

# Symposium

## Introduction to Symposium: Reasoning from Literature

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We often ask of law whether it succeeds at judging and organizing society. We ask: “Is this law good?” or “Does this law work as intended?” One way of thinking about whether law succeeds (is “good”) is if instead of dominance and oppression from law, given its reasons for benefiting some and burdening others, we feel that it is understandable and honorable. As Lief Carter and Tom Burke have written, “[t]he whole point of the rule of law is to set standards of governance that transcend individual moral feelings.”<sup>1</sup> To them, and to me, a central question of legal reasoning is not whether we, as legal subjects, like the result law provides,

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1. LIEF H. CARTER & THOMAS BURKE, *REASON IN LAW* 3 (7th ed. 2007).

but whether the reasons provided for the result make the best kind of sense.<sup>2</sup>

Too often we might hear from students, clients or the popular media that this or that law makes no sense. An author asks a copyright lawyer, “What do you mean I can’t reprint parts of my own book in this new article I’m writing? It’s my book, isn’t it?” The author finds it difficult to make sense of a copyright law that protects the publisher’s rights over her own when it comes to an original work of expression that she herself created and from which the publisher is nonetheless benefiting. There might be reasons for this law that the author does not know, but the experience of “this is unfair” or “this makes no sense to me as the author” floods the conversation between client and lawyer. Or, a student asks the question, “Why is a state or federal government immune from suit, even if they violate the law?” and, despite a discussion of the relevant constitutional provisions, statutes and case law, the student continues to ask this same question unsatisfied with the legal reasons provided. She states with certainty, “A state should pay for damages it causes to its citizens for violating its laws.” This student cannot imagine a set of circumstances—and is unconvinced by those the professor sets forth—that justifies a state failing to make a citizen whole when it breaks the law.

The essays that follow and that make up this Symposium entitled “Reasoning from Literature” take as its premise that law makes no sense when the story it tells fails to resonate with its audience—when the world that the story-in-law has constructed is incredible. In putting together this Symposium, which was originally a panel discussion sponsored by the Law and Humanities Section of the American Association of Law Schools at the 2010 annual meeting, I asked Peter Brooks, Laura Heymann, Bernadette Meyler, Carol Rose and Kenji Yoshino, to wrestle with what I imagined to be a central question of the law and humanities inquiry, that is: what does it mean to “reason from literature”? I focused on this question because that is what I think law does, in its inevitable story-telling way. Whether law makes sense to those it purports to govern has little to do with whether as a matter of formal logic or economic modeling the result it intends follows. Economists and philosophers may rehearse syllogistic logic, speak about valid and invalid premises, hypothesize beginnings (e.g., the rational actor or the reasonable person) and draw what some call “impeccable conclusions.” But, in the end, law is less successful (it is perceived as less honorable, less understandable, less capable of governing its subjects) when it relies on these forms of logic

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2. As Francis J. Mootz describes it, there is this tension at the heart of the idea of the rule of law: on the one hand, the rule of law means a government of laws, not men; but on the other hand, for those laws to be effectuated, they must be interpreted and judged by people. Therefore, “[e]very construction has the potential to undermine the rule of law.” *LAW AND THE HUMANITIES: AN INTRODUCTION* 37 (Sarat et al. eds., 2009).

than on a good story. Why might this be? What might a good story entail? And how might we align the learning about stories—and their intellectually mature cousin, narrative—with that of law?<sup>3</sup> The essays in this Issue make clear that legal authority derives from literary power, which itself derives from the complex relationships between authors, readers, words, text and situation.

When investigating the story-function in law, we must avoid the idealization of humanities and literary studies as a redeemer of the so-called abstract, technical or rigid law.<sup>4</sup> Stories are not more ethically upstanding than law is inevitably oppressive.<sup>5</sup> Stories, like law, work on us, constitute us as subjects, and implicate us in the moral points made. So we must study stories—or the reason in literature—as a way to understand how we are worked on and how we might work on others.<sup>6</sup> This is our responsibility as citizen storytellers, whether in law, in literature, with friends and family, with acquaintances or strangers.<sup>7</sup> Law's result, be it a verdict, a penalty, a loss of life or liberty, may feel different in kind than a literary effect,<sup>8</sup> but the point here is that the way they both legitimate their force is through rhetorical persuasion, as Justice Souter says, by being "sufficiently plausible."<sup>9</sup> For law or literature to successfully move (or make) us, as I have defined it, we must be able to plausibly imagine ourselves and our loved ones there in it, living the story that the law tells.

