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# SKEPTICISM BORDERING ON DISTRUST

## Portrayals of Law in American Literature

By David Ray Papke

**M**any works in the American literary canon include legal characters, settings, and themes. Lawyers with a taste for literature might delight in reading or rereading these works and perhaps even comparing the fictional portrayals of law, lawyers, and legal proceedings to what they encounter in the “real world.”

Yet literary legalists should beware that these canonical works do not necessarily champion law or express a belief in justice under law. The works’ skepticism—bordering on distrust—might give lawyers pause and lead them to dismiss this literature as inaccurate and biased. That would be unfortunate. The symbolic, usually narrational world of literature can help lawyers refine their critical consciousness regarding law.

My plan in this essay is to point out examples of American law-related essays, stories, and novels; to underscore a sizable handful of personal favorites; and to distill the criticisms these works offer of law, lawyers, and legal proceedings. The rudder for this ambitious voyage will be three grand modes of literary expression—romanticism, realism, and absurdism.

### An “American Renaissance” and the Law

The Republic’s earliest literati were not as accomplished in their essays, stories, and novels as were the fledgling statesmen with their declarations, constitutions, and amendments, but a genuinely noteworthy body of literary works did appear a half-century after the founding of the nation. The authors of these works could be classified as “romantics.” As with the transnational romanticism that surged during the late eighteenth and early nineteenth century, the American authors glorified nature and also valorized imagination and emotion rather than reason and structured argument. Their works often employed introspective narrative voices, told magical tales of bigger-than-life characters, and ended in an apprehensive mood. The legendary F. O. Matthiessen, one of the first literary critics to treat the American writers as a distinct group, was

so impressed by their work that he referred to it, if a bit pretentiously, as “the American Renaissance.”

The essays, stories, and novels from the American romantics did not necessarily focus on the law, but the works that did certainly merit attention. The essayist Ralph Waldo Emerson and his disciple Henry David Thoreau tossed out aphorisms as if they were bread crumbs for a flock of birds, but Emerson and Thoreau were especially pointed in warning of law’s shallowness and its tendency to enforce conformity. In Thoreau’s enduring “On the Duty of Civil Disobedience” (1849), he excoriates Daniel Webster, the era’s most famous lawyer, and says, “The lawyer’s truth is not Truth, but consistency, or a consistent expediency.” The law itself, Thoreau insists, “never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.”

Nathaniel Hawthorne, who never fully welcomed Thoreau into his circle of writers and intellectuals and once suggested life among “the Indian tribes” would have suited Thoreau well, nevertheless shared some of Thoreau’s doubts about law. Hawthorne’s *The Scarlet Letter* (1850) begins with Hester Prynne pushing open a “heavily timbered” prison door and beginning a life of painful marginalization. Hawthorne condemns the “dismal severity of the Puritanic code of law” and warns against accepting retribution as a sound reason for punishment. And my goodness, I think Hawthorne’s *The House of the Seven Gables* (1851), published just a year later than *The Scarlet Letter*, is on one level about fraud and duplicity in real estate transfers and in trusts and estates. It concerns manipulating the law, albeit with serious consequences.

My personal favorite among the authors of the “American Renaissance” is undoubtedly Herman Melville. He is of course known for *Moby Dick* (1851) and a half dozen other superb novels. Less known is that he was married to the daughter of Lemuel Shaw, a prominent lawyer, jurist, and chief justice of the Massachusetts Supreme Judicial Court. Might Melville’s attitudes about lawyers and law have had something to do with his personal feelings about his father-in-law and the latter’s calling? Scholars have worn themselves out speculating if one or another of Melville’s lawyers or judges was inspired by Shaw.

I am particularly fond of two of Melville’s law-related tales. In “Bartleby, the Scrivener” (1853), the unnamed lawyer/narrator is a former Master in the Court of Chancery in New York City and, by all accounts, “an eminently safe man.” His attempts to make sense of the distant and uncooperative scrivener Bartleby, one of which includes laughable research in legal treatises, fail badly. Poor Bartleby in essence commits suicide and dies with his face up against the wall in the Tombs. Reflecting in a postscript on Bartleby’s earlier employment in the “lost letter” department of the Post Office, the lawyer/narrator sighs, “Ah Bartleby! Ah humanity!”

