

# Law, Literature, and History: The Love Triangle

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## INTRODUCTION

A decade ago, at the end of her characteristically astute provocation of law and literature scholars in “Law, Literature, and the Vanishing Real,” Julie Peters suggested moving beyond the law/literature dichotomy into both “law, culture, and the humanities” and global “disciplinary tourism.”<sup>1</sup> By silently glossing over “literature” in favor of the broader terms “culture” or the “humanities,” new formulations of the area of study might, she indicated, help to dispel the “interdisciplinary illusion” fueling the opposition between and relation of law and literature, dispensing with the notion shared by scholars of both law and literature that the “real” is located just over the methodological divide between the fields.<sup>2</sup> Peters’ essay valuably rejected the binary that appears in far too many versions of law and literature scholarship. Its aspiration to put aside disciplinary boundaries among sectors of the humanities in studying “law, culture, and the humanities” or

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1. Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, in *TEACHING LAW AND LITERATURE* 71, 83–84 (Austin Sarat et al. eds., 2011). The essay was first published in “the changing profession” section of *PMLA*. Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 *PMLA* 442, 451 (2005).

2. Peters, *supra* note 1, at 71–73.

“law and the humanities” *tout court* has not, however, proved entirely feasible, nor is it necessarily desirable.

As those familiar with “law and society” know, the turn toward a broader category—like culture, or the humanities, or society—may not remain un vexed, as questions arise respecting the unity of the umbrella term and its framing in opposition to law.<sup>3</sup> Moreover, from within the parameters of law, and particularly those of legal pedagogy, “law and the humanities” designates not precisely a decomposition of the boundaries between law and its outside, but a gesture toward one form of law’s outside, the humanistic, as opposed generally to the social sciences.<sup>4</sup> Despite the proliferation of the “law and” fields, many—including law and the humanities—still appear from the vantage point of legal pedagogy as a superficial carapace that can be shed when financial exigencies press law schools to cut costs and reduce tuition.

This Article aims to demonstrate the centrality of the humanities to the core of law school pedagogy today.<sup>5</sup> At the same time, by focusing on two areas within the humanities—literature and history—it tries to show how disciplines still matter, both as engines and impediments. Examining the shifting passions that bind law, literature, and history to each other, it foregrounds the dynamic quality of disciplinary relations as the attraction of fields for each other waxes and wanes. This dynamism itself advances the possibilities for new births of knowledge. Although unstable and of unknown fate, the love triangle of law, literature, and history continues to spawn fertile offspring.

The notion of the love triangle has captured the imagination of many writers, including Simone de Beauvoir, whose own experiences furnished material for her

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3. For a brief account of the history of the law and society movement and how it became an umbrella category for a variety of disparate kinds of scholarship, see Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 1 (Austin Sarat ed., 2004). Almost twenty years earlier, Lawrence Friedman described the impetus behind the movement and the approaches it comprehended in *The Law and Society Movement*. Lawrence M. Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763, 764 (1986). Work emerging from earlier “Law As . . .” symposia at the University of California, Irvine School of Law, has foregrounded the problems with the “law and” formulation. As Chris Tomlins and John Comaroff explained, the movement from “law and . . .” to “law as . . .” “suggests that explanations of law are not to be found, either necessarily or sufficiently, in its relation to other things.” Christopher Tomlins & John Comaroff, “*Law As . . .*”: *Theory and Practice in Legal History*, 1 *U.C. IRVINE L. REV.* 1039, 1041 (2011). Furthermore, “‘law as . . .’ dwells . . . on the conditions of possibility for a critical knowledge of the here-and-now . . .” *Id.* at 1044.

4. There are, of course, a number of disciplines—such as History and Anthropology—that could be considered either part of the humanities or of the social sciences, taking on different valences when identified with one or the other general rubric.

5. The Article in this respect agrees with Sherman Clark’s claim that it is not “a question of ‘balancing’ the professional and personal elements, as perhaps by mixing in some ‘law and \_\_\_’ or theoretical classes, along with practical and doctrinal classes. Indeed, . . . the dichotomy between practical training and the development of deeper capacities is a false one.” Sherman Clark, *Law School As Liberal Education*, 63 *J. LEGAL EDUC.* 235, 236 (2013).

first novel, *She Came to Stay* (*L'Invitée*).<sup>6</sup> The heroine of the 1943 work, Françoise, resembles de Beauvoir in a number of respects, including in her relationship with Pierre Labrousse, a thinly veiled version of Jean-Paul Sartre. Intimately involved with each other since their early twenties, Sartre and de Beauvoir had agreed to renounce jealousy and act freely on their desires for others. One of the objects of these desires was Olga Kosakiewicz, a young woman of Russian parentage whom they supported so that she could live alongside them in Rouen and then Paris. Unsuccessful in seducing Olga, Sartre moved on to her younger sister, Wanda, with whom he proceeded to have an affair of several years. The character of Xavière in *She Came to Stay* (a work dedicated to Olga) collects attributes of both sisters. Despite the mutual involvement of the various protagonists, Sartre and de Beauvoir—as well as their characters—found that “the most satisfying form of communication was tête-à-tête. If Sartre was eating with Wanda at the Coupole, or if Beauvoir was seeing Olga at the Dôme, there was no question of the other’s spontaneously joining them.”<sup>7</sup>

De Beauvoir’s reduction of Olga and Wanda to one character in the novel suggests the extent to which the idea of the love triangle—as opposed to a larger and messier mélange—proves imaginatively productive. Although isolating law, literature, and history may similarly elide characters affiliated with them, the stylization brings to the fore more clearly both the generative and competitive aspects of the relations among the three. On a broader level, the figure of the love triangle insists that interdisciplinarity need not be conceived as either an exclusive connection between two or as an entirely open multiplicity; instead, intermediate arrangements may spur new developments.

Part I of this Article traces the genealogy of the relationships among law, literature, and history so far. First breaking down each component pair, it concludes with two tensions that have characterized the interactions between legal history and law and literature, those of authority and normativity. Part II then focuses on a pedagogical experiment I designed to put into practice the idea that interdisciplinary work might be prompted by delving further into the intricacies of one particular discipline, that of law. In Part III, the Article returns to considering two possible ways to reinvigorate the relationship among law, literature, and history in the classroom and on the page. Throughout, discussions of scholarship are interwoven with those of pedagogy. In this way, the Article aims not only to address the small cadre of scholars working on law, literature, and history, but also to resound more broadly in the classroom, whether in the experience of law students, liberal arts undergraduates, or graduate students in the humanities.

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6. SIMONE DE BEAUVOIR, *SHE CAME TO STAY* 210–11 (Y. Moyses & R. Senhouser trans., The World Publishing Co. 1954) (1943).

7. HAZEL ROWLEY, *TÊTE-À-TÊTE: SIMONE DE BEAUVOIR & JEAN-PAUL SARTRE* 73 (2005). For a comprehensive discussion of the biographical story and its relation to the fictional ones furnished in *She Came to Stay* and other works penned by those in the Sartre-de Beauvoir circle, see *id.* at 1–146.

## I. BREAKING DOWN THE AFFAIRS

For a while Françoise gazed with a lover's eyes at this woman whom Pierre loved.

"On the contrary, everything could be so easy," she said. "A closely united couple is something beautiful enough, but how much more wonderful are three persons who love each other with all their being." She waited a while. Now the moment had come for her, too, to commit herself and to take her risks. "Because, after all, it is certainly a kind of love that exists between you and me."

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"You see, if there is also love between you and Labrousse, what a beautiful well-balanced trio that makes," she said. "It's not a recognized way of living, but I don't think it will be too difficult for us. Don't you think so, too?"<sup>8</sup>

For any love triangle, a story can be told about how each pair within it came to know each other, whether through hushed whispers overheard from afar, a dramatic confrontation, or a chance encounter and exchange of glances. Often one of the three is a latecomer to the relationship between two, intervening to destabilize an established dynamic; how enduring the effects of the intervention will be can remain uncertain for quite some time. Law, literature, and history are no exception. As J.G.A. Pocock famously demonstrated in *The Ancient Constitution and the Feudal Law*, the origins of modern historiography are themselves almost coextensive with the beginnings of modern Anglo-American law in seventeenth-century England.<sup>9</sup> Despite this venerable heritage, legal history was not taught regularly in separate law school courses until after World War I, when it became part of the curricula of some elite schools; in the 1960s, law schools finally embraced legal history more broadly.<sup>10</sup>

Law and literature as an area of study boasts an even more recent history, often dated back to the 1970s with James Boyd White's *The Legal Imagination*, which countered the emerging field of law and economics with a focus on the humanistic backdrop of law.<sup>11</sup> Of course, isolated works like Sir Dunbar Plunket Barton's 1929 *Links Between Shakespeare and the Law*, tracing legal themes and allusions, or Benjamin Cardozo's essay *Law and Literature*, examining the rhetoric of judicial opinions,

8. DE BEAUVOIR, *supra* note 6, at 210–11.

9. J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 31 (1987).

10. See Joan Sidney Howland, *A History of Legal History Courses Offered in American Law Schools*, 53 AM. J. LEGAL HIST. 363, 375 (2013).

