

1986

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Richard A. Posner, "Law and Literature: A Relation Reargued," 72 Virginia Law Review 1351 (1986).

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VIRGINIA LAW REVIEW

VOLUME 72

NOVEMBER 1986

NUMBER 8

LAW AND LITERATURE: A RELATION REARGUED

*Richard A. Posner**

I. INTRODUCTION

AFTER a century as an autonomous discipline, academic law in America is busily ransacking the social sciences and the humanities for insights and approaches with which to enrich our understanding of the legal system. One of the humanities to which academic lawyers are drawn is the study of literature. This essay considers why academic lawyers are interested in literature and what the field of "law and literature"¹ can be expected to contribute to the understanding of either law or literature. I shall argue, among other things, that the study of literature has little to contribute to the interpretation of statutes and constitutions but that it has something, perhaps a great deal, to contribute to the understanding and the improvement of judicial opinions.

Literary criticism may seem so remote from my own professional interests as to demand an explanation for this venture. Although long devoted to literature, I did not until recently suspect much overlap between this interest and my professional interests, though

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¹ For useful introductions to the field see Papke, *Neo-Marxists, Nietzscheans, and New Critics: The Voices of the Contemporary Law and Literature Discourse*, 1985 *Am. B. Found. Res. J.* 883; Weisberg & Barricelli, *Literature and Law, in Interrelations of Literature* 150 (J. Barricelli & J. Gibaldi eds. 1982); White, *Law as Language: Reading Law and Reading Literature*, 60 *Tex. L. Rev.* 415 (1982).

I realized there was some.² It was only in the course of preparing a response³ to an attack on the economic model of human behavior surprisingly pivoted on the fiction of Kafka⁴ that I became acquainted with the law and literature movement and began to realize that it had potential applications, not to economic analysis, but to the interpretation of statutes and constitutions and the writing of judicial opinions, which are now professional concerns of mine.

The field of law and literature is not new. Nineteenth-century English lawyers wrote about depictions of the legal system by Shakespeare, Dickens, and other famous writers.⁵ Wigmore thought lawyers should read the great writers to learn about human nature.⁶ Cardozo's paper "Law and Literature" analyzed the literary style of judicial opinions.⁷ But only since the publication in 1973 of James Boyd White's *The Legal Imagination*⁸ has a distinct, self-conscious field of law and literature emerged. Until then the field consisted of little more than reminders that law is a surprisingly frequent subject of literature and that judicial opinions, and to some extent other forms of legal writing, often have a literary character and quality. The frequency with which legal subject matter appears in literature is, I shall argue later, a largely adventitious circumstance. The literary character of judicial opinions, on the other hand, is an interesting and significant phenomenon, though regrettably a diminishing one, as more and more opinions are ghostwritten by newly graduated law students neither chosen for nor encouraged in literary flair.⁹

² Chapter 5, "The Homeric Version of the Minimal State," and Chapter 8, "Retribution and Related Concepts of Punishment," of my book, *The Economics of Justice*, use literary sources in an economic analysis of justice. R. Posner, *The Economics of Justice* 119-45, 207-27 (1981).

³ Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *Harv. L. Rev.* 1431 (1986).

⁴ 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).

⁵ See, e.g., C. Davis, *The Law in Shakespeare* (1883); Stephen, *The License of Modern Novelists*, 106 *Edinburgh Rev.* 124, 128 (1857).

⁶ See Wigmore, *Introduction*, in J. Gest, *The Lawyer in Literature* ix-xii (1913).

⁷ B. Cardozo, *Law and Literature*, in *Selected Writings of Benjamin Nathan Cardozo* 339 (M. Hall ed. 1947).

⁸ J. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1973).

⁹ See R. Posner, *The Federal Courts: Crisis and Reform* 105-19 (1985), and references cited therein.

