

Empathy and Judgment

Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon Press, 1996. Pp. xvii, 137. \$20.

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Reclaiming the place of philosophy as a metadiscipline,¹ philosophers have once more assumed the role of mediating boundary disputes among other disciplines. As the boundaries and shapes of various disciplines have grown vague and controversial, that role has become particularly significant and particularly quixotic as well.² Those who play this role have many audiences. Some speak primarily to, and about, scholars. Others concern themselves with pedagogy. Still others think about the impact of the disciplines on public officials and public affairs.

The relationship of law and literature is an especially fruitful interface for such scrutiny. Although courses on law and literature have proliferated in law schools, accompanied by a bull market in interdisciplinary articles, books, and journals,³ there is little agreement about the content and purpose of these activities. Indeed, there seem to be almost as many ways of giving content to law and literature as there are practitioners of it. This intersection of disciplines may variously become

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1. "The notion that there is an autonomous discipline called 'philosophy,' distinct from and sitting in judgment upon both religion and science, is of quite recent origin. . . . [This is] the sense in which it has been understood as an academic subject in the nineteenth century." RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 131 (1979). The philosophical contributions of Ludwig Wittgenstein and Richard Rorty are widely understood as challenging this traditional way of conceiving of philosophy, and they have been influential in doing so. See also *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* (Quentin Skinner ed., 1985).

2. See *THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS* (Avner Cohen & Marcelo Dascal eds., 1989); *REDRAWING THE LINES: ANALYTICAL PHILOSOPHY, DECONSTRUCTION, AND LITERARY THEORY* (Reed W. Dasenbrook ed., 1989).

3. The proliferation of courses and research on law and literature is discussed in Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 *VAL. U. L. REV.* 665 (1995).

- (a) law *in* literature (the depiction of lawyers, judges, and legal practices in fiction), or
- (b) law *as* literature (the application of theories and techniques of understanding, borrowed from literary criticism, to legal texts and activities), or
- (c) the law *of* literature (consideration of the legal norms that shape and limit literary activity and attitudes), or
- (d) law *as influenced by* literature (examination of the role of literature in affecting legislation, judicial practice, political attitudes, and so on).

This list is only suggestive. Categories may be added to it, and these four categories themselves accommodate indefinitely many agendas and preoccupations.⁴

The purpose of all this activity is, if anything, more controversial than its content. To be sure, it provides employment for defrocked humanities scholars who have migrated to law schools in recent decades, and it affords law students a non-narcotic diversion from the rigors of legal doctrines and the apprehensions of study for the bar. At the same time, the vast majority of legal academicians persist in seeing law and literature courses and scholarship as fluff, peripheral to the enterprise of training lawyers, and therefore dispensable and unserious. No doubt many law students, lawyers, and judges agree. And there is also no doubt that equally many "pure" literary scholars continue to view their interdisciplinary cousins as adulterating the enterprise of theorizing about literature, as tainting the delicate dissection of transactions between readers and writers with distracting references to politics and legal doctrine.

Such skeptics about law and literature, as self-appointed guardians of traditional borders between the disciplines, may from one point of view be seen as fighting a war long lost. That, at least, is likely to be the position of scholars who have grown up without such borders, scholars who are more at home talking about texts in general than about legal texts or literary texts in isolation.⁵ The existence of this very Journal testifies to the viability and centrality of such scholarship.

4. I briefly discuss some of these possibilities in *Ethics and Style: The Lesson of Literature for Law*, 45 STAN. L. REV. 497 (1993).

5. Over the last thirty years, the work of such theorists as Roland Barthes and Jacques Derrida has effected a revolution in the study of language and in our understanding of all disciplines in which texts play an essential role. Hermeneutics, the study of the retrieval of meaning, has focussed the attention of legal and literary scholars on problems that their text-based enterprises have in common. Postmodern scholars are typically preoccupied with the implications of hermeneutical questions for understanding and communication in general. Among the most influential texts have been ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* (Annette Lavers & Colin Smith trans., 1968); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 1976); HANS-GEORG GADAMER, *TRUTH AND METHOD* (Garrett Barden & John Cumming eds. & trans., 1975).