11. JAMES B. WHITE, *THE LEGAL IMAGINATION*, at xix (1973). As Gary Minda writes, discussing both White's *Legal Imagination* and Richard Weisberg's *Failure of the Word*, "The jurisprudential zeitgeist for two of the most important intellectual movements in law—law and literature and law and economics—can . . . be found arising in the intellectual ferment at the University of Chicago in the 1970s and 1980s. It was a time when the winds of change were blowing across the intellectual landscape at the University of Chicago and when new ideas about how to best approach the study of law came into existence."

Gary Minda, *Reflections*, 26 CARDOZO L. REV. 2397, 2398 (2005) (citation omitted).

existed before that.<sup>12</sup> None of these interventions attempted to engage literary studies as a disciplinary matter, unlike the scholarship that has proliferated since the 1970s. During this more recent period, the field of literary studies has attempted to seduce law away from history, or, perhaps more accurately, to seduce law and history together. In the process, it has frequently suffered rebuffs at the hands of one or the other. It remains to be seen whether the love triangle will become a true ménage à trois.

The early story of what has come to be known as the law and literature enterprise has been told, and told well. In brief, as both Jane Baron and Julie Peters have elaborated, humanist, rhetorical, and narrative strands predominated at least through the movement's twenty-fifth birthday.<sup>13</sup> If the "humanist" vision of law and literature emphasized "its commitment to the human as an ethical corrective to the scientific and technocratic visions of law that had prevailed in most of the twentieth century," the "hermeneutic" instead deployed interpretive techniques derived from literary theory in legal contexts.<sup>14</sup> Beginning in the late 1980s, feminism and critical race studies focused attention instead on the personal narratives of those not previously considered the proper subjects of law and the transformative potential of those narratives.<sup>15</sup>

This is where, however, many accounts of law and literature stop, either positing the death of the enterprise, insisting upon its survival, or presenting new possible paths.<sup>16</sup> Within the past several decades, two developments have occurred, both of which opened new avenues for law and literature. Following the 1998 translation of Giorgio Agamben's *Homo Sacer* into English and the rise of interest in sovereignty and biopolitics within literature departments, political theory attracted adherents and generated concern with the connection between law and politics.<sup>17</sup> Even Agamben's own *State of Exception*, the sequel to *Homo Sacer*, addresses the provisions—or lack thereof—for states of emergency within various constitutional

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12. DUNBAR PLUNKET BARTON, LINKS BETWEEN SHAKESPEARE AND THE LAW 3–4 (1929); BENJAMIN CARDOZO, *Law and Literature*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 3 (1931).

13. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1063–66 (1999); Peters, *supra* note 1, at 72–76.

14. Peters, *supra* note 1, at 73–75.

15. *Id.* at 76.

16. Peter Goodrich addresses claims of the death of law and literature in "Screening Law." See generally Peter Goodrich, *Screening Law*, 21 LAW & LITERATURE 1 (2009). In that piece, Goodrich embraces new or renewed directions, lamenting the narrowness of "literature" and positing that "literature . . . was never an adequate or full description of the political spectacle of legality," which instead "depends upon mixed media." *Id.* at 3. In his aptly named essay, "Law and Literature As Survivor," Richard Weisberg alludes to the possibility of "a cyclical return to the unity of law and literature." Richard H. Weisberg, *Law and Literature As Survivor*, in TEACHING LAW AND LITERATURE, *supra* note 1, at 40.

17. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

regimes.<sup>18</sup> Interest in sovereignty has prompted examination of legal and political theory by those working on contemporary globalization as well as on early modern monarchies.<sup>19</sup> The implementation of human rights and the concomitant rise of a notion of a responsibility to protect within international law have likewise furnished subjects for both literary and legal scholarship.<sup>20</sup>

Even before this turn to political theory, the arrival of New Historicism in literary studies brought with it a host of materials that might previously have been considered less relevant to scholarly endeavors. Early versions of New Historicism often focused on a particular period and tied analyses of literary with nonliterary works from the same period; the texts considered alongside classics of the literary canon included accounts of Early Modern colonial encounters and reports by Victorian reformers.<sup>21</sup>

Despite emerging in opposition to formalism,<sup>22</sup> the New Historicists' approach was text based—too text based for some, who argued that the method “amounts to a large claim about society or social relations based on some very close readings of tropes and figures in a number of parallel texts, say a novel, a medical treatise, a classic of political economy, and maybe some popular journalism” or that it simply exported techniques of reading from literary to other objects, which “can mean that the social text turns out to be read as [scholars] have been trained to read a literary text, that is, in traditional formalist terms.”<sup>23</sup> Many of the most prominent

18. GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., Univ. of Chi. Press 2005) (2003).

19. The essay collection *THE SCAFFOLD OF SOVEREIGNTY: A GLOBAL INTERDISCIPLINARY APPROACH* (Stefanos Geroulanos et al. eds., forthcoming 2015), includes precisely such a range of work. Philip Lorenz's recent book, *THE TEARS OF SOVEREIGNTY: PERSPECTIVES OF POWER IN RENAISSANCE DRAMA* (2013), relies on Agamben but focuses primarily on the Early Modern period.

20. For some representative books in the area of human rights, see ELIZABETH S. ANKER, *FICTIONS OF DIGNITY: EMBODYING HUMAN RIGHTS IN WORLD LITERATURE* (2012); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011); and JOSEPH R. SLAUGHTER, *HUMAN RIGHTS, INC.: THE WORLD NOVEL, NARRATIVE FORM, AND INTERNATIONAL LAW* (2007).

21. For example, Thomas Harriot's *A Brief and True Report of the New Found Land of Virginia* (1588) plays a central role in Stephen Greenblatt's classic essay *Invisible Bullets*, see Stephen Greenblatt, *Invisible Bullets: Renaissance Authority and Its Subversion, Henry IV and Henry V*, in *POLITICAL SHAKESPEARE: ESSAYS IN CULTURAL MATERIALISM* 18 (Jonathan Dollimore & Alan Sinfield eds., 2d ed. 1994), while Mary Poovey analyzes Edwin Chadwick's 1842 *Report on the Sanitary Condition of the Labouring Population of Great Britain* at length, see MARY POOVEY, *MAKING A SOCIAL BODY: BRITISH CULTURAL FORMATION, 1830–1864*, at 115–31 (1995).

22. See STEPHEN J. GREENBLATT, *LEARNING TO CURSE: ESSAYS IN EARLY MODERN CULTURE* 1–4 (1990).

23. Regenia Gagnier, *Methodology and New Historicism*, 4 J. VICTORIAN CULTURE 116, 119 (1999); Carolyn Porter, *History and Literature: “After the New Historicism,”* 21 NEW LITERARY HIST. 253, 257 (1990). Peter Hohendahl wrote relatedly that “the New History is at home in American literature departments rather than in history departments for fairly obvious reasons: the problem that the New Historians address is that of inter- and contextualization of literary texts—a question that is only of marginal interest to professional historians, especially social historians.” Peter Uwe Hohendahl, *A Return to History? The New Historicism and Its Agenda*, 55 NEW GERMAN CRITIQUE, Winter 1992, at 87, 89–90.

works of the movement therefore put aside the question of whether a text had emerged out of some systematic framework—such as the legal—that shaped its mode of expression and even its meaning.<sup>24</sup>

In the effort to distinguish itself from an older historicism and to avoid teleology, New Historicism also embraced the anecdotal. As Stephen Greenblatt wrote in his introduction to one of the classic works of the movement, *Learning to Curse: Essays in Early Modern Culture*, “What is crucial for me . . . is the insistence on contingency, the sense if not of a break then at least of a swerve in the ordinary and well-understood succession of events. The historical anecdote functions less as explanatory illustration than as disturbance, that which requires explanation, contextualization, interpretation.”<sup>25</sup> Instead of focusing on the question of how a phrase moved from one sphere to another, New Historicists concentrated on the narrative that a present observer might construct based on its occurrence in various domains. As Peter Hohendahl glossed it, “the agenda of the New Historians [is] a hermeneutic project, in which the critic is seen as locally situated, without absolute access to the truth, but at the same time motivated by his or her social and political concerns.”<sup>26</sup>

Recent work in law and literature influenced by New Historicism has diverged from its forebears in several ways. It is characterized by a return to considerations of form—not only form as traditionally conceived within literary study, but legal form as well. These legal forms comprehend both the kind of legal work most accessible to literary scholars—the judicial opinion—and modes of procedure that call upon the more arcane knowledge of the legal scholar. The very title of Bradin Cormack’s *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law* indicates its interest in connecting the particularity of the legal mode of asserting authority—jurisdiction—with the literary.<sup>27</sup> While Max Brzezinski and others have critiqued the new literary formalism for focusing on form *instead of* content,<sup>28</sup> scholars operating within the encounter among law, literature, and history

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24. Brook Thomas’s work has always furnished an exception to this general tendency. Even in his earliest book on law and literature, *Cross-Examinations of Law and Literature*, Thomas considered law as an institution producing effects across culture rather than as a set of texts among others. See generally BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE* (1987).