In *Billy Budd* (unpublished at the time of Melville’s death), the author imagines a fictional drumhead court hastily assembled to consider questionable charges of murder and mutiny against the unfortunate indentured seaman Billy Budd. Captain Vere, whose name must be ironic, controls the proceedings, reveals himself to be a rigid positivist, and virtually dictates Budd’s conviction. Nevertheless, as Budd stands on the yardarm about

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to be dropped into the sea, he calls out, “God bless Captain Vere,” a final victory perhaps of the poetic over the rational.

What is the core criticism that the American romantic writers offered regarding law and legal institutions? Thoreau, Hawthorne, Melville, and the other romantics have little confidence in law and legal institutions’ ability to sort out the contradictions in human nature and the complexities of social life, both of which the authors took to be bewildering and even terrifying. Lawyers and legal thinkers, the romantics thought, do not go deeply enough. They are insufficiently philosophical and therefore not profound. In part because of its pride in itself, legal thought struck the romantics as superficial and unable to get to the “truth” of things.

### Realism, Law, and Social Injustice

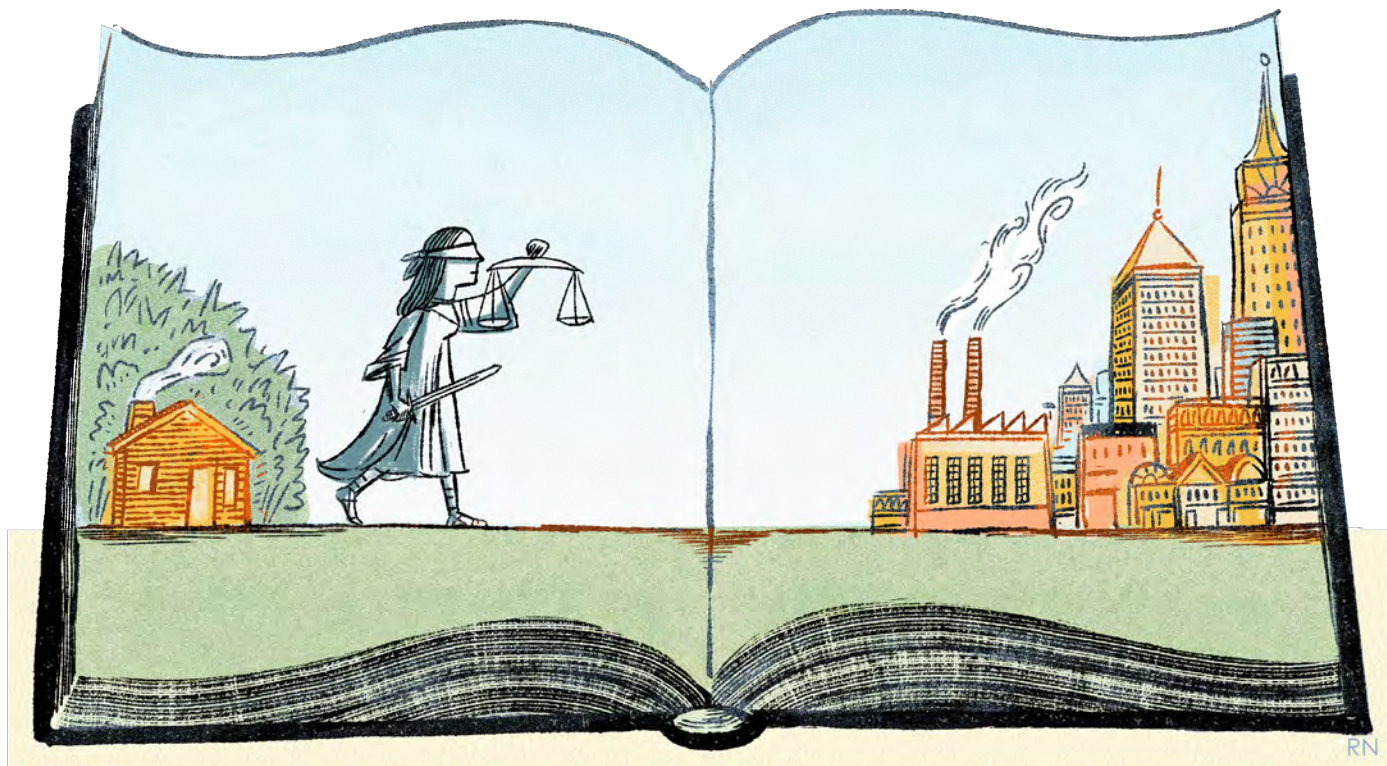
Romanticism has never completely disappeared from American life, but in the decades following the Civil War, literary realism supplemented romanticism as an important mode of literary expression. Neither romanticism nor realism is more “accurate” than the other, and surely neither is inherently better. Basically, different writers and readers prefer one or the other. Such preferences are usually unreflective.

