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COMMENTARY
SKEPTICISM ABOUT PRACTICAL REASON IN LITERATURE AND THE LAW

Martha C. Nussbaum*

I. FREEDOM FROM DISTURBANCE: THREE STORIES

I begin with three stories about the fourth century B.C. Greek philosopher Pyrrho,1 the founder of skepticism in the Western philosophical tradition.2 These stories were handed down by the ancient biographer Diogenes Laertius; they exemplify the way in which semi-mythical tales about the founder are used to illuminate aspects of the skeptical way of life — a life without commitment to definite normative beliefs.

A.

Pyrrho is on the deck of a ship at sea when a storm comes up suddenly. Pyrrho's fellow passengers begin to rush around, filled with

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anxiety. Having definite beliefs about what is good and what is bad, they try to protect themselves, their loved ones, and their possessions, and they wonder anxiously what to do. Meanwhile, on the deck of the ship, a pig goes on eating contentedly at its trough. Pyrrho points to the pig and says, "The wise person should live in just such freedom from disturbance."3

B.

One afternoon Pyrrho's colleague Anaxarchus falls into a swamp. Pyrrho sees him floundering, but walks on by without helping. When others blame Pyrrho, Anaxarchus himself — by this time, let us hope, somehow escaped from the mud, though Diogenes Laertius does not say — praises Pyrrho's lack of normative commitment and his freedom from emotion.4

C.

Pyrrho, out walking, is confronted by a fierce dog. He is startled and displays, in his fear, signs of a residual attachment to definite beliefs about what is good and what is bad. He comments apologetically: "How difficult it is entirely to divest oneself of the human being."s

These stories show that practical reasoning — reasoning about what course of action is good or right — brings trouble. Both the difficulty of the reasoning itself and the normative commitments that result lead to anxiety and disturbance. Life is calmer if one gets rid of such definite commitments and the struggle to arrive at them. On the other hand, these exceptionally shrewd anecdotes indicate two things about the effort of removal. First, it is driven not by good arguments, but by something very different. No good reasons lead to the skeptic's suspension of normative commitments; in fact, suspension appears to be motivated by the calm condition that results. Second, when normative commitments go, something fundamental to humanity goes with them, something that is deeply bound up with our ability, as humans, to care for one another and to act on one another's behalf.

The skeptics are with us again. We are living in the midst of a revival of the attack on normative reasoning and commitment that was a stock-in-trade of Pyrrho's school. This revival enjoys some influence in philosophy but far more in literary theory and, lately, in those parts of legal thought that are influenced by literary theory. It is becoming fashionable to make some of the claims associated with

3 Diogenes Laertius, supra note 1, at IX.68.
4 See id. at IX.63.
5 Id. at IX.66.
the Pyrrhonist tradition: that to every argument some argument to a contradictory conclusion can be opposed; that arguments are in any case merely tools of influence, without any better sort of claim to our allegiance; that when contradictory claims are asserted there is no rational way to adjudicate between them; that normative commitments not only are unjustified, but also are barriers to a fruitful social life, a kind of reactionary up-tightness; and finally, that all of these skeptical claims are not normative assertions at all, and thus signs of an internal inconsistency in the position, but simply reports or avowals of one's current mental state, quasi-assertions that inscribe themselves within their own critique.6 All this, which should sound familiar from contemporary debates, is, in fact, Pyrrhonism.

Modern skeptical positions can be and have been criticized in many ways. But the historical parallel sheds new light, both on the structure of some contemporary arguments and on ways that we might respond to them. I will argue that there is a striking and significant affinity between the views and methods of Pyrrhonist skepticism and the views of some prominent contemporary literary and legal thinkers. As examples that will, in their diversity, stand for a wider group of positions, I shall discuss Jacques Derrida, Stanley Fish, Barbara Herrnstein Smith, Richard Posner, and Robert Bork. Although their views may seem extreme, I shall argue that they are both highly influential and symptomatic of pervasive tendencies. The excursus into ancient skepticism illuminates the contemporary scene because the ancient arguments are more fully worked-out than their modern analogues, more methodologically self-conscious, and also, above all, more explicit about the change in ways of life that they require of their adherents.7

I wish to note two facts before I begin. First, the modern thinkers I shall discuss do not always describe themselves as skeptics; Fish, indeed, would clearly say he rejected the label.8 To the extent that this move is not simply inaccurate or disingenuous, it can be explained by the fact that the sort of skepticism modern thinkers know best is a modern sort, which attacks certainty and justification rather than belief and commitment, and in which the skeptical critique leaves the

6 See infra pp. 721–22.

7 I have so far focused on skepticism's assault on normative ethical beliefs, but it attacks, as we shall see, far more, including beliefs about the physical world and even logical beliefs. Most of the modern positions I discuss are similarly broad, but the attack on the normative remains the central focus of this Commentary.

8 See STANLEY FISH, Anti-Foundationalism Theory, Hope, and the Teaching of Composition, in DOING WHAT COMES NATURALLY 342, 353 (1989). Fish formulates his position in terms of "tacit knowledge," which would usually be taken to be inconsistent with skepticism. I argue that Fish's position is similar to ancient skepticism and that what Fish calls "tacit knowledge" is similar to the ancient skeletal ideas of habits and customs. See infra pp. 721–22.
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rest of the practices of life unaltered. Ancient skepticism is very different from its modern descendants in these and other ways; and it is ancient, not modern skepticism that I believe to be interestingly close to several kinds of modern anti-normative arguments.

Second, this Commentary is a piece of a larger project that develops my own positive view of practical and especially legal reasoning. This project has two closely related parts. It contains an account of the procedures of rational judgment. This account, based on Aristotle, stresses the importance of systematic thought about human well-being, and at the same time urges the combination of systematic thought with experience and with a grasp, based on experience, of concrete particular cases. It develops an account of the role to be played by emotions and, in particular, the emotion of compassion, in good public reasoning. The project also contains an account of good human functioning and of ability to function that should be the basis for public reasoning in the areas of welfare and development policy and other related areas of public reasoning, including some areas of the law. I argue that it is possible to give a rational justification for an account of practical reasoning that is, in its most general terms, universal and non-relative, although the justification of the account relies exclusively on historical and experiential criteria. Although I focus here on the critical part of my project and not on the positive view, its general contours, at least, will emerge from my portrait of a skeptical pupil and from my critical arguments.

II. Nikidion in the Skeptical School

To pursue the ancient–modern analogy we need an account of Pyrrhonist skepticism. To be truly revealing, such an account must describe not only philosophical arguments, but also the larger set of practices in which the philosophy is embedded. For these ancient

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philosophies, like their modern literary and legal counterparts, present themselves not as mere professional positions, but as understandings that derive from needs within life and change life in turn. We would therefore profit from following a hypothetical pupil whose adventures and responses we can examine. Because philosophers of this time seem to have held that women had the same difficulties with ethical reasoning that men did, and the same capability for progress, I introduce a female pupil, one actually mentioned by Diogenes Laertius as among the courtesans who became followers of the Epicurean school. I select a pupil named Nikidion, which means "Little Victory"—suggestive of a woman who will, as I imagine her, have a very intense interest in intellectual success and security.

Nikidion has, when we encounter her, definite views about what is good and bad. For the sake of argument, let me suppose that they are not those of an Epicurean pupil, but instead the neo-Aristotelian views that I would wish to defend. These include a commitment to reasoned dialectical argument about the good human life, based upon a sifting of experience—a sifting that attempts to produce a coherent ordering of ethical beliefs, "saving the greatest number and the most basic." They also include a commitment, open-ended and revisable because grounded upon dialectical arguments that have their roots in experience, to a definite view of human flourishing and good human functioning. Nikidion believes that both she and other human beings have needs for things in the world: for political rights, for money and food and shelter, for respect and self-respect, for love and friendship, for the freedom to plan a life for oneself and to live in accordance with that plan. Because she has concluded that the good of other human beings is an end worth pursuing in its own right, apart from its effect on her own pleasure and happiness, she is committed to thinking hard about the political and economic conditions in which other people live, and to doing whatever is in her power to promote people's capabilities to function well. Through these commitments she interprets herself and the world.

