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## Literature and legal history: analysing methodology

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### ABSTRACT

*Whilst canonical literature has been used in conjunction with legal history, there is very little direct discussion of the broader methodological issues involved in doing so. This paper seeks to redress that balance by analysing a range of inter-disciplinary approaches and studies. After consideration of Richard Posner's critique of depictions of law in literature, it is argued that, viewed in isolation, their significance in terms of the history of legal doctrine, procedural technicalities and institutional structures is limited. More broadly, however, and notwithstanding the abstract nature of the cultural inter-relationship between law and literature, it is possible to use literary sources to illuminate legal history. First, legal historians have used literature to provide cultural comparators and points of reference in order to offer fresh perspectives on the past. Second, at a more conceptual level, law and literature studies have augmented understanding of the ways in which literature has influenced the evolution of legal history. Third, recent developments in socio-cultural history have demonstrated that when literature is used in conjunction with other non-fictional sources, it has significant potential in constructing wider social*

*and cultural contexts and analyses, which can then provide new insights into legal history.*

### KEYWORDS

Legal History - Law and Literature - Methodology - Law and Culture

### INTRODUCTION

Although there are a number of studies which have sought to combine legal history with canonical literature, there is very little direct consideration of the historical value of literary depictions of law (Finn, 2002, pp.140-141). From the perspective of scholars of law and literature whose primary concern is to deepen understanding of literature or ethics, the issue is peripheral, uncontroversial and un-philosophical (Ward, 1995, p.59). Perhaps surprisingly, however, legal historians have also tended not to address the issue in any great detail. Those who have written about literature often seem to launch into the literary texts after a brief discussion of their own specific research objectives, rather than dwelling on the wider value of literature to legal history. This may be because one of the main attractions for legal academics generally of writing about literature is that it is an enjoyable - even liberating - thing to do. Thus, in his endnote to a thought-provoking collection of essays on law and literature, Peter Goodrich wrote that the legal academics who had contributed had engaged with literary texts 'as a way of challenging the stylistic, textual, and hedonic limits of law. They argue in variable forms that literature represents a fracture, a crisis, a puncture of the legal restraint of the text. They use poems, fictions, insubordinate acts, and wild writings as a way of getting outside of the norm of legal writing and so bringing to consciousness the politics of law's inscription' (Goodrich, 2004, p.159). If, as Kafka memorably commented, studying law is 'like chewing sawdust' (Ward, 1998, p.176), then, for some legal academics, thinking about law in literature is perhaps akin to being freed from the shackles of conventional legal analysis: unlike literary scholars, however, they are also relatively unconstrained by the norms of literary theory.

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At the risk of chewing sawdust, the objective of this discussion is to focus on analysing the use of literature in legal history, rather than literature itself. Taking Richard Posner's criticisms of literature as a source of legal history as the starting point, it is contended that, although aspects of his theory are open to question, he is correct to argue that historic literary texts are unlikely to tell legal historians much that is new about doctrinal, institutional or procedural technicalities, or at least anything which cannot be derived more directly and fully from the legal sources. Moving beyond Posner's arguments, however, depictions of law in literature can, when used appropriately, provide valuable insights into legal history. Whilst different techniques of utilising literature and legal history have been used in different studies,

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there is, as mentioned previously, very little discussion of the broader methodological and cultural context to doing so. This paper therefore articulates and assesses the forms and limits of the methodologies which have been used, from the perspective of legal, rather than literary, history.

## POSNER'S CRITIQUE

Posner's strongly sceptical analysis of Shakespeare's *The Merchant of Venice*, Kafka's *The Trial*, and Dickens' *Bleak House* as legal history is the only occasion that the historical (rather than the ethical) value of literary representations of law is considered directly by one of the main protagonists in the wider debate on law and literature (Posner, 1986, pp.1351-1360; 1998, pp.127-144). Posner argues that, whilst law features significantly in the novels of a wide range of authors, this is because 'for literature to survive it must deal with things that do not change much over time' (Posner, 1986, p.1356). Law is a constant and relatively unchanging part of society and is accessible to authors, their public and subsequent generations of readers. The great writers of the literary canon have therefore used law as a useful symbolic or metaphorical device (pp.1356-1358). Leading on from this, Posner contends that those interested in the technical legal rules of particular periods would not learn much from law in literature:

Although the writers we value have often put law into their writings, it does not follow that those writings are about law in any interesting way that a lawyer might be able to elucidate. If I want to know about the system of chancery in nineteenth-century England I do not go to *Bleak House*. If I want to know about fee entails I do not go to Felix Holt. There are better places to learn about law than novels – except perhaps to learn about how laymen react to law and lawyers. Obviously this is not true in cultures where the only information about law is found in what we call literature, though contemporaries thought of it as history .... [e.g. the Norse sagas] .... But in a culture that has non-literary records, those records generally provide more, and more accurate, information about the legal system than does literature (pp.1356-1357).

This argument is a powerful one, based on a formalistic view of legal positivism. For Posner, the law is a pure, discrete entity, a collection of norms. It is, as he puts it, 'subject matter rather than technique' (p.1359). His argument also reflects aspects of Oliver Wendell Holmes's contention that, 'When we study law, we are not studying a mystery but a well-known profession'. Viewed in this context, Holmes argued that the purpose of law is to eschew mystery in favour of clarity, certainty and predictability (Wendell Holmes, 1897, p.457). Since, as Posner argues, the interests and skills of great authors tend to lie elsewhere, they do not engage with the law itself but present different fictional representations of law, lawyers and legal institutions for literary rather than for legal purposes. On this interpretation, historic literature which depicts law in societies with non-literary records therefore has little to offer legal historians wanting to find out about the law of the past, other than perhaps an appreciation of how contemporary authors had perceived it. For the avoidance of confusion, it should be made clear at the outset that this paper is concerned with the inter-relationship between legal history and literature in societies with non-literary records.

