ESSAY

THE LITERARY JUDGE: THE JUDGE AS NOVELIST AND CRITIC

*Justice Evelyn Keyes**

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I. INTRODUCTION

A number of jurisprudential scholars, including Ronald Dworkin and Martha Nussbaum, have exhorted judges to inform their decisionmaking with the insights and techniques of literature and literary criticism.[1] In this Essay, I argue that the

* Justice Evelyn Keyes sits on the Texas Court of Appeals for the First District. She holds a Ph.D. in philosophy from Rice University, a Ph.D. in English from the University of Texas, and a J.D. from the University of Houston Law Center.

1. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); MARTHA NUSSBAUM, POETIC JUSTICE xiii–xv, 79–82 (1995). Not all proponents of applying the insights of literature to the art of judging agree that judges should also use the techniques of literature or criticism to decide cases. *See, e.g.*, RICHARD A. POSNER, LAW & LITERATURE 7 (1998) ("Readers should not infer from my emphasis on the limitations of the law and literature movement that my overall attitude

conflation of literature and the techniques of literary criticism with law and the techniques of legal decisionmaking holds pernicious implications for good judging. At the same time, I argue that a judge can never be a great judge without a thorough grounding in what the humanities, including literature, as well as law itself, really do have to teach us.

The mistaken notion that the techniques of the literary artist or critic are adaptable to judicial decisionmaking arises from a failure to distinguish among categorically different, although superficially similar, forms of evaluative reasoning, or of interpretation and judgment: literary criticism, social criticism, and judicial decisionmaking.

These forms of reasoning share certain critical elements:

- They are value-based and *interpretive*;
- They are *normative*—they apply standards, or norms, in the form of aesthetic, moral, or legal principles to reach a judgment (about a work of art, a moral choice, a form of social organization, or a legal case);[2]
- They are *evaluative*—they weigh or compare potential outcomes to determine which work of art, or society, or legal outcome is good or bad, better or worse under the applicable standards or principles;[3]
- They are *prescriptive*—they tell the artist, the political actor, or the litigants in a case what they should or must do to achieve the best outcome conformable to the rational application of applicable standards.[4]

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toward it is negative. . . . I want it to flourish but not to be overrated. Law and literature have significant commonalities and intersections, but the differences are as important. Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods for interpreting and evaluating it are aesthetic.”).

2. *See* ANDREW G. OLDENQUIST, MORAL PHIL. TEXT & READINGS 12–13 (1978) (defining normative ethics as that aspect of ethics concerned with “appraising moral opinions and principles” to determine the “norms” or standards for what is right and wrong, good or bad, as distinct from theoretical ethics); Rudolf Carnap, *The Rejection of Metaphysics*, *in* 20TH CENTURY PHILOSOPHY: THE ANALYTIC TRADITION 213 (1966) (defining normative ethics as “the philosophy of moral values or moral norms” whose purpose is “to state norms for human action or judgments about moral values”).

3. *See* Mary Ann Fitzgerald & Chad Galloway, *Relevance Judging, Evaluation, and Decision Making in Virtual Libraries: A Descriptive Study*, 52 J. AM. SOC’Y FOR INFO. SCI. & TECH. 989, 990–92 (2001) (“[E]valuative behavior include[s] when participants [are] considering the credibility, quality, trustworthiness, and usefulness of a resource.”).

4. *See* OLDENQUIST, *supra* note 2, at 30 (defining descriptive meaning and “prescriptivity” as the two components of the meaning of “ought,” that which implicitly

But literary criticism, social or political criticism, and judicial decisionmaking are also categorically different:

- The purpose of literature is to communicate insight into the human condition in accordance with aesthetic principles of harmony and metaphor in such a way as to touch common chords of humanity in a multiplicity of readers with different background experiences and, thereby, to evoke understanding and empathy and thus to enlighten and to enrich the human experience;[5] accordingly, the purpose of literary criticism is "to learn and propagate the best that is known and thought in the world, and thus to establish a current of true and fresh ideas;"[6]

- The purpose of social criticism is to argue logically and persuasively for those principles of moral choice or political organization that, when rationally applied, will best achieve the goals of respecting the humanity and worth of those affected by the choice or the system and will thus improve social conditions or further the good of society;[7]

"*prescribe*[s], *will*[s], or *want*[s]" a result and which "ensures that moral judgments do not *just describe things*: they also are *acts of valuing things*"). Because this is not an essay in value theory or normative science, I take it as given that these forms of understanding and appreciation have these characteristics and that the characteristics and terminology of *moral* judgments are applicable to aesthetic judgments or to any other type of value-based reasoning and judgment, as opposed to purely deductive reasoning, i.e., reasoning by valid forms of logical argument from true premises to a necessarily true conclusion. *See generally* IMMANUEL KANT, CRITIQUE OF JUDGMENT (1790), *reprinted in* THE PHILOSOPHY OF IMMANUEL KANT 265–364 (Carl J. Friedrich ed., 1929) (distinguishing pure and practical reason, the latter subsuming aesthetic and moral reason).

5. Wordsworth's famous preface to his and Samuel Taylor Coleridge's "Lyrical Ballads" reflects this understanding of the nature of poetry:

> [A]ll good poetry is the spontaneous overflow of powerful feelings; and though this be true, poems to which any value can be attached were never produced on any variety of subjects but by a man who, being possessed of more than usual organic sensibility, had also thought long and deeply. . . . [T]he understanding of the reader must necessarily be in some degree enlightened, and his affection strengthened and purified.

William Wordsworth, *Preface to the Second Edition* of *Lyrical Ballads* (1800), *in* 2 MAJOR BRITISH WRITERS 20 (G. B. Harrison ed., Harcourt, Brace & World, Inc. 1959) (1954).