But the other face of commitment is vulnerability. Because she is an Aristotelian about human flourishing, Nikidion is frequently disturbed. She is disturbed, first, for her own well-being. She notices keenly the impediments to good human functioning that her society has placed in her path: the absence of political rights for women, for example, and women's perilous economic condition. She feels anger

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12 See Nussbaum, supra note *, at 45 n.38, 322–24.
13 See Diogenes Laertius, supra note 1, at X.7. His account of these philosophical women shows that a certain sort of sexism can claim ancient origins. His list includes names such as Mammarion (roughly translated as "Tits"), Erotion ("Lovie"), and Hedeia ("Sweetie-Pie"). See id.
14 Aristotle, Ethica Nicomachea VII.1.1145b5–1145b6 (L. Bywater ed., 1890) (Great Britain, E Typographeo Clarendoniano 1894) (my own translation from the Greek text).
at her present state and fears for her future. At the same time, she
notices the situation of others, and, because she is a social being who
considers the flourishing of others to be an important goal, she re-
responds to their perceived misery with compassion and urgency. In
this way, by thinking about human needs and about the good, she
multiplies her sources of disturbance. Poverty, slavery, ill health, the
deaths of children — in all these misfortunes of others she finds
additional burdens for herself.

Furthermore, having views about rightness and goodness, and
having built her life on these views, Nikidion will be very upset if
she encounters a challenge to those views that she cannot rebut. Let
us now suppose that an equally dedicated adherent of an opposing
ethical view, let us say a stoic,\(^{15}\) confronts her. The stoic mounts a
strong, well argued attack against Nikidion's Aristotelian view, and
argues for an incompatible thesis: that the things of the world are
worth nothing at all, and only one's own thought has value. If this
opponent is right, Nikidion is wrong, and, more important, she is
living badly, because she is focusing much of her attention on worth-
less things. But she cannot immediately find an answer to the chal-
lenge. The arguments appear to be of equal force. Because she has
been encouraged to care about truth and correctness, she is troubled:
which one is really right? She turns to a third major school of her
time,\(^{16}\) the skeptical school, in the hope that it will solve her problem.

Skepticism, as its official definition holds, is the “ability to set up
an opposition of impressions and thoughts, in any way at all — an
ability through which we come, through the equal force of the op-
posing statements and states of affairs, first into suspension of com-
mitment, and after that into freedom from disturbance.”\(^{17}\) This sig-
nificant account needs close scrutiny. Skepticism, first of all, is an
“ability.” That is, it does not pose as a body of truths, or a kind of
knowledge. Because the skeptic will urge Nikidion to stop caring
about truth and to stop making truth-claims, this is wise. What she
will learn, her teacher announces, is a kind of know-how. Second,
what the ability does is to set up “oppositions of impressions and
thoughts.” Nikidion's experience of opposition, which occurred the

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\(^{15}\) For a good general account of Stoic ethics, see LONG & SEDLEY, cited above in note 1, at 344–437; and A.A. LONG, Hellenistic Philosophy 179–209 (1974).

\(^{16}\) The best brief account of the history of the various schools is David Sedley, The Protagonists, in Doubt and Dogmatism I (Malcolm Schofield, Myles Burnyeat & Jonathan Barnes eds., 1980). I focus here on the account of skepticism offered by Sextus, which seems to represent an attempt by later skepticism to return to its Pyrrhonist origins, or at least to what it takes the life and practices of Pyrrho to represent. See David Sedley, The Motivation of Greek Skepticism, in The Skeptical Tradition, supra note 2, at 9, passim. A good case for Indian influence on Pyrrho is made by Everard Flintoff, Pyrrho and India, 25 PHRONESIS 88, 103-04 (1980).

\(^{17}\) Sextus Empiricus, Pyrrhonism, supra note 1, at I.8.
first time by chance, she will now learn to produce systematically across the board: for every belief she holds, the skeptical teacher will produce, from somewhere, the contradictory belief. This opposition, the skeptic now announces, may be done "in any way at all," for, as we shall see, the skeptic does not have definite normative commitments about procedural matters any more than he does about anything else and officially denies all concern about the validity and formal structure of arguments. This "ability," says the skeptic, uses the "equal force" (isosthenetia), or the apparently equal persuasiveness of the opposing claims, to show that "neither of the contending discourses lies ahead of any other as being more convincing."\(^{18}\) This equal force brings the skeptic to a "suspension of commitment" (epochê), which is defined as "a standstill of reason through which we neither deny nor assert anything."\(^{19}\) Finally, the skeptic is left with "freedom from disturbance" (ataraxia), "the unburdened and tranquil condition of the soul."\(^{20}\)

We now need to look more closely at how all this works. Nikidion is firmly convinced, let us say, that cannibalism is wrong. The skeptic teacher now produces for her examples of people somewhere in the world who firmly believe the contrary and who give strong religious arguments for their conclusion.\(^{21}\) The teacher uses his ability to get Nikidion to feel genuinely torn. Now she will give up on trying to find out what is really right, convinced that there is no deciding the matter.\(^{22}\) And then she will be freed from normative commitment and will enjoy a tranquil and unburdened condition of soul.

The skeptic is aware that by proceeding in one way rather than another, and especially by teaching Nikidion to do things one way rather than another, he might seem to be recommending something. Thus he might seem to be engaging in normative discourse and making normative assertions, just as much as those he attacks. There is a carefully crafted response to this charge. Many of the skeptic's utterances, he acknowledges, do have the grammatical form of asser-
tions. When their content is normative, they look very much like normative assertions. But this is not what they are. They are, instead, reports or "confessions" of the teacher's psychological state at the moment. "[I]n bringing these utterances forward, he is telling what strikes him about what is at hand, in the manner of someone making a report,"23 "not with belief and conviction, but going over what he is experiencing."24 And insofar as he adopts, as a teacher, some definite approach to the pupil, this too involves no commitment about what is best. It is simply a natural reaction, much as a dog with a thorn in its paw is naturally inclined to remove it.25

But we might now ask whether Nikidion, in order to be freed from her cognitive commitments by skepticism, must not believe in the validity and soundness of its arguments. The answer is yes and no. At the time, she is swayed by the opposing arguments. They have force with her as causes, and, if she is still in a primitive condition of skeptical education, she may at first believe that they give good reasons. But as she progresses into skepticism, her commitment to all standards is weakened. The arguments, as they loosen her from her other normative commitments, go to work upon themselves. The skeptics use several vivid metaphors to describe this situation. Their characteristic description of the self-undermining character of skeptical argument is that the arguments "are inscribed together with"26 the things they attack: an image of the argument drawing a line around, or through, other normative statements and at the same time inscribing an X, so to speak, across itself. Going through the arguments, the skeptic adds, is like climbing a ladder to a high place and then kicking the ladder away.27 Even more accurately (because self-inscription is, properly speaking, a simultaneous rather than a two-stage process), the arguments are like purgative drugs, which remove the waste matter from bodies and remove themselves at the same time.28

It was frequently objected in the ancient world that no person could live and act like this.29 For it would appear that action requires beliefs, including beliefs about what is good and bad, better and worse. Skeptics deny this. In doing away with commitments about the way things really are, they have not, they insist, done away with

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23 Sextus Empiricus, Pyrrhonism, supra note 1, at 1.200.
24 Id. at 1.197; see id. at 1.4, 1.187–91, 1.200, 1.203; Diogenes Laertius, supra note 1, at IX.104.
25 See Sextus Empiricus, Pyrrhonism, supra note 1, at 1.238.
27 See Sextus Empiricus, Against the Professors, supra note 1, at VIII.481.
28 See id. at VIII.480; Sextus Empiricus, Pyrrhonism, supra note 1, at I.206, II.188; Diogenes Laertius, supra note 1, at IX.76.
29 See Burnyeat, supra note 2, at 118.
all motive forces that produce action. Many living creatures move and act without belief. Animals are moved by the way things strike them. They have no commitments about what is correct, but they are still moved in various ways: by their faculties, their habits, and even their memories.\textsuperscript{30}

The same, the skeptic continues, can be true of Nikidion. She can simply allow herself to be swayed by what the skeptic calls "the observances of life."\textsuperscript{31} Four forces that cause action are identified: first, "the guidance of nature,"\textsuperscript{32} by which the skeptics mean the natural, uncommitted use of cognitive faculties of perceiving and thinking; second, "the necessity of the feelings," for example, "the way hunger sets us on the road to food, thirst to drink";\textsuperscript{33} third, "the transmission of customs and laws,"\textsuperscript{34} that is, ethical conventions that have, by being deeply embedded in the personality, become motivating forces whether or not one believes in them — for example, the way one may follow religious observances without being a believer; and, finally, professional training, which, again in an embedded and routinized way, causes us to act whether or not we believe in what we are doing.\textsuperscript{35} This means that Nikidion need not sit in a corner in silence. She can speak and act in a seemingly normal way. She can follow the customs of her community, she can eat and drink, she can even be a lawyer. "But all this," the skeptic reminds his pupil, "we do without belief."\textsuperscript{36}

The result of following this way of life, the skeptic teacher claims, is that Nikidion will act without the agonizing uncertainty of deciding what is right to do, speak without the fuss of wondering about beauty and correctness, follow custom and habit and professional expertise without the irritating worry that some ethical argument somewhere can show that this way of doing things is wrong. Of course she can. That is why it is so foolish to care about arguments. In this way, the skeptic claims, through skepticism Nikidion will achieve what people seek in vain from ethical argument and ethical belief: repose of the spirit, action without the pressured intensity of concern that usually characterizes ethical choice. Sextus Empiricus tells a revealing story about the skeptic's initial discovery of skeptical techniques:

\textsuperscript{30} See, e.g., \textsc{Sextus Empiricus}, \textit{Pyrrhonism}, \textit{supra} note 1, at I.23–24.

