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**A Historical Reassessment of the Law and Literature Movement in the United States**

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*Introduction*

The traditional account of the modern United States law and literature movement takes James Boyd White's publication of *The Legal Imagination* in 1973 as its founding moment. This account also acknowledges Benjamin Cardozo's writings as an important "pre-modern" or "pre-founding" achievement. While Cardozo's and especially White's contribution to the U.S. law and literature movement can scarcely be underestimated, this account is incomplete and oversimplified. Accordingly, this article provides a richer and more detailed history of the U.S. law and literature movement.

Foremost, the traditional account fails to note that a nineteenth-century law and literature discourse enjoyed considerable influence well before Cardozo or White. This account also overlooks the law and literature scholarship that predated Cardozo or the scholarship completed in the nearly fifty-year gap between Cardozo's *Law and Literature* (1925) and White's *The Legal Imagination* (1973). By examining key examples of this overlooked scholarship, this article reassesses the historical development of the movement and provides a clearer picture of its steady, but uneven development. This article also discusses a neglected discursive shift in nineteenth-century legal practice, where lawyers largely abandoned using literature in legal practice as the law became increasingly specialized.

This article contains three sections. The first section assesses the role of literature in U.S. legal practice from the nation's founding to Christopher Langdell's tenure as Harvard Law School Dean. The second section examines early examples of U.S. law and literature scholarship from the 1880s through the 1960s. The third section discusses the establishment and growth of the modern U.S. law and literature movement. This article concludes by revisiting the historical trajectory of the law and literature movement and by considering its influence within the U.S. legal academy and beyond.

### *The Law and Literature Movement within the United States*

Historically, both law and literature have enjoyed a special social and cultural significance within the U.S. Notable lawyers and writers shared significant overlap in the early days of the nation, and despite a divergence in the mid-1800s, the two fields maintain a reciprocal fascination. The law and literature movement exemplifies this fascination, as does the number of lawyers turned writers and the staggering amount of popular culture that depicts the practice of law or the U.S. legal system.

The law and literature movement contains several distinct approaches. These approaches generally fall into the broader *law in literature* or *law as literature* categories. The law in literature approach studies the representation of law in literature.<sup>1</sup> In contrast, the law as literature approach focuses on the interpretation of legal texts. This approach applies literary theory to legal texts, which often creates contested meanings of seemingly settled legal questions.<sup>2</sup> While their interpretive strategy and focus differ, proponents of both the law in literature and the law as literature approach agree that studying literature will produce better lawyers.<sup>3</sup>

#### **A. The Role of Literature in Early United States Law: From the Founding to Langdell**

Law and literature claim a special significance in U.S. history. Moreover, the connection between law and literature was particularly important and especially strong during the nation's early history. Referring to the importance of lawyers in early U.S. literature, Robert Ferguson states that between the revolution and the 1840s:

Half of the important critics of the day trained for law, and attorneys controlled many of the important journals. *Belles lettres* societies furnished the major basis of cultural concern for post-Revolutionary America; they depended heavily on the legal profession for their memberships. Lawyers also wrote many of the country's first important novels, plays, and poems. No other vocational group, not even the ministry, matched their contribution.<sup>4</sup>

In addition to the prevalence of lawyers writing, editing, and publishing literature, Ferguson also notes that early U.S. lawyers depended on a combination of legal training and literary knowledge for successful legal practice.

In the absence of more technical guidelines, the early American lawyer found vocational definition in general knowledge and learned eloquence, in his acceptance of the classical past as a touchstone, in his commitment to public service through the written word.<sup>5</sup>

Ferguson's discussion of the relationship between law and literature from the revolution to the late 1800s details the influence that each discourse had on the other discourse's development by utilizing two key themes. The first theme is the shift from general to technical legal practice, and how this shift affected the relationship between law and literature. As Ferguson notes, the practice of law changed dramatically after the Civil War, largely due to the increasingly technical demands of legal practice to accommodate sophisticated commercial transactions. The second is the limitation of the law and literature relationship. While there is an important connection between law and literature, Ferguson argues that there are limits to this relationship, both for legal practice and for historical comparison. Relatedly, Ferguson marks the divergence of law and literature in the 1850s as a key moment for both legal practice and literature. This divergence begins the shift toward a specialized legal profession, and perhaps

correspondingly, to the limitation of the law and literature comparison. This shift also foreshadows the more nuanced contemporary relationship between law and literature.

### **1. Early United States Lawyers and Literature: From Generalist to Specialist**

Since early U.S. lawyers relied on literature for legal practice, it is not surprising that many of these lawyers pursued literary projects or even literary careers. Likewise, early U.S. lawyers encouraged one another to undertake these projects. “Each generation of the antebellum bar went on to extol the literary impulses in the one preceding it.”<sup>6</sup> Receiving institutional support from the bar, nineteenth-century American lawyers attempted to develop a “self-conscious display of learning.”<sup>7</sup>

Although early U.S. lawyers received institutional and social encouragement to undertake literary projects, they could not entirely replace legal practice with literary venture. “Trained as a scholar, the lawyer of the formative period had to remain a man of action, one for whom literature could never become an independent interest.”<sup>8</sup> As Ferguson notes, in the early 1800s U.S. lawyers wishing to leave legal practice for a full-time literary career faced a crisis between “duty and creativity.”<sup>9</sup> Indeed, he observes that leaving the legal profession “constituted the crisis of a lifetime” for Charles Brockden Brown, “the country’s first important novelist”; Washington Irving, America’s “first prominent author”; and William Cullen Bryant, America’s “first national poet.”<sup>10</sup> This crisis is particularly evident in the work of Brown. For example, “The hero of *Stephen Calvert* moves within a prism of shame and remorse; he cannot reconcile the external requirements of social obligation with the private dictates of creative imagination.”<sup>11</sup> Ferguson’s observation is telling and illustrates the restrictions that gender and class placed on individuals within this period. Of course, men like Brown, Irving, and Bryant enjoyed tremendous social and economic privilege due to family wealth, social connections, and the racial, gender, and class stratification of early U.S. society. Nonetheless, that breaking from the socially respected practice of law to engage in literary careers caused such tension for these men demonstrates the rigidity of social

norms and the strength of socially conservative perspectives on duty and responsibility prevalent at this time.

