conrad* (Cambridge: Cambridge University Press, 1999); Margot Finn, Michael Lobban and Jenny Bourne-Taylor, ed., *Legitimacy and Illegitimacy in Nineteenth Century Law, Literature and History* (New York: Palgrave, 2010) and my *Law, Literature and the Transmission of Culture in England, 1837-1925* (Aldershot: Ashgate, 2010).

didactic use of punishment, for instance, later aestheticised accounts produced a more heroic figure to thrill the reading audience. Yet as Bertrand shows, the outsized criminal of the broadside represented a relatively small percentage of those actually condemned to die. Instead, the broadside created a generic criminal to distract the crowd from the petty criminals that died with him under the Bloody Code.

Bertrand's inclusion of a range of media ('prose, verse, and illustration', p. 13) moves us outside the novel form and its increasingly private consumption into what can be thought of as Victorian tabloid writing. Noting that the development of 'courtroom narratives' pushed the broadside closer towards criminal news reporting, Bertrand argues that the outlaw who formerly might evoke the crowd's sympathy was replaced by the 'monster' who shocked and stimulated them. Where anonymity, or the lack of particulars, could make the early broadside criminal into an Everyman spectators might identify with, the monstrous criminal was a distinct persona whose exceptionality countered the representativeness by which didacticism worked.

Bertrand introduces readers to various forms of gallows' literature and their differing effects on audience. Against this background, Erica McCrystal's essay on crime fiction, notably the Newgate novel, reconsiders Victorian critiques that their lionised heroes made crime attractive and posed a threat to readers. In contrast, in 'Reformative Sympathy in Nineteenth-Century Crime Fiction', McCrystal shows how writers such as Edward Bulwer-Lytton and Harrison Ainsworth cast their characters as victims of their environment, principally of a flawed penal system that mechanised rather than reformed criminals. Drawing on the eighteenth-century discourse of sympathy and the influence of political reformer William Godwin, McCrystal examines the discursive interplay of infection/affection as ways of characterising criminality *and* of defining a concomitant social responsibility. She suggests that the political agenda was advanced through fiction as opposed to straightforward political treatises or prefatory comments, which Godwin and Bulwer-Lytton had written, 1) precisely because of the heightened affective appeal fiction could make, and 2) because novels would reach a broader audience.

These two essays are about the formation of a criminal subject, the way different genres configure that identity, and about their different audiences. Bertrand's point that the Newgate novels were out of reach of most gallows spectators reminds us that the reformist agenda McCrystal identifies in the novels was directed at a different, middle-class audience better able to pursue institutional reforms, whereas the conservative moralising and admonitory tone of the early broadside condescended to curb the masses. Alongside their depiction of the criminal subject, a version of the poor emerges as well in which susceptibility – both real and projected – is the dominant characteristic. McCrystal shows how even in the 1830s (i.e. before criminality was pathologised in medical discourse), the language of moral contagion was deployed by the critics, to describe the dangers of reading crime fiction, but also by the novelists, to castigate the institutional practices that defined criminality. In this

sense, the essays call readers to consider how the literary text intervenes in legal categories of deviance and marginality and their association with class.

McCrystal's essay connects Bertrand's discussion of criminality and Colleen Willenbring's explicit concern with the category of the poor in terms of their social construction as well as in the requisite social response. In McCrystal's reading of Ainsworth and Bulwer-Lytton, the infection of criminality could be ameliorated through the discourse of affection, or sympathy. For Willenbring, this sympathy could be created through specific narrative conventions that, in the case of Harriet Martineau's *The Town* (1834), sought to evoke affective support for scientific solutions to legal and social problems. In 'Legal Questions and Literary Answers: Poor Law Taxonomies and Realist Narrative Technique in Harriet Martineau's *The Town*', Willenbring shows how Martineau used narrative point of view to voice theories of political economy in a novel written purposely to 'popularize[e] legal reform' (p. 54). This infusion of political theory into the novel highlights an important question about the function of the novel that is particularly apt for analysis of social problem fiction: in what way is an aesthetic response to social problems an effective mode of critique? What does it 'do', and how does Martineau's novel in particular stage opportunities and provide criteria for judgment that would lead to a better administered Poor Law or system of social welfare? For Martineau, political economy had to pass through literature in order to work its reforms, which highlights the importance of the opportunity literature may give readers to see and hear the poor, as well as the officers charged with allocating relief.