In this context, "interdisciplinary studies" threatens to become a misnomer when the disciplines themselves lose their identity and distinctiveness.

We can distinguish, therefore, three orientations toward such enterprises as law and literature. The first orientation—represented no doubt by the significant majority of legal academics, lawyers, and teachers of literature—presupposes that familiar, historically recognized borders among disciplines remain reliably and unshakeably in place. Interdisciplinary work is therefore secondary both in conception and in importance. The second orientation also presupposes that what we mean by law and by literature has changed little, that for the most part the study and practice of each discipline is bounded as it has been for most of the twentieth century. But this orientation is distinguished by a commitment to the importance of interdisciplinary work, in particular by the argument that lawyers and law teachers must accord literature a special place. The third orientation, as we have seen, is characteristic of those who question the assumed borders of disciplines and who deploy techniques, such as the deconstruction of texts and the exploration of hermeneutical insights, that transcend borders, arguably making them irrelevant. This third orientation belongs distinctively to postmodern commentators.

The position that Martha Nussbaum takes in her eloquent and passionate new book, *Poetic Justice: The Literary Imagination and Public Life*,⁶ and the task she sets for herself, clearly reflect the second orientation. She accepts and adheres to familiar distinctions between law and literature and illuminates the lessons of the latter for the former. As her argument progresses, it seems most immediately addressed to judges. She seeks to show that judicial decisions informed by "the literary imagination" are likely to be sounder and wiser than judgments reached by other means. Secondarily, she argues that legal education and the perspectives of lawyers should similarly be tempered by literary study.

If the focus of postmodern writers is on understanding and meaning, the preoccupation of more traditional writers such as Nussbaum is with morality. In her view, the lessons of literature for law are unequivocally moral lessons, lessons that are both indispensable for those who claim to do justice and unlikely to be learned in other ways,⁷ such as through social interaction.⁸ This impulse and

6. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1996) [hereinafter *POETIC JUSTICE*].

7. See *infra* text accompanying note 14.

8. Nussbaum's concerns echo the notorious debates about relationships between "the two cultures" (science and the humanities) in the early 1960's. C. P. Snow and F. R. Leavis, as pointmen in the debates, disagreed about whether science and the humanities define two

conviction lead Nussbaum to accord training in literature an essential role in the cultivation of empathy and to accord empathy an essential role in judging. In the following discussion, I shall fill out the details of Nussbaum's argument (Part I), examine the implications and limits of her literary examples and her underlying conception of literature (Part II), and examine the implications and limits of her conception of the constraints of law and the role of judges (Part III).

I. LITERATURE AND MORAL IMAGINATION

Poetic Justice is derived from a series of lectures first given in 1991 at Northwestern University Law School and subsequently refined before other academic audiences. Nussbaum cites her experience teaching a law and literature course at the University of Chicago Law School in 1994 as shaping her arguments. Long associated with Brown University, most recently as University Professor, she is now professor of ethics at the University of Chicago. Her influential and well-received earlier books include works on Aristotelian theories of moral development⁹ and on the intersection of literature and moral philosophy.¹⁰

Two long-standing intellectual commitments are reflected in her agenda for law and literature. The first is a commitment to understanding the indispensable role of emotions in judgment, in particular the role of compassion and mercy in public judgment. The second is a commitment to the intelligibility of the concept of "quality of life," and to the defense of transcultural, nonrelativistic standards for measuring and assessing it.¹¹ What emerges from these ingredients are "the investigation and principled defense of a humanistic and multivalued conception of public rationality that is powerfully exemplified in the common law tradition."¹²

Poetic Justice is more hortatory than analytical. It defends unabashedly optimistic conceptions of the emotional potential of human beings, the power of literature to educe strong, beneficent emotions, and the capacity for wise, emotionally informed judgment among persons in general, among lawyers in particular, and even more particularly among judges. Nussbaum clearly rejects the more extreme claims of multiculturalists. For her, the relevant moral

separate cultures and whether the humanities naturally have hegemony over the transmission and refinement of morality. In claiming that role for literature, Nussbaum to some extent follows Leavis. See F. R. LEAVIS, *TWO CULTURES? THE SIGNIFICANCE OF C. P. SNOW* (1962); C. P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* (1964).

9. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* (1986).

10. MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990).

11. See *THE QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993).

12. *POETIC JUSTICE*, *supra* note 6, at xv.

community is Western culture as it has evolved over recent millenia rather than the Balkanized subcultures of contemporary cultural discourse. It is important to look more closely at these features of her account, and to appreciate the ways in which they challenge the intellectual fashion, at least as that fashion is represented in the work of Jacques Derrida, Catherine MacKinnon, and Stanley Fish, rather than, for example, William Bennett.¹³

The essential first step of Nussbaum's argument is that persons in general are morally educable largely because they are emotionally educable. She is not concerned with self-regarding emotions such as anger, anxiety, or pride but rather with the emotions that underlie our perceptions of and transactions with others. Among the latter, certain emotions, such as envy and fear, inhibit such transactions while others, such as compassion, facilitate them. In Nussbaum's Aristotelian picture of human nature, compassion can be cultivated. Indeed it *must* be cultivated if persons are to exercise sensitive and refined moral judgment. Morality, in turn, is not a Kantian matter of determining universal rules and their instantiations but rather a matter of carrying out particularized acts characterized by appropriate feelings and other-regarding intentions. Compassion in this sense testifies against the privacy of emotions; it is possible only to the extent that one person enters into the emotions of another. This kind of linkage in turn makes possible moral responsiveness.

Nussbaum gives first place to literature in the triggering and cultivation of compassion (or empathy). At first, this seems odd. One might assume that compassion is directly evoked by social life rather than by reading, that our capacity for compassion is tested and aroused through the implicit demands of others, through observing and joining their pleasures and pains. Nussbaum thinks otherwise, apparently for two reasons. First, authors heighten and direct the opportunities for feeling empathy. Their creative intelligence concentrates the experience. We are single-minded in our attention to literature even if we are inattentive in our personal encounters. Thus, for Nussbaum, the important works of literature are those we are "held to . . . by love and fear" and not merely by "intellectual exhilaration and rational self-interest."¹⁴ Her second reason for

13. I have in mind Nussbaum's implicit rejection of skepticism about the coherent moral evolution of Western culture, the kind of skepticism that is exemplified by MacKinnon's self-styled Marxist analysis of the effects of power and bias on moral consciousness, see CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989), and by Fish's suggestion that moral assumptions depend on the adventitious evolution of interpretive communities, see STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989). The popular writings of William Bennett are free of such qualms about power and the relativity of value. See *THE BOOK OF VIRTUES* (1994); *THE MORAL COMPASS* (1995).

14. *POETIC JUSTICE*, *supra* note 6, at 30.

favoring literature over social life as a goad for empathy is that empathy includes metaphorical thinking, and literature is the main context in which such thinking flowers. In this sense, reading literature takes precedence over reading history: “[H]istory simply shows us ‘what happened,’ whereas works of literary art show us ‘things such as might happen’ in a human life.”¹⁵

Nussbaum has great confidence in the ability of persons in general and legal decision-makers in particular to engage in metaphorical thinking, guided by empathy, in their public roles. “[T]his imagination—including its playfulness, including its eroticism—is the necessary basis for good government of a country of equal and free citizens. With it, reason is beneficent, steered by a generous view of its objects; without its charity, reason is cold and cruel.”¹⁶ The implied dichotomy here is sharp. It seems to apply not only to individuals (those with playful imagination and those without) but also to particular judgments (those informed by playful imagination and those informed by cold reason).