Throughout the 1840s, law and literature continued to overlap substantially. This relationship changed dramatically, however, as the U.S. approached, experienced, and then emerged from its Civil War (1861–65). The experience of the Civil War, the increasingly technical practice of law, and the outlook of major writers within the American Renaissance (1876–1917), contributed to the divergence—but not full break—between law and literature. As legal practice became increasingly technical and case law accumulated, the early U.S. lawyer became outdated and ineffective. Ferguson describes this transition starkly.

The early lawyer searched for a declaration derived from common usage and consistent with nature. His successor, the reader of case reports, thought in terms of specific commands that society had placed upon itself. . . . Their respective needs made general literature useful to the former and increasingly irrelevant to the latter. And the second lawyer inevitably swallowed the first.<sup>12</sup>

At the same time that law began excluding literature from everyday legal practice, important U.S. writers, such as Ralph Waldo Emerson, Walt Whitman, and Henry David Thoreau, began to exclude the law from literature. “This new aesthetic of the American Renaissance excludes the legal mind from literary enterprise.”<sup>13</sup> As Ferguson notes, the development of U.S. law and literature forced the fields to move in different directions. Lawyers embraced an increasingly systematic legal system with the goal of eliminating uncertainty, whereas writers embraced the exceptional, thereby questioning and destabilizing social norms.<sup>14</sup>

By the middle third of the nineteenth century, the divergence between law and literature was evident,<sup>15</sup> as legal practice dictated the decline of the generalist and the corresponding rise of the specialist. Legal education and judicial approach both reflected and contributed to this transition, exemplified by Christopher Columbus Langdell’s

invention of the case method and Oliver Wendell Holmes, Jr.'s embrace of the common law and legal skepticism.<sup>16</sup> Of course, this shift did not occur uniformly. In the U.S. south, the "configuration of law and letters" persisted much later than in the north and the west.<sup>17</sup> Unlike in the north and the west, the predominantly agrarian southern economy deterred economic and legal specialization.<sup>18</sup> Here, the development of commercial law occurred at a much slower pace, which allowed the generalist lawyer to remain viable well past 1850.<sup>19</sup>

## **2. The Limits of the Law and Literature Relationship**

U.S. literature often reflects the national concerns of a particular historical moment, whether directly or indirectly. Following the revolution and founding, the largest national concern was the longevity and stability of the newly formed republic. Early U.S. literature showed this concern. "Because a nation defined through its law rested on a republic obsessed with its own frailty, the same combination of assertion and anxiety necessarily dominated the literature of the period."<sup>20</sup> Likewise, Ferguson notes that Jeffersonian optimism "represents the clearest example we have of a legal aesthetic at work in early American literature."<sup>21</sup> Given the importance of law in the early history and development of the U.S., the inclusion of law within the literature of this period is not surprising. However, as the U.S. developed, law and literature took divergent paths. Perhaps most notably, writers of significant literary reputation began to question the role of the law in social issues and political debate.

As noted above, the rise of the technical lawyer and the influential perspective of the American Renaissance contributed to the divergence of law and literature. Important literary works of the time reflect this divergence. Turning again to Charles Brockden Brown, Ferguson notes how Brown utilized outsider characters to critique dominant social and legal norms. "At odds with republican culture, Brown made his heroes and heroines outsiders on the brink of rebellion."<sup>22</sup> More emphatically, the inability of the legal profession to resolve the slavery issue significantly damaged the reputation of profession and constituted a crisis for many lawyers.

The anathema heaped upon Webster over the Compromise of 1850 and the even greater outrage in 1857, following the Supreme Court's effort to settle the slavery issue in *Dred Scott v. Sanford*, bespoke a general loss of faith in the lawyer and his republic of laws.<sup>23</sup>

Cumulatively, these developments resulted in a distancing of the two professions. Lawyers engaged in increasingly specialized legal practice, whereas literature was no longer useful in everyday legal work, especially in the complex area of commercial law. Likewise, writers, again especially those writers associated with the American Renaissance, found the law less important. While the two disciplines never regained the comfortable, overlapping relationship that they exhibited in the early years of the nation, the influence and interest between the two disciplines remain strong, demonstrated by the sustained interest of scholars from academic backgrounds as well as the success of the modern U.S. law and literature movement.

## **B. Early Examples of Law and Literature Scholarship in the United States**

Identifying a “founding moment” for any movement is usually something of a misnomer. Long-term trends and forgotten or underappreciated events typically shape the conditions that allow for a then more noticeable “founding.” Nonetheless, for the early U.S. law and literature movement, the most recognized moment is Benjamin Cardozo's publication of “Law and Literature” in the 1925 *Yale Review*.<sup>24</sup> At this time, Cardozo was nearing the end of his 14-year term as an Associate Judge of the New York Court of Appeals (the highest state court in New York). Cardozo's influential article reappeared six years later in his larger work *Law and Literature and Other Essays and Addresses*.<sup>25</sup> The following year, Cardozo left the New York Court of Appeals to join the United States Supreme Court.