25. GREENBLATT, *supra* note 22, at 5.

26. Hohendahl, *supra* note 23, at 99.

27. BRADIN CORMACK, *A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF THE COMMON LAW, 1509–1625* (2007).

28. Categorizing versions of the “new formalism,” Marjorie Levinson has divided them into “activist formalism,” which “want[s] to restore to today’s reductive reinscription of historical reading its original focus on form” and “normative formalism,” identified with “those who campaign to bring back a sharp demarcation between history and art, discourse and literature, with form . . . the prerogative of art.” Marjorie Levinson, *What Is New Formalism?*, 122 *PMLA* 558, 559 (2007). As understood in Levinson’s essay, “New formalist work concentrates in the areas of early modern and Romantic period study.” *Id.* at 562. Turning to critics of modernism, Max Brzezinski has identified and lamented a third variety of formalism, that which “presents what Levinson calls ‘normative formalism’ as itself the only means for ‘activist criticism’ and attempts to square the circle, to present the return to modernist norms

have tended to demonstrate the constitutive nature of the formal aspects of both law and literature, showing how literary and legal authority both find themselves established through metaphor, precedent, and jurisdiction. This turn has, in effect, reconciled the dichotomy Robert Weisberg identified in speaking of the division of law and literature into “law as literature” and “law and literature.”<sup>29</sup> If one takes seriously the formal aspects of the materials involved, the same project can both read law as literature and see law in literary form.

Scholarship in this mode also tends to focus on a particular theme that crosses over the legal-literary divide and to explore the development of the topic in question through the mutual operations of literature and law. In doing so, it raises questions about the mechanisms by which concepts circulate among sectors of society within a particular period. Luke Wilson’s *Theaters of Intention: Drama and the Law in Early Modern England* or Oliver Arnold’s *The Third Citizen: Shakespeare’s Theater and the Early Modern House of Commons* both resonate with this approach.<sup>30</sup> Finally, the tone of these works tends to bear a greater resemblance to that of historians’ writings, generally framed without immediate reference to the situation of the critic herself.

While this type of law and literature scholarship—increasingly connected with close historical analysis or delving into law’s relation with political theory—has created a significant mark in the academy, most of its practitioners have resided institutionally outside law schools.<sup>31</sup> Hence many law and literature courses taught to law students fall within older paradigms, like that embraced by Richard Posner’s popular textbook, *Law and Literature*, now in its third edition.<sup>32</sup>

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as itself a form of political activism.” Max Brezinski, *The New Modernist Studies: What’s Left of Political Formalism?*, 76 MINN. REV. 109, 117 (2011). Taking as his prime example Martin Puchner’s *Poetry of the Revolution: Marx, Manifestos, and the Avant-Garde*, Brezinski claims that Puchner’s book evacuates Marxism of its political urgency by focusing on the effects of the manifesto form. *Id.* at 114–15. Putting to one side the accuracy of this account of Puchner’s work, it could not be extended to recent “new formalist” scholarship in law and literature, which presents a variety of complicated dialectical relations between form and content along the lines that Brezinski appears to be advocating. *Id.* at 115.

29. See Robert Weisberg, *Law, Literature, and Cultural Unity: Between Celebration and Lament*, in TEACHING LAW AND LITERATURE, *supra* note 1, at 86, 88.

30. See generally OLIVER ARNOLD, *THE THIRD CITIZEN: SHAKESPEARE’S THEATER AND THE EARLY MODERN HOUSE OF COMMONS* (2007) (examining the political theories implicit in several of Shakespeare’s plays in relation to conceptions of parliamentary representation in seventeenth-century England); LUKE WILSON, *THEATERS OF INTENTION: DRAMA AND THE LAW IN EARLY MODERN ENGLAND* (2000) (tracing the early modern English transmission of the language of premeditation within legal and dramatic texts).

31. The editors of the forthcoming *Oxford Handbook of Early Modern Law and Literature*, Bradin Cormack and Lorna Hutson, have constructed the volume in line with these recent developments in law and literature scholarship. OXFORD HANDBOOK OF EARLY MODERN LAW AND LITERATURE (Bradin Cormack & Lorna Hutson eds., forthcoming 2015). At the moment, only four of the approximately forty-five planned contributors are institutionally affiliated with a law school.

32. See RICHARD A. POSNER, *LAW AND LITERATURE* (3d ed. 2009) [hereinafter POSNER, *LAW AND LITERATURE*]. The first edition of Posner’s *Law and Literature*, subtitled “A Misunderstood Relation,” appeared in 1988 and aimed both to demonstrate that literary works had little to offer for legal analysis and to attack the idea of applying literary critical approaches to law. See generally RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). In the 1988 volume, Posner came across as a “belles-lettristic” reader, more concerned with judging the quality of parts of



Turning to the pairing of literature and history, what may be most striking is the paucity of actual dialogue between scholars of literature and history despite literary studies' fascination with history and history scholars' interest in literary texts. Pedagogical endeavors to combine the study of history with literature, such as Harvard's History and Literature Concentration, have had great success, at least if measured by the number of students they have attracted.<sup>33</sup> And yet history as conceived in literature departments, including the New Historicism and its descendants, and history as practiced by historians remain imperfectly linked. Based on a careful analysis of recent scholarship in Atlantic studies and a survey of cross-disciplinary book reviews between literary scholars and historians, Eric Slauter recently concluded:

[L]iterary scholars now import more from historians than they export to them. To put the point in figurative terms that do not disguise the economic stakes involved, a trade deficit now exists on the side of literary studies. Even as literary scholarship has become markedly more "historical," it has apparently become less marketable to historians.<sup>34</sup>

Treating potential explanations and remedies, Slauter contended that literary scholars still often rely on already familiar historical materials rather than "supply[ing] a real contribution to historical knowledge" or "advanc[ing] a powerful theoretical claim to be further developed and historicized."<sup>35</sup> For their part, historians could do more to recognize the theoretical insights furnished by the work of literary scholars.<sup>36</sup> A less superable problem is perhaps presented by the move of history as a discipline away from text-based scholarship toward demographic and economic models.<sup>37</sup>

At the same time, however, a newfound interest in text within legal history has the potential for reinvigorating the relation between literature and history, particularly as the history of the book has captured the imagination of literary

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the literary canon than with understanding how literature might work. See Donald N. McCloskey, *The Essential Rhetoric of Law, Literature, and Liberty*, CRITICAL REV., Spring 1991, at 203, 207. While the newest edition aspires to the status of a treatise in the field and seems more open to the possibility that literature could offer something to law, it continues to ignore "much of the best work in the field." See Penelope Pether, Book Review, 7 COMPARATIVE CRITICAL STUD. 418, 419–21 (2010) (reviewing POSNER, LAW AND LITERATURE, *supra*).

33. Between 2007 and 2011, History and Literature was second only to English in the number of concentrators that it graduated each year. See Harvard University Fact Book 12 (2011–2012), available at [http://oir.harvard.edu/files/huoir/files/harvard\\_fact\\_book\\_2011-12\\_final.pdf](http://oir.harvard.edu/files/huoir/files/harvard_fact_book_2011-12_final.pdf) (listing the number of those graduating with a concentration in History and Literature as fifty-two in 2007, forty-four in 2008, fifty-four in 2009, fifty-three in 2010, and fifty-eight in 2011).

34. See Eric Slauter, *History, Literature, and the Atlantic World*, 65 WILLIAM & MARY Q. 135, 135 (2008). Treating the subfield of legal history, Margot Finn earlier lamented from the literary vantage point that "[l]egal historians' general reluctance to expand their methodological repertoire and their specific failure to avail themselves of analytical insights derived from literature pose a significant obstacle to both discipline-based and interdisciplinary studies of Victorian law." Margot Finn, *Victorian Law, Literature and History: Three Ships Passing in the Night*, 7 J. VICTORIAN CULTURE 134, 140 (2002).

35. Slauter, *supra* note 34, at 159.

36. *Id.* at 160.

37. *Id.*

scholars. For example, although Mary Bilder's work on *The Transatlantic Constitution* focuses on transatlantic legal practice rather than constitutional text per se in examining the structures of colonial appeal to the Privy Council in England that furnished a model for Supreme Court review of state laws under the U.S. Constitution, it simultaneously explores the nature of "legal literacy" within the colonies, explaining the cultural and legal consequences of the sparsity of texts available for public perusal.<sup>38</sup> Addressing an earlier period, Tom McSweeney has identified the significance of the transient efflorescence of case law in thirteenth-century England, at a time previously considered lacking in a precedential approach to law.<sup>39</sup> In a piece from an earlier Irvine symposium on "Law As . . ."—*Law/Text/Past*—Steven Wilf explicitly thematized legal historians' relation to text, lamenting that "text is of essential importance to legal historians and at the same time underexamined" while suggesting a way forward in envisioning the "legal historian as an *interested reader* of text."<sup>40</sup>

Finally, law and history is the old, established pair, whose passions have ebbed and flowed with new interests and renewed affairs. The Anglo-American story of their relation could be narrated as a political history, connected with the establishment of the autonomy of law from politics or sovereignty within seventeenth-century England. The conventional tale, however, begins in the late nineteenth century, with F.W. Maitland.<sup>41</sup> As Michael Lobban has recently elaborated in an excellent piece on the genealogies of legal history following Maitland, "legal historians working in law faculties tended to focus more on doctrinal histories. This was true on both sides of the Atlantic."<sup>42</sup> The work of the "law and society" movement and the writings of J. Willard Hurst shifted the scene in the U.S. academy within the mid-twentieth century.<sup>43</sup> As Lobban summarizes:

Law, in the Hurstian view, was about the practice of government, at every level where law structured or regulated the exercise of power between people. In his view, the proper way to study legal history was not to look at the development of single doctrines over the long term, but to look in great detail at the working of law in one particular context and era.<sup>44</sup>

With Bob Gordon's 1984 essay *Critical Legal Histories*, critical legal history broke onto the scene and disrupted the Hurstian vision, insisting upon the contingency of legal developments and the mutually constitutive relation of law and

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38. See MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 15–30, 73–90, 186–96 (2004).