\textsuperscript{31} Id. at I.23.

\textsuperscript{32} Id.

\textsuperscript{33} Id. at I.24.

\textsuperscript{34} Id.

\textsuperscript{35} See \textit{id.} at I.23, I.145–63; \textit{see also} Burnyeat, \textit{supra} note 2, at 126 (explaining Sextus's fourfold scheme of life).

\textsuperscript{36} \textsc{Sextus Empiricus}, \textit{Pyrrhonism}, \textit{supra} note 1, at I.24.

\textsuperscript{37} The word used by the skeptics for what they remove from people is \textit{suntunos}, used elsewhere for the tautness of the string of a musical instrument, for muscular tension, and for the stress of a non-leisured life.
Beginning to philosophize with the idea of sorting out impressions and grasping which are true and which are false, so as to be free of disturbance, he fell into a disagreement, with equal weight on both sides. Being unable to sort this out, he suspended judgment: and as he was suspending judgment, there followed, as it just happened, freedom from disturbance in the sphere of belief . . . . The skeptic’s experience is, in fact, the same as what is reported about the painter Apelles. For they say that as he was painting a horse, and trying to represent the foam on its coat, he was so unsuccessful that he gave up and flung at the picture the sponge on which he had been wiping the paints off his brush. And the sponge made the effect of the horse’s foam. So, too, skeptics used to hope to get freedom from disturbance through sorting out the discrepancies in impressions and thoughts; but proving unable to do this, they suspended commitment. And as they were suspending, freedom from disturbance, as if by chance, followed them as a shadow follows a body.38

The skeptic claims that the pupil’s original motive for argument was to attain freedom from disturbance by resolving troubling contradictions and uncertainties. The search itself, however, generates anxieties. But in the very failure of commitment, in the paralysis of reason by its own oppositional activity, she gets what she wanted all along.

III. NIKIDION IN LAW SCHOOL

Let us now leave the ancient world behind for a time, and transport our fictional pupil to the late-twentieth-century campus of a great American law school. As before, I imagine her as a committed ethical believer: committed both to a definite view of human flourishing and to the arguments that support it, committed to promoting the well-being and capabilities of others along with her own. As before, she is frequently disturbed by anger and compassion and fear. Like many young law students, she has chosen the legal profession, because she is inspired by these disturbances and these social commitments and plans to seek a career in public interest law. But as in the ancient world, she is eager to have a theoretical understanding of the arguments she uses, and in general of the latest influential theories. She is eager for intellectual victory. Consequently she tries to read the latest theoretical discussions, especially those that concern normative ethical argument. Here she finds a great diversity of positions. But there is one set of readings that especially intrigues her: for here, in the literary and legal theory of the late-twentieth century, she finds arguments that remind her strongly of her former life in ancient Greece.

38 Sextus Empiricus, Pyrrhonism, supra note 1, at I.26, I.28–29.
Advised by her law school classmates and professors to study that branch of literary theory generally known as deconstruction, because it is important for the understanding of legal reasoning, she reads widely in the writings of two leading literary theorists: Jacques Derrida and Stanley Fish. In both of these authors she finds a familiar Pyrrhonist strategy.

First, these authors are fond of pointing out that for any argument an opposing argument can be presented. Like the ancient Pyrrhonists, they give examples of many kinds, but especially examples from the activity of textual interpretation. A text is presented; an interpretation is brought forward. Now another contradictory interpretation is brought forward. At this point, the modern Pyrrhonist sees the opposition of claims and declares that they are of equal weight and that one simply cannot decide between the two alternatives; one must therefore simply suspend judgment. In *Spurs: Nietzsche's Styles*, Derrida brings forward a fragmentary text, a scrap of paper discovered in Nietzsche's files. It reads, "I have forgotten my umbrella." Derrida interprets it, first, in the most straightforward way, as a memo. He then tries out, playfully, a contradictory interpretation of a Freudian sort. He points out that we cannot choose between these two interpretations; we are stuck, in effect, with two arguments of equal weight. Furthermore, he continues, the same is true of Nietzsche's text taken as a whole: no interpretation can be shown to be on stronger ground than any other. We must therefore suspend judgment. And, finally, well aware of the self-referential character of a good skeptical argument, Derrida turns the critique on itself: all of this is true of his own text, which inscribes itself together with the text it criticizes. What is left, as in the ancient case, is the free play of critical artistry, following its own desires.

Derrida's positions cannot easily be subjected to rigorous analysis, because, as a writer, he is both playful and obscure. At times his

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40 Derrida, Spurs, supra note 39, at 123.

41 See id. at 129.

42 See id. at 129–31.

43 See id. at 131–33 ("[I]t is always possible that it means nothing at all or that it has no decidable meaning. There is no end to its parodying play with meaning . . . .").

44 See id. at 133–35.

45 See id. at 135–37.
opponents seem to be only those who posit a transcendent or extra-
human origin for values and who hold, in addition, that we can have
a completely unmediated access, or "presence," to those extra-human
sources through the operations of the mind. And Derrida's counter-
proposal is merely the straightforward suggestion that we affirm the
dignity and joy of human activity — including, presumably, evaluative
argument — and stop searching for such transcendent origins.
But this position is systematically intertwined with a much stronger
and more controversial thesis. In this stronger thesis, Derrida's target
is the entire tradition of Western philosophy, including many thinkers
who do not posit a transcendent origin for value. The problem
Derrida finds with this tradition seems to be that it searches for the
single best answer to the questions it asks. The positive alternative
is to realize that we are stuck with the "movement of play" in a
centerless field that contains nothing to "arrest[] and ground[] the play
of substitutions." This realization should lead, in turn, to "the af-
firmation of a world of signs without fault, without truth, and without
origin which is offered to an active interpretation." This sounds like
a position that is incompatible with commitment to an ethical or
political stand on the basis of reasoned arguments that one holds to
be the strongest. And although Derrida's position is not incompatible
with taking an ethical or political stand as play, or on the basis of
some non-reasoned commitment, Sextus's story about Pyrrho's failure
to help Anaxarchus has already made Nikidion apprehensive about
the consequences of such a stance.

46 This appears to be the argument throughout much of Derrida's Of Grammatology. See Jacques Derrida, Of Grammatology 6-26, 27-65, 101-40 (Gayatri C. Spivak trans., 1976) [hereinafter Derrida, Of Grammatology]. It is also the argument in part of one important essay. See Jacques Derrida, Structure, Sign, and Play in the Discourse of the Human Sciences, in Writing and Difference 278, 280 (Alan Bass trans., 1978) [hereinafter Derrida, Structure, Sign, and Play].

47 Derrida summarily condemns both rationalists and empiricists. See Derrida, Structure, Sign, and Play, supra note 46, at 288. In Of Grammatology, the author denounces the entirety of the Western philosophical tradition in a manner reminiscent of Sextus. See Derrida, Of Grammatology, supra note 46, passim.

48 See Derrida, Structure, Sign, and Play, supra note 46, at 289 (suggesting that it is wrong to search for any "center" and for anything "finite").

