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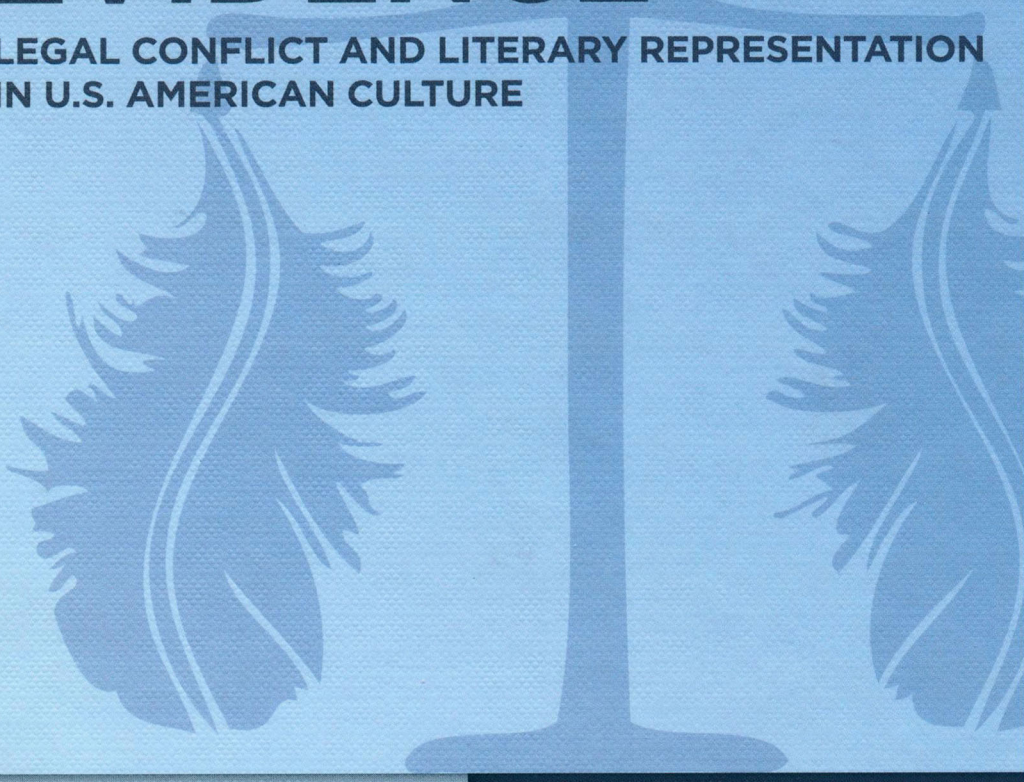
Peter Schneck

RHETORIC AND EVIDENCE

LEGAL CONFLICT AND LITERARY REPRESENTATION IN U.S. AMERICAN CULTURE



LAW & LITERATURE

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Chapter 1

Law, Literature, and the Predicament of Representation

The following introductory chapter is meant to delineate what I consider a fundamental challenge facing the portrayal of law in literary fiction. In order to do so, I will take several related steps. Since the complex relation between the legal and the literary has become the focus of various critical approaches in the context of the so-called law-and-literature movement, I will give a first, provisional outlook on the basic divisions of the field in order to better position my own perspective. A more in-depth discussion of central debates and concepts that have developed within the law-and-literature movement is reserved for the second chapter. For now, my aim is to describe the specific interest of my approach in reference to the increased general attention given to the law and literature relation in the United States. I will regard this interest as one expression of a more general debate, which I take to be most obvious in American culture, though not exclusive to it: a debate concerning the stability and the nature of evidence in relation to the rhetorical struggles of the democratic public sphere. The intense cultural and literary interest in the law, I will argue, must be interpreted as a symptom of the functional relation, or correlation, of legal and literary concepts of evidence and rhetoric.

This is why in the United States the courtroom trial has become the dominant form and focus of cultural representations of the law, including the trials and tribunals presented in literary fictions. In these representations, the trial situation emerges as a paradigmatic situation in which the truth and evidence established by rhetorical strife are meant to serve the advancement or restoration of justice — yet also often fail to do so. That the legal process of a public trial involves the potential for drama and that failures and inequities are part of it, may be taken as one of the most obvious reasons for literature's critical engagement with the law. However, the notion of justice also implies certain exigencies in regard to the legitimacy of representation that concerns both law and literature. Starting out from Jacques Derrida's discussion of the 'mystical foundation' of legal authority and his remarks on the relation between law and literature, I attempt to describe what can be called the *predicament of representation* that challenges the literary representation of the law.

