

Arts and the Aesthetic in Legal History

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Abstract

This special issue of *Critical Analysis of Law* brings together a rich array of articles at the intersections of arts and legal history. In this introduction we reflect on some of the benefits and implications of this interdisciplinary juncture, which contemporary legal historians have been slow to engage. We highlight the significance of engaging with the arts for theoretical conundrums central to legal history: art as source, the philosophy of time, methodological scripts, and the relation of the descriptive to the normative. The arts, we argue, prove vital in tackling and breaching the limits of imagination imposed by our time and place—disciplinary place included.

“Actual life was chaos, but there was something terribly logical in the imagination.”
Oscar Wilde, *The Picture of Dorian Gray* 297 (1891)

I. Introduction

How to spur one’s imagination in order to make sense of the chaos of life is a constant challenge, not least for the legal historian conscious of pasts that appear bewilderingly complex. A turn to the arts seems an attractive course to consider, yet one few contemporary legal historians have followed. At the beginning of the century cultural historian Margot Finn complained, “Legal historians’ general reluctance to expand their methodological repertoire and their specific failure to avail themselves of analytical insights derived from literature pose a significant obstacle to discipline-based and interdisciplinary studies of . . . law.” With few exceptions, she argued, legal historians have “remained largely resistant to the interdisciplinary textual strategies suggested by the new cultural history and the new historicism.”¹ Finn was referencing the cultural turn of the last decades, which prompted historians’ turn to meaning and situatedness. Sources considered aesthetic, as well as the theory and history of aesthetics, gained pride of place in historical inquiry; the complexity of meanings they signaled, and their perceived proximity to situated human experience, became not only unproblematic, but right to the point. As Finn observed, however, legal history had not been much of a participant.

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¹ Margot Finn, *Victorian Law, Literature and History: Three Ships Passing in the Night*, 7 *J. Victorian Culture* 134, 140 (2002).

Fifteen years into the century, interdisciplinary legal history, particularly that involving arts and aesthetics, is still far from mainstream. Use of arts as sources and as theory in legal history awaits explanation, theorization, even introduction. There are multiple drivers for this phenomenon which merit analysis, not least the ideologies of law and of legal history in late modernity, the practical cost of crossing disciplines, and the broader crisis of the humanities. On what seems to us a more manageable, more constructive note, at least part of the challenge can be confronted by bringing together work pursued in varied alleys, conceptualizing its routes, benefits, and implications, and emphasizing that what might appear idiosyncratic and irregular is in fact of methodological, ideological and analytical interest within legal history. Arts and the aesthetic in legal history is a realm of research blessed with excitingly rich and communicative prospects.

This special issue of *Critical Analysis of Law* emerges from a conference convened to discuss the issue's theme.² In this introduction we dwell briefly on some of the many things that can be done with the arts in legal history. We do so without any irritating insistence that all the relations between arts and law must first be theorized, once and for all, whether in romantic or disenchanted vein, with just the right quantum of autonomy for either arts or law, whether as genre or discipline. We prefer to open the lists with demonstrations. As the articles collected here testify, the options are rich.

The authors in this issue, coming from different disciplinary traditions, deal with the conjunction of arts and law in various forms and genres, contemporary and historical: prose fiction, myth, oral storytelling, music, film and painting. As individuals they engage with the theory and history of aesthetics, and they do different things with both, whether in writing history, or writing about it. In thinking about the articles here as a collection, we seek to highlight the significance of engaging with the arts for theoretical conundrums central to legal history. Beginning with the seemingly simple question of art as source in legal history, our discussion attempts to open up questions on the philosophy of time, on methodological scripts, and on the relation of the descriptive to the normative. The arts time and again animate our routes toward and into legal history.

