

Law and Literature: Works, Criticism, and Theory

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At a time when many departments of literature are discounting literary criticism and scholarship in favor of cultural studies, the rise of the law-and-literature movement is a welcome affirmation of literature's relevance to the larger society. The search for relevance, however, may lead one down blind alleys. This Essay reviews the work of several prominent legal thinkers, arguing that they generally have been misled in their search for legal insights in literary texts, criticism, and theory. The first section discusses the ideas of Richard Weisberg and Martha Nussbaum, who argue that great literary works support their respective theories about the law. Their arguments fail to persuade, both because they consider such a narrow range of works and because their readings display more special pleading than disinterested analysis. I then turn to the work of two theorists who evaluate literary criticism for insight into the interpretation of legal texts: Richard Dworkin and Stanley Fish. Dworkin advocates the application of the methods of literary interpretation to legal texts, while Fish proposes that both legal and literary texts should be seen ultimately as rhetorical exercises. Dworkin misunderstands the literary criticism on which his argument relies, while Fish leaves interpretive questions in both law and literature as he found them. Finally, I review the contribution of Richard Posner—a long-standing critic of the notion that literary analysis can add anything at all to the understanding of the law. While Posner's criticisms of the excesses of the law-and-literature movement are persuasive, his wholesale dismissal of literature as a source of insight for the legal profession goes too far. Literature has the potential to broaden and deepen the individual's understanding of ethics, politics, and human relations in general. Thus, while I take issue with the attempts made by Weisberg and Nussbaum to confine

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the insights available from literature within narrow ideological boundaries and also with Dworkin's proposal to found a new literary hermeneutics on his ideas about literary criticism, I maintain that literature remains an important source of insight for all those interested in questions of morality and justice, a class that surely includes most lawyers, judges, and law professors.

I. LAW AND LITERARY MASTERPIECES: RICHARD WEISBERG AND MARTHA NUSSBAUM

Both Richard Weisberg and Martha Nussbaum argue that literature is on their side, that an unbiased, sensitive reading of great literary works supports their theories about law. Their willingness to look for support in poems and novels is a welcome sign that the attempt of some professors of literature to condemn Western fiction, poetry, and drama as little more than a repository of prejudices has been less successful outside their home departments than within. Both Weisberg and Nussbaum reject as well the notion, sponsored by deconstruction before it became integrated into cultural studies, that literary texts have no reference to anything beyond themselves. They waste no time wondering if Paul de Man was right in doubting "that literature is a reliable source of information about anything but its own language."¹ So far, so good. Unfortunately, both Weisberg and Nussbaum, in their eagerness to commandeer the great works for their own causes, demonstrate little more respect for the complexity and depth of literary works than do those literary critics who simply denounce them.

In *Poethics*, Richard Weisberg appeals to what he calls, with a defiant directness, "the Great Books," the "mainstream texts of literary art,"² and "the traditional canon."³ Martha Nussbaum in *Poetic Justice* is more vague, referring instead to "the literary imagination,"⁴ "the structure of the literary experience,"⁵ the "literary understanding,"⁶ and "the light of the poetic imagination,"⁷ phrases that sidestep the objections raised by academic feminists, among others, to the "great books" or "the canon."⁸ Weisberg, on

1. PAUL DE MAN, *The Resistance to Theory*, in *THE RESISTANCE TO THEORY* 3, 11 (1986).

2. RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* at xii (1992).

3. *Id.* at 119.

4. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* at xii (1995).

5. *Id.* at 87.

6. *Id.* at 92.

7. *Id.* at 119.

8. In the *Feminist Critical Revolution*, an essay introducing her anthology *The New Feminist Criticism*, Elaine Showalter affirms Sandra Gilbert's belief that feminist criticism

the other hand, notes the criticisms feminists such as Carolyn Heilbrun have made about law and literature's focus on the classics and answers them directly, asserting that "I do not think the case has been made for Law and Literature's abandoning the canon just because some feminists insist we do."⁹ In Weisberg's view, feminists are generally right about the changes they are seeking but wrong in thinking that the canon is their enemy. Taking it for granted that feminism is a "progressive movement," Weisberg asks its adherents to appreciate the usefulness of the traditional canon: "If the body of masterpieces we have on hand—works of indisputable narrative brilliance—contains within it the seeds of a radical departure for Western culture, what more than knee-jerk response would lead a progressive movement to jettison it in favor of the unknown?"¹⁰

Although Weisberg's references to "the canon" suggest that he intends his thesis to hold for literary masterpieces from Homer to the present, at times he restricts his argument to the more defensible notion that there is a "self-destructive, autosubverting" quality to much "mainstream nineteenth- and twentieth-century fiction."¹¹ In defense of this thesis Weisberg could adduce the authority of the great literary critic Lionel Trilling, who once noted that the works of such modern masters as D.H. Lawrence, Joseph Conrad, and Thomas Mann seem to affirm what Trilling calls "this chief idea of modern literature," namely "the idea of losing oneself up to the point of self-destruction, of surrendering oneself to experience without regard to self-interest or conventional morality, of escaping wholly from the societal bonds . . ."¹²

Trilling, however, did not regard this phenomenon with the same unqualified approval as Weisberg. Notions that seem liberating when first gleaned from *Heart of Darkness* or *Death in Venice* or *Sons and Lovers* become strangely platitudinous, even ideological, when they serve as the slogans of an entire "adversary culture" that, just like the larger culture, "generates its own assumptions and

demands "a complete and cataclysmic change in all our ideas of literary history and literary meaning." ELAINE SHOWALTER, *Introduction: The Feminist Critical Revolution*, in *THE NEW FEMINIST CRITICISM* 3, 10 (1985). According to Showalter:

Feminist critics do not accept the view that the canon reflects the objective value judgments of history and posterity, but see it instead as a culture-bound political construct. In practice, "posterity" has meant a group of men with the access to publishing and reviewing that enabled them to enforce their views of "literature" and to define a group of ageless "classics."

Id. at 11. Feminist criticism, she declares, "shares the same enemies" as other "avant-garde" movements: "namely, those who urge a return to the 'basics' and the 'classics.'" *Id.* at 16.

9. WEISBERG, *supra* note 2, at 122.

10. *Id.* at 119.

11. *Id.* at xii.

12. LIONEL TRILLING, *On the Teaching of Modern Literature*, in *BEYOND CULTURE: ESSAYS ON LITERATURE AND LEARNING* 3, 26-27 (1978).

preconceptions, and contrives its own sanctions to protect them."¹³ This anomalous situation led Trilling to propose "the view that art does not always tell the truth or the best kind of truth," and therefore needs to be subjected "in the interests of autonomy, to the scrutiny of the rational intellect."¹⁴

Weisberg himself seems to take it for granted that no more desirable historical possibility could present itself than the opportunity to make "a radical departure" from the Western Judeo-Christian tradition. Weisberg is certain that "the downfall of Christian culture and all it represented" was highly desirable, the necessary preliminary to "the rebuilding of a sound Western culture."¹⁵ But where does that leave us in regard to the authority of the literary masterpieces themselves, many of them indisputably part of "Christian culture and all it represented"? Trilling, on the other hand, does not suggest that the idea "of escaping wholly from the societal bonds" is affirmed by literature as a whole but only by some works of modern literature, leaving open the possibility of an appeal from the moderns to the generations before them.¹⁶ Trilling himself has to go back only to the early nineteenth century to find poems and novels whose affirmations are very different from those in the modern masterpieces. In the works of John Keats, William Wordsworth, and Jane Austen, for example, Trilling discovers affirmations of the self and the self's relation to both society and nature that are very different from the governing ideas of the moderns.

Trilling sees in Keats's awareness of his own death an "implicit and explicit commitment to the self even in the moment of its extinction" that is stronger, more heroic, than anything he can find in modern literature.¹⁷ In *Wordsworth and the Rabbis*, Trilling observes that Wordsworth's poetry reveals "a certain quality in him which makes him unacceptable to the modern world,"¹⁸ a "quietism . . . an affirmation of life so complete that it needed no saying."¹⁹ This quietism, so different from the modern "predilection for the powerful, the fierce, the assertive, the personally militant,"²⁰ unites Wordsworth with tragedians from Homer to Tolstoy, since "every

13. LIONEL TRILLING, *Preface to BEYOND CULTURE*, *supra* note 12 [n.p.].

14. *Id.*

15. WEISBERG, *supra* note 2, at 269 n.26.

16. *See* TRILLING, *supra* note 12, at 27.

17. LIONEL TRILLING, *The Poet as Hero: Keats in His Letters*, in *THE OPPOSING SELF: NINE ESSAYS IN CRITICISM* 3, 43 (1978).

18. LIONEL TRILLING, *Wordsworth and the Rabbis*, in *THE OPPOSING SELF*, *supra* note 17, at 104, 108.

19. *Id.* at 115.

20. *Id.* at 117.

tragic literature owes its power to the high esteem in which it holds the common routine, and the sentiment of being which arises from it, the elemental *given* of biology."²¹

Modern literature, in contrast, is marked by its "failure to conceive the actuality of the life of common routine," a life lived within the boundaries of laws and social convention, in favor of "the fantasy of death."²² Meanwhile, Jane Austen's *Mansfield Park* commends to its readers "the idea of society as a limiting condition of the individual spirit," the very idea, according to Trilling, against which modern literature mobilizes its fiercest energies.²³ And yet in discussing *Emma*, Trilling also discovers in Austen a conception of the possibilities of this limited self that holds out a "rare hope" more generous than anything offered in contemporary literature.²⁴

A brief consideration of works from only a slightly earlier time than the modern period suggests that the characteristic productions of modernism do not speak with the authority of literature in general. It is, furthermore, by no means obvious that the great works of the modern period allow alienation the last word, as Trilling uneasily supposes and as Weisberg enthusiastically assumes. One example must suffice. In a passage in which Mann considerably italicizes the key sentence, *The Magic Mountain's* protagonist Hans Castorp explicitly affirms a moral far more in accord with traditional Christian morality than suits Weisberg's thesis:

I will keep faith with death in my heart, but I will clearly remember that if faithfulness to death and to what is past rules our thoughts and deeds, that leads only to wickedness, dark lust, and hatred of mankind. *For the sake of goodness and love, man shall grant death no dominion over his thoughts.*²⁵

Lionel Trilling came to feel that even the great masterpieces of art and literature could sometimes be wrong, while Richard Weisberg seems certain that they always speak the truth. One cannot help but feel, however, that there is more intelligent respect for the great works in Trilling's troubled disagreements than in Weisberg's certainty that the masterpieces share his program.

Martha Nussbaum seems convinced that "the literary imagination" of any period fosters solidarity rather than the alienation Weisberg emphasizes. She identifies "the literary imagination" with "the

21. *Id.* at 130.

22. *Id.* at 128-29.

23. LIONEL TRILLING, *Mansfield Park*, in *THE OPPOSING SELF*, *supra* note 17, at 181, 184.

24. LIONEL TRILLING, *Emma and the Legend of Jane Austen*, in *BEYOND CULTURE*, *supra* note 12, at 28, 49.

25. THOMAS MANN, *THE MAGIC MOUNTAIN* 487 (John E. Woods trans., Vintage 1995) (1924).

compassionate imagination.”²⁶ Literature’s great social function, in Nussbaum’s view, is that it encourages us “to imagine one another with empathy and compassion.”²⁷ Nussbaum does acknowledge, however, that even great works of literature do not always meet her own standards of altruism, forcing her to admit that “not even the literary imagination is free from blame.”²⁸

Nussbaum’s *Poetic Justice: The Literary Imagination and Public Life* is a small book—121 pages of text—that makes large claims. The book’s brevity owes something to the admirable succinctness of Nussbaum’s argument and something to her willingness to ignore obstacles to those claims. Nussbaum bypasses, for example, the obvious problem of deciding what books deserve to be called “great” by simply avoiding the question. In doing so, however, she raises an even larger difficulty. It is hard enough to make a case that “the canon” endorses any particular point of view; it would seem to be a much more difficult task to discover what “the literary imagination” in general proposes on any specific topic. Does “the literary imagination” encompass the imagination represented in best-sellers? In Harlequin romances? In the westerns of Louis L’Amour or Zane Grey? *Poetic Justice* doesn’t bother to ask such questions, let alone supply even provisional answers to them.

Nussbaum’s sweeping generalizations about “the literary imagination” are based on a remarkably small sample of works. Walt Whitman’s *Song of Myself* (first and foremost), Charles Dickens’s *Hard Times*, Richard Wright’s *Native Son*, and E.M. Forster’s *Maurice* are the only works given extended treatment. Her choice of authors suggests that she subscribes to traditional views about literary worth; the authors she has selected are all major literary figures. The “literary imagination” she discusses is apparently the imagination embodied in the works of major authors, not the—perhaps very different—imagination manifested in works that make no claim to moral or artistic seriousness. Nussbaum’s choice of Walt Whitman, E.M. Forster, Richard Wright, and Charles Dickens rather than, say, Margaret Mitchell, John Grisham, Louis L’Amour, and Barbara Cartland commits her, tacitly but definitely, to the notion that major literary figures report on human life with an accuracy and depth superior to those authors whose main claim to fame is the number of their books sold. If the first four are considered more trustworthy witnesses than the second quartet, the reason is that the first four possess greater literary eminence. It is

26. NUSSBAUM, *supra* note 4, at xviii.

27. *Id.* at xvii.

28. *Id.*

only on the condition that the reader is willing to grant the independent stature of the works discussed that Nussbaum's use of *Song of Myself*, *Native Son*, *Maurice*, and *Hard Times* may be persuasive.

As it happens, at least two of the works chosen by Nussbaum, *Native Son* and *Maurice*, have only a tenuous claim to the authority possessed by acknowledged masterpieces. Richard Wright's *Native Son* is surely an important work that continues to attract attention for a variety of reasons. Almost since it was published, however, there has been an ongoing debate about its stature as a product of the literary imagination. A number of distinguished critics sharing Wright's commitment to equality for African Americans have questioned the literary quality of his most famous novel. In *On Native Grounds*, Alfred Kazin in 1942 agreed with R.P. Blackmur that "Wright—from the highest possible motives—had written 'one of the books in which everything is undertaken with seriousness except the writing.'"²⁹ Ralph Ellison, while honoring Wright's courage and historic achievement, still felt compelled ("here I must turn critic") to explicate the artistic limitations of *Native Son* by suggesting that "Wright failed to grasp the function of artistically induced catharsis."³⁰

For James Baldwin, *Native Son* exemplified the sort of protest novel that, Baldwin argues, "so far from being disturbing, is an accepted and comforting aspect of the American scene."³¹ Rather than upsetting its readers, it reassures them, since "we receive a very definite thrill of virtue from the fact that we are reading such a book at all."³² In *Many Thousands Gone*, Baldwin explains why the "long and bitter summing up" of Max, Bigger's Communist party lawyer, arouses "such a positive glow of recognition" in so many readers by distinguishing two views of human life:

It is addressed to those among us of good will and it seems to say that, though there are whites and blacks among us who hate each other, we will not; there are those who are betrayed by greed, by guilt, by blood lust, but not we; we will set our faces against them and join hands and walk together into that dazzling future when there will be no white or black. This is the dream of all liberal men, a dream not at all dishonorable, but, nevertheless, a dream. For, let us join hands on this mountain as

29. ALFRED KAZIN, *ON NATIVE GROUNDS: AN INTERPRETATION OF MODERN AMERICAN PROSE LITERATURE* 301 (1956).

30. RALPH ELLISON, *Remembering Richard Wright*, in *GOING TO THE TERRITORY* 198, 211 (1987).

31. JAMES BALDWIN, *Everybody's Protest Novel*, in *NOTES OF A NATIVE SON* 9, 14 (1955).

32. *Id.*

we may, the battle is elsewhere. It proceeds far from us in the heat and horror and pain of life itself where all men are betrayed by greed and guilt and blood lust and where no one's hands are clean.³³

For Baldwin, it is the task of the literary imagination to convey the latter vision, which refuses the temptation to divide human beings between the "we" who possess "good will" and those others who are malicious. Martha Nussbaum at times seems more comfortable with the former, which accords such transcendent importance to achieving equality between human beings that the classifying of individuals on the basis of whether or not they share this ideal becomes a worthwhile project.

If Nussbaum had acknowledged the criticisms that have been made about the literary quality of *Native Son* and explained why she nevertheless considers it an exemplary work of "the literary imagination," her discussion of it would have made a greater contribution to her argument as a whole. As it is, a reader of *Poetic Justice* is more likely to feel that Nussbaum's discussion of *Native Son* succeeds in illustrating not her own thesis about the literary imagination but James Baldwin's point about the "thrill of virtue" that protest fiction can provide.

If *Native Son* provides, at least in Nussbaum's presentation, an unconvincing illustration of "the literary imagination," E.M. Forster's *Maurice* does no better. Nussbaum argues that *Maurice* "makes its case for equal sexual liberty by showing the profound worth of that liberty in its portraits of the flourishing of Maurice and the stunted life of Clive, "who renounces his homosexual relationship with Maurice for marriage."³⁴ Nussbaum's formulation implicitly connects the literary value of *Maurice* with the persuasiveness of the "case for equal sexual liberty" that she believes it presents. Unless the novel can make its readers feel the "profound worth" of sexual freedom by dramatizing the "flourishing" of one character and the "stunted life" of another, however, its contribution to debates about law and sexuality will be unimportant. Unfortunately, Nussbaum's brief discussion fails to engage the novel as a work of literature at all. Instead she simply takes its affirmations at face value. When one considers *Maurice* as a work of fiction, as a work of "the literary imagination," in Nussbaum's phrase, its usefulness for her argument becomes doubtful.

Barbara Rosecrance's trenchant analysis in *Forster's Narrative*

33. JAMES BALDWIN, *Many Thousands Gone*, in NOTES OF A NATIVE SON, *supra* note 31, at 18, 35.

34. NUSSBAUM, *supra* note 4, at 99.

Vision notes limitations that not only reduce the novel's literary standing but also vitiate its force as a witness on behalf of a "case for equal sexual liberty."³⁵ Her discussion is echoed by Richard Posner's observation that "Forster was a novelist of great distinction, but *Maurice* is his weakest novel."³⁶ Rosecrance begins her discussion of *Maurice* by noting that "[t]he two Forster novels with which *Maurice* invites comparison, *A Room with a View* and *The Longest Journey*, both expose the poverty of the homosexual novel."³⁷ Rosecrance points out that the novel's literary flaws affect its value as a socio-political statement:

But not only does *Maurice* suffer from its limitation as a thesis novel: at the heart of the thesis is a contradiction that prevents even its narrow purpose from being realized. For despite his assertion of fulfillment, Forster cannot overcome his ambivalence about the homosexual condition, and throughout the novel an inner schism undermines the brave ideology of his postscript.³⁸

Perhaps Forster intended his novel to demonstrate what Nussbaum calls "the flourishing of Maurice and the stunted life of Clive," but Rosecrance convincingly demonstrates that the dramatic effect of the novel is by no means so straightforward. Her careful analysis demonstrates that, contrary to Nussbaum's assertion and contrary, apparently, to Forster's own intentions, "the novel's real center of interest is not Maurice but Clive, whose inner harmony and moral superiority Forster unambiguously endorses Clive receives the greater authorial approval."³⁹

On this reading *Maurice* reveals a tortured dividedness over homosexuality, a complexity that belies Nussbaum's simple contrast between "flourishing" and "stunting":

His [Forster's] equivocation pervades the portrait of Maurice, and his confusions beset the novel's two love affairs. The result is a novel whose interest lies not in its artistic claim, which is slight, but rather in its expression of an inner conflict whose psychological and social implications reflect their historical context and reveal heretofore hidden aspects of the man.⁴⁰

Unlike *Native Son* and *Maurice*, *Hard Times* is a major work by one of the great novelists of the English language. Not

35. BARBARA ROSECRANCE, *FORSTER'S NARRATIVE VISION* 151 (1982).

36. RICHARD A. POSNER, *LAW AND LITERATURE* 321 (rev. ed. 1998).

37. ROSECRANCE, *supra* note 35, at 151.

38. *Id.* at 153.

39. *Id.* at 165.

40. *Id.* at 155.

coincidentally, the novel proves more resistant to Nussbaum's theorizing than either *Maurice* or *Native Son*, neither of which provoke her to any criticism at all. *Hard Times* raises a number of inconvenient difficulties. It exhibits "some sentimentality" and, more seriously, portrays trade unions "in a light manifestly unfair."⁴¹ The novel not only "falsely depicts the labor union movement,"⁴² it also "does not rate high enough the harm involved in class hierarchy itself,"⁴³ and provides a "somewhat glib and condescending solution" to the issues it dramatizes.⁴⁴ Worse yet, "Dickens also fails to take note of harms caused to women by inequalities of autonomy that are endemic to marriage as it was lived in his time."⁴⁵

In the light of such criticisms, one wonders what it is that Nussbaum sees in "the literary imagination" that makes it a useful guide in appraising political and legal controversies. Her answer is that although novels offer "a guidance that is, if promising, still fallible and incomplete," they remain important because "the formal structures implicit in the experience of literary readership" give us a sense of "the importance of viewing each person as separate with a single life to live."⁴⁶ Throughout *Poetic Justice* Nussbaum emphasizes the notion that, whatever the explicit political affiliations of authors may be, "the literary imagination" dramatically vivifies "the ideal of full equality"⁴⁷ of all human beings, encouraging readers to feel a "truly equal concern" for all people, even those whom we would otherwise ignore or reject.⁴⁸ Nussbaum is aware that "mass movements frequently fare badly in the novel,"⁴⁹ and she finds it understandable that "from the point of view of such movements the novel is a dangerously reactionary form."⁵⁰ Nevertheless, the accomplishment of the "literary imagination" in inducing readers to value every life equally, to foster "a truly equal concern," is so fundamental that it overrides for Nussbaum otherwise damning objections.

Nussbaum's own reading of *Hard Times* demonstrates, however, that "the literary imagination" cannot be trusted even this far. A comparison with Nussbaum's discussion of *Maurice* will clarify the issue. That novel, Nussbaum explains, encourages the reader to

41. NUSSBAUM, *supra* note 4, at 33.

42. *Id.* at 75.

43. *Id.* at 76.

44. *Id.* at 77.

45. *Id.* at 76.

46. *Id.*

47. *Id.* at 50.

48. *Id.* at 87.

49. *Id.* at 70.

50. *Id.* at 70-71.

appreciate the humanity of Maurice, although his friends, once they become aware of his homosexuality, treat Maurice as though “he had suddenly become a monster.”⁵¹ Maurice’s friends, Nussbaum explicates, “simply cannot permit themselves to imagine for a moment what it may be like to be him.”⁵² They lack the central gift of the literary imagination, “the ability to imagine what it is to live the life of another person who might, given changes in circumstance, be oneself or one of one’s loved ones.”⁵³ To see anybody as a “monster” is to deprive him or her of that full humanity in which we all share equally.

Her discussion of *Hard Times*, however, reveals that the novel has induced Martha Nussbaum herself to think of one of the characters, Bitzer, not as a human being to whom one owes “truly equal concern,” but as a kind of monster, something less than human—and to do so in response to, among other things, the color of his skin.⁵⁴ According to Nussbaum, “as the novel shows us, Bitzer is chillingly weird and not quite human. From our first glimpse of his ‘cold eyes’ and his skin, ‘so unwholesomely deficient in the natural tinge,’ we know that we are dealing with a monster.”⁵⁵ Nussbaum is right in asserting that Dickens’s treatment of Bitzer illustrates “a feature of the genre, a feature of the way in which realist novels solicit and cultivate the imagination,”⁵⁶ but she seems not to notice that it is a “way” that vitiates her major thesis about the “literary imagination’s” commitment to “full equality.”

Nussbaum wants to argue that “the structure of the literary experience” fosters a commitment to equality because in reading we identify with each of the characters with equal empathy. Thus, for example, in going through *Hard Times*,

[t]he reader enters each of these lives not knowing, so to speak, which one of them is hers—she identifies first with Louisa and then with Stephen Blackpool, living each of these lives in turn and becoming aware that her actual place is in any respects an accident of fortune.⁵⁷

This description of a reader’s experience seems to owe more to John Rawls’s “veil of ignorance” than to the experience of actual readers of fiction. Nussbaum’s account of Bitzer has already made it clear that she at least does not identify with all of the characters but only

51. *Id.* at 98.

52. *Id.* at 98-99.

53. *Id.* at 5.

54. *Id.* at 87.

55. *Id.* at 30.

56. *Id.*

57. *Id.* at 87.

with some of them—and her discussion strongly suggests that identification with some characters is furthered by the reader's repulsion from others. Nussbaum may be right in claiming that novels “undermine hierarchies of race and class and gender”; what she fails to recognize is that those same novels establish their own hierarchies, often more absolute than those they “undermine.”⁵⁸ Condemnation is just as intrinsic to the novel as compassion, and hierarchy as much as equality.

Although Nussbaum's readings of Dickens, Forster, and Wright fail to persuade, her reading of Walt Whitman seems convincing enough. In *Walt Whitman* Nussbaum has found an author whose major work explicitly advocates the sort of equality she wants to believe is the implicit ideal of “the literary imagination” in general. Whitman, indeed, goes perhaps further than Nussbaum herself in affirming not only the equality of human beings to one another but the spiritual equality of “every thing”:

I swear I see now that every thing has an eternal soul!
The trees have, rooted in the ground. . . . the weeds of
the sea have. . . . the animals.
I swear I think there is nothing but immortality!⁵⁹

There are difficulties, however, in identifying Whitman's vision with that of the “literary imagination” in general, especially since Whitman himself proudly emphasized that his poetry represented a radical break with the literature of the past. In *Democratic Vistas* he declared that “literature, strictly consider'd, has never recognized the People, and, whatever may be said, does not to-day.”⁶⁰ The old literature, in Whitman's view, did not merely ignore ordinary people but had been everywhere “the main support of European chivalry, the feudal, ecclesiastical, dynastic world.”⁶¹ According to Whitman the old literature was downright hostile to democracy: “The great poems, Shaksper [sic] included, are poisonous to the idea of the pride and dignity of the common people, the life-blood of a democracy.”⁶² Whitman is surely right if he means to point out that most readers will come away from a reading of a work like *King Lear*

58. *Id.* at 76.

59. WALT WHITMAN, *Leaves of Grass*, in WALT WHITMAN: COMPLETE POETRY AND COLLECTED PROSE 1, 106 (Justin Kaplan ed., Literary Classics of the United States 1982) (1855).

60. WALT WHITMAN, *Democratic Vistas*, in WALT WHITMAN: COMPLETE POETRY AND COLLECTED PROSE, *supra* note 59, at 929, 944 (1867).

61. *Id.* at 933.

62. *Id.* at 955.

with a renewed sense of the gulf between ingratitude and loyalty as exemplified by, say, Goneril and Kent, rather than with a reinforced feeling that all human beings are basically alright. Until Nussbaum is willing to test her hypothesis about “the literary imagination” against what Whitman calls “the great poems,” her argument remains incomplete. As Richard Posner shrewdly observes, Nussbaum’s “choice of works to discuss in *Poetic Justice*” is “as it were, preselected.”⁶³

II. LAW AND LITERARY INTERPRETATION: RONALD DWORKIN AND THE NEW CRITICISM

Ronald Dworkin does not invoke the authority of literary masterpieces to support his reading of the Constitution, but he does argue that interpreters of the Constitution should follow the example set by literary critics who, according to Dworkin in *How Law Is Like Literature*, assess interpretations of a work according to “which way of reading (or speaking or directing or acting) the text reveals it as the best work of art.”⁶⁴ Dworkin compares his proposal to those put forward by his two rivals: E.D. Hirsch’s “author’s intention theory”⁶⁵ and Stanley Fish’s idea that “interpretation creates a work of art and represents only the fiat of a particular critical community.”⁶⁶

Richard Posner accurately points out that Dworkin’s “aesthetic hypothesis” is “reminiscent of the New Criticism,”⁶⁷ a school whose leading American practitioners included Cleanth Brooks, John Crowe Ransom, and R.P. Blackmur. It does nothing to discredit Dworkin’s position to note that the approach he favors reached its peak of influence around fifty years ago; given the current disarray of literary studies, the era of the New Criticism begins to look like a kind of golden age. The sort of close reading exemplified in Cleanth Brooks’s *The Well Wrought Urn*⁶⁸ did set a new standard of critical attentiveness, and the textbooks produced by Brooks and Robert Penn Warren, especially *Understanding Poetry*,⁶⁹ eventually “revolutionized the teaching of English literature” as René Wellek notes.⁷⁰ Nevertheless, even in the heyday of the New Criticism in the

63. POSNER, *supra* note 36, at 324.

64. RONALD DWORKIN, *How Law Is Like Literature*, in A MATTER OF PRINCIPLE 146, 149 (1985).

65. *Id.* at 154.

66. *Id.* at 150.

67. POSNER, *supra* note 36, at 218.

68. CLEANTH BROOKS, *THE WELL WROUGHT URN* (1947).

69. CLEANTH BROOKS & ROBERT PENN WARREN, *UNDERSTANDING POETRY: AN ANTHOLOGY FOR COLLEGE STUDENTS* 240 (1960).

70. RENÉ WELLEK, *6 A HISTORY OF MODERN CRITICISM 1750-1950*, at 191 (1986).

forties and fifties the focus “on the work of art as an object in itself”⁷¹ was challenged by Marxists, Freudians, myth critics, and many others.⁷²

Since the 1960s the prestige of the New Criticism has declined. René Wellek, himself an admirer of the school, though not an uncritical one, was forced to conclude in 1978 that “[t]oday the New Criticism is considered not only superseded, obsolete and dead, but somehow mistaken and wrong.”⁷³ Although Dworkin acknowledges in a general way that “critics themselves are thoroughly divided about what literary interpretation is,”⁷⁴ his failure to discuss specific schools, and especially the New Criticism, allows him to propose “to use literary interpretation as a model”⁷⁵ as though there were only one “model” available: the one Dworkin offers as “the aesthetic hypothesis,”⁷⁶ thereby gaining what seems an unearned rhetorical advantage. In referring to the approach he is commending as the “aesthetic hypothesis,” he leaves the implication that he is not turning merely to one critical school among others but rather adopting an approach shared, in some variation or other, by literary critics generally.

Dworkin’s “aesthetic hypothesis” assumes that the methodology of literary criticism both commits its practitioners to readings that cast a text in as favorable a light as possible and then commands them to disregard the intentions of its author in working out those readings. Both assumptions are wrong. First, the notion that good criticism always attempts to bring out the strengths of a work is not supported by the actual practice of literary critics. Second, even New Critics like Cleanth Brooks, whose work provides the strongest support for Dworkin’s theory, maintain a commitment to authorial intention denied by the “aesthetic hypothesis.”

All literary works are not masterpieces, just as all legislation is not necessarily well-advised. The New Critical technique of close reading can be used with devastating effect to bring out the shortcomings of a poem or novel just as surely as it can reveal the hidden riches of a masterpiece. Dwight Macdonald’s close reading of James Could

71. WILLIAM HARMON & C. HUGH HOLMAN, *New Criticism*, in *A HANDBOOK TO LITERATURE* 345, 345 (7th ed. 1996).

72. See, e.g., EDMUND WILSON, *THE WOUND AND THE BOW* (1965) (Freudian critique); PHILIP RAHV, *IMAGE AND IDEA* (1949) (Marxist critique); NORTHROP FRYE, *ANATOMY OF CRITICISM* (1957) (myth criticism).

73. WELLEK, *supra* note 70, at 144. Wellek’s chapter on “The New Criticism” first appeared as *The New Criticism: Pro and Contra*, 4 *CRITICAL INQUIRY* 28 (1978). It was also reprinted in RENÉ WELLEK, *THE ATTACK ON LITERATURE AND OTHER ESSAYS* 87 (1982).

74. DWORKIN, *supra* note 64, at 148.

75. *Id.* at 158.

76. *Id.* at 149.

Cozzens's *By Love Possessed*, for instance, persuasively and hilariously demonstrated why that bestseller of the 1950s was not a great work of literature after all, despite the adulation it had received from critics who should have known better.⁷⁷ *Understanding Poetry*, a textbook by Cleanth Brooks and Robert Penn Warren that brought New Critical techniques to classrooms across the country, proceeds on the assumption that students need to learn what makes a bad poem bad as well as what makes a good poem good. James Russell Lowell's *After the Burial* is included as an example of a poem that is "an expression of deep personal grief" and yet "a bad poem."⁷⁸ Joyce Kilmer's *Trees*, the authors note, "has been very greatly admired by a large number people," yet, they uncompromisingly add, "it is a bad poem."⁷⁹

Just as literary critics are more willing to recognize that all poems and novels are not masterpieces than Dworkin's theory requires, likewise few critics, including the New Critics themselves, have shared Dworkin's belief that interpretation must be "cut loose from these associations with speaker's meaning or intention,"⁸⁰ although this is a central feature of the "aesthetic hypothesis." *Understanding Poetry*, for example, offers the following "proviso" for students to keep in mind when "thinking of form" in regard to poetry: "Poems are written by human beings and the form of a poem is an individual's attempt to deal with a specific problem, poetic and personal."⁸¹

Brooks and Warren did not merely offer such advice to students, they took it to heart in their own critical writing. If there is one book whose explications embody the New Criticism at its best and most characteristic, it is Cleanth Brooks's *The Well Wrought Urn*.⁸² Here, if anywhere, are examples of the kind of criticism that Dworkin's "aesthetic hypothesis" is meant to affirm. The recognized ability of such criticism to convey the beauty and insights of poetry seems to affirm the validity of the "aesthetic hypothesis." If the "hypothesis" has been tested and found to work so well in literary criticism, then perhaps it deserves a trial in legal interpretation.

A close reading of *The Well Wrought Urn* itself, however, reveals that Brooks nowhere "cuts loose" from the poet's "meaning or intention." In a chapter on Keats's *Ode on a Grecian Urn*, for

77. See DWIGHT MACDONALD, *By Cozzens Possessed*, in *AGAINST THE AMERICAN GRAIN* 187 (1983).

78. BROOKS & PENN WARREN, *supra* note 69, at 240.

79. *Id.* at 288.

80. DWORKIN, *supra* note 64, at 148.

81. *Id.* at xiv.

82. BROOKS, *supra* note 68.

example, Brooks distinguishes his own approach from that of other critics by noting that he neglects “Keats the man” only to emphasize “Keats the poet.”⁸³ Later Brooks characterizes his own specific focus in a way that heightens rather than diminishes the role of the author: “This is surely not too much to ask of the reader—namely to assume that Keats meant what he said and that he chose his words with care.”⁸⁴ Brooks presents himself so emphatically as the defender of Keats’s own vision that it becomes far easier to see his criticism as an attempt to recapture the author’s original vision in all its complexity and depth than as an effort to cut the author loose from the poem.

Similar examples demonstrating the critic’s respect for the author and authorial intention could be gleaned from the writings of any of the New Critics and, indeed, from virtually any example of significant literary criticism from any period or school, even if the theory affirmed by the critic denies intentionality. As Stanley Fish, himself a proponent of the notion that in interpretation “the reader supplies . . . *everything*,”⁸⁵ points out, readers, whatever their theoretical inclinations, cannot help but “positing an intention for an utterance if they are in the act of regarding it as meaningful.”⁸⁶ Thus, although Dworkin is quite right to feel that a good deal of literary criticism—though by no means all—“attempts to show which way of reading . . . the text reveals it as the best work of art,”⁸⁷ he is wrong to suggest that such an approach commits one to discounting the author’s “meaning or intention.” It requires only that the critic believe, on the basis of reputation or the direct evidence of the author’s work as a whole, that the writer is capable of greatness. Posner points out that the New Critics’ “hypothesis of total coherence” works best when one is dealing with works whose greatness has been attested by centuries of comparison and reconsideration.⁸⁸

Even in this favored situation, however, the “aesthetic hypothesis” seems vitiated by a paradox. A masterpiece is likely to provide revelations that surprise even the most experienced critic—revelations that one may miss unless one is especially attentive to the manifestations of a perspective presumptively wider and deeper than one’s own. Cleanth Brooks does not attempt to compete with John

83. *Id.* at 153.

84. *Id.* at 155.

85. STANLEY FISH, *Why No One's Afraid of Wolfgang Iser*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 68, 77 (1989).

86. STANLEY FISH, *Wrong Again*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 103, 177.

87. DWORKIN, *supra* note 64, at 149.

88. POSNER, *supra* note 36, at 247.

Keats. The “aesthetic hypothesis,” however, encourages and even justifies a competition between Ronald Dworkin and James Madison as to who, given the wording of the text, can produce the better Constitution over the long haul. The same impulse arises in interpreting religious texts. Does one turn to them to confirm one’s own moral insights or to confront a different, perhaps more demanding, although seemingly less sophisticated perspective? George Santayana speculated somewhat maliciously on the way the problem appeared to the progressive Christians of nineteenth-century Boston:

Jesus was a prophet more winsome and nearer to ourselves than his predecessors; but how could any one deny that the twenty centuries of progress since his time must have raised a loftier pedestal for Emerson or Channing or Phillips Brooks? It might somehow not be in good taste to put this feeling into clear words . . . nevertheless it beamed with refulgent self-satisfaction in the lives and maxims of most of their followers.⁸⁹

III. LEGAL INTERPRETATION AND AUTHORIAL INTENTION: RONALD DWORKIN AND E.D. HIRSCH

Dworkin turns to the “aesthetic hypothesis” in part because he finds theories of interpretation based on the author’s intention unconvincing. At one point it seems as though Dworkin has no real quarrel with some suitably capacious notion of authorial intention but only with “the more doctrinaire authors’ intention theories” that force readers to restrict their interpretations “to what the author in some narrow and constrained sense intended to put there.”⁹⁰ At another point he suggests that the “complex and structured intention” of a novelist must “embarrass any simple author’s intention theory,”⁹¹ thereby leaving open the possibility that a complex theory might prove adequate to the novelist’s complexity. And when Dworkin concedes that “[n]o plausible theory of interpretation holds that the intention of the author is always irrelevant,”⁹² it sounds as though the issue is practical rather than theoretical, a matter of emphasis rather than principle. But the title of the collection in which *How Law Is Like Literature* appears—*A Matter of Principle*—suggests that the question of authorial intention is, like the other issues he considers, finally “a matter of principle.”

89. GEORGE SANTAYANA, CHARACTER AND OPINION IN THE UNITED STATES 16 (John W. Yolton ed., Transaction 1991) (1920).

90. DWORKIN, *supra* note 64, at 154.

91. *Id.* at 163.

92. *Id.* at 155.

If it is indeed a matter of principle one wonders why Dworkin spends so much effort criticizing those “more doctrinaire” or “simple” versions of a theory that he is determined to reject even in its strongest version. One reason for suspecting that Dworkin’s strategy is rhetorical rather than intellectual is that he never tells us who holds the “more doctrinaire” theories or, for that matter, who holds any more complex theories. The only opposing theorist he mentions is E.D. Hirsch, and he fails to tell us whether Hirsch’s work could be classified with the “more doctrinaire” theories, the “simple” theories, or whether it belongs in some other, unnamed category.⁹³ One can only suppose that Dworkin feels that Hirsch’s theorizing belongs in one or both of the two former categories, since he takes only one short paragraph to dismiss it.

Yet Hirsch’s theory of authorial intention does indeed provide plausible responses to the objections Dworkin raises. In *How Law Is Like Literature*, Dworkin insists that any theory of authorial intention must restrict meaning to, at best, “the full set of interpretive beliefs an author has at a particular moment, say at the moment he sends final galleys to the printer.”⁹⁴ Therefore, Dworkin charges, “the author’s intention school, as I understand it, makes the value of a work of art turn on a narrow and constrained view of the intentions of the author” because it ignores a characteristic “kind or level of intention, which is the intention to create a work of art whose nature or meaning is not fixed . . . because it is a work of art.”⁹⁵ Yet in *Validity in Interpretation*, Hirsch had pointed out that “for some genres of texts the author submits to the convention that his willed implications must go far beyond what he explicitly knows.”⁹⁶ Early in *Validity in Interpretation* Hirsch observes that “it is very possible to mean what one is not conscious of meaning . . . [T]he distinction between attended and unattended meanings is not the same as the distinction between what an author means and what he does not mean.”⁹⁷

In later writings Hirsch went even further to meet the kind of objections that Dworkin raises. In *Meaning and Significance Reinterpreted*, Hirsch revised his conception of meaning in order to take explicit account of the intention, shared by most poets, novelists, and dramatists, “to communicate effectively in the future”⁹⁸ with readers in widely different circumstances. In doing so,

93. *Id.* at 153.

94. *Id.* at 157-58.

95. *Id.* at 158.

96. E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* 123 (1967).

97. *Id.* at 22.

98. E.D. Hirsch, Jr., *Meaning and Significance Reinterpreted*, 11 *CRITICAL INQUIRY* 202,

Hirsch engages in exemplary self-criticism. Finding that his earlier conception of the realm of meaning failed to leave sufficient room for the future-oriented intentions of authors, he expands his conception of the “domain of meaning” to include the possibility of “new exemplifications [that] are embraced by original intention.”⁹⁹ Thus in reading one of Shakespeare’s sonnets on love, for example, the possibility of each reader thinking of different “exemplifications” does not require that each has a different meaning in mind:

If you think of your beloved in reading Shakespeare’s sonnet, while I think of mine, that does not make the meaning of the sonnet different for us, assuming that we both understand (as of course we do) that the text’s meaning is not limited to any particular exemplification but rather embraces many, many exemplifications.¹⁰⁰

Hirsch makes this point even more forcefully in his 1996 essay *The Validity of Allegory*:

Authors normally intend that readers should go beyond the authors’ explicit intentions. Aware that their writing will be read by strangers distant in space and time, authors *want* their meanings to go beyond their own conscious intentions and the constraints on meaning that are imposed by what they and their contemporaries can conceive in their own time and place. Shakespeare clearly expressed such an intention to go beyond conscious intention when he predicted that his mistress would continue to live posthumously in his sonnets, not only because his verse is splendid but also because future lovers will apply his words in unforeseen ways to their own lives.¹⁰¹

The criterion of authorial intention, in Hirsch’s treatment, requires not Dworkin’s “narrow and constrained view of the intentions of the author” but rather a large-minded willingness to consult “the spirit of original meaning”¹⁰² of the work as a whole even against the literal sense of particular passages. The danger is not that the criterion will allow too little but too much, that “in practice” it will be nothing more than “a pious slogan” available to support “whatever interpretation one wishes to defend.”¹⁰³ Hirsch does not deny that the standard of original intention may be misused, but he argues that a survey of the history of interpretation suggests that “[b]eing true to

205 (1984).

99. *Id.* at 215.

100. *Id.* at 210.

101. E.D. Hirsch, Jr., *The Validity of Allegory*, in CONVEGNO INTERNAZIONALE SUL TEMA: ERMENEUTICA E CRITICA 215, 221 (1996).

102. *Id.* at 227.

103. *Id.* at 228.

the spirit has in fact been more than empty rhetorical gesture."¹⁰⁴ Interpretations are always debatable, but there is a clear difference between those that at least aim at fidelity to the original and those that practice what Hirsch calls "the hermeneutics of violence."¹⁰⁵

IV. ANTI-FOUNDATIONALISM AS "EXTERNAL SKEPTICISM": RONALD DWORKIN AND STANLEY FISH

No historical survey would convince Stanley Fish that either Dworkin or Hirsch were right; it is a cardinal point of his theory that there is no neutral evidence, inside or outside of the text, to which one can appeal. No matter how hard one looks, the "independent or uninterpreted text" is nowhere to be found.¹⁰⁶ Nor can one use the historical context, or any kind of context, as a basis for interpreting a literary or legal text, since "context is a product of interpretation and as such is itself variable as a constraint."¹⁰⁷ Fish's point certainly is persuasive when applied to his own theses; just as they are not based on any sort of literary or historical evidence, so they cannot be disproved by any. Like religious dogmas and metaphysical propositions, Fish's key assertions are compatible with any and all facts or events.

Just for that reason, however, they provide little or no practical guidance in confronting the inescapable task of choosing between rival interpretations of particular texts. Fish himself emphasizes that his "anti-foundationalism" is "unable to give" any assistance at all in regard to "knowledge, goals, purposes, strategies."¹⁰⁸ Thus, in discussing attempts to arrive at "the just bounds between church and state," Fish refuses to offer any suggestion of his own beyond the injunction to "figure out what you think is right and then look around for ways to be true to it."¹⁰⁹ This refusal is consistent with his general thesis that "theory," his or anybody else's, has "no consequences."¹¹⁰ More accurately if less radically, theory has at least no purely "theoretical consequences;" in other words, "the consequences of theory . . . are not the consequences of a practice that stands in a relationship of precedence and mastery to other

104. *Id.*

105. *Id.* at 233.

106. STANLEY FISH, *Working on the Chain Gang: Interpretations in Law and Literature*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 87, 98.

107. FISH, *supra* note 86, at 103, 108.

108. STANLEY FISH, *Anti-Foundationalism, Theory, Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 342, 355.

109. Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2332 (1997).

110. STANLEY FISH, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 315, 325.

practices.”¹¹¹ What Fish calls “theory talk” may indeed have all sorts of rhetorical effects, but none of these, in his view, could possibly have anything to do with the logic of an argument, what Jürgen Habermas calls the “unforced force of a better insight.”¹¹²

Most works discussing the connections between law and literature propose ways in which legal thinking might be improved by the study of either works of literature or theories about literature and its interpretation. Weisberg, Nussbaum and Dworkin all make such proposals. Fish, however, makes none. Instead he advocates looking at both law and literature from a perspective that sees both as exemplifications of “the truth that all operations . . . are rhetorical.”¹¹³ In turn “rhetoric” is simply “another word for force,”¹¹⁴ and “force” itself “is simply a (pejorative) name for the thrust or assertion of some point of view,” or, to put it another way, “force is just another name for what follows naturally from conviction.”¹¹⁵

At times, Fish seems happy to affirm this thesis in a way that emphasizes his radical break with common sense. Common sense holds that there is a big difference between making a decision because one chooses to do so and obeying an order made by someone holding a gun to one’s head. According to Fish’s philosophy, however, there is “finally no difference at all”¹¹⁶ between the former and the latter:

Or to put the matter another way: *there is always a gun at your head*. Sometimes the gun is, in literal fact, a gun; sometimes it is a reason, an assertion whose weight is inseparable from some already assumed purpose; sometimes it is a desire, the urging of a state of affairs to which you are already predisposed; sometimes it is a need you already feel; sometimes it is a name—country, justice, honor, love, God—whose power you have already internalized. Whatever it is, it will always be a form of coercion, of an imperative whose source is an interest which speaks to the interest in you. And this leads me to a second aphorism: not only is there always a gun at your head; *the gun at your head is your head*; the interests that seek to compel you are appealing and therefore pressuring only to the extent they already live within you, and indeed *are* you. In the end we are always self-compelled, coerced by forces—beliefs, convictions,

111. *Id.* at 337.

112. JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 305 (Frederick Lawrence trans., MIT Press 1987) (1985).

113. STANLEY FISH, *Rhetoric*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 471, 493.

114. STANLEY FISH, *Force*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 503, 517.

115. *Id.* at 521.

116. *Id.* at 518.

reasons, desires—from which we cannot move one inch away.¹¹⁷

Fish expends a good deal of ingenuity, even coining not one but two “aphorisms,” to encourage the reader to see things as they would appear to a mind detached from all situations, free to see things as they are “finally,” as they are “[i]n the end.”

Dworkin, whose putative errors Fish attacks with so much gusto in essays with titles like *Wrong Again*¹¹⁸ and *Still Wrong After All These Years*,¹¹⁹ has a point when he characterizes Fish’s perspective as a kind of “external skepticism”¹²⁰ that is irrelevant to the ongoing concerns of literature and law. For Dworkin, Fish’s brand of skepticism is

skepticism brought to an enterprise from the outside, skepticism which engages no arguments of the sort the enterprise requires, skepticism which is simply tacked on at the end of our various interpretive and political convictions, leaving them all somehow unruffled and in place.¹²¹

Fish concedes as much when he declares that his “anti-foundationalism” has no distinctive “knowledge, goals, purposes, strategies”¹²² to offer. Fish nonetheless agrees with Dworkin that “external skepticism” is irrelevant to any conceivable practice. Dworkin and Fish agree further that “external skepticism” describes a mistaken attempt to, in Fish’s paraphrase of Dworkin, “speak from the outside and inside at once.”¹²³

The two disagree, however, about whose work is more flawed by such an attempt. Fish nominates Dworkin’s *Law’s Empire*, since the mistake of the external skeptic “is the mistake that Dworkin himself makes throughout the book. Indeed, it is the mistake that *is* the book.”¹²⁴ This seems odd, since Fish himself notes that Dworkin in *Law’s Empire* is offering a principle, “law as integrity,” that appears anything but skeptical.¹²⁵ Fish argues, however, that Dworkin’s promotion of law as integrity assumes the validity of “the general claim of philosophy to be a model of reflection that exists on a level superior to, and revelatory of, mere practice”—and the notion that

117. FISH, *supra* note 114, at 520.

118. See FISH, *supra* note 86.

119. See STANLEY FISH, *Still Wrong After All These Years*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 356.

120. RONALD DWORKIN, *On Interpretation and Objectivity*, in *A MATTER OF PRINCIPLE*, *supra* note 64, at 167, 176.

121. *Id.* at 177.

122. FISH, *supra* note 108, at 355.

123. FISH, *supra* note 119, at 371.

124. *Id.*

125. *Id.* at 356.

there is a realm beyond “mere practice” is, in Fish’s view, the key error that Dworkin’s “law as integrity” shares with “external skepticism.”¹²⁶ Dworkin, on the other hand, claims that it is “people like Fish”¹²⁷ who most strikingly exemplify external skepticism. For both Fish and Dworkin, the only skepticism worth taking seriously is a limited skepticism, a skepticism about means rather than ends. Thus the doubts of an “external skeptic” about the value of sports in general would be irrelevant to the concerns of baseball players and managers, while the skepticism of an analyst of the game who doubted the value of home run hitters as opposed to batters who could get on base frequently might be relevant.¹²⁸ In any case, Fish agrees with Dworkin when the latter asserts “[t]his kind of skepticism can make no difference to our own efforts to understand and improve interpretation, art and law.”¹²⁹ Thus, their answers to Dworkin’s rhetorical question “What do we lose in giving it up?”¹³⁰ would seem to be the same: nothing very important.

An advocate of “external skepticism” might reply that something very important would indeed be lost: the possibility of escaping at least occasionally from our usual goal-oriented perspective to view the world *sub specie aeternitas*, under the aspect of eternity. The stance of the mystic or contemplative philosopher might well be characterized as “external skepticism” without thereby impugning the enterprise. Metaphysicians and theologians have argued that the attainment of such a perspective is the height of wisdom, bringing with it serenity and fulfillment. This defense would not be open to Fish himself, since he views the world not as a source of contemplation but rather “as a field of possibilities to be seized.”¹³¹ It is possible that some readers, delighted to find relief of any sort from the anxieties of contemporary life, may feel only gratitude for the verbal legerdemain by which Fish makes the case that “finally” and “[i]n the end” the difference between making up one’s own mind and being threatened by a gunman is unimportant. Most of those interested in the connections between literature and law, however, are likely to turn to Fish’s work not for therapy but for assistance in clarifying, refining, and explicating the distinctions that enable them

126. *Id.* at 371.

127. DWORKIN, *supra* note 120, at 172.

128. Fish observes that Dworkin’s urging legal practitioners to practice law as integrity is analogous to somebody telling baseball players that they have an “obligation to try and score runs,” as though some members of the team “thought it something else.” FISH, *supra* note 119, at 368.

129. DWORKIN, *supra* note 120, at 177.

130. *Id.*

131. STANLEY FISH, *Critical Self-Consciousness, Or Can We Know What We’re Doing?*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 436, 465.

to make the decisions confronting them as literary critics, lawyers, legal scholars, and citizens. Unfortunately, the characterization of the debates over such questions as rhetorical contests rather than as searches for the truth provides little or no guidance in making these decisions—decisions that remain unavoidable, however they are characterized.

V. THE IRRELEVANCE OF LITERATURE? RICHARD POSNER

For Fish the incapacity of his “anti-foundationalism” to assist in the resolution of specific questions of legal interpretation—an inability that Fish not merely concedes but emphasizes—illustrates not the limitations of his own approach but the validity of his general contention that each interpretive community establishes its own particular rules, rules that have no special standing outside that community. In doing so he is not speaking as a literary scholar but as a philosopher and metaphysician or, what comes to the same thing, an anti-metaphysician. As Richard Posner pointed out in the first edition of *Law and Literature*, “[i]t is not Fish the Milton scholar who enters the lists; it is Fish the interpretive skeptic . . .”¹³² Richard Posner himself is something of a skeptic. He shares Fish’s secular, pragmatic outlook and, like Fish, refuses to accord literature its traditional authority as a source of insight about human life and moral judgment.

A reader of Fish’s vehement essay on the first edition of Posner’s *Law and Literature*, *Don’t Know Much About the Middle Ages: Posner on Law and Literature*,¹³³ is likely to come away thinking that the two disagree so sharply that in any dispute with either, one is likely to have the other as an ally. When one looks more closely at *Don’t Know Much*, however, the rhetorical energy of the essay is focused not so much on refuting Posner’s theses as on suggesting that Posner’s book, “innocently occasional as it might seem,” is actually “part and parcel of a wholesale effort to restructure several key American institutions in accordance with a very definite, and some would say extreme, political and moral vision.”¹³⁴

Posner, that is, is part of that “vast right-wing conspiracy” about which most of us were alerted only when Hillary Clinton denounced it on nation-wide television. In the “revised and enlarged” 1998 edition of *Law and Literature*, Posner does not reply in kind by

132. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 263 (1988).

133. FISH, *Don’t Know Much About the Middle Ages: Posner on Law and Literature*, in *DOING WHAT COMES NATURALLY*, *supra* note 85, at 294.

134. *Id.* at 310.

questioning Fish's good faith. In fact, he does not respond to Fish's accusation at all. Instead, he addresses Fish's ideas on their own merits, as though speculation about the personal motivations of their author were irrelevant in considering their capacity for explicating the relations between law and literature.

The major addition to the 1998 edition of *Law and Literature* is a section entitled *The Literary Turn in Legal Scholarship*,¹³⁵ the first chapter of which is a critique of "The Edifying School of Legal Scholarship."¹³⁶ Like Fish, Posner is suspicious of those who claim the high moral ground. Just as Fish easily refutes the pretensions of those Critical Legal Theorists who deconstruct traditional moralities only to assert their own moral absolutes, so Posner has little difficulty in demonstrating that literature is larger and more complicated than even the most progressive doctrines. He argues convincingly that the legal principles that Nussbaum, for example, claims to derive from literature owe more to her own enlightened thinking than to any consensus available from the classics, which, as Posner points out, "are full of moral atrocities."¹³⁷ But the momentum of the argument carries Posner too far. Rightly observing that Nussbaum's humanitarianism, however admirable, is not deducible from great works of literature, he cannot refrain from himself extracting a doctrine from the same source. Declaring roundly that "the world of literature is a moral anarchy," he concludes that "immersion in it [literature] teaches moral relativism."¹³⁸

In contrast to Nussbaum and Weisberg, both of whom affirm the ideas they claim to discover in literature, Posner does not use his discovery that literature teaches moral relativism as an argument in favor of that doctrine. For Posner, what literature may seem to teach is unimportant, since literature in any case is largely irrelevant to moral inquiry. At times, he suggests that literature is irrelevant or unimportant to any central human concern, so that he is finally "obliged to consider why, if we do not read literature in order to form better or truer opinions on matters of religion or politics, of economics or morality, we read it at all."¹³⁹ After considering a number of rather weak candidates ("We might read to improve our reading skills;" "We might read literature to learn to express ourselves better") Posner muses that in reading "we acquire experience vicariously" and thereby "expand our emotional as well

135. POSNER, *supra* note 36, at 303.

136. *Id.* at 305.

137. *Id.* at 311.

138. *Id.*

139. *Id.* at 326.

as our intellectual horizons."¹⁴⁰ This seems uncomfortably close to the traditional notions about literature's moral significance that Posner wants to reject. Eventually he returns to his original refusal of any moral relevance to literature, claiming finally that "the moral properties [of literature] are almost sheer distraction."¹⁴¹

If literature has nothing to offer by way of moral guidance, it follows that it will have little to say about justice and thus about ethical issues confronting judges, lawyers, and legal scholars. Posner is right to assert that legal thinkers have little to learn from contemporary literary theorists, and he is right to reject the efforts of Weisberg and Nussbaum to align literature with their own moral principles, but he is wrong, I think, to discount the contribution literature makes to moral awareness and thus to our understanding of justice and law.

In doing so, however, Posner seems to have the support of his occasional adversary, Fish. Although Fish has been "reading poetry . . . for a living" for decades, its significance for the rest of his life now seems "entirely contingent and in [his] case almost non-existent."¹⁴² More generally, Fish disclaims any connections between "aesthetic, political, and philosophical inclinations."¹⁴³ It is worth noting, however, that Fish did not always deny the relationship between literature and life. His first book, he wrote in its closing paragraph, is based on "the assumption that poetry is significant inasmuch as it deals responsibly with the complexities of existence."¹⁴⁴ In the book that made his critical reputation, *Surprised by Sin*, Fish argued that Milton's *Paradise Lost* is truly educational, since it teaches "the hardest of all lessons, distrust of our own abilities and perceptions."¹⁴⁵

It would not be difficult to cite other similarly eloquent statements affirming the significance of literature for moral and even political reflection while rejecting mere didacticism. From Horace and Longinus to Sir Philip Sidney to Ralph Ellison, the moral relevance of literature has been proudly asserted by poets and writers and accepted by the world at large. Perhaps the most impressive witness in this particular case, however, is Posner himself. Over and over again, he connects the greatness of a literary work to its moral depth. He criticizes E.L. Doctorow's *Ragtime* in comparison to Kleist's

140. *Id.* at 326-27.

141. *Id.* at 332.

142. Stanley Fish, *Truth and Toilets: Pragmatism and the Practices of Life*, in *THE REVIVAL OF PRAGMATISM* 418, 427 (Morris Dickstein ed., 1998).

143. *Id.* at 425.

144. STANLEY FISH, *JOHN SKELTON'S POETRY* 260 (1965).

145. STANLEY FISH, *SURPRISED BY SIN: THE READER IN PARADISE LOST* 22 (1967).

Michael Kohlhaas because “the spirit of the original is lost. . . . In Doctorow’s hands, *Michael Kohlhaas* becomes farce or fantasy rather than a meditation on the moral ambiguity of revenge.”¹⁴⁶ Meanwhile, Posner praises the *Iliad* because, among other things, “[t]he *Iliad* teaches not only the excessive character of the passion for revenge but also its fragility as a principle of social order.”¹⁴⁷ Shakespeare, like Homer, is cited by Posner as a teacher of obvious but important moral-political truths: “[T]he play [*Hamlet*] contains a good deal of implicit criticism of revenge. . . . *Hamlet* also illustrates the problem of the avenger’s emotional excess.”¹⁴⁸ And when Posner praises William Gaddis’s *A Frolic of His Own* over Tom Wolfe’s *The Bonfire of the Vanities* because of the former’s “greater depth, resonance, and humanity,”¹⁴⁹ he seems to be accepting entirely if tacitly the old-fashioned view that literary quality and moral insight are closely related though by no means identical.

VI. CONCLUSION

I began this essay by questioning the characterizations of literature by some legal theorists. In doing so, I may have seemed to imply that law professors and other legal scholars should stick to their own discipline and leave literature to the accredited experts in the field. Literature, however, is too important to be turned over to literature professors. Literature’s importance to judges, lawyers, and law professors follows from its importance to human beings in general. Likewise, the argument that literature has no special relevance for legal studies depends on the larger claim that literature provides little or no insight into human life in general. When Posner wants to deny the pertinence of literature to legal studies, he first argues that literature is irrelevant to moral questions of any sort. Posner argues persuasively that literature does not provide vindication of the favored doctrines that Weisberg and Nussbaum profess to discover. There are, however, more substantial arguments for the relevance of literature to life, and thus to law, than those offered by Weisberg and Nussbaum.

Posner believes that the arguments about literature’s relevance may be subsumed into two traditions: the “aesthetic tradition,” which he favors; and an “edifying tradition,” which he opposes.¹⁵⁰ However, it is not necessary to insist on edification as the end of

146. POSNER, *supra* note 36, at 71.

147. *Id.* at 73.

148. *Id.* at 77.

149. *Id.* at 36.

150. *Id.* at 306-07.

literature in order to acknowledge that it offers us more than an opportunity for aesthetic delight, precious as that is in itself. Aristotle, for example, did not insist that poetry point to a moral, but he nevertheless believed that “poetry is something more philosophical and more worthy of serious attention than history,” because poetry tells us “the kinds of things a certain type of person will probably or necessarily say or do in a given situation,” while history merely reports back what certain people actually did do.¹⁵¹ History deals with “particular facts,” while poetry is concerned with “universal truths” about human life.¹⁵² In Aristotle’s view, poetry does not tell us what we should do—that is, it does not edify—but rather informs us about the sort of things that people “probably” or “necessarily” do. Aristotle’s *Poetics* presents one highly influential version of the traditional idea that literature is in some sense an imitation of life.

This idea, dominant in Western culture until the Romantics, carries with it the notion that literature provides a way of learning about life without actually having to undergo experiences for oneself. The mimetic theory of literature is no longer fashionable, but it is nevertheless affirmed in practice by historians, sociologists, and ordinary readers every day. We still read novels set in distant countries to find out about how people live in faraway places, and we read stories about war to learn about how people act in extreme situations. Courtroom dramas are popular because, among other reasons, non-jurists are curious about what it feels like to take part in a trial. “Is it true to life?” remains an important criterion for judging novels, short stories, and films, even though anti-foundationalists skeptics insist that such questions should not be asked.

Literature, however, does far more than merely report on the way things are in diverse locations, eras, and milieus, though it surely does that. Literature, more than any other art, is a vehicle for moral reflection and discrimination. There may be great works of music, painting, and sculpture that seem to lack moral ramifications, but the moral implications of great works of literature are inescapable, which is not to say that they are necessarily obvious or unambiguous. Even those literary works that avoid moralizing and philosophizing cannot avoid implicit affirmations, perhaps all the more powerful because they are not explicit.

It is of course true that writers differ in the virtues they commend and the vices they condemn, explicitly or implicitly. The variety of

151. Aristotle, *On the Art of Poetry (Poetics)*, in CLASSICAL LITERARY CRITICISM 29, 43-44 (T.S. Dorsch trans., Penguin Books 1965).

152. *Id.* at 44.

philosophies and religions endorsed by literary works, and even the diversity of human qualities either applauded or scorned in poetry, fiction, and drama, if considered with the requisite seriousness, cannot help but check the human propensity to identify the goods possible to human beings with what is considered good in one's own circle. Experiencing literature can and often does deepen, complicate, and qualify our moral judgments—a process different, more subtle, and less immediately gratifying than what is usually connoted by “edification.” To say so much is to challenge Posner's attempt to force one to choose between edification and aestheticism, while also acknowledging why his own choice of aestheticism seems at least momentarily plausible. Wide reading in the literary classics certainly does lead one to doubt that all moral truth is contained in any particular doctrine, a result that ideological absolutists would find less than edifying. If such doubt constitutes “moral relativism,” then Posner is right. There is a good deal of room, however, between accepting one doctrine or ideology as the complete truth about life and denying morality altogether.

The humanistic tradition in literary criticism brings literature to bear on moral and political dilemmas not because any univocal answer is forthcoming, but because literature provides a salutary check on the human willingness to be satisfied with slogans, especially those of one's own party. It is, of course, possible to use literature merely as an instrument to advance an ideological agenda. When confronted by such attempts, the humanistic critic has an obligation to call attention to the variety and complexity of literature. The breadth and depth of great literature are not evidence of “moral anarchy,” as Posner asserts, but they do limit the legitimate influence of literature to the broadly moral rather than the narrowly political. If law has nothing to do with justice, if legal discussion is simply a struggle to gain power with words (for the moment) rather than arms, then literature has no particular relevance for the law. If, on the other hand, the law has something to do with justice, and if legal studies involve reflection on human life as well as the manipulation of symbols for rhetorical effect, then those concerned with law have something to learn from literature.

I am not nearly so worried that literary works may be occasionally misinterpreted by legal scholars as I am about the possibility that lawyers, judges, and law professors, believing either that the significance of literature may be summed up in a few words—as Weisberg's and Nussbaum's theses suggest—or that literature has nothing to teach them—as Fish and Posner suppose—may fail to turn to poems, novels, and plays for insight about the law as an aspect of the human condition.