The field of law and literature has grown in recent years for both institutional and substantive reasons. The institutional reasons are the displacement of many graduate students, and some faculty, from the humanities into law, following a decline in academic job opportunities in the humanities that began around 1970; the growing receptivity of academic lawyers to the insights and methods of other fields of learning; and the sheer increase in the size of law school faculties, which has permitted faculty members to specialize. The substantive reasons are also threefold. First, the 1970's saw many literary scholars mount a sustained attack on the possibility of objectively interpreting works of literature.¹⁰ Instead of "construing" these works, more and more literary scholars "deconstructed" them;¹¹ and deconstruction, perhaps imperfectly understood (as we shall see), seemed to offer academic lawyers, particularly those of radical bent, grounds to doubt the possibility of objective interpretations of statutes and in particular of the federal Constitution—perhaps even to doubt the objectivity of law itself.¹² Second, the areas of the law that deal explicitly with literature have gained increasing importance in recent decades. Defamation has been constitutionalized; sexually explicit expression has increasingly been made privileged from government regulation; copyright law has been overhauled under the pressure of new technologies. Third, the growth of science and technology—a growth dramatized in academic law by the emergence and rapid growth of my own field of major interest, economic analysis of law¹³—has provoked a countercurrent of concern with preserving humanistic values in law.

I shall not attempt in this essay to discuss every overlap between law and literature. Among other things, I shall omit:

¹⁰ See, e.g., S. Fish, *Is There a Text in This Class?* (1980).

¹¹ See J. Culler, *On Deconstruction: Theory and Criticism After Structuralism* (1982); C. Norris, *Deconstruction: Theory and Practice* (1982).

¹² See, e.g., Peller, *The Metaphysics of American Law*, 73 *Calif. L. Rev.* 1151, 1160 n.6, 1171-74 (1985); Frug, *Henry James, Lee Marvin and the Law*, *N.Y. Times*, Feb. 16, 1986, § 7 (Book Review), at 1. The "deconstruction" of legal texts is vigorously attacked in Fiss, *Objectivity and Interpretation*, 34 *Stan. L. Rev.* 739 (1982), and vigorously debated in *Law and Literature*, 60 *Tex. L. Rev.* 373 (1982) (symposium issue). The legal deconstructionists are called "rejectionists" (of interpretation)—and rejected—in Grey, *The Constitution as Scripture*, 37 *Stan. L. Rev.* 1, 2 (1984).

¹³ See, e.g., R. Posner, *Economic Analysis of Law* (3d ed. 1986).

- 1) the description by creative writers of real legal events, such as actual trials;¹⁴
- 2) the occasional fictional writing by lawyers that is designed to illuminate real legal problems;¹⁵
- 3) Milner Ball's interesting attempt to compare trials with plays;¹⁶
- 4) attempts to compare the Constitution to the Bible, the latter being viewed in this comparison as a sacred rather than literary text;¹⁷
- 5) the bodies of law that are explicitly about literature and involve such questions as determining redeeming social value in obscene literature and evaluating the defamatory effect of fictional works.

I do not wish to denigrate any of these applications of literary methods to law; I simply have no room to discuss them, and I mention them merely to convey a sense of the breadth and variety of the field. I shall confine myself to three topics: the presentation of legal subject matter in literature; the interpretation of legal texts by the methods of literary criticism; and the use of literature to improve judicial opinions. My *pièce de résistance*, found in Part III(A), is a literary analysis of Justice Holmes's dissent in the *Lochner* case.

II. LAW IN LITERATURE

Literature contains a surprising amount of legal subject matter—surprising, at any rate, given how boring most people (including a disheartening number of lawyers) think law is. For example, a trial provides the climax of the *Oresteia*, *The Merchant of Venice*, *Billy Budd*, and *L'Étranger*; the focus of attention in *Bleak House* and James Gould Cozzens' fine novel *The Just and the Unjust*; the title of Kafka's most famous novel (though a better translation of *Der Prozess* would be *The Case* or *The Proceeding*); and

¹⁴ The classic of this genre is S. Bedford, *The Faces of Justice: A Traveller's Report* (1961); see also Adler, *Annals of Law: Two Trials* (pts. 1 & 2), *The New Yorker*, June 16, 1986, at 42, June 23, 1986, at 34 (describing General Westmoreland's libel action against CBS and General Sharon's libel action against Time magazine).

¹⁵ See, e.g., N. Morris, *Madness and the Criminal Law* 7-27, 89-126 (1982); Fuller, *The Case of the Speluncean Explorers*, 62 *Harv. L. Rev.* 616 (1949).

¹⁶ See Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 *Stan. L. Rev.* 81 (1975).

