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Christine Krueger
Marquette University, christine.krueger@marquette.edu

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CHAPTER 4

Law and Literature and History

Christine L. Krueger

Thinking historically about law and literature has become a common, if not obligatory, scholarly practice. Yet historicism was largely absent from the founding of the interdiscipline. For the influential "law and literature movement" in particular, New Critical and neo-Aristotelian paradigms seemed better suited to promoting literature as a humanizing corrective to legal reasoning that they believed to be rule-bound, unempathetic, and unjust. If putting law and literature into conversation required some deft disciplinary negotiations, that was nothing compared to the demands of synthesizing both with history. This chapter tells a story of how this came about: what developments urged historicism on law and literature, what practical, methodological and ideological challenges were overcome, what benefits have accrued from this new multidisciplinary practice, and what problems it presents. In effect, this chapter historicizes how an interdisciplinary practice became a multidisciplinary one.

I begin with the methodological and ideological challenges that complicated the development of law, literature, and history as a multidisciplinary practice, and the imperatives that compelled their synthesis. Two forces that influenced both law and literature likewise transformed the discipline of history: New Historicism and the theorization of historical traumas, principally in Holocaust studies. New Historicism may be the more obvious influence, though not an uncomplicated one. The impact that Holocaust studies has had on transitional justice movements constitutes an equally potent – and even competing – influence on what history means for law and literature. Therefore, no account of the multidiscipline can ignore how justice (law), witness testimony (narrative/literature), and memory (history) have been intertwined in transitional justice processes, most notably South Africa's Truth and Reconciliation Commission.

The second part of the chapter focuses on examples of scholarship that fostered multidisciplinary practices. These texts might engage not only law, literature, and history, but also political theory, psychoanalytic theory, and

feminist theory. I look first at the significance of the Holocaust in the work of Richard H. Weisberg, a founder of the law and literature movement. I suggest that Weisberg's insistence that law and literature address the Holocaust necessarily entails historicism. Weisberg's *Failure of the Word* (1984), *Vichy Law and the Holocaust in France* (1996), and 1999 essay reflecting on twenty years of law and literature bookend the other examples I discuss: Barbara Shapiro's *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (1991); Alexander Welsh's *Strong Representations: Narrative and Circumstantial Evidence in England* (1992); and Carole Pateman's *The Sexual Contract* (1988). Each historicizes Anglo-American law both synchronically and diachronically, tracing the evolution of epistemological, social, and political issues over the long arc from the early modern period to modernity, attentive to particular historical conditions and drawing evidence from canonical and non-canonical works. The chapter concludes with a discussion of South Africa's Truth and Reconciliation process, drawing on work by various scholars, including Pumla Godobo-Madikizela, a member of the TRC.

My discussion is confined to the English common law tradition, which is likely to be of greatest significance to readers of this volume. Nevertheless, as I will conclude, current uses of law, literature, and history urge us to be more international, as well as interdisciplinary.

Disciplinary Barriers

Literary and legal theorists have resisted historicism for reasons unique to their disciplines and approaches. It might seem obvious that a legal system based on precedents would be historically self-conscious. Instead, the very legitimacy of common law depended upon the fiction that each new legal decision reiterated the truth of prior decisions, albeit in new circumstances. To admit that law evolved over many decisions and revisions of precedent would be to demystify the law's transcendent authority and locate legal power in judges.

Historical jurisprudence first emerged as an influential force in Sir Henry Maine's *Ancient Law* (1861), and later in such works as James Fitzjames Stephen's *History of the Criminal Law of England* (1883) and *The History of English Law Before the Time of Edward I* by Frederic William Maitland and Sir Frederick Pollock (1895). While we may think of historicism as a critical tool to expose entrenched power and denaturalize oppressive social relations, Victorian positivists, notably John Austin,

construed historical jurisprudence as reactionary, reasserting tradition against scientific efforts at improving law.

As A. V. Dicey put it in 1905, "Historical research ... tends to quench the confident enthusiasm necessary for carrying out even the most well approved and the most beneficial among democratic innovations."[1] Historicism, then, was resisted by both traditional common law thinkers and positivist legal reformers.

Nevertheless, in the decades preceding the law and literature movement, historians produced such magisterial works as William S. Holdsworth's thirteen-volume *History of English Law* (1903–66).[2] These may have become indispensable guides for current law and literature scholarship, but they did not necessarily intervene in legal thinking. And while legal theorists may have ignored law *as* history, historians devoted much attention to law and literature *in* history. For example, laws governing censorship attracted the attention of social, political, and literary historians.[3] Copyright law was also addressed as a matter of both legal and literary history. Well before postmodern theories of the author, Benjamin Kaplan, in *An Unhurried View of Copyright* (1967), mooted the idea that conceptions of authorship arose from copyright law.[4] But the domain of law and literature was drawn to exclude a host of robust scholarly relationships with history.