Thus, Posner argues that *The Merchant of Venice* tells lawyers little or nothing about law or the Elizabethan legal process. The play is not about 'the enforcement of a contract that contains a penalty clause, which the defendant avoids by a technicality' (Posner, 1986, p.1357). It would, he contends, be obvious to Shakespeare's audience that the contract was unenforceable and that the trial was, in any technical, legal sense, a farce. Instead, the play is about other themes, such as Christian values of love, and the pursuit of commercial self-interest. Viewed from this narrow perspective, it can be assumed safely that most theatre-goers would not disagree with him. Similarly, with regard to Kafka's *The Trial*, although many aspects of the legal procedures which feature in the novel had been shown to be reasonably accurate depictions of early twentieth century Austro-Hungarian criminal procedure, and Kafka himself was an Austro-Hungarian lawyer, the novel is not, for Posner, about substantive law or legal procedure in any significant way (p.1357-1358). Whilst Posner has been engaged in a fierce debate with Robin West over the broader significance of Kafka's work for lawyers (pp.182-205; West, 1985; West, 1986), his narrow point that the literary value of the novel is not to be found in its depictions of technical legal procedures is self-evident.

In a similar vein, Posner writes of Dickens' *Bleak House* that it was:

a powerful, if belated, satire on a seriously flawed, though already reforming, legal institution. But someone who wanted to learn about nineteenth-century chancery court would not spend time reading *Bleak House*. There are fuller and soberer sources of data.... Viewed merely as description and critique of the Court of Chancery, *Bleak House* is a century-and-a-half-old piece of fictionalised journalism' (Posner, 1998, p.142).

To Posner, Dickens' well-known depictions and criticisms of the Chancery Court as being inefficient,

wasteful, unjust and the embodiment of the corrupt self-interest of the legal profession are 'unfair', because, amongst other things, 'Chancery procedure was reformed before *Bleak House* was written, and the novel confuses will contests with guardianships' (p.141). He explains the lengthy delays in chancery cases as being 'due in major part to the innocent fact that chancery exercised supervision over guardians and trustees of minors', which had to continue into adulthood (p.141). The problem with the courts of equity, for Posner, is that they were 'slow and costly' for systemic reasons, arising from the application of legal principle (p.142). Whilst he concedes that Dickens' treatment of *Bardell v Pickwick* in *The Pickwick Papers* was 'more on the mark as legal criticism' (p.141), the value of *Bleak House* to those interested in the history of the Chancery Court is dismissed, ostensibly on the basis that its representation of the law was substantively inaccurate or anachronistic (pp.142-143). Legal historians, it can be inferred, should restrict themselves to the historical sources.

### **SOME SCEPTICISM ABOUT POSNER'S SCEPTICISM**

Although Posner expresses himself with great erudition and confidence, a number of his views can be challenged. In particular, his interpretations of literary history and the historical context to *Bleak House* are open to question. For example, drawing on West's position in her exchange with Posner, Schramm takes issue with Posner's contention that 'the legal matter in most literature is peripheral to the meaning and significance of the literature' (Schramm, 2000, p.8). She demonstrates through a wide interdisciplinary comparison of literary history with literary texts and legal history that Dickens, Eliot and other nineteenth century realist authors, who sought explicitly to depict and analyse different aspects of society, were influenced significantly by developments in criminal trial procedures, the provision of legal representation for accused persons and the law of evidence (pp.22-23, 118-123). The legal, ethical and social issues arising from these developments were not – for these authors at least – merely useful symbolic or metaphorical literary devices. Developments in the law therefore affected the approach taken by these authors to their literary narratives. Dolin also argues convincingly that whilst law is often criticised in literature, legal trial procedures provide 'such an influential model of reality-construction in the modern West that fictional critiques of the law [such as *Bleak House*] are often unable to escape its forms and its rhetoric' (Dolin, 1999, p.19). Accordingly, viewed from the perspective of literary historians, the significance of law for literature might reasonably be thought to be greater than Posner contended.

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Posner's arguments on the historical accuracy of Dickens' representation of the law and the Chancery Court in *Bleak House* can also be challenged. It is worth acknowledging that Dickens' depictions, fictional, satirical and exaggerated though they are, may have been based on his long experience of law and lawyers. Some literary theorists would, of course, contend that the role of authors should not be considered in the reading of literary texts (Ward, 1995, pp.28-34). As Ward argues, however, although it is never possible to access the intentions of an author fully, in the case of avowedly realist writers such as Dickens, not to consider the role of the author is deliberately obtuse (pp.35-36).

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It is therefore interesting to note that when Dickens was a child, his father served a six month prison sentence for debt at Marshalsea, and that this was one of the most significant formative events of his life (Johnson, 1953, vol.1, pp.34-36). As a young man of fifteen, he was taken on as a lawyer's clerk (pp.51-52), writing later that it was 'a very little world and a very dull one' (House, Storey, Tillotson, eds., 1965-2002, vol.1, p.423). Dickens then worked as a law reporter, transcribing cases in Doctors' Commons and the Chancery Court (Johnson, 1953, vol.1, pp.57-59). Even after he had established himself successfully as an editor, author and journalist, Dickens registered (as did many other authors of the period) as a student barrister at the Middle Temple in 1839. He did not get round to eating the required number of dinners to be called to the Bar, but it was not until 1855 that he finally resigned his membership (Collins, 1964, pp.177-178). Dickens was also a plaintiff in a series of Chancery Court cases for breach of copyright (Holdsworth, 1929, p.9), and was friendly with a number of judges (Collins, 1964, p.181).

