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What Has Modern Literary Theory to Offer Law? (reviewing Guyora Binder & Robert Weisberg, Literary Criticisms of Law (2000))

Richard A. Posner

BOOK REVIEWS

What Has Modern Literary Theory to Offer Law?

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LITERARY CRITICISMS OF LAW. By Guyora Binder† and Robert Weisberg‡. Princeton: Princeton University Press. 2000. 544 pp. $24.95.

The title of this review is the question that the authors of *Literary Criticisms of Law* set out to answer in more than 500 pages of tightly packed print dense with learning. Although critical of much of modern literary theory, the authors conclude that it is a potentially rich resource for leftist critique of law. Many readers who slog through to the end of this fatiguingly long book will answer my question differently: "Nothing."

I think it is accurate to term the type of legal scholarship that this book represents decadent in the sense in which some of the literature and art of the late nineteenth and early twentieth century were termed decadent. That is, it is intricate, subtle, ornate, self-indulgent, and disdainful of utility. (Remember what Oscar Wilde said in the preface to *The Picture of Dorian Gray*, that classic specimen of *fin de siècle* decadence: "There is no such thing as a moral or an immoral book. Books are well written, or badly written. That is all."[1]) Despite appearances, I am not being critical in calling Binder and Weisberg's book decadent. There is nothing wrong with decadent writing in the sense just described; it is an important genre of nineteenth-century *fin de siècle* art and literature, and now that another *fin de siècle* has rolled round, a revival is welcome. I am identifying a genre, not condemning it. The authors are fascinated by, and minutely examine, a set of scholarly literatures that have no practical significance for law; some of them are not about law at all. The book has no pedagogic function or potential that I can see, will be inaccessible by reason of its length and its

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1. OSCAR WILDE, THE PICTURE OF DORIAN GRAY 5 (Wordsworth Classics 1992) (1908).

heavy weight of erudition[2] to all but the tiniest sliver of the legal profession (even to most other law professors), and contains nothing that could be used to understand or improve the law—in part because it doesn't (except very sporadically) discuss law, or for that matter literature, but instead confines itself to the scholarly literatures on these subjects. The authors evidently have different interests, Binder in intellectual history and Weisberg in literary theory, and their interests are imperfectly melded (that is another of the self-indulgent features of the book). None of which is meant to deny that *Literary Criticisms of Law* is an *interesting* book. It contains many shrewd and even pungent passages, and at least one first-rate chapter (chapter 3, on narrative).

To understand what the authors are about, it is necessary to distinguish between two different ways in which the law might be approached as a subject of literary criticism.[3] The first and more straightforward would be to analyze legal texts, such as statutes, wills, contracts, briefs, and judicial opinions (the most obvious candidate, given the literary distinction of some of our famous judges) as if they were literary texts. The imagery, narrative techniques, character portrayal, voice, tone, and other literary properties would be studied, compared, assessed. The focus would be on the text rather than on the theoretical apparatus that the analyst brought to it. The analysis would be "literary" only in paying close attention to the features of the legal text that a literary critic would attend to in a work of imaginative literature.[4]

That is not the way of Binder and Weisberg. They are not interested in legal texts as such. They are interested in "the law" at a high level of abstraction—namely law as a "cultural activity" and "a process of meaning making."[5] One wouldn't expect a working literary critic to have much to say about law so conceived; it invites theoretical reflection, and for guidance the

2. As where we are told, in a discussion of Wilhelm Dilthey's hermeneutic theory, that "Simmel and Weber [were] influenced by two rival, neo-Kantian theorists of the *Geisteswissenschaften*, Heinrich Rickert and Wilhelm Windelband." P. 126, n.50.

3. I am not talking, as the authors do not talk, about the depiction of law in literature.

4. See, for an effort at such analysis, Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995) (distinguishing style from other literary concepts and associating judicial writing style with jurisprudential stances), and RICHARD A. POSNER, LAW AND LITERATURE 255-302 (revis. and enlarged ed. 1998) ("Judicial Opinions as Literature"). Binder and Weisberg appear to be unaware of the 1998 edition of *Law and Literature*, though it was published two years before their own book. They cite only the first edition, from 1988, which they describe inaccurately as a "polemic" against law and literature scholarship rather than as an attempt to contribute to that scholarship; it is both, as indeed is their book. The first edition of my book, in Part II, covers some, and the 1998 edition, in Parts II and III, covers much of the same ground traversed by Binder and Weisberg's book, though more briefly and with different emphases. Another book that overlaps theirs, but it could not have been cited because it was published even more recently than theirs, is ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110-216 (2000).