While Cardozo's 1925 article is the most recognized text of the early U.S. law and literature movement, there were several precursors. Most notably, John Henry Wigmore

published “A List of Legal Novels” in the *Illinois Law Review* in 1908.<sup>26</sup> Wigmore is best known for his encyclopedic study of evidentiary law and as a comparative legal scholar that taught law at Keio University in Japan before joining Northwestern University.<sup>27</sup> Still, Wigmore was passionate about the need for practicing lawyers and judges to study literature throughout their professional careers.<sup>28</sup> As such, he proposed requiring law students to read narrative fiction to graduate from law school.<sup>29</sup> He also proposed the equivalent of continuing legal education seminars on literary criticism.<sup>30</sup>

While Cardozo and Wigmore offer two examples of early U.S. law and literature scholarship from prominent legal figures, there are numerous similar projects from less known figures. For example, Irving Browne was a New York attorney that practiced law in the late nineteenth century. Browne published several books detailing mundane areas of legal practice such as *A Treatise On The Admissibility Of Parol Evidence In Respect To Written Instruments* (1883) and *The Elements of the Law of Bailments and Common Carriers* (1896). Browne valued literature, and following his death in 1899, a brief *New York Times* article celebrates his love of literature and his exceptional book collection.<sup>31</sup>

Browne published *Law and Lawyers in Literature* in 1882.<sup>32</sup> This text explores the representation of lawyers by “dramatists,” beginning with Aristophanes and concluding with the Irish playwright James Kenney; “novelists,” beginning with Cervantes and concluding with Anthony Trollope; “moralists, essayists, historians, and satirists,” beginning with the fourth-century Roman historian Ammianus Marcellinus and concluding with (quite interestingly) Oliver Wendell Holmes; and “poets,” beginning with the Roman satirist Juvenal and concluding with William Cullen Bryant (another interesting choice).<sup>33</sup> Browne restates very long passages from the writers that he selects and very much demonstrates the approach of early law and literature scholarship that focused on the portrayal of lawyers by other disciplines. For the most part, Browne avoids substantive criticism or analysis. In this sense, his work reads more as an anthology than as a work of criticism.

If, despite Wigmore’s publications and attention to literature, one considers Cardozo’s 1925 article the founding moment of the early U.S. law and literature



movement, there is still a nearly fifty-year gap between that article and James Boyd White's publication of *The Legal Imagination*, which is recognized as the founding text of the modern U.S. law and literature movement. Numerous law and literature scholars and popular writers discussed the relationship between law and literature during this gap, although scholars generally fail to account for this work. Three such examples of this early law and literature scholarship include Paul Squires's "Dostoevsky's Doctrine of Criminal Responsibility"<sup>34</sup> (1937), Helen Silving's "A Plea for a Law of Interpretation"<sup>35</sup> (1950), and F. S. C. Northrop's "Law, Language and Morals"<sup>36</sup> (1962).

Squires's article exemplifies the awkward first attempts at modern law and literature scholarship. Squires, a member of the New York Bar,<sup>37</sup> and almost certainly not a literary critic, offers little literary interpretation or legal analysis in his article. Rather, he mostly quotes extensive passages of Raskolnikov's dialogue in *Crime and Punishment*.<sup>38</sup> Although his article is not particularly insightful, neither is it completely without merit. Perhaps more importantly, Squires shares Wigmore's belief that literature is an invaluable teaching tool for lawyers and law students. "Every lawyer ought to read the trial of Dmitri Karamazov, and every law student should be required to do so."<sup>39</sup> Squires's enthusiasm for using literature as a legal teaching tool is telling, as early modern law and literature scholarship largely viewed literature as a valuable complimentary teaching tool, but not as a proper field of interdisciplinary scholarship.

Silving's article, published only thirteen years later, is much more representative of modern law and literature scholarship. Silving argues for a narrow interpretation of legal language, particularly statutory law. She labors to show that "rules of interpretation are methods for increasing legal certainty."<sup>40</sup> Silving's mode of argument is more important than her article's premise, as she compares legal interpretation to other types of interpretation, including literature, to reach her conclusion. She asks, "Does 'interpretation' mean the same in law as it does in other fields of social expression, such as science, religion, literature, or art?"<sup>41</sup> Silving concludes that it does not, which is not surprising given her goal of increasing legal certainty. Still, her comparison of legal rules of interpretation and scientific or artistic rules of interpretation

is quite adept.<sup>42</sup> The sophistication of Silving's article illustrates how rapidly the quality and complexity of law and literature scholarship improved. Indeed, Silving's article raises difficult questions of interpretive approach that legal scholars are no closer to answering satisfactorily today than they were in 1950.

Northrop's article also exemplifies an increased sophistication in law and literature scholarship. Northrop, then a prominent philosophy professor at Yale University, discusses the philosophical underpinnings of linguistic meaning in relation to legal interpretation. Northrop's breadth of inquiry is impressive, as he draws upon various intellectual fields. He discusses moral philosophy including the work of David Hume, G.E. Moore, and especially Immanuel Kant, early legal history including Sir Henry Maine's *Ancient Law*, and analytic philosophy and logic such as A.J. Ayer's *Language, Truth, and Logic* (1948) and John von Neumann's *The Computer and the Brain* (1958).<sup>43</sup> In addition, Northrop discusses different theories of linguistics, such as realism.<sup>44</sup>

Twenty-five years passed between Cardozo's law and literature article and Silving's article comparing legal interpretation to scientific and artistic interpretation. Northrop's article marks an additional twelve years. The difference between Cardozo's article and the article that Northrop published thirty-seven years later is immense. Foremost, Northrop's article is simply much richer. In addition, his use of varied intellectual sources and academic disciplines is considerably more sophisticated than Cardozo's article. Moreover, Silving's and Northrop's articles demonstrate a move toward nuanced literary and philosophical analysis. In addition, these articles stand in such contrast to Browne's work as almost to be unrecognizable within the same field of inquiry. Of course, it is a mistake to think of the shift from early law and literature scholarship to the modern law and literature movement as a neat linear progression. Nonetheless, to regard the "pre-modern" law and literature movement as a relatively steady progression from early ad hoc attempts at law and literature scholarship to more rigorous and systematic analysis by later scholars is borne out by historical example.