One central moment of this challenge concerns the status of linguistic representations as evidence, that is, as legitimate and appropriate representations of truth or reality. As I will discuss in more detail below, evidence

must be understood as an essentially rhetorical concept. This does not simply imply that evidence is a rhetorical construction but, rather, that rhetoric makes evidence necessary as a concept: on the one hand, in order to reflect upon the relation between reality and its representation, and, on the other, to form judgments about rhetorical truth claims. The difference between legal and literary discourse finds its origin in the distinction between rhetorical and poetical practices of proof. However, as the example of Aristotle demonstrates, this distinction had already implied the similarity, or rather the complementarity, of law and literature as related yet competing rhetorics of evidence.

The predicament of representation must thus become most intense where the literary depiction of the law critically focuses on the rhetorical grounding of legal evidence in order to replace it with its own evidence. These observations will finally lead to a general thesis about the legal moment in literary fictions of law and justice; that is, the unacknowledged self-reflective and self-critical dimension of literature's portrayal of the law.

I

From the perspective of academic study and criticism in the United States, the relation between law and literature appears to be both intense and somewhat enigmatic. Of course, the intensity of the relationship has become more obvious for the contemporary observer after the emergence of the so-called law-and-literature movement in the late 1970s and its rapid development over the last four decades into a veritable interpretive and theoretical enterprise. Even though the interdisciplinary thrust of law and literature scholarship has been criticized by Julie Stone Peters and others as merely an empty gesture and its institutional standing in terms of joint programs and degrees is far from impressive, law and literature approaches and the work that results from them have spread conspicuously in reach and number, especially in the humanities. In addition, the increasing international scope and the further extension of the critical interchange between law and the humanities in general has become rather obvious over the last fifteen years, particularly in areas like literature and human rights or literature and property law.[1] The "border between law and literature has become a bridge," Kieran Dolin ob-

[1] See, for instance, Slaughter, *Human Rights Inc.*; Schmidgen, *Eigtheenth-Century Fiction and the Law of Property*; Porsdam, *From Civil to Human Rights*; Weitin, *Zeugenschaft: Das Recht der Literatur.*

served in 2007, "which will enable even more connections to be discerned" and most likely "produce further transformations in both fields."[2]

And yet, the enigmatic dimension of this academic success story lies in the fact that there is still no and most likely never was or will be a discernible common program, approach, or methodology that would give the comparative study of law and literature the more decisive contours of a conventional discipline or field of scientific inquiry and theoretical speculation. There is no "central programmatic thrust, whether positive or normative, to the law-and-literature movement," Richard Posner has stated, leading to "a rich but confusing array of potential links."[3] between the two fields. In a similar vein, Guyora Binder and Robert Weisberg, in their comprehensive approach to the literary criticism of law, conclude that, since there is no single theory, the diverse critical endeavors centered around the law and literature relation should

> be understood as a series of genres — discrete, historically specific social practices of criticism, organized by recurrent purposes and interests, canonical texts, problems and themes, and characteristic rhetorical tropes, voices and forensic strategies.[4]

The two genres that have become so generally recognized as to almost assume a status similar to full-grown scholarly approaches are called, respectively, *law in literature* and *law as literature.* As these appellations indicate, the former looks at the literary representation of legal issues and processes, including the study of various thematic, topical, and symbolic aspects of law in literature, as well as the role of certain legal personnel in literary fictions, like the lawyer or the judge. The latter perspective is generally understood as the criticism of legal documents, acts, records, and practices with the help of concepts and methods derived from literary and cultural theories. The law as literature perspective thus focuses on the law as text, narrative, story, performance, or rhetoric.

This approach is less easily defined by the conventional practices and objectives of literary theory, however. Those who look at the law as literature are often not only literary but also legal scholars, and indeed this approach has found resonance both with post-structuralist textual criticism in general and with the Critical Legal Studies movement specifically, with their common emphasis on the "discursive context in which law and its effects are

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[2] Dolin, *Critical Introduction,* 11.
[3] Posner, *Law and Literature,* 1.
[4] Binder/Weisberg, *Literary Criticisms,* 20.

created, presented, interpreted, and assessed."[5] Whatever aspect of legal discourse and practice scholars are focused on, 'law as literature' is something of a misnomer: it embraces interpretations that treat law as literature for heuristic reasons only, not because they assume that law actually is or was literature. In fact, there is every reason to call this perspective 'literature in law' since its particular interest is the use of literary means in legal discourse, that is, the literariness of the law: its stories, its metaphors, its rhetoric, and its fictions.