39. See Tom McSweeney, *English Judges and Roman Jurists: The Civilian Learning Behind England's First Case Law*, 84 *TEMP. L. REV.* 827, 829–37 (2012).

40. Steven Wilf, *Law/Text/Past*, 1 *U.C. IRVINE L. REV.* 543, 545–46 (2011).

41. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (2d ed., London, Cambridge Univ. Press 1911) (1899).

42. Michael Lobban, *The Varieties of Legal History*, *CLIO@THÉMIS*, June 2012, at 1, 9.

43. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (The Lawbook Exchange 2007) (1950).

44. Lobban, *supra* note 42, at 15.

society.<sup>45</sup> In the wake of Gordon's foundational statement of anti-foundationalism, legal historical narratives of the kind he advocated have proliferated, perhaps most prominently in the work of John Witt, including his book *The Accidental Republic*.<sup>46</sup>

A love triangle may also entail tensions and oppositions between the pairs that comprise it or contests over the affections of a central figure. Between law and literature and legal history at least two such struggles have occurred, one over authority and the other over normativity. Despite historians' ambivalent relation to law's normativity, both the legal academy and legal practitioners deem the expertise of historians central to the proper formulation and understanding of law.<sup>47</sup> The status of the knowledge derived from literary disciplines remains much less exalted within legal institutions. At the same time, law and literature scholarship insists upon its normative positions and, in some respects, chastises legal history for its insistence on a descriptive rigor that can be separated from normative claims.<sup>48</sup>

Imagine, for example, the following scenario. A case reaches the U.S. Supreme Court urging the reconsideration of the *D.C. v. Heller* decision holding that the Second Amendment protects an individual right to bear arms.<sup>49</sup> As in *Heller* itself, amicus curiae briefs arguing about the relevant history would proliferate.<sup>50</sup> A literary critic's perspective on the meaning of the amendment would be given short shrift by the Justices, however.<sup>51</sup> Similarly, were a cultural theorist to file a brief challenging the possibility within the current social imaginary of separating handguns (explicitly protected by *Heller*) from machine guns and other military weapons, this account of the significance of the distinctions within contemporary

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45. See Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). A recent symposium in *Law and Social Inquiry* traced the heritage of Gordon's essay with contributions by Hendrik Hartog, Susanna Blumenthal, Laura Edwards, and Chris Tomlins, as well as Gordon himself. Susanna L. Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History: Robert W. Gordon, 1984. Critical Legal Histories*, 37 LAW & SOC. INQUIRY 167 (2012); Laura F. Edwards, *The History in "Critical Legal Histories": Robert W. Gordon, 1984. Critical Legal Histories*, 37 LAW & SOC. INQUIRY 187 (2012); Robert W. Gordon, "Critical Legal Histories Revisited": A Response, 37 LAW & SOC. INQUIRY 200 (2012); Hendrik Hartog, *Introduction to Symposium on "Critical Legal Histories": Robert W. Gordon, 1984. Critical Legal Histories*, 37 LAW & SOC. INQUIRY 147 (2012); Christopher Tomlins, *What Is Left of the Law and Society Paradigm After Critique? Revisiting Gordon's "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 155 (2012).

46. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2006) (setting out the story of the contingent institutions and encounters that resulted in the twentieth-century American law of accidents); Blumenthal, *supra* note 45, at 177–78 (citing to the *Accidental Republic* and Roy Kreitner's work as carrying out, in part, the program set forth in Gordon's *Critical Legal Histories*).

47. See Jeffrey S. Sutton, *The Role in History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1176–78 (2009); *infra* notes 49–52 and accompanying text.

48. See Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U.L.Q. 37, 40–41 (1998); *infra* notes 56–59 and accompanying text.

49. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

50. See, e.g., Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners, *Heller*, 554 U.S. 570 (No. 07-290).

51. Peter Brooks has shown that this occurred in *Heller* itself with respect to the amicus curiae brief filed by Professors of Linguistics and English. See Peter Brooks, *Literature As Law's Other*, 22 YALE J.L. & HUMAN. 349, 363–64 (2010).

society would largely appear beside the point to the Court. Even when Chief Justice Rehnquist invoked the dissemination of the *Miranda* warning into popular consciousness through its ubiquity in culture, he relied on personal experience rather than disciplinary expertise.<sup>52</sup>

On first blush, one might imagine that the difference lies in the fact that the members of the Court already possess both interpretive acumen and cultural knowledge, whereas they require the specialized training of historians to uncover the relevant history behind constitutional provisions. As any reader of judicial opinions already knows though, the kind of history recited by judges often appears more like what has been disparaged as “forensic history” than the type of inquiry respected by historians.<sup>53</sup> Indeed, invocations of history within judicial decision making may appear to historians no less illegitimate than judicial interpretive practice seems to literary critics or the Court’s account of popular consciousness looks to experts in cultural studies. The authority historians currently hold—at least nominally—in the judicial process hence stems not from the actuality of a specialized knowledge that lawyers do not already possess but from law’s recognition of their knowledge as lending authority to judicial decision making. Law has determined within the past decade or two that historians’ mechanisms for ascertaining historical truth should be included as a part of the process of understanding the U.S. Constitution.<sup>54</sup> To realize that this conjunction is not inevitable one has only to look to the example of seventeenth-century English jurist Sir Edward Coke, who explicitly defined his own historical account of the common law against the work of chroniclers and annalists, historians he found lacking in the rigor of an internal perspective on the law.<sup>55</sup> The relation of legal institutions with the discipline of history hence possesses a particular salience today, one that literary studies lacks and envies. The next question, which is too involved to answer here, might be why history currently has such purchase for law and represents the kind of expertise to which the Supreme Court must at least pay lip service.

At the same time, the teaching of and scholarship on law and literature often adopt unapologetically normative positions, unlike most rigorous legal history. Robert Cover’s classic writings on law and literature insisted upon the normative purchase of the endeavor.<sup>56</sup> Nor has that tendency been entirely eclipsed within the law and literature enterprise. For example, Robin West concludes her recent essay

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52. See *Dickerson v. United States*, 530 U.S. 428, 430 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”). For a discussion of the treatment of the cultural authority of *Miranda* in the *Dickerson* opinion, see Kenji Yoshino, *Miranda’s Fall?*, 98 MICH. L. REV. 1399, 1412–14 (2000).

53. See JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 5–7 (2005); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203–04 (1993).

54. *Heller* is a good example of the use of historian’s methodologies in obtaining a fuller understanding of the Constitution. See *Heller*, 554 U.S. 570.

55. For a discussion of Coke’s treatment of historians unaffiliated with law, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 585–86 (2006).

56. See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1982).

on *Literature, Culture, and Law* by observing that “[p]opular narrative fiction, television shows, and films, no less than canonical literature, may, on occasion, have something true to teach us about law, life and sex.”<sup>57</sup> What they have to teach consists partly in critique; as West had earlier explained, Tom Wolfe’s novel *Charlotte Simmons* “should be read as a critique of potent and harmful—but nevertheless legal—sex, and the culture that legitimates, honors and encourages it.”<sup>58</sup>

By contrast, as Steven Wilf has observed in *Law/Text/Past*, for at least the past half century, legal history has been characterized by an avoidance of normativity.<sup>59</sup> This should be no discovery for those of us who have been involved in legal history workshops, where disputes often rage over whether a project is excessively “presentist” in focus, spawned by a normative desire to use the past, or whether it can be considered more rigorously historical, its dominant question instead emanating from the archive. Wilf contends that alternative possibilities can be found within the history of legal history itself, particularly in the legal realists’ aspiration for the normative potential of scholarship in legal history.<sup>60</sup> Wilf “insists that the demand for normative readings of law’s past comes from the particular ways that legal historians must read purposeful legal texts. As suggested, we failed to take advantage of the possibilities posed by historical jurisprudence and legal realism of a normative turn to history . . . .”<sup>61</sup> New approaches to legal history, such as the ones signaled by some of the papers that, like Wilf’s, have emerged out of earlier “Law As . . .” symposia at the University of California, Irvine School of Law,<sup>62</sup> may be in the process of rethinking legal history’s neglect of normativity; an opportunity for literature may, concomitantly, be on the way.

## II. THE ROMANCE

In Rouen, Sartre started to spend time with Olga Kosakiewicz. They enjoyed being together, and everyone benefited. Sartre felt reinvigorated in Olga’s presence, Beauvoir was relieved to see Sartre more cheerful, and Olga liked to feel needed.