That having been said, realist literature has distinctive features. Realist stories and novels tend to employ third-person narrators with pronounced observational skills, to feature everyday characters, and to chronicle fictional daily events in great detail. Literary naturalists, the close relatives of literary realists, add an additional twist: The fate of their protagonists is often predetermined and therefore outside their direct control.

The pantheon of literary realists is large and ramshackle, and the following authors are lined up in the temple alphabetically rather than by the quality of their works: Stephen Crane, Theodore Dreiser, William Dean Howells, Henry James, Jack London, Frank Norris, Katherine Anne Porter, Upton Sinclair, John Steinbeck, and Edith Wharton. Stories and novels by these authors do not necessarily take shaped and consistent political positions, but in general the authors are sensitive to socioeconomic class and inequality and to the ways law and legal institutions can be biased against immigrants, the working class, and societal outsiders.

An emotionally devastating but important example of this can be found in Upton Sinclair’s





*The Jungle* (1906). Set among the immigrants working in Chicago's turn-of-the-century meatpacking houses, the novel supposedly led Congress to enact the Meat Inspection Act and the Pure Food and Drug Act in hopes of eliminating the meatpacking industry's unhygienic practices and foul products. This tale of a literary work awakening the public's consciousness and then spurring government action notwithstanding, the author did not want bourgeois law reform. Sinclair cast criminal law, real estate law, and labor law as handmaidens of industrial capitalism and thought all of them should be turned on their heads on the way to socialism. In his own famous words, "I aimed for the public's heart, and by accident I hit it in the stomach."

A sterling realist novella with intriguing literary reflections on legal practice and the workings of the courts is Katherine Anne Porter's *Noon Wine* (1937). In the story, a Texas farmer named Royal Earle Thompson benefits greatly from the hard work of a Swedish farmhand named Olaf Helton. When a bounty hunter arrives looking for Helton, Thompson kills the bounty hunter with an axe. Thompson's lawyer assures him a jury will never convict, and at trial Thompson is in fact acquitted. However, the community knows Thompson is guilty as sin, and Thompson and his wife become outcasts. Confused and distraught, Thompson kills himself.

Equally sobering is Richard Wright's *Native Son* (1940). A tale of deprivation, oppression, and perhaps liberation, the novel revolves around Bigger Thomas, a twenty-year-old African American raised in Chicago's slums. He stumbles into one murder and then violently perpetrates another. At trial, he is sentenced to death, but the proceedings have an "artificiality" about them, as Thomas's Communist defense counsel and the hyper-patriotic district attorney try to place Thomas's crimes into pre-shaped political narratives. Examinations and cross-examinations are small annexes to the lawyers' larger soapboxes. Most troubling of all are the lessons Thomas learns. Having developed and grown in the midst of an odd "bildungsroman," he appears in the end to be saying, "I killed, therefore I am." If this makes the reader uncomfortable, Wright would take that as an accomplishment.

In general, the critique of law and legal institutions served up by the realist novels differs from that of romantic works. Realism portrays bias and manipulation rather than superficiality and overconfidence. Law and legal institutions—especially but not exclusively the courts—take advantage of immigrants, workers, poor people, and people of color. We had best watch carefully, the authors imply and sometimes say explicitly, lest we find ourselves swept up with powerless parts of the population. The legal system, alas, frequently contributes to social injustice.