Perhaps the most telling omission of historical literary criticism from the founding of the law and literature movement may be Ian Watt's *Rise of the Novel* (1957).[5] Among the preeminent works of literary criticism in the twentieth century, Watt's study argued that realist fiction succeeded in a

[1] A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England* (London: Macmillan, 1962 [1905]), p. 461.

[2] See also Leon Radzinowicz, *History of English Criminal Law and Its Administration from 1750*, 3 vols. (London: Macmillan, 1948–1968); J. H. Baker, *An Introduction to English Legal History* (London: Butterworths, 1971); John Beattie, *Crime and the Courts in England, 1660–1800* (Princeton: Princeton University Press, 1986).

[3] In such studies as Charles Gillet's *Burned Books: Neglected Chapters in British History and Literature* (New York: Columbia University Press, 1932); F. S. Siebert's *Freedom of the Press in England, 1476–1776* (Urbana: University of Illinois Press, 1952); Donald Thomas's *A Long Time Burning: The History of Literary Censorship in England* (New York: Praeger Publishers, 1969) and Leona Rostenberg's *The Minority Press and the English Crown: A Study in Repression, 1558–1625* (Nieuwkoop: B. De Graaf, 1971).

[4] In *Copyright in Historical Perspective*, Lyman Ray Patterson, a lawyer, produced what remains a definitive and comprehensive account of how copyright shaped British literature from the Anglo-Saxon period to the nineteenth century. See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968).

[5] Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson and Fielding* (Berkeley: University of California Press, 1957).

new literary marketplace by addressing readers as jurors, presenting them with evidence through plot and character, and asking them to render judgment based on the facts put before them. Though early advocates of the literary imagination in legal reasoning relied heavily on novels for their evidence, it was not Watt's historicized account of the genre that underlay their arguments. Historicism challenged claims for literature as the instantiation of stable meanings and transhistorical values. The significance of *Rise of the Novel* for law and literature would eventually be recognized in Welsh's *Strong Representations*.

New Criticism, which banished historical scholarship from literary interpretation, was favored by early law and literature advocates. Robert Weisberg and Guyora Binder locate New Criticism at the head of a line of practices, from reader-response through structuralism to hermeneutics, which connected law and literature via their formal features.[6] New Criticism endowed the aesthetic qualities of literary forms with ethical and philosophical significance. But it would not survive challenges from postmodernism and cultural criticism.

New Historicism, which brought postmodern theories to the interpretation of history, inspired literary critics to historicize law and literature topics. Michel Foucault's *Madness and Civilization: A History of Insanity in the Age of Reason* (1964) and *Discipline and Punish: The Birth of the Prison* (1975) influenced scholarship on the legal persecution of deviance and provided the Panopticon as a compelling metaphor for the rise of a surveillance state. Early examples of New Historicist literary critics' engagement with legal themes include D. A. Miller's *The Novel and the Police* (1986), John B. Bender's *Imagining the Penitentiary: Fiction and the Architecture of the Mind in Eighteenth-Century England* (1987), and Marie-Christine Leps's *Apprehending the Criminal: The Production of Deviance in Nineteenth-Century Discourses* (1992). What is more, some traditional topics in the history of literature and law were revisited under the auspices of New Historicism. Citing global threats to freedom of speech in 1984, Annabel Patterson, in *Censorship and Interpretation: The Conditions of Writing and Reading in Early Modern England*, revisited early modern censorship in terms of poststructuralist theories of the lyric.[7] Mark Rose, in *Authors and Owners: The Invention of Copyright* (1993),

[6] Robert Weisberg and Guyora Binder (eds.), *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), pp. 115–25.

[7] Annabel Patterson, *Censorship and Interpretation: The Conditions of Writing and Reading in Early Modern* (Madison: University of Wisconsin Press, 1984), pp. 124–25.

credited Roland Barthes and Foucault with having "stimulated" reconsiderations of the legal constructions of authorship.[8]

Still, while New Historicism brought literary critics into the field of law and literature, it often complicated exchanges with both historians and lawyers. New Historicism debunked literature as a repository of transcendent values. Of what use could this version of literature be to legal thinkers who looked to literature to provide ethical meaning for legal decision-making? Conversely, New Historicist literary critics often failed to do justice to legal history. Viewing history through the lens of Foucault or Lacan tended to reveal the same pictures of power and repression, of disciplinary discourses and the "law of the father," regardless of historical period or nation. Historians influenced by postmodernism might connect with literary criticism attentive to the material conditions of literary production. How New Historicist literary critics represented legal history, however, could strain credulity. And those literary scholars who undertook to refine New Historicist accounts of legal history encountered considerable practical and methodological obstacles. Legal documents were not preserved and organized in such a way as to facilitate historical – much less literary – research. Beyond the problem of access, interpretation of legal documents required expertise in case law, trial procedures, and legal terminology. It would be some time before literary critics succeeded in bringing to historical legal documents the interpretive tools of literary analysis.