This step in her argument merits analysis. On one hand, many will regard it as transparently (and heartwarmingly) true. Empathy, guided by playful imagination and guiding reason, is always a good thing; its absence is always regrettable. Thus, an empathetic decision is necessarily better than a nonempathetic one. On the other hand, the step involves easy, too easy, elisions. Does playful imagination always involve beneficence and generosity—or can the play of imagination equally well serve cruelty and selfishness? Is analytical reason always cold and defective, or do many problems of legal judgment require hard choices? Do such problems often require us to disregard our empathetic impulses, however regretfully? These questions implicate Nussbaum’s conception of law and the task of judging and will be considered in Part III.

The premises of Nussbaum’s argument represent a qualified (Aristotelian) form of individualism whereby full development of individual moral capacities follows a describable course. The individual who does not use his imagination to enter into the lives of others, to apprehend both their difference and their accessibility, is doubly doomed, doomed to a narrow and ungenerous range of emotions and doomed to moral inadequacy. In other words, imagination, or what Nussbaum calls “fancy,”¹⁷ is the vehicle through which emotions are cultivated. Moreover, the exercise of fancy develops not just any emotions but a hierarchy or ordering of

15. *Id.* at 5.

16. *Id.* at 43.

17. *Id.* at 13-52.

emotions that makes possible responsive, generous, and particularized actions. Individuals alone are bound to lack such ordered feelings and are therefore incapable of refined and sophisticated moral discrimination. Yet, as we have seen, social life itself is for Nussbaum neither the preferred nor the necessary medium for emotional/moral flourishing. Rather, literature is imaginative and “playful” participation in others’ lives, lives that are recreated through the prism of the author’s own imagination and thus transformed into seductive metaphors. To be sure, a reader who has lived in chaste isolation from others may not be the ideal beneficiary of literature’s lessons, but Nussbaum says little about how much living is a precondition for growth through reading. In any event, the community in her version of communitarianism is one in which persons “connect” through authors and books.¹⁸

Although Nussbaum never describes the emotions that inform morality or the parameters of moral judgment, the reason is neither coyness nor relativism. If they are emotions at all, empathy and compassion are second-order emotions; they are more accurately seen as modes of being in touch with the emotions, feelings, expectations, and vulnerabilities of others. What we expect from judges is not the experience of first-order emotions—such as fear, love, anger, distress—but the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others. Moreover, empathy endows the judge with both closeness to and distance from others, the closeness of access and the distance required by fairness and justice. The latter is implicit in recognition by the judge of her power of decision and appreciation of her separate identity.¹⁹

Thus, Nussbaum is not being coy when she declines to specify the relevant emotions and parameters of judgment. Her position is that, for the judge who is not compassionate, no amount of argument and analysis can illuminate what she lacks, and for the compassionate judge, any attempt to set down and analyze the principles and rules of judgment will be otiose. Similarly, her argument is not relativistic. She assumes that compassionate judges, like Tolstoy’s happy families,²⁰ will be more alike than they are unlike. She urges judges and all moral decision-makers to be “confident in the process that some reasons are indeed stronger than others, that some ways of

18. Her preoccupation with empathy invites comparison with E. M. Forster’s concerns in presenting his bookish characters and admonishing them (and us) to “only connect.” E. M. FORSTER, *HOWARDS END*, epigraph (Vintage ed., 1970).

19. *POETIC JUSTICE*, *supra* note 6, at 75.

20. “All happy families are alike but an unhappy family is unhappy after its own fashion.” LEO TOLSTOY, *ANNA KARENINA* 13 (Rosemary Edwards ed. & trans., Penguin Books 1954).

treating human beings are indeed better than others, and can be justified as better by the giving of such reasons."²¹

Such an objectivist commitment can be seen as weak or strong. At its weakest and most formal, it concedes only that *any* moral judge deploys reasons that *she* regards as stronger than others and that for any person who claims to make moral judgments it cannot be the case that all "ways of treating human beings" are morally equivalent. But Nussbaum's commitment is neither weak nor formal. "[A]s concerned readers we search for a human good that we are trying to bring about in and for the human community. . . . Our search is guided, as well, by the judgments and responses of our fellow readers, who themselves are seeking such a comprehensive fit."²² In other words, Nussbaum presupposes a broad and universal humanism to which the imaginative and responsive reading of literature holds a key. Communication among moral agents, facilitated by literature, will yield such harmonious and harmonizing insights.²³

II. ON LITERATURE AND MORALITY

Compelling as it is, Nussbaum's defense of the role of literature begs questions about the nature of literature and the nature of law. I will address questions about literature in this Part and questions about law in the next Part.