6. Matthew Arnold, *Preface to Poems, Edition of 1853*, *in* MAJOR BRITISH WRITERS, *supra* note 5, at 642 (emphasis added).

7. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 60, 246 (1971) (arguing that ideal representative persons behind a veil of ignorance as to their future position in society would choose as organizational principles of a just society his two principles of "fairness" and stating that "[v]iewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can").

- The purpose of legal judgment is to resolve particular cases in accordance with the law and the facts to determine the legal rights and duties of the individual litigants under the applicable legal principles; hence, to do justice to the litigants in the case and to provide a principled and coherent guide for future litigants in similar circumstances.

Accordingly, a directive derived from the standards and techniques applicable to achieve the purposes of one form of human understanding and experience but applied to determine judgment in another is, in my view, categorically mistaken.

II. LITERATURE

Over and over again, artists and critics have expressed the purpose of art as the evocation of truth about the human condition through beauty:

- "'Beauty is truth, truth beauty,'—that is all / Ye know on earth, and all ye need to know."[8]
- "[T]o 'see life steady and see it whole.'"[9]
- "True Wit is Nature to advantage dressed, / What oft was thought, but ne'er so well expressed; / Something, whose truth convinced at sight we find, / That gives us back the image of our mind."[10]

In essence, the artist—including the literary artist—captures some aspect of life in such a way that others recognize it as profoundly true of the common human experience and also as stamped with the author's unique personality or point of view. Art focuses insight in a particular form and thus heightens or makes more profound and broadens experience for the reader, viewer, or listener.

A poet, a dramatist, or a novelist captures the particular elusive thoughts and feelings that open out into realms of experience that are shared and completed by the observer. Thus, all true art is evocative and is completed by the observer, but it is never exhausted by any observer's experience of it because different observers coming from different perspectives will

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8. John Keats, *Ode on a Grecian Urn* (1820), *reprinted in* THE OXFORD POETRY LIBRARY 178 (Elizabeth Cook ed., 1994).

9. Gustav E. Mueller, *Philosophical Foundations of Historical Civilizations*, 1 PHIL. E. & W. 25, 30 (1951).

10. ALEXANDER POPE, *An Essay on Criticism* (1717), *reprinted in* THE BEST OF POPE 59, 61 (George Sherburn ed., 1929).

appreciate different aspects of what is really there in accordance with their own experiences and the depth of their knowledge of the possibilities of art in form and substance. The message of art is thus not complete until the observer brings to it his outside resources and experience of the world (who *he* is) and finds the work both enriching and true to human experience as he knows it, even that completeness is momentary.[11]

The artist accomplishes his objective not only by experiencing deeply himself but by acquiring command of the tools of the art–by mastering *form* as well as possessing the insight into the essence of things that provides *substance*. Thus all art proceeds through metaphor that permits different levels and aspects of meaning to be taken from the same images or words on the page—that permits interpretation through formal structures and devices which frame the boundaries of the artistic experience and focus and guide attention, such as the acts of a play proceeding to the climax and denouement; the stanzas of poetry made memorable by devices, like rhyme and meter, and by formal patterns, like the English or Petrarchan sonnet or the terzarima; or the chapters of a novel that tell a linear or nonlinear story and that may use the techniques and images of realism, magical realism, fantasy, or any of a myriad of forms that can coherently open possibilities of interpretation and thus enlarge the vistas of our shared experience.

III. LITERARY CRITICISM

The criteria for judging a work of literary art are the profundity of its insight into human experience and its use of the forms of literary expression to convey emotion and meaning and to evoke deepened understanding.

All criticism implies interpretation and judgment, but in terms of what? The professional critic or professor of literature makes the experience of the work of art available for students by elucidating the substantive themes and techniques that make up

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11. It is this insight that Wallace Stevens expresses when he writes in his poem "Peter Quince at the Clavier," "Beauty is momentary in the mind— / The fitful tracing of a portal; / But in the flesh it is immortal"; or when he writes of his collection of short poems, "The Man with the Blue Guitar": "This group deals with the incessant conjunctions between things as they are and things imagined. Although the blue guitar is a symbol of the imagination, it is used most often simply as a reference to the individuality of the poet, meaning by the poet any man of imagination." POEMS BY WALLACE STEVENS 5, xi (Samuel French Morse ed., 1947). Quoting this, Stevens's editor, Samuel French Morse, comments: "This set of variations on a theme is his masterpiece of improvisation . . . . It resolved more or less permanently the problem of the poet's relation to his world; and it opened up endless possibilities for further exploration." *Id.*

the work and by helping the student see the relationship of the form of the work to its substance and the relationship of that work of art to other works of art and to experience. The critic thus helps the observer to share the experience of the art more fully than would otherwise be the case within the boundaries that the work permits, i.e., as part of a coherent whole whose parts are directed to an understanding supported by the metaphors and devices used. But all criticism is necessarily partial, both because art itself is evocative and depends on the observer (whether professional or lay) for its completion and because any observer of art necessarily filters the work of art through his own point of view and thus fixes the meaning at the junction between his capacity as an observer of the work to receive and the capacity of the work itself to give. Because art is completed only by the experience and the critical faculties of the different persons who approach it, bringing to it their different educations, theories, preconceptions, emotions, experiences, thoughts, and needs, the meaning of a work is never complete for any one interpreter or fixed for all—it is only confined within the parameters that the form and the substance expressed therein permit. Within those boundaries, it is open to interpretation.

The work of the literary critic, then, is to learn what substantive insights distinguish great art and the principles of form by which those insights are focused and expressed so that, by acquaintance with a variety of works of art and artistic forms and techniques and their use in expressing feelings and ideas, he becomes capable of understanding how the work was constructed and what it is intended to convey and does convey and is thus able to appreciate and to judge the quality of the work and to convey that enriched understanding to others. The critic teaches the student how to separate good art from bad and how to extract the meaning in the metaphor. The critic's prescription for the artist is how to improve his work; for the student it is how to improve his aesthetic understanding and, through deepening that understanding, his understanding of life itself as it is lived.