Before she even set eyes on Sartre, Olga had encountered the legend. Beauvoir had talked about him and the couple they formed. Sartre knew that. As he wrote later, his relationship with Beauvoir appeared “fascinating” and “crushingly powerful” to the people around them. “Nobody could love one of us without being gripped by a fierce jealousy—

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57. Robin West, *Literature, Culture, and Law at Duke University* (Georgetown Law Faculty, Working Paper No. 75, 2008), available at [http://scholarship.law.georgetown.edu/fwps\\_papers/75](http://scholarship.law.georgetown.edu/fwps_papers/75).

58. *Id.* at 112.

59. Wilf, *supra* note 40, at 562.

60. *Id.* at 556–64.

61. *Id.* at 564.

62. See Peter Goodrich, *Specters of Law: Why the History of the Legal Spectacle Has Not Been Written*, 1 U.C. IRVINE L. REV. 773 (2011); Tomlins & Comaroff, *supra* note 3.

which would end by changing into an irresistible attraction—for the other one, even before meeting them, on the basis of mere accounts.”<sup>63</sup>

Passions arise easily in the pedagogical context; hence it is there that the possibilities for the romance among disciplines may be most completely realized. Julie Peters is doubtless right to lament that the “real” always appears elsewhere within exchanges between law and literature.<sup>64</sup> Nevertheless, in the classroom, it may be the desire for something outside of the discipline—whether “real” or imaginary—that most effectively propels interdisciplinary inquiry. The task of teaching law and the humanities consists, I contend, in inciting each audience—whether undergraduates in the humanities, law students, or graduate students—to experience a lack within their discipline, a lack that propels the passionate investigation of another field. Rather than, however, presenting each mode of inquiry as itself deficient, I would embrace a pedagogy that temporarily situates students entirely within the technical aspects of the local discipline. Only through fully entering into the consciousness of a particular field can one experience a desire for another discipline that follows not a path of assimilation or escape but rather one of embrace.

This point could be put in conceptual, rather than romantic, language. Niklas Luhmann persuasively did so in describing the relation between legal and social systems. In *Law as a Social System*, Luhmann posits law’s “operative closure” with respect to its environment.<sup>65</sup> As Luhmann contends, “the legal system operates in a normatively closed and, at the same time, cognitively open way.”<sup>66</sup> What this means is that stimuli from the environment can only affect the legal system indirectly, through the recursive operations of that system itself, which proceeds to include or reject components of the outside world. This approach reformulates the distinction between law and morality. Luhmann insists:

The thesis on normative closure above all opposes the idea that morality could immediately or intrinsically be understood as valid in the legal system. This intrinsic validity has been excluded in many older legal orders through formalism—but was then compensated for by the distinction between law and equity. In modern society, any understanding of an immediate validity of morals in the legal system is even less possible . . .

Only when law is differentiated from the ever-changing tidal flow of moral communication, and only when distinctions based on law’s own criteria for validity can be made, is it possible to specify the facts which are legally relevant and separate them from general appraisal made by persons.<sup>67</sup>

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63. ROWLEY, *supra* note 7, at 57 (quoting JEAN-PAUL SARTRE, *WAR DIARIES* (Quintin Hoare trans., Verso ed. 1984) (1983)).

64. Peters, *supra* note 1, at 81–84.

65. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 105 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004).

66. *Id.* at 106.

67. *Id.* at 107–08.

Although morality is excluded under this account from appearing without mediation in law, it can be integrated through the legal systems' own operations. Even after becoming law, this and other material from law's environment retain traces of their location within another system and direct the legal actor toward an investigation of the relationship among these systems.

One consequence of invoking passion—or systems theory—might be a movement away from assertions of similarity or difference. Even the most sophisticated scholarship in law and literature tends to divide according to whether it places emphasis on the resemblance between legal and literary materials or insists upon their disparities. For example, in her penetrating book *Common Precedents: The Presentness of the Past in Victorian Law and Fiction*, Ayelet Ben-Yishai contends that “the homologous intellectual patterns generated by precedential reasoning in law and in literature yield radically *dissimilar* forms” and that, “[a]lthough the two kinds of narratives . . . read in this book—law reports and realist novels—are both structured on precedential reasoning as a means for managing change, their differences are more prominent, and more telling, than their similarities.”<sup>68</sup> While legal and literary forms may, in fact, diverge, the significance of this phenomenon lies not in the divergence but rather in the institutional forces producing it. What counts as authority is determined within the particular system at issue, whether legal or social (or cultural), and stylistic discrepancies index those processes. At the same time, identical protagonists pass through these varied systems and may import techniques and tools from elsewhere.

All of this remains quite abstract though; how might a teacher actually serve as procuress of these passionate engagements? In order to suggest one possible answer, I will briefly describe a pedagogical experiment I began to undertake several years ago. Having taught the introductory Constitutional Law class at Cornell Law School for a number of years, often to students in the first semester of their first year of law school, I grew frustrated with some aspects of the various casebooks that I sampled in the effort to enhance students' experience. Many of the texts abbreviate cases so radically that it is impossible to recover alternate readings or to see disparate paths that the law might have taken.<sup>69</sup> Other casebooks valuably furnish historical materials in conjunction with Supreme Court opinions, giving context for the development of law.<sup>70</sup> Yet engaging in lengthy historical inquiry into

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68. AYELET BEN-YISHAI, *COMMON PRECEDENTS: THE PRESENTNESS OF THE PAST IN VICTORIAN LAW AND FICTION* 22 (2013).

69. While it furnishes an excellent and comprehensive doctrinal overview of constitutional law and for a long time formed the basis for my pedagogy, recent editions of Kathleen Sullivan and Gerald Gunther's *Constitutional Law*, which has now become Kathleen Sullivan and Noah Feldman's *Constitutional Law*, excerpt some cases so briefly that it is difficult to use them in any way other than mapping doctrine. See generally KATHLEEN SULLIVAN & NOAH FELDMAN, *CONSTITUTIONAL LAW* (18th ed. 2013); KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (17th ed. 2010).

70. See, e.g., PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 261–71 (5th ed. 2006).

the evolution of doctrine under the Commerce Clause frequently exasperates first-year students who wonder about the relevance of this material to legal practice. It is simultaneously difficult to avoid the sense that the histories told in this setting are mere forensic history (as John Reid would call it), tending to naturalize the jurisprudential place where we have landed.<sup>71</sup> Finally, despite the meteoric rise in theories emphasizing extrajudicial interpretation and implementation of the Constitution,<sup>72</sup> these find little purchase within constitutional law casebooks, which still remain largely indebted to Supreme Court opinions.

Having previously attempted to supplement these texts with my own materials, from history articles, to statutory text, to essays on constitutional interpretation, I decided upon a counterintuitive solution. Instead of adding more and more context, I resolved to see what would happen if I presented the lawyers' lawyer version of the materials, fulfilling the presentist desires of the students more than they could ever have wished. To this end, I developed new materials around several Supreme Court cases that had either been decided in the past term or remained pending. We began with *National Federation of Independent Business (NFIB) v. Sebelius*, otherwise known as the healthcare decision.<sup>73</sup> Doctrinally, this allowed us to cover a number of the major congressional powers, including the Commerce, Necessary and Proper, and Taxation and Spending Clauses. Rhetorically, it presented a fascinating study in contingency, framing, compromise, precedent, concurrence, and dissent.

Prior to commencing the case, I asked the students to peruse the Constitution and to read the relevant sections of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act"),<sup>74</sup> in order to situate them in the same textual position (absent Supreme Court precedent) as the Justices would have been. We then sliced through the case, treating the opinions section by section, and covering them in their entirety.

Not only was the *NFIB v. Sebelius* decision preceded by substantial public controversy, but it also entailed a split between members of what is frequently considered the conservative wing of the Supreme Court.<sup>75</sup> The heart of the

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71. See REID, *supra* note 53.

72. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (forcefully arguing that the U.S. Constitution was not designed to be relegated to the interpretation of judges rather than the people themselves); Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1440 (2006) (discussing the growing group of scholars considering "the Constitution Outside the Courts").

73. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

74. 26 U.S.C. § 5000a (2012).