Of course, these disciplinary negotiations were taking place in larger historical contexts, which conjoined law, literature, and history. The Holocaust raised devastating anxieties about representation – aesthetic, legal, and historical. Theodor Adorno's declaration in 1951 that "writing poetry after Auschwitz is barbaric" crystallized how literature and the aesthetic could not escape the traumatic history of injustice. The Nuremberg trials had presented an unprecedented spectacle of legal procedure as some remedy for crimes against humanity. They also focused attention on the forensic probity of testimony and documentary evidence of genocide. Documentary records of these and other war crimes trials strained conventional historical explanations and invited psychoanalytic and anthropological interpretations. Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963) is likely the best-known and most controversial example of debates over the meaning of justice in war crimes trials.

[8] Mark Rose, *Authors and Owners: The Invention of Copyright* (Massachusetts: Harvard University Press, 1993), p. 1.

Holocaust testimony, it was determined, required new disciplinary collaborations, and projects commenced to collect videotaped interviews of survivors. These efforts could confer historical, psychological, and ethical meaning on testimony, operating not from traditional legal conceptions of evidence, but rather from literary and psychoanalytic principles. For example, the Video Archive of Holocaust Survivors' Testimonies at Yale (now the Fortunoff Video Archive) was founded in the early 1980s by Laurel Fox Vlock, Geoffrey H. Hartman, and Dori Laub, MD. Fox Vlock was a documentary film maker and reporter. Hartman was a leading exponent of deconstruction and influential critic of Romantic poetry and Laub is a psychiatrist. This multidisciplinary endeavor would preserve a historical record of Holocaust survivors, informed by an understanding of testimony that differed fundamentally from its status in legal contexts. In *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History*, Laub and his coauthor, the literary theorist Shoshana Felman, describe the listeners (interviewers of survivors) in these terms: "They have to learn ... how to bond with the narrator in a common struggle to release the testimony which, in spite of inhibitions on both sides, will allow the telling of the trauma to proceed and to reach its testimonial resolution."[9] This archive, along with other Holocaust archives around the world, established a paradigm for documenting genocide through first-person narratives. The archives also had a profound effect on how history should be done.

This is evident in the "Historians' Debate" of 1986–9 in Germany. The prospect of Germany's integration into the West after reunification posed the question: How would Germany's national identity continue to be defined by the Holocaust? As Dominick La Capra notes, the debate raised two broader questions: "whether one could neatly separate between arenas or spheres in modern life (the professional and the public spheres, for example) and whether one could define history in purely professional, objective, third-person terms under the aegis of a structurally differentiated or even autonomized paradigm of research."[10] The historian Ernst Nolte asserted that Germany should no longer be identified with Hitler's "Final Solution"; significantly, the leading rebuttal came from the political philosopher Jürgen Habermas.[11]

[9] Shoshana Felman and Dory Laub (eds.), *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (London: Taylor and Francis, 1992), p. xvii.

[10] Dominick La Capra, *History and Memory after Auschwitz* (Ithaca: Cornell University Press, 1998), p. 67.

[11] For a discussion of the "Historians' Debate" in Holocaust studies, see La Capra, *History and Memory*, pp. 49–68.

Habermas, Adorno, and Arendt were among the philosophers and political theorists who called on historians to transform their methodologies to address the Holocaust and historical trauma. La Capra, Hartman, and Felman were among the literary critics who exerted similar pressure. The common theme was that not only understanding, but also justice, required more capacious and multidisciplinary methods of interpretation. Their claims had implications for law, as well. Richard Weisberg's influential contributions to our interdiscipline reveal how the legacy of the Holocaust engaged law and literature with history, in a manner distinct from New Historicism.

Lest Law and Literature Forget: Richard H. Weisberg and History

In his groundbreaking books *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (1984) and *Poethics: And Other Strategies of Law and Literature* (1996), Weisberg had objected to postmodern theories for their axiomatic indeterminism. Frequently he turned to Holocaust history to demonstrate that not merely theory but also justice was at stake. For example, citing Stanley Fish's *Is There a Text in This Class?*, Weisberg writes that "[Fish's] powerful endorsement of the view that professional norms cannot exist apart from the practices of the community allegedly bound by those norms must eventually run up against holocaustic barriers."[12] For Weisberg,

> the lesson of Vichy [France] is that professional communities *cannot* accept theories denying the objective existence of texts. They must resist such theories, yet fight to understand what is meant by textuality as something apart from any reader or group of readers, and then substantively learn to evaluate the motives and subjective biases from which all texts are generated ... [Vichy lawyers'] zeal in interpreting [Nazi] legislation, unconstrained by traditional (textual) French notions of egalitarianism and personal freedom, exemplifies the risks to professional communities of theories privileging situation over standards.[13]

Weisberg declared in *Vichy Law and the Holocaust in France* (1996) that "Selective forgetfulness has no place in the post-Holocaust world."[14] Drawing upon archives of historical legal documents, historical scholarship, and postmodern theories, Weisberg aimed to debunk the prevailing