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It is a matter for speculation whether and how these experiences may have fed Dickens' fascination with what he perceived to be the culture of self-interest within the legal profession, and the way in which lawyers used their specialised knowledge of the law and the legal process to enrich themselves at society's expense (Johnson, 1953, vol.2, pp.771-772). In any case, in chapter one of *Bleak House* in particular, the complexities of Chancery law and legal procedure, the delay, the muddle, the multiple fees, and the voluminous legal documents were depicted as a pompous, absurd and remorseless confidence trick, orchestrated by venally incompetent and complicit lawyers and court officials. This was juxtaposed with the plight of ordinary people unfortunate enough to be caught up in the law's web, who faced destitution and ruin at the hands of lawyers and the courts.

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Writing in the 1920s, Holdsworth sought to demonstrate that Dickens' representations of the law were of value to legal historians because they could supply 'information which we can get nowhere else', and also because 'these pictures were painted by a man with extraordinary powers of observation, who had first

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hand information' (Holdsworth, 1929, p.3). In Holdsworth's view,

in Dickens' descriptions of the courts, the lawyers, and the law of his day, we get an account of the way in which the curious mixture of ancient and modern rules, which made up the law of that time, were then worked and applied; and we get an account of the results they produced. It is obvious that a series of pictures of this age of transition, painted by an exceptionally gifted observer, is of unique value to the legal historian' (p.2).

While Posner dismisses Holdsworth's analysis without discussion and in a footnote (Posner, 1986, p.1356), it nonetheless raises a number of specific points in relation to Posner's criticisms of *Bleak House*. First, although the novel was published in serial form in 1852-53, it should not necessarily be assumed that this was when it was set, as Posner appears to do. Holdsworth (1929, p.81) has presented a reasonably convincing argument to the effect that *Jarndyce v Jarndyce* was possibly set in the Chancery Court of around 1827, when the abuses of the court were at their worst. Recent studies of the Chancery Court of the early-to-mid nineteenth century argue that it was a wholly inadequate and essentially medieval institution with a convoluted, technical, and slow procedure that was manipulated by lawyers and court officials for their own profit (Lobban, 2004a; 2004b). It seems clear that Chancery proceedings were failing to meet the needs of a growing and increasingly wealthy population. Despite this, the report of the first Chancery Commission in 1826 only gave rise to relatively modest reforms (2004a, paras.29-53; 2004b, paras.1-28). 13

Second, many of the problems associated with the Chancery Court continued until at least the second Chancery Commission of 1850, two years before *Bleak House* was published (2004a, paras.29-53; 2004b, paras.1-28). Posner's inference that the court had been successfully reformed some time before Dickens made his criticisms in *Bleak House* is therefore open to question. Indeed, whilst a number of changes were introduced after the first Chancery Commission, significant problems of delay, inefficiency and profiteering by lawyers and court officials remained (2004a, paras.8-15, 29-53; 2004b, paras.1-28). It was not until the Chancery Procedure Act of 1852 that the court's pleadings and procedures were comprehensively reformed as part of a process which culminated in the creation of the Supreme Court of Judicature under the Acts of 1873 and 1875 (2004a, paras.54-57; and 2004b, paras.27-49). 14

Posner (1998, pp.141-142) is, however, correct in suggesting that Dickens confused will contests with guardianship, and that the intrinsic flexibility of equity contributed to the delay and expense of the Chancery Court. With regard to the latter point, Lord Chancellors such as Eldon sought to decide according to the merits of the case, and, given the court's equitable jurisdiction, pursued the ideal of doing 'strict' or 'perfect' justice (Lobban, 2004a, paras.23-26). That said, the problem of delay did not arise solely from the application of the principle of equity, as Posner implies. Despite having responsibility for most of the work of the court, the Chancellors had long appeared either unable or unwilling to exercise control over its lawyers and officials, who had a vested interest in continuing actions for as long as possible (2004a, paras.8-15). Chancellors such as Brougham were pre-occupied with their political role (2004a, para.43), and they were all largely ineffective in pursuing institutional reform to improve Chancery Court procedures (2004a, paras.16-28 and 39-57). Unsurprisingly, therefore, criticism of the Chancery Court and the Lord Chancellors was common in the first half of the nineteenth century (2004a, paras.1-4 and 15; 2004b, para.1-6). Set against its historical backdrop, Dickens' powerful imagery of an anachronistic, inefficient and self-serving legal system can perhaps be treated rather more generously than Posner is inclined to. Despite being a satirical pastiche, Dickens' critique, when set in historical context, provides an interesting, and not entirely unfounded, perspective for legal historians. 15