Although the meaning of a work of art is never entirely closed or fixed, it is not the case that all criticism is equally valid. Some interpretations are shallow. Some are misinformed in that the work simply will not support the interpretation without internal inconsistency or incoherence. Some interpretations are so ideologically constricted as to be blinkered to the full, or even the correct, possibilities of interpretation actually presented by the work—such as rigid Marxist or feminist readings of works never written to express Marxist or feminist themes and

wrenched into those traces only by force of will of the critic and obedience to that will by the student.

When the critic turns from interpreting a work of art in order to enrich the experience of life and uses it merely as a tool to validate an external social theme, he necessarily subordinates the literary values and themes of the work to his own sociological values and themes and thus makes a category mistake: works of art are not sociological polemics—although some sociological polemics do try to present themselves as works of art until they are discovered and cast aside as artistic imposters whose real purpose is not truth, but persuasion to an abstract point of view metaphorically expressed and distorted, i.e., until they are exposed as propaganda. This is the error that must be guarded against by the social critic turned literary critic, and even more so by the social or literary critic turned judge.

IV. JUDGING

The aims of a judge, the context in which legal judgments are made, the form of legal judgments, and the justification of "good" legal opinions in a constitutional common law society like ours are all different from the aims, context, form, and justification of literature.[12]

In making a legal judgment in a case or controversy, a traditional judge (or panel of judges) begins with the facts and the law relevant to the case. He tells a story, but the story is *not* told for its literary effect, that is, it is not told to persuade the listener (the parties, their attorneys, and those attorneys who will look to prior case law in arguing future cases) by appeal to sentiment or "fancy" (Nussbaum's word)[13] to acknowledge or empathize with the humanity of the parties and thus to enhance

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12. There are many different methods or "strategies" for deciding cases and many different methods of interpreting documents and statutes. *See, e.g.*, Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457 (2003) (distinguishing four types of judicial decisionmaking: traditional, political, strategic, and litigant-driven); Timothy P. Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 EMORY L.J. 523, 523–60 (2004). There is, however, no real disagreement on the essential nature of traditional, or "conventional," judging. *See* RONALD DWORKIN, LAW'S EMPIRE 116 (1986) ("Conventionalism makes two . . . directive claims. The first is positive: that judges must respect the established legal conventions of their community except in rare circumstances . . . . The second claim . . . declares that there is no law—no right flowing from past political decisions—apart from the law drawn from those decisions by techniques that are themselves matters of convention, and therefore that on some issues there is no law either way.").

13. "Fancy is the novel's name for the ability to see one thing as another, to see one thing in another. We might therefore also call it the metaphorical imagination." NUSSBAUM, *supra* note 1, at 36.

understanding of the human condition in general as a guide to deciding the case. Rather, the traditional judge reasons logically from the positive legal principles[14] in the case and the material facts to the necessary conclusion, although, every good judge keeps always before his sight the knowledge that his opinion will affect the interests, often the most important human interests, of real people under real circumstances and also the interests of other real people in similar circumstances in the future. That is, he appreciates the consequences of his judgment for those affected by it and for the law itself.

If the judge has judicial integrity, the story he tells in his legal opinion will give as full and accurate an account of the facts as is necessary to reach that result which is best supported by the record of the case and the applicable legal principles, and it will contain nothing extraneous. The judge considers the facts as presented by the record in light of the relevant substantive legal principles and precedent and, using prescribed procedural rules and standards, rationally determines the legal rights of the parties by logically applying those legal principles and precedents to the material facts of the case. He applies the same laws and the same process of judicial decisionmaking to all persons, treats all similarly situated persons alike, and treats constitutional rights or liberties as more fundamental than statutory or common law rights, according procedural fairness to those whose rights are affected by the judgment. He is "bound down by strict rules and precedents"[15] that determine what he may say and how he may say it in order to conform his opinion to a coherent whole that will enter without disruption into the stream of ongoing law. The rational conformity of statutory and common law to substantive and procedural constitutional principles is ensured by his and his colleagues' application of the rules of procedure, rules of construction, and the extant positive law. The positive law thus made is part of a living, self-contained system that is kept procedurally and substantively fair and rational by the adherence of judges to the rules of judging; and

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14. By the "positive" law and "positive" legal principles, I mean those principles in the standard sources of American law, i.e., the Constitution, statutes, rules, and case law. *See* BLACK'S LAW DICTIONARY 1200 (8th ed. 2004) (defining "positive law" as "[l]aw promulgated and implemented . . . by political superiors, as distinct from moral law or law existing in an ideal community or in some nonpolitical community").

15. THE FEDERALIST No. 78, at 496 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); *see also id.* at 492 ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.").

traditional judges, by respecting the constraints of that structure, ensure both the procedural and the substantive integrity of the law they construe and to which their opinions contribute.

Judicial decisionmaking, like legislative enactment and constitutional amendment, is thus an integral part of the self-generating and self-correcting mechanism of democratic society itself. If judges follow the law, the overall result is beneficent—society's own conception of the principles of ordered liberty, or law, most conducive to the common good is preserved, and the judicial decisions that are made provide a principled guide for the parties directly affected by the judgment and for future litigants. Traditional jurisprudence thus acts as a force for both flexibility and stability in the law and as a check on any tendency in the judiciary to reach beyond the bounds of interpretation to become legislators, or makers of law, by extra-systemic means. Indeed, the integrity of the system depends upon the shared expectation that judges will play by the rules of the game, i.e., that they will follow the rules and precedents produced by the system itself.

Unlike a work of art or literary criticism, therefore, the universe of a legal case is self-contained and an integral part of a living, self-contained system of constitutional, statutory, and case law. It does not open out metaphorically or evocatively into the human experience.