[12] Richard H. Weisberg, *Vichy Law and the Holocaust in France* (London and New York: Routledge, 1996), p. 173.
[13] Weisberg, *Vichy Law*, p. 175. [14] Weisberg, *Vichy Law*, p. 3.

myth that all French were part of the resistance. And he brought to bear the very aims for legal education that he had been espousing through the law and literature movement. In speculating on why the French legal profession collaborated in Nazi terror, he notes habits shared by lawyers of the United States, United Kingdom, Canada, and Australia, *viz.*, "*an ingrained approach to the reading of legal texts*" [original italics] that enabled a select group of "others" to be excluded from legal protection. "Unless legal education changes – in part because it has learned from these events – liberal constitutional cultures must turn to the other side of the coin, and they must constantly insist on *less flexible* readings of the legal system's egalitarian stories."[15] Weisberg thereby added a historical perspective to the requirements for a legal education that contributes to justice.

In "Literature's Twenty-Year Crossing into the Domain of Law: Continuing Trespass or Right by Adverse Possession?" Weisberg defended his approach to law and literature in historicist terms. His rebuttal of postmodernist anti-foundationalism concluded,

> postmodernists have only grudgingly perceived that post-war strategies of language have perhaps been wrongly geared as a response to the referential and idealist "simplicity" of Hitler's rhetoric, geared in fact to avoid at all costs all referential language, all clarity of speech, all quests for meaning and even law. Now, with new work revealing that the Holocaust emerged at least as much from complex, creative and even deconstructive strategies of oppressive speech ... law and literature has eschewed any unambiguous alliance with an antifoundational program.[16]

Putting his project of law and literature into a historical context, Weisberg asserts, "The events of this tragic century have more than fulfilled the prophetic signs emerging from Melville, Dostoevsky, and Kafka – that the West was ready for a cataclysm, and that the innocent of the world would suffer horribly during the death throes of the dominant culture."[17] This is one form of historicist thinking – looking at literature of the past for explanations of the present and ethical principles for law's future. "Our goal, so far unreached," Weisberg concludes, "is justice."

Weisberg represents a major line of thought about history in the field of law and literature. Significantly, though they share ethical concerns, this strand stands apart theoretically from LaCapra's and Felman's approaches

[15] Weisberg, *Vichy Law*, p. 4.

[16] Richard H. Weisberg, "Literature's twenty-year crossing into the domain of law: continuing trespass or right by adverse possession?" in Michael Freeman and Andrew Lewis (eds.), *Current Legal Issues: Literature and Law* (Oxford: Oxford University Press, 1999), vol. 2, pp. 55–56.

[17] Weisberg, "Literature's twenty-year crossing," p. 60.

to historical trauma. Weisberg may share more with Habermas, who similarly reads the past to discern new social formations for attaining justice in the present. Trauma studies may share methodologies with New Historicism, but the latter neither confines itself to examples of historical trauma nor brings the same ethical commitments to its subject matter. New Historicists may take up law and literature topics with skepticism about power and the disciplining effects of discourses, but often their work makes no presentist claims about history. Increasingly, they draw upon the materials of traditional empiricist historical scholarship of law and literature. As I suggested at the outset, then, a host of ethical and methodological commitments have arisen since the founding of the law and literature movement that have brought historians, legal scholars, literary critics, and others into conversation to practice multidisciplinary methods of interpretation. Significantly, multidisciplinary scholarship, such as that of Shapiro, Welsh, and Pateman, contributes a more robust defense of Weisberg's aims for law and literature.

A History of Truth across the Disciplines: Barbara Shapiro's *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence*

Barbara Shapiro's multidisciplinary explorations of the history of truth in the early modern period represent a key development for historical approaches to literature and law. In *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (1983) she demonstrated that law did not constitute an autonomous institution and body of doctrine, but functioned dynamically within a network of discourses in evolving ideas of truth and belief. How legal doctrine and criminal procedure could reveal the workings of that dynamic was the subject of *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (1991).

Nothing is more fundamental to legal decision-making than the interconnection between epistemology and justice, or, more baldly, the true and the good. Investigating this relationship as discursively constructed and historically contingent required a reconceptualization of legal decision-making and methodological innovation. To demonstrate how law interacted with – and shaped – the transformation of dominant ideas of what was *probably* true, Shapiro translated across disciplines, examining texts from law, religion, and philosophy from 1500 to 1800. That is, she proceeded

synchronically and diachronically. Though Shapiro covers an extensive span of time – actually reaching back to the Middle Ages and suggesting implications for contemporary law – she resists applying a master narrative. She reads with attention to differences among discourses at particular points in history as well as how they change across time.

