

What Remains “Real” About the Law and Literature Movement?: A Global Appraisal

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For several decades, the reincarnation of studies labeled Law and Literature has served to enliven, challenge, and threaten traditional legal discourse. Always in implicit competition with the interdiscipline of Law and Economics,¹ Law and Literature has withstood (and been strengthened by at least some) criticism from within and without. Recognized in late century² and beyond³ as one of the primary contributors to North American jurisprudence, Law and Literature continues to inspire from both sides of the aisle a discourse not so much of ironic abhorrence of the law as of an aspiration to just norms of law and an insistence that perennial deviations from such norms are neither inevitable nor inexplicable. In many iterations, and in what follows here, Law and Literature seeks the reunion of the fields, conjuring a 2000-year-old continuum from Cicero⁴ to Cardozo⁵ as a challenge to more obvious and more flawed trajectories, some of which—like the development of mainstream Western religious discourse—have arguably brought about these deviations.⁶

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1. See, e.g. GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* (1995). See also David Ray Papke, *Problems with an Uninvited Guest: Richard A Posner and the Law and Literature Movement* 69 *B.U.L.Rev.* 1067, 1084 (1989) (review of RICHARD POSNER, *LAW AND LITERATURE, A MISUNDERSTOOD RELATION*).
2. See generally MINDA, *supra* note 1, at 164.
3. See generally JEFFREY MILLER, *THE STRUCTURES OF LAW AND LITERATURE* (2013).
4. GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 17 (2000).
5. Benjamin N. Cardozo, *Law and Literature*, reprinted in *SELECTED WRITINGS OF BENJAMIN N. CARDOZO* 339 (Margaret Hall ed., 1947) [hereinafter *SELECTED WRITINGS*].
6. See, e.g., FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (1887); RICHARD H. WEISBERG, *IN PRAISE OF INTRANSIGENCE* (2014). Both of these texts, the second heavily influenced by the first, describe a 2000 year trajectory during which law, narrative, and justice have been dissociated.

This essay first brings the non-specialist reader up to date on the various claims, counterclaims, and provocations connected to American Law and Literature scholarship. It reveals that the field has burst through to dynamic invocations in many other countries. Finally, it restates what is always already there in the modern version of the interdiscipline: the rigorous assessment through stories of the way law operates, of how it is interpreted by its major speakers, and of how—above all—its minor, major, and catastrophic errors can be traced through the unique medium of stories to idiosyncratic deviations in the words and deeds of authoritative lawyers and judges. The path to justice always is readily available in these stories; it is the identifiable reason for its denial that helps the practitioner understand and correct why law so often goes terribly wrong. The claim is that only fictional narratives, which move through time together with characters whose actions and words are revealed, permit us to understand dynamically the jurisprudence of our era.

From the mid-1990s to the present, scholars have offered descriptive accounts of the Law and Literature movement, both in the United States and abroad. As Peter Brooks has recently put it, they have analyzed closely “not quite what you would call a school but nonetheless a set of perspectives, an agenda for research, an aspiration to cross-disciplinary understanding.”⁷ My favorite assessments range chronologically from Gary Minda’s *Postmodern Legal Movements*,⁸ to Elizabeth V. Gemmette’s mid-’90s survey of almost 100 Law and Literature courses offered in the U.S. and Canada,⁹ to Sarat, Frank and Anderson’s recent set of essays in *Teaching Law and Literature*,¹⁰ to Brooks’ *The Humanities and Public Life*.¹¹ Newcomers to the field should also be aware of its ascendancy in such places as the U.K.,¹² the continent of Europe,¹³ Australia,¹⁴ the Mideast,¹⁵ and Latin America.¹⁶