The essays that follow approach the "sufficiently plausible" question from different angles. In other words, what it means to "reason from literature" varies with the reading and writing situation and the genre of text.<sup>10</sup> Peter Brooks' essay, which culminates in a stinging critique of Justice Scalia's majority opinion in *District of Columbia v. Heller*,<sup>11</sup> is also a critique of "law's attempt to keep its language to itself."<sup>12</sup> Countering Scalia's reading of the Second Amendment, Brooks says that

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3. Peter Brooks writes that law and literature are like twins separated at birth seeking to reunite. I might add that with the drama of the search for each other comes the fear of what each might find upon recognition of the other. Peter Brooks, *Literature as Law's Other*, 22 YALE J.L. & HUMAN. 349, 356 (2010).

4. GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 22 (2000).

5. LAW'S STORIES: NARRATIVE AND THE RHETORIC OF LAW 16 (Peter Brooks & Paul Gewirtz eds., 1998).

6. *Id.* at 17.

7. "Narratives do not stand outside social authority – they are part of it." BINDER & WEISBERG, *supra* note 4 at 23.

8. *Cf.* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

9. *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (Souter, J.) (speaking about the Court's legitimacy as being based on "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the nation.").

10. *See, e.g.*, ROSS CHAMBERS, STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION 3 (1984).

11. 554 U.S. \_\_\_ (2008).

12. Brooks, *supra* note 3 at 352.

“meanings don’t simply announce themselves.”<sup>13</sup> He reckons that we provide meanings from a range of the possible (“plausible”). And, he says, if we are to be disciplined and principled in the provision of meaning to language, we would, as philologists do, “examin[e] . . . the structure of language prior to the meaning it produces.”<sup>14</sup> For example, regarding the Second Amendment, we would worry about the “ablative absolute”—or, as Scalia calls it, the prefatory clause or the prologue—which begins the Amendment: “A well-regulated militia, being necessary to the security of a free state. . . .” Scalia doesn’t worry about how, to us in the twenty-first century, this phrasing is unfamiliar. That is because he, like many human beings, sublimates that which is uncomfortable. How does he sublimate the uncomfortable? By telling an alternative story to make sense of the precious text he claims to be, simply, reading. He ignores the prefatory clause (trivializing it as “prologue”) *and also* ignores the brief filed by the Professor of Linguistics and English, who sought to inform the Court about how such a clause would have functioned for writers and readers working with the Constitution in the eighteenth century United States. The new story Scalia tells is about the modern urban landscape in which self-defense and handguns figure prominently. Scalia keenly understands that this story will resonate with many “ordinary citizens” whom he wishes the Constitution was drafted to protect. What Brooks points out is that Scalia’s story is deeply disconnected from the historic roots of the Constitution Scalia claims to revere. By uncovering the alternative story in Scalia’s majority opinion—the contemporary story rather than the originalist one—Brooks demonstrates how the points made through law are made by people today, for good or for ill. And to be “good,” Brooks argues, the stories must be accountable to our past. Ignoring the learning about our past by those in the present who can teach us, Justice Scalia failed at this measure.

Professor Carol Rose’s essay about game theory and law and economics similarly investigates the deep structure of certain legal arguments, revealing them to participate in one of four conventional story structures: the prisoner’s dilemma, the stag hunt, the battle of the sexes and chicken. Rose explains how the details of these stories fill out—“breathe life into”<sup>15</sup>—the law and economic modeling that claims to predict the outcome of certain conflict-ridden situations. This is unsurprising. Details provide more information about the human situation—in prison, hunting in the forest, settling a debate with your spouse, driving a car—and therefore help the audience situate the conflict, empathize with certain

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13. *Id.* at 362.

14. *Id.* at 357 (quoting Paul de Man, *The Return to Philology*, reprinted in *THE RESISTANCE TO THEORY*).