5. P. ix.

authors turn to modern literary theory rather than to practical literary criticism.

Many readers will question both the focus and the instrument. Although law can certainly be described as a cultural activity, it is not obvious that this is a useful description. It invites the question: So what? Every human practice can be so described. And if the "so what" question can be answered (Binder and Weisberg do not try), still there are many perspectives from which to study cultural activity, and it is not obvious that literary theory is among the more promising. Modern literary theory involves a turning away from the classic works of literature to texts and practices (called "texts" also—everything is a text to today's literary theorists) that provide easier vehicles for making political points, invariably of a left-wing cast (though many of them contingently, not inherently, so) but decked out in a forbidding vocabulary drawn from a kaleidoscope of overlapping theories that go by such names as deconstruction, structuralism, poststructuralism, multiculturalism, hermeneutics, queer theory, postcolonialist theory, subaltern studies, reader response, reception theory, and the new historicism. These theories in their number and famously obscure jargon place a barrier rather than a magnifying lens between the literary scholar and the work of literature. They offend activists by channeling left-wing intellectual energies into politically inert obscurantism and faculty intrigue, and by inviting through their excesses right-wing ridicule that resonates with the general public and so pushes the intellectual Left further to the margin. Because postmodernist professors of literary and cultural studies "no longer think of themselves as citizens of a functioning democracy, they are producing a generation of radical students who think of 'the system' as irredeemable, and who therefore can think of nothing better to do with their sense of moral outrage than to fling themselves into curricular change."[6] To be of any practical use, leftist intellectuals must "giv[e] up the claim that philosophical or literary sophistication is important because it prepares us for the crucial, socially indispensable role that history has allotted to us—the role of 'critic of ideology.'"[7] "'On every campus . . . there is one department whose name need only be mentioned to make people laugh . . . .' [E]veryone knows that if you want to locate the laughingstock on your local campus these days, your best bet is to stop by the English department."[8]

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6. Richard Rorty, *Intellectuals in Politics: Too Far In? Too Far Out?*, DISSENT, Fall 1991, at 483, 489-90.

7. Richard Rorty, *The End of Leninism and History as Comic Frame*, *in* HISTORY AND THE IDEA OF PROGRESS 211, 223 (Arthur M. Melzer, Jerry Weinberger, & M. Richard Zinman eds., 1995).

8. Andrew Delbanco, *The Decline and Fall of Literature*, N.Y. REV. BOOKS, Nov. 4, 1999, at 32.

The theory-mongering that is making laughingstocks of English departments is not an auspicious starting point for the study of law as a cultural activity. I think that Binder and Weisberg know this, for much of what they discuss under the rubric of literary theory is not modern, or is not literary theory at all, but instead belongs to history or to jurisprudence. When they do discuss modern literary theory they are critical (they explain in the introduction that the Romantic and Victorian conceptions of literature create the risk that literary theories will be sentimental, skeptical, or authoritarian), except for the new historicism, which is their preferred theory. But they are unable to identify any practical benefits that the legal system might derive from that or any other literary theory.

The book is divided into six very long chapters, each purportedly devoted to a different genre of literary criticism of law: interpretation, hermeneutics (viewed as a particular style of interpretation), narrative, rhetoric, deconstruction, and new historicism, or, the authors' preferred term, "cultural criticism." Each chapter reviews the history of its subject and summarizes the views of each of the principal theorists in a page or a few pages. So in eight pages on "The Hermeneutic Tradition" we zip from Schleiermacher to Dilthey to Nietzsche to Imgarden (taken out of chronological order) to Heidegger.[9] The summaries seem accurate, so far as I can judge, and give the book value as a reference work, but reading them consecutively, like counting beads on a string, is tedious.