7. Peter Brooks, *Law, Literature: Where Are We?*, in *TEACHING LAW AND LITERATURE* 61 (Austin Sarat, Cathrine O. Frank & Matthew Anderson eds., 2011) [hereinafter *TEACHING*].
8. MINDA, *supra* note 1, at 149-166.
9. Elizabeth V. Gemmette, *Law and Literature: Joining the Class Action*, 29 *VAL. U. L. REV.* 665 (1995).
10. *TEACHING*, *supra* note 7.
11. PETER BROOKS, *THE HUMANITIES AND PUBLIC LIFE* (2014).
12. See MICHAEL FREEMAN & ANDREW LEWIS, *LAW AND LITERATURE* (1999).
13. See, e.g., Christian Biet, *L’Empire du Droit, les Jeux de la Littérature*, *EUROPE REVUE LITTERAIRE MENSUELLE*, Apr. 2002, at 7; *La Démocratie, Peut-Elle Se Passer de Fictions?*, *RAISONS POLITIQUES*, no. 3, 2007, at 1-129; HERMANN WEBER, *RECHT UND JURISTEN IM SPIEGEL VON LITERATUR UND KUNST* (2014); HELLE PORS DAM & THOMAS ELHOLM, *DIALOGUES ON JUSTICE* (2012).
14. See JOHN FROW, *GENRE* (2006).
15. See MOSHE SIMON SHOSHAN, *STORIES OF THE LAW* (2012); Nili Cohen, *The Betrayed (?) Wills of Kafka and Brod*, 27 *L. & LITERATURE* 1 (2015).
16. See Vera Karam de Chueiri, *Direito e Literatura*, in *DICIONÁRIO DE FILOSOFIA DO DIREITO*, 233-35 (Vicente de Paulo Barretto ed., 2006).

Gary Minda’s late-century assessment of the field remains authoritative; in it he locates the jurisprudential move still thought by many to be signally important:

Literary jurisprudence uses the great books of literature as a medium for discovering insight about meaning, use of rhetoric, and the values of the law . . . *Narrative jurisprudence* relies on the analyst to develop the text of a story for appraising the narrative content of the official stories told by law.¹⁷

Minda’s relatively early account responds *avant la lettre* to three developments in the field that have followed. First, it fortells that any schematic subdivision of Law and Literature (say into law/in, law/as, or stylistics) would detract from its theoretical and practical contributions. Narrative jurisprudence conflates these subdivisions, necessarily serving all equally well, because the law *in* literature already involves the central hermeneutic challenges artificially labeled the law *as* literature and at the same time emphasizes *style*,¹⁸—an awareness that style and substance are linked.¹⁹ It unpacks the importance of writing not as ornament but as central to the determination of a text’s value, its rightness or wrongness. Literature was not being mined for goodness; it was the locus as well for the most powerful kinds of badness, including especially interpretive and stylistic cruelty, a textual resentment replete with “organic mendacity” and pointing to a more pervasive illness in public and especially legal discourse. Thus Minda applauds Robin West’s “imaginative interpretation of Kafka’s *The Trial* . . . to expose the limitations in the mindset of Richard Posner’s *Economic Analysis of Law*”²⁰ while at the same time Minda perceives the formal twinning of legal narrative and certain literary genres. The very idea that stories often replicate law as a matter of form has become in the twenty-first century a kind of genre criticism within Law and Literature, claiming as does Honni van Rijswijk in 2015 that “[g]enres not only construct ‘schematic worlds’ with their own ‘definitions of space, time, moral ethos and players’ but can reveal something of how worlds—including legal worlds—are created and maintained.”²¹ And Minda also was among the first to see literature and law as linked “performative enterprises,”²² narratives that (for better or worse) have “operative significance in bringing about specific kinds of actions,” thus already adding to the usual triad a scholarly and audience-related component

17. MINDA, *supra* note 1, at 155.

18. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE* 255-95 (1998); Linda Berger, *A Revised View of the Judicial Hunch*, 10 *LEGAL COMM. & RHETORIC: JALWD* 1 (2013); Linda Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 48 *J. LEGAL EDUC.* 155 (1990).