49 Id.

50 Id. at 292.

51 See supra p. 2.

52 In this connection, she is struck by the fact that it is only quite recently, in the wake of the scandal surrounding the revelation of Paul de Man's anti-Semitic journalism, that Derrida has begun to attempt to show that his notion of play can indeed make room for ethical argument of a traditional sort. See, for example, his treatment of philosophical views of friendship in Jacques Derrida, The Politics of Friendship, 85 J. Phil. 632, 634-35 (1988). It is the earlier position, however, that has been influential in the law; Nikidion feels entitled to read these earlier texts without the hindsight supplied by the new work, which seems to represent a shift in position.
Whatever the ambiguities of Derrida's stance toward ethical values, the most influential legal thinker in the deconstructionist movement, Stanley Fish, is perfectly frank about his Pyrrhonist sympathies, perhaps most clearly in the paper entitled *Anti-Professionalism* in his book *Doing What Comes Naturally*. Fish, like Derrida at his most extreme, takes the existence of opposing claims — in literary interpretation, in legal interpretation, and in many other areas of life — to be sufficient reason to suspend normative judgment. Indeed, like Derrida, he seems to believe that we would have good reasons for judgment only if we had not only universal agreement but also something further that he seems to take to be a necessary underpinning for agreement: namely, transcendent normative standards, standards that exist independently of our history and our practices. What the very fact of disagreement reveals, he says, is that no such standards exist. However, when Fish reaches the point of suspension of normative judgment, he takes a slightly different tack from that taken by Derrida. In a move familiar to Nikidion from her experience in the ancient world, Fish points out that we have, nonetheless, ample forces for action in the training and activity of the professions to which we belong. Although there is no rationally defensible criterion of adjudication in normative matters, we can still reach a decision by following professional expertise and simply see where the current professional debate comes out. That manifestation of power will take the place of our old notions of truth and rightness, giving us a way to choose and to act. This approach differs from Derrida's position in *Spurs*, but only slightly. Fish focuses on power, Derrida on free play; but what is important to both is the suspension of normative judgment that precedes it, the skeptical equipoise about good reasons that leaves us with causal forces that push us this way and that. And Fish, very like Derrida, insists that his own work inscribes itself in its own critique: it has authority to the extent that it, and its author, have professional standing — a notion that is explicitly denied all normative force.


54 See Fish, supra note 53, at 226–31, 235–39, 241–43. Fish insists that people nevertheless make decisions, and in that sense make judgments, but that these are the result of the play of force rather than of rational argument and that they give us motives for action, rather than reasons for action. See id. at 244–46.


56 See id.

57 See id. at 242–43.
In his latest book, moreover, Fish makes the legal consequences of his position explicit.58 Focusing on the regulation of speech, Fish argues that all we see in the debate is partisan politics, which he construes as the play of forces, not as reasoned deliberation.59 There is no such thing as a free speech absolutist, he argues plausibly enough — nobody is opposed to all regulation of speech, for example the regulation of perjury, attempted bribery, and so forth.60 This being so, the line between protected and unprotected speech cannot be drawn by reasoned argument; it is always "not an independent value but a political prize. . . . [W]e have never had any normative guidance for marking off protected from unprotected speech. . . . In short, the name of the game has always been politics."61 On these grounds, Fish is critical not only of dogmatic ethical views that claim to derive conclusions from first principles, but also of any form of ethical or legal argument that makes a definite recommendation for what society and law should do — including the arguments of self-described pragmatists Richard Posner and Richard Rorty.62 Fish's brand of pragmatism, by contrast, recommends nothing, and leaves us with the play of forces:

[H]earkening to me will lead to nothing. Hearkening to me, from my point of view, is supposed to lead to nothing. . . . All I have to recommend is the game, which, since it doesn't need my recommendations, will proceed on its way undeterred and unimproved by anything I have to say.63

So far, Nikidion feels that she understands what is going on. The positions and the players seem to her rather familiar. She is not surprised to discover that this skeptical approach is castigated by "dogmatists" of many kinds, and that the skeptics, in turn, consider themselves to be better people than the dogmatists, more honest and open-minded, perhaps more democratic, certainly less anxious and

58 See Stanley Fish, There's No Such Thing as Free Speech and It's a Good Thing, Too 3–28 (1993).
59 See id. at 7 ("Reasons do not confirm or shore up your faith; they are extensions of your faith and are reasons for you because of what you already believe at a level so fundamental that it is not (at least while you are in the grip of belief) available for self-conscious scrutiny.").
60 See id. at 102–19; see also Cass Sunstein, Democracy and the Problem of Free Speech at xii (1993) (arguing that, although the words of the First Amendment seem absolute, they are actually ambiguous).
61 Fish, supra note 58, at 102, 111.
62 See id. at 200–30.
63 Id. at 307. This point is underscored several times in the book: "[T]he point is that there is no point, no yield of a positive programmatic kind to be carried away from these analyses. . . . It's the unavailability of such a yield that is my point. . . . People absolutely go bonkers when they hear that, but that's the way it is." Id. "What follows? What does this mean for the way we live? My answer is, 'not very much,' and it is an answer that will be distressing both to the forces on the intellectual left and to their opponents." Id. at 19.
elitist and authoritarian. What surprises and confuses her, however, is her discovery that a very similar position is advanced by people who would not consider themselves at all friendly to the deconstructionists — people who place themselves politically in opposition to Fish\textsuperscript{64} and his allies in the law, and who claim to be constructing a scientific account of legal matters.

Neoclassical economists have tended to assume a very strong distinction between fact and value, according to which all ethical evaluation is unqualifiedly subjective and arbitrary, a mere play of self-interested forces. As far as science is concerned, and whatever they take to fall within the domain of science, they are far from skeptics — this, in fact, is the major difference between their position and that of the deconstructionists. But as far as evaluation itself is concerned, they have tended to accept Milton Friedman's famous statement that concerning questions of value, "men can ultimately only fight."\textsuperscript{65} Because it is the economics of the Chicago school that has, on the whole, been influential in the law-and-economics movement, it is no surprise to find this movement adopting the Friedman view of evaluation. We should remember, too, that the statement made famous by Friedman was actually made in almost the same words by the renowned jurist Oliver Wendell Holmes, Jr.,\textsuperscript{66} whose influence on Richard Posner and other thinkers of the law-and-economics movement has been profound.\textsuperscript{67} The approach seems to be similar to the deconstructionist approach. Because, in matters of value, we have neither external standards nor universal agreement, we are left with the abyss of arbitrary subjectivity. We cannot give good reasons in ethical matters, or even say what good reasons are. But there is one thing we can assert: that the process by which agents seek to make reasoned judgments, like other forms of behavior in which they engage, is really a form of utility maximizing. A significant difference between this law-and-economics position and that of the deconstructionists is that the legal economists, given their adherence to the fact-value distinction, refuse to take the step of skeptical self-inscription; they refuse to apply their strictures to their own views in the playful yet consistent manner of Fish and Derrida. The view, both predictive and normative,\textsuperscript{68} that rationality consists in individual maximization

\textsuperscript{64} However, as Fish himself correctly points out in his new book, he is not necessarily "on the left," because his view refuses to recommend anything. One will be disappointed if one looks to him for a definite left-wing policy. See id. at 20–21, 307.


\textsuperscript{66} See infra note 88.


\textsuperscript{68} There is a tendency in this literature to slide back and forth between the predictive and
of satisfactions is, on the whole — unlike the skeptic's freedom from disturbance, to which it is analogous — treated as if it were an objective behavioral fact, exempt from the general critique of evaluation.

There are many thinkers in the law-and-economics movement, and one of the major ones, Richard Posner, has recently shifted ground, espousing a type of "pragmatism." He has also granted that economic analysis is insufficient to yield the normative libertarian conclusions he favors, and that ethical argument to these conclusions has weight. His position still has a marked Pyrrhonist dimension, but it is increasingly complicated by other ethical notions.

In the light of these complexities, I hope I shall be forgiven if I illustrate some of these points using as my example a legal thinker who is less philosophical than Posner, and who is committed to economic analysis only in certain areas of the law, but whose position makes especially clear the structural parallel between deconstruction and the legal right. I refer to Robert Bork, who, in The Tempting of America, argues against the idea that judges are entitled to invoke the normative, but the commitment to a normative notion of rationality ("this is how people ought to think") is evident in crucial passages. For example, at the opening of The Economics of Justice, Posner asks rhetorically whether it is the case that people are "rational" only in overt market behavior, and not, as well, in their personal decisions; whether it is not the case that people from non-Western cultures, and so forth, are as "rational" as Westerners. See Richard A. Posner, The Economics of Justice 1-2 (1981). By "rational" he clearly means "reasoning well," and yet he defines rationality in the way that economics does, as the maximization of expected utility. See id. at 1. Later, when he concludes that the Supreme Court's privacy jurisprudence is not "rational" in the economic sense, he asserts that their judgments form a "topsy-turvy world." Id. at 345.