The first chapter, on interpretation, is not about literary theory at all, which means that the book really doesn't get going until page 112, the first page of the second chapter. Interpretation is something literary critics do, of course, but they are not the only ones. Anyone whose business is with the meaning of (or to be given) old, difficult, obscure, or ambiguous texts is compelled to engage in interpretation. The anyone includes judges asked to apply our eighteenth-century Constitution, or one of the later amendments, or a statute, or a regulation, or a contract, or a doctrine stated in previous judicial opinions. It is possible, though I am doubtful,[10] that judges and lawyers engaged in legal interpretation can benefit from the sustained attention that literary theorists and critics have given to the problems of interpreting literary texts. But that is not the question broached in chapter 1, which is instead a history of theories of legal interpretation. All the familiar figures are here, from Edward Coke and Francis Lieber to James Bradley Thayer and Oliver Wendell Holmes and Learned Hand and Edward Levi and Alexander Bickel, with the curious exception that none of the modern originalists, such as Bork, Scalia, and Easterbrook, are discussed (Bork

9. Pp. 123-31.

10. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 209-54 (analyzing different schools of literary theory and their potential applicability to legal interpretation).

receives a passing mention). This is a clue that the authors are writing for and within the left intelligentsia.

The authors' principal effort in chapter 1, to tie the history of legal interpretation to literary theory, is lame. It is in fact a mere play on words: Theorists of liberal interpretation as opposed to strict interpretation, such as Cardozo, emphasized the "creative" function of the judge, even called what they did "art" rather than "science." Literary or artistic creativity is not the only kind of creativity, and when judges describe interpretation as art rather than science all they mean is that interpretation is not algorithmic, as interpretive formalists believe. As a modern judge, I am duly flattered to see the modern judge described as "a moral artist . . . exemplifying the artistic virtues of nonconformity, independence, and integrity,"[11] but these are not virtues peculiar to writers or other artists, and the possession of them does not make a judge's opinions works of literature. It is meaningless to say as the authors also do that "the judge, like the modern literary author, was expected to provide charismatic moral leadership."[12] Not only is that a curious description of what is expected of modern writers, but it assumes away nonliterary providers of charismatic moral leadership, such as Martin Luther King, Jr. Would a judge who (improbably) modeled himself on King necessarily be embracing a literary conception of law? "Art" and "literature" are being used here as honorifics.

On the very next page, ushering in the chapter on hermeneutics, the authors, embroidering the metaphor of the "judicial artist," tell us that modern American law requires "a judicial artist with the skills of a literary critic."[13] It is unclear whether possession of those skills marks a judge as a judicial artist or whether they are a supplement to the supposedly artistic virtues described in the first chapter. In any event, chapter 2 is about the schools of interpretation that emphasize the reader's role in determining the meaning of a text. These schools include the German hermeneutic tradition, which, like theories of interpretation generally, was not limited to, or even primarily concerned with, literary texts. But the interpretive schools discussed in this chapter also include the newer "reader response" school of interpretation, which is more specifically literary and which the authors naturally associate primarily with Stanley Fish, a literary critic and theorist who writes about law as well as literature. Fish, and a number of left-leaning law professors such as Sanford Levinson, Owen Fiss, and Mark Tushnet, do not think that the words of a text can determine its meaning; other sources for stabilizing meaning must be sought. The Constitution provides that the President must be at least thirty-five years old, and this seems clear enough,

11. P. 111.
12. P. 93.
13. P. 112.

but it is clear only by virtue of such taken-for-granted practices as keeping reliable records of dates of birth and using numbers to denote precise quantities rather than, as the ancient Greeks did, relative magnitudes.[14] Binder and Weisberg infer from such examples that interpretation cannot be just of a text, but must be of its cultural context as well. Which is to say that all the world's a text, and the cultural critic's potential reach vast: "[A] genuinely hermeneutic criticism would have to interpret and evaluate law as part of a larger culture. In our final chapter we will propose such a Cultural Criticism of Law."[15] Again they are playing with words. The fact that interpretation of a text requires consideration of contextual factors does not mean that it is no longer just the text that's being interpreted. The text's cultural surround may or may not require interpretation too.

Despite the references to formalist (mainly New Critical) and reader-response literary theorists, most of the theorists discussed in this chapter are philosophers or law professors, with only the apparent exception of Stanley Fish, who writes as a philosopher in the debate over legal interpretation. The law professors occasionally invoke literature or literary theory, but the invocations are ornamental. Eager to tie the book's theoretical meander back to literature from time to time, Binder and Weisberg devote particular attention to Ronald Dworkin's analogy of constitutional interpretation to writing a chain novel. There are a number of objections to the analogy,[16] but the one most pertinent to the theme of this review is that it functions as a metaphor rather than as a serious invocation of literary theory or practice. Dworkin is not interested in chain novels. Nor, for that matter, are literary theorists and critics; for there are no good chain novels—they are merely a curiosity, a parlor game. Dworkin's analogy is just a vivid way of making the point that judges are constrained by past decisions in a way that legislators are not.