II. Source, Insight, Destabilization

“Art can provide a valuable set of historical sources,” argues David Schorr in an article that turns to art as a source for the history of environmental law. In Schorr's article the emphasis is on the capacity of art to break new ground in historical scholarship by enabling the reexamination of topics and historical phenomena from new perspectives. Take as an example the cultural background of the late rise of environmental law: did late moderns actually see industrial air pollution as a cause for celebration, as paintings by cer-

² The fifth annual Berg conference held at the Faculty of Law, Tel Aviv University, on June 22-24, 2014. The conference was supported by the David Berg Foundation Institute for Law and History at Tel Aviv University and the Cegla Center for Interdisciplinary Research of the Law. We are grateful for their support. We thank Assaf Likhovski, Sharon Hannes and Seffi Weintraub for their keen involvement and support.

tain Impressionists suggest? What of the existence of specific kinds of legal regulation (of chimney heights, for instance), not otherwise known from other sources?

Schorr is correct that multiple insights are generated through the mere expansion of sources. Choice of source materials iterates the borders of law and legality; consequently, reconsideration of sources is often fruitful. Assumptions about the borders of law are an effect of historical contingency, political interest, and analytic benefit, and should be continuously reconsidered for the same reasons. One recurrent result of adding arts to available sources is a generative destabilization. We see the implications in Andreas Philippopoulos-Mihalopoulos's article on fraternizations across enemy lines in WW1. A filmic representation of fraternizations, Christian Carion's *Joyeux Noël* (2005), received with hostility, reveals a counter-narrative to patriotic accounts of the war, on which Philippopoulos-Mihalopoulos builds an account of spatial justice, examining the spatial and material conditions that operate to hold and to undo the force of law on human bodies. A different destabilization occurs in Anat Rosenberg's history of consumer credit law. Rosenberg examines Victorian debates about working-class financial means to show how a balance-sheet assessment of value was gradually naturalized in legal thinking as simple truth, a process that made older styles of assessment (particularly, those reliant on social networks of credit) appear not just contested, but incorrect. However, a work of art of the same time and place, Oscar Wilde's *The Picture of Dorian Gray*, raised analogous questions of evaluation, interrogated their implications, and undermined the naturalization of the balance sheet. As important, the hostility visited on the novel reveals the cultural effort behind the rise of a new form of evaluation in law. Following Agnew, Rosenberg suggests that when antipathy is visited on a work of art we do well to observe its explanatory force. The legal process would appear almost uncontested and effortless without the turn to art.

These two uses of destabilization are methodologically distinct. Like Rosenberg, Philippopoulos-Mihalopoulos builds on art's reception for a critical takeaway. With his analysis, however, we encounter the question of temporal boundaries: Philippopoulos-Mihalopoulos examines a film from the 2000s, a much later period than his historical event. The film, he argues, performatively breaks the taboo on fraternization, rather than simply record that the taboo was broken "in the past." Art in this case forms a crucial link between present and past. For some of the authors in this issue this is an invitation to reflect on the philosophy of history.

III. Destabilization, Temporality, Script

The collapse of temporal boundaries offers philosophical import in Chris Tomlins's study of William Styron's 1967 novel, *The Confessions of Nat Turner*. Tomlins asks about the ability of a work of fiction to mediate for us a past moment of revolt which threatened to unravel the legal order of slavery in Southampton County, Virginia. The violence that a novel itself might visit upon a violent history by uprooting the revolt's leader (Turner) too completely from his past serves Tomlins's attempt, invoking Walter Benjamin's philosophy of history, to undo distinctions between separate temporalities and to recognize a dialectic of

past and present. Styron's failure, Tomlins claims, lay not in any attempt to recognize Turner through Styron's present, which is essential. His failure lay in erasing the past completely, thus making the present self-contained. "If we embrace history as an enlivened understanding of an object of contemplation . . . we must recognize that the contemplated object is . . . enlivened . . . by the fold of time that creates it in constellation with the present," he argues. The novel can illuminate its object, or fail to do so—as Tomlins claims ultimately was the case here—only by being itself illuminated in its contemporaneity.

Some legal constructs capture the folding of past and present in their very structures. The paradigmatic case would seem to be inheritance, engaged in Ravit Reichman's article. Reichman's interest is in the dross of life that we all accumulate—economically and culturally inconsequential property that no one wants, but that in its passage through inheritance forces confrontations with pasts that may turn out to be traumatic, functioning as a break in the flow of time. She examines a recent documentary, Arnon Goldfinger's *The Flat*, dealing with the revelation of a friendship between the filmmaker's deceased German-Jewish grandparents and Nazi acquaintances, discovered through seemingly trivial papers left for the filmmaker/heir to sort out. Through the film, Reichman argues that public engagements with the past in courts of law, in this case Jewish restitution cases, crowd out more subtle dialogues that almost lack language, let alone legal theory. We can only begin to conceptualize this absence in law, and its implication for inserting ourselves into history, through the film's analysis.