71 For the residual Pyrrhonism, see Posner, cited above in note 67, at 447. Posner speaks of "locating a ground for judicial action in instinct rather than in analysis" and concludes that "our deepest values . . . live below thought and provide warrants for action even when we cannot give those values a compelling or perhaps any rational justification." Id. Posner here refers to Holmes to explicate his view, and his expression of the point is, it would seem, influenced by Holmes's statement that "a law was constitutional unless it made him want to 'puke.'" Id. (citing Philippa Strum, Louis D. Brandeis: Justice for the People 361 (1984). Posner does later qualify his position by saying that his approach "need not . . . be quite as shapeless, as subjective, as visceral as I have implied. Certainly it need not be inarticulate . . . ." Id. It would appear that Posner believes that the libertarian principle has more than instinct on its side: he spends much of Sex and Reason showing the social benefits of taking a libertarian stand on sexual matters. See Posner, Sex and Reason, supra note 70, at 181–219, 241–442. His argument appeals not to transcendent standards, but rather to human experience and human happiness. But it looks like a good ethical argument. It is, in fact, a committed and well-reasoned ethical argument of the sort Aristotle would favor, and in an area — human liberty — in which Posner's "deepest values" might appear to his reader to lie.
substantive moral principles in constitutional interpretation. His attack proceeds by way of a general assault on ethical evaluation. Bork begins as deconstructionists frequently begin, by demanding universal agreement as the criterion of acceptability for an ethical principle. No principles, of course, pass the test. Without further ado, and without any search for other criteria of evaluation, Bork concludes that all moral evaluation is altogether arbitrary and subjective. He reacts as do Derrida and Fish: if not the heavens, then the abyss. The evaluator, he says, is "adrift on an uncertain sea" with "no principled way to make the necessary distinctions." All attempted persuasion in ethics, Bork now claims, is really "seduction" — the book's subtitle is "the political seduction of the law." (Bork evidently has a rather low opinion of seduction, which he takes to be altogether independent of reasons or true needs or even good taste.) Judges who attempt to decide cases on the basis of ethical judgments are, he concludes, simply asserting their own "value preferences."

Bork now gives the reader a striking example of his view. There is, he announces, no non-arbitrary way to distinguish the pain of a living being who is being tortured from the pain a religious bigot feels knowing that couples in the state of Connecticut are using contraception. Therefore, there is also no way to distinguish, morally, between the action of the torturer and the action of the user of contraception. This being the case, opinions such as Justice Douglas's opinion in *Griswold v. Connecticut,* which relied on an ethical judgment about the moral worth of privacy, are altogether groundless and unjustified; he might just as well have defended someone who likes to torture...
puppies. In this situation we must, Bork argues, leave matters to the struggle of power — that is, to a majority vote, understood by Bork as the aggregation of a lot of different subjective preferences. Torture of animals should be illegal only because, at this time in our history, a majority votes that way. Sexual privacy, on the other hand, should not be protected if state laws give evidence that a majority would prefer to interfere.\(^7\)

Struck by the uncanny resemblance between this so-called right-wing position and the so-called left-wing position of Fish, Nikidion is thrown into confusion. Her confusion is compounded when she discovers yet one more new fashionable book from the literary world: *Contingencies of Value* by Barbara Herrnstein Smith.\(^8\) Herrnstein Smith, she knows, is a colleague of Fish at Duke and is closely affiliated with Fish's academic stance, which describes itself as radical. And yet her book cites among its sources of intellectual authority the writings of Gary Becker and George Stigler, Chicago school economists whose views are neither radical nor even liberal.\(^8\) In fact, we find in Herrnstein Smith what was bound to occur sooner or later, given the skeptical convergence I have described: namely, the birth of an all-American, Chicago-school, economic deconstructionism. Herrnstein Smith attacks all normative evaluation in a variety of ways — above all, by pointing to the prevalence of disagreement and change of belief,\(^8\) and by suggesting that any objective way to adjudicate disagreements would require the existence of extra-historical, transcendent standards.\(^8\) Because there are no such standards available, she continues, all evaluation is subjective.\(^8\) And because this is so, how should we understand what goes on when people make evaluative judgments? By using, she replies, the idea of the *market*, and a model

\(^7\) *See* Bork, *supra* note 72, at 258. Bork argues that the unavailability of an "objectively 'correct' hierarchy" of moral principles in nature implies this result. *Id.* Unless there is such a hierarchy,

the judge must let the majority have its way. There is, however, no principled way to make the necessary distinctions. Why is sexual gratification more worthy than moral gratification? . . . There is no way to decide these questions other than by reference to some system of moral or ethical principles about which people can and do disagree. Because we disagree, we put such issues to a vote . . . .

*Id.* at 258–59.

\(^8\) *Barbara H. Smith, Contingencies of Value* (1988).

\(^8\) *See* *id.* at 191–92 n.6 (praising George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 Am. Econ. Rev. 76 (1977), in which she finds (rightly or wrongly) the thesis that differences in behavior and judgment are best explained along economic lines, with the assumption that we behave and judge so as to maximize our utility). *See generally id.* at 125–49 (discussing utilitarianism, its humanist critiques, and the author's reconciliation of the two through a conception of "utility" as a subtle, complex, and difficult-to-measure element of motive and behavior).

\(^8\) *See* *id.* at 48–52, 63, 65, 71.

\(^8\) *See* *id.* at 93–94.

\(^8\) *See* *id.* at 148–49.
of value judgment as utility-maximizing. Here the deconstructive project comes full circle to embrace Milton Friedman: free play and power, American style.

Nikidion takes in all of these theories. And although at first she believes that the positions she has encountered may be extreme and unrepresentative, she discovers, as she reads rather eclectically in a number of areas of the law — from constitutional reasoning to torts and contracts — the presence of similar ideas, whether under the influence of economists, under that of the more radical thinkers, or even under the influence of the closely-related positions of Holmes. Indeed, she discovers that these positions have, in the law itself, a complicated history. She ponders the Pyrrhonist claims of Holmes, that “[w]hen I say that a thing is true, I mean that I cannot help believing it,” and that visceral responses such as disgust are “ultimate and therefore as irrational as reason itself.” And she is aware that similar claims were advanced early in this century by the legal realists. All these currents, as well as those of continental deconstructionism, feed the present situation. And the present situation is that the very acceptability of ethical reasoning as a mode of legal interpretation is under attack.

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85 See id. at 30, 98-102.
86 See, e.g., Geoffrey Brennan & James M. Buchanan, Is Public Choice Immoral? The Case for the “Nobel” Lie, 74 VA. L. REV. 179, 188 (1988) (describing “public choice theory” and its quest to provide models of political action “that will work well independently of the behavioral postulates introduced”); Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. PA. L. REV. 933, 960 (1991) (“Normative discourse is indeterminate; for every social reformer’s plea, an equally plausible argument can be found against it.”); Pierre Schlag, Normativity and the Politics of Form, 139 U. PA. L. REV. 801, 807 (1991) (describing as a “problem” with normative legal thought the fact that it calls for “a choice, a commitment to this way or that way”).
88 Oliver W. Holmes, Jr., Ideals and Doubts, 10 U. ILL. L. REV. 1, 2 (1915).
89 Letter from Oliver W. Holmes, Jr., to Lewis Einstein (May 21, 1914), in THE ESSENTIAL HOLMES 114 (Richard A. Posner ed., 1992). In a letter to Harold Laski, Holmes expressed the view that values are simply factual generalizations “emotionally expressed.” Letter from Oliver W. Holmes, Jr., to Harold Laski (Sept. 15, 1929), in THE ESSENTIAL HOLMES, supra, at 116. Elsewhere, he told Laski that “[t]ruth is the unanimous consent of mankind to a system of propositions,” Letter from Oliver W. Holmes, Jr., to Harold Laski (Apr. 6, 1929), in THE ESSENTIAL HOLMES, supra, at 115, a position that is, on its surface, inconsistent with the view of truth cited above, but one that displays the motivation for taking up the “can’t help” view. Holmes was a complex thinker, as Posner argues in his excellent introduction, see Richard A. Posner, Introduction to THE ESSENTIAL HOLMES, supra, at xix-xx; the Pyrrhonist critique is only one of many Holmes suggested, not all of them mutually consistent.
90 See, e.g., Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71, 160 (1928), reprinted in AMERICAN LEGAL REALISM 200 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993) (arguing that legal reasoning is “not dictated by logic,” and that the choice of an analogy “can be made only in reliance upon practical considerations or upon pure chance”).
IV. SHOULD NIKIDION BE A SKEPTIC?

We now have a picture of the skeptical "ability" at work in both ancient and modern academies. Now we must ask, should Nikidion become a skeptic? And what criticisms might we advance if we wanted to make her reconsider her choice? Once again, I shall begin with the ancient view and then move to its modern counterparts. I shall focus on four difficulties with the skeptical position.