### C. The Modern Law and Literature Movement in the United States

Unlike many other academic disciplines, the modern U.S. law and literature movement has a recognized founding moment: James Boyd White's publication of *The Legal Imagination* in 1973.<sup>45</sup> This work remains a key text of the modern law and literature movement. White's text is ambitious in scale and scope and exhibits the complexity and richness that proto-modern law and literature scholars, such as Silving and Northrop demonstrated. White's text is also notable because it attempts to move the law and literature movement firmly into the legal academy. In fact, although somewhat difficult to categorize, the text is ultimately a textbook and in the *Introduction to the Student*, White characterizes it as "an advanced course in reading and writing, a study of what lawyers and judges do with words."<sup>46</sup>

In addition to White's founding text, the modern law and literature movement contains several discernable features. First, prominent law and literature scholars, including White, emphasized the law in literature approach as much as, if not more than the law as literature approach. Second, the law and literature movement secured an institutional foothold within the legal academy and the research university by hosting successful conferences and forming academic journals devoted to this field. Here, a 1981 conference at the University of Texas Law School proved especially important for the fledgling movement. This conference included notable legal scholars and some of the most influential English literature professors in the U.S. Indeed, leading literary critics Stanley Fish, Gerald Graff, and Walter Benn Michaels all attended this conference. The attendance of these influential literary critics in turn illustrates a third feature of the movement: a viable interdisciplinary approach. As legal historian Neil Duxbury notes, jurisprudential movements in the U.S. often called for an interdisciplinary approach to studying and teaching law, but very rarely followed up on these calls.<sup>47</sup> Duxbury cites the legal realists as the worst offenders, but he also notes that the law and economics and critical legal studies movements were guilty of talking rather than doing in this regard.<sup>48</sup> In contrast, many English literature and cultural studies academics work in the law and literature field. White himself completed graduate training in literature before

attending law school. Thus, the law and literature movement demonstrates a genuine commitment to interdisciplinarity, a commitment that many other legal movements exhibit only superficially.

Finally, in what is not a defining feature, but rather an interesting academic and cultural moment, the law and literature movement gained significant attention as high-profile members of the legal profession criticized the movement. Here, the most discussed example is Judge Richard Posner's criticism of law and literature. Although Posner's criticisms were often misunderstood, his critique of the discipline, most notably within his work *Law and Literature*,<sup>49</sup> caused legal academics to take notice of the movement. In fact, Posner's criticism and the response that it generated paralleled how social commentators came to know the critical legal studies movement through the university culture wars in the 1980s. The difference being that the reaction was not nearly as extreme. In addition, the debate over the merit of the law and literature movement remained largely entrenched within higher education.

### **1. The Founding Moment: James Boyd White's *The Legal Imagination***

In 1973, James Boyd White published *The Legal Imagination*. As mentioned above, White's work remains a key text of the modern law and literature movement. White's nearly 1,000-page tome is primarily a textbook for law students to study language. White relies on an immense collection of texts—literary, legal, and historical—to demonstrate the importance of language within legal writing and legal discourse. He arranges the book's chapters to compare literary and legal texts before providing writing assignments. The range of these writing assignments is extensive and often asks the reader to address some of the most controversial legal areas. For example, White asks the reader to draft model homicide and abortion statutes<sup>50</sup> and to “[p]ropose a wise and rational sentencing system.”<sup>51</sup>

Foremost, White clearly envisions the study of the law and legal practice to be a literary activity. Addressing the reader, he states, “He [or she] is asked to see what the lawyer does as a literary activity, as an enterprise of the imagination . . . .”<sup>52</sup> But, White

also views literature or literary study as “a way of looking at the law from the outside, a way of comparing it with other forms of literary and intellectual activity.”<sup>53</sup> Accordingly, for White, law is a literary activity, but literature also allows for an outsider’s perspective of the law. This conclusion informs his approach to use literary theory and literary examples to study the law. It also informs his goal of using his text “not to reach conclusions, even tentative ones, but to define responsibilities.”<sup>54</sup> White’s goal suggests that like literature, the law is always open to interpretation. Thus, the lawyer cannot reach final conclusions about the law, but rather must be responsible for interpreting the law anew in each particular instance.

White’s text also emphasizes the power of language and how legal language deploys authorial claims and shapes social arrangements. Indeed, White refers to the law as “a sort of social literature,”<sup>55</sup> and notes, “legal language is constantly used for the purposes of defining and sharing power, and giving directions and delegating discretion . . . .”<sup>56</sup> He also notes that legal language is “an inherited and formal language” and “a dangerous enterprise.”<sup>57</sup> Accordingly, controlling the language of the law is imperative and here White looks to literature for guidance.<sup>58</sup> Thus, White would have law students study literature—the art of language and writing—as a means to become better lawyers.

Just as White provides writing exercises that address the most contested areas of U.S. law, he also provides historical material that addresses the most uncomfortable moments of U.S. legal history. The best example is White’s inclusion of legal and literary materials that deal with slavery. In examining how the law uses social labels in what he terms “The Old Days: The Vicious Use of Racial Language,”<sup>59</sup> White writes, “As you read the legal literature of our slave society, you will find much of it terrible, evil beyond your comprehension. Can this be our own legal system, managed by lawyers like ourselves?”<sup>60</sup> White begins this section with a brief discussion of involuntary servitude under article IV of the U.S. Constitution<sup>61</sup> before discussing the Fugitive Slave Act<sup>62</sup> and various state statutes.<sup>63</sup> For example, White cites article 35 of the Louisiana Civil Code (1838), which defines a slave as “one who is in the power of a master to

whom he belongs. The master may sell him, dispose of his person, his industry and his labor: he can do nothing, possess nothing, nor acquire any thing but what must belong to his master.”<sup>64</sup> White also includes early cases regarding the murder and assault of slaves, where the courts of Mississippi, North Carolina, and Alabama debate the rights of slaves.<sup>65</sup> Following these legal materials, White includes pro-slavery literature from a collection titled *The Pro-Slavery Argument*, first published in 1852.<sup>66</sup> He includes this difficult material to force the reader (presumably in most instances a law student) to confront the law’s dubious past. Although he eventually moves to abolitionist legal materials, by including pro-slavery writings, White demonstrates that legal language has real power to coerce, and that historically, the law helped maintain a brutal social practice and a reprehensible socioeconomic institution.