¹⁷ See Grey, *supra* note 12. On the difference between the Bible as sacred and as literary text, see C.S. Lewis, *The Literary Impact of the Authorised Version*, in *Selected Literary Essays* 126 (1969).

the incidental symbology of many of his stories and fragments, including *The Judgment*, *The Penal Colony*, and *Before the Law*. Will contests are a staple of Victorian fiction—witness *Bleak House* again, plus, it seems, almost every novel by Trollope.¹⁸ Law and judging figure prominently in the Bible, the Norse *Eddas*, and Heinrich von Kleist's classic novella, *Michael Kohlhaas*. *Measure for Measure* is, at least superficially, about the problem of discretionary nonenforcement of law. In fact, Shakespeare's plays contain so many incidental references to law¹⁹ that some people have speculated that he had some legal training. Indeed, the legal references in Shakespeare have led some foolish people to ascribe his plays to Francis Bacon. Even *Alice in Wonderland* ends in a trial—a trial notable for a depiction of the jury system that its critics should continue to find apt.²⁰

Nevertheless, I doubt that a lawyer qua lawyer can make a significant contribution to the understanding of literature. To begin with, the degree to which writers of imaginative works are interested in law may be largely a statistical artifact. As is generally true with normative discourse, there is no scientific procedure for identifying "great" literary work. As Orwell used repeatedly to say,²¹ literature is judged great by a strictly Darwinian test: its ability to survive in the competition of the literary "marketplace" (a word I put in quotation marks to make clear that I am speaking not of commercial profitability but of reputation). No one could

¹⁸ On the fascination of Victorian novelists with the law, see the interesting discussion in Frye, *Literature and the Law*, 4 L. Soc'y Gazette 70, 70-72 (1970).

¹⁹ See, e.g., P. Clarkson & C. Warren, *The Law of Property in Shakespeare and the Elizabethan Drama* (1942). For an excellent review of lawyers' writings on Shakespeare, see O. Phillips, *Shakespeare and the Lawyers* (1972).

²⁰ L. Carroll, *Alice's Adventures in Wonderland*, in *Alice in Wonderland* 3, 97-98 (1923):
One of the jurors had a pencil that squeaked. This, of course, Alice could not stand, and she went round the court and got behind him, and very soon found an opportunity of taking it away. She did it so quickly that the poor little juror (it was Bill, the Lizard) could not make out at all what had become of it; so, after hunting all about for it, he was obliged to write with one finger for the rest of the day; and this was of very little use, as it left no mark on the slate.

Id. Because most American jurors are not allowed to take notes, they are no better off than Bill the Lizard.

²¹ See, e.g., G. Orwell, *Lear, Tolstoy, and the Fool*, in 4 *Collected Essays, Journalism and Letters of George Orwell* 287, 290, 302 (S. Orwell & I. Angus eds. 1968). For a philosophical defense of a survival theory of aesthetic merit, see A. Savile, *The Test of Time: An Essay in Philosophical Aesthetics* (1982).

confidently have called Shakespeare a great playwright when he retired in 1611, though many suspected him to be. Shakespeare's greatness was not clear until Samuel Johnson brought out his edition of Shakespeare's plays in 1765, revealing them to be riveting almost two centuries after their composition. Only today, more than sixty years after major writings by Kafka, T.S. Eliot, Joyce, and Mann, can we say with some confidence—though more provisionally than in the case of Homer, Dante, Milton, Shakespeare, or Tolstoy—that these men have written classics, too. And there is beginning to be doubt about some people who a few years ago seemed well on the way to the status of greatness, such as Hemingway and Gide, for their work is starting to date in a way that great work does not.

If survival is the test of greatness in literature, we can begin to see why law figures with some frequency as a subject of great literature. For literature to survive it must deal with things that do not change much over time;²² and, like love, ambition, and human nature generally, the law is a remarkably unchanging facet of human social existence. Specific doctrines and procedures may change, but the broad features of the law do not. The legal systems of Elizabethan England and even Periclean Athens²³ are thoroughly accessible to modern understanding, and the differences between the Austro-Hungarian procedures reflected in *The Trial* and modern Continental or American procedure, though important to lawyers, would strike most laymen as small.

Although the writers we value have often put law into their writings, it does not follow that those writings are about law in any interesting way that a lawyer might be able to elucidate. If I want to know about the system of chancery in nineteenth-century England I do not go to *Bleak House*.²⁴ If I want to learn about fee entails I do not go to *Felix Holt*. There are better places to learn about law than novels—except perhaps to learn about how laymen react to law and lawyers. Obviously this is not true in cultures where the only information about law is found in what we call

²² This was Samuel Johnson's theory of Shakespeare's greatness. See S. Johnson, Preface to the Plays of William Shakespeare, in Samuel Johnson: Selected Poetry and Prose 299, 301 (F. Brady & W. Wimsatt eds. 1977).