75. Opposition to the challenges mounted against the Affordable Care Act became quite heated, as the title of Paul Krugman's predecision Op Ed—*Broccoli and Bad Faith*—indicates. See Paul Krugman, Op. Ed., *Broccoli and Bad Faith*, N.Y. TIMES, Mar. 30, 2012, at A27. On the other side, a nearly simultaneous piece in the *National Review* insisted that the mandate constituted "government by coercion." Mario Loyola & Richard Epstein, *Government by Coercion: What Obamacare's Individual Mandate and Medicaid Expansion Have in Common*, NAT'L REV. (Mar. 28, 2012, 1:00 PM), <http://www.nationalreview.com/articles/294677/government-coercion-mario-loyola>. For a discussion of the split among the justices, see *infra* notes 76–77.



disagreement involved the question of whether Congress possessed the authority to pass the so-called “individual mandate” provision of the Affordable Care Act, the section requiring everyone to purchase insurance or face a penalty.<sup>76</sup> Between the first challenges to the individual mandate as exceeding Congress’s power and the time the Court issued its opinion in *NFIB*, avid Court watchers first derided the notion that the individual mandate would be struck down, deeming such an outcome impossible under current precedent, then became increasingly convinced that the Court would actually invalidate the provision.<sup>77</sup> While the majority did not do so, the margin and grounds for reaching a different result were quite tenuous. Chief Justice Roberts disagreed with both Justice Ginsburg—who would have upheld the mandate under all justifications the government offered—and the four Joint Dissenters (Scalia, Roberts, Alito, and Kennedy)—who would have struck down the mandate under all available justifications.<sup>78</sup> Instead, he split the difference, agreeing with the dissenters that the Commerce Clause could not allow Congress to force individuals into activity and into participation in the healthcare market, but deeming the individual mandate justified under the Taxation Clause, despite Congress’s efforts to represent the mandate as anything but a tax.<sup>79</sup>

The circumstances surrounding the healthcare decision, although contemporary rather than historical, dramatize the contingency of constitutional decision making and the role of social movements (such as the Tea Party) in the generation of constitutional shifts, aspects that legal historians have been emphasizing since Bob Gordon’s *Critical Legal Histories* and Reva Siegel’s work on social movements respectively.<sup>80</sup> When teaching the “switch in time that saved the nine”—the Court’s supposed capitulation to FDR’s New Deal and its concomitant decision to interpret Congress’s economic powers expansively<sup>81</sup>—it is difficult to

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76. 26 U.S.C. § 5000a.

77. Compare Ryan Lirette, *Will the Individual Mandate Hold Up in Court?*, AMERICAN (Apr. 8, 2010), <http://www.american.com/archive/2010/april/will-the-individual-mandate-hold-up-in-court> (“[T]he majority of constitutional experts are betting that the courts will uphold the mandate. Their prediction is based on a simple observation: the mandate is consistent with the past 73 years of broad constitutional interpretation, which has granted Congress the authority to regulate nearly anything.”), with Ilya Somin, *Recent Poll of Supreme Court Experts Finds that Most Expect the Court to Strike Down the Individual Mandate*, VOLOKH CONSPIRACY (June 20, 2012, 1:39 PM), <http://www.volokh.com/2012/06/20/recent-poll-of-supreme-court-experts-finds-that-most-expect-the-court-to-strike-down-the-individual-mandate/> (“A new insider survey of 58 legal experts conducted after the oral arguments [in *NFIB v. Sebelius*] found that most predict that the court will strike down the so-called individual mandate . . .”).

78. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2609, 2642.

79. *Id.* at 2593, 2601.

80. See Gordon, *supra* note 45. For a discussion of the impact of social movements on constitutional law, see Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); and Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

81. Under the traditional account, Justice Roberts’ switch from striking down New Deal statutes to his vote in favor of the constitutionality of a federal minimum wage in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), deflated the political appeal of President Roosevelt’s proposal that Congress “reorganize” the federal judiciary and allow for the appointment of additional Supreme Court justices. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A*

convey to students anything but the feeling of the ineluctable march of historical change, economic expansion dictating the eventual demise of policies rooted in eighteenth-century realities. By contrast, the healthcare decision remains recent enough in public consciousness that several of the students in my class expressed great puzzlement about it on the first day, before realizing that we would be covering the case. The confusion these students voiced pertained not only to the media's framing of the case and predictions of what the outcome would be but also to the significance of the decision, once rendered. Rationalizations have proliferated since *NFIB* appeared, rendering the outcome more obvious in retrospect.<sup>82</sup> Considering the healthcare decision so soon after its resolution allowed us to inhabit its contingency more completely.

Justifying the decision in light of this contingency required resort to a mechanism for constructing authority internal to the legal system, that of furnishing precedent. From each opinion, we generated a list of the five precedents that seemed most crucial to the historical narrative recounted for every constitutional clause. Unsurprisingly, these differed significantly between the Ginsburg opinion and the Joint Dissent, but there were also subtle disparities between the Joint Dissenters and Roberts as well. Taking our cue from the various opinions, we examined the several possible genealogies of the present. In the process, the question continually arose as to the relationship between the aims of a history of doctrine produced within the legal system and other versions of history.

By puzzling through the Roberts and Joint Dissenters' citations in the Spending Clause area, we also watched the seamless conversion of precedent from one area to another and the generation of constitutional meaning through judicial interpretation. In the process of finding that the Medicaid provisions of the Affordable Care Act engaged in unconstitutional "coercion" of the states in violation of the Spending Clause, the first time that such coercion had been

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CONSTITUTIONAL REVOLUTION 3–5 (1998). Not only was Roberts almost certainly ignorant of the plan before casting his vote in *West Coast Hotel*, but Dan Ho and Kevin Quinn have also recently demonstrated that his votes on the Court in general moved significantly and briefly to the left in 1936. See generally Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 69 (2010).

82. See, e.g., Akram Faizer, *Chief Justice John "Marshall" Roberts—How the Chief Justice's Majority Opinion Upholding the Federal Patient Protection and Affordable Care Act of 2010 Evokes Chief Justice Marshall's Decision in Marbury v. Madison*, 11 U. NEW HAMPSHIRE L. REV. 1, 2 (2013) (arguing that "Chief Justice Roberts's decision is reminiscent of our greatest Chief Justice's decision in *Marbury v. Madison*"); Bradley W. Joondeph, *The Affordable Care Act and the Commerce Power: Much Ado About (Nearly) Nothing*, 6 J. HEALTH & LIFE SCI. L. 1, 7 (2013) (explaining "why the ruling's limited scope should be unsurprising, given that the challengers deliberately pushed a narrow theory to make their argument as attractive as possible to the Court"); Gillian E. Metzger & Trevor W. Morrison, *The Presumption of Constitutionality and the Individual Mandate*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 124 (Nathaniel Persily et al. eds., 2013) (justifying the Chief Justice's opinion by arguing that statutory analysis should be informed by the presumption of constitutionality); Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper,"* in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS*, *supra*, at 146 (arguing that the decision "fills a gap" in the Court's Necessary and Proper Clause jurisprudence).

discovered, Chief Justice Roberts cited extensively and without much fanfare to cases derived from the Commerce Clause area, particularly the “commandeering” decisions *Printz* and *New York v. United States*.<sup>83</sup> In the confusion over differentiating “coercion” from “commandeering” and the attempt to discern what the extension of the metaphor from commerce to spending might signify, we watched the process of constitutional meaning making at work and observed the effects of constitutional rhetoric in action.

Finally, examining the language of the Affordable Care Act itself before turning to the case assisted in seeing the mechanisms behind the law’s co-optation of facts. Whereas Roberts and the Joint Dissenters framed the individual mandate in terms of a distinction between activity and inactivity, insisting that requiring individuals to purchase health insurance or face a penalty resembled compelling broccoli consumption,<sup>84</sup> Ginsburg saw the individual mandate as a necessary part of a comprehensive legislative scheme, just as the Court had found the medicinal use of marijuana to be legitimately prohibited as part of the federal government’s broader regulation of drugs.<sup>85</sup> Neither of these accounts was dictated by the prejudicial situation, but both served to narrate the facts to legal effect.

By foregrounding contemporary cases, I asked these first-year law students to move from the social system they had been inhabiting to the legal system and to observe the process by which that movement was taking place. Through carefully inspecting the mechanisms by which they could make themselves legal actors, they became aware of law as a discipline while simultaneously witnessing the distinctions law draws to render itself independent of its environment. It may be this very cognizance of disciplinarity that enables the passion for other disciplines to arise. Rather than being sated by the anodyne version of history that appears in casebooks, students were prompted to think about the competing forces of historical momentum and change that coalesced in the healthcare decision as well as about the extralegal implications of granting economic rights as the Affordable Care Act arguably did. By reading the passages of the opinion that cited to counterintuitive precedents and inquiring about the generation and co-optation of language like that of commandeering and coercion, they were incited to imagine a literary approach to legal opinions.

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83. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2602–03; *see also* *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

84. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2591, 2650.

85. *Id.* at 2609 (Ginsburg, J., concurring in part and dissenting in part); *see also* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (deeming the regulation of concededly intrastate growing of marijuana valid under the Commerce Clause as a necessary part of a comprehensive legislative scheme).

## III. AUDIENCES AND ACTORS

Paula moved to the middle of the stage. She was not yet very well known to the general public, but here everyone admired her art.

. . . [Françoise] turned her eyes toward Pierre, but Pierre was not looking at her.

He was looking at Xavière. With parted lips and eyes filled with tears, Xavière scarcely breathed. She no longer knew where she was; physically she didn't exist. Françoise looked away, embarrassed. Pierre's insistence was indiscreet and almost obscene; that rapt face was not for public view. . . .

"Have you seen Xavière's face?" Pierre asked.

"Yes," said Françoise.

He had spoken without taking his eyes off Xavière.

*That's the way it is*, thought Françoise. Her features were no more distinct to him than they were to herself; amorphous, invisible, she was vaguely a part of him. He spoke to her as to himself, but his eyes remained fixed on Xavière. . . .

Applause broke out.<sup>86</sup>

While immersion within a disciplinary frame may furnish an initial impetus toward exploring and understanding the other disciplines that the field in question refracts and redacts, it does not indicate how to move beyond those early steps in the direction of a more thoroughgoing interdisciplinary relation. Thinking of the connections among disciplines in terms of their performances with and for each other could assist both in developing more dynamic modes of pedagogical interaction and in moving law, literature, and history in the direction of active engagement with contemporary concerns.