### **EVALUATING POSNER'S ARGUMENT**

With the above points in mind, it clearly is possible to challenge aspects of Posner's argument. But, significantly for the purposes of this paper, important elements of his criticism of the value of literary depictions for legal historians remain valid. Holdsworth, for example, would not have learnt about the details of the law and procedure of the Chancery Court primarily from *Bleak House*. He was, after all, the author of the monumental *History of English Law*. As is discussed later, whilst Holdsworth's analysis of Dickens' novels has a number of worthwhile attributes, his knowledge of the history of the Chancery Court would have been derived mainly from the extensive study of legal and other non-fictional sources. Presumably, Dickens' representations stimulated his interest in the Chancery Court by providing him with interesting mental pictures and impressions of the court's proceedings, as seen through the kaleidoscope of Dickens' literary critique. Crucially though, and as Posner would no doubt point out, Dickens' novels are not comparable to non-fictional historical source material on matters of legal doctrine, procedure or institutions - which, traditionally at least, has been the staple fare of legal history. 16

So, whilst acknowledging that Posner's interpretations of literary and legal history are open to question, his contention that literary texts by themselves do not offer any particularly valuable insights into the history of the law carries considerable weight when law is envisaged restrictively as technical rules, 17

procedures and institutional processes. Literature is, on its own, unlikely to tell legal historians much about the history of 'lawyers' law'. In this specific context Posner makes an important, if perhaps obvious, point. Few would think that reading *The Merchant of Venice*, *The Trial* or *Bleak House* would enable lawyers (or anyone else) to learn very much that was new or meaningful about the content of the detailed legal rules of the societies and periods in which these works were written. Information of this sort is, self-evidently, provided in detail elsewhere by an extensive range of non-fictional, historical sources. Where literary portrayals of law were based on close personal observation and experience, this can provide vivid images and additional perspectives on the cultural context of the legal sources. In this sense, and as is discussed in more detail below, Ian Ward is right to argue that the study of historical literature is of value as an 'educative supplement' to more conventional legal history (Ward, 1995, p.59). But, fundamentally, it must be remembered that the portrayals and images of law in works of literature cannot be relied upon to explain the technical substance of the law. Viewed from this narrow perspective Posner is justified in arguing that, taken in isolation, depictions of law - even in 'realist' novels such as *Bleak House* - have relatively little to offer the legal historian.

## BEYOND POSNER: WIDER PERSPECTIVES FOR LEGAL HISTORIANS

It is, however, possible to move the debate beyond the constraints of Posner's analysis. Schama (1991) 18 makes the point that historians generally are engaged in an impossible task, that of attempting to capture the past. For him, historians 'are left forever chasing shadows, painfully aware of their inability ever to reconstruct a dead world in its completeness, however thorough or revealing their documentation' (p.320). It is always the case that the attempts of historians to formulate problems and provide explanations 'remain contingent on their unavoidable remoteness from their subjects' (p.320). Historians are therefore 'doomed to be forever hailing someone who has just gone around the corner and out of earshot' (p.320).

Thus, legal historians are engaged in creating structured and sourced interpretations of past laws and legal systems, rather than establishing one-dimensional historical 'truths'. In so doing, the main focus of their attention is, of course, non-fictional sources, of which there is often no shortage in post-medieval Western legal systems. But an awareness of how law was represented in literature can nonetheless provide fresh perspectives for legal history: indeed, Posner himself hints, albeit dismissively, that depictions of law in literature may provide an insight into how law was perceived by non-lawyers (Posner, 1986, pp.1356-1357). If it is impossible for legal historians to go round the corner and catch up with the past, the use of law in literature can assist them in inching closer towards the corner. This is not, of course, to say that literature is the only socio-cultural source which can be utilised by legal historians. For example, songs, religious sermons, political pamphlets, cartoons, music hall acts, film, radio and television programmes may all provide valuable insights. However, the cultural significance of the works of writers in the literary canon undoubtedly carries significant weight, most particularly in periods such as the nineteenth century, when the realist novel was the dominant narrative form (Dolin, 1999, p.15). 19

## DISTINGUISHING LITERARY HISTORY FROM LEGAL HISTORY

Using law in literature and legal history together is, self-evidently, an inter-disciplinary exercise. Inter-disciplinary research is, of course, conducted within a continuum of greater or lesser degrees of synthesis with other disciplines (Vick, 2003, pp.164-165 and 184-185), and there are countless examples of the genre. In this context, it is important to be aware that many of the studies which use legal history in conjunction with literature are concerned with using the former to illuminate the latter, and not vice-versa. Thus, for example, Schramm and Dolin have both produced thought-provoking studies of the different effects that law had on nineteenth century literature, and the ways in which authors sought to use fiction to criticise aspects of law and the legal process. As legal academics who are also skilled in literary theory, they use legal history primarily to see how and why historic literary narratives have been influenced by law, and why authors may have depicted law in the way they did (Schramm, 2000, pp.6-7, 22-23; Dolin, 1999, pp.2-4, 17-20). So, although they discuss legal history, they look to it mainly as a way of providing a way into developing a deeper understanding of literary texts. The substantive detail of legal history forms the non-fictional bedrock for their literary analysis (see for example, Schramm, 2000, pp.105-123; Dolin, 1999, pp.21-44), and is not the primary focus of their attention. 20

It is perhaps appropriate to sound a cautionary note at this point. For analysis of literature to illustrate particular themes or moral dilemmas relating to law or lawyers requires some understanding of literary theory. This is not to argue that those who are skilled in law cannot also analyse literature. Some, such as Posner, Weisberg, West, Ward, Schramm, and Dolin very clearly can. But it is inevitably the case that most legal historians are not schooled in literary theory, and they should therefore be wary of being sucked into enjoyable but potentially flawed speculation about the literary significance of representations of law and lawyers in particular periods. It is important to acknowledge that legal history is not the history of literary depictions of law, although it is related and may be able to draw on it. Assessing the literary 21

significance of how law has been used by authors is primarily the preserve of literary scholars, or at least those lawyers who are skilled in literary analysis.