Even though Binder and Weisberg are almost exclusively interested in the literary criticism of law which looks at law as literature, their observations can also be made useful for an approach that, like the one I will present in this introduction, is instead concerned with the function of the law in (and for) literature. In their view, both the study of law in literature and of law as literature are characterized more by certain presumptions about the relationship between the two parts of the equation and less by strict differences in critical theory and practice on either side. Accordingly, the "analogical relation" between law and literature, for instance, which forms the basis of most literary criticisms of the law, must be regarded as a trope that hinges on rather different "images of literary activity." Law and literature, in turn, can be considered as a master trope, or, in Weisberg and Binder's words, a "fertile rhetorical figure," which is shared by a highly diversified set of critical practices and approaches, all resting on specific conceptualizations of law and of literature.[6]

What distinguishes each approach from the next, more precisely, is how these concepts are conceived of in relation to each other, and how this relation is eventually turned into a foundation for the specific analytical and interpretive strategies employed. For example, both 'law' and 'literature' are employed as metaphors or tropes in most works that discuss their relation — including my own, for now at least. Indeed, it could be argued that only through the metaphorical use of the terms a more extended comparison seems possible in the first place. There is a certain downside, though, especially when the relation features a definite article: literature and *the* law — where it is never quite clear what *the* law would entail — and when a certain understanding of one part is projected onto the other, e.g. when (the) law is reduced to text or speech. I address some of these difficulties in Chapter Four.

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[5] Bauman, *Critical Legal Studies*, 247.
[6] Binder/Weisberg, *Literary Criticisms*, 20.

Given these conditions, it appears mandatory that, in order to introduce my own approach, I should first describe more clearly the intellectual concerns implied and the basic questions that inform these concerns. I do not deny that my approach also relies on a certain image of literary activity, as indeed my attention will be very much on literature as a critical activity or practice, a disposition which fundamentally defines its relation to the law. In this regard, the differentiation between the 'law in literature' perspective and its correlate approach, 'law as literature,' has turned from a convenient gradation signaling the advance of literary concepts within the realm of legal hermeneutics into a rather unfortunate dividing line for the development of a more advanced investigation of the representation of law in literature by literary criticism and theory.

Such an advanced investigation appears especially necessary if one considers the importance and cultural prominence which the literary (or, more generally, the symbolic) representation of legal procedures and practices has maintained in American culture from colonial times until today. Even before Independence, there was a noticeable interest in the public representation and discussion of trials which reached well beyond the immediate audience of tribunals or public executions. The publication of execution sermons, conversion narratives, and the extensive records and commentaries on accusations and trials of witchcraft demonstrate that the Puritans viewed this kind of 'literature' as exemplary in its didactic and moral function.[7] Traditional interpretations of such representations of law in literature often proceed from a somewhat limited understanding of a basic mimetic function, simply assuming that the literary portrayal of legal discourse and practice could or should be read in a rather straight-forward fashion. Another variant of this approach takes the literary representation of the law as a metaphorical or allegorical device to express and negotiate more universal notions, like justice, morality, or the necessity of normative institutions.[8]

In contrast, more recent investigations in the wake of the law-and-literature movement place heavy emphasis on the similarities of rhetorical and narrative strategies used both in legal and in literary 'stories' or 'fictions.' The more these similarities are emphasized, however, the more the relation between law and literature comes to rest on something like a conceptual essentialism. The relation between law and literature is then solely based on some

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[7] For Puritan narratives, see Bosco, "Lectures at the Pillory;" Williams, "Criminal Conversion Narrative" and for later developments Halttunen, "The Birth of Horror" and Wiltenburg, "True Crime."

[8] See, for instance, Browne, *Law and Lawyers*, and Smith, *Law and American Literature*.

common universal disposition, such as the rhetoricity of literary and legal speech acts or the fundamental role of story-telling in legal and literary reconstructions of reality and experience. From the more radical vantage points offered by such interpretations, the representation of the law in literature must appear as just another, albeit more obvious, variant of the inherent literariness or rhetoricity of the law. To put it polemically, in the radical readings of law as literature, law itself becomes a sort of literature, or more precisely, it becomes the only literary subject worth studying for the law and literature enterprise.