The disciplines of both literature and law divide practices from reflections on those practices. In an era when law schools have increasingly hired scholars with doctorates as well as JDs and courts accept input from psychologists, sociologists, and historians, differences still remain between what is considered part of the operations of the legal system and what are deemed critical or other accounts of that system. The situation may be even more extreme in the literary context, as the demystifying efforts of academics place strain on English Departments' relation with creative writers, who often find it difficult to see their work as refracted through the scholarly lens. By contrast, despite the potential discrepancy between academic and popular history, history as a practice remains at core the same kind of enterprise as history as an academic pursuit.

One way to conceptualize the duality of practice and reflection on that practice is through a notion of audience. Within the love triangle, audience may also have analytic purchase. In light of the shifting relations of participants, the position of

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86. DE BEAUVOIR, *supra* note 6, at 149–50.

observer and observed may be occupied in rapid succession—or even simultaneously—by the same person. The literary critic may thereby function as an audience at once for literary production and for legal decisionmaking, while the creative writer or historian might likewise sit as a spectator to the unfolding of legal dramas.

In the effort to understand the relations between law, literature, and history through the lens of audience, I developed a course on “The Jury as Audience.”<sup>87</sup> By describing the jury as an audience, the class began by positing the overlap between spectatorship and participation, both within law and culture. Simultaneously, it emphasized the transit of spectators from one arena to the other and the historical dynamics of that movement. Plays such as Aristophanes’ *Wasps*—performed before Athenians steeped in jury service—not only critique the cadre of jurors they implicate as venal addicts of condemning, but also suggest the relevance of aesthetic spectatorship for political participation.<sup>88</sup>

As Lorna Hutson has argued in *The Invention of Suspicion*, early modern dramas such as Shakespeare’s *Titus Andronicus* stage epistemologies that would have been familiar to their audiences from the operations of the English jury.<sup>89</sup> Moreover, within early modern England, the close connection between the Inns of Court and the theaters ensured that those studying to be lawyers as well as those serving on juries functioned as spectators for plays.<sup>90</sup> The Induction to Ben Jonson’s *Bartholomew Fair*, for example, riffs on this overlap between the early modern law schools and the theater.<sup>91</sup> As we also know from court records and certain dramas’ disparate framing for a royal rather than common audience, Kings and Queens themselves sat in judgment on theatrical work, exercising their royal prerogative to condemn in the dramatic as well as the politico-legal arena.<sup>92</sup> Spectators of the often legally and politically inflected performances staged in late sixteenth- and seventeenth-century England were frequently the same as those who judged or argued in legal or political contexts.<sup>93</sup> These audiences mediated between the literary and the legal. Although not simply importing a model of judgment from one sphere to the other, they brought their experience as members of a politico-legal community or an aesthetic one to bear in performing their other evaluative tasks.

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87. The courses took place at Cornell University during the fall of 2010 and the spring of 2012. The first was taught exclusively to undergraduates and the second to a group composed half of undergraduates and half of law students.

88. 4 ARISTOPHANES, *Wasps*, in *THE COMEDIES OF ARISTOPHANES* 1 (Alan H. Sommerstein ed. & trans., 1983).

89. LORNA HUTSON, *THE INVENTION OF SUSPICION: LAW AND MIMESIS IN SHAKESPEARE AND RENAISSANCE DRAMA* 90–103 (2007).

90. For more discussion of this point, see Bernadette Meyler, “*Our Cities Institutions*” and the *Institution of the Common Law*, 22 *YALE J.L. & HUMAN.* 443, 446–50 (2010).

91. See *id.* at 448–49.

92. JONATHAN GOLDBERG, *JAMES I AND THE POLITICS OF LITERATURE*, at xi–xv (Stanford Univ. Press 1989) (1983).

93. See Meyler, *supra* note 90, at 446–50.

Nor does the model of audience pertain only to trials or staged performances; it can also serve to explain aspects of readership within legal and literary contexts.<sup>94</sup>

In teaching “The Jury as Audience,” I focused on a particular intersection between legal and literary readerships, that which occurred in the late nineteenth century, at a moment when readers of sensationalized trial narratives often overlapped with devotees of the novel. Many of the nineteenth-century trial collections and trial reports address a particular kind of lay reader—namely, a juror—and instruct him or her in how to approach the legal scene or the legal narrative from a critical vantage point. At the same time, early mystery novels, such as Wilkie Collins’s *The Law and the Lady*, suggest reading, or reading clues, as a model for evaluating evidence, and attempt to shape their audiences’ epistemological strategies by foregrounding the disparate possibilities presented by different generic ways of reading, whether that of the romance or the detective story.<sup>95</sup>

This account of the function of mystery novels in refining readers’ evidentiary approach might conjure a more recent example, that of the putative “*CSI* effect,”<sup>96</sup> which the class also considered. Despite the loud media and prosecutorial protests over a *CSI* effect, according to which jurors influenced by the proliferation of television shows attributing quasi-magical powers to forensic science demand ever increasing physical evidence and state-of-the-art testing in order to convict defendants, most empirical studies have suggested that the *CSI* effect is extremely limited, if extant at all.<sup>97</sup> A question that these studies raise is why jurors—many of whom do, indisputably, watch hour upon hour of such shows—check their *CSI*-related requirements at the door when themselves entering upon the task of criminal judgment. Do they treat *CSI* simply as an alternative, fictional realm, without consequence to daily life? Or do they contextualize *CSI*, recognizing its quasi-science fictional quality in suggesting techniques of analyzing evidence that do not

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94. As I have previously argued in *Defoe and the Written Constitution*, both the novels and political pamphlets Daniel Defoe penned suggest a certain myth of the power of the written constitution, perhaps best exemplified by his account of the piratical articles to which all crews were obliged to swear allegiance, but which were routinely destroyed before capture as potential evidence of the pirate conspiracy. The varying audiences of Defoe’s novels—from the children of members of the founding generation, to ordinary Americans, to the Founders themselves—may have been influenced by this mythology to surround their constitutional documents with greater authority than they might otherwise have possessed. Bernadette Meyler, *Defoe and the Written Constitution*, 94 CORNELL L. REV. 73 (2008).

95. See WILKIE COLLINS, *THE LAW AND THE LADY* (1903). For an elaboration of this argument, see generally Bernadette Meyler, *Wilkie Collins’ Law Books: Law, Literature, and Factual Precedent*, in *THE SECRETS OF LAW* 135 (Austin Sarat et al. eds., 2012).

96. *CSI: Crime Scene Investigation* (CBS Broadcasting, Inc.).

97. Tom Tyler’s piece on *Viewing CSI and the Threshold of Guilt* outlines both the claims for the existence of a “*CSI* effect” and the tenuous nature of the evidence supporting such assertions. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1050 (2006). Simon Cole and Rachel Dioso-Villa subsequently examined why media sources and prosecutors continued to promote the notion of a *CSI* effect despite significant empirical evidence suggesting that “television drama is [not] disadvantaging criminal prosecution” and that “the opposite may just as easily be the case: forensic-themed police procedural dramas may actually advantage the prosecution in criminal cases.” Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1342 (2009).

even yet exist? Whatever the answer to these questions, lack of existence of a robust *CSI* effect indicates that, despite the movement of audiences from one sphere to another, culture may not be seamlessly converted into law or vice versa, the dominant norms of the social and legal systems altering the subjectivities of even those participating as jurors or viewers rather than judges or authors.

This brings me back to Robin West's essay on *Literature, Culture, and Law*.<sup>98</sup> Relying in part on Naomi Mezey's *Law As Culture*,<sup>99</sup> West considers the cultural context in which prosecutors could avidly pursue the accusation of rape against members of the Duke lacrosse team, despite the falsity of the charges. One aspect of that cultural context included Tom Wolfe's novel *I Am Charlotte Simmons*, depicting the unwanted yet not coercive sex the work suggests routinely occurs on college campuses.<sup>100</sup> To the extent that the media conceived of *I Am Charlotte Simmons* as the paradigm for the Duke incident, it furthered the plausibility of the putative victim's story. To the extent that the media conceived of *I Am Charlotte Simmons* as the paradigm, however, as West astutely points out, it should have questioned whether rape itself occurred.<sup>101</sup> Although the novel represents collegiate sex as debilitating for women on campus, it does not depict acts that rise to the level of rape.<sup>102</sup> There is, however, yet another level of difficulty here in attempting to move seamlessly from culture to law that West does not explicitly acknowledge. In that movement, it is precisely the nature of *Charlotte Simmons* as a work of fiction that becomes elided. By failing to consider the relative autonomy of law, we run the risk of considering a novelistic truth a legal one and neglecting the mediation necessary to move effectively from the social into the legal and back again.