²³ See, e.g., D. MacDowell, *The Law in Classical Athens* (1978).

²⁴ Though Holdsworth thought Dickens a good legal historian. See W. Holdsworth, *Charles Dickens as a Legal Historian* (1929).

literature, though contemporaries thought of it as history: in particular, the Homeric and Norse epic poems.²⁵ But in a culture that has nonliterary records, those records generally provide more, and more accurate, information about the legal system than does literature.

The great writers have known this, and used law in their work for other reasons. I will give just two examples. The first is *The Merchant of Venice*. At one level the play is about the enforcement of a contract that contains a penalty clause, which the defendant avoids by a technicality. Even in Elizabethan England the contract would have been unenforceable and the trial regarded as farcical. The legal dispute is not the point of the play but a convenient metaphorical framework for contrasting two modes of social interaction:²⁶ the arm's length dealing of mutually suspicious strangers and the way of altruism and love. Shylock the Jew symbolizes the rejection of love, embodied in its specifically Christian form by Jesus Christ, in favor of commercial, self-interested values symbolized by the lending of money at interest. Antonio, the merchant of the title, is a symbol of Christ, and Portia, I believe, a symbol of practicality and good sense.

My second example is Kafka's *The Trial*. The protagonist is arrested in the first chapter and executed in the last; in between he spends most of his time trying without success to discover the charge for which he was arrested. As shown in a recent article by a lawyer,²⁷ many details in *The Trial* are faithful reproductions of Austro-Hungarian criminal procedure—which is not surprising, as Kafka himself was an Austro-Hungarian lawyer. Though written in 1914, *The Trial* prefigures uncannily the methods by which the Nazis and other twentieth-century totalitarians deformed judicial procedure to their unsavory purposes. Nevertheless, I do not think the book is about law or legal procedure in any interesting sense.²⁸ The "court" in which the trial takes place inhabits a rabbit warren of rickety tenements; its personnel are masochists in funny clothes; and the proceeding itself is dreamlike and grotesque, with weird

²⁵ On the former see R. Posner, *supra* note 2, at 119-45; on the latter see Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. Legal Stud. 399 (1979).

²⁶ For a good discussion see A. Bloom, *Shakespeare's Politics* 17-18 (1964).

²⁷ See Robinson, *The Law of the State in Kafka's The Trial*, 6 ALSA Forum 127 (1982).

²⁸ See Posner, *supra* note 3, at 1434-35, 1440-41, 1447 n.42, and references cited therein.

erotic overtones. The reader seems meant to take it all as a kind of huge though sinister prank on the hapless defendant. Because Kafka indicates that the defendant is free to opt out of the proceeding at any time, his eventual execution takes on aspects of suicide; indeed, the entire novel has a strong masochistic flavor. The meaning of *The Trial* is quite unclear, in part because Kafka never finished it and in part because he was a most enigmatic writer. Most scholars, however, do not think that the novel's legal aspects have more than a symbolic significance. Thus, Professor Robinson's admirably thorough and, so far as I can judge, accurate elucidation of Kafka's borrowings of Austro-Hungarian criminal procedure seems neither to illuminate the meaning of the novel nor to explain its fascination. The literary significance of *The Trial* is unlikely to derive from its description of Austro-Hungarian criminal procedure. Very few of Kafka's readers have any interest in Austro-Hungarian criminal procedure or, for that matter, in due process of law (the failure to notify the protagonist of the charge against him and to accord him a proper hearing before his execution are, of course, flagrant violations of due process), just as few readers of *The Merchant of Venice* give a fig about the enforcement of penalty clauses in contracts.

Although the role of the lawyer *as lawyer* in elucidating the meaning of works of literature—even those that are overtly about the law—seems very modest, the qualification is important. I do not suggest that being a lawyer disqualifies one from being a good literary critic, any more than being a lawyer disqualified Kafka or Wallace Stevens from being creative writers of great distinction. Recent books by Richard Weisberg and James Boyd White contain (so far as I am able to judge) highly competent interpretations of Homer, Jane Austen, Flaubert, Camus, and other writers.²⁹ But with the possible exception of Professor Weisberg's study of *Billy Budd*,³⁰ which argues that certain legal errors committed in the court-martial of the protagonist are important to the novella's

²⁹ See R. Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (1984); J. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) [hereinafter J. White, *Heracles' Bow*]; J. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984) [hereinafter J. White, *When Words Lose Their Meaning*].