The immanent relationality of past and present confronts debates about the expanse of time that is or should be the object of legal history. More familiar are historians' concerns about periodization, the questions historians perennially ask about which past moments should mark the beginning and end of an inquiry. Steven Wilf's article, however, suggests that even within this familiar conversation, methodological scripts, and particularly the classical question of text and context, contain an implicit engagement with expanses of time. Wilf grounds these insights on a comparative analysis of two well-known series of twentieth-century detective fiction, Sarah Caudwell's "Hilary Tamar" series, and Batya Gur's "Michael Ohayon." Hilary Tamar, the protagonist detective of Caudwell's fiction, relies on text, and assumes that its details capture the past. Gur's Michael Ohayon is a contextualist, and conceives his role to be one of dynamic excavation across a broad expanse of time. Neither script, however, is ultimately successful; as Wilf shows with the closing novel in each series, a collapse inevitably occurs, a point to which we return later. For now we ask: what else does the insertion of arts into reflections on method do for us?

IV. Script, Descriptive, Normative

If arts can invigorate efforts to come to terms with the experience of time, they are also a manner of rethinking the boundary between the descriptive and the normative. Part of the ambivalence of legal history in relation to art is the place of normativity. Scholarship based in literature, or arts more broadly, "chastises legal history for its insistence on a descriptive

rigor that can be separated from normative claims.”³ There are two ways to read this chastisement. One speaks to the situatedness of the historian, not always acknowledged. The situatedness of historians always carries political implications in necessarily engaging history through the lens made available by one’s political present. When Tomlins speaks of a Benjaminian constellation, he speaks of the historian’s concerns which enter her object of contemplation. In her article, Nan Goodman speaks to the same problematic from a different perspective. She criticizes the failure of historians of early American law and the antinomian controversy specifically to account for Anne Hutchinson’s final move in her 1637 trial, her confession to an immediate revelation from God, which seems to confirm her variance from the Puritan ministry. At stake is a failure to engage Hutchinson on her terms, claims Goodman, which requires the use of aesthetics—from the Greek for “relating to perception by the senses.” Goodman’s close reading of Hutchinson’s trial, reliant on an aesthetic emphasis on the auditory over other senses, recovers not only the consistency in Hutchinson’s legal strategy, but more fundamentally a break in modern legal sensibility. Aesthetics here recover an element lost on modern legal scholars; once recovered, it offers a view of the antinomian crisis as less a theological battle than one over the terms of legal aurality.

When Wilf contrasts the text-and-context historian-detectives in their ideal forms, the situatedness of the historian within methodological scripts, rather than in time, is at stake. Situatedness here means a position, normative we might say, about human agency: in line with the core concerns of law itself, choice of method participates in the unsure search for the locations, marks, and explanations of and for agency. Is agency anchored in individual traits or social surroundings? How deeply is it inscribed in tangible marks? How far and wide does one need to look to trace a causal chain of occurrences? Methods of legal history offer implicit answers to these questions. When we choose method, each series of novels implies, as often as not we are making a normative commitment.

Another way to read the claim that description and normativity overlap is as a project of showing that the very pursuit of truth is a normative concern, often surrounded by political heat. The history of the arts in modernity—particularly the modern anxiety over the place of fiction in relation to the real—has been crucial in developing language and theory that come to terms with the normativity of truth. Some authors in this issue rely on art to deepen legal history’s engagement with this theme. Thus, Leora Bilsky’s study of transitional justice challenges the rise of the right to truth in international law by reading it through the lens of Sophocles’s *King Oedipus*. *Oedipus*, Bilsky claims, is not only a rare critical evaluation of the interaction between law and truth, but one that conveys the profound sense of tragedy involved in the adoption of absolutist conceptions of truth in a society seeking to make a transition to democracy and the rule of law. In Bilsky’s article the history of transition focuses on the children of the disappeared in Argentina. The ancient myth of Oedipus assumes modern political resonance, reminding us that pursuit of

³ Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, 5 UC Irvine L. Rev. 363, 373 (2015).

the descriptive is always politically loaded. Reichman and Philippopoulos-Mihalopoulos likewise rely on art to highlight that knowing in legal contexts, and coalescing around a perceived truth, involves an act of choice, a decision to embrace a particular understanding along with the political meanings it carries, whether for the construction of national collectivities, interpersonal relationships, or self-identity. In Rosenberg a similar insight is framed not as a choice to know or not, but rather as a question of how to know. The choice between different epistemologies of value reveals a transition to a modern market consciousness. Epistemological shifts, in other words, are political events. In recent decades, historians have taken increasing interest in these shifts as harbingers of political change. The arts may prove particularly potent in bringing their insights into legal history.

But normativity can also collide with descriptive ambitions. Rather than simply assume as much and be chastised, Levi Cooper points us to the collision itself as generative of norms. Cooper examines the role of the oral art of storytelling in Jewish tradition as part of the regulation of cantorship. Bringing together two stories—a Hasidic tale about the Tsaddik of Kaliv, and a Hasidic-like tale about the cantor Josef Rosenblatt—with a legal opinion of Rabbi Meir Horowitz, all located in late modernity, Cooper identifies a joint though uncoordinated support of the norm of site-specificity of cantorship. Narrative art, he suggests, lends support to normative systems lacking effective enforcement; this is art creating a *nomos*; the stakes for law are high as art becomes part of it. At the same time, we note, to capture the norm-generating role of art Cooper expressly observes a distance from description, which the stories themselves might not give away.

The baffling tension in narratives between description and normativity, to which Cooper alludes, has been interrogated by artists themselves. Anthony Trollope memorably advised his readers,

There are two kinds of confidence which a reader may have in his author . . . There is a confidence in facts and a confidence in vision. The one man tells you accurately what has been. The other suggests to you what may, or perhaps what must have been, or what ought to have been. The former require simple faith. The latter calls upon you to judge for yourself.⁴

Trollope was here justifying his deviations from description: “[T]he man who . . . works with a rapidity which will not admit of accuracy, may be as true, and in one sense as trustworthy, as he who bases every word upon a rock of facts.”⁵ And yet the important point is that Trollope needed justification, and seemed unable to completely break from the descriptive attire, hence his back and forth between the language of factuality and that of judgment. The descriptive attire, however diluted, seems to remain crucial for the generation of normativity outside formal law. As Foucault had shown us, art often suffers a loss of social authority from being *not* science. Battles over the place of knowledge and insistence on empirical rigor are the distinguishing trait of modern social capital. Observ-

⁴ Anthony Trollope, *An Autobiography* 117-18 (H.M. Trollope ed., 1883).

⁵ *Id.* at 118.

ing efforts to retain art's ties with description, whether at the level of content or form, attunes the historian to the norm-generating projects existing outside formal legality.

The possible distance of arts from empiricist ambitions is a virtue in legal history, as Schorr points out, when questions of consciousness and culture are at stake. Schorr suggests that the gap between realities and their contemporaneous artistic representations bolsters art's value as a prism for understanding historical consciousness. This is another sense of Trollope's notion of "vision" and "truth": by maintaining a recognized distance from "the hard rock of facts" arts reveal a historical space of interpretation which historians might examine. More broadly, conceiving of arts as sites of social thought invites legal historians to consider processes of meaning-making as inseparable from shifts in material and political power and in the daily experience of law. Whether the turn to arts is theorized as a turn to the context of law—that is, to a broader account of where and how law operates or is felt—or to conceptual critique of law, as evidenced variously in different articles here, we can be confident that the turn itself will open up discussions about meaning (the locus of culture) and that it will offer us methodological tools to engage in those discussions.