19. Benjamin Nathan Cardozo, *Law and Literature*, in *SELECTED WRITINGS*, *supra* note 4, at 340.

20. MINDA, *supra* note 1 at 159.

21. Honni van Rijswijk, *Encountering Law’s Harm Through Literary Critique: An Anti-Elegy of Land and Sovereignty*, 27 *L. & LITERATURE* 237, 239 (2015).

22. MINDA, *supra* note 1, at 63.

of Law and Literature that had been proposed by Pierre Schlag, among others,²³ and that finds its recent concomitant in widely publicized debates about famous trial scenes,²⁴ or actual jury trials or appellate arguments before sitting judges whose task it is to “re-try” characters such as Shylock.²⁵

Minda downplayed carving Law and Literature into handy schematic pieces. His early account constitutes an answer to subsequent chronological schemas such as Julie Stone Peters’,²⁶ which subdivide the field decade by decade (“legal humanism” in the 1970s; “hermeneutics” in the ’80s; “narrative”—through feminist theory and critical race theory—in the ’90s). He also declined, correctly, to find that law makes powerful differences while stories are lovely, open-ended and powerless.²⁷ Reactions of audiences over time indicate that, for better or worse, the *New Testament* and *Hamlet* have influenced behavior more than have *Brown v. Board* or *Roe v. Wade*.

Julie Stone Peters’ more substantive claim, inspiring responses from Brooks and me, to which she in turn responded, attempted to find incurable anomalies in the implicit goal of reconstituting a Ciceronian unity between law and literature. She found instead “each discipline’s splitting and transfer of disciplinary desire: to project the humanist real onto literature [as the law professors were doing] was implicitly to accept the law as a system of utilitarian calculus; to project the political real onto law [as she claims literary folks were doing] was implicitly to acknowledge the inconsequence of the aesthetic.”²⁸ Thus, she argued, each partner’s desire for the “real” within the other only reinforced, by confessing, its side’s traditional unidisciplinary essence: The law was powerful but formalistically blind, while literature was beautiful but powerless.²⁹

Julie Stone Peters’ critique from the literary side (though she is also a lawyer) found echoes from law professors such as Robert Weisberg and Gyora Binder, whom she cites, but she avoids their absurd argument that literary jurisprudence is “sentimental,”³⁰ a claim belied by the rigorous value demolition instigated by close readings of stories that proffer Nietzschean-level correctives otherwise unavailable in mainstream legal scholarship. The argument Peters makes, that each side’s extradisciplinary desire for a “real” to

23. *Id.* at 283, n.4.

24. Tom Goldstein, *Once Again Billy Budd is Standing Trial*, N.Y. TIMES, June 10, 1988, at B9.

25. Elizabeth Widdicombe, *The Bench: Re-trial of Shylock*, NEW YORKER, Dec. 22, 2008, at 4. *See also*, Rachel Donadio, *Ruth Bader Ginsburg Presides Over Shylock’s Appeal*, N.Y. TIMES, July 27, 2016.

26. Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 PUBLS. OF MOD. LANGUAGE ASSOC. 442 (2005), reprinted in TEACHING, *supra* note 7, at 71.

27. MINDA, *supra* note 1, at 158-9. *See also* for this proposition, DANIEL KORNSTEIN, *KILL ALL THE LAWYERS*, ch. 16 (1994). *See also* Weisberg, *INTRANSIGENCE*, *supra* n. 6, ch. 5.

28. Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion* in TEACHING 80, *supra* note 7.