15. Carol Rose, *Game Stories*, 22 *YALE J.L. & HUMAN.* 369, 378 (2010).

positions and potentially understand the how and why of the outcome. We do not think in terms of graphs and equations; we think in terms of things and people and causes and effects because that is what our daily lives are made of. But Rose goes further to show how these stories are gendered. Depending on your experience and perspective, this *may be* surprising. The allegedly objective realm of economic modeling (with the rational actor as its premise) is revealed to rely on gendered stock stories to illuminate and substantiate its main points. The prisoner's dilemma could have been "deal or steal" without the masculine valence of cops and convicts. The stag hunt, about hunters collectively shooting a deer or individually shooting a rabbit, could have been "the quilting bee" or some other collective endeavor. The battle of the sexes, in which a heterosexual couple seeks compromise over optimal entertainment choices, could instead have been "lunch date." And chicken, the game that imagines two cars heading towards each other at top speed driven by young, testosterone-filled men, could have been called "Chicken Soup" or "Too Many Cooks," "in which the soup is fine where only one is cooking, but ruined when neither defers and both insist on staying in the kitchen."<sup>16</sup> Rose provocatively suggests that it is not only the story-quality of these fables that gives law and economics modeling purchase, but that the gendered nature of these stories is "evocative enough to fasten itself in the minds of others . . . [to] be vivacious."<sup>17</sup>

The gendered nature of these stock stories suggests something further: perhaps it is the gendered details themselves that make these stories so tenacious in legal theory and culture. If stories fill out economic equations, "breathe life" into them, the gendered backstory helps to foment even more detail that we in fact supply on our own. Like the well-known optical illusions or word puzzles that require readers or viewers to fill in gaps to make sense of them,<sup>18</sup> our participation in the filling out of these stories with our own mundane experiences of gendered dynamics helps us accept their cause and effect as more likely (even true) by building upon stereotypical experiences. This is "depressing," Rose says, and rightly so. Who needs a dominant legal theory to unnecessarily reinforce gender stereotypes with stories that could just as easily be renamed and repopulated with alterative characters? If law and economics is so right, why must it perpetuate the cognitive error and expressive harm of gender stereotypes in the 21<sup>st</sup> century?

In the second half of her essay, Rose infuses the stock stories with some

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16. *Id.* at 379.

17. *Id.* at 380.

18. PAUL KRIWACZEK, DOCUMENTARY FOR THE SMALL SCREEN 21 (1997) (discussing that we are programmed to see patterns and that when we fill in the patterns, the more satisfying the resulting image or story becomes such that it feels like "it belongs to [us], rather than seeming an alien view foisted onto [us]").

nuanced analysis and suggests that in reality—in contrast to in stories—we play games repeatedly rather than in one-off situations. In one-off games, there may be good reason (higher pay offs) to coerce or cheat. In repeat player situations, in contrast, we find reasons to trust each other. This fact muddles the stories, rendering them less distinguishable and therefore less helpful as analytic tools. “If we were to rename the [prisoner’s dilemma] story Deal or Steal?, we would see a more realistic version of the dilemma: the underlying problem is not the inability to talk things over, but rather mistrust.”<sup>19</sup> “[I]n suggesting that all we need is talk, this particular fable suppresses the importance of friendship—or something like it, some generosity that assures trustworthiness . . . .”<sup>20</sup> Rose concludes her essay with a moral of her own to aid (and critique) the law and economics literature: why resort to “selfish genes when fully-formed human beings do not behave selfishly enough to conform to the precepts of rational behavior.”<sup>21</sup>

Professor Laura Heymann’s essay might be better characterized as “reasoning from the reader” than “reasoning from literature.” She takes warning labels—as in “caution: the contents of this cup may be hot”—and addresses a puzzle presented by the blackletter law regarding the efficacy of disclaimers and warnings on dangerous products and trademarked goods. The puzzle is this: the law requires warnings and disclaimers but also implies that purchasers don’t regularly heed them.<sup>22</sup> What could account for this internal contradiction? Heymann turns to reader-response theory, a branch of literary criticism, to analyze the problem.

Heymann says this contradiction persists only if we focus on the text alone—the label on the product. But “the importance of readers and audiences as creators of meaning is a defining aspect of modern culture. . . . [T]he consumer [i]s an equal meaning-maker in the cultural exchange. . . .”<sup>23</sup> And in our heavily branded and advertising-saturated culture, the reader is adept at negotiating oppositional messages, messages about a product that might be self-contradictory (as in “Buy these cigarettes” and “These cigarettes are bad for your health”).<sup>24</sup> We can assume that a reader ignores the scary warning and is seduced by the dominant advertising message; or we can recognize an “intellectual dexterity of the consuming public” that laughs at subtle parodies and distinguishes between different

19. Rose, *supra* note 14 at 389.

20. *Id.*

21. *Id.* at 390.

22. Laura A. Heymann, *Reading the Product: Warnings, Disclaimers and Literary Theory*, 22 YALE J. L. & HUMAN. 393, 398-400, 402 (2010).