### LITERATURE AND LEGAL HISTORY: THE CULTURAL CONTEXT

It should not, however, be thought that law and literature studies of this sort are of no significance to legal historians. It should be acknowledged, as Dolin (1999, pp.4-17) does, that they can exemplify the potential of legal history as a means of articulating the wider cultural importance of law. For if, as Schramm and Dolin argue, law has influenced canonical literature, then it has acted as an indirect motive force in cultural development. This is an issue often overlooked in legal history, which (for reasons touched upon below) has tended to focus internally on matters such as the operation of legal systems, the development of statute and judicial precedent, and related jurisprudential and socio-legal issues. 22

In *Fiction and the Law*, and primarily in order to elucidate how law influenced nineteenth century literary narratives, Dolin (1999, p.11) locates the inter-relationship of literature and legal history within Cover's broader cultural theory of '*nomos*'. Cover sought to re-conceptualise law as part of the *nomos*, or normative universe, which we inhabit. Within the *nomos*, 'the rules and principles of justice, the formal institutions of law, and the conventions of a social order' are important, but nonetheless form only a 'small part of the normative universe that ought to claim our attention' (Cover, 1983, p.4). Of crucial significance to the *nomos* is the role of narrative and, in the legal context, 'no set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning' (p.4). In this sense, narratives give law meaning and become a world which we inhabit, rather than a system of rules: law and narrative are 'inseparably related' (p.5). Cover argued that every prescription (including legal ones) needs to be located in the normative universe, as must history and literature (p.5). In this context, Dolin therefore seeks to link the history of law with literature within the broader narrative universe. By reference to key aspects of the social and intellectual history of European law in the eighteenth and nineteenth centuries, he established a specific *nomos*, which provided the cultural context for his analysis of how the treatment of law by different authors of the period had shifted from affirmation to critique, and how the narrative structure of fiction was affected (pp.17-43, 21-44 and 193-200). 23

However, beyond reminding us that law and literature are located in the same normative universe, and that legal developments influenced the works of nineteenth century writers such as Dickens, it should be acknowledged that Dolin's analysis is of limited utility to legal historians wishing to find out more about law. For it does not provide an obvious path to new insights about specific aspects of legal history, and is essentially a broad generalisation about law's role in culture as a *nomos* and a motive force in nineteenth century literature. That is, it does not shine new light on the tensions and conflicts within the legal *nomos* itself (although Dolin could quite justifiably respond that doing so was not the main objective of his study, which focuses on the influence of law on literary history). It is therefore the abstract, generalist nature of the cultural relationship between legal history and literature which is at the nub of the issue of how to link literary depictions with law, in a way that illuminates legal history. For, thus far, while we have seen that legal history is of significance to literary history, the cultural value of literature for legal history seems to be more difficult to articulate. 24

Perhaps this is not surprising, for as Cover (1986a, p.1609; and 1986b) and West (1987) have both pointed out, legal studies are, unlike their literary counterparts, ultimately concerned with real-life decisions relating to issues such as the implementation and enforcement of the law, conviction, acquittal, the award of compensation and the sanctioning of punishment. Obviously, these issues are derived from the practice of law, and it is the link with practice which gives the academic discipline of law its individual character (Murphy and Roberts, 1987; Birks, 1996, p.ix; as discussed in Vick, 2003, pp.177-181). Viewed in this orthodox way, law is fundamentally not about literature. Those such as Posner might even wish to argue that the study of literature and culture generally is irrelevant to the study of law. But without necessarily adopting this view, or indeed Richard Weisberg's (1988, p.72) opposing argument that an appreciation of the ethical and philosophical content of literature has a crucial role in helping lawyers to understand what they do, the historical literary developments discussed by Schramm and Dolin can, from a legal perspective, be viewed as peripheral cultural by-products of legal history. For, even in the case of socio-legal historians such as Sugarman and Rubin (1984; and Sugarman D, 1992), who emphasise the social and empirical study of legal history, the core of legal history as a sub-discipline of legal studies is, inevitably, concentrated around the analysis of issues emerging from the practice of law: that is, the reasons why and how legal rules and institutions have emerged, how rules are enforced through the legal process, and interconnected jurisprudential and sociological considerations. 25

### BRIDGING THE CULTURE GAP BETWEEN LITERATURE AND LEGAL HISTORY

It is, however, possible to negotiate the generalities of the cultural relationship between law and literature in such a way as to enable literature to be used to gain new insights into legal history, although there are 26

relatively few studies in which it has been done. Perhaps more surprisingly, beyond the provision of study-specific aims and objectives, there is very little attention given to analysing the broader context and significance of the different methodological approaches adopted, which is what this section of the paper seeks to do.

### **THE ORTHODOX APPROACH TO LITERATURE IN LEGAL HISTORY**

The first, relatively uncontroversial, approach is to use the observations and perceptions of law by writers in the literary canon to provide cultural comparisons and points of reference in the discussion of legal history. In this broad context, a variety of methods can be used, and, by way of example, consideration is given to a range of different studies by Holdsworth, Meron, Treitel and Ward. 27

Notwithstanding its dismissal by Posner, it should be acknowledged that Holdsworth's *Charles Dickens as a Legal Historian* was an early attempt to compare historic literary depictions with discussion of contemporaneous law in order to illuminate understanding of legal history in a wider cultural setting. Holdsworth (1929, p.3) bemoaned the fact that it was always difficult for the legal historian to develop an appreciation of the 'atmosphere' of the period. The use of non-fictional texts would, of course, provide a record of 'what things were actually done' (p.3). However, as Holdsworth argued, the weakness of these sources is that it is 28

difficult to get from [them] ... an account of how the men of any given period did these things, a picture of the men themselves, or an impression of the contemporary background of the actual scene; and without such an account or such an impression our history of events and movements and technical doctrines is a very lifeless story' (p.3).