By examining these issues, Willenbring's essay takes readers to the beginning of a long history in which the economy and, following Robin West, law were in one sense disentangled from morality and feeling, the better to judge law with.¹⁵ Redefined as social utility in a rationalising legal system, 'morality' became the province of other domains of culture, but the problem of subjectivity, of applying the rules and of deciding what was the social good, remained, as the analysis of Martineau makes clear. Further, to the extent that Willenbring entertains the trope of rescue, or the idea that literature acts as a humanising corrective of legal mechanisation, her analysis reveals an ambivalence at the root of this argument. On the one hand, that is, she shows how Martineau's novels made the economy, not morality, the primary determinant of behaviour so that characters stand in as 'arguments' (p. 39) in a way that might make them seem more typological than well developed, and hence might compromise claims for literature as a clear route to justice. On the other hand, Martineau's self-conscious experimentation with character as a narratological construct, her 'focalization' on different characters and layering of their perspectives, suggests that Martineau practised a form of narrative jurisprudence

¹⁵ See Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993), especially her critique of this supposed distinction in her discussion of the 'critical dilemma' (p. 2).

avant la lettre. In this way, Willenbring offers an historically specific version of the way literature, political science and law circulate through the figure of ‘the poor’ that offsets the abstraction to which discussions of law and literature are sometimes susceptible.

Alison Moulds anchors the issue with her essay on the female witness and the place of melodrama in otherwise realist fiction. ‘The Female Witness and the Melodramatic Mode in Elizabeth Gaskell’s *Mary Barton*’ offers a re-reading of the eponymous heroine’s testimony that promises to restore its significance in critical discussion of the novel by showing how Gaskell drew from the genre of melodrama, relying on her readers’ familiarity with and interest in its tropes, to stage Mary’s performance in a way that merges divisions in the novel’s so-called public and private narratives. Further, by pointing out the way the court could compel women’s speech by calling them to give evidence, Moulds complicates perceptions of its androcentricity and the broader logic of separate spheres, a logic that applied equally to women novelists. Thus, Moulds argues that Mary’s performance as a storyteller parallels Gaskell’s own practices as a first-time novelist as both assume that conceptually puzzling role of ‘public woman’ (p. 68).

Moulds’s carefully contextualised reading of Gaskell’s novel brings together examples of the public appetite for sensation (as evidenced by the press’s coverage of trials) with contemporary accounts of the potential value, as well as the liabilities, that attended women’s appearance in court. Her essay’s attention to the development of the adversarial trial and to the conventions of melodrama is especially illuminating insofar as melodrama conditioned readers’ expectations of women’s stories (those they starred in and those they told) and, she suggests, was responsible for the prominent role the trial itself assumed in the popular imagination, structured as it was on a similar contest of good and evil.

Moulds’s attention to the space of the courtroom complements Bertrand’s focus on the gallows that opens this issue. As Moulds notes, *Mary Barton* is set in the 1830s, shortly after passage of legislation that allowed defence counsel to prisoners, which heightened the adversarial aspect of trial procedure and contributed to the shift from the scaffold to the dock as the symbolic locus of justice. At the same time, references to the persistent, mass appeal of salacious detail confirms the legacy of broadside literature even as it mutates into tabloid journalism and as its dramatic elements, in the shape of melodrama, maintain a place in serious realism. What further unites these essays is their attention to the relationship between the Victorian audience and the specific social function of the literary works they discuss. Whether that purpose is disciplinary, as imagined in the early broadside’s didacticism, or critical as in the Newgate novel’s critique of the penal system, or propagandistic as in Martineau’s use of poor law fiction to popularise legal reform, or discursive and analytical, as in the way Gaskell called on cultural narratives that conditioned the reception of women’s speech, these essays amply testify to Victorian writers’

understanding that their audience was already – and wanted to continue – reading for the law.

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