Moreover, Shapiro draws attention to the problems posed by legal history. "Law is a particularly challenging branch of intellectual history," she reflects, "because, at least in the common-law world, the actors being observed have a particular interest in disguising what the historian seeks to discover."[18] The processes of legal decision-making, she notes, are largely unrecorded. "What we can know about the history of this aspect of the law of evidence is very limited because of the black box of the jury, and of the magistrate, for that matter . . . Almost no historical or even contemporary record exists of what actually goes on in the minds of the actors in the criminal justice system." What judges do say "typically reduces itself to such talismanic formulas as 'beyond reasonable doubt' and 'probable cause.'"[19]

In the absence of direct evidence, then, she models how a multidisciplinary approach reveals "the way in which religious and philosophical notions concerning the nature of truth and the appropriate methods of attaining it affect legal concepts of evidence and proof."[20] From dense and often undigested guides to magistrates and jurors, among other sources, Shapiro identifies developing pressures on conceptions of jury trials and jurors' duties, leading to the juror becoming an evaluator of fact. This new function demanded reliable epistemological guidelines and Shapiro argues that, while legal doctrine was influenced by standards of proof in other disciplines, legal conceptions of probability and certainty exerted a major influence beyond law.

Formalism Has a History: Alexander Welsh's *Strong Representations* (1992)

Strong Representations: Narrative and Circumstantial Evidence in England historicized formalist analysis in the interdiscipline of law and literature. Welsh had addressed Victorian law and literature in *George Eliot and Blackmail* (1985) and *From Copyright to Copperfield: The Identity*

[18] Barbara Shapiro. *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991), p. 249.

[19] Shapiro, "Beyond reasonable doubt," p. xii. [20] Shapiro, "Beyond reasonable doubt," p. xii.

of Dickens (1987). His influential 1990 article, "Burke and Bentham on the Narrative Potential of Circumstantial Evidence," marked a move into the study of probability and its representational forms.[21] *Strong Representations* would take up where Shapiro's *Beyond Reasonable Doubt* left off. Welsh focused on the period 1700–1900, but like Shapiro, he saw the need for new, multidisciplinary investigation into the long arc of epistemological and ethical transformations from the early modern period into modernity. And, like Shapiro, Welsh considered law to be a key force in this dynamic – not an autonomous category of discourse and practice, but one jostling alongside not only literature but theology and science, as well. "The history of narratives founded on circumstantial evidence is multifarious," Welsh wrote, "and neither lawyers nor novelists nor psychologists would have pushed the evidence so far, or forged so many chains, were it not for important precedents in science and natural religion."[22]

The principal differences between Welsh and Shapiro are suggested by his title. For Welsh, evidence and belief arise from multidisciplinary dynamics, but they are constituted through "representations." He investigates the formal narrative qualities of probative circumstantial evidence across disciplines – how they are mutually constitutive and how they evolve over time. For the period he studies, he takes "strong representations" to mean those that

> [O]penly distrust direct testimony, insist on submitting witnesses to the test of corroborating circumstances, and claim to know many things without anyone's having seen them at all. They may be religious or legal or literary representations, as long as no devilish or miraculous interventions are admitted. They are very much of the Enlightenment, representations that mirror without mystery the Pauline evidence of things not seen.[23]

"To make a representation," he explains, "means to subordinate the facts to a conclusion that makes a difference one way or the other."[24] That is, representations of evidence employ narrative devices of selection, emphasis, order, point of view, etc., as a rhetorical strategy regardless of discipline or genre. Interestingly, he locates the origins of this insight connecting literary narrative strategies with the management of legal evidence in Ian Watt's *The Rise of the Novel*. "Watt's implicit comparison

[21] Alexander Welsh, "Burke and Bentham on the narrative potential of circumstantial evidence," *New Literary History*, 21 (1989–90), 607–27.

[22] Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992), p. 7.

[23] Welsh, *Strong Representations*, p. 8. [24] Welsh, *Strong Representations*, p. 9.

between Defoe's or Richardson's realism and Fielding's," Welsh writes, "applies equally well to distinctions between direct and indirect evidence, or between evidentiary facts and facts arranged, in Burke's terms, 'narratively and historically.' In a given trial, each kind of evidence may have its virtues, as the nature of the case of personality of the witnesses will determine. The same is true of the novel."[25]

Welsh brings to his subject a literary historian's appreciation for the conditions of authorship and publication, as well. The explosion of print culture, in Welsh's argument, exerts its own influence on how evidence is evaluated and managed. He attributes the evolution of modern "adjectival law" to treatises on rules of evidence and published law reports, which burgeoned in the late eighteenth century. Such authoritative tomes as *Wigmore on Evidence* should be understood in part as ways of managing proliferating "legal" publications, such as trial accounts (including the Old Bailey Sessions Papers), sensational pamphlets, and legal digests.