The authors are not enthusiastic about hermeneutic criticism of law. They argue that the fact that the words of a legal text may not constrain does not make interpretation a free-for-all. The example of the age thirty-five provision of the Constitution makes this clear. So the "indeterminacy" of the text viewed in isolation from its cultural surround does not, as other left-leaning legal hermeneuticists believe, open the door to "progressive" interpretation; that door can be opened only by "progressive" interpretation of the surround when the surround is unclear. This is a valid point, and the project of chapter 6. But it doesn't follow, as the authors suggest, that literary criticism must become cultural criticism. Maybe literary criticism should stick closely to the text, as New Critics and other formalist critics

14. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 220.

15. P. 200.

16. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 246-47.

believe, and leave the illumination of the social context to historians and sociologists.

Chapter 3, which deals with narrative, comes closest to presenting a meaningful application of literary theory to law. Literary theorists and critics have said a lot of interesting things about narrative techniques in literature, and most works of literature have a narrative structure. But so, for that matter, do many "works" of law—trials, for example, and constitutional doctrine, which is often presented as a narrative of the growth of concepts of liberty or equality. Good lawyers understand intuitively the importance to success in litigation of being able to tell a good story, but they are not self-conscious about the narrative element in law, and so perhaps can learn something from the literary narratologists.

The chapter contains a very thorough, very helpful discussion of what literary critics have said about the function, structure, and politics of narrative. It also contains some properly critical remarks on "victim narratives"—the personal, often autobiographical stories of discrimination and oppression that are the hallmark of the "critical race theory" branch of legal scholarship and of much feminist writing both inside and outside of law. Binder and Weisberg argue persuasively that there is nothing inherently edifying about narrative and no incompatibility between narrative and analysis. Narratives can be accurate and insightful, but they can also be misleading and obtuse. And narratives frame or are framed by analysis. Discussing several edifying examples of law-related narrative, including a study of "battered women's" stories that surprisingly concludes that "[v]ictims of domestic abuse are not passive and helpless, but insubordinate and indomitable,"[17] Binder and Weisberg observe that "[t]hese texts achieve their subversive effect not by opposing reason with experience, but by offering reasons to replace one narrative 'construction' of experience with another."[18] But they don't consider the possibility that conservative narratives, for example of affirmative action and political correctness, might be equally redescriptive and "subversive" in the opposite direction. Nor are they forthright in confronting the issue of truthfulness presented by such notable "victim narratives" as Patricia Williams's *Alchemy of Race and Rights*, which they discuss admiringly and at length.[19]

The chapter also contains a worthwhile discussion at my expense of Robin West's comparison of me to Kafka.[20] West had argued that the characters in Kafka's fictions are parodic versions of "economic man" that

17. P. 245.

18. *Id.*

19. Pp. 257-60; *see also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991), *discussed in* RICHARD A. POSNER, OVERCOMING LAW 368-84 (1995).

20. Pp. 284-87.

demonstrate the factual and moral inadequacy of economic models of human behavior.[21] Although Binder and Weisberg have room for so much else, even for Rickert and Windelband,[22] they do not find room to mention my criticisms of West's interpretations both of Kafka and of economic theory.[23] But they are right that her take of Kafka and mine on economics are alternative ways of "narrating" law, hers a narrative in which the central characters are Kafka's "hapless schlemiels anxious to salvage their bourgeois dignity by consenting to their own discontents,"[24] and mine consisting of robust clear-eyed rational maximizers of their own satisfactions.[25] Binder and Weisberg make a better case than West that "Kafka's fiction is not only," as I had argued, "about interior despair but also about the social world that helps create it."[26] I had already made a bow in this direction in my discussion in the second edition of my book of Kafka's great story "The Metamorphosis,"[27] but the authors are not aware of the second edition and if they were they would regard the bow as too slight. They may be correct.

In chapter 4 the authors take up rhetorical literary criticism. "Rhetoric" is a maddeningly elusive term.[28] In one sense it just means style, and when it is so understood rhetorical criticism is coextensive with formalistic criticism. In a more influential sense, that of Aristotle, rhetoric means the methods of rational persuasion suitable to areas in which exact methods of inquiry, such as mathematics and logic (today one would add scientific experimentation), are unavailable. In a still broader sense, one that has commended itself to some modern literary critics such as Wayne Booth, and to James Boyd White, one of the founders of the law and literature movement, it refers to edifying discourse, discourse that preserves and enhances culture and decency, as distinct from the antiseptic and (as White certainly sees it) sinister prose of the social scientist.