Nussbaum examines three works of literature to illustrate her thesis: Dickens' *Hard Times*, Whitman's *Song of Myself*, and Wright's *Native Son*. Dickens receives the lion's share of attention because the message of *Hard Times* so clearly inspires and tracks Nussbaum's own message. In that novel, Dickens satirizes a mode of education, as well as a mode of thinking, that can variously be described as utilitarian, behaviorist, or crudely empirical. According to this view, only what is directly observable and quantifiable counts as an ingredient of knowledge. Usable knowledge, the only knowledge worth having, uses hard, not soft, data. The methods of science and not the methods of what we have come to call the humanities yield true knowledge and offer a basis for social progress. Thus, the most fruitful insights, the most exhilarating and effective clearing of intellectual cobwebs, arise from applying scientific methods to human affairs.

21. POETIC JUSTICE, *supra* note 6, at 83.

22. *Id.* at 84.

23. Confidence in the harmonizing power of dialogue is, of course, commonplace in contemporary political theory. The most resonant influence is the work of Jürgen Habermas. See 1,2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984, 1987).

Nussbaum demonstrates that Dickens' withering critique of this view works on two levels. The novel is not merely didactic and argumentative but is also written to evoke and exercise the empathetic capacities (the capacity for "fancy") of the reader. In other words, the novel is itself an *example* of the kind of education it commends. The same aims, or complementary ones, are achieved, according to Nussbaum, by Whitman and Wright. Whitman leads us to compare poets with judges as observers who abjure an "abstract pseudomathematical vision of human beings" for "a rich and concrete vision that does justice to human lives."²⁴ That vision embodies a "commitment to fairness and fitness [that] does not yield to bias and favor" but cultivates fairness as neutrality in full recognition of the "rich historical concreteness"²⁵ of persons.

If this commitment to seeing persons at once empathetically and neutrally (without bias) is essential for sound judging, and if literature is essential in showing readers how empathy and neutrality can be compatible, then "we should seek novels that depict the special circumstances of groups with whom we live and whom we want to understand."²⁶ Wright's *Native Son* is, for Nussbaum, a paradigm because it shows "how not only the external circumstances of action, but also anger, fear, and desire have been deformed by racial hatred and its institutional expression."²⁷

Thus, three disparate literary works support the argument that empathy in fueling imagination is an essential aspect of rational judgment in human affairs, and a fortiori in legal affairs. As a statement of humanistic optimism, the argument can hardly be faulted. Certainly some admirable works of literature can be used just as Nussbaum describes, and certainly some judges in varied situations perform their job wisely and benignly when they follow the methods she outlines.

A serious limitation of Nussbaum's argument, however, is that it takes a narrow, even a Procrustean, view of literature and its powers. In this sense, her own account is criticizable on some of the same grounds on which she disparages the utilitarian, pseudoscientific perspective of Mr. Gradgrind in *Hard Times*. Just as there is more to human nature than is accommodated in his philosophy²⁸ and more about the complexity and individuality of human experience to be gleaned from reading than he is prepared to concede, so too

24. POETIC JUSTICE, *supra* note 6, at 81.

25. *Id.*

26. *Id.* at 93.

27. *Id.* at 94.

28. "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Nussbaum offers an artificially constricted view of human nature and the benefits of reading. To be sure, she admits that she is selective, but she implies that works that do not conform to her thesis are lesser works, safely ignored: "We all know that many popular works entice the reader through crude sentiments and the evocation of fantasies that may involve the dehumanization of others."²⁹ Even if we shamefacedly put aside and censor from our awareness such works of apparent near-pornography, much of human nature and its apprehension through literature is left out of account.

Literature and human nature.