Finally, Welsh reads a range of literary genres (fiction, poetry, criticism), as well as extensive professional and popular legal, theological, and scientific materials. This includes a historicized example of law *as* literature: a chapter on the epistemological import, historical contexts, and rhetorical devices of James Fitzjames Stephen's *Introduction to Evidence* (1872). Stephen, "whose authority in English criminal law" Welsh describes as being "as great as Fielding's in the novel," treats circumstantial evidence almost exclusively in murder cases, thereby betraying an anxiety about religious attitudes toward human life in the age of Lyell's geology, something he shares in common with Tennyson's *In Memoriam*.[26] Lyell, Welsh notes, was also a barrister. In sum, *Strong Representations* set a high bar for the multidisciplinary study of the history of evidence.

Telling a Difference Story: Carole Pateman's *The Sexual Contract* (1988)

The Sexual Contract is a leading example of how theories of difference were historicized – a critical element in historicizing law and literature. Difference as the principle by which inequities and subjugation are constituted was, of course, a central concern of much law and literature scholarship. Feminists and critical race theorists, for example, found in law and literature an opportunity to combat present-day legal oppression with literary liberation – at the same time critiquing the interdiscipline for its

[25] Welsh, *Strong Representations*, p. 63. [26] Welsh, *Strong Representations*, pp. 152; 154–5.

resistance to difference. And though it would seem to have been an obvious point of engagement among law and literature practitioners from various disciplines, questions of difference were – and to some degree remain – confined within disciplinary and theoretical silos. Ahistorical conceptions of law, literature, and difference, though not the sole causes of these disconnects, were major contributors. Treating difference not as an ahistorical absolute but as a historically constructed system of social organization in significant ways enabled – perhaps demanded – multidisciplinary approaches. Significantly, one such breakthrough argument came from a political theorist. Carole Pateman approached law not as an autonomous institution or a transhistorical metaphor, but as one entity in a network of evolving social practices with unjust, ongoing, and remediable consequences.

Pateman historicized difference as a mechanism of political subordination with a sweeping, detailed, and vigorously argued history of social contract theory, demonstrating how it necessarily entailed sexual inequality. Drawing on feminist historians such as Gerda Lerner, Pateman demonstrated that patriarchy was neither a relic from long-gone kinship structures nor an abstraction of postmodern feminist theory; rather, it was an identifiable aspect of the writings of Locke, Rousseau, and other social contract theorists. From its origins in the seventeenth century, social contract theory depended upon an unacknowledged sexual contract – the marriage contract – with the result that women's inferior legal status became a constitutive feature of liberal democracy.

By demonstrating that gender subordination was inherent in the transition from status to contract, Pateman made a radical challenge to received histories of modern political structures since Maine's influential *Ancient Law*. Moreover, she argued that our failure to recognize how social contract theory historically obscured its dependence on the sexual contract prevented us from understanding how women were necessarily disadvantaged in contemporary liberal democracy. If "patriarchy" was no longer a historical dinosaur, relegated to the era of kinship politics, but was instead a vital part of an ongoing historical legacy, then its function in contemporary social and political relationships demanded attention. Pateman extends her own argument to the social and legal status of contemporary sex workers and surrogate mothers.

Pateman's argument may have gone to the heart of legal history, but it met resistance. Nor did law and literature respond immediately to feminist challenges. But in time, the history of difference – gender, race,

sexuality – became a major focus of law and literature. Two years after *The Sexual Contract* was published, literary critic Carolyn Heilbrun and law professor Judith Resnik drew attention to the persistent resistance to feminism in the law and literature movement.[27] They argued that law and literature remained "indifferent to the rich infusion of feminist theory in literature departments and to the claims that feminist jurisprudence was making in law."[28] Their work sparked defensive responses, but also encouraged feminist scholars to address the history of women through literature and law. They were joined by critical race theorists similarly objecting to claims that law could be equitably administered if it failed to address racial difference. Many theories contributed to the press for a recognition of difference in law, and they often came from literary theory and appealed to literary texts as a corrective to the historical legacies of legal oppression.[29]

Pateman, Shapiro, Welsh, and Weisberg help us to recognize how lines of inquiry and methods of analysis integrated historical thinking into law and literature. For us, such key concepts as evidence, testimony, agency, and equity all have histories constructed across multiple disciplines. What requires our attention now is how our practices have fostered new legal and political processes that institutionalize historical narration as a response to atrocity and as a means to transition to just, democratic political structures from oppressive, violent, even genocidal, regimes. It may be hard to see what impact historicizing law and literature might have beyond the academy. But the theoretical underpinnings of our multidiscipline are largely those to which advocates of truth and reconciliation processes appeal. That law, literature, and history would become intertwined in transitional justice processes during the same period in which the interdiscipline of law and literature was coming to embrace historical approaches is no mere coincidence. If we engage in historical approaches to law and literature, then we should be aware of how the theories we employ are shaping justice in the present and future.

[27] Carolyn Heilbrun and Judith Resnik, "Convergences: law, literature and feminism," *Yale Law Journal*, 99 (1990), 1913.