V. THE JUDGE AS NOVELIST AND CRITIC

The literary judge, as described by Nussbaum or by Dworkin, is cut from an entirely different cloth than the traditional judge I have described.

In Dworkin's view, the standard sources of the positive law are inadequate to resolve legal cases that present novel and controversial moral issues;[16] the statements of law of traditional judges, bound as they are by the "strict rules and precedents" in the positive law, are merely "backward-looking factual reports" that cannot resolve hard or novel legal issues in areas of moral controversy.[17] Thus, to ensure justice, judges of integrity, especially Supreme Court justices, must stand aside from the community as interpreters and final moral arbiters of its laws according to their own best judgment, recognizing that

16. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82–84 (1977) ("Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or reinterpreting existing rules.").

17. DWORKIN, *supra* note 12; *see also* FEDERALIST No. 78, *supra* note 15, at 496.

"propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[18] Neither the constraints of precedent nor the constraints of rules of procedure and construction that bind traditional jurists determine the "truth" of a "proposition of law" or the justice of a judicial decision.[19]

Dworkin contends, "We can usefully compare the judge deciding what the law is on some issue . . . with the literary critic teasing out the various dimensions of value in a complex play or poem."[20] But, he continues, judges are not only critics but also novelists, in that a judge adds to the tradition he inherits so that "future judges confront a new tradition that includes what he has done."[21] Dworkin, therefore, suggests we look at judges as novelists writing a "chain novel."[22] He counsels,

> [The judge] must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew. If he is a good critic, his view of these matters will be complicated and multifaceted, because the value of a decent novel cannot be captured from a single perspective. He will aim to find layers and currents of meaning rather than a single, exhaustive theme.[23]

In Dworkin's philosophy, there are only two constraints on a literary judge's interpretive freedom—neither of them traditional judicial constraints. One is the judge's belief that a single author could have written the novel he is imaginatively creating, or at least most of it.[24] The other, which applies when more than one interpretation "fits the bulk of the text," is the judge's personal judgment that the text he chooses to write "makes the work in progress best, all things considered."[25] In other words, there are no constraints at all on the interpretive freedom of the judge seeking to express the "truth" of the law other than his own "constructive interpretation" of the requirements of abstract principles of "justice, fairness, and procedural due process," as he

18. DWORKIN, *supra* note 12, at 225.
19. *See id.*
20. *Id.* at 228.
21. *Id.* at 229.
22. *Id.*
23. *Id.* at 230.
24. *Id.*
25. *Id.* at 231.

understands them. Judges have even greater license than literary critics, for judges are both critics and artists.

Nussbaum, similarly, sees literary works, and especially novels, as valuable to judging because they "promote identification and emotional reaction" and thus "requir[e] us to see and to respond to many things that may be difficult to confront."[26] She sums up her own philosophy of "poets as judges" by invoking a statement by Supreme Court Justice Stephen Breyer during his confirmation hearings, culminating in his statement that he finds literature "very helpful as a way out of the tower."[27] Nussbaum states: "My approach—like, I believe, the approach that Breyer sketches in this statement—stresses the need for technical mastery as well as sentiment and imagination and insists, too, that the latter must continually be informed and tethered by the former."[28] "Technical mastery" is, however, never explored by Nussbaum and is given very short shrift indeed in the conclusion to her examination of "poets as judges."[29] Nor is it at all clear whether the "technical mastery" to which she refers is the mastery of literary techniques or of judicial ones, although the conclusion of her book implies that she, like Dworkin, prefers that judicial opinion-writing be guided by an artist's constructive imagination of the "best" law as tethered by legal technique rather than by the "strict rules and precedents" in the positive law that inform the traditional judicial method for deciding legal cases.[30]

Thus, although Nussbaum acknowledges that "[t]he judge is not a legislator, and his imagination must conform to tight institutional constraints,"[31] she never explores these constraints. Rather, while she states that the opinions she admires, *Carr v. Allison Gas Turbine Division, General Motors Corp.*[32] and Justice Stevens's dissent in *Hudson v. Palmer*,[33] "are valuable precisely because they are connected to good legal reasoning of a traditional sort and to a solid grasp of the facts," she continues, "in both cases we can say, I think, that the literary judge has a better grasp of the totality of the facts than the nonliterary

26. NUSSBAUM, *supra* note 1, at 6.

27. *Id.* at 79 (quoting Stephen G. Breyer, to the Senate Judiciary Committee in hearings on his nomination to the United States Supreme Court) (emphasis added).

28. *Id.* at 99.

29. *Id.* at 121.

30. *Id.*; *see also* FEDERALIST No. 78, *supra* note 15, at 496.

31. NUSSBAUM, *supra* note 1, at 118.

32. Carr v. Allison Gas Turbine Div. Gen. Motors Corp., 32 F.3d 1007 (7th Cir. 1994).

33. Hudson v. Palmer, 468 U.S. 517, 541 (1984) (Stevens, J., dissenting).

judge."[34] Thus, "[m]y claim is, then, that literary judging is by no means sufficient for good judging, and could certainly be pernicious if not properly tethered to other purely institutional and legal virtues; but we should demand it in appropriate circumstances, whatever else we also demand."[35]

Hence, my question for Nussbaum and Dworkin: Now that we know that the literary judge is distinguished by his "constructive interpretation" of the law or by his empathetic "sentiment and imagination" and that the only express checks on his interpretation of the law's requirements are his own critical appreciation of the law he construes and its coherence with the novel he himself is writing (Dworkin) or his fancy as controlled by a "connection" with good legal reasoning (Nussbaum), what *are* the circumstances in which we should "demand" literary judging and *why* should we demand it?