29. *Id.*

30. BINDER & WEISBERG, *supra* note 4, at 17-18.

be found in the other paradoxically undermines the project of reunification through Cicero or Cardozo, is rearticulated more simply in the quite recent account of Paul Kahn. He describes his experiences as a humanist set adrift from the Yale Law School’s social scientific mainstream. Kahn’s look at his Yale colleagues exposes the fiercely defended unidisciplinary sense of what Peters called the “real” and shows it to be far more phantasmagorical than any implicit longing in Law and Literature studies:

Of course I am not the only humanist working in the building [Kahn says of the Yale Law School], but all of us suffer from the sense that we are merely ornamental: We are tolerated in order to make the school more attractive to the rest of the university. My colleagues frequently ask me, “What is the evidence to support your claims about the nature of law or the legal imagination?” They expect me to cite polling data or perhaps to design social psychology experiments. How else can we “know” what people think? I respond that there is no reason to prefer a poll to a film, and that we learn what people think by looking at the products of their imaginations—books, poetry, films, political rhetoric, judicial opinions, performances, and practices.³¹

Could it be that traditional legal thought in 2016, more than narrative and literary jurisprudence, reveals Peters’ “projected desires in search of a phantom”?³² The desire is to maintain law as an autonomous discipline, and to avoid reducing law professors’ salaries when it comes out that law and literature are the same; and the phantom is whatever methodology—so long as it is “scientific”—most distances law from its natural literary twin. In this way, history unhappily repeats itself. When Charles Reich³³ and Robert Cover³⁴ began discussing *Billy Budd, Sailor*³⁵ as text and method, their Yale colleague Arthur Leff declared himself terrified. What, he asked, was happening to the “correct answer available through doctrine, neutrality, and formalism?”³⁶ He continued: “The critical questions were henceforth no longer to be those of systematic consistency but of existential operations Terrifying . . . because they required law professors to become experts on good and evil.”³⁷ The memory of Reich and Cover has been “Yale-ified” by expunging it of all its provocations to law and by creating only isolated moments and spaces for thinkers like Paul Kahn.

31. BROOKS, *supra* note 11, at 116.

32. Julie Stone Peters, *Reply* [to Weisberg], 121 PUBLS OF MOD. LANG. ASSOC. 548 (2006).

33. MINDA, *supra* note 1, at 69-70.

34. *Id.* at 77, 151.

35. HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Simon & Schuster Paperback Ser. 2009) (1924).

36. MINDA, *supra* note 1, at 75.

37. *Id.* at 78.

So which real is real? In a brief two-part conclusion, I need first to reemphasize that Law and Literature, under that rubric as opposed to alternatives such as Law and Humanities or Law and Culture, is alive and well at home and abroad. As Robert Weisberg has demonstrated, “other pairings just don’t seem to generate the same productive friction.”³⁸ And recent scholars have opined, with Robin West, that:

. . . the law and culture movement now seems more an outgrowth of the law and literature movement than a critical alternative to it To the degree that culture encompasses literature, this development is obviously an overdue and welcome expansion of the law and literature movement. [However,] [o]ne stark difference between the movements cuts the other way. One of the central scholarly and pedagogical projects of the law and literature movement—to read literature for its substantive contribution to our understanding of law—has no real analogue in cultural legal studies, at least to date.³⁹

The force of the interrelation thus specifically reiterated, I turn to my second and more important claim: the merger of law and literature, as Minda first argued, brings forth a jurisprudence that is as methodologically incomparable as it is substantively appealing.

We are still a long way from figuring out how our legal institutions so often go so badly wrong. Literary and narrative jurisprudence provide insights that are unique, which means (redundantly) that they are unavailable in more traditional jurisprudential approaches. This methodology goes beyond, although it values tremendously, the close reading of legal texts. Close readings of judicial texts have always been part of Law and Literature studies.⁴⁰ These insist on narrative not as ornament but as weapon. Legal authorities reach good results when they organize words soundly, and they err (sometimes badly) when they bring words and structure to the service of unjust outcomes.⁴¹ But when these close readings are juxtaposed to the wisdom gained from stories about law, literary jurisprudence takes on its exceptional quality. And its key insight is the revelation that neither judicial error nor infinite interpretive maneuverability is endemic to law, at least law as soundly practiced. Neither close scrutiny of legal texts nor close readings of stories about law demonstrate the inevitability of unjust legal outcomes. Within the stories of the law, a pathway to a sound and fair outcome *always* exists. To discover it, you just have to be careful and persistent, using your ordinary lawyer-like skills.