Holdsworth set out to show that Dickens' depictions of law provided 'that account of the human side of the rules of law and their working, which is essential to the legal historian' (p.7). Through a detailed comparison of Dickens' depictions with orthodox legal sources, he sought to illuminate legal history and to bring it to life. In so doing, Holdsworth was able to confirm the substantive accuracy of many of Dickens' observations and his power to produce powerful mental images of the law and its related 'atmosphere'. Ultimately, Holdsworth concluded that Dickens' novels provided 29

information for which we look in vain in the regular authorities; and that they justify my contention that the extent, the variety, and the accuracy of this information entitles us to reckon one of the greatest of our English novelists as a member of the select band of our legal historians' (p.148).

With the earlier discussion of Posner's arguments in mind, it may be thought that Holdsworth over-egged the pudding to some extent. Importantly though, his analysis is still of value. His comparisons showed convincingly that many elements of Dickens' fictional representations were reasonably accurate, thereby adding weight to them as a vigorous contemporaneous critique of the law. More broadly, Holdsworth's early study was successful in showing that literature can provide a wider socio-cultural context for the discussion of legal history. 30

More recently, in *Henry's Wars and Shakespeare's Laws*, Meron (1993, pp.2-4) illustrates the historical evolution of the law of war and provides legal commentary on how Shakespeare depicted international law in *Henry V*, which is utilised as his principal framework for a wide discussion of legal issues. The result is a rich and interesting discussion of what Meron terms the 'clusters' (p.211) of medieval norms which underlie Shakespeare's text. These include what are still key areas of the law of war, such as the just war doctrine, declarations of war and peace treaties (pp.211, 17-63 and 172-190). He demonstrates clearly that Shakespeare's coverage of detail and the rules of international law was 'truly impressive', although, unlike Holdsworth, Meron is always careful to view the literary text as illustrative of the social, cultural and political issues underlying the legal sources (p.214-215). 31

Treitel's shorter analysis of Jane Austen's novels uses a similar approach. He shows how Austen parodied lawyers, and that the utilisation of her depictions of law as points of reference can lead into consideration of what he terms legal 'puzzles' (Treitel, 1984, pp.549-557). His methodology is to conduct a wide-ranging study of the representations of law in Austen's novels, and then to consider how different scenarios raise a series of issues relating to, for example, the legal history of property settlements, family law, tenancies and contract (pp.557-582). Unlike Meron's extended discussion of the legal issues arising from a single text, however, Treitel's analysis of a range of different texts means that there is no underlying theme linking discussion, which as a result seems somewhat eclectic in nature. That said, in the course of detailing and assessing the substantive accuracy of Austen's fictional representations of law, Treitel is successful, as is Meron, in using literature as a reference point to show not only how law was perceived and presented publicly, but also that it is possible to utilise legal depictions as a way of 32

contextualising legal history and engaging with particular legal issues.

Ward (1995, p.59; 1998, pp.170-176; and 1999) has explored the comparative approach to its limit through his discussion of Shakespeare's treatment of constitutional thought. Ward seeks to demonstrate the 'potential educative value' (1995, p.59) that literature can have as a way of accessing contemporaneous issues in legal history. His objective is consciously complementary to more conventional studies of the constitutional history of the period (e.g., 1995, pp.60-66). Indeed, Ward's avowed objective is to provide an educative or literary supplement (1995, p.59; 1999, p.3) in order to illuminate understanding of historical texts. As he puts it, 'we will better understand the nature of the early modern constitution, if we appreciate Shakespeare's description of it' (1999, p.3). In this context, there is much in his detailed discussion of the literary texts which provides insights into the issues and debates within the Tudor constitution. Significantly though, Ward is careful not to make extravagant claims for the methodology. Although his extensive coverage of the literary texts illustrates the various tensions present in the contemporary debate, his analysis of them is often centred around an evaluation of Shakespeare's own thinking on the constitution (e.g., 1995, pp.74, 80, 88-89; 1999, pp.43-44, 68, 114 and 141). This approach is also set in the wider context of Ward's philosophically-based theory of law as a construct of the imagination (1999, pp.1-4), which is discussed separately in the next section.

33

In sum, orthodox legal history methodologies of this sort can be said to use literature as an external cultural comparator or point of reference to substantive legal sources. They are useful in that they can encourage fresh critiques of, or perspectives on, legal history and place it in a wider cultural context. With the exception of Ward, whose conceptually-based arguments are considered in more detail below, the potential of literature as a means of providing insights into wider socio-cultural values, which can then inform analysis of legal history in a more profound way, is typically not explored to any great extent. The utility of this approach to using literature in legal history is therefore restricted, and the value of the literary text is intrinsically external and supplemental to that of conventional, non-fictional sources. More fundamentally, it must be wondered whether many studies of this nature would actually be of more value to those interested in enhancing their understanding of literary texts through the development of an appreciation of legal history, rather than vice-versa.