In the final two chapters, White asks the reader to consider the professional activities of the lawyer—again defined as an act of literary imagination—and the education of lawyers. These two chapters retain White’s insistence on analyzing the language of the law and comparing this language to literary works, but they also ask the reader to answer fundamental questions of legal theory and legal education. For example, White asks the most ontological of legal questions, “[W]hat is the law? Where is it? One who ‘teaches’ or ‘learns’ the law must surely identify and find it first.”<sup>67</sup> While previous chapters used the same approach of comparing and contrasting legal language and literary works, these two chapters ask the reader to contemplate not just the legal profession, but law in its entirety. White’s exemplary use of legal and literary materials, as well as his willingness to raise fundamental ethical questions regarding the law and legal practice make *The Legal Imagination* an enduring scholarly work, which helps explain its continued relevance and use more than 40 years after its publication.

## **2. The Academic Institutionalization of the Modern Law and Literature Movement**

Through the publication of *The Legal Imagination*, White succeeded, albeit perhaps not entirely intentionally, in founding the modern U.S. law and literature movement. Following this publication, numerous legal scholars responded to White’s work, and

these responses began to shape the contours of the academic discipline. Perhaps the most important development toward securing a place within the legal academy, however, was the participation of preeminent literary critics in early law and literature conferences. The success of these conferences attracted the attention of the legal academy and university English literature departments. By attracting prominent literary critics to these early conferences, the movement bolstered its academic reputation and fostered a spirit of interdisciplinary exchange and cooperation. These early conferences also led to several key symposiums dedicated to law and literature, which further bolstered the academic reputation of the movement.

Another important development was the establishment of the Law and Humanities Institute. J. Allen Smith founded the Law and Humanities Institute in 1978 and Richard Weisberg served as the institute's first president.<sup>68</sup> Weisberg succeeded in organizing the movement by making many of the original conferences possible and creating a scholarly community between interested academics, judges, and lawyers. Ultimately, the law and literature movement used its previous successes, to establish specialized legal journals and law and literature courses at many U.S. law schools. In this sense, the story of the law and literature movement follows a typical academic narrative, as a handful of scholars committed to a specific scholarly approach succeeded in constructing a specialized discourse.

#### i. Influential Symposiums

In 1981, the University of Texas School of Law held an important law and literature conference. Interpretation—literary and legal—was an especially contested topic. The symposium journal issue that followed included the work of influential legal scholars such as James Boyd White, Richard Weisberg, Sanford Levinson, and Ronald Dworkin. The symposium also included the work of preeminent literary critics Stanley Fish, Gerald Graff, and Walter Benn Michaels. In addition, future mainstays of the law and literature movement, Robin West and Judge Richard Posner, also published articles in this symposium. Much of the symposium addresses Sanford Levinson's bleak outlook,

which argues that without finality in literary interpretation, there can be no confidence in legal interpretation.<sup>69</sup> The editors of the symposium journal issue also foreshadowed the divisiveness of the movement.

Readers who plow through the offerings in this Symposium may be left feeling battered by the cacophony of it all. Not only do the authors disagree on substantive positions, they are unable to arrive at similar characterizations of each other's work.<sup>70</sup>

Five years later, the *Georgia Law Review* published the aptly named symposium *The Constitution and Human Values: The Unfinished Agenda*.<sup>71</sup> This symposium was part of the Law and Humanities Institute's fourth annual meeting and again interpretation was the most contested topic. Academic stakes were high, as Milner Ball compared the unfinished agenda in the politics of constitutional interpretation to the unfinished work of the nation that Lincoln referred to in the Gettysburg Address.<sup>72</sup> Symposium participants included familiar law and literature scholars James Boyd White, Richard Weisberg, and Robert Cover. This symposium is notable for foreshadowing the second "founding moment" of the law and literature movement: the debate over the interpretation of the Constitution. In addition, this symposium demonstrates the institutional success of the movement, as the Law and Humanities Institute continued to have its annual meeting and symposium published in prestigious law journals.<sup>73</sup>

## ii. A Journal of Their Own: *Cardozo Studies in Law and Literature*

Perhaps capitalizing on the success of the law and literature conferences and symposiums held throughout the early and mid-1980s, the Benjamin M. Cardozo School of Law published the first volume of *Cardozo Studies in Law and Literature* in 1989.<sup>74</sup> In 2002, the school renamed the journal *Law and Literature*. Now published by the University of California Press, *Law and Literature* remains "one of only two journals in the entire country entirely focused on the interdisciplinary movement known as Law



and Literature.”<sup>75</sup> While the University of California Press publishes the journal, the Cardozo School of Law faculty continues to serve as the journal’s editors. The faculty editors describe the law and literature movement as that “which extols law-related literature and the literary value of legal documents” and “provides a unique perspective on how law and literature are mutually enlightening.”<sup>76</sup> The editors include “gender and racial bias,” “hermeneutics,” and “legal themes in works of literature” as regular topics within the journal.<sup>77</sup> The various topics that the editors include demonstrate the journal’s attempt to address the numerous and diverse aspects of the law and literature movement. Moreover, creating and maintaining a specialized legal journal further illustrates the movement’s institutional success.

### iii. An Influential Model: Law and Literature outside the United States

In addition to achieving academic success and a firm institutional footing in higher education, the modern U.S. law and literature movement has proved influential to scholars outside the U.S. For example, Australian scholars founded the Law and Literature Association of Australia in 1989.<sup>78</sup> This association began an annual conference series, formed an academic journal dedicated to the field, and helped to establish law and literature courses within Australian universities.<sup>79</sup> Founding member J. Neville Turner credits U.S. scholars for pioneering the law and literature field.<sup>80</sup> In 1994, Turner and Pamela Williams edited the association’s first collection of articles, *The Happy Couple: Law and Literature*.<sup>81</sup> Citing the publication of this collection and the association’s other accomplishments, Turner concludes that the law and literature field in Australia – largely based on the U.S. model – has attained respectability.<sup>82</sup>

*The Happy Couple* is an uneven collection and contains several articles that while interdisciplinary, do not readily fit into the law and literature paradigm. Nonetheless, the collection is notable, not just for its novelty within Australian academia, but because the collection features scholarship intent on pushing the field toward a law and cultural studies approach. The final part of the collection, *On a Higher Plane*, features cultural studies and other interdisciplinary approaches instead of close readings of literary texts.