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21. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985). West uses Kafka's depictions of human motivation to dispute my claim that wealth-maximizing transactions promote well-being and autonomy.

22. *See* note 2 *supra* and accompanying text.

23. *See* POSNER, LAW AND LITERATURE, *supra* note 4 at 182-205. The authors' second thumbnail characterization of my book—"its ultimate point is to defend market-oriented legal thought against West's literary reading," p. 285—is no more accurate than the first (a polemic against law and literature scholarship); but it *is* a characteristic of chapter 6 of my book, the chapter on Kafka and West. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 182-205.

24. P. 285.

25. The suggestion that economic analysis of law is an unrealistically optimistic narrative has been made before, notably by Arthur Leff. Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 452 (1974).

26. P. 287.

27. POSNER, LAW AND LITERATURE, *supra* note 4, at 186.

28. *See id.* at 255-56.

In perhaps the best discussion in the book, Binder and Weisberg explain that the followers of Leo Strauss, including Allan Bloom, the author of the bestselling *The Closing of the American Mind*,[29] though they consider themselves philosophers and political theorists, are in fact "conservative rhetoricians," whose position the authors summarize as follows:

> Conservative rhetoricians oppose classical thought to modern thought, and so oppose rhetoric to both the subjectivism of Romantic literature and the objectivism of science. . . .
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> . . . [They] apparently adhere to a classical metaphysics made up of natural wholes, classes, and values. Yet it is not always clear whether they believe that this metaphysics is true or merely that it is useful to the maintenance of desirable forms of social authority.
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> . . . Conservative rhetoricians present themselves as open-minded pluralists, seeking to make room for classical ideas in modern debate rather than to replace modern ideas. Yet this position may simply reflect an effort to exploit the vulnerabilities of liberal ideas like value relativism, value neutrality, and tolerance. And it may reflect the awareness of these rhetoricians that classical ideas are unlikely to prevail with the general public in a modern liberal state. In any case, their teachings are not primarily directed at the public but at intellectual and political elites.
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> . . . Conservative rhetoricians place relatively little value on candor, which they associate with incontinent self-revelation and an irresponsible disregard for how information may be misused.
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> . . . .
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> . . . [They] see themselves as a relatively powerless intellectual elite . . . that must ally with and civilize other sources of political power in order to conserve itself and its values.
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> . . . [They] see the structure of rhetorical discourse as hierarchical. For those interlocutors unfit for initiation into wisdom, rhetoric serves to deceive and mollify. For those fit for instruction, rhetoric is a pedagogic. . . . A lengthy, suspenseful, and eroticized process of initiation serves to confirm the charismatic authority of the teachers and to socialize the pupils to deference and patience.[30]

This seems to me just right. There is only one problem. Binder and Weisberg's analysis of Straussian political theory as conservative rhetoric has naught to do with either law or literary criticism. If there are any Straussian judges or law professors, Binder and Weisberg are not telling, and their skillful anatomizing of Straussian theory owes nothing that I can see to either literary criticism or literary theory. It is an example, their wonderful excursus on the Straussians, of the self-indulgent character of the book. It is a compendium of the authors' thoughts rather than a disciplined analysis of a

29. *See* pp. 321-22.

30. Pp. 329-30.

subfield of law and literature. No more than half the book is within yards of the intersection of law and literature.

I have not done with chapter 4. The authors, here repeating an earlier and unusual claim in the book that Alexander Bickel was a principal forerunner of the law and literature movement, say that he believed that the only way to meet the crisis as the authors see it of the Constitution's failure to speak clearly to modern issues of race relations was "through ever greater artifice and ever more subtle aesthetic vision."[31] Specifically, "[his] method was *rhetorical* in the sense that it combined prudential reason with eloquence, in that it aimed at reaffirming the normative basis of social solidarity, and in that it aimed at modeling the political virtues of restraint, forbearance, and commitment to deliberative dialogue."[32] Here "rhetorical" is being used in an unhelpfully broad sense, but on the next page the authors explain that Bickel, adopting Hamilton's description of the judiciary as "the least dangerous branch"[33] of the federal government, believed that the role of the judiciary was "to lead by persuasion, not coercion, and by example rather than regulation."[34] This is fine, but it is the beginning rather than the end of rhetorical criticism. The judiciary's role having been defined as leadership by persuasion and example rather than by force and precept, the critic would be expected to take over and explain how that role is best played in dealing with specific constitutional issues, such as abortion, school prayer, and affirmative action. But that is not attempted and the authors veer off into a discussion of Lincoln's politics of prudence.