An analysis of the jurisprudence of Dworkin and Nussbaum makes clear that both, in fact, view the judge as a *social* critic charged with constructing the best imaginative model for future societal behavior as he sees it and *not* as a traditional judge bound to follow and to contribute to an entire body of positive law. Moreover, both clearly count on the literary judge having his social consciousness raised not just by any ideas in the marketplace, even literary or philosophical ones, but by the *right sort* of ideas that will lead him to adopt the same outlook that Dworkin and Nussbaum and their academic colleagues and peers all share. The expectation appears to be that judges engaged in the same "rational discourse" in which Dworkin and Nussbaum and their associates and colleagues are engaged will have their social consciousness raised in the same way, will deliver themselves of the same sort of politically and philosophically correct judicial opinions, and will thus improve the law they receive—promulgated as it was by legislators, judges, and even constitutional delegates less enlightened or less nobly motivated than themselves—to the betterment of society.

Dworkin does not extol the virtues of literature so much as those of moral and political philosophy to aid judges in constructing the "best" story of the law. But Nussbaum does concentrate on the power of literature itself to create in the judge the proper frame of mind for resolving cases imaginatively and empathetically. In this regard, Nussbaum quotes approvingly from Walt Whitman's *Song of Myself* and then states:

34. NUSSBAUM, *supra* note 1, at 118.
35. *Id.*

> Whitman is especially insistent that the poet's speech will remove the veil from the voices of those silenced by sexual exclusion and opprobrium. He claims that the light of the poetic imagination is a crucial agent of democratic equality for these and other excluded people, since only that imagination will get the facts of their lives right, and see in their unequal treatment a degradation of oneself.[36]

Crucially, Nussbaum does not consider (nor does Dworkin) whether the American social and legal system envisions its judges, like its poets, as "crucial agent[s] of democratic equality"[37] or whether, within that system, it is not judges, but legislators, who are charged with making legal rights that ensure democratic equality, while judges are charged, instead, with impartially interpreting the laws made by those legislators and with carrying forward consistent and reliable case law.

Nor does Nussbaum quote authors who might be skeptical about the consequences of using literature not only to inspire an ideal of social justice but to inspire judges to enforce their own conception of the social ideal. I think of William Butler Yeats—both Nobel prize-winning poet and member of parliament in the Irish Republic, whose creation he helped inspire.[38] Yeats revived the myth of the "indomitable Irishry" in his poetic plays about the Countess Cathleen (romantic Ireland personified) and wrote eloquently in *Easter 1916* about the execution of Irish revolutionaries in the uprising against British rule: "All changed, changed utterly: / A terrible beauty is born[,]"[39] only to write later, near the end of his life,

> All that I have said and done, / Now that I am old and ill, / Turns into a question till / I lie awake night after night / And never get the answers right. / Did that play of mine send out / Certain men the English shot? / . . . And all seems evil until I / Sleepless would lie down and die.[40]

Had Nussbaum considered Yeats's thoughts on the potential consequences of even great artists using their imaginative power to inspire social change, might she have questioned the *judge*'s

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36. *Id.* at 119.

37. Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1519 (1995).

38. PoetryFoundation.org, William Butler Yeats, http://www.poetryfoundation.org/archive/poet.html?id=7597 (last visited Aug. 30, 2007) (highlighting the life and works of Yeats).

39. WILLIAM BUTLER YEATS, *Easter 1916*, *in* THE COLLECTED POEMS OF W. B. YEATS 177, 178 (4th prtg., 1959).

40. WILLIAM BUTLER YEATS, *The Man and the Echo*, *in* THE COLLECTED POEMS OF W. B. YEATS, *supra* note 39, at 337, 337–38.

recourse to artistic imagination and the "constructive interpretation" of the law and the facts, not just to inspire social reform, like a poet or novelist, but actually to implement it through his judicial opinions? And might such a literary judge have occasion later, as Yeats did, as a poet and statesman, to wonder if perhaps such inspired judicial passion is indeed justified or good as a means of achieving the aims of legal decisionmaking?

Neither Nussbaum nor Dworkin (to the extent he considers literature a judicial resource and not merely a metaphor for the judicial role) appear to consider literature as anything other than a means of raising the social consciousness of judges to social inequalities and a source of techniques for imaginatively and persuasively constructing the "best" story they can tell of a just society governed by principles of decency and fairness. Accordingly, neither demands of our judges that they consult anything other than literature or philosophy that informs them about the plight of the downtrodden or the excluded and the denial to them by society of the "true" conditions of their full humanity.[41] They do not suggest, for example, that judges inform their humanity by perusing what is, by virtually all accounts, the single greatest work of both literature and moral and political philosophy in the English language: the King James Version of the Bible. Yet, is there any more poignant or resonant cry from the depths of the human condition in all of literature than "O my son Ab'salom, O Ab'salom, my son, my son!"[42] unless it be "My God, my God, why hast thou forsaken me"?[43] Or if the Bible will not do to inform us about the human condition and the plight of the poor souls in it, why not take *Paradise Lost*[44] as our guide—the problems being that Milton's faith is now old-fashioned and that different critics and different times have variously found the hero in Satan and in God.[45]

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41. *See, e.g.*, DWORKIN, *supra* note 16, at 23–27 (discussing "true" democracy in terms of moral membership in society that is denied the moral minority by the majority in actual political society).

42. 2 *Samuel* 19:4 (King James).

43. *Matthew* 27:46 (King James).

44. *See generally* JOHN MILTON, PARADISE LOST (1667), *reprinted in* 32 GREAT BOOKS OF THE WESTERN WORLD 93 (Robert Maynard Hutchins ed., 1952).

45. *Compare* Peter Dendle, *Hume's* Dialogues *and* Paradise Lost, 60 J. HIST. IDEAS 257, 276 (1999) ("The parts of *Paradise Lost* that most resemble classical epic . . . appear to cast Satan in the role of hero"), *with* Daniel W. Doerksen, *"Let There be Peace": Eve as Redemptive Peacemaker in* Paradise Lost*, Book X*, 31 MILTON Q. 124, 124 (1997) (stating that, in *Paradise Lost*, Milton "[took] as hero not the military commander Satan but the Prince of Peace, the Son of God, as well as the pastoral Eve and Adam").