23. *Id.* at 405, 407. As we will see in Bernadette Meyler’s essay, *infra* at 443, the audience/reader is central to the “reasoning” in Shakespeare’s plays, especially as Meyler reads *Measure for Measure*. To be sure, some describe Shakespeare as foreshadowing modern culture. See Marjorie Garber, SHAKESPEARE AND MODERN CULTURE (2008).

24. *Id.* at 409.

products branded with similar trademarks.<sup>25</sup> In point of fact, it is only when the text ceases to be oppositional—when it is boilerplate—that readers may cease to engage with them. For Heymann, the story that makes sense of seductive brands that coexist with labels that warn us about the dangers of seduction is one where the consumer co-authors the message. To Heymann, “reasoning from literature” means accounting for the reader-as-author. Like Rose’s essay, Heymann’s essay ends with optimism but also with a word of caution for law that ignores the literary in all of us: “The . . . presence of intelligent disclaimers and warnings sends . . . a signal of expectation [and] encouragement to the reader to interrogate the main text.”<sup>26</sup> Disagreement over the meaning of the text should not be seen as evidence of the need for Draconian regulation, as if words and phrases (of law) could asymptotically approach perfect clarity. Disagreement requires engagement, a self-conscious exploration of the interpretive communities of readers that will give the text meaning. Only by understanding these communities (and therefore understanding the social context in which reading occurs) will the text be adjudicated to a just situation, one we can comprehend and thus in which we can comfortably thrive.

So far “reasoning from literature” means recalling the history of language upon which literature is founded; it requires peeling away the story’s details (of prisons and hunting) to access a substrate of seductive fables or myth; it demands recognizing the readers as participants in the making of meaning. For Kenji Yoshino and Bernadette Meyler, “reasoning from [Shakespeare]” is a way to understand law’s anxious relationship with sovereignty. Yoshino’s essay illuminates the *Henriad* as set of stories interrogating the source of the monarch’s legitimacy. Meyler’s essay describes how *Measure for Measure*, when performed and discussed in the seventeenth century, produced historical moments of self-consciousness in the diverse spectators whereby rulers and the governed questioned their capacity to judge fairly. Concluding this Symposium with these discussions of Shakespeare is, in one way, a return to beginnings. Shakespeare’s plays were some of the first texts upon which the law and literature movement focused.<sup>27</sup> In another way, it is the way forward; both of these essays on Shakespeare ask important questions about how “reasoning from [Shakespeare]” interrogates the role of law in the relationship between tyranny and democracy in the evolving nation state. We could say that all law is politics,<sup>28</sup> but that would be sarcastic

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25. *Id.* at 410 (quoting Laura A. Heymann, *Metabranding and Intermediation: A Response to Professor Fleischer*, 12 HARV. NEGOT. L. REV. 201, 220 (2007)).

26. *Id.* at 414-15.

27. See, e.g., JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 166-67, 297-99, 554-55, 790-91, 848-56, 873-74 (1973).

28. William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a*

and imprecise. Instead, Yoshino and Meyler show how Shakespeare's plays make manifest that politics—the shape of our public commitments to each other, which includes law—is played out on the field of literature.

Yoshino contends that Prince Hal and his father Henry IV understand that “sovereignty subsumes stagecraft.”<sup>29</sup> This is the crux of Yoshino's essay: the insecurity of law's rule depends on the successful seduction of the ruled by their leader. Seduction can be in the form of Falstaff, whom Yoshino delightfully describes as anarchic, “sublime[ly] alert[] to the possibilities in language,”<sup>30</sup> “the most sublime of scofflaws,”<sup>31</sup> and “the fattest lamb literature ever sacrificed on the altar of the law.”<sup>32</sup> We love Falstaff for his warmth and wit, as well as for his defiant freedom (in language and in life) which nonetheless kills him. This kind of seduction is deadly. Against this is the Chief Justice, with whom the Prince—and later his incarnation as the King—strategically allies. Henry V is legitimated as leader by inheritance and merit; the Chief Justice is legitimated as the law by his evenhandedness of execution. Yoshino's reading of the *Henriad* distinguishes itself within Shakespearean criticism in its refusal to choose between Hal and Falstaff as heroes. Yoshino highlights instead the Chief Justice as the stand out, the only *ideal* figure in the cycle. The Chief Justice is left untarnished by the seduction in which leaders must engage to produce followers.<sup>33</sup> In this way, the Chief Justice—justice and the rule of law—“bears what no mortal could.”<sup>34</sup>

Embracing the most “boring”<sup>35</sup> of characters in the *Henriad* is a curious way to engage “reasoning from literature,” although I find myself in agreement with Professor Yoshino. We cannot help but identify with Falstaff or Hal, the human behind the most anarchic, deadly or despotic of acts, because that is how we feel: the reasons in literature are often made from our own experience with human failings. We do not identify with the law. Nonetheless we demand it, indeed we seek out the law in our yearning for impossible happy endings to be attained through the idealized institution of the court, which is necessarily made of humans, to be sure, but we wish it were not so.<sup>36</sup>

Professor Bernadette Meyler posits that the seventeenth century

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*Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (“critical legal realists. . . argued that all law is politics and thereby impugned the neutrality and legitimacy of law”).

29. Kenji Yoshino, *The Choice of the Four Fathers: Henry IV, Falstaff, the Chief Justice and the King of France in the Henriad*, 22 YALE J. L. & HUMAN. 417, 423 (2010).

30. *Id.* at 425. “Falstaff breaks the rules of meter, overflows those rules, and expects not just to be forgiven, but to be loved for his excess.” *Id.* See also *id.* at 435 (“Falstaff is both an extraordinarily seductive figure and an extraordinary threat to the rule of law.”).

31. *Id.* at 436.

32. *Id.*

33. *Id.* at 439.

34. *Id.* at 435.

35. *Id.* at 439.

36. *Id.*



performances of *Measure for Measure* provided an opportunity for spectators (royal and layperson alike) to ponder and debate the problems of legitimacy that arise from a monarch's act of judging in person.<sup>37</sup> "[T]he play rehearses older monarchical fears about exposing the king to censure through his involvement in the legal system, and . . . explores new possibilities for the autonomy of judicial procedure from the sovereign."<sup>38</sup> In other words, Meyler suggests that *Measure for Measure* incites the occasion for political discourse whereby the triadic structure of the older common law, rise of parliament and the power of the sovereign are discussed as parts of the burgeoning English nation.

Meyler contends that "reasoning from literature" varies with historical time periods, and this must be true. She convincingly describes England in the seventeenth century as a place where "the play is the thing,"<sup>39</sup> that is, where theater is not artifice to be distinguished from reality, but a rhetorical framework through which communities and their politics are deliberated upon and constituted. In a close reading of Sir Edward Coke's political theory alongside *Measure for Measure*, Meyler foregrounds the self-reflective nature of Shakespeare's play: its commentary on the importance to the evolving nation for people (parliament and the theatrical audience) to be their own judges at the same time as they are learning to demand impartial justice, to wit, that one does not judge in one's own case.<sup>40</sup> This self-reflexivity propels political debate; it also protects those who criticize the monarch with the veil of humor and yet facilitates discussion of the play's central conflict, which was the conflict of the day. In this way, "reasoning from literature" in seventeenth century England was a form of political engagement and likely also of community mobilization.

I dare say that "reasoning from literature" is as effective as political mobilization today as it might have been 300 years ago.<sup>41</sup> Stories situate us. A good story situates us, involves us and brings us along to participate in—even compel and embrace—its conclusion. "Literature is, like law, an arena of strategic conflict."<sup>42</sup> Our task as tellers and listeners—as lawyers and citizens—is to be attentive to the appropriation and reconfiguration that law and literature accomplish as part of their reasoning.<sup>43</sup> When reasoning from literature, we are alert to historical truths, to "unauthorized

37. Bernadette Meyler, "Our Cities Institutions" and the Institution of the Common Law, 22 YALE J.L. & HUMAN. 443, 444-45 (2010).

38. *Id.* at 444-45.

39. WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2. See also Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

40. *Id.* at 452, 454.

41. See, e.g., Francesca Polletta, *It Was Like a Fever: Storytelling in Protest and Politics* (2006).

42. BINDER & WEISBERG, *supra* note 4 at 19. "[L]iterature is a social practice conditioned by institutional convention, social power, and practical aims." *Id.*

43. *Id.* at 27.

myths or stereotypes that circulate through culture like . . . contagion,”<sup>44</sup> to the readers who command attention and power and in whom the story lives and grows. In this way, stories (literary reasoning) “organiz[e] and speak[] the world.”<sup>45</sup> And so in asking whether the law succeeds—whether it is good—we are also necessarily asking whether the story it tells is good, whether in its reasoning it accounts to and for us, and whether the world it calls into being is one we could comfortably inhabit.

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44. *Id.* at 23.

45. Brooks & Gewirtz, *supra* note 5 at 14.