This position is in a way complemented by the literary exceptionalism of interpretations that take literary texts as the better law, whose office it is to remind its readers of the moral and human failures of legalistic practice and to appeal to a sense of justice that cannot be satisfied by rules and legal reasoning alone. Hence Binder and Weisberg's warning against the "characteristic risk of the law as literature trope":

> First, a *sentimentalism,* in which passion is never cruel or self-indulgent or muddleheaded, invention is never destructive or dishonest, and civility is always inclusive and never elitist. Second, a facile sophistication that mistakes *skepticism* for criticism and dishonors good causes with bad arguments. Third, a genteel *authoritarianism* that restricts the aesthetic to the role of ornamenting institutionalized power and becalming the spirit of discontent.[9]

The question is how the literary criticisms of law that fall under the "law as literature" category could contribute to an advanced understanding of the intense interest of literature in the law — a question I will subsequently specify to investigate the particular engagement with legal matters in American fiction. That includes the question of how the models of relation on which the "law as literature" trope hinges could be made useful for the revision of the conventional "law in literature" approach.

Neither conceptual essentialism nor literary exceptionalism are particularly satisfying for an attempt to come to terms with the functional correlation of law and literature within the larger context of American history and culture. As I will discuss in detail in the next chapter, this difference and its specific cultural and historical formation have to be kept in view for a thorough understanding of the interdependence between literary and legal concepts of rhetoric and evidence in a democratic culture. In face of this interdependence of law and letters in American culture, the persisting preoccupation with the law cannot be reduced simply to a matter of mimetic and ideological reproduction. Nor can it be relegated exclusively to the artistic

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[9] Binder/Weisberg, *Literary Criticisms,* 16–17.

(and economic) exploitation of the law's dramatic potential. And it certainly would be all too simplistic to interpret the obsessive interest in courtroom drama in all forms as a contemptible symptom of the inherent sensationalism of American popular culture.

On the contrary, the American obsession with the law signifies an extreme answer to the fundamental insecurity and instability of evidence established by, but also constantly defied by, the adversarial differences and the resulting rhetorical struggles between factional interests and opinions in a democratic public sphere. Also, in this way, the law-and-literature movement and the debates that surround it can be said to reflect a more general cultural struggle for evidence fought with rhetorical means. Finally, the particular confrontation between law and literature is characterized by the fact that the assertion of their respective evidence relies on very similar rhetorical strategies while their status as "truth" is often considered mutually exclusive.

A closer look at the important discussion of rhetoric in the law-and-literature movement will reveal that the debate over the rhetorical — and, by extension, the literary — dimension of the law always implies a concept about the possibility or impossibility of evidence as a consensual form of truth. Put in a more consciously rhetorical fashion, the argument about rhetoric in law and literature might be said to center around an unspoken — and probably unsolvable — question: whether rhetoric can be just without being just rhetoric.

Even though literature has responded to this question in obvious ways, the critical concern which informs most literary representations of the law cannot not be reduced to an exclusively literary perspective on legal rhetoric, just as the literary and the legal cannot simply be reduced to their institutionalized manifestations. Binder and Weisberg, for example, point to the distinction between law as the "work of a particular profession" versus law as "an ordering function, a process of identifying, allocating and testing authority that pervades all spheres of social life"; so too between literature in the narrow sense and literature as "imagination, complexity of perception, density of meaning, and the qualities of dramatic and aesthetic interest."[10]

Instead, the examination of legal rhetoric and evidence in literary fictions touches upon the performative power and interpretative violence which grounds the law and its fictions of justice, as Jacques Derrida has argued in his seminal essay, "Force of Law: 'The Mystical Foundation of Authority'" (1992). I will discuss the essay above all in regard to the relation between law and literature — a relation which occupies a prominent role in other texts by

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[10] Binder/Weisberg, *Literary Criticisms,* 5.

Derrida as well. This is meant to sharpen the contours of my own argument and to formulate a basic thesis about the nature of literature's critical engagement with the law.

II

Derrida's far-reaching speculations in "Force of Law" are based on a passage from Pascal, in which the latter asserts that the "essence of justice" does not reside in the laws themselves but in the "mystical foundation"[11] of received customs. As Derrida shows, Pascal's remark in fact presents a gloss on an (unacknowledged) passage from Montaigne which runs as follows:

> And so laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other. ... Anyone who obeys them because they are just is not obeying them the way he ought to.[12]

At first sight, Montaigne is simply making a distinction between justice and laws because, as Derrida comments, the "justice of law, justice as law is not justice. Laws are not just as laws."[13] Yet, this distinction must be read as an open question about the real source of the law's authority, an authority which, as Pascal revises Montaigne's paradoxical observation, cannot exist without force: "and so it is necessary to put justice and force together ... to make sure that what is just be strong, or what is strong be just."[14] Pascal's and Montaigne's formulations point to the same inherent problem or paradox of legal authority which refers to the necessary, but also completely arbitrary, relation between law, justice, and power (or force, as Derrida insists). If justice does not reside in the law, where, then, does it reside, and how can it serve as a foundation for the law's authority? In what way can the law realize the adjustment of justice and force?