They come back, though, to James Boyd White, who "conceives rhetoric as restorative . . . . The aesthetic vision animating this view of literary art is the New Critical 'tolerance of ambivalence . . . .'"[35] The authors are skeptical:

> White's literary rhetoric aims to evoke in the hearer an *attitude* of devotion to principle, an attitude that might be jeopardized by confrontation with any *particular* principle. . . . Passions will be sublimated in art, and opponents will be soothed by the complex symmetry of the discursive world they make together. Aesthetic self-discipline will replace moral self-discipline, and righteous indignation will give way before gracious gestures.[36]

This is a fair summary, and a damaging one.

The authors end up criticizing both conservative and liberal versions of rhetoric, and, again pointing forward to their last chapter, urge "equat[ing]

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31. P. 310.
32. *Id.* (emphasis in original).
33. They seem to think it Bickel's coinage. P. 311.
34. *Id.*
35. P. 352.
36. P. 353 (emphases in original).

rhetoric with the performance and criticism of culture."[37] Why they think it helpful to retain the word "rhetoric" is unclear.

In the penultimate chapter the authors take up what they call deconstructive criticism of law. The word "deconstruction" is (properly) used in at least two distinct senses. One, the easier to grasp, is as a style of textual interpretation far wilder than anything dreamed of by the New Critics but recognizable as an extension of the New Criticism by its fascination with the extravagant ambiguities of meaning that emerge when a text is inspected minutely, obsessively, with little regard for stabilizing contextual features. This meaning of deconstruction has obvious if unacceptable implications for legal interpretation,[38] because fixity of meaning is necessary to minimize legal uncertainty and cabin judicial discretion. Binder and Weisberg are less interested in deconstruction as an interpretive technique than in deconstruction as an ontological stance that they deem reactionary because it implies (and in Derrida expresses) criticism of participatory democracy. Common sense tells us that speech is a more reliable, in a sense more "basic," method of communication than writing because it is immediate, because it enables meaning to be clarified by inflection and body language and by interrogating the speaker, and because the speaker knows who his "reader" (that is, listener) is and can fit his words to the listener's understanding. At the opposite extreme is a document written for one purpose centuries or even millennia ago and read today for another purpose by people culturally as well as temporally remote from the writer—the *Iliad*, for example. Derrida opposes the privileging of speech over writing and finds it exemplified in radical politics, where new meanings and identities are forged in meetings, rallies, and other communal projects that bring people face to face with each other.

This analysis of Derrida's political philosophy is very interesting but its connection to either law or literature is tenuous. After thirty pages on Derrida the authors turn to legal radicals ("crits"), such as Duncan Kennedy, who the authors believe misunderstand deconstruction as licensing epistemological skepticism. The crits think the arguments that lawyers make and that judges purport to base decisions on do no actual work because every legal argument implies its opposite. In showing this the crits say they are "deconstructing" the legal process. (Here "deconstruction" becomes close to a synonym for "destruction.") Binder and Weisberg argue that the crits mistakenly believe that deconstruction is skeptical, whereas actually it is pragmatic; and "skepticism presumes that epistemological foundations must be established for knowledge to be legitimate," while "pragmatism presumes

37. P. 377.

38. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 211-16, 219-20, 234-36.

that because such foundations cannot be established they cannot be necessary."[39]

At the end of the chapter the authors give a helpful preview of their own preferred approach, "cultural criticism". It means applying

> literary analysis to the drama of particular legal disputes and legal transformations, to better understand what is truly at stake. Whether we are bent on describing normative conflict or prescribing its solution, we will do better if we understand that it is the very identities of the participants that are at issue.[40]