A. Problems with the Ancient View

1. Unrealistic Goal. — The skeptic demands nothing less than universal agreement as the criterion of acceptability for a normative principle. He points out that if we can come up with anyone at all who believes the contradictory of a given proposition — or if we even believe that we might find some such person — this is sufficient to get us started on the road that leads to suspension of commitment. But why should we think so? There are many different reasons that people come to have the beliefs they have, in normative as in other matters. Not all of these reasons are good reasons; many, such as habits or customs, are mere subconscious causes, yet they may influence behavior in powerful ways. It is only because the skeptic has already given up on the distinction between good reasons and mere causes that all beliefs to him look equal. But he is not supposed to assume that this distinction is unavailable, he is supposed to show that it is so. Until he has shown it, Nikidion should not be troubled by the fact that the Egyptians endorse incest, or that a tribe somewhere endorses cannibalism. This fact alone does not have weight independent of the reasons and arguments that are given for holding these beliefs.

2. Loaded Dice. — Once we begin thinking this way, we notice that, in fact, the skeptic does not bring forward arguments that really are equally forceful on the contradictory sides of all questions. The movement from assertion and counter-assertion to alleged "equal force" is rigged, in the texts, by ignoring arguments with good, strong, human credentials that really do help people choose one view as against another. For although we rarely, if ever, find universal agreement on normative matters, we do in the vast majority of cases find ourselves able to decide that this is better than that, that this is good and that bad. Because the skeptic has set the goal unreasonably high, demanding universal agreement, these humble human arguments seem to him of no interest. And we can say something more: that he assumes, in the act of constructing his arguments, a stance of detachment from commitment and belief that is supposed to be the outcome of the arguments, not their necessary prerequisite. It is only because he stands back so far and refuses to allow himself to be swayed by reasons in the way that even he takes to be ordinary for people who
are deciding between one thing and another, that each proposition seems exactly as strong as its opposite.

In fact, the ancient skeptics are forthright about this. They admit that they load the dice, argumentatively speaking, in the direction of equal weight. In a fascinating section of the Outlines of Pyrrhonism, titled "Why the skeptic sometimes deliberately puts forward arguments that are weak in persuasive power," Sextus Empiricus compares his procedure to that of a good doctor. As a doctor will not give a patient an overdose, but will carefully calibrate the dose of medicine to the magnitude of the disease, so too the skeptic will carefully gauge the degree to which the pupil has been infected by the disease of commitment, and will choose an argument precisely calibrated to counterbalance these obstacles. Sometimes his arguments will be weighty, but sometimes "he does not shrink from propounding . . . some that are evidently less forceful." The pupil is viewed as a seesaw, leaning first one way and then another under the weight of argument. The teacher's object is to balance the weights in such a way that eventually she will stop, suspended, right in the middle.

But of course this balancing involves a big departure from the everyday human practices of reasoning and arguing, in which we do not hold all arguments to be of equal force.

3. Freedom from Disturbance Presupposed as the Goal. — What explains this departure? Here we must say, I think, that an ineliminable element of dogmatism enters the skeptical picture. The skeptic insists that neither he nor his pupil should be committed to anything — not to any ethical end and not even to the belief that the argumentative procedures in which they engage are productive of any good end. And yet he advertises his therapy by pointing to its efficacy in achieving a certain end: namely, freedom from disturbance. He claims to have no commitments; he just goes along with life. But isn't he committed here?

The skeptic's official answer is as follows. Freedom from disturbance simply comes by chance, as the result of some process he happens to be following anyway, perhaps because it is his trade. He does not seek it out. It follows, remember, like a shadow after a body. Apelles did not have any deliberate goal when he threw the sponge; he just threw it out of frustration, and the effect came as a lucky coincidence. If his arguments cause freedom from disturbance in his pupil, he will not object to that. But he could not and would

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91 See Sextus Empiricus, Pyrrhonism, supra note 1, at III.280.
92 Id. at III.281.
93 See id.
94 See id. at I.29; supra p. 723; cf. Diogenes Laertius, supra note 1, at IX.107 (explaining that the goal of the skeptic is to suspend judgment and that freedom from disturbance will follow).
not choose to teach in this or that way for the sake of freedom from disturbance — either his own or somebody else's. For this would be a commitment, and to be committed is to be liable to disturbance.

Notice how the emphasis on the value of freedom from disturbance keeps coming back. The purpose of the skeptic's very skeptical attitude toward freedom from disturbance is to avoid disturbance. As Sextus says:

Those from the skeptical way, not affirming or denying anything rashly, but leading everything into skeptical examination, teach that to those who believe that there is something genuinely good and bad there follows unhappy living, while to those who refuse to define and who suspend, "the most carefree life among humans is theirs."95

The skeptic prefers his way to the committed way; he recommends it. If he qualifies his interest in freedom from disturbance, or fails to make it clear that this end is better than disturbance, the whole enterprise will look pointless and unappealing. Nikidion would only learn that it appears to someone that on some occasions a non-committed procedure has produced freedom from disturbance, which seems to some people to be a good thing. This would be unlikely to convert her from her habitual dogmatism.

Consider, too, the role played by freedom from disturbance in ordering the whole skeptical procedure. Suppose the connection between arguments of equal strength and freedom from disturbance was, as Sextus says, discovered by chance in the first place. Well, what happened next? Did the skeptic now argue any old way, and wait for freedom from disturbance to happen if and when it chanced to do so? Did Apelles go back to his brushwork until the next episode of frustration caused him to throw another sponge? Of course not. Apelles, we may imagine, used his sponge from then on whenever he wanted that effect. And the skeptic, as we have seen, devises, with care and ingenuity, patterns of argument that he or anyone else can use to bring Nikidion into equipoise about anything at all. The procedure is incomprehensible except on the supposition that the practitioner believes that freedom from disturbance is an end worth pursuing by some sort of deliberate effort.

Finally, notice that there is one major ethical thesis that the skeptic never subjects to his own antithetical procedures. This is, of course, the belief that freedom from disturbance is an important end. Imagine the following application of skeptical therapy. Some people, says the teacher, regard freedom from disturbance as the highest end or good

95 Sextus Empiricus, Against the Professors, supra note 1, at XI.111 (quoting Homer, Odyssey IV.59); see also id. at XI.112, XI.118, XI.140, XI.141, XI.161 (asserting that freedom from disturbance can only result from the belief that nothing is either inherently good or inherently evil).
and find disturbance, produced by intensity of commitment, the greatest evil. But you know (he says to a Nikidion who eagerly nods her head), there are many other people — Aristotelians for example — who like intense commitment, and don’t really mind the disturbances it causes.96 The skeptic could very well give Nikidion such a lesson; indeed, by his account of his own method, he seems duty-bound to do so. He does not give it, or even mention it. We can see why, if we imagine what would follow from such a lesson. For then, because freedom from disturbance, so he has claimed, is supported by skeptical procedures, and because the intense pursuit of virtue is supported by other, more dialectical and Aristotelian procedures, then, together with the opposition of ethical claims, the teacher will have to arrange for Nikidion a full-scale opposition of methods and procedures. If she is really to end up neutral about freedom from disturbance, the teacher must, it seems, arrange for her to be at one and the same time a pupil inside skeptical therapy and a pupil of a different type of procedure that is aimed not at suspension, but at truth and commitment.

Thoughts of this sort are not entertained in skepticism. The reason can only be that one end is presumed and held fixed, and thus we are allowed to prefer the method allied to that one. What can the skeptic say in response? I think he would now answer that, after all, an orientation to freedom from disturbance is fundamental to his procedure. But this orientation is not itself a belief, or a value-commitment. It has the status of a natural inclination. Naturally, without belief or teaching, we move to free ourselves from burdens and disturbances. Just as the dog moves to take the thorn out of its paw, says Sextus, so we naturally move to eliminate our pains and impediments.97

But this leaves the skeptic in a very uncomfortable position. For now, first of all, his entire edifice seems to turn on the truth or falsity of an empirical thesis about basic inclinations: are human beings the way he says they are, or are they more the way Aristotle says they are, eagerly pursuing the search for understanding from infancy?98 Because he claims not to be committed to the truth of any thesis, this is an uncomfortable position indeed for the skeptic. He must admit that he has nothing to say to any human being who does not have the psychological characteristic he describes. But the problem is worse still. Human beings, by the skeptic’s own admission, are in fact not

96 With some modifications, this is Aristotle’s position, for he holds that one should care so intensely about one’s goals that one would be willing to risk life itself for their sake. See Aristotle, supra note 14, at III.9.1117b10–1117b16, IX.8.1169a15–1169a26. Annas and Barnes, in The Modes of Skepticism, announce that they themselves prefer intense commitment to its absence. See Annas & Barnes, supra note 1, at 170.

97 See Sextus Empiricus, Pyrrhonism, supra note 1, at I.238.

just instinctual but also ethical creatures, creatures who do commit themselves to views of the good, and modify their animal behavior accordingly. Can the skeptic show that it is better to get rid of all this?