Returning to the pedagogical scene, teaching "The Jury as Audience" to a group composed half of undergraduates and half of law students required considering the divided audience of the classroom as well as the variegated audiences of the literary and legal works we covered. Although sometimes the separation caused some stumbling, the combination, at its best, allowed for the greater elaboration of both literary and legal perspectives on the material. For example, those undergraduates who had taken one or more classes in Shakespeare were able to perform literary close readings of scenes in the plays or contextualize the works for the benefit of the law students present, while the law students frequently relished the availability of an undergraduate audience to appreciate their more technical legal analyses of the materials. These disparate approaches were most effectively shared through the ten-minute presentations each class member was asked to perform on whatever aspect of one of the readings he or she preferred. Hearing these presentations gave other members of the group insight into how a differently trained audience might read and interpret the same materials. Bringing

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98. West, *supra* note 57.

99. Naomi Mezey, *Law As Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

100. TOM WOLFE, *I AM CHARLOTTE SIMMONS* (2005).

101. West, *supra* note 57.

102. *Id.*

together students who are methodologically immersed in law, literature, or history—precisely at the moment when they are in the midst of learning how disciplinary thinking takes place—may allow more cross-pollination of the fields than putting together scholars who are already disillusioned with aspects of their area of study and seeking to be rescued from themselves by another approach. If the aspiration of the Shakespeare professor Julie Peters presents in *Law, Literature, and the Vanishing Real* to “use law to end poverty, racism, and war” meets with derision from his legal academic colleagues,<sup>103</sup> the Shakespeare student’s account of how generic form works in *The Winter’s Tale* intrigues law students and prompts conversations about the legal significance of dramatic construction.

As everyone who has encountered participatory theater knows, the audience is also an actor. In recent years, however, there have been efforts in both literary and historical studies to reimagine the scholar more as an actor and less as an audience member. In part stemming from fatigue with critique and the hermeneutics of suspicion, academics have proposed new paths, ranging from Chris Tomlins’s suggestion of replacing “critical legal history” with an approach influenced by Walter Benjamin, to Jeff Dolven and Graham Burnett’s *Poetry Lab* at Cabinet, to Franco Moretti’s call for “distant reading.”<sup>104</sup> These developments have yet to be fully integrated into work at the intersection of law, literature, and history.

Although no one voice has so far emerged as dominant in the effort to put critique to one side, literary scholars and historians alike have—in what I believe is a previously unrecognized synchrony—recently expressed dissatisfactions with the inheritance of critical methodologies, which appear to many to have ossified. From the historical—or, more precisely, legal history—side, Chris Tomlins’s essay *After Critical Legal History: Scope, Scale, Structure*, takes aim against the thirty-year dominance of critical legal history, and its “repeated emphasis upon historical contingency and contextualization, its preference for complex relationality, its debunking of secret laws of causation.”<sup>105</sup> Viewing critical legal history as “squarely in the tradition of modernist disenchantment,” Tomlins instead advocates for a Benjaminian version of legal history focused on the dialectical image. From a Benjaminian perspective, Tomlins contends,

[T]he role of the critic/historian becomes essential, in that criticism completes the text’s meaning retrospectively by revealing its prehistory and its posthistory, which is to say its role in the prehistory of what follows. That is, criticism loosens from the text the meanings contained with it. It does so by mortifying the text, not by evaluating or interpreting it as a thing in itself but by corroding it—rendering it a rubble of fragments such that its fragment of truth may be extracted from amid the material (mythic)

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103. Peters, *supra* note 1.

104. See, e.g., FRANCO MORETTI, DISTANT READING 47–48 (2013); Christopher Tomlins, *After Critical Legal History: Scope, Scale, Structure*, ANN. REV. L. & SOC. SCI., Dec. 2012, at 31, 31; *Poetry Lab*, CABINET MAG. (2011), [http://cabinetmagazine.org/events/poetry\\_lab.php](http://cabinetmagazine.org/events/poetry_lab.php).

105. Tomlins, *supra* note 104, at 39.



content in which that truth is imprisoned and by which it is obscured . . . .  
[C]ontext must be dissolved if what is sought is to be exposed. . . .

Out of the fragments of meaning amassed from the subjection of past phenomena to the critical process, the critic/historian constructs constellations—that is, new historical objects or dialectical images that join together what may be quite distinct phenomena, whose significance can emerge only posthumously or retrospectively, in a relationship with the now that has apprehended their significance.<sup>106</sup>

The emphasis here is on allegorical connections through time rather than the concatenations of a particular moment. Instead of focusing on context, Benjamin speaks in terms of the event, which “in its singularity takes no meaning from the time of its occurrence recorded mechanically or from its apparent relationships with other events in historical time.”<sup>107</sup> From this Benjaminian account of the philosophy of history, Tomlins sketches the possibility of a legal history beyond critical legal histories.

The language of textuality evident even in Tomlins’s gloss of Benjamin is perhaps noteworthy. Although Tomlins himself does not reference the literary in his piece, Benjamin’s elaborations of a philosophy of history frequently took place through readings of texts, from his landmark 1924 essay on Goethe’s *Elective Affinities* onwards.<sup>108</sup> Tomlins’s new approach to legal history hence already implicates the literary through adopting a Benjaminian framework, yet it fails to consider the possibility of such a move for the relationship of law, literature, and history.

Somewhat further afield from the legal, Jeff Dolven’s and Graham Burnett’s *Poetry Lab* presents an alternative for literary education, one that brings out the creativity in critique. These evening-long events have often focused on a particular poet, using a key concept to enter into his or her work.<sup>109</sup> For example, a session on Wallace Stevens paid homage to J. Hillis Miller’s book *Topographies* by focusing on space.<sup>110</sup> Divided into groups, participants foraged through the local neighborhood to generate a map of the local smells (proliferant in the Gowanus area of Brooklyn). On returning to Proteus Gowanus, the site of the gathering, they wrote poetic postcards, engaging with this aspect of Stevens’ work. Another workshop on James Merrill took the form of a séance, complete with Ouija boards.

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106. *Id.* at 42.

107. *Id.*

108. Benjamin’s notion of a “caesura,” at which point “every expression simultaneously comes to a standstill, in order to give free reign to an expressionless power inside all artistic media,” although elaborated in relation to literature in his essay *Goethe’s Elective Affinities*, bears implications for his later work on history. 1 WALTER BENJAMIN, *Goethe’s Elective Affinities*, in WALTER BENJAMIN: SELECTED WRITINGS, 1913–1926, at 297, 341 (Marcus Bullock & Michael W. Jennings eds., 1996). For a discussion of the implications of the caesura for Benjamin’s later work, see Dmitris Vardoulakis, *The Subject of History*, in WALTER BENJAMIN AND HISTORY 118, 123 (Andrew Benjamin ed., 2005).

109. For a list of the Poetry Lab events, see *Poetry Lab*, *supra* note 104.

110. The description of these events is based on my own participation in the ones discussed. See also J. HILLIS MILLER, *TOPOGRAPHIES* (1995).

As the very idea of a poetry “lab” suggests, the emphasis rests on the actions one takes in response to creative work and the mechanisms for incorporating prior influences into one’s own experiments.

Both Tomlins’s and Dolven and Burnett’s innovations present the reader and the historian as actor rather than simply spectator. This emphasis resonates with another recent turn within legal education, that involving the embrace of clinical courses. Beginning with NYU, law schools that previously offered one or two practical courses—often focusing on landlord/tenant or other issues in the surrounding community—began in the past decade and a half to ramp up clinical education, so that now, at some schools, it is possible for students to devote almost a third of their time to clinics. With media attention prominently focused on the demise of legal education as we know it, these clinics are often proposed as the wave of the future, and, in the process, opposed to interdisciplinary legal education, which remains merely the province of would-be academics rather than practitioners.<sup>111</sup> One of the challenges facing the study of law, literature, and history in the coming years will be to counter that notion. New methods in legal history and in literary study suggest a way forward that may not entail arguing for law and these humanities *against* clinical legal education, but rather in conjunction with it. Can we, I ask, imagine a law, literature, and history clinic, and what would it look like?

#### CONCLUSION

Alone. She had acted alone. As alone as in death. One day Pierre would know. But even he would only know her act from the outside. No one could condemn or absolve her. Her act was her very own. *I have done it of my own free will.* It was her own will which was being fulfilled, now nothing separated her from herself. She had chosen at last. She had chosen herself.<sup>112</sup>

In the last chapter of *She Came to Stay*, Françoise does act—with disastrous consequences for Xavière and for the love triangle. Pierre and Xavière’s liaison has been broken off, but Xavière has learned that Françoise betrayed her by carrying on a secret affair with Xavière’s other lover, Gerbert. Deeming her own guilt inexpiable as long as Xavière continues to exist and her consciousness persists in judging, Françoise opens the gas in Xavière’s room as the latter is about to fall asleep and leaves Xavière to perish.

This Article has attempted to suggest how the disciplines comprising one version of law and the humanities—law, literature, and history—might coalesce into a true ménage à trois rather than sacrificing one in service of another’s autonomy while leaving the third out of the battle. In particular, immersion within a particular discipline may not exclude other areas but instead prompt more desire for those fields. Likewise, performing a discipline for audiences located within another

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111. Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 26, 2011, at A18.

112. DE BEAUVOIR, *supra* note 6, at 404.

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disciplinary frame can prompt reflections from both sides on the particular techniques of performance and the boundaries of the frame. Finally, law, literature, and history find themselves at an opportune moment for joining together to act rather than remaining content with analyzing. I hope that they can act, in whatever form, together, not alone.