V. Description, Normativity, Aesthetics, Enchantment

What if arts could mediate between the normative and the descriptive? Some of our authors speak to the role of aesthetics as a mediating concept that deserves more attention in efforts to understand law and its history, and to step outside the overstated tension between normativity and descriptivism. Aesthetic sensibilities in themselves, these authors argue in different modes, are at the basis of modern ways of speaking about law.

Christine Krueger argues that the modern methods and materials of empiricist history, based on archival research of primary sources, took their impetus in England from a narrative aesthetics embraced by nineteenth-century entrepreneurs of archives. These figures have been overshadowed by the eminent masters of historical jurisprudence. Focusing on Mary Anne Everett Green, and partially also on Thomas Carlyle, Krueger explores the distinctly aesthetic modes applied to the creation, organization and modes of access to legal documents that made archival work in legal history what it is today. Lawyerly questions were not conducive to the logic of compilation and sorting that became essential for historical jurisprudence. That came from the so-called "literary searchers" whose history Krueger recovers.

The role of aesthetics in legal analysis as well as history is the heart of Simon Stern's article. While attention to legal aesthetics has gained traction in legal studies, Stern shows, aesthetics are too often treated ahistorically through a focus on effects, like proportionality or transparency, rather than technique. Examining Blackstone's relational aesthetics in the *Commentaries*, Stern suggests that our ability to know law, to turn to a legal text as a source for either analysis or history, crucially depends on appreciating its aesthetic technique. Blackstone's aesthetics, for one, should have warned readers against relying on him naïvely as a guide to the doctrinal details of the English law of his time, and should warn historians against doing the same thing today. When Goodman emphasizes

the legal aesthetics of aurality informing Hutchinson's trial strategy, she speaks to the same problematic. Neither Stern nor Goodman is explicit about the political or normative stakes of their readings, but they do not treat them as simply matters of description either. Instead, aesthetics function as an alternative focus to normativity and description, carrying implications on both of these fronts which scholarship is invited to develop.

In a different vein, arts also intervene between description and normativity by reminding us of the role of elements of enchantment. "How might historians react when their own comfortable formulae are shattered by those whose epistemes include the unreal, the apocalyptic, or the utopian?" asks Wilf. His detective novels imply that ignoring alternative epistemes, as ideologies of descriptive objectivity attempt, must lead to a failure in comprehending the past. Aspirations to rational empiricism must remain sensitive to, and operate in conjunction with, alternatives that legal historians too easily discard. Our own metaphysics are challenged in various ways in articles here: the countering of religious fervor (Tomlins), mystical prowess (Cooper), sensual experience we tend to disregard in law (Goodman), desire (Philippopoulos-Mihalopoulos), fantasy in the midst of observed truth (Rosenberg), the irrational in our drive to confront or escape our pasts (Reichman), conceptions of temporality that our notions of linear time disallow (Tomlins, Wilf). Rather than treat elements of this kind as a pile of unknowables that resist historical assessment, as the very notion of aesthetics is sometimes treated (Stern might argue), one can unpack its workings and implications in terms that are conducive to historical understanding and knowing, and to choosing normative and political stances.

VI. Conclusion

Legal historians after the cultural turn enjoy, or perhaps suffer, an extensive variety of methodological and theoretical options. We proceed on varied premises, commitments, and interests, with a license to expand our purview and shift among schools of thought. One anxious intellectual challenge which persists in all cases, however, is how to come to terms with the limits of imagination imposed by our time and place—disciplinary place included. As our introductory discussion has attempted to suggest, this problematic broaches questions of sources, of temporality, and of the role of normativity. If nihilism is not an option, the possibilities seem to be either overcoming the limits of imagination, or turning them to use. The articles collected in this issue all rely on the arts to these ends: in one vein, arts exert significant pressure on imaginations; in another, they bring together distinct mentalities and temporalities, both theoretically and performatively.

One need not argue that the arts are necessary in every case. Fully to account for the place and significance of the arts in legal history as source, as language, as conceptual focalizers, or as theory, however, requires theories and histories of genres and disciplines. Those are developed through engagement with the arts, as we observe their vitality in tackling the limits of our localism, and, in breaching those limits, pressing upon us an array of essential questions for legal history. Given their vitality, we should not suffer the arts to remain beyond legal history's margins.