This problem is brought to the surface in several skeptical stories. We see it in the equivocal portrait of Pyrrho on the ship's deck, commending the pig's behavior over committed human behavior of many kinds. We see it in the story of Pyrrho and the dog, in which the advice to "divest oneself entirely of the human being" is more than a little equivocal. We see it most clearly of all in an image used by Sextus when he is asked whether the skeptic needs to control a natural inclination to believe and to make ethical commitments. His reply:

Just as you would not call a eunuch self-controlled with respect to sexual intercourse, nor the person who has a stomach upset self-controlled with respect to eating — for there is not in them any inclination for these things, over which they would need to exercise control — just so the wise man should not be called self-controlled, since that over which he would need to exercise control does not arise in him.\(^9\)

The urge to make commitments can be excised; it leaves behind the orientation to calm. But the creature who seeks calm is described as a eunuch and a stomach patient — both impaired with respect to human flourishing.

4. Ethical Consequences of Ethical Non-Commitment. — How will Nikidion reason, if she follows the skeptic way? And how will she live? Treat others? Decide lawsuits? Cured of the normative view of the good that brought her so much disturbance, and cured as well of her commitment to a definite mode of normative reasoning, she will decide what to do by following the play of forces upon her. And this entails, the skeptics emphasize, that she will lack all emotion — that is, all desiderative attitudes such as anger, fear, jealousy, grief, compassion, envy, or passionate love, that are based, as these are, upon the investment of value in an object external to oneself.\(^10\)

Without evaluative beliefs, she will be subject to none of these forms of disturbance. The skeptics advertise this as one of the positive benefits of their therapy, but we might be less confident. To remove the beliefs about worth on which love, fear, grief, and so on are based is indeed to remove many sources of pain, but the resulting life may seem flat and lacking in wonder. And it may also be lacking in a type of information that is crucial to good ethical and also legal reasoning; to respond with the pain of compassion at the sight of

\(^9\) Sextus Empiricus, Against the Professors, supra note 1, at XI.212.

\(^10\) See Sextus Empiricus, Pyrrhonism, supra note 1, at III.235-38; Sextus Empiricus, Against the Professors, supra note 1, at XI.115.
another person’s suffering is to understand the importance of that suffering in a way no uncommitted person could possibly do. Without the information given by such emotions few difficult issues concerning poverty, or damages, or privacy, or mitigation, could be well addressed.\textsuperscript{101}

The skeptic claims that there will be other surprising practical benefits of his programme. The removal of belief removes arrogance and irascibility, which create barriers between one person and another. Quarrels arise because people have beliefs about the importance of things — reputation, or rightness, or objects that are in short supply. Skeptics, lacking all this, are calm and gentle.\textsuperscript{102} In fact, Diogenes tells us revealingly that some skeptics actually say that their end, freedom from disturbance, can also be called “gentleness.”\textsuperscript{103} Again, believers are imagined as interfering people who like to impose their way paternalistically on others. The skeptic, by contrast, keeps to himself, and lets others go their own way. He is free of dogmatic social prejudices as to who should do what. Pyrrho, who lived with his sister, did not mind if he was seen doing the dusting and taking the pigs to market: “they say he even showed his indifference by washing a pig.”\textsuperscript{104} This indifference to gender role and lack of class consciousness was evidently shocking to the skeptics’ contemporaries; to us it might be an attractive result.

But another side of skeptical “indifference” is more disturbing. Even those of us who might accept a life without deep personal emotion are likely to be troubled by the extent to which the skeptical life lacks commitment and responsiveness to other people and to society. The skeptic tries to insist that Nikidion will behave as she did before, being motivated by the same habits and customs, only seen now as causes of behavior, rather than as reasons. But he knows, too, that skepticism has removed the intensity of commitment to virtue that makes people risk their lives for justice, or endure hardship for the sake of those they love. Indeed, it has also, in removing belief-based emotions, removed the inner understanding of and response to the hardships of others. We recall the fate of Anaxarchus, floundering around in the swamp while his colleague passes by, undisturbed. Anaxarchus doesn’t even blame Pyrrho, because, as a good skeptic, Anaxarchus knows that the removal of commitment has removed the basis for a compassionate understanding of his predicament. Listen to Sextus’s profoundly ambiguous answer to the charge that the skeptic

\textsuperscript{101} I develop this argument in NUSSBAUM, cited above in note 10. Related arguments are made in Martha C. Nussbaum & Amartya Sen, \textit{Introduction} to \textit{The Quality of Life} 1–6 (Martha C. Nussbaum & Amartya Sen eds., 1993).

\textsuperscript{102} See DIOGENES LAERTIUS, supra note 1, at IX.63, IX.65–66, IX.68.

\textsuperscript{103} \textit{Id.} at IX.108.

\textsuperscript{104} \textit{Id.} at IX.66.
will not be able to make a choice if ordered by a tyrant to do something “unspeakable.” Of course the skeptic will be able to reach a decision, he replies, following the various causal forces he has mentioned. When the tyrant orders the unspeakable act, “he will perchance choose the one course and avoid the other.”

Sextus is not clear about which alternative will “perchance” be chosen, nor can he be. The skeptic must go with the play of forces upon her; she cannot guarantee ahead of time which force will push harder.

B. Problems with the Modern View

Now let us return to the modern Nikidion, whom we left in the law library of a great university, mulling over the challenges to normative commitment. The modern arguments that she is reading here have problems similar to those of their ancient counterparts.

1. Impossible Goal. — The modern skeptics begin, like their ancient relatives, by demanding a goal that is unattainable. Usually this goal is, or includes, universal agreement as a criterion of acceptability for an evaluative principle. This criterion is put forward very frankly by Bork, explicitly made the definition of truth by Holmes, endorsed implicitly by Derrida, Fish, and Herrnstein Smith — all of whom reveal their attachment to agreement in their procedures, which treat the production of a contradictory view as sufficient to undermine the view in question, without any further analysis or adjudication. But our literary theorists are not interested in agreement simply for its own sake. They take its absence as the sign of another and more important absence — the absence of external norms fixed in the nature of things, norms to which we can have unmediated presence through reason and that will, from then on, determine what we should do and be. It is really the absence of these transcendent standards that prompts the collapse into equipoise. The idea seems to be, roughly speaking, that if God is dead, anything is permitted. If no external authority binds us, our lives just go with the free play of forces. I think that the same thing happens in Bork’s work, in a slightly different way. As a thinker influenced by economic thought, he operates with a hard fact-value distinction according to which science does indeed discover the facts about the nature of things, and it is the failure of ethics to measure up to that scientific norm that makes him despair of any order or reason in the domain of values.

These skeptical maneuvers, however, betray a deep attachment to the impossible goal itself. For it is only to one who is attached to the

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105 Sextus Empiricus, Against the Professors, supra note 1, at XI.166; cf. Diogenes Laertius, supra note 1, at IX.108 (noting, in response to the argument that skepticism could lead one to commit unspeakable acts, that, although the skeptic suspends judgment about truth, as a practical matter he will take precautions and observe rules and customs).

106 On this, see further in Derrida, Of Grammatology, cited above in note 46, at 1-73.
existence of a transcendent ground for evaluation that its collapse seems to entail the collapse of all evaluative argument and inquiry. As Nietzsche showed, it is only to someone whose faith in his own human capacities has been eroded by the teachings of an other-worldly faith that the news of the death of God brings nihilism and the abandonment of evaluation and selection. The failure of these thinkers to commit themselves to sorting out our human and historical practices of choice and selection, the insistence that we could have good normative arguments only if they came from heaven — all this betrays a shame before the human. On the other hand, if we really think of the hope of a transcendent ground for value as uninteresting or irrelevant to human ethics, as we should, then the news of its collapse will not change the way we think and act. It will just let us get on with the business of reasoning in which we were already engaged.