Accordingly, it foreshadows the law and literature movement's later turn toward law and cultural studies.

Terry Threadgold's *Re-Writing the Law as Postmodern Fiction: The Poetics of Child Abuse*<sup>83</sup> and Rosanne Kennedy's *The Logic of Metonymy: Reading Catherine MacKinnon*<sup>84</sup> offer two outstanding examples of early law and cultural studies scholarship. Threadgold questions the coherence of the legal body, advocating for the examination of legal textual practices and the relation of the law to institutional and individual social practices.<sup>85</sup> Threadgold calls for scholars to apply literary theory, discourse analysis, rhetoric, feminism, and sociology to this examination.<sup>86</sup>

Re-writing the law as postmodern fiction—a play of difference, metaphor, absence of logic and meaning—may capture something of the sense of helplessness one has when caught up in the intractable, obscure, and mystifying practices of the current legal system . . . .<sup>87</sup>

Kennedy asks how feminists should read Catherine MacKinnon's work given MacKinnon's unique position within feminist discourse. Addressing the concerns of authorship in postmodern theory and MacKinnon's privileged place within feminist discourse, she asks, "[W]ho has the authority to speak for women and for feminism [?]"<sup>88</sup> Kennedy concludes that by seeking to establish radical feminism as "'true feminism,'" MacKinnon "inevitably set herself up to judge feminisms and to police the borders of feminist discourse."<sup>89</sup>

### **3. A Second Founding Moment: *Interpreting Law and Literature***

In 1988, the modern U.S. law and literature movement experienced a second "founding moment," as the fierce debate over originalism and constitutional interpretation entered the discourse and resulted in the influential text *Interpreting Law and Literature*. This text also encapsulated the shift within the law and literature

movement from close readings of literary works toward hermeneutical scholarship that relied significantly on “high” literary theory.

In *Interpreting Law and Literature*, constitutional scholar Sanford Levinson and rhetorician Steven Mailloux use literary theory to demonstrate the many possible interpretations of a legal text. Levinson and Mailloux argue that interpretation is the key activity of both literary scholarship and legal analysis and their collection features articles that complicate legal interpretation through literary theory. Here, the application of French philosopher Jacques Derrida’s theory of deconstruction to legal texts is especially relevant.<sup>90</sup> Accordingly, the contributors use deconstruction and other poststructuralist theory to show how interpretive disputes arise when a common reading of a text is not possible.<sup>91</sup>

*Interpreting Law and Literature* begins with the famous debate between U.S. Supreme Court Associate Justice William Brennan, Jr. and U.S. Attorney General Edwin Meese III regarding the role of “originalism” in the interpretation of the U.S. Constitution. Nearly all of the articles that follow reply to this debate in some way. This format is fitting, as the most significant question that Levinson and Mailloux hoped to answer was what boundaries define appropriate constitutional interpretation.<sup>92</sup> Noting the long history of the intentionalist-formalist debate in both legal and literary interpretation, Levinson and Mailloux describe how avoiding charges of relativism drove interpretive approaches in both disciplines.<sup>93</sup> *Interpreting Law and Literature* also demonstrates the importance that legal scholars within the law and literature movement began to give to literary theory in the mid-to-late 1980s. Unlike most previous law and literature works, there are scarcely any references to literary texts or literary examples within the collection. This is a sharp divergence from White’s *The Legal Imagination*, which contains an incredible amount of literary examples and passages. Instead, theories of interpretation, especially high literary theory, permeate *Interpreting Law and Literature*. As noted above, several essays discuss Derrida and deconstruction, but other poststructuralist theories also receive considerable attention.<sup>94</sup>

This collection is also notable for its inclusion of important literary critics. Again, Stanley Fish, Gerald Graff, and Walter Benn Michaels contribute to this collection and familiar legal scholars James Boyd White and Richard Weisberg also offer contributions. Influential critical legal studies scholars Mark Tushnet and Claire Dalton also add to this collection, which underscores the shift within the movement from close literary readings toward literary theory. Tushnet's and Dalton's participation also attests to the overlap between law and literature and critical legal studies. Moreover, the inclusion of Fish, Graff, and Michaels illustrates the sustained interest of prominent literary critics in legal interpretation and the law and literature movement.

Although well received, *Interpreting Law and Literature* is not without criticism. L.H. LaRue criticizes the collection for failing to demonstrate that interpretation is the "crucial commonality" between legal scholarship and literary criticism.<sup>95</sup> LaRue also finds that the contributors do not satisfactorily address how the purpose of reading alters interpretation.<sup>96</sup> Nonetheless, he concedes that law and literature is an important movement because it provides the reader with valuable new insights, including the recognition that motivation affects meaning and understanding.<sup>97</sup> Finally, LaRue concludes by noting the field's growth and its interdisciplinary approach. "The study of law and literature is indeed a burgeoning interdisciplinary field that can provide interested readers with new perspectives and fascinating intellectual challenges."<sup>98</sup>

### *Conclusion*

LaRue made these comments nearly twenty-five years ago. Since then, numerous challenges have marked the ongoing development of the law and literature movement within the United States. Following the rise of theory, the law and literature movement experienced a strong backlash from some of its members who called for a return to scholarship steeped in close readings of literary texts.<sup>99</sup> This development parallels the same debate that occurred throughout English literature departments, pitting more traditional literary scholars against theorists.<sup>100</sup> In addition to internal debate, the movement faced external challenges from philosophers that wished to employ a specific

version of law and literature scholarship to counter the law and economics movement.<sup>101</sup> The movement also received challenges from the bench.<sup>102</sup>

The law and literature movement survived these challenges and continues to enjoy success within the legal academy and higher education. Moreover, the movement continues to evolve. Here, law and cultural studies is the most notable example. Law and cultural studies inhabits an interesting academic space, as it is both a continuation of and challenge to the law and literature movement. While law and cultural studies scholars may investigate the representation of the law in literary texts, these scholars also rely on literary and cultural theory, and consider the representation of the law in other mediums, such as television, film, or popular culture. Emerging from the British tradition of cultural studies, this approach continues to gain relevance in the U.S., but it remains most influential in the U.K. where cultural studies scholars first established a strong academic presence.

Within the U.S. law and literature movement, law and narrative, or storytelling, offers the most anticipated, yet incomplete scholarly approach. The storytelling approach is similar to the broader law and literature movement in its distrust of legal abstraction. Like law and literature generally, the storytelling approach focuses on the experiences of individuals rather than legal abstraction. Numerous scholars, particularly feminist, critical race, LGBT, and indigenous rights scholars look to the storytelling approach as a solution to legal abstraction that often excluded their experiences and struggles. Proponents of this approach favor the minority or outsider voice, arguing that due to their historical silencing, they have more of a claim to speak.<sup>103</sup> In this sense, the storytelling approach threatens the law's autonomy by undermining its claims of universality.<sup>104</sup> "[A]ll stories must be told, all voices heard and acknowledged. Official law will, inevitably, use its violence in relation to some of those voices, in the interest of a stable social order."<sup>105</sup>

This comment is telling, as it reflects the crisis in the U.S. legal profession over slavery in the build-up to the Civil War that contributed to the initial divergence between law and literature in the U.S. Indeed, the tension between literature, which uses

language foremost for individual expression, and law, which uses language to maintain social order, will necessarily remain unresolved. Nonetheless, these two disciplines will continue to enrich each other and scholars will continue to study this special relationship.

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## NOTES

1. John Morison and Christine Bell. "Introduction." *Tall Stories? Reading Law and Literature*. John Morison and Christine Bell. Eds. Sudbury: Dartmouth Publishing Company, 1996, p.2.
2. *Ibid.*, p.3.
3. *Ibid.*, p.2.
4. Robert Ferguson. *Law and Letters in American Culture*. Cambridge: Harvard University Press, 1984, p.5
5. *Ibid.*, p.6.
6. *Ibid.*, p.67.
7. *Ibid.*, p.68.
8. *Ibid.*, p.87.
9. *Ibid.*, p.94. "Literature in isolation meant a life of sterility and irresponsibility; intellectual respectability required involvement within the world." *Ibid.*, p.179.
10. *Ibid.*, p.89.
11. *Ibid.*, p.135.
12. *Ibid.*, p.200.
13. *Ibid.*, p.271-72.
14. *Ibid.*, p.272.
15. *Ibid.*
16. *Ibid.*, p.287-88. Interestingly, Holmes' father, Oliver Wendell Holmes, Sr. was a noted physician, medical reformer, and poet, thus exhibiting the tension between duty and career



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present within Brown, Irving, and Bryant. Moreover, Holmes, Sr. was a member of the Fireside Poets, a group that also included Bryant.

17.*Ibid.*, p.290.

18.*Ibid.* Ferguson notes, "Men trained in law utterly dominated southern literature between 1830 and 1870." *Ibid.*, p.291.

19.*Ibid.*, p.293.

20.*Ibid.*, p.54.

21.*Ibid.*, p.33.

22.*Ibid.*, p.147.

23.*Ibid.*, p.203.

24.Benjamin N. Cardozo. "Law and Literature." *Law and Literature and Other Essays and Addresses*. New York: Harcourt, Brace & Co., 1931, pg.3: Cardozo first published this article in the Yale Review in July, 1925.

25.*Ibid.*

26.John H. Wigmore. "A List of Legal Novels." *Northwestern University Law Review*. 2.9 (1908): 574-93.

27.*Ibid.*

28.Richard Weisberg. "Wigmore, and the Law and Literature Movement." *Cardozo Legal Studies Research Paper*. Paper No. 177. Dec. 14, 2006. Online. <<http://ssrn.com/abstract=951700>>.

29.*Ibid.*

30.*Ibid.*

31."Irving Browne and His Books." *New York Times*. 18 February 1899.

32.Irving Browne. *Law and Lawyers in Literature*. Littleton: Fred B. Rothman & Co., 1982 (1882).

33.*Ibid.*

34.Paul C. Squires. "Dostoevsky's Doctrine of Criminal Responsibility." *Journal of Criminal Law and Criminology*. 27.6 (1937): 817-27.

35.Helen Silving. "A Plea for a Law of Interpretation." *University of Pennsylvania Law Review*. 98.4 (1950): 499-529.

36.F.S.C. Northrop. "Law, Language and Morals." *Yale Law Journal*. 71.6 (1962): 1017-48.

37.Squires, p.817.

38.*Ibid.*, p.820-24.

39.*Ibid.*, p.823.

40.Silving, p.520.

41.*Ibid.*, p.499.

42.*Ibid.*, p.519.

43.Northrop.

44.*Ibid.*, p.1024.

45.James Boyd White. *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*. Boston: Little, Brown & Co., 1973.

46.*Ibid.*, p.xxxi. White recognized the difficulty of classifying his work and in the Preface wrote, "The task of telling the reader what sort of book he [or she] has in his [or her] hand is unusually difficult in this case, for this book does not fit easily into any existing category." *Ibid.*, p.xix.

47.Neil Duxbury. *Patterns of American Jurisprudence*. Oxford: Oxford University Press, 1997 (1995).

48.*Ibid.*

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49. Richard Posner. *Law and Literature: Revised and Enlarged Edition*. Cambridge: Harvard University Press, 1998.
50. *Ibid.*, p.212.
51. *Ibid.*, p.408.
52. *Ibid.*, p.xix-xx.
53. *Ibid.*, p.xx.
54. *Ibid.*, p.xxi.
55. *Ibid.*, p.243.
56. *Ibid.*
57. *Ibid.*, p.81.
58. *Ibid.*
59. *Ibid.*, p.432.
60. *Ibid.*
61. U.S. Constitution, art. IV, § 3: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom the such service or labor may be due."
62. White, p.433.
63. *Ibid.*, p.434-46. White references the Louisiana Civil Code (1838), the Laws of Mississippi (1840), the Laws of Alabama (1843), and the Revised Code of North Carolina (1855).
64. *Ibid.*, p.434-35.
65. *Ibid.*, p.447-56.
66. *Ibid.*, p.456-61.
67. *Ibid.*, p.928.
68. Law and Humanities Institute. Online. <<http://docs.law.gwu.edu/facweb/dsolove/Law-Humanities/institute.htm>>.
69. "Editor's Introduction." *Texas Law Review*. 60.3 (1982): i-iv.
70. *Ibid.*, p.iv.
71. Milner S. Ball. "A Bicentennial Symposium—The Constitution and Human Values: The Unfinished Agenda." *Georgia Law Review*. 20.4 (1986): 811-13.
72. *Ibid.*, p.812.
73. Previously, the papers presented at the first annual meeting were published in the *Human Rights Quarterly* while papers presented at the second annual meeting were published in the *Mississippi College Law Review*. *Ibid.*, p.811 n.2.
74. "Editor's Preface." *Cardozo Studies in Law and Literature*. 1.1 (1989): v-ix.
75. University of California Press. "Law and Literature." Online. <<http://www.ucpressjournals.com/journal.asp?j=lal>>.
76. *Ibid.*
77. *Ibid.*
78. J. Neville Turner. "Preface." *The Happy Couple: Law and Literature*. J. Neville Turner and Pamela Williams. Eds. Sydney: Federation Press, 1994, p.xv.
79. *Ibid.*
80. *Ibid.*
81. J. Neville Turner and Pamela Williams. Eds. *The Happy Couple: Law and Literature*. Sydney: Federation Press, 1994.
82. Turner, p.xv.

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83. Terry Threadgold. "Re-Writing Law as Postmodern Fiction: The Poetics of Child Abuse." *The Happy Couple: Law and Literature*. J. Neville Turner and Pamela Williams. Eds. Sydney: Federation Press, 1994, p.322.
84. Rosanne Kennedy. "The Logic of Metonymy: Reading Catherine MacKinnon." *The Happy Couple: Law and Literature*. J. Neville Turner and Pamela Williams. Eds. Sydney: Federation Press, 1994, p.342.
85. Threadgold, p.340.
86. *Ibid.*
87. *Ibid.*
88. Kennedy, p.343.
89. *Ibid.*, p.358.
90. Sanford Levinson and Steven Mailloux. "Preface." *Interpreting Law and Literature: A Hermeneutic Reader*. Sanford Levinson and Steven Mailloux. Eds. Evanston: Northwestern University Press, 1988, p.x-xii.
91. *Ibid.*, p.xii.
92. Sanford Levinson and Steven Mailloux. "Introduction I." *Interpreting Law and Literature: A Hermeneutic Reader*. Sanford Levinson and Steven Mailloux. Eds. Evanston: Northwestern University Press, 1988, p.10.
93. Sanford Levinson and Steven Mailloux. "Introduction II." *Interpreting Law and Literature: A Hermeneutic Reader*. Sanford Levinson and Steven Mailloux. Eds. Evanston: Northwestern University Press, 1988, p.37-38.
94. David Couzens Hoy. "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives." *Interpreting Law and Literature: A Hermeneutic Reader*. Sanford Levinson and Steven Mailloux. Eds. Evanston: Northwestern University Press, 1988, p.319. Hoy discusses the interpretive debate between Jürgen Habermas and Hans Georg Gadamer, as well as the work of French philosophes such as Jacques Derrida and Michel Foucault.
95. L.H. LaRue. "Dissecting Interpretation." *Texas Law Review*. 68.5 (1990): 1073-86.
96. *Ibid.*
97. *Ibid.*, p.1085.
98. *Ibid.*
99. Richard Weisberg. *Poethics: And Other Strategies of Law and Literature*. New York: Columbia University Press, 1992, p.x. Weisberg calls for a reaffirmation of the standard literary canon. "There are many of us who do not believe, on the present record, that postmodern criticism has made its case for avoiding, nor the feminist criticism for restructuring, the canon." *Ibid.*, p.123.
100. *Ibid.*, p.xiii. Interestingly, Richard Posner notes that only six years later interpretation is no longer a high-profile topic in the law or literature. Posner, p.209: "The focus of literary theory has shifted to feminist and multiculturalist criticism of the literary canon, while a determinedly middle-of-the-road Supreme Court is busily defusing the debate between originalists and 'noninterpretivists.'"
101. Martha C. Nussbaum. *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon Press, 1996.
102. Here, the most well-known example is that of Richard Posner. This notoriety is perhaps undeserved, as Posner does not reject the law and literature movement, but rather argues that literature will have only a limited application to legal practice. In addition, Posner spends considerable effort defending the law and economics movement from the critique of a subset of law and literature scholars, but admits the limits of both disciplines and concludes that "for the

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most part, the two movements are neither complimentary nor competitive but merely separate,” and that “[e]conomics is not about to annex literature, or literature vanquish economics.” Posner, p.299-301.

103.Carol Weisbrod. *Butterfly, The Bride: Essays on Law, Narrative, and the Family*. Ann Arbor: University of Michigan Press, 1999, p.152: “Some of the most contested aspects of the storytelling movement in the law have related to the privileging of certain voices, particularly the claim that the minority or outsider voice has a different and, because historically silenced, more important sound.” *Ibid.*

104.*Ibid.*, p.161-62.

105.*Ibid.*, p.164.

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