³⁰ See R. Weisberg, *supra* note 29, at 133-59.

meaning,³¹ I am not clear just what contribution legal training and experience have made to these critics' literary analyses. Indeed, I have argued elsewhere that Weisberg has misread *Billy Budd* by ascribing literary significance to legal errors that have no part in the fictive world of that novella.³²

Weisberg, it is true, uses a case note by a Vichy French lawyer about the definition of "Jew" as a kind of leitmotif. He finds in Dostoevsky, Flaubert, Melville, and Camus criticisms of the kind of disembodied intellectualizing that, in Weisberg's view, enabled the French lawyer to write such a piece.³³ But this thesis owes little to law; for the lawyer's opinion Weisberg could easily have substituted the sales brochure of a chemical company that wanted to sell poison gas to the SS.

White complements Weisberg in interesting ways. Weisberg's background is in comparative literature, and his primary interests are the continental European and American novel; White has a background in English and classics, and he is primarily interested in English and classical literature. Weisberg and White do not discuss the same works, but their methods are broadly similar—though Weisberg is what is called in literary criticism a "structuralist," and White a "New Critic." Like Weisberg, White offers readings that do not seem to owe much to his lawyerly skills and experience. Both discuss, in the same breath, as it were, legal and literary texts; I shall get to that aspect of their work later. For now, the only point I want to make is that their writings on literature reflect primarily their extralegal interest and training in literature, not their legal skills.

The reason is simple. Law is subject matter rather than technique.³⁴ Legal analysis is the application to the law of analytic methods that have their source elsewhere: mainly the careful and logical reading and comparison of texts, but also and increasingly

³¹ Id. at 147-53.

³² See Posner, Book Review, 96 Yale L.J. (forthcoming April, 1987) (reviewing R. Weisberg, supra note 29). As I point out there, the most useful contribution that Weisberg makes as a lawyer in his discussion of literature is in contrasting Continental and Anglo-American methods of criminal investigation—a contrast that helps make works like *Crime and Punishment* and *L'Etranger* intelligible to an American reader. Id.

³³ See R. Weisberg, supra note 29, at 1-9.

³⁴ In this it differs radically from economics, a method of analysis that can be applied very broadly—to law, among other things. See, e.g., Hirshleifer, *The Expanding Domain of Economics*, Am. Econ. Rev., Dec. 1985 (special issue), at 53.

economics and, how fruitfully we shall see, techniques of interpretation used by literary critics. One would not expect a lawyer to have an advantage in dealing with the problems of another field unless the works in that field used law in some organic sense, which, I have argued, is rarely the case in literature.

III. THE INTERPRETATION OF LEGAL TEXTS BY THE METHODS OF LITERARY CRITICISM

I come now to what I consider the great false hope of law and literature—that it will change the way in which lawyers think about the interpretation of statutes and the Constitution.³⁵ Lawyers whose interest in literature, quite unlike that of Weisberg or White, is tendentious sometimes argue as follows. Literary scholars, like legal scholars, deal with texts, many of which are very old. The techniques they use to extract meaning from literary texts are therefore relevant to what lawyers do in extracting meaning from statutes and constitutions. So if literary scholars decide that meaning cannot be extracted from their texts—can only be put into them—lawyers, too, should give up the pretense of interpreting legal texts and acknowledge that what they are doing is also “deconstruction.”³⁶ If this is true, judicial “activists” need no longer apologize for reading things into the Constitution that do not seem to be there, for that is simply the nature of what we naively call “interpretation.” Better we should say “construction”—and mean it literally.

I suggest that this is a misconstruction of deconstruction. Although I do not pretend to be an expert in that arcane technique, I do not think its practitioners really mean to assert that *no* text has a determinate meaning. Their focus is on literary and philosophical texts rather than legal documents; their emphasis is on exploring latent contradictions in texts rather than just using them as Rorschach tests.³⁷ It is true, however, that deconstruction is part of an amorphous but influential school of approaches to the reading of

³⁵ Cf. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 Rutgers L. Rev. 676, 694 (1979) (finding similarities between the disciplines of law and literature and concluding that a better understanding of each will enhance both).