2. Loaded Dice. — Armed with her new awareness of the history of ancient Greek philosophy, Nikidion now reexamines the works of the deconstructionists and the legal economists, asking herself how they arrived at the conclusion that all ethical reasons were on a par and none was stronger than any other. She now sees that the same suspect strategies are at work here that she noticed in the works of Sextus Empiricus. The idea that any old counter-argument is, or can be made to be, sufficient to knock out the argument originally put forward depends on a posture of detachment from our ordinary daily practices of arguing. When we are talking about things that matter to us in our lives, we do not proceed as Derrida and Fish proceed, treating all positions as having equal weight. We have familiar and reasonable ways of asking ourselves how much weight an argument has, and to these I shall be returning. The way that Derrida, Fish, and the others get to “equal weight” is by refusing to immerse themselves in the matter at hand, to allow its concerns to weigh with them, to arouse emotions in the way moral arguments usually do. For Bork, the detachment comes from the posture of the judge as empirical social scientist, who reports the contending beliefs without entering, as a judge, into the way of life of any; for the deconstructionists, it comes from assuming the posture of the literary theorist, who stands at some distance from the text, neither moved by nor immersed in it, and playfully asks how this combination of propositions could possibly be construed. Our pupil also notes that Holmes’s famous detach-


108 Fish provides an example of the detachment this approach might allow: “[M]y forward time span is generally two hours. By that I mean I tend not to think about or worry about anything more in the future than two hours hence. From a negative point of view, one might characterize my vision, therefore, as severely constrained and limited.” Fish, supra note 58, at 298.
ment is not unconnected with his conclusion that judgment is the free play of power. From such a posture it is no surprise that these thinkers arrive at equipoise and suspension. For they are indeed free from the disturbances occasioned by commitment and emotional immersion. But disturbance is often a source of valuable information about important human matters.

3. Freedom from Disturbance Presupposed as the Goal. — Why do they set things up as they do, Nikidion might now ask? And I think she will find here, as she did in the ancient case, that there is no convincing answer to this question that does not mention something like the skeptic's freedom from disturbance as an organizing goal. Why does Derrida, interpreting Nietzsche, reject the difficult task of trying to decide what is the best reading of the complicated text? We suspect that it is on account of Nietzsche. For Nietzsche himself praised above all people who undertook painful difficult tasks, and wrote, "[o]f all that is written I love only what a man has written with his blood."

Derrida turns away from the task of deciding what to praise and what to commend, and toward an interpretive strategy that leaves him free to play and cleverly indulge himself. Can we explain this, in the end, without mentioning his preference for the condition of free play itself? Can we, similarly, explain why Fish proceeds as he does, without mentioning his preference for an outcome that permits the play of professional forces to decide things, and professional power to be the only source of rational authority? That permits him, in life generally, to stop worrying about the future and about the internal consistency of his own actions? Herrnstein Smith is very frank about her own procedures: she prefers them to others, she says, because they have greater utility for her. And finally, the economist's refusal to engage in normative ethical argument in judicial decisionmaking clearly reveals a preference for what we might call the low decision costs incurred by the strategy of simply aggregating preferences. In the case of Bork, the outcome involves turning privacy questions over to a majority vote — a result he clearly favors anyhow, both for its low decision costs and perhaps, though in consistency he can't say this, for its likely concrete content. What all this implies, however, is that people who do not share these critics' love for the condition of freedom from disturbance have been given no reason to prefer skeptical procedures and outcomes to the ones

109 NIETZSCHE, supra note 107, at 40.
110 See FISH, supra note 58, at 299. Fish describes an encounter with an imaginary acquaintance who points out an inconsistency in Fish's actions over time. Fish responds without disturbance, "Don't bother me. Give me a break. I am not in the business of organizing my successive actions so that they all conform to or are available to a coherent philosophical account."
111 See SMITH, supra note 80, at 113–14.
they currently use as they painstakingly distinguish good arguments from bad ones, trivial claims from weighty ones.

4. Ethical Consequences. — Nikidion must now ask what life and practical reasoning are like if one chooses to follow the modern Pyrrhonists. Here she will find, I believe, the same combination of initially attractive and profoundly disturbing consequences that she found in studying Sextus. At first, the deconstructive way of life seems, like the ancient skeptic way, to offer a refreshing absence of interfering paternalism, a kind of gentleness to people of many different sorts, a commendable refusal to impose one's own way on others. That is, indeed, the way that all four of my examples commend their procedures to her; this appeal is likely to have some force with anyone brought up, as our modern Nikidion has been, in a modern liberal society, and apt, as so many liberals are, to confuse tolerance with suspension of commitment. The new way of life also seems liberating. Commitments that used to seem compulsory now seem to her like just someone's view. Predicaments that used to be the occasion for anxious responses of fear and compassion now have their serious badness suspended.

But if Nikidion really thinks things through before she becomes deeply immersed in the new methods, the dangers of Pyrrhonism may begin to seem to her more evident than the rewards. For if one really relinquishes one's life to the play of forces and renounces reasoned evaluation, one cannot guarantee that the outcome will always be one that is morally acceptable. "Perchance he will choose the one and avoid the other," says the skeptic. When the game is power, the powerless frequently lose out. When the game is the maximization of utility, the poor frequently prove to be in a weak position. The Pyrrhonist cannot successfully commend her strategy to us by pointing to any sound argument that backs it. Now it seems dubious that she can commend it any more successfully by pointing to the social consequences that it delivers. For in fact, by depriving us of commitments to the importance of things outside ourselves, skepticism has even deprived us of the information we need to make sense of social ills and to respond to them in a humanly appropriate way. The Nikidion who was disturbed at the situation of women and poor people and slaves was in a far better position to select appropriate action than the laid-back, free-play Nikidion of the skeptical cure.

At this point, of course, the job has only begun. By pointing out the intellectual deficiencies and the moral dangers in the skeptic's position, I have already started to articulate an alternative. For I

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112 Sextus Empiricus, Against the Professors, supra note 1, at XI.166. Derrida, she remembers, returned to normative argument very quickly indeed when the de Man case became the focus of his attention. See supra note 52.
Skepticism about Practical Reason

have insisted that the absence of external transcendent standards does not leave us with only free play. We have, in the moral discourse we actually carry on, principles of adjudication and pictures of practical reason to which we can turn to resolve the difficulties caused by disagreement. There are many promising accounts of how this should be done, of which the Aristotelian account I defend is only one. What we must insist, however, is that the assessment should not be done from a posture of detachment from the actual weight and the sometimes disturbing intensity of practical questions as they arise in the course of an actual human life. The skeptic, standing to one side of human practices like some sort of Martian social scientist, was able always to perceive contradictory arguments as equally weighty precisely because of his detachment. To a human being, life does not present itself that way, and ethical debate begins if one can ask immersed human beings what is actually deepest and most indispensable for them and what beliefs they find most central or basic as they make sense of themselves and their lives.

Such a procedure, like Nikidion’s original approach, will be dialectical rather than pseudo-scientific, Aristotelian in spirit rather than Platonic. It will, that is, search not for heavenly norms, but for the norms that are internal to human history. And a large part of its information will come from emotions such as fear, grief, compassion, and love, through which we acknowledge the importance of the joys and sufferings of others, and in which we acknowledge ourselves to be implicated in their good and ill. I plan to develop this Aristotelian account of immersed ethical reasoning and to apply it to the special case of legal reasoning, by appeal to Aristotle’s conception of an equitable judgment that is historically situated, responsive to particular circumstances, and yet committed to general norms of justice.

One thing that my criticisms here have suggested is that the model of the textual interpreter so frequently invoked in deconstructionist skepticism may be a misleading model. The literary interpreter imagined by both Derrida and Fish is an extremely detached, playful figure, rather like an alien onlooker who has no stake, other than power and money, in the outcome of the interpretive debate. (Power and money may well favor choosing novelty and variety for their own sake, and a waiving of the standards of plausibility that a less professionalized reader might well employ.) Instead, we need to imagine a figure who is more deeply immersed in the human issues at stake, whose interest in the outcome is, although not personally biased, intense and urgent. I suggest elsewhere\(^\text{113}\) that we get a much richer starting point, one that complements my Aristotelian account of practical reasoning, if we think of the adventures of an involved reader

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\(^{113}\) See Nussbaum, supra note 10.
of a novel who reads with delight and emotion, who cares about the fate of the characters, and who is concerned — albeit in a way not involving her own personal profit — with the justice or injustice, the fruitfulness or misery, of the world they inhabit. Although this is not the place to elaborate on this idea, it should at least hint at where I would look to find a non-skeptical procedure in evaluative matters and what role I think literary experience can play in getting us to such a procedure as a model of compassionate immersion and non-indifference.

Even Pyrrho's indifference had, they say, its limits. In one of his most revealing anecdotes,114 Diogenes Laertius tells us that once a man insulted Pyrrho's sister Philista, and Pyrrho allowed himself to feel both anger and compassion on her behalf — allowed himself, therefore, some definite normative beliefs about the badness of what was going on. He said, "[i]t was not in the case of a helpless woman that one should make a demonstration of one's indifference."115 And here we see at last just how deeply skepticism cuts into humanity, even while claiming that it follows the ordinary practices of life. For it seems to be a mark of the human being to care for others and feel disturbance when bad things happen to them. Perhaps that more richly human and appropriately disturbed use of practical reasoning is what we can't do without — in personal life, in politics, and even in the law.

114 See Diogenes Laertius, supra note 1, at IX.66.
115 Id.