Is it not better and more appropriate that judges read literature to inform their own humanity rather than that they use it as a mine for examples of social injustice with which to inspire and infuse their judicial opinions? Regardless of the literature (or philosophy) we choose as our guide to good literary opinion-writing, does it not seem a travesty to read the greatest and most detailed novelistic accounts of life as it is lived in different times and places *solely* to appreciate the plight of "excluded people" and so to come to condemn the insensitivity of those around them and, by analogy, the insensitivity of our own society, which is different in very many material ways, even as it remains constant in more profound ways? I think of Jane Eyre and Rochester groping towards love and marriage across the social barriers of mid-nineteenth century rural Yorkshire;[46] all of Jane Austen's heroines in their confining lives in Surrey;[47] Natasha Rostova locked in her room by a solicitous family, heaving dry sobs, her heedless elopement with Prince Anatole Kuragin thwarted, and the family friend, Count Pierre Bezukhov (much later to be her husband), dispatched to tell her Anatole is already married (a story based on Tolstoy's own grandparents in a time of *War and Peace*);[48] Mrs. Ramsey, on her knees holding up the stocking she is knitting against her son James's six-year-old leg, promising a trip *To the Lighthouse* tomorrow "if it's fine" and Mr. Ramsey bluntly stating, "But it won't be fine," to James's hatred; or Mr. Ramsey carrying through doggedly on a visit to the lighthouse years after Mrs. Ramsey is dead and praising James for steering the boat straight into the harbor.[49] How paltry the panorama of the human condition as captured in literature seems when reduced to a mine of sociological data for a twenty-first century American judge to draw directly upon in resolving legal disputes. If that is the point of literature for law, would it not be more straightforward to suggest that judges mine the sociological opinions of those writers in their more didactic works rather than their more literary ones—Woolf's *A Room of One's*

46. *See generally* CHARLOTTE BRONTË, JANE EYRE (Margaret Smith ed., Oxford Univ. Press 1993) (1847).

47. *See generally* JANE AUSTEN, EMMA (James Kinsley ed., Oxford Univ. Press 1995) (1816).

48. *See generally* LEO TOLSTOY, WAR AND PEACE (George Gibian ed., W. W. Norton & Co. 1966) (1865–69).

49. *See generally* VIRGINIA WOOLF, TO THE LIGHTHOUSE 9–11 (Harcourt, Brace & World, Inc. 1955) (1927).

Own (possibly the best work of feminist argument in the canon)[50] or Tolstoy's *Resurrection*?[51]

And if we, as judges, do decide to use literature to determine our opinion-writing and, therefore, take Dickens's social satire about the soullessness of mid-nineteenth century utilitarianism in *Hard Times*[52] as our guide to resolving cases about civil rights in twenty-first century America—as Nussbaum suggests we do to make our opinions more human[53]—why should we not turn just as readily to Ayn Rand's *The Fountainhead*?[54] Or, if Rand is too radically conservative or insufficiently artistic, then to Dostoevsky, who unquestionably is a great writer and is sensitive to the excluded? Am I, as a judge, to take from *Crime and Punishment*[55] such sympathy for the psychological torture suffered by Raskolnikov, the murderer of a pawnbroker and her sister, based on a real case in nineteenth century Tsarist Russia,[56] that I consider him punished adequately in his own imagination, and therefore redeemed, and import my understanding of his sufferings into the next opinion in which I am faced with affirming or reversing a murder conviction? And do I then, having, as I believe, thoroughly understood the murderer (as filtered through the artistic lens of Dostoevsky, the translator, my literature professors, and my literary background), take Raskolniknov as my guide for understanding "excluded people" and correct for the murderer's exclusion from society by reversing his conviction (unlike the judges in *Crime and Punishment*, who sent Raskolnikov to Siberia)?[57]

Or what if I take to heart Camus's image in *L'Etranger*[58]of man confronting an indifferent and absurd universe and feel compassion for Meursault, who having moved through life impassively in the moment, and having killed a man without thought or pre-formed intent, is condemned to the guillotine

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50. VIRGINIA WOOLF, A ROOM OF ONE'S OWN (1929).

51. LEO TOLSTOY, RESURRECTION (Louise Maude trans., Oxford Univ. Press 2004) (1899).

52. *See generally* CHARLES DICKENS, HARD TIMES FOR THESE TIMES (Kate Flint ed., Penguin Books 1995) (1854).

53. NUSSBAUM, *supra* note 1, at 52.

54. *See generally* AYN RAND, THE FOUNTAINHEAD (1943).

55. *See generally* FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (Jessie Coulson trans., Oxford Univ. Press 1981) (1866).

56. *Id.* at 73–76; *see also* William Burnham, *Dostoevsky: Crime and Punishment*, 100 MICH. L. REV. 1227, 1227–29 (2002) (reflecting that "real cases of his day" inspired Dostoevsky's works).

57. *Id.* at 514.

58. *See* ALBERT CAMUS, THE STRANGER 59 (Matthew Ward trans., Alfred A. Knopf, Inc. 2006) (1942).

primarily because he does not accept society's mores and did not cry at his mother's funeral, and comes to appreciate the value of life only as it is snatched from him? How could I not come to a fuller understanding, as Meursault does, both of the value of life in itself and also of the awesome power of the state over those who reject its moral codes? And should I then apply that understanding to guide my decisions in the murder cases in front of me? Surely, in musing on the victims of the system—the Meursaults—I will "get the facts of their lives right, and see in their unequal treatment a degradation of [my]self."[59] And surely then I will follow not the positive law before me but those true "propositions of law . . . [that] figure in or follow from . . . principles of justice, fairness, and procedural due process" and my decision will reflect "the best constructive interpretation of the community's legal practice"[60] my fancy allows.