³⁶ See, e.g., Brest, *Interpretation and Interest*, 34 Stan. L. Rev. 765 (1982); Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982); Peller, *supra* note 12, at 1160-61 n.6, 1173-74.

³⁷ See J. Culler, *supra* note 11, at 213-16.

texts—a school, or more properly perhaps a collection of schools, sometimes referred to as “poststructuralism”³⁸ or even just “theory”³⁹—that reverses the usual primacy of author over reader in the interpretation of a text.⁴⁰ From such a reversal the advocates of free interpretation of legal texts draw aid and comfort.

But poststructuralism has not yet swept literary criticism clean of rival approaches. Some distinguished literary scholars still believe that their task in reading a work of literature is to reconstruct the author’s intentions;⁴¹ these scholars provide ammunition for the “interpretivists” of legal texts, and perhaps even for the “strict constructionists.” Professor Dworkin has taken an intermediate position,⁴² which I shall label the “New Critical” position. Dworkin argues that we choose between two competing interpretations of a work of literature by deciding which one makes the work better, and that we should do the same with statutes and the Constitution. We should ask, for example, what interpretation of “equal protection of the laws” makes the fourteenth amendment the best statement of public policy in light of contemporary political theory. Dworkin reverses Shelley’s dictum: he thinks legislators are the unacknowledged poets of the world.

I believe that there are too many differences between works of literature and enactments of legislatures or constitutional conventions to permit fruitful analogizing from literary to legal interpretation. As a result, I believe it perfectly consistent for someone to be an “intentionalist” when it comes to reading statutes and the Constitution and a “New Critic” when it comes to reading works of literature, even though these positions would be inconsistent if applied to the same genre. An “intentionalist” legal scholar holds that reading a statute (by which, unless otherwise indicated, I mean to include a constitutional provision) requires one to discern, from the words, the background, the circumstances, and any other available materials, how the legislators who enacted the statute

³⁸ See *id.* at 22-30.

³⁹ See *id.* at 8.

⁴⁰ See *id.* at 217-18, 273-74.

⁴¹ See, e.g., E. Hirsch, *The Aims of Interpretation* (1976); E. Hirsch, *Validity in Interpretation* (1967).

⁴² See Dworkin, *Law as Interpretation*, 60 *Tex. L. Rev.* 527 (1982) (also published, with commentary and reply, in *The Politics of Interpretation* 249-320 (W. Mitchell ed. 1983), and in somewhat different form, in R. Dworkin, *Law’s Empire* 45-86 (1986)).

would probably have answered the question of interpretation if it had been put to them along with any relevant developments since the statute was passed. A "New Critic" of literature treats a work of literature as an artifact, coherent in itself and not to be understood better by immersion in the author's biography or any other circumstances of the work's creation, except insofar as some knowledge of those circumstances may be necessary to understand specific references in the work.⁴³ To complete my matrix, I shall define an intentionalist literary critic as one who believes that the way to understand a work of literature is to reconstruct the author's conscious intentions—the meaning he assigned to it, or would have assigned to it had he thought to do so⁴⁴—and a New Critical legal scholar as one who believes that interpreting a statute requires him merely to assign some coherent and satisfying meaning to its words.

The New Critic shares with the deconstructionist an unwillingness to define his task as the search for the conscious intentions of the author, but here the resemblance ends. The New Critic assumes that a work of literature is a unity; the deconstructionist assumes that it is a mass of contradictions and looks outside the work to find the causes and consequences of these contradictions. Professor Dworkin has suggested a New Critical approach to judging, as well as literature. The late Professor Cover suggested a deconstructionist approach to both—but without falling into the vulgar error of thinking that such an approach is merely a *carte blanche* entitling the reader to give the text any meaning he

⁴³ Two durable classics of the New Criticism are C. Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* (1947), and W. Wimsatt, *The Verbal Icon: Studies in the Meaning of Poetry* (1954). The term has both a broad and a narrow signification. Here, and generally, I use it broadly. Later I shall briefly consider the narrower signification. I am well aware that, in either sense, the New Criticism is widely believed to be passé. See, e.g., F. Lentricchia, *After the New Criticism* (1980). Naturally, newