

## CHAPTER 6

# LAW AND LITERATURE

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## I. INTRODUCTION: THE LITERATURES OF CRIMINAL LAW

TRUE-crime stories of outlaws have been a part of popular culture in England since the Middle Ages. Tales of criminality gained increasing circulation in print through the *Old Bailey Sessions Papers* (1674–1913) and the “dying confessions” published in broadside form by the Ordinary of Newgate in the eighteenth century.<sup>1</sup> The confessional broadsides were designed as warnings for their audience; though sometimes inclined to revel in the details of an offender’s crimes, these exemplary tales of condign punishment typically presented their narrators as penitent reprobates, and they

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<sup>1</sup> On the genre of “dying confessions,” see Daniel A. Cohen, *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1674–1860* (1993); Andrea McKenzie, “From True Confessions to True Reporting? The Decline and Fall of the Ordinary’s Account,” (2005) 30 *London Journal* 55; Frances Dolan, *True Relations: Reading, Literature, and Evidence in Seventeenth-Century England* (2013); Joy Wiltenburg, *Crime and Culture in Early Modern Germany* (2012), 65–87. Ruth Ahnert discusses much earlier forms of writing from within prisons in *The Rise of Prison Literature in the Sixteenth Century* (2013). The *Old Bailey Sessions Papers* (now available online, see the References) have attracted a significant amount of attention from scholars interested in their narrative implications. See e.g. Hal Gladfelder, “Criminal Trials and the Dilemmas of Narrative Realism, 1650–1750,” (1997) 20 *Prose Studies* 21; John E. Loftis, “Trials and the Shaping of Identity in *Tom Jones*,” (2002) 34 *Studies in the Novel* 1; Charles Kinian Cosner, Jr., “‘Neither Lye Nor Romance’: Narrativity in the *Old Bailey Sessions Papers*” (Ph.D. thesis, Vanderbilt University, 2007).

emphasized the inevitability of capture and conviction, resulting in execution. The eighteenth century also saw the development of more narratively complex stories that ostensibly adhered to this pattern, but treated criminality more ambiguously, as in Daniel Defoe's *Moll Flanders* (1722) and John Gay's *The Beggar's Opera* (1728). This genre would flourish even more vigorously in the early nineteenth century, in the form of the "Newgate Novel" (including some of the early works of Charles Dickens and Edward Bulwer-Lytton), sparking a debate that brought the genre to a close in the late 1830s.<sup>2</sup> These novels served as a significant source for public perceptions of crime and criminality.

The eighteenth century also witnessed the emergence of new forms of literature that openly satirized the institutions and administration of criminal law. For example, Henry Fielding's novels *Joseph Andrews* (1742) and *Tom Jones* (1749) attacked the Black Act (1723) and its capital penalties with a kind of specificity often lacking in other contemporaneous diatribes against legal institutions or lawyers.<sup>3</sup> The novelists of the 1790s developed another literary form that challenged the culture of criminal law administration and its practices of surveillance. Exemplified by William Godwin's *Caleb Williams* (1794), this genre did not target particular legal doctrines so much as the government's widespread abuse of its prosecutorial powers, particularly in the treason trials of 1794.<sup>4</sup> Featuring paranoid characters whose paranoia is largely justified, these stories touch on the psychological and physical dimensions of privacy, and they mark an early phase in the literature of legal reform. In that sense, they can be associated with other literary efforts that complemented broader reform movements aimed at the termination of the slave trade, the transformation of prisons, and the provision of counsel for defendants in felony cases.<sup>5</sup>

<sup>2</sup> Keith Hollingsworth, *The Newgate Novel* (1963); Jan-Melissa Schramm, "The Anatomy of a Barrister's Tongue: Rhetoric, Satire and the Victorian Bar in England," (2004) 32 *Victorian Literature and Culture* 285; Lyn Pkyett, "The Newgate Novel," *Oxford Bibliographies Online: Victorian Literature*, available at: <<http://www.oxfordbibliographies.com/view/document/obo-9780199799558/obo-9780199799558-0066.xml>>. For American versions of the genre, see Paul Christian Jones, *Against the Gallows: Antebellum American Writers and the Movement to Abolish Capital Punishment* (2011), 65–94.

<sup>3</sup> David Punter, "Fictional Representation of the Law in the Eighteenth Century," (1982) 16 *Eighteenth-Century Studies* 47; John Allen Stevenson, "Black George and the Black Act," (1996) 8 *Eighteenth-Century Fiction* 355.

<sup>4</sup> John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide, 1793–96* (2000); Benjamin Pauley, "Far from a Consummate Lawyer: William Godwin and the Treason Trials of the 1790s," in Ulrich Broich et al. (eds.), *Reactions to Revolutions: The 1790s and Their Aftermath* (2007), 203–230; Kenneth R. Johnston, *Unusual Suspects: Pitt's Reign of Alarm and the Lost Generation of the 1790s* (2013). Johnston's very thorough bibliography is an excellent guide for further reading.

<sup>5</sup> John Bender, *Imagining the Penitentiary* (1987); Jan Alber, *Narrating the Prison* (2007); George Bouloukos, *The Grateful Slave: The Emergence of Race in Eighteenth-Century British and American Culture* (2008); Jonathan Grossman, *The Art of Alibi: English Law Courts and the Novel* (2002); Jones (n. 2).

The psychological turn in nineteenth-century fiction adds a further dimension to the forms of literary engagement with criminal law. Novelists such as George Eliot, Robert Louis Stevenson, and Henry James offered increasingly complex meditations on responsibility, and on the specification and representation of intention, which provide a context for evolving ideas about *mens rea*. The growing interest, among criminal lawyers, in formalizing the concept of *mens rea* is itself part and parcel of the culture that sponsored these intricate fictional investigations of agency, motive, and intent.<sup>6</sup>

The later nineteenth century also saw the development of two new forms that emphasized the connection between these issues and their legal manifestations: the detective story and the courtroom novel. Following the emergence of organized police forces in Britain and the United States around the 1830s, the detective story was prefigured in the mid-century by the rise of supposedly autobiographical detective memoirs.<sup>7</sup> Recast in fictional form, the genre retained the memoirs' emphasis on the impossibility of escaping the wages of crime. The importance of legal analysis in these plots may be gleaned from the fact that the two leading candidates for the first American detective novel—Metta Fuller Victor's *The Dead Letter* (1867) and Anna Katherine Green's *The Leavenworth Case* (1878)—both have lawyers as detectives.<sup>8</sup> Within a few decades, these stories were joined by a subgenre that recalled the Newgate Novels, focusing on the criminal's point of view and the thrill of the successful crime. Among the earliest and most popular efforts were the Raffles stories (1905) by E. W. Hornung (brother-in-law of A. Conan Doyle, the creator of Sherlock Holmes).<sup>9</sup>

The courtroom novel seems to have gained in popularity after the disappearance of the Newgate Novels, which included occasional courtroom scenes but centered their plots around the crimes themselves. By contrast, in courtroom novels the trial forms the crux of the plot. Although James Fenimore Cooper's *The Ways of the Hour* (1850) is often characterized as the first example of this genre, several earlier novels also use trials in this fashion, such as John Neal's *Rachel Dyer* (1828), Samuel Warren's *Now and Then* (1847), and Elizabeth Gaskell's *Mary Barton* (1848).<sup>10</sup> Neal's novel deals with the Salem

<sup>6</sup> Lisa Rodensky, *The Crime in Mind: Criminal Responsibility and the Victorian Novel* (2003); Susan Zieger, "How far am I Responsible? Women and Morphinomania in Late Nineteenth-Century Britain," (2005) 48 *Victorian Studies* 59.

<sup>7</sup> Haia Shpayer-Makov, *The Ascent of the Detective: Police Sleuths in Victorian and Edwardian England* (2011), 226–297.

<sup>8</sup> Simon Stern, "Detecting Doctrines: The Case Method and the Detective Story," (2011) 23 *Yale Journal of Law & the Humanities* 339, 370–372.

<sup>9</sup> Literature and film in this era also sought increasingly to represent the perspective of the female criminal. See Elizabeth Carolyn Miller, *Framed: The New Woman Criminal in British Culture at the Fin de Siècle* (2008).

<sup>10</sup> See Jon W. Blandford, "Known Criminals: Nineteenth-Century U.S. Crime Literature and the Epistemology of Notoriety" (Ph.D. thesis, Indiana University, 2011), 184–217 (discussing Cooper's novel); David J. Carlson, "Another Declaration of Independence: John Neal's *Rachel Dyer* and the Assault on Precedent," (2007) 42 *Early American Literature* 405; and Jonathan Grossman, "Mary

witchcraft trials, but the other three describe versions of the story that is most typical in this genre—that of a criminal defendant who is wrongly accused of murder and is ultimately exonerated.<sup>11</sup> Both detective and courtroom novels create space for reflection on particular doctrines or practices of criminal law, by using them as plot devices or by showing how they may result in injustice. Indeed, the latter was ostensibly the motive for Melville Davisson Post's unscrupulous, loophole-seeking lawyer in *The Strange Schemes of Randolph Mason* (1896), a collection of detective-like stories that were accompanied with citations to the cases that provided the doctrinal basis for his plots.<sup>12</sup>

Over the last century, writers have experimented further with the relations between real and imaginary crimes, narrative modes of tracing their origins and consequences, and literary devices for positioning the reader vis-à-vis the events and the investigation. Modernist fiction expanded the range of materials that could be repurposed for literary ends; thus, for example, when Theodore Dreiser's *An American Tragedy* (1925) retraces the details of a 1906 murder case, at some points the narrative probes the protagonist's thoughts directly and elsewhere it draws on the reportage of contemporaneous newspaper coverage. The publishers promoted the book with an essay contest highlighting the doctrinal puzzle that the novel poses and complicates: was the main character guilty of first-degree murder?<sup>13</sup> A series of books published in Weimar Germany featured true-crime narratives that mined the actual case files, combining an array of visual and documentary materials in a multi-perspective form, and presenting this evidence in a way that conveyed a sense of crisis resulting from the failure of the detective's rational powers.<sup>14</sup> In England, the 1930s saw a resurgence of the criminal autobiography, now cast as offering an inside perspective on the scientific and institutional management of crime.<sup>15</sup> The French surrealists experimented with representations of crime across a variety of forms including tabloid journalism, visual art, and pulp fiction, using fictional stories and actual murder cases to pose questions about state violence and media culture.<sup>16</sup> The expansion of corporate criminal liability

*Barton's Telltale Evidence*" in Grossman (n. 5) 107–136. Scholars have discussed some of Warren's other legally oriented fiction, such as *Ten Thousand a-Year* (1839–41)—see e.g. Grossman (n. 5) 102; Kieran Dolin, *Fiction and the Law* (2009), 73—but *Now and Then* has not attracted any critical attention.

<sup>11</sup> For more examples, see Breen's bibliography in the References, and Rob Warden (ed.), *Wilkie's Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions* (2005).

<sup>12</sup> Stern (n. 8) 345–347.

<sup>13</sup> The \$500 prize went to a law professor, whose essay was published as a pamphlet: Albert Lévit, "Was Clyde Griffiths Guilty of Murder in the First Degree?" (1926). Lévit assigned Dreiser's novel in his criminal law class, and used the novel on his final exam. The text of his rare pamphlet was reprinted, with a critical discussion, in Philip Gerber, "'A Beautiful Legal Problem': Albert Lévit on *An American Tragedy*," (1991) 27 *Papers on Language and Literature* 214. John Cyril Barton also discusses Lévit's analysis in *Literary Executions: Capital Punishment and American Culture, 1820–1925* (2014), 242–245.

<sup>14</sup> Todd Herzog, *Crime Stories: Criminalistic Fantasy and the Culture of Crisis in Weimar Germany* (2011).

<sup>15</sup> Matt Houlbrook, "Fashioning an Ex-Crook Self: Citizenship and Criminality in the Work of Netley Lucas," (2013) 24 *Twentieth Century British History* 1.

<sup>16</sup> Jonathan P. Eburne, *Surrealism and the Art of Crime* (2008).

spawned a number of novels and movies that attempted to imagine the kinds of entities and powers that could account for these acts.<sup>17</sup> Truman Capote reanimated the true-crime genre again in *In Cold Blood* (1965), attempting a new kind of narrative proximity afforded by extensive interviews with the two men who were ultimately convicted of the murders Capote describes.<sup>18</sup> Terrorism, and the cyber- and financial crimes of recent decades, continue to offer new prospects for these narrative inquiries.<sup>19</sup>

Academic research on law and literature began to proliferate in the 1970s. For legal scholars, a significant part of the interest in fiction and drama involves the power of literary language, its ability to absorb the reader's attention in a way that rarely occurs with legal prose, which usually strives for more factual and affectless descriptions.<sup>20</sup> This way of examining the legal dimensions of literary texts accepts the fictional portrayal as given—it may be riveting, confusing, or inaccurate, but whatever it has to offer is a matter of the plot and characters, and perhaps also the rhetoric that accompanies their delineation. Usually characterized as the study of “law in literature” (with corollaries such as law in film, television, etc.), this approach is concerned with what the story says explicitly, not with questions of genre, narrative structure, and technical modes of representation, which would move beyond the story to ask about the means by which it is given to us.

More recently, scholars have shifted their attention to questions about the grounds of narrative—questions about the motives for narrating the story and the conditions that make a story narratable. Current scholarship along these lines examines the relations between narrative form and techniques of representation, on the one hand, and structures of legal analysis on the other. “Narrative form” is taken here to encompass not simply an Aristotelian tracing of the action from initiation to resolution, but also matters such as the use of a narrator who is internal or external

<sup>17</sup> Stefan Andriopoulos, *Possessed: Hypnotic Crimes, Corporate Fiction, and the Invention of Cinema* (2008).

<sup>18</sup> For a helpful discussion of Capote's novel in relation to twentieth-century American “true crime” writing, see David Schmid, “True Crime,” in Charles J. Rzepka and Lee Horsley (eds.), *A Companion to Crime Fiction* (2010), 198–209. Recent research on “true crime” stories has ventured into a number of other previously overlooked contexts; see e.g. Louise McReynolds, *Murder Most Russian: True Crime and Punishment in Late Imperial Russia* (2013); Joy Wiltenburg, “True Crime: The Origins of Modern Sensationalism,” (2004) 109 *American Historical Review* 1377; Jonathan Smolin, *Moroccan Noir: Police, Crime, and Politics in Popular Culture* (2013), 80–123; Anneke Rautenbach, “‘Every Technique Known to Prose’: The Aesthetics of True-Crime in Contemporary South Africa,” (2013) 25 *Current Writing* 153.

<sup>19</sup> Matthew G. Kirschenbaum, *Mechanisms: New Media and the Forensic Imagination* (2008); David S. Wall, “Cybercrime and the Culture of Fear: Social Science Fiction(s) and the Production of Knowledge about Cybercrime,” (2008) 11 *Information, Communication, & Society* 861; Margaret Scanlan, *Plotting Terror: Novelists and Terrorists in Contemporary Fiction* (2001); Annie McClanahan, “Future's Shock: Plausibility, Preemption, and the Fiction of 9/11,” (2009) 17 *symplekē* 41.

<sup>20</sup> Scholarship in this area rarely examines poetry. For discussions of criminal law that do, see Jonathan Goodman, *Bloody Versicles: The Rhymes of Crime* (1993) and Ellen L. O'Brien, *Crime in Verse: The Poetics of Murder in the Victorian Era* (2008).

to the plot, the ways in which the narrative encourages and frustrates the reader's expectations, and the presence of features that make the story seem like a fable or a minutely fact-based account. Plot and character do not become irrelevant in this approach, but instead of limiting the focus to the content of the story, the analysis also brings in the means and conditions of narration.

These inquiries usually proceed historically, by looking at the emergence of new legal modes of evaluating responsibility, consent, or harm, for example, and asking how they align with narrative methods for representing consciousness, or generic patterns for achieving closure. Rather than treating a character's meditations, or the narrative presentation of a plot detail, as a transparent slice of reality that is significant because of what it describes or because of its evocative language, scholarship in this vein asks how narrative access is afforded or withheld, and what techniques, now so familiar as to be capable of passing without notice, are being exploited to guide the reader's perceptions.

This mode of inquiry has not yet been labeled in a fashion akin to "law in literature." For convenience, it is characterized here as "legal aesthetics," to convey the sense that literary methods and devices may have legal corollaries, if not precise counterparts. The significance of this approach might seem to consist in showing that modern legal concepts (e.g. "continuing acts") and analytical structures (e.g. the distinction between objective and subjective liability) are not inevitable but are contingent products of historically specific developments. That would be an uninspiring conclusion to draw, because lawyers, ever ready to offer their own proposals for doctrinal modification, are well aware that the law is a collage of improvised and reconditioned patches for specific problems. Rather, the approach described here offers a way of illuminating the rationales at work in the creation of legal concepts and structures, allowing us to see where they came from and what assumptions, discernible from other contemporaneous sources, allowed them to make sense. The aim generally has less to do with reforming the law than with explaining the origins of the framework and premises that govern the current state of affairs, but for those interested in reform, the result is to facilitate a more informed critique (or justification) of the existing doctrine. A fuller discussion of legal aesthetics would also include work on visual media—particularly film—but because of space constraints, I focus specifically on literature.<sup>21</sup> In what follows, I first discuss "law in literature" (and its cognates) in more detail, and then turn to legal aesthetics. I use literary examples to

<sup>21</sup> For discussions of visual media that take up issues involving criminal law, see Andriopoulos (n. 17); Samuel Y. Edgerton, *Pictures and Punishment: Art and Criminal Prosecution during the Florentine Renaissance* (1985); Katherine Fischer Taylor, *In the Theater of Criminal Justice: The Palais de Justice in Second Empire Paris* (1993); Cristina Vatulescu, *Police Aesthetics: Literature, Film, and the Secret Police in Soviet Times* (2010); Rachel Hall, *Wanted: The Outlaw in American Visual Culture* (2009); John Denvir, *Legal Reelism: Movies as Legal Texts* (1996); Nicole Hahn Rafter, *Shots in the Mirror: Crime Films and Society* (2000); and Richard K. Sherwin, *Visualizing Law in the Age of the Digital Baroque* (2011).



show what both approaches might yield. The final section briefly discusses the suggestive possibilities opened up by recent research in cognitive literary studies.

## II. LAW IN LITERATURE, LITERATURE IN LAW

Literature has traditionally been seen as a useful means of thinking about criminal law insofar as fictional narratives supply richly detailed illustrations of legal dilemmas, envisioned with a depth and fullness rarely found in legal opinions. Seen in this way, the conjunction of literature and criminal law is merely one part of a network of literary engagements with legal material, in which dramatic, bizarre, or humorous ways of imagining conflicts create opportunities to speculate about the proper application of legal doctrine. Stories involving crime and punishment offer especially notable instances of such conflicts, because the details are more vivid and the stakes are higher, but in this mode of inquiry, no matter which field of law is invoked, the reason for turning to literature remains the same—namely, to provoke thought about the validity and limits of legal doctrine and practices, through concrete depictions of law's feats, quirks, and misfires.<sup>22</sup> Because portrayals of legal events in fiction often affect readers' beliefs about what the law is and what it should be (either by purporting to give accurate accounts of legal doctrines and the courts, or by imagining the complexities of situations that law confronts only partially), stories of law may influence how the law is applied, and therefore may end up becoming part of law.<sup>23</sup>

Whereas literary scholarship on criminality reaches back at least as far as the “dying confessions” of the eighteenth century, legal scholarship on the literary dimensions of crime has focused largely on material from the nineteenth and twentieth centuries. One reason for this focus involves the pedagogical rationale for adding literature to the law school curriculum. It was in the mid-to-late nineteenth century that exhortatory tales of penitent criminals gave way to stories offering indictments of the legal system, through novelistic portrayals that solicit sympathy for the victims of unjust laws and unjust punishments. The dispute over the *Newgate Novels* of the 1830s arose because of the genre's penchant for making criminality attractive; writers solved the problem by taking the narratively compelling

<sup>22</sup> For a recent discussion, see David Alan Sklansky, “Dick Wolf Goes to Law School: Integrating the Humanities into Courses on Criminal Law, Criminal Procedure, and Evidence,” (2012) 3 *California LR Circuit* 55.

<sup>23</sup> Richard K. Sherwin, *When Law Goes Pop* (2000).

opportunities that crime offers, and reallocating to them to stories with deservedly sympathetic protagonists. Law schools usually include “law in literature” for precisely this reason: to offer an alternative perspective on the workings of the criminal law system, and to illustrate its unfair treatment of those deemed “other,” on whatever grounds are socially acceptable at the time.<sup>24</sup>

The pedagogical potential of law in literature, however, remains underexploited. When slotted into this role, literary examples are often used to pose the kinds of hypotheticals that law professors would invoke in any case, with the added benefit of providing a welcome contrast to the prose usually encountered in casebooks. In effect, this approach treats novels and plays as expressing propositional views—as praising or denouncing legal doctrines, assumptions, and institutions. The result is not only to reduce the complexity of the literary material, but also to reduce the complexity of the legal readings it accompanies. To take a familiar example, Susan Glaspell’s short story “A Jury of Her Peers” sometimes figures in the criminal law curriculum as a means of helping students to understand Battered Women’s Syndrome in the law of self-defense. The story’s function, when approached in this fashion, is to reveal the limits of the law in Glaspell’s era—that is, to show why the law of self-defense needed to be modified, and how the law of evidence reflected a set of assumptions that screened out women’s knowledge and interpretive skills. Originally published in 1917, the story describes an investigation into the death of John Wright, in a lonely homestead in the Midwest—a death, as the reader comes to see, that was caused not by an unknown intruder but by John’s emotionally abused wife, Minnie. An uneven set of stitches after a series of neat ones on a half-finished quilt, the broken door of a birdcage, and a bird with a broken neck—these signs of her abuse, carrying the implication that her own life may have been threatened, are barely glimpsed by the men conducting the investigation, but are apparent to their wives, who hastily conceal the evidence. Because we apprehend all this evidence through the remaining clues (Minnie Wright, held in jail pending trial, never appears in the story), we are also left to speculate about John Wright’s brutality. When read alongside the jurisprudence on Battered Women’s Syndrome, the story is often taken to show that the women, Minnie Wright’s true peers, are uniquely capable of understanding what has taken place.

But given that the story depends so heavily on the interpretation of clues, this reading itself seems to miss some of the clues in the text. The women’s decision to hide the evidence suggests that the men are equally capable of noticing and correctly interpreting these details—otherwise there would be no need to conceal them. The

<sup>24</sup> Winfried Fluck discusses the implications of this approach in “Fiction and Justice,” (2003) 34 *New Literary History* 19; see also Rob Atkinson, “What Is It Like to be Like That: The Progress of Law and Literature’s ‘Other’ Project,” (2008) 43 *Studies in Law, Politics and Society* 21. Some scholars use the criminal’s law treatment of the “other” to explore sociological issues rather than to address legal doctrine as such; see e.g. Vincenzo Ruggiero, *Crime in Literature: Sociology of Deviance and Fiction* (2003).



women, by their thoughts and actions, are shown to be empathetic, whereas the perspectives of the men are largely withheld from us, available only to be inferred from their words—such as the sheriff’s observation that (male) jurors tend to be sympathetic to female defendants. Although he is holding Minnie Wright as a suspect, he doubts that a jury would convict her of killing her husband, because no clear motive can be pinned on her. “[W]hen it comes to women,” he observes, juries are reluctant to convict without “some definite thing,” “a story” that explains the defendant’s motive.<sup>25</sup> It is not clear, however, why it would be sufficient to discover some motive, any motive, as long as it explains the murder. One might think that in this case, the same concern that jurors normally show for female defendants would operate in Minnie Wright’s favor, once the jurors understood her desperate situation. Indeed, one of the men in the search party—Mr. Hale—is shown to be just as ready to harp on “trifles” as any of the women accompanying them, and he goes so far as to observe that “what his wife [Minnie] wanted [never] made much difference to John.”<sup>26</sup> In short, he seems ready to acknowledge John Wright’s cruelty, and this realization might translate into sympathy for Minnie Wright. This is not the only way to make sense of Hale’s comments, but it remains a possible interpretation, given that we are shown the women’s thoughts directly and left to infer the men’s thoughts.

To suggest that the men might be capable of interpreting the same clues as their wives, or might be capable of rendering the same verdict, would serve to complicate the usual reading of the story. But it is precisely because literary examples rarely yield propositional conclusions that fiction has so much to offer, when used in the classroom. Indeed, in a tale centered on the interpretation of circumstantial evidence, one might think that the story’s effect consists as much in the experience of apprehending the range of possible inferences as in the drive to reach a definite conclusion. These considerations might serve to reorient the story’s pedagogical use: instead of arguing for the viability of a particular doctrinal solution, the reader’s hesitation among various ways of understanding the clues might offer an opportunity for considering the task of a jury when required to choose among competing explanations.

Because of its complexity and ability to yield meaning at several levels of analysis, fiction inevitably suggests ambiguities and offers tangible grounds for disagreement. Rather than contrasting literary ambiguity with legal clarity, we might instead ask how fiction can be used to expose legal ambiguity. Fiction, of course, abounds in techniques that solicit the reader’s interpretive efforts (e.g. through the presentation or withholding of characters’ thoughts, the manipulation of perspective, and strategic handling of background details), whereas legal opinions use devices that purport to resolve uncertainty (e.g. by quoting precedent and using string cites to

<sup>25</sup> Susan Glaspell, “A Jury of Her Peers,” in Edward J. O’Brien (ed.), *The Best Short Stories of 1917* (1918), 256, 279.

<sup>26</sup> Glaspell (n. 25) 260.

demonstrate the strength of a proposition), but despite these efforts, judges often fail to make their conclusions seem inevitable. Legal and literary ambiguity take different forms, and the use of imaginative literature is hardly the only pedagogical means of revealing the complexities that legal arguments strive to conceal. The dispute between the majority and dissenting opinions in *Scott v. Harris*, giving contrasting accounts of a suspect's behavior and its bearing on the use of deadly force by the police, is perhaps the most notorious recent episode in which different ways of framing the same conduct produced radically different interpretations of the events,<sup>27</sup> but any number of cases might be mined for the same purpose. Nevertheless, any means of helping students to recognize these complexities should be fully exploited, whereas literary materials are too often simplified. Literary portrayals of legal dilemmas offer an opportunity not only to gain an alternative perspective on doctrinal matters, but also to inquire into the features these different forms of writing use to manage ambiguity and to draw the reader in.

Literature in law is a less discussed variation of the law-literature enterprise. Jurists and lawyers often draw on literary materials as fodder for legal arguments. Indeed, before the emergence of law and literature as a distinctive field of research, much of the interest in literature, for lawyers and law professors, stemmed from fiction's ability to dramatize legal dilemmas and to reinforce legal arguments with the emotional power of an individual character's personal experience.<sup>28</sup> Nineteenth-century manuals on advocacy, for instance, often urged lawyers to equip themselves with a storehouse of literary examples.<sup>29</sup> Judgments from this era also quoted literary sources with some regularity.<sup>30</sup> Similarly, nineteenth-century treatises sometimes drew extensively on literary materials to illustrate doctrinal points. An especially notable instance of this method is James Ram's *A Treatise on*

<sup>27</sup> 550 U.S. 372 (2007); see also Dan M. Kahan, David A. Hoffman, and Donald Braman, "Whose Eyes Are You Going to Believe: *Scott v. Harris* and the Perils of Cognitive Illiberalism," (2009) 122 *Harvard LR* 837.

<sup>28</sup> E.g. John Henry Wigmore's lists of "legal novels" consist primarily of novels featuring criminal law issues. John H. Wigmore, "A List of One Hundred Legal Novels," (1908) 2 *Illinois LR* 574; John H. Wigmore, "A List of One Hundred Legal Novels," (1922) 17 *Illinois LR* 26.

<sup>29</sup> On the forensic value of literary fluency, see e.g. Edward W. Cox, *The Advocate: His Training, Practice, Rights, and Duties* (1852), 88, 122–123; Byron K. Elliott, *The Work of the Advocate: A Practical Treatise* (1888), 390–391; Henry Hardwicke, *The Art of Winning Cases* (1894), 264–265, 305, 425–426. The point remains a familiar one in discussions of forensic technique; for a recent example, see Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (3rd ed., 2012), chs. 11–14.

<sup>30</sup> W. N. Osborough, *Literature, Judges, and the Law* (2007); "Poetry in Judicial Opinions," (1898) 2 *Law Notes* 26; "Some Instances of Poetry in Judicial Opinions," (1907) 64 *Central LJ* 465. Nineteenth-century fiction includes a few instances of the counterpart to this practice—i.e. the citation of legal material in literary texts. Besides Post's lawyer-detective stories (n. 12), see Warren's *Ten Thousand a-Year* (n. 10) and Dolin's discussion of it (n. 10); and the legal opinion in chapter 25 of Anthony Trollope's *The Eustace Diamonds* (1873), which Marco Wan discusses in "Stare Decisis, Binding Precedent, and Anthony Trollope's *The Eustace Diamonds*," in Marco Wan (ed.), *Reading the Legal Case* (2012), 205.

*Facts as Subjects of Inquiry by a Jury*. In the first edition of his treatise, published in 1861, Ram cited more examples from poetry, drama, and fiction than from cases. He added a number of legal citations to the next two editions (1870, 1873), but also increased his range of literary reference. The third edition included more than a hundred literary examples and, in addition to a table of cases, featured separate tables of the authors and of the works quoted in the text. Though Ram's treatise is unusual in this respect, his heavy use of literary material probably reflected the same considerations that typically explain why law professors use literature in the classroom. The law of evidence, in the second half of the nineteenth century, was beginning to adopt increasingly sophisticated distinctions that were consistent with the refinements of contemporaneous legal science, and the vivid and memorable examples that Ram found in literary sources may have seemed to offer an antidote to these abstractions. His penchant for literary rather than legal examples hints at an idea that seems to underlie many of the legal ventures in this direction, but that jurists are loathe to assert directly: namely, that literature might be a source of law.

While the practice of literary quotation still has a place in judicial writing, contemporary manifestations of literature in law have also taken another form, involving the use of features borrowed from particular genres. Thus, for example, in a 2008 dissent that sought to show why the U.S. Supreme Court should have agreed to hear an appeal in a dispute over the existence of probable cause to make an arrest, Chief Justice Roberts mimicked the style of a hardboiled crime novel. By describing the arrest from the perspective of a beat cop used to the mean streets and the ways of criminals, Roberts presented the arresting officer as a seasoned observer whose inferences easily satisfied the probable-cause requirement.<sup>31</sup> Experiments in this vein raise intriguing questions about the effects of literary allusion in the legal context. The noir genre is best known for the deceptions and double-crossings that complicate its plots, and for a sense of pervasive corruption that makes the actions of the police seem futile at best—yet presumably these are not the associations the reader is meant to draw on here, where the point is to make the officer seem reliable and effective. Legal uses of literary allusion, whether through direct quotation or generic imitation, have received little scholarly attention, and they tend to be treated as serving a merely decorative function, or as attempts to display erudition. Precisely because legal prose is so often seen as bereft of the features that draw readers to literary texts, judges' self-conscious efforts to modulate their prose in this fashion merit more attention.

"Law as literature" is the more commonly invoked rubric for scholarship that brings literary methods to bear on legal writing. While this might seem an appropriate label for the literary tendencies just described, the study of law as literature rarely considers literary and legal texts together, but instead addresses features such

<sup>31</sup> 555 U.S. 964 (2008) (Roberts, C.J., dissenting from denial of certiorari).

as personification, metaphor, and narrative form in legal writing, with a focus on storytelling. To be sure, legal texts—including judicial opinions—have sometimes been treated as literary works. Rufus Griswold's *The Prose Writers of America* (1846), one of the most popular and influential literary compilations of its time, included extracts by John Marshall, Joseph Story, and Daniel Webster. Writings by the same figures appear in the *Cyclopedia of American Literature* (1855), along with excerpts from Joseph Kent's treatises. This conception of literature as including forensic oratory and writing is consistent with Robert Ferguson's treatment of the interchange between law and literature in nineteenth-century America, an interchange based on shared social and educational norms that began to disappear as the century wore on.<sup>32</sup>

In contemporary work on law as literature, the animating questions involve the ways in which judges craft their opinions—particularly the narrative arc and the selective use of detail in reciting the facts—so as to make the legal analysis seem persuasive. One of the favorite themes of work in this area is that only through the frame of a plot and its orienting pressures do we attribute meaning to events, or even understand them as discrete events that have any significance in a larger structure.<sup>33</sup> Recast in the form of advice rather than analysis, the study of law as literature yields insights for the trial lawyer, whose management of a case similarly requires skill in gauging the facts' narrative impact. Accordingly, in the same advocacy manuals that offer literary recommendations to flavor the lawyer's arguments, we also find literary models endorsed for their value as narrative templates.

Research on law's narrative operations has lavished a significant amount of attention on *Old Chief v. United States*, perhaps the only decision in which the U.S. Supreme Court has discussed the importance of narrative control to a lawyer's handling of the case—and the limits that courts may place on that control. The defendant, charged with an offense based in part on his status as a felon, offered at trial to stipulate to the prior felony, but the prosecution opted to put the details before the jury. He was convicted, and ultimately the Supreme Court ruled that while a party may normally present its case by harnessing the "persuasive power of the concrete and particular," in this case the defendant's legal status was "entirely outside the natural sequence of...[the events bearing on] the current offense," and, far from adding to the "descriptive richness" of the prosecution's case, these details only created a risk of unfair prejudice.<sup>34</sup> In another criminal dispute involving the

<sup>32</sup> Robert A. Ferguson, *Law and Letters in American Culture* (1984).

<sup>33</sup> For examples of research on some of the less commonly studied contexts for these issues, see Yasuhiko Karasawa, "From Oral Testimony to Written Records in Qing Legal Cases," in Charlotte Furth et al., *Thinking with Cases: Specialist Knowledge in Chinese Cultural History* (2007), 1–24; Robert E. Hegel, "Imagined Violence: Representing Homicide in Late Imperial Crime Reports and Fiction," (2004) 25 *Zhongguo Wenzhe Yanjiu Jikan* 61; Jordanna Bailkin, "The Boot and the Spleen: When Was Murder Possible in British India?," (2006) 48 *Comparative Studies in Society and History* 462; Baudouin Dupret et al. (eds.), *Narratives of Truth in Islamic Law* (2007); Christian Biet, "Judicial Fiction and Literary Fiction: The Example of the Factum," (2008) 20 *Law and Literature* 403.

<sup>34</sup> *Old Chief v. U.S.*, 519 U.S. 172, 187 (1997).

admissibility of evidence, the First Circuit offered a similar analysis, chastising the prosecution for presenting its case in a manner that positioned the jurors as readers of a detective story, and for seeking to exploit this strategy in order to get around the hearsay prohibition:

in an effort to make the evidence of defendants' guilt more lively and to captivate the jurors with the drama of the hunt for the solution to the crime, [prosecutors] will often organize the presentation of the evidence of guilt in the form of a narrative of the investigation. . . . [B]y choosing a more seductive narrative structure for the presentation of the evidence of guilt, [the prosecution attempted to] expand the scope of the relevant legitimate evidence, so as to convert prejudicial and otherwise inadmissible evidence into admissible evidence.<sup>35</sup>

It should not come as a surprise that these decisions, and many of the others in which courts have been at pains to call attention to the issues of narrative arrangement and control, turn on the admissibility and presentation of evidence.<sup>36</sup> As noted previously, this was the context for Ram's literary jurisprudence. However, if the legal importance of narrative is restricted to questions about the management of evidence, or even to questions about how the facts of a case are presented, we risk losing sight of the potential that narrative analysis offers.

The subject of narrative perspective, for example, is rarely taken up in discussions of law and narrative, but it can help to reveal complications that might otherwise escape notice. In determining the existence of probable cause to legitimate a search, courts consider the details that were "available to the officer"<sup>37</sup> when the search was conducted. The question may seem simple, but as studies of hindsight bias have shown, it is difficult to screen out information acquired later, such as the result of the search itself.<sup>38</sup> Research on narrative perspective might alert us to the difficulty implicit in the inquiry about the facts "available to the officer": available in the sense that the officer had actually observed them, or in the sense that they were capable of being observed? The usual form of inquiry overlooks this distinction, seeking only to guard against the use of information that the officer could not possibly have known. Dorrit Cohn, in an influential study of techniques for representing thought in fiction, shows how the reader may be led to distinguish between "the mind's vague ruminations" and perceptions that have actually found "conceptual expression" in a character's mind or speech.<sup>39</sup> While recovering an officer's perceptions is no easier than assessing a

<sup>35</sup> *U.S. v. Benitez-Avila*, 570 F.3d 364, 369 (1st Cir. 2009).

<sup>36</sup> In a related discussion, the Supreme Court of Canada has observed that unless the trial judge monitors the arguments carefully, the structure governing the parties' closing summaries may allow the prosecution to exploit "the right of final address to reorient its argument, build[ing] its case on the 'gaps' in the address of the accused," and "adding new elements apart from narrative coherence and rhetorical force to the evidence against the accused" (*R. v. Rose*, [1998] 3 SCR 262, paras. 20, 21).

<sup>37</sup> *Texas v. Brown*, 460 U.S. 730, 742 (1983).

<sup>38</sup> Simon Stern, "Constructive Knowledge, Probable Cause, and Administrative Decisionmaking," (2007) 82 *Notre Dame LR* 1085, 1120–1121.

<sup>39</sup> Dorrit Cohn, *Transparent Minds: Narrative Modes for Presenting Consciousness in Fiction* (1978), 104.

defendant's intentions, Cohn's distinction at least offers a means of recognizing the problem, whereas the formulation adopted by the courts encourages us to ignore it.

Similarly, courts often undertake to represent a speaker's intentions on the basis of a retroactive reconstruction that tacitly blends disparate narrative perspectives. For example, in *Bumper v. North Carolina* one of the points of contention involved a search that was made to appear consensual in precisely this fashion. At trial, the court reporter rendered the dialogue between the prosecution and one of the witnesses "in the form of a narrative" that recast "the actual questions and answers... [as] continuous first person testimony," effectually "put[ting] into the mouth of the witness some of the words of the attorneys."<sup>40</sup> The effect was to conflate the prosecution's view of the events with that of the witness, thereby making it appear that she had permitted the police to search her home. The effort to establish a defendant's intent may depend on similar adjustments of language and perspective. As Anne Coughlin notes, a suspect being interrogated may "offer conflicting versions concerning what she may have known, believed, intended, hoped, and feared before, during, and after the [events]," with the result that her uncertain meditations about, for example, an afghan inadvertently or semi-consciously or deliberately tossed on a radiator may support a first-degree murder charge once the details have been aligned in "a story with a coherent plot and human agents who are endowed with and act upon knowledge, beliefs, and intentions."<sup>41</sup> Offered up speculatively (again, as in *Bumper*, by way of response to adverse questions), this is the kind of language that a novelist would present through free indirect discourse so as to convey a sense of uncertainty about the speaker's awareness of her intentions. Even though the speculations are elicited in response to a series of questions, they can be made to form a seemingly coherent and self-generated statement. The study of narrative technique has long figured prominently in literary scholarship, and closer attention to this topic could revitalize an area of legal research that has largely been restricted to discussions of plot structure.

### III. LEGAL AESTHETICS

Recent work on the links between law and literature has begun to put more emphasis on the ways in which structures of explanation or inquiry in one area migrate into the other. The result has been to widen the range of literary material

<sup>40</sup> *Bumper v. North Carolina*, 391 U.S. 543, 547, n. 8 (1968). On this effect, see also Peter Brooks, "Narrative Transactions—Does the Law Need a Narratology?" (2006) 18 *Yale Journal of Law & the Humanities* 1, 7.

<sup>41</sup> Anne M. Coughlin, "Interrogation Stories," (2009) 95 *Virginia LR* 1599, 1626.



that carries legal significance: texts that do not dwell explicitly on legal issues at all might nevertheless turn out to engage with the same questions that the law considers.<sup>42</sup> Of course, literature is hardly the only incubator from which lawyers borrow models of thought, nor is law the only source to supply imaginative writers with ideas about how conflicts arise and are negotiated. However, because of their shared interests, the cross-pollinations between these two fields have been especially productive. Lorna Hutson, for example, has looked at experiments in the enactment of probabilistic inquiry on the English stage in the sixteenth century and has discussed their use of “civic humanist plot[s] of . . . detection” as applications of, and contributions to, the modes of legal inquiry that would form some of the foundations of evidence law, eventually informing the concept of probable cause.<sup>43</sup> Whereas a “law in literature” approach to murder novels might consider attitudes about murderers and the kinds of legal justifications they should be allowed to invoke, Stephen Kern has studied these novels as sources of cultural ideas about causation.<sup>44</sup> Several books have examined the various trial-like structures that animate the plots of eighteenth- and nineteenth-century novels, showing how shifts in narrative proximity alter the reader’s faith in the possibility of any satisfying conclusion to the story—and linking these literary investigations of conduct and motive to the concerns that led to the passage of the Prisoners Counsel Act, 1836, which allowed defendants in felony cases to be represented by counsel.<sup>45</sup>

Despite their methodological differences, these studies share similar premises. In particular, they proceed from the recognition that literary techniques of representation inevitably mediate the details they disclose, and that when investigating these techniques, we achieve less by seeking to identify biographical reasons for a particular writer’s designs on the reader, than by considering the ways in which writers participate, cannily or unwittingly, in historically specific debates that these literary techniques illuminate through analogy. These might be relatively focused debates, such as those about criminal defendants’ eligibility for legal representation, or more wide-ranging debates on matters such as whether and how we can confidently assess responsibility or diagnose an actor’s intentions, yielding effects that can be discerned in technical developments in legal doctrine and that are also

<sup>42</sup> For a helpful short example, see James Phelan, “Narratives in Contest; or, Another Twist in the Narrative Turn,” (2008) 123 *Publications of the Modern Language Association of America* 166.

<sup>43</sup> Lorna Hutson, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (2007), 217.

<sup>44</sup> Stephen Kern, *A Cultural History of Causality: Science, Murder Novels, and Systems of Thought* (2004).

<sup>45</sup> Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (1992); Grossman (n. 5); Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature, and Theology* (2000). For studies that extend this investigation to early twentieth-century fiction, see Rex Ferguson, *Criminal Law and the Modernist Novel: Experience on Trial* (2013); Brian Artese, *Testimony on Trial: Conrad, James, and the Contest for Modernism* (2012).

associated with narrative devices for providing access to characters' minds. In work on criminal law, one of the forms this research has taken involves the development of *mens rea* analysis and its relation to the development, in nineteenth-century fiction, of new narrative and syntactic techniques for conveying the characters' thoughts, feelings, and motives. Much of this work has focused on third-person narrative forms—in particular, the use of free indirect discourse to reveal a character's reflections.<sup>46</sup> Yet similar questions may arise even in fiction that does not exploit this technique, as I show here with the example of Robert Louis Stevenson's *The Strange Case of Dr. Jekyll and Mr. Hyde* (1886).<sup>47</sup>

Though Stevenson's tale is rarely used in courses on law and literature, its overtly legal features would seem to make it an appealing choice. The story includes a brutal assault on a "girl of maybe eight or ten" and a lethal attack on "an aged and beautiful gentleman,"<sup>48</sup> a series of alternating mental states bearing on the actor's responsibility, and a lawyer (Mr. Utterson) who helps to precipitate the events that bring the tale to a close, and who turns out to be Jekyll's beneficiary. Most of the events are narrated retrospectively by Utterson and his friend, Dr. Lanyon, and because they cannot understand the relation between Jekyll and Hyde (whom they take to be two separate people), the question of how to understand Hyde's actions is set as a mystery that is not resolved until the final chapter, consisting of a letter in which Jekyll/Hyde explains everything.

As this summary suggests, the tale might be explored as an example of law in literature, with the aim of considering the details relating to Hyde's liability. That is, we might ask whether Hyde is guilty of first- or second-degree murder, and whether he has a defense of diminished capacity. If instead we consider how his actions and their underlying causes are presented to us, the story affords a discussion of the conditions that make these forms of liability discernible. One of the story's most important aspects, for an approach based on legal aesthetics, is Stevenson's elaborately scientific explanation of Jekyll's experiments, conducted with the aid of various powders, salts, and liquids (46–47). In setting out these details, Stevenson was taking an unusual step: several reviewers found this part needlessly explicit and insisted that the tale would have been more powerful without it.<sup>49</sup> For Stevenson,

<sup>46</sup> See Rodensky (n. 6); Brooks (n. 40); Sandra MacPherson, *Harm's Way: Tragic Responsibility and the Novel Form* (2010); Paul Cobley, "The Reactionary Art of Murder: Contemporary Crime Fiction, Criticism and Verisimilitude," (2012) 21 *Language and Literature* 286. For an example applying these ideas to legal concepts of causation, see Sol Azuelos-Atias, "Legal Causality and Criminal Intent in the Legal Discourse," (2006) 19 *International Journal for the Semiotics of Law* 183.

<sup>47</sup> For a discussion that examines the story along similar lines, see Nicola Lacey, "Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility," (2010) 4 *Crim. Law & Philosophy* 109.

<sup>48</sup> Robert Louis Stevenson, *The Strange Case of Dr. Jekyll and Mr. Hyde and Other Tales* (ed. Roger Luckhurst, 2008), 7, 20. It is implied that Hyde has committed other crimes as well: "his past was...disreputable: tales came out of the man's cruelty, ... of his vile life" (28).

<sup>49</sup> Henry James and Oscar Wilde both took this view; see Marty Roth, *Drunk the Night Before: An Anatomy of Intoxication* (2005), 170 fn 10.

however, the investigation of the “duality of man” (53) required this kind of specificity. The story appeared at a time when legal analysis had itself been transformed by methods learned from analytical science, particularly chemistry. Criminal law was becoming increasingly refined and precise in delineating the bases of liability, burdens of proof, and distinctions between offenses and defenses. In the course of the nineteenth century, what had once simply been “crimes,” essentially characterized by “malice,” were separated into “elements,” and the distinction between *mens rea* and *actus reus* began to acquire its now canonical form and basic significance.<sup>50</sup> These systematic and essential distinctions, in turn, led to new distinctions that were being formulated around the time that *Dr. Jekyll and Mr. Hyde* was published—such as the distinction between general and specific intent.<sup>51</sup>

Dr. Jekyll, in the letter that he leaves behind, shows himself to be thoroughly a creature of such distinctions. His experiments into the organization of consciousness, he explains, were prompted by curiosity about “those provinces of good and ill which divide and compound man’s dual nature” (52), and by a fascination with “the thought of the separation of those elements” (53). He is certain that others, following in his wake, will discover more elements, more minute and specific than any he has identified: “others will outstrip me on the same lines,” he predicts, and will show that each individual in fact consists of “multifarious, incongruous, and independent denizens” (53). His letter testifies to his dual nature: riven between the first person and the third person in its narration, the letter ends with Jekyll’s name, but also speaks of Hyde as “I.” Thus, at one point Jekyll says of Hyde, “He, I say—I cannot say, I” (63), and yet in recalling his adventures in the guise of Hyde, he frequently does say “I,” and the letter even takes up an indeterminate position, seemingly external to both identities, from which Jekyll is called “he” (65). Just as Jekyll’s studies and his predictions for future progress reflect the same approach that led lawyers to break rights down into “bundles of sticks,” his account of the dual nature of human consciousness offers a parallel to the dissolution of crimes into elements, marked first and foremost by the split between *mens rea* and *actus reus*. Whether or not Stevenson had read anything by contemporary legal scientists, it is clear that his treatment of Jekyll/Hyde’s criminal behavior and intentions depends on the same analytical structures that would have guided a contemporary criminal law theorist. A Blackstonian lawyer would have seen that Hyde’s malice was fully “demonstrated by [his] outward actions,”<sup>52</sup> but by Stevenson’s time, the very question that Blackstone puts aside (how to “fathom the intentions of

<sup>50</sup> On viciousness as the characteristic feature of crimes in the eighteenth century and earlier, see Guyora Binder, “The Meaning of Killing,” in Markus D. Dubber and Lindsay Farmer (eds.), *Modern Histories of Crime and Punishment* (2007), 88; Lacey (n. 47) 117–119.

<sup>51</sup> *R. v. Doherty* (1887) 16 Cox C.C. 306 (per Stephen J.); *State v. Yarborough*, 18 P. 474 (Kan.1888); R. U. Singh, “History of the Defence of Drunkenness in English Criminal Law,” (1033) 49 *LQR* 528.

<sup>52</sup> William Blackstone, *Commentaries on the Law of England*, Vol. 4 (1769), 21. Stevenson emphasizes that Hyde’s wickedness is engraved in his appearance: he inspires “loathing . . . at first sight” (7); even

the mind”<sup>53</sup>) had become an essential part of the inquiry.<sup>54</sup> It is also notable that Stevenson structures the narrative so as to turn the question of responsibility into a mystery—one that we can only speculate about, on the basis of external appearances, until reading the first-person testimony that explains all. The confessional letter solves the problem of the missing mental element, and in insisting on the irreducibly dual structure that leaves both Jekyll and Hyde incomplete when either one is viewed in isolation, the letter also serves as kind of self-reflexive statement about the law, by the law. It is as if a completed offense, rather than an individual, were testifying about its own nature.

Much more could be said about Stevenson’s tale, which also turns on emerging forms of forensic evidence such as handwriting analysis, and on questions of legal ethics raised by Utterson’s efforts to manage his roles as Jekyll’s friend and legal advisor. Even this short discussion, however, may suggest the complex historical links between the way Stevenson posits Jekyll’s “case” and the way criminal liability was being reconceived. While this kind of exercise requires more time than a first-year doctrinal course normally affords, it may be appropriate for an upper-level course on criminal law theory, which attempts to understand the historical conditions fostering the theoretical distinctions we now take for granted. As Stevenson’s novella shows, literature may be used not just to illustrate doctrinal points but also to inquire into their foundation.

#### IV. THE FUTURE OF LAW AND LITERATURE

Recent work in cognitive literary studies has the potential to open up new lines of inquiry in law and literature. Research in this area has led literary scholars to reconsider the ways in which narratives present acts of cognition and engage readers in such acts. Some scholars, for instance, have discussed literary texts as a testing ground for our efforts to understand the motives behind others’ behavior (usually called “mind-reading” in this research).<sup>55</sup> Whereas in social life, we often have no way to confirm our speculations about others’ motives, narratives may disclose the characters’ motives, or may deliberately mislead us only to expose the error, or may plant suggestive clues without offering any definitive evidence.<sup>56</sup> Particularly in

the unflappable Utterson regards him with “a hitherto unknown disgust, loathing, and fear” (15); “evil was written broadly and plainly on [his] face” (55). <sup>53</sup> Blackstone (n. 52) 21.

<sup>54</sup> For a fuller and more complex discussion of this point, see Lacey (n. 47) 121–123.

<sup>55</sup> Lisa Zunshine, *Why We Read Fiction: Theory of Mind and the Novel* (2006), 6–9.

<sup>56</sup> e.g. literary texts often provide “a few verbal cues . . . to suggest something more at the same time that this *something* remains withheld,” and this phenomenon may help us to consider “our readiness

contemporary literature, even seemingly definitive statements, offered by an ostensibly omniscient narrator, are not necessarily reliable, and hence the reading experience may amount to an experiment that does not serve to instruct readers in correct or incorrect methods, but instead offers opportunities for speculative mind-reading that daily life cannot supply. Future scholarship might consider what various literary examples suggest about our efforts to assign intention in criminal law, and how these narrative experiments may have functioned, since their inception, to influence those efforts.

One aspect of this research has looked at how narratives elicit our outrage against characters cast as cheaters and free-riders, and how narratives may strive to modulate our desire to see these characters punished. Blakey Vermeule notes that numerous popular literary forms—including “mysteries, detective novels, . . . thrillers, true crime, [and] exposés”—cater to our hunger for examples of bad behavior and its punishment, and she observes that subtle uses of personification can fuel this hunger.<sup>57</sup> Personification can encourage us to perceive casual relationships where otherwise we might not, and to see events as motivated rather than random. These responses are associated with the “affect heuristic,” which has also been cited to explain why statistical predictions have less power when expressed in purely numerical terms than they do when expressed as numbers of persons (e.g. “ten percent” as against “ten out of a hundred people”).<sup>58</sup> An obvious implication of this research is that just as personifying legal entities may be a necessary doctrinal means of making them eligible for criminal sanction (as with “corporate persons”), the repeated use of this personification in the course of a trial may have a significant influence on the determination of liability. A subtler implication is that the use of personified standards (e.g. “the reasonable person” as against “reasonableness”) may also have an effect on how the standard is applied. Vermeule, considering these issues from a literary point of view, observes that fiction need not simply gratify our desire for punishment, but may also strive to “wean us . . . off comeuppance stories” by frustrating this desire.<sup>59</sup> One of the frequently repeated themes in research on

to contend with partial representational cues in everyday, nonliterary experience.” Elaine Auyoung, “Partial Cues and Narrative Understanding in *Anna Karenina*,” in Lars Bernaerts et al. (eds.), *Stories and Minds: Cognitive Approaches to Literary Narrative* (2013), 59, 60.

<sup>57</sup> Blakey Vermeule, “A Comeuppance Theory of Narrative and Emotions,” (2011) 32 *Poetics Today* 235. See also William Fleisch, *Comeuppance: Costly Signalling, Altruistic Punishment, and Other Biological Components of Fiction* (2007).

<sup>58</sup> Vermeule (n. 57) 248–249, citing Paul Slovic, Melissa Finucane, Ellen Peters, and Donald G. MacGregor, “The Affect Heuristic,” in Thomas Gilovich, Dale Griffin, and Daniel Kahneman (eds.), *Heuristics and Biases: The Psychology of Intuitive Judgment* (2002), 397, 413–414. In the study by Slovic et al., one set of clinical forensic psychologists was told, “Patients similar to Mr. Jones are estimated to have a 10% chance of committing an act of violence to others” and a second set was told, “Of every 100 patients similar to Mr. Jones, 10 are estimated to commit an act of violence to others.” The latter were nearly twice as likely to refuse to discharge the patient (41% refused, as against 21% in the first group). *Ibid.*

<sup>59</sup> Vermeule (n. 57) 252.

law and narrative has been that narrative learning leads us into error by making us expect to find literary coherence in real-world events, as when a jury refuses to believe the defendant who denies any responsibility for the victim's death, despite having uttered a death threat. While literary templates are crucial devices for our perception of the world, this oft-repeated warning supposes that narrative coherence depends on a particular form, usually associated with an Aristotelian model of dramatic structure. What recent scholarship on narrative shows, however, is that numerous literary devices operating at a much less noticeable level can also guide our perceptions, and that just as literature may satisfy our expectations, it may also involve new experimental forms that have the potential to alter those expectations. As we learn more about how readers engage with narratives—not simply by surrendering to their premises but by reveling in the problems they raise and speculating about possible outcomes—we will find new ways of linking literary texts with familiar questions in criminal law, such as how to evaluate intent and what it is like to experience a reasonable doubt.

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