Countless works of literature, from Sophocles through Shakespeare and Ibsen to Faulkner and Beckett, show how hard it is to attain the preconditions for empathy and the benign deployment of imagination and judgment. First of all, as Freud was adept at arguing, our emotions often operate in the service of denying rather than pursuing self-knowledge.³⁰ Self-knowledge, a precondition for empathy, is often painful to achieve and often achieved in a struggle with emotional predispositions. Even when it is achieved, self-knowledge can destroy.³¹ For other personalities, self-knowledge and empathy can be used for malign ends; Richard III is nothing if not in touch with the feelings of others, as is every master of manipulation.³² And, often in literature, altruistic motives may serve naiveté.³³ Beyond all this, literature often raises the pessimistic question of whether an imaginative and robust understanding of others in their complexity is compatible with mutual harmony and toleration or whether it is an awful and burdensome kind of knowledge that persons can hardly endure.

Dickens and Wright are special authors in this regard. Dickens has limited empathy for his characters insofar as few of them are three-dimensional (or round) and most are two-dimensional (or flat).³⁴ Rather than interacting with each other and demonstrating a capacity for change, the secondary (flat) players characteristically do star turns, demonstrating a single exaggerated trait. They are persons as epithets. The main (round) players are, in the eyes of many readers,

29. POETIC JUSTICE, *supra* note 6, at 10.

30. See generally SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS (James Strachey, ed. & trans., Norton 1976).

31. SOPHOCLES, OEDIPUS REX (D.W. Myatt trans., Thurmynd Press 1994); WILLIAM SHAKESPEARE, KING LEAR.

32. WILLIAM SHAKESPEARE, RICHARD THE THIRD.

33. HENRIK IBSEN, THE WILD DUCK (1884) *reprinted in* 6 IBSEN, at 127 (James Walter McFarlane ed. & trans., Oxford University Press 1960).

34. Generations of critics owe this distinction to E. M. FORSTER, ASPECTS OF THE NOVEL (1927).

insipid and limited, however much they may be empathetic and benign; they are easily overshadowed by the villains and the eccentrics.³⁵ Wright's characters as well, powerful as they are in stirring social conscience, are not notable for their complexity and variety.

Thus, Nussbaum's curriculum for law and literature threatens to paint an admirably optimistic view of human nature—of the relations among emotion, rationality, imagination, and judgment—but one that may be true neither to its inherent Protean complexity nor to the myriad representations of it in literature.

Literature and politics.

When writers of fiction grapple with law and politics, few find solace and cause for optimism. Many authors are persuaded that institutions are corrupt, that law and politics represent facades and rituals that barely hide, and indeed often facilitate, exploitation.³⁶ Moreover, many believe and argue that the more virtuous a public official is, the more readily she will be defeated and destroyed.³⁷ Victory for the forces of good is always the exception.

Nussbaum says little about, and has little use for, literature that shows the complex contexts in which empathetic and rational judgment must operate. The problem is, of course, more complicated than the Manichean opposition of the forces of altruism and the forces of corruption. Many authors see and fear that the processes of law and politics stultify even more than they corrupt, causing hope and ambition to wither. In countless ways, literature explores these contexts. Such literature should arguably be an important part of a curriculum in law and literature, especially one focussed on the capacities and opportunities of judges.

Literature and hermeneutics.

Much of Nussbaum's analysis seems to proceed on the assumption that literary works speak to us univocally. Certainly, Dickens and Wright hardly suffer from ambiguity, and Nussbaum analyzes Whitman with the assurance that she has ferreted out his singular meanings. Of course, she is correct in treating these particular works

35. Compare, for example, Uriah Heep with David Copperfield in CHARLES DICKENS, *DAVID COPPERFIELD* (Nina Burgis ed., Oxford University Press 1981) or Fagin with Oliver Twist in CHARLES DICKENS, *OLIVER TWIST* (Oxford University Press, 1966).

36. This Rousseauist view of human institutions is displayed in countless novels, plays, and films. See, e.g., ROBERT PENN WARREN, *ALL THE KING'S MEN* (1946); LOUIS MALLE, *LACOMBE, LUCIEN* (Nouvelles Éditions de Films, 1974).

37. See, e.g., HENRIK IBSEN, *AN ENEMY OF THE PEOPLE* (1882), reprinted in 6 IBSEN, *supra* note 33, at 19.

with little deference to variations in meaning and understanding that are reader-dependent. The satirical aspects of *Hard Times*, for example, are hardly more dependent on the particularities of a reader's expectations than are the hortatory aspects of a STOP sign.

Yet, the lessons of hermeneutics and theories of deconstruction are not irrelevant. Many desirable components of a curriculum in law and literature are works that invite endless debate and support multiple perspectives. Works by Kafka (*The Penal Colony*³⁸, for example), Melville (*Billy Budd, Bartleby the Scrivener*³⁹) and Camus (*The Fall*⁴⁰) only begin to fill a roster of writers for whom law is an arena of ambiguity and danger, and judgment is a task full of challenge and peril, both for the judge and the judged. These complexities hardly seem to be accommodated at all in Nussbaum's scheme.

The assumption that novels are primarily didactic and yield moral, or at least edifying, lessons⁴¹ is a premodern assumption, well suited to the context in which nineteenth-century novels (or novels written in a nineteenth-century mode) were published.⁴² Modernism, in the hands of such novelists as Joyce, Kafka, Musil, and Faulkner, teaches us to suspend the assumption that novels mirror moral and epistemological characteristics of the "real world" and to understand the manipulative powers of authors to suspend and surprise realist expectations.⁴³ Finally, postmodernism treats the reader's contribution to the transaction between author and reader as problematic. By focussing on didactic novels and by presuming to generalize readers' responses, Nussbaum takes a premodern, if intuitively seductive, posture toward literature.⁴⁴

III. ON LAW, INSIGHT, AND EMPATHY

If Nussbaum has a constrained view of literature and its relevance,

38. FRANZ KAFKA, *THE PENAL COLONY* (Willa and Edwin Muir trans., 1975).

39. HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Penguin Books, 1986); HERMAN MELVILLE, *Bartleby the Scrivener* in *THE PORTABLE MELVILLE* 45 (Jay Leida ed., 1952).

40. ALBERT CAMUS, *THE FALL* (Justin O'Brien trans., Knopf 1957).

41. POETIC JUSTICE, *supra* note 6, at 12.

42. According to many critics, the nineteenth century (and the decades framing it) was the heyday of the novel, an era in which the novel represented the most familiar and commodious medium for cultural communication and in which questions of form and content were relatively unproblematic. The era that begins with Fielding and ends with Lawrence (the era of Dickens and Eliot, Balzac and Flaubert, Tolstoy and Dostoyevsky) was succeeded by a period of uncertainty and experimentation during which the terms of novelistic communication came to be reconceived by each author.

43. The breakdown of realism and a new self-consciousness about form and method are distinctive features of modernism in art and the theater, of course, as well as in fiction.

44. It seems plausible that this posture and these expectations are shared by most readers of fiction.

the same can be said for her view of law. It is, to be sure, churlish and wrong-headed to quarrel with the idea that empathetic imagination is more desirable than its absence, and that justice presupposes judges who understand the lives, needs, and feelings of those affected by their decisions. It is, however, easy to exaggerate this warm insight.

Consider Nussbaum's claim that empathetic "imagination—including its playfulness, including its eroticism—is the necessary basis for good government of a country of free and equal citizens. With it, reason is beneficent, steered by a generous view of its objects; without its charity, reason is cold and cruel."⁴⁵ Here, there seem to be two notions, that playful imagination *insures* beneficent judging (and law-making) and that generosity should never be absent from the workings of law. The first and less important notion posits an ideal that one *wishes* were true. But, as history, literature, and personal experience too often show, the links between imagination and beneficence (or generosity) cannot be assumed. Nussbaum, drawing inspiration from Aristotle, wants us to join the two dimensions of empathy, the cognitive and the motivational, to convince us that to understand others is to be disposed to treat them altruistically. The claim is attractive in positing an ideal, but the debate regrettably remains open.

The second notion, about links between generosity and law, leads Nussbaum to criticize such legal theorists as Herbert Wechsler and Stanley Fish. Against Wechsler, she emphasizes that neutral principles in law must always be tempered by "as rich and comprehensive an understanding as possible of the situation of the group involved in the case,"⁴⁶ that one must always see legal claimants "as individuals with their own stories to tell."⁴⁷ She attacks Fish for arguing that once you "take away extrahistorical justification . . . you do away with all rational justification. You are left with causes but not good reasons."⁴⁸ Nussbaum counters that the understanding that comes with empathy supplies its own good reasons, its own ethical justification.

Nussbaum criticizes Wechsler and Fish as too ethereal and seeks to bring them down to earth, but she performs her own acts of levitation. Although no one would question that it is highly desirable for judges to understand the background, circumstances, and feelings of parties to the case, these facts are not all always relevant, nor do they always

45. POETIC JUSTICE, *supra* note 11 at 43.

46. *Id.* at 89-90.

47. *Id.* at 96.

48. *Id.* at 84.

inspire generosity. First of all, one must raise the question, "Generous to whom?" It is not possible to be generous to both sides in a case, at least insofar as litigation is a zero-sum game.⁴⁹

Second, generosity and justice are strange bedfellows. To be just, on a common understanding of the term, is to give persons what they deserve; to be generous is to give them more than they deserve. Justice may require us to curtail or limit our generosity. Moreover, justice is often depicted as blind—blind, that is, to the individual characteristics that often appropriately inspire generosity.⁵⁰

Third, it is an over-familiar but uncomfortable fact that desert according to moral claims and desert as measured by legal claims are often different matters. In applying the law, insofar as it is clear and therefore perhaps inflexible, a judge may be prohibited from being beneficent.

Finally and most importantly, fully to inhabit the circumstances of a criminal defendant and listen to the "story" she would tell is almost certainly to exercise generosity in the direction of forgiveness. Responsibility according to the criminal law is typically imposed on those least able to comply because of wholly understandable personal histories and attitudes. Just as psychiatrists, in their pursuit of understanding, refrain from blaming and assigning guilt, so too all empathetic listeners characteristically move from blame to tolerance to (at least partial) forgiveness. But law exists to enforce responsibility even when it is barely reasonable to expect compliance.

None of this implies that imaginative understanding and generosity have no place in law, or that it is anything but desirable to have judges with such dispositions. But the predicament of such judges is often complex, harsh, and painful. Nussbaum offers too little discussion of these hard choices.

IV. CONCLUSION

The picture of human nature, of law and judging, and of the contribution of literature to law that Nussbaum evokes is immensely attractive. It posits an ideal of harmony and beneficence at many levels. Literature is a vehicle for cultivating beneficent habits of mind and heart by which we gain access and insight into the lives of others. Such habits of mind, through imagination, make possible just and generous institutions and social relationships of mutual understanding.

At the same time, literature, like other domains of experience, has endless effects. It may lead us to understand our limits as well as our

49. Perhaps the story of the judgment of Solomon is the exception that proves the rule.

50. I am indebted for this observation to Richard Kay.

strengths, our capacity for evil as well as for good, our capacity for insensitivity and confusion as well as for empathy and mutual transparency. It is possible, and often desirable, to focus on literary works that cast our common humanity in a positive light. As many writers know, however, what is common is not necessarily positive and what is positive is not necessarily common.

Literature teaches many kinds of lessons. Nussbaum's argument is compelling when she stresses the importance for judges of an informed and imaginative understanding of how lives are affected by their reasoned judgment. Her argument is less compelling, or at least less clear, when it presumes to tell us what lessons literature yields and how those lessons may inform justice. If the ideal of empathetic justice and the arguments articulating it are more tentative than Nussbaum admits, the ideal is still a venerated one worth reasserting on the cusp of the new millenium.