[28] Judith Resnik, "Singular and aggregate voices: audiences and authority in law & literature and in law & feminism" in Michael Freeman and Andrew Lewis (eds.), *Current Legal Issues: Literature and Law* (Oxford: Oxford University Press, 1999), vol. 2, p. 688.

[29] See, for example, Susan Sage Heinzelman and Zipporah Wiseman (eds.), *Representing Women: Law, Literature and Feminism* (Durham: Duke University Press, 1994).

Witnessing History/Achieving Justice

Law and literature's engagement with history – and a web of other disciplines – has had profound practical consequences for how we have come to respond to atrocities since the Holocaust. As we have seen, the Holocaust radically challenged assumptions about justice, representation, aesthetics, and history. The urgent demands for justice and reconciliation posed by new acts of mass violence tax our ability to mount meaningful responses. Martha Minow has described contemporary responses to atrocities as:

> lurch[ing] among the rhetorics of law (punishment, compensation, deterrence): history (truth); theology (forgiveness); therapy (healing); art (commemoration and disturbance); and education (learning lessons). None is adequate and yet, by invoking any of these rhetorics, people wager that social responses can alter the emotional experiences of individuals and societies living after mass violence.[30]

Minow makes these remarks as editor of *Breaking the Cycles of Hatred: Memory, Law and Repair*, a collection of essays bringing together scholars from many fields with the hope that their shared insights might yield new practices that disrupt the narrative of violence, trauma, and revenge. Minow herself exemplifies this phenomenon. A leading legal theorist, she has been involved in many human rights projects, including the Independent International Commission on Kosovo and the UN High Commission on Refugees. Significantly, her thinking on post-atrocity justice and healing has been shaped by literary and philosophical theories of history. Responding to her own question – "After mass atrocity, what can and should be faced about the past?" – she cites conflicting answers from Jean Baudrillard, Milan Kundera, the philosopher Hermann Lubbe, and the journalist Tina Rosenberg, among others. How histories of violence are narrated conditions the likelihood of justice and peace in the future. "Living after genocide, mass atrocity, totalitarian terror," Minow writes, "makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and the future of individuals and entire societies."[31]

[30] Martha Minow, *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton: Princeton University Press, 2002), p. 27.

[31] Martha Minow (ed.), *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), pp. 118–19.

In other words, these traumatic events necessarily conjoin law, literature, and history with real urgency.

Julie Stone Peters, a skeptic of law and literature, cites the interdiscipline as one key source of the testimonial practices that have been institutionalized in transitional justice movements. "What lies behind claims about the value of post-atrocity narrative," she argues,

> are a set of views influenced by ancient Christian traditions of confession and redemption and by modern psychoanalysis, but borrowed also from literary and narrative theory of the past quarter century. These views were promulgated most directly by what became known in the 1980s as the "law and literature movement," with its 1990s offshoot, the "legal storytelling movement" ... These movements entered into dialogue with less narrowly legal and more global sub-disciplines and theoretical movements: Holocaust studies, with its discussion of the nature and limits of the representation of atrocity and the paradoxes of memorial; feminist criticism and critical race theory, with their discussion of the liberatory force of counter-hegemonic narrative; Latin American "testimonio" and trauma studies, with their discussion of witness bearing and the curative power of truth.[32]

But even for this critic of law and literature in the domain of post-atrocity politics, more history – not less – is the answer. Having proffered this genealogy of "truth commissions and other testimonial venues," Peters urges us to "look at the intertwined histories of modern literature and modern rights, histories that are ... inextricably linked from the eighteenth century onward. Understanding these linked histories may help us not only to contextualize contemporary claims about the function of narrative in the representation of human rights abuses, but also to look critically at some of their strongest assumptions."[33]

South Africa's Truth and Reconciliation Commission (TRC) is the best-known example of how this process has led to what Claire Moon has termed the "reconciliation industry."[34] Mark Sanders's analysis of the report of South Africa's TRC succinctly illustrates how law, personal narratives, and history are linked. Whereas the Commission solicited, attended to, and recorded testimony from both victims and perpetrators of apartheid, in its five-volume written report "extracts from testimony are

[32] Julie Stone Peters, "Literature," the "rights of man," and narratives of atrocity: historical backgrounds to the culture of testimony," *Yale Journal of Law and the Humanities*, 17(2) (2003), 255–6.

[33] Peters, "Literature," 254, 256.

[34] Claire Moon, *Narrative Political Reconciliation: South Africa's Truth and Reconciliation Commission* (Maryland and London: Lexington Books, 2008), pp. 2 5.

illustrative, first-person attestations to the veracity of the historical narrative, written in the third person, that encloses them." Sanders reminds us that the report explicitly states that its purpose is not "to write the history of th[e] country." Nevertheless, he argues that "the cumulative effect is of a thorough historical reckoning, albeit one driven by an exposure and cataloguing of human rights violations so relentless that it leaves little space for anything *other* than a history of gross human rights violations."[35]

The TRC brings home to us the real-life impact of our scholarly theories and practices. This is made particularly vivid in the writing of Pumla Godobo-Madikizela. A theorist of transitional justice movements, she brings a complex multidisciplinary perspective to the matrix of identities she inhabits as a black South African woman, a professor of psychology, and a member of the TRC. In *A Human Being Died that Night: A South African Story of Forgiveness* (2003), Godobo-Madikizela reflects on her own subject positions and their competing responses to history. As a member of the TRC, she writes,

> My emotions were becoming increasingly confused, but only in the sense that they represented my multiple identities, the past, and the present: as a child, student and adult growing up under the apartheid regime; as a human being able to feel compassion for the suffering of others; as a member of the Truth and Reconciliation Commission expected to remain levelheaded in my thinking about the past.[36]

Both national and personal healing demand a robust theory of forgiveness, Godobo-Madikizela argues – a narrative that negotiates the ferociously difficult demands of historical trauma and future peace.

First, Godobo-Madikizela acknowledges that the TRC was "essentially a political project, the creation of a political compromise that played out in the public domain." There are limits to what the legal, political, and narrative structures of the TRC could contribute to transitional justice, bypassing the real social and psychological work of processing historical trauma. Godobo-Madikizela presents two options for dealing with historical trauma, both taken from Holocaust theorists – respectively, Hannah Arendt and Emanuel Levinas. She rejects Arendt's argument that the Holocaust transcends human ethics and politics and therefore lies outside

[35] Mark Sanders, *Ambiguities of Witnessing: Law and Literature in the Time of a Truth Commission* (Stanford: Stanford University Press, 2007), p. 151 and citing the South African *Truth Commission Report*, vol. 5, p. 257.

[36] Pumla Godobo-Madikizela, *A Human Being Died that Night: A South African Story of Forgiveness* (Boston: Mariner Books, 2003), pp. 33–4.

the domains of forgiveness or justice, remarking that "One of the problems with these views, which have come to represent conventional wisdom on the subject of forgiveness in some circles, is that they are no longer realistic in light of actual practice in post-conflict situations."[37] Instead, Godobo-Madikizela seeks to break the cycle of violence and turns to Levinas, as well as Julia Kristeva and Jacques Derrida, to theorize "restorative justice" and reconciliation. She poses the question: "is Levinas's ethics compatible with the political realm?"[38] Her answer begins with literature, specifically Julia Kristeva's analysis of *Crime and Punishment*, in which Kristeva counters "Arendt's conceptualization of the term [forgiveness], [and] contends that forgiveness is a means to initiate a new beginning."[39] Next she turns to Derrida's reflections on history and forgiveness. Derrida, she writes, "expands the boundaries of the forgivable beyond Hannah Arendt's ethical limits, revealing its complexity. Placing it in an historical context he resists giving the absolute 'final word' on what can or cannot be forgiven."[40]

What does this tell us about the state of law, literature, and history as a multidiscipline? First, it tells us that these three disciplines – and their practitioners – have been inextricably connected in current events. What was once a matter of overcoming academic silos, or methodological disputes, is now a practical reality with wide impact. Julie Stone Peters once opined that literary scholars were drawn to legal topics to compensate for their irrelevance in human affairs. As her own more recent work indicates, history has thrust literature into politics with a vengeance. Second, our practice takes place in a context that is not only more interdisciplinary, but also international. My focus here has been on the English common law tradition, which partly encompasses South Africa. But our multidiscipline will increasingly be compelled to be comparative and take into account distinctive traditions of law, literature, and history. Finally, that our most urgent agenda should be to historicize law and literature more fully, whatever our area of research. As I have argued elsewhere, such scholarship "demonstrates the historically contingent political impact of legal and literary texts for outsider advocacy." Historical approaches to law and literature, regardless of the particular subject matter, caution against claims that any discourse possesses reliably salutary qualities. What is demonstrated by the scholarship I have discussed here is that we live with the legacy of modernity, "inherited

[37] Godobo-Madikizela, *A Human*, p. 47.
[38] Godobo-Madikizela, *A Human*, p. 59.
[39] Godobo-Madikizela, *A Human*, p. 50.
[40] Godobo-Madikizela, *A Human*, p. 46.

conceptions of justice [that] have been imagined across a variety of discourses, literature and law each making distinctive contributions and offering salutary mutual critiques."[41]

Finally, historical approaches to law and literature should not merely dissolve differences among disciplinary methodologies. Rather, they should challenge us to become more deeply literate in an array of distinctive disciplines – law, literature, history, theology, philosophy, psychology, politics, economics, science – so that each enhances our critical understanding of the others. As practices of teaching and scholarship, historical approaches to law and literature contribute an informed, sympathetic critique to projects that wisely engage the full range of human discourses to advance the common good.

[41] Christine L. Krueger, *Reading for the Law: British Literary History and Gender Advocacy* (Charlottesville: The University of Virginia Press, 2010), pp. 2, 13.