The key words are "drama" and "identities," as we see most clearly in a vignette in the final chapter. The authors are describing a book that contains a chapter about the trial of Abbie Hoffman and other radicals (the "Chicago Seven") on charges growing out of the riots at the 1968 Democratic convention in Chicago. At the trial Hoffman "broadly played the *shtetl*-dweller, just off the boat."[41] The judge, also named Hoffman, and also Jewish, was an elderly man, a Republican, of exaggerated formality, and in fact a courtroom martinet. Abbie Hoffman "placed Judaism on both sides of the civilization divide . . . [b]y calling public attention to Judge Hoffman's Jewishness";[42] thus showing, among other things, that "Judge Hoffman was not simply striving to 'pass' but was actually collaborating in the persecution of his own people."[43] Binder and Weisberg offer this analysis as an example of how we can read a trial "to discover the social forms, rituals, and mechanisms of meaning that underlie its apparent function."[44] The trial of the Chicago Seven, conceived as a literary text, was not about whether Abbie Hoffman and the other defendants had committed crimes but about "exposing the soiled undergarments of civilization—its sexuality, materiality, savagery."[45]

This is an *outré*, even a bathetic, example ("soiled undergarments"). The other examples that embellish this final chapter are no more representative of the normal operation of the legal system—a war crimes trial, the medieval Icelandic revenge system, an Indian tribal trial, and the trial of John Brown. The quirky choice of examples illustrates the self-indulgent tone of the book. The chapter culminates in an aesthetic analysis of capitalism. The authors argue that to make capitalism work, society had to invent new "characters"

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39. P. 461.

40. *Id.* The authors do not mention in this connection Paul Kahn, the most programmatic advocate of a "cultural studies" approach to law. *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999). Maybe Kahn's book was published too late for Binder and Weisberg to cite it.

41. P. 482.

42. *Id.*

43. *Id.*

44. P. 481.

45. P. 482.

(in the literary sense) for merchants, creditors, financiers, and other key actors in a capitalist society who had been despised in the Middle Ages. This is a good point; and the literary depiction of the transition from medieval to capitalistic values is well captured in *The Merchant of Venice*,[46] which the authors do not discuss. The authors are after bigger game, arguing among other things that

> the corporation represents the eternal capitalist life, the form of commerce that transcends the vagaries of commerce. . . .
>
> The corporation is a figure of ravenous desire, conceived as a mere agent of distribution but ending up as the great consumer of value. It is the answer to the wonderful question of capitalism that [Walter Benn] Michaels poses: How do rich people who seem to have all that a person could want manage to keep on wanting? A person has to have a limited body and hence a limited appetite, but the corporation can transcend these limits. Just as the corporation, saviorlike, takes upon itself the liability of its investors, it also takes on their desires and keeps them safe from satiation.[47]

These are wild and whirling words, behind which lurks a Depression-era fear of overproduction—a theme of another literary work that Binder and Weisberg do not discuss, Aldous Huxley's *Brave New World*, and of 1950s-style sociologists such as David Riesman, Daniel Bell, and Richard Sennett. Capitalism is *too* efficient: It spews out products in such abundance as to threaten disaster, as in the story of the Sorcerer's Apprentice. Society casts about frantically for methods of sopping up the excess production, as by turning the citizen into an avid consumer or creating an artificial person, the corporation, to store goods forever. Yet disaster is always lurking just around the corner for the capitalist, and so, the authors argue, rich people collect art because its permanence acts as a hedge against the inherent insecurity of capitalist enterprise.

I leave the reader to evaluate the cogency of this conception of capitalism. I want to make three points that will bring this review to a close. First, the project of "cultural criticism" described at considerable length in this final chapter is ostentatiously marginal to any serious interest in the American legal system. Second, if it has implications that I have missed for the "progressive" politics that cultural criticism of law is supposed to serve, the authors do not describe any. And third, it is all secondhand. Because the authors do not apply their conception of cultural criticism to particular trials, doctrines, or institutions, but merely paraphrase the applications of other scholars, such as the new-historicist literary theorist Walter Benn Michaels talking about the corporation, the reader cannot tell whether there is anything distinctive or original in their approach. This is not to deny that their

46. *See* POSNER, LAW AND LITERATURE, *supra* note 4, at 107-08, 189.

47. P. 531 (citations omitted).

paraphrases are skillful and helpful to anyone who wants help in understanding modern literary theory.

I hope I have given an adequate sense in a reasonable compass of the scope and thrust of the book, and of its strengths and weaknesses. Its strengths are its many penetrating criticisms, of which I have been able to give only a glimpse. Its weaknesses are its inordinate length and promiscuous breadth, its failure to define and organize a subject, and its lack of a constructive aspect, a lack shown most dramatically by the authors' failure to redeem the promise—held tantalizingly before us, just out of reach, in the earlier chapters—of illumination through "cultural criticism."