In order to characterize the "mystical foundation" of the law's authority more clearly, Derrida refers to another of Montaigne's passages about the law, which apparently argues that this source of authority may reside in the fictions of the law: "even our law, it is said, has legitimate fictions on which it founds the truth of its justice." Again, this description does not solve but, rather, further defers the initial question of the law's authority to another in-

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[11] Derrida, "Force of Law," 11–12.
[12] Qtd. in Derrida, "Force of Law," 12.
[13] Derrida, "Force of Law," 12.
[14] Pascal, *Pensées*, frag. 298, Brunschvicq edition; qtd. in Derrida, "Force of Law," 11.

quiry — one that is also central to my own discussion: "What is a legitimate fiction? What does it mean to establish the truth of justice" with the help of fictions? As Derrida suggests, there is more than one way to approach these questions. The most obvious one would be to refer to the "functional mechanism" inherent in both Montaigne's meditation on the necessity of fiction and Pascal's comments on the necessary conjunction of force and justice, and simply read — and criticize — the fictions of the law as a symbolic masking of the real (political, economic) sources of its power.[15]

More important, however, Derrida continues to insist, is Pascal's and Montaigne's common concern for an "intrinsic structure," which "a critique of juridical ideology should never overlook."[16] This concern points to a source of the law's authority which resides in its very origination and which therefore cannot be related to or grounded in either force or fiction, and yet always implies both in its performative power:

> The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force: this time not in the sense of law in the service of force ... but rather in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence. ...
>
> Its very moment of foundation or institution ..., the operation that amounts to founding, inaugurating, justifying law (droit), making law, would consist of a coup de force, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate.[17]

Even this elaborate attempt to describe the moment of the performative institution of law and justice inevitably involves a paradox, as Derrida concedes: "Here the discourse comes up against its limits: in itself, in its performative power itself. Here a silence is walled up in the violent structure of the founding act."[18] The original foundation of the law's authority and therefore the legitimate force of its fictions are indeed "mystical" in the sense that they defy their justification by another discourse, another fiction: "No justificatory discourse could or should insure the role of metalanguage in relation to the performativity of institutive language or its dominant interpretation."[19]

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[15] Derrida, "Force of Law," 12.
[16] Derrida, "Force of Law," 13.
[17] Derrida, "Force of Law," 13.
[18] Derrida, "Force of Law," 13–14.
[19] Derrida, "Force of Law," 13.

One reason for the difficulty these statements may present to the unwary reader is that Derrida is trying to describe a moment of institution that is outside, or before, the law, yet which nevertheless draws its justification from the very law it attempts to institute. It is of course not a concrete, localized event Derrida is talking about, but the logical underpinning of certain acts or discourses of legitimation. The question that drives these hypothetical assumptions is "what justifies the justification of the law?" That is, specifically, how can the authority of the law be justified or challenged in regard to the act that instituted it. One answer is given by Pascal, who states that the authority is based on certain customs whose authority goes back in time. The notion that the law developed out of ancient customs has always been a conventional way of giving existing laws a history or a point of origin. Derrida argues, however, that legal history in this sense presents a retrospective narrative of origin and emergence, that is, it is another fiction of the law that ultimately cannot explain how and why the law's authority should or could be grounded in justice. That is why Derrida is much more interested in the conclusion of Pascal's enigmatic remarks: "Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it."[20]

Derrida consequently reads Pascal's warning as another indication of the paradoxical structure of the institution of legal authority in reference to justice. In another way, it also points to a necessary form of repression or denial without which the law, or any other form of self-authorized juridical power, would demolish the foundation of its legitimacy. In this sense, literature, when it attempts to speak (for) the law, and to judge the law by tracing the sources of its authority, may find itself threatened by the annihilation of its own 'mystical' foundation.

The central compelling motivation for Derrida's argument is to speak about the possibility of justice, which he links precisely to the impossibility of its representative institution or definition. As he insists, the "mystical" dimension of the foundation of law and justice presents an "experience of aporia" that can be understood in two ways. One would emphasize the impossibility of the experience of aporia, which means that "justice would be the experience that we are not able to experience."[21] Given this impossibility, it follows that "there is never a moment that we can say in the present that a decision is just ..., or that someone is a just man — even less, "I am just."[22] From a

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[20] Qtd. in Derrida, "Force of Law," 12.
[21] Derrida, "Force of Law," 16.
[22] Derrida, "Force of Law," 23, original emphasis.