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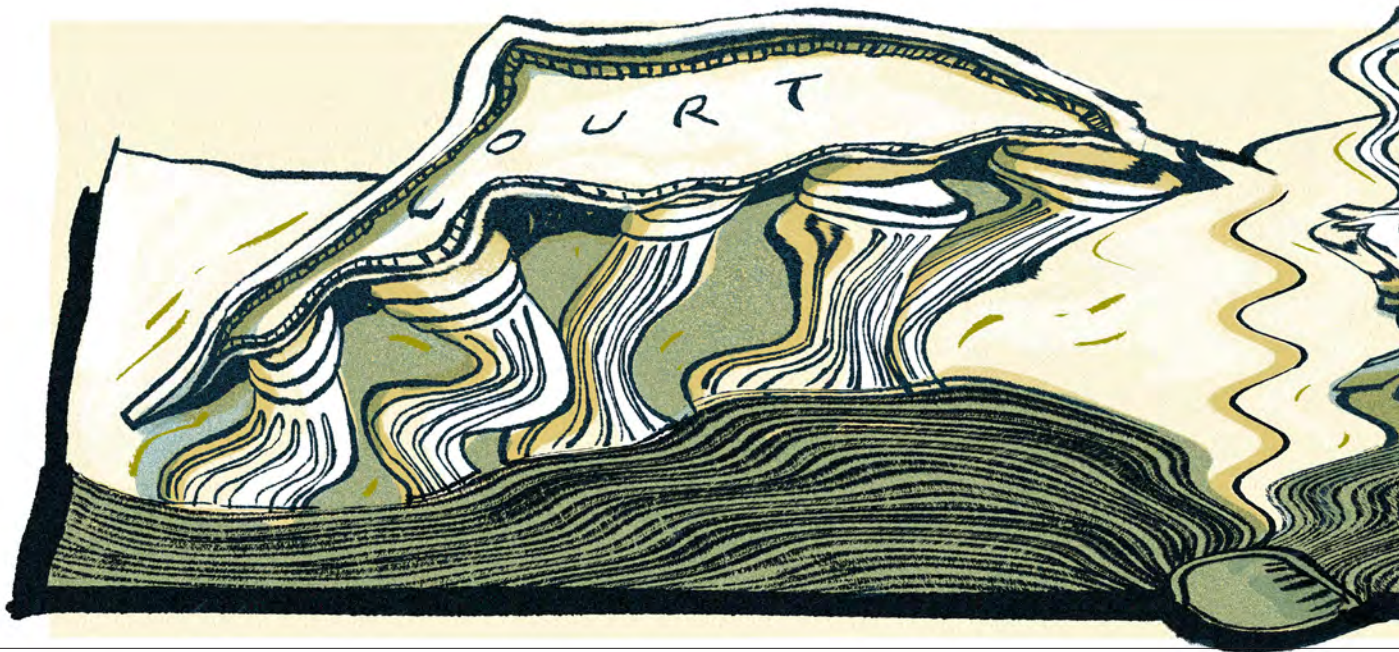
### Law, Like Everything Else, Is Absurd

Absurdism began rearing its sometimes goofy head in American literature following World War II, but that did not mean either realism or the even earlier romanticism disappeared. Harper Lee’s *To Kill a Mockingbird* (1960), for example, might be thought of as a law-related realist novel. It is also, by many accounts, the most popular American novel of the twentieth century. Valentine Davies’s *Miracle on 34th Street* (1947), meanwhile, is essentially a law-related romantic novella. It features lengthy courtroom proceedings regarding the mental health of a man named Kris Kringle and in the end confirms that he is none other than Santa Claus. The film version won the Academy Award for Best Story, a designation that in recent times has given way to more prosaic awards for screenwriting.

Absurdism was a multifaceted movement hardly limited to the United States or even to literature per se. Influenced by surrealist and Dadaist art and also by existentialist literature and philosophy, absurdist literary expression is often “metafictional”—that is, it pauses to reflect on itself. Given this tendency toward what some consider navel-gazing, absurdist authors have staked out less space in the literary canon than their romantic and realist compatriots, but the leading American figures include Donald Barthelme, Don DeLillo, Joseph Heller, Thomas Pynchon, Tom Robbins, Kurt Vonnegut, and David Foster Wallace.

Absurdist literary expression is not rigidly formulaic, but several features commonly appear. For starters, absurdist literature is usually comic and includes abundant black humor. If life makes no sense, why not laugh at it? The literature is also ironic and bursting with incongruity, and narrators are frequently sneaky tricksters who cannot be trusted. The endings of absurdist stories and novels rarely proffer enduring or inspiring messages but tend instead to be agnostic and even nihilistic. Democracy is a joke, and God is not only dead but also buried.

The two best-known works of American absurdist literature are probably Joseph Heller’s *Catch-22* (1961) and Kurt Vonnegut’s *Slaughterhouse-Five* (1969), and although neither features a lawyer character or legal proceeding, each takes sudden, snappy jabs at law. In *Catch-22*, bombardier John Yossarian has ample opportunity to reflect not only on absurdly contradictory situations but also on an actual military rule: If a soldier is crazy, he does not have to fly bombing missions, but if he asks to be excused from a mission, that shows he is not crazy and makes him ineligible to be excused. *Slaughterhouse-Five* revolves around optometrist, prisoner of war, and time-traveler Billy Pilgrim. He reflects from time to time on Edgar Derby, an American soldier who, in the midst of the horrid, deathly firebombing of Dresden in World II, is arrested for taking a teapot from the ruins, quickly found guilty at trial, and shot on the spot by a firing squad. “So it goes.”



If one is interested in an absurdist work of American literature in which the protagonist is a lawyer and legal proceedings abound, I recommend John Barth's exquisite *The Floating Opera* (first published in 1956 but substantially revised in 1967). The cynical narrator is 54-year-old Todd Andrews, who characterizes himself as the best lawyer on Maryland's Eastern Shore and recounts in detail the day he decided not to go through with his planned suicide. Andrews's cases are comical, with the most extended one involving ownership and responsibility for multiple pickle jars of excrement in a decedent's estate. For Andrews, the practice of law is merely a game that he enjoys playing. He is intrigued by the relationship of law to justice in the way one might be intrigued by a toy tractor attempting to climb over a book. "The law and I," Andrews says and Barth presumably agrees, "are uncommitted."

Overall, absurdist literature does not so much hone in on legal concerns, but it does provide a critique of law, legal thought, lawyers, and legal institutions. As already suggested, from an absurdist perspective all are as silly as the world around them. Law and legal thought are, for the absurdists, not so much superficial, as they were for the romantics, but rather nonsensical and contradicted. Lawyers and legal proceedings are not biased against the weak as they were for the realists but rather noncommittal and meaningless. Something such as "justice under law" cannot exist, given the irrational, vindictive, and vicious nature of humankind.

## What Might We Do with All This?

If so inclined, a legalist or most anyone else for that matter could reply to the romantic, realist, and absurdist literary critiques of the law. Take note, Emerson, Thoreau, Hawthorne, Melville, and other romantics, the legal discourse might lack philosophical depth, but it never sought that in the first place. We rely on law to manage social affairs rather than to seek enduring "truth." Attention, Messrs. Sinclair, Steinbeck, and Wright, and also all other realists, everyone realizes that assets and power can provide advantages in the courts and in other legal institutions. However, equality under the law remains a valuable aspirational wagon to which our society can hitch itself. And Heller, Vonnegut, Barth, and other absurdists, how do we move forward and what do we use as a guide if law is unavailable? Religion, nationalism, and militarism are not particularly appealing alternatives.

The assorted literati, I suspect, would want the last word on these issues, but even our literary greats do not get to speak from the grave. Perhaps it is best simply to say the portrayals of law, lawyers, and legal proceedings in canonical American essays, stories, and novels invite one to reflect on law. In my work as an academic, I have found critical engagement with the law to be the greatest intellectual treat. Literature has been an extraordinarily useful resource for me in the development of my critical legal consciousness. ■



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