38. Austin Sarat, Cathrine O. Frank & Matthew Anderson, *Introduction*, in *TEACHING*, *supra* note 7, at 4 (introducing Robert Weisberg’s piece in the book).

39. Robin West, *Literature, Culture, and Law at Duke University*, in *TEACHING*, *supra* note 7, at 98, 99 .

40. *See generally* JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

41. RICHARD H. WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992).

Literary jurisprudence thus denies some inevitable cycle of blindness and cruelty, of indeterminacy and interpretive flexibility, which compel a legal system to persecute, misunderstand, and even destroy the outsider and the powerless. Of course, in writers such as Dostoyevsky,⁴² Camus,⁴³ Bernard Malamud,⁴⁴ Friedrich Dürrenmatt,⁴⁵ William Faulkner,⁴⁶ or Katherine Anne Porter,⁴⁷ to name just a few, judicial error happens almost constantly.⁴⁸ But literary jurisprudence recognizes and emphasizes that these story-tellers are careful to demarcate a potential road to soundness, often embodied in a lawyer who (tragically) winds up being defeated. This injustice, however, is not systemic; it happens because of negligent, reckless, or willful missteps taken by other judicial figures in the story. As usually cannot be done in an actual investigation, the reader of such narratives moves back and forth through its pages to detect with complete precision the fateful detours from accuracy, the internal flaws that lead some characters to distort the law, and the concomitant attack by such legalistic wrong-doers on those who would stand in their way.

Narrative jurisprudence avoids the total broadside against law of other critical movements. Something *happens* when institutions speak and write wrongly, something that can be *traced* and *grasped*. Stories, because they move through time within a verbal medium—exactly as legal resolutions do!—uniquely and clinically identify the sources of interpretive distortion and the marred narratives that follow. As a powerful form of forensic representation, they offer the reader a look at reality that is most closely analogous perhaps to a video, which can be run countless times just by turning back the story’s pages to its relevant narrative moments. This process within the reader of letting her “fingers do the walking” to-and-fro within the story reveals that error is not a norm but rather a byproduct of demonstrable malignancies within the interpreter/speaker. Some of these authoritative deviations are of such long standing that, like the Yale Law School threatened by literary jurisprudence, we tend to move back to them as though they were normal.⁴⁹

Law and Literature seeks, though the quest may take longer than a few academic cycles, to revivify and restore the very idea of narrative soundness.

42. FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* (Sidney Monas trans., Signet Classics 1980) (1866); FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* (Constance Garnet trans., Barnes & Noble Pub. 1995) (1881).
43. ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., Vintage Int’l 1988) (1942).
44. BERNARD MALAMUD, *THE FIXER* (1966).
45. FRIEDRICH DÜRRENMATT, *DIE PANNE* [THE BLOW-OUT] or [A DANGEROUS GAME] (1959).
46. WILLIAM FAULKNER, *INTRUDER IN THE DUST* (Vintage Books 1991) (1948).
47. Katherine Anne Porter, *Noon Wine*, in *THE COLLECTED STORIES OF KATHERINE ANNE PORTER* (1979).
48. WOLFGANG HOLDHEIM, *DER JUSTIZIRRTUM ALS LITERARISCHE PROBLEMATIK* (1968). An excellent partial translation is by Marguerite D. Allen, *Judicial Error as a Literary Theme* (1969), *Defining the Theme*, 7 *CARDOZO STUD. IN L. AND LITERATURE* 117 (1995).
49. Richard H. Weisberg, *Law and Literature in Dialogue, A Response to Peters*, 121 *PUBS. OF MOD. LANG. ASSOC. AM* 546 (2006).