34

#### **A THEORETICAL APPROACH TO LITERATURE AND LEGAL HISTORY**

The second approach is conceptually-based, and seeks to combine law and literature studies with legal history. In a thought-provoking and closely argued series of publications, Ward (1995, pp.59-118; 1998; 1999) has explored the cultural relationship between canonical literature and law, and sought to analyse the way in which literature operates as a motive force in the development of law. Acknowledging that the work of those who are elevated to the literary canon inevitably reflects the values of the social and cultural elite (1995, p.39), he argues that most of those who have studied, practised and taught law in the UK since the mid-nineteenth century will, through their schooling and upbringing, have been familiar with children's literature, the classics, Shakespeare, and the novels of writers such as Dickens and Austen. It is therefore reasonable to contend that their psychological and social development, and their understanding of important, essentially jurisprudential issues such as good, evil, guilt, punishment, fairness and due process will have been conditioned accordingly. Thus, 'long before arriving at law school to be belaboured by various worthy but impenetrable tomes, the student will already have learned from literature, and of course from life, what the essential questions are, and have already decided what the answers should be' (1995, p.117). Ward also points out that for the vast majority who never engage in the study of law, the experience of children's literature and other works during their formative years may be the only time that jurisprudential questions and answers of this sort are ever considered seriously (1995, p.118).

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More specifically, Ward argues that narrative formation, along with history, is at the heart of the constitution, which 'should be understood as a product of the imagination' (1998, p.170; 1999, pp.1-4). Importantly, therefore, the law of the constitution forms only part of the constitution, which 'is supplemented by the creative and active role of the audience of citizens which read it and interpret it, and fashion the context within which that interpretative process is conducted' (1998, p.170). As the constitution is a construct of the imagination, canonical literature such as Shakespeare is of crucial significance in the narrative construction of our own community (1998, p.170). Thus, for Ward, it follows that 'what Shakespeare wrote about the constitution is of infinitely greater importance, certainly in terms of audience reception and comprehension, than any textbook on constitutional law' (1998, p.170; and 1999, pp.1-2, 43-44). He then goes on to argue that in times of constitutional change, the strength of the constitutional order depends more on the popular imagination than on 'textbooks, cases or courts' (1998, p.174). In highlighting what he calls the 'fictions of nationalism' – such as Englishness in *Henry V* or Scottishness in the novels of Walter Scott – Ward argues that the 'evolution, and future prospects of the "British" nation-state and its constitution depends far more on the reception of Shakespeare ... than on Dicey, Bagehot or Hart' (1998, p.174; 1999, pp.45-69).

36

For Ward, the importance of this analysis is that it leads to the understanding that 'law ... only exists in the imagination, and the great irony of law and legal education is the attempt to deny this irreducible truth' (1998, p.176). He uses this insight as the basis for a re-appraisal of legal education and the wider responsibility of lawyers in society (1998, pp.177-179). It is, however, also clear that arguments of this nature are of significance to legal historians (1999, pp.1-4). Although it is a truism that fiction, as a narrative form, is immediately historical in nature, the novel in particular is justifiably seen by literary theorists as being inter-linked symbiotically with the development of modern Western culture and society (Bakhtin, 1996, pp.38-40). In this context, whilst it might be thought that Ward at times exaggerates the cultural significance of canonical literature, depictions of law or representations of broader jurisprudential themes in influential, historic works of literature are clearly of influence in terms of both cultural and legal development. As Ward argues, in addition to illuminating our understanding of the past, they can add to our appreciation of the present law and constitution 'as a product and expression of history' (1999, p.4). This view of literature and legal history also develops appreciation of the 'historically imaginative nature' (1999, p.4) of the constitution, thereby requiring our participation and revivifying constitutional morality. So, whilst it should be acknowledged that Ward's theories do not (and were not intended to) provide legal historians with an empirical methodology for determining how to quantify the extent of the influence that literature has had on law, and that they are perhaps also vulnerable to the charge of according literature an overly-privileged cultural status, they can nonetheless provide a valuable perspective on the evolution of legal history. 37

### **SOCIO-CULTURAL APPROACHES TO LITERATURE AND LEGAL HISTORY**

The third – and for the legal historian most interesting - methodology linking literature with legal history has been developed recently by Margot Finn in her inter-disciplinary study of personal credit in English culture between 1740 and 1914. Finn, who is a social and cultural historian, uses the work of novelists of the period, such as Samuel Richardson, Anthony Trollope, Dickens and John Galsworthy, to build a detailed study of popular perceptions and attitudes towards personal debt (Finn, 2003, pp.25-63). Importantly, however, she utilises the literary texts in conjunction with diaries, autobiographies, private papers and other non-fictional sources (pp.64-105). In this way, she is able to develop a sophisticated analysis of the different and shifting patterns of individual, inter-personal and social behaviour, thereby providing important insights into the complexities of credit in the period under consideration (pp.317-318). She shows convincingly that novels, if used appropriately with other sources, are able to provide valuable information about attitudes towards social, ethical and gender structures (pp.62-63). Building on this broad socio-cultural platform, Finn is able to examine how perceptions of individuality shifted in the ongoing consumer revolution (pp.9 and 63). She then shows how attitudes towards credit, which were influenced heavily by literary representations, were affected and altered by changes in the statutory provision for imprisonment for debt and small claims statutes (pp.188-193 and 206-207). 38

