Why Legal Historians Need to Read Literature

➡ read the rest of this Forum
➡ Supplementary Materials ("Felony")

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For years, literary historians, like John Alford, Emily Steiner, and Richard Firth Green, have been trying to alert us to the wealth of information contained in medieval literature for the study of the law. Time and again, they have demonstrated how literary representations of trials can enhance our understanding of medieval law in practice, especially when the legal sources have so little to offer. More important still, these intrepid historians have drawn our attention to the fact that medieval writers did not feel they should be bound by the conventions of genre. They did not recognize that different rules apply to different modes of writing, and because of that we often see unexpected borrowings. A medieval chronicler might shape an historical account following the narrative structure of a favorite romance, even though that meant departing from the truth as to what actually happened. It was about effective writing: not sticking to the facts.

As Elise Wang demonstrates in *The Making of Felony Procedure in Middle English Literature*, this was also true when it comes to legal treatises. There is simply no way to make sense of *Placita Corone* without thinking about "narrative satisfaction." As Wang makes clear, scholars who have brooded over the treatise's disappointment as a "guide to procedure" have failed to recognize the book's prioritizing of "good stories over procedural accuracy" (52).

But it's not just about successful narrative and writing style. Conversations about law and its complexities often took place outside legal forums. This should come as no surprise, given that fourteenth century poets often held day jobs as bureaucrats. In this environment, poetry and law not only coexisted, they interacted. Arvind Thomas has made this argument convincingly in his recent book *Piers Plowman and the Reinvention of Church Law in the Late Middle Ages* (University of Toronto Press, 2019). Langland's *Piers Plowman* was not just touching on subjects of interest to canon lawyers; through the text, Langland was participating in some of canon law's most provocative debates on penance and pastoral care. He used *Piers Plowman* as a means to sway opinion and forge new law.

Wangtakes up this banner, but instead of examining just one text, she considers a multiplicity from a wide variety of genres, including miracle stories, legal treatises, metrical romances, alliterative poems, and the mystery plays, whereby she confirms that Langland was doing nothing exceptional. Medieval writers habitually turned to literature to flesh out the law and participate in defining its procedures. Accordingly, Wang reveals that legal scholars who discount the value of literature are missing out on critical developments in the law.

I

At the best of times, the study of English common law is beset by myriad obstacles. It is a body of unwritten law, based on custom and usage, although figuring out exactly what that custom or usage was is no easy feat. Thankfully, some twelfth- and thirteenth-century jurists were equally perturbed by the situation and hoped to rectify it by writing legal treatises (such as *Glanvill, Bracton, Britton, Fleta, The Mirror of Justices*), documenting both procedure and law itself. Granted, at times, these treatises create more problems than they solve. In trying to be comprehensive, their authors sometimes drew on Roman law to fill in the gaps in their knowledge, introducing a whole host of Roman vocabulary and procedure to English common law. As a result, the treatises are sometimes about actual practice; but not always, and it's up to the legal historian to figure out which is which.

We also have statute law, which really comes into its own during the reign of Edward I. Statutes act as a corrective to common law, when legislators felt the law needed to be refined, or clarified, or as a means of adding to the law for new situations not covered by old law. Statutes frequently refer to existing custom and usage, thus opening a window for historians into the secrets of the common law.

And finally, we have the plea rolls, records of the law in practice, although the records are very much constrained by their purpose. They exist chiefly so that kings knew how much money was coming to them. As a result, a trial record might be a mere paragraph in length and include only what seemed necessary: names, dates, subject matter, and jury verdict—omitting the investigation, evidence, and procedure altogether.

None of these legal genres starts from scratch. They all assume a basic knowledge of English common law and so definitions for what may seem to be essential terms are absent. (I've always felt that reading medieval statute law is like starting a book series on volume three—you are always scrambling to catch up and figure out what is going on.). Wang's book opens into this grey space, in which she notes, with some exasperation, that medieval law included no definition of "felony." At best it was defined by its punishment: execution. We could take things a step further and note

that it was not just felony they failed to define; nor did they define what was meant by “crime.” How could they function without definitions for terms that seem so fundamental to the implementation of the law?

Of course, in many respects we (the historians and our modernist expectations) are the problem. We come from a system where we see a clear division between civil and criminal jurisdictions, which makes it integral to define what is meant by “criminal,” what is meant by “felony.” The medieval world did not. The English crown instead divided things into Civil Pleas and Pleas of the Crown. The latter included not just felony, but anything relevant to the king’s peace: wardship, treasure trove, advowson, corrupt officials, shipwreck, broken bridges, and beached whales. Civil pleas also included a lot of what we today would call criminal misdemeanors (assault, petty theft). Thus, these categories can in no way be made to fit into our comfortable civil/criminal divide.

My point here: medieval law didn’t define “felony” because lawmakers did not see it as the crucial term. Defining it would have made no difference to them. They knew which offenses were included in the Pleas of the Crown. That means they knew what to try, and that’s what really mattered to them. Why define it if you don’t have to?

II

The hands-off approach of lawmakers left felony and its concomitant procedures “to laymen to define” (3). Wang writes, “[t]he medieval [inquest] jury was largely left to its own devices when it came to investigating the crime, gathering evidence, interviewing witnesses, and coming to a conclusion” (6). How they approached this process was surely guided by the legal treatises—*Bracton*, for example, offers useful instructions on how to examine the body and the crime scene—but also by the collective experiences of the coroners and others in the community who served on previous inquest juries. To this body of knowledge, Wang adds law in literature. In the texts that she examines, Wang sees that “both their authors and their contemporary audiences understood them to be creating the law” (4). They were actively involved in establishing a standardized process for accusations and investigations.

We see this best when it comes to evidence. Much hullabaloo has been made about the fact that premodern England had no rules of evidence. In addition, trials were brief—roughly fifteen minutes in length, according to Ralph Pugh—which means that they could not possibly have had time for the presentation of evidence at trial.[1] Together, these facts have led some scholars to assume that there was no evidentiary bar whatsoever.

Wang shows just how wrong that assumption is by turning to the miracle story of *St. Erkenwald*, a medieval murder mystery in which the townspeople of early London discover a tomb that no one knows anything

about: they don't know who the person was, how or when he died. So they summon Erkenwald, the bishop of London, to act as the coroner in an inquest into the death. The *miraculum* includes a very full description of the investigative process, demonstrating how the story engages in making law by providing a model for future inquests, but also allowing historians insight into a process that is absent entirely from the legal record.

Through her analysis, Wang shows that evidence did matter to English juries. Indeed, there was even a hierarchy of evidence. The body and what it can tell us mattered most, but inquest jurors examined also witness depositions, taking into account the credibility of individual deponents and making an effort to verify the information they brought forward. They looked at written records when it was thought that they might be relevant; in this case, they rifled through old inquest records hoping to find something about the newly discovered corpse. And above all, jurors sought the truth of what happened.

Wang's analysis of *St. Erkenwald* makes two critical interventions in the field:

- Criminal law in medieval England was people-centered law. It wasn't about lawyers or judges. They did not play an active role in prosecution or defense. Judges never had an opportunity to hear all the evidence; indeed, they probably had no idea whether the defendants were innocent or guilty. Quite frankly, I doubt they actually cared. Instead, we have got to shift our focus to the people of the community. They were the ones who carried out the investigation; they sorted through the evidence; they decided whom to accuse; and through their actions, they created the standards for a proper criminal investigation. Wang likens an inquest to a medieval form of crowdsourcing (33), both a useful analogy and a helpful reminder of who really mattered in the investigation.

- Inquest jurors cared about discovering the truth. The 1985 publication of Thomas Green's *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (University of Chicago Press) was the first study of medieval practices of jury nullification, highlighting how jurors shaped their indictments to punish the defendant while avoiding conviction, believing that the death penalty was too harsh a punishment for most crimes. Since then, work by John Bellamy (*The Criminal Trial in Later Medieval England*, University of Toronto Press, 1998) and Richard Firth Green (*A Crisis of Truth: Literature and Law in Ricardian England,* University of Pennsylvania Press, 1999) have reinforced the perspective of jurors operating with their own set of values and expectations, working at cross purposes to the established law.Firth Green, for example, argues that jurors weren't judging the truth of

> the facts so much as the "truth" of the defendant, that is, his or her reputation. Wang is certainly not rejecting the findings of Green, Bellamy, and Firth Green; but she is making clear that none of this undermines the integrity of the inquest jury, a group of men from the locality who were earnest in their hope to discover what had happened and if possible to catch the person responsible.

III

A few other highlights from Wang's book in brief. She includes a compelling analysis of pleading as it appears in *The Seven Sages of Rome,* Gower's *Confessio Amantis,* and Chaucer's *Man of Law* in order to draw attention to the threat of narrative to the law. Wang argues that the authors of these texts sought to warn judges to watch out for the convincing narrative, because a beautifully crafted, compelling narrative was probably false. Wang also alerts us to how literature might have been used as a means of exposing vulnerabilities within the legal system. *The Pistil of Swete Susan*, for example, complains of a testimonial system in which honesty was defined by wealth, not credibility, such that elites could easily manipulate the court with their lies and corruption. At all times, Wang is careful to address the complexities of the law, and to accept that expectations were not always straightforward. Juxtaposing the depiction of Christ at trial in the mystery plays with *Mum and the Sothsegger*, Wang sees conflicting perceptions of those who stood mute. Christ's silence before Herod might be interpreted as heroic; but Mum's silence was disruptive and anti-social. We do not have to choose one interpretation: as Wang writes, their coexistence reveals "the contradictory demands of the law" (21).

IV

Wang's book is not without faults. Chapter four is built on the premise that English criminal justice was a failed system because most criminals were never even tried, let alone convicted. She describes the system as a "story of failure" to which they kept returning "again and again, without a sign of pursuing a different answer" (96). I can certainly see why Wang would make this assessment. Acquittal rates in thirteenth- and fourteenth-century England hovered between 77.6 and 87.6 percent; whereas today, most criminal cases don't even go to trial because nine out of ten defendants plead guilty.[2]

However, to call this a failure is too modern an assessment. Conviction rates are a modern marker of success, and one that makes sense with the existence of penal imprisonment and gradations in punishment. But they weren't a marker for the Middle Ages. Medieval lawmakers cared about the restoration of the king's peace, which could be accomplished easily without conviction. More to the point, medieval communities did not regard

conviction as necessary to punish a criminal. Indictment itself functioned as a form of punishment: after a couple of years in prison awaiting trial, the perpetrator had learned his or her lesson and was ready to reintegrate into the community. Conviction wasn't necessary, and not even desirable given that conviction for felony always meant execution, a traumatizing event. Even for those who fled rather than stand trial, from a medieval perspective, a formal accusation in absentia punished the perpetrator. They could not easily return, and so were isolated from family, friends, and any decent means of financial support. And with the criminal expelled from the community, everyone else could set to work restoring the king's peace.

Execution should *not* be our measure of whether the medieval criminal justice system was a success because it wasn't their measure. This would seem to have been true even if we are looking at things from the perspective of the king: with the number of royal pardons handed out to felons each year, it is clear that medieval kings also did not see putting people to death as the goal.

V

The Making of Felony Procedure in Middle English Literature makes us think more deeply about the relationship between law and literature. Wang asserts successfully that this was not a one-way relationship: literature did not just "reflect" law. Rather, authors with a vested interest in the legal system used literature as a means to participate in refining the law, creating procedure, and thinking about jurisprudence. Ignoring the literature, and all the useful tools crafted by literary historians to help us understand narrative construction, means that legal historians are going to miss out on a fuller understanding of how the law worked and who made it work.

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[1] Pugh, R.B. (1983). The Duration of Criminal Trials in Medieval England, in E.W. Ives and A.H. Manchester (eds), Law, Litigants and the Legal Profession, 104-115.

[2] Given, James B. (1977). Society and Homicide in Thirteenth Century England.Stanford University Press, 133; Hanawalt, Barbara A. (1979). Crime and Conflict in English Communities, 1300-1348. Harvard University Press, 59; Gramlich, John (June 14, 2023); Fewer than 1% of Federal Criminal Defendants Were Acquitted in 2022. Pew Research Center (https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/).

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