I remember reading, two or three years ago, the trial testimony of a convicted murderer in a case before me that was as spare, elegant, and compelling as Camus's account of Meursault's crime in *L'Etranger*. Yet, as with Meursault, the law was not with the defendant, and although I recognized that here was a convicted murderer whose own appreciation of events was as simple and dignified as Meursault's, and although I thought fancifully of copying his testimony to preserve it as art and even of somehow apprising the defendant of his talent, in the end I merely voted to affirm the conviction on the law and the facts in the record and returned the record to the file. But suppose instead, having recognized the essential dignity and worth of the defendant, as I did, I had based my legal opinion on my recognition of his humanity and, indeed, his merit as an artist, rather than on the law and the facts that supported his conviction beyond a reasonable doubt. How would the opinion I would then have written, based as it would have been on the finest of literary sentiments and imagination, look? And how would it guide the next judge, who might not be as enlightened as I am and who might confine himself to ruling on the law? What would happen when my opinion disregarding the mere law (but evincing the tug of my literary sentiments and imagination, even while "conforming to tight institutional constraints" and contributing to making the chain novel I am participating in writing "best, all things considered") got into the legal reporters? And if I were not alone in deciding my opinions on a "literary" or

59. NUSSBAUM, *supra* note 1, at 119.
60. DWORKIN, *supra* note 12, at 225.

philosophical basis, but my fellow judges similarly came to appreciate their roles as literary judges, what would happen to the reliability of judicial opinions and the accountability of judges to actual litigants on both sides of a case and to the continuity of the law itself?

VI. CONCLUSION

From the standpoint of a practicing judge who must answer to present and future litigants and to the society that placed her in office, the exhortation to become a "poetic" or "literary" judge is an exhortation to become a bad judge. Suppose, for example, I as a judge followed the exhortation of Dworkin or Nussbaum to "imagin[e] the prisoner's dignity and humanity," not merely as a general exhortation to recognize what law is, in the end, all about—justice for all under laws that recognize the dignity and worth of all—but, as Nussbaum puts it, as "an understanding of constitutional reasoning" that would prohibit recourse to mere "expediency arguments" as a matter of constitutional principle.[61] Then I would be required to rule *legal* arguments in or out according to my personal philosophical conception of the requirements of human dignity.[62] From a humanitarian

61. NUSSBAUM, *supra* note 1, at 104 (approving Justice Stevens's dissent in *Hudson v. Palmer*, 468 U.S. 517, 541 (1984) (Stevens, J., dissenting)). In *Hudson*, a majority of the Supreme Court upheld a search of a prisoner's cell for contraband, which the prisoner contended violated his Fourth Amendment right to privacy against unreasonable searches and seizures. *Hudson*, 468 U.S. at 519, 525–26 (majority opinion). The Court held that the "recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 526. Nussbaum writes that the majority, ruling from "expediency," i.e., on the law as applied to the facts of the case, "showed no concern to imagine the prisoner's legitimate interest in his property," unlike Stevens, who, in dissent, "generalizes about the class of prisoners throughout, emphasizing the representative character of the case and thus the universalizable character of his judgment," so that "his opinion is closely linked, in literary terms, to the generalizing strategies of the ancient tragic chorus." NUSSBAUM, *supra* note 1, at 103. Notably, however, Nussbaum fails to distinguish between the proper form of a majority opinion and that of a dissent, which traditionally has been allowed much more leeway to evoke emotion and concerns outside the positive law than a majority opinion, which is constrained to report the decision that follows logically from the application of the actual law to the record facts. Indeed, it is precisely the "representative character of the case" and the "universalizable character" of judgments that distinguish *political* judgments from legal ones based on the application of strict rules and precedents to the facts of particular cases.

62. Dworkin likewise argues that, in interpreting the requirements of the Constitution in the area of civil rights, legal decisionmaking should be guided by moral principles, specifically by the principles of equality and liberty as understood by moral philosophers, without an emphasis on those principles elucidated in preceding case law. *See* DWORKIN, *supra* note 1, at 7–8 (asserting that a "moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy"); DWORKIN, *supra* note 12, at 87–89 (warning against favoring "unifying and

perspective, this is an appealing claim. Why, then, do I say that the exhortation to judges to act as literary judges in the interest of jump-starting the just society is an exhortation to them to become bad judges?

I believe the type of "literary" judging I have described is bad judging because the attributes specific to it are antithetical not only to traditional judging but to sound judging if, in the end, the objective of judging is to do justice to the litigants in particular cases and to maintain the integrity of the law in general. Specifically:

- Literary judging encourages judges to reimagine and restructure the facts in the record to affect the sentiments of the reader, not to report the facts clearly, fairly, and accurately as they appear in the record, and to apply the "best" principles of justice, not positive legal precepts, and it thus undermines the legitimate expectations of the particular litigants that their case will be judged on its own merits under the positive law;

- It conceives of literature as a means to the end of determining the "best" constructive understanding of the requirements of fairness and decency, and yet it lacks any coherent means for distinguishing the philosophically and politically correct or "best" lessons to be derived from literature from the incorrect, and thus it lacks a principled means for determining what should count as "true" propositions of law that judges should follow or as "fancies" they should indulge;

- It substitutes judges' personal values for the values present in the law made by the people and by prior case law;

- It encourages generalization, exhorting judges not to decide particular cases on the basis of their own facts and the applicable law, but rather to decide cases on the basis of general principles and to express their opinions in general terms, in the interest of improving society by their own lights, bypassing society's safeguards;

- It encourages cherry-picking of supporting arguments and facts from wherever judges can find them in their own experience or reading at the

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socializing factors," such as the "practice of precedent," over moral judgments).

expense of reasoned argument in accordance with the facts of particular cases and the "strict rules and precedents" in the law; and, therefore,

- It leads to discontinuity and unreliability in the law; and
- It undermines the public perception that judges are impartial and accountable to the law and the people rather than to their own private notions of social justice.

If literary judging has all of these untoward attributes and consequences, should we then eschew it altogether? Should we encourage judges *not* to think about the human dignity and worth of those persons of whose liberty, children, and fortunes they dispose? Should we encourage judges to look on themselves as above compassion or empathy, as agents of a state distinct from and superior to the people affected by the laws, and as unconcerned by the effects of their judgments on actual litigants? Should we disparage judges who broaden their horizons and deepen their understanding of the human condition through "fancy schmancy" literature and philosophy?

I say, to the contrary, that the judge who is well-grounded in literature, moral and political philosophy, and history, but who puts that knowledge to the service of his own calling, and does not substitute the one calling for the other, is far and away the better judge than one who is not so grounded. The humanistically educated judge understands that the law itself in a democratic society, like our own, is founded upon the original right of the real people who make up society, with their real and varied interests and objectives, to make those laws through their representatives, freely and equally chosen, that they believe most conducive to the common good and that the law is, therefore, reflective of the people's own values and interests. Indeed, the law in a democratic society can be viewed as nothing more than the collective expression of society's conception of those guiding principles and rights whose enforcement, in the people's accumulated and evolving collective judgment over time, best advances the good of all.[63] But, if the capacity of the law to

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63. *See* THE DECLARATION OF INDEPENDENCE ¶ 2 (1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and

further the common good depends upon the expression of the common will of the people, their votes, and the votes of their elected representatives, then only a morally literate and humanistically informed people can maintain a free society against the dehumanizing forces of totalitarian ideology and destructiveness that constantly assail it, for only they will know what is at stake. And what is true of the people in general is particularly true of those by whom the law is officially made and interpreted.

The study of the humanities by lawyers and judges—preeminently literature, history, and moral and political philosophy—serves four great purposes essential to the maintenance of a free society founded upon respect for the equal dignity and worth of all:

- It increases the understanding and appreciation of our common heritage, culture, and values—and their alternatives;

- It acquaints us with different modes of perception and understanding of human predicaments and of the essential dignity and worth (or evil) of those caught within those predicaments with which we would otherwise be unfamiliar or insufficiently familiar (I think of the revelations of the dehumanizing experience of slavery captured by Toni Morrison's *Beloved* and of the holocaust in Elie Wiesel's *Night*.[64]);

- It gives us the knowledge of evaluative and interpretive techniques and the ability to use them so that we better understand the nuances of words and the ambiguities in situations and in laws and are better able to discern the real issues lurking beneath the surface of an apparently simple (or deceptively complex) case; and

- It teaches us how to comprehend and express complex thoughts (English) and how to reason logically and soundly (philosophy).

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organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."); *see also* Marbury v. Madison, 5 U.S. 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

64. *See generally* TONI MORRISON, BELOVED (Penguin Books 1988) (1987) (addressing slavery and its aftermath in post-Civil War rural Ohio); ELIE WIESEL, NIGHT (Bantam Books 1986) (1960) (describing a young Jewish boy's experiences at a Nazi concentration camp).

But while a humanistically illiterate judge is a hobbled judge, and can never be a great one—precisely because he lacks both the interpretive skills and the understanding that philosophy, literature, and history impart—noble contemplation in the ivory tower of the mind or the soul and rational discourse among like-minded, socially committed elites are no substitute for the experience of life as it is really lived. This is the experience a lawyer gets when he must sort the jumble of facts a client gives him and learn to craft legal arguments to persuade on the basis of an accurate rendition of the facts and the law in order to prevail in a courtroom. Nor is literature a substitute for the experience of the judge who, having taken the bench after years at the bar, hears and decides real cases as an arbiter on the basis of given law and facts that affect the individual lives of real people in the panoramic variety of real life situations in which they find themselves before the bench.

The experience of Sissy or the Gradgrinds in *Hard Times* (used as an exemplar by Nussbaum), or of Billy Budd, or of Raskolnikov is not the same as that of the litigant whose case is before the judge.[65] And the judge is not Dickens, or Melville, or Dostoevsky—heightening certain facts, excluding or minimizing others, generalizing from the particular, imaginatively recreating a scene in accordance with his own experience, sensibility, and literary skill, evoking empathy and understanding in the observer, and then, as judge, going on to hand down opinions that reform or "re-form" the law in accordance with the "true" propositions of law that comport with his "fancy" or his own constructive interpretation of the "best legal practice of the community."

A judge is a lawyer elected or appointed to the bench who is constitutionally and ethically committed to deciding the particular cases before him by applying the applicable law to the actual facts through reasoned argument, keeping within the bounds of reasonable interpretation, in light of precedent and rules of construction. He is bound by law and duty to craft clear, logical, sound opinions that are supported by the record and the law, that prescribe courses of action which the parties to the case, if they understand the law and appreciate its application to the facts, will deem fair, and that future litigants, coming upon, will believe upheld the integrity of the law. And, if the judge is gifted by nature with compassion and intelligence and the opportunity to develop them; educated with a deep

65. *See supra* notes 52, 55 and accompanying text.

understanding of human nature and the human condition; blessed with the insight to discern the simple and compelling, or the true, in a welter of conflicting, jumbled, and even false assertions of law or fact; marked with the ability to reason logically from applicable legal principles and the facts of the case to empirically sound conclusions; and skilled in expressing his thoughts clearly, logically, and persuasively—particularly if he has honed his insight and his skills through years of studying literature, philosophy, and history, as well as the law—then he has at least the possibility of becoming a great judge, which, without these attributes, he can never be.