Of particular interest to legal historians is Finn's account of the way in which the popular culture and social values relating to credit as manifested in literature and other non-fictional sources interacted with the way in which the local small claims courts and then the county courts exercised their powers (pp.197-277). In this context, she argues that the requirement for the small claims courts to use equitable reasoning, which necessitated consideration of the individual circumstances of each case, was a factor in the courts repeatedly registering and affirming 'entrenched social beliefs, identities and practices [which] ... constrained fully contractual consumer behaviour' (pp.3-4). Importantly, the combination of literature and other non-fictional sources provides her with the means of accessing these underlying phenomena: this broad socio-cultural context (pp.25-105) underpins her discussion of the use of equitable reasoning by the courts to incorporate traditional social relations into their decision-taking (p.309). By contrast, Finn infers that the common law served as the vehicle for the emerging principle of individualistic, autonomous liability under contract (p.309). Finally, in addition to providing fresh socio-legal insights into the introduction and operation of the Married Women's Property Acts, her analysis also suggests that the introduction of the County Courts in 1846 was a less significant development than it has hitherto been thought to be (pp.237-238). 39

Although Finn does not use literary depictions which were specifically legal in nature, a number of important methodological points that can be extrapolated from her study are of wider relevance in terms of articulating the value of literature in legal history. She has demonstrated that literature can provide fresh interpretations of the past when used in combination with a range of non-fictional sources, thereby providing a way of translating aspects of Ward's philosophical insights into a methodology which uses literature to illuminate particular aspects of legal history. More specifically, literature, along with other forms of expression, can have a valuable part to play in developing understanding of the relationship between the history of popular culture and that of the law, by providing insights into how patterns of behaviour, the law and legal institutions were perceived and presented socially and publicly. Non-fictional sources such as private papers can then be used alongside the literary sources to provide personal views of how social attitudes, law and legal institutions affected people as individuals, and were perceived by them. By using these materials in conjunction with other non-fictional sources such as official papers and 40

court reports, Finn has shown that the incorporation of literature into cultural histories can provide a foundation for the analysis of legal history through the provision of insights into socio-cultural attitudes, which in have turn influenced the development of law and legal institutions. In this way, methodologies which use representations of law in literature as part of a broad cultural analysis, rather than in isolation, have the potential to lead to fresh perspectives for legal historians. Moreover, the limitations of literature as an historical source are acknowledged, as is its potential value.

## CONCLUSION

Although certain aspects of Richard Posner's strongly sceptical argument concerning the value of literary depictions of law to those interested in legal history are open to challenge, his contention that literature on its own can tell us little about the history of doctrinal, 'black-letter' law and the technical workings of legal processes carries considerable weight. Nonetheless, it is possible to move beyond Posner's argument. In so doing, it is important to ensure that the use of legal history by law and literature scholars, who seek to explore the effect that events in legal history have had on literature, is distinguished from that of using literary texts to illuminate legal history, which is the objective of legal historians. But this is not to say that historically-based law and literature studies should be disregarded, as they highlight the cultural inter-relationship between legal history and literature. In this context, Dolin and Schramm show the effect that legal developments can have on literature. However, given the inevitable orientation of legal studies towards issues related to the practice of law, establishing links between legal history and the less functional concerns of literature in such a way as to offer meaningful perspectives on law presents significant challenges. Perhaps surprisingly, those who have sought to use literature to provide insights into legal history have given relatively little consideration to the significance of analysing methodology in this broader context. 41

A number of methodological themes have therefore been identified, with the objective of bringing a wider perspective to the debate. First, a number of legal historians have taken a range of different approaches to utilising the relatively uncontroversial technique of using historic, canonical literature as a cultural point of reference or comparator. Whilst studies of this nature are able to provide worthwhile critiques of law, and can set legal history in a cultural context, they do not, for the most part, seek to use literature as anything other than a contemporaneous fictional perspective. Accordingly, although not negligible, the value of this methodology for legal historians is intrinsically supplemental to legal sources. Moreover, the discussion of legal history in conjunction with literary texts may prove to be of more value to literary historians seeking to enhance understanding of the historical context of the texts, than to legal historians. 42

Second, arguing from a conceptually-based law and literature perspective, Ward contends that literature has a profound effect on the way in which law has been perceived and developed in socio-cultural terms. Law and the constitution are seen as imaginary constructions, and so the way in which they are depicted in canonical literature, such as the works of Shakespeare or Dickens, is of crucial significance in terms of shaping the development of the popular imagination of law, and that of lawyers themselves. Although Ward does not seek to provide a methodology to demonstrate the extent of the influence of literature in the historical development of law, and he accords to canonical literature a socio-cultural status which arguably it may not deserve, his arguments are nonetheless of value in that they emphasise the importance of developing understanding of the inter-actions between legal history and its wider cultural context. 43

Third, Finn, who is a socio-cultural historian, has developed a challenging inter-disciplinary methodology for the use of literature in history. Importantly, this provides new possibilities for legal historians, and enables Ward's philosophical analysis of how law may be influenced by literature to be explored empirically. Literary depictions, when combined with a range of non-fictional sources, can be used to build understanding of socio-cultural attitudes and perceptions, which can then inform the analysis of specific aspects of social and legal history. In this rich inter-disciplinary mix, literature, and how law is portrayed in it, is able to open up new interpretations of past societies, and, more specifically, to help legal historians develop their understanding of the interaction of law with cultures and values which are now, through the passage of time, alien and entirely imaginary constructs. It therefore has the potential to expose conventional views of legal history to different cultures, traditions and ways of thinking. More broadly, the use of literature as one element in the construction of a socio-cultural base from which to analyse the law can encourage legal historians to think holistically about law as a crucial part of past societies and to develop more sophisticated and pluralistic perspectives on the nature and role of law and the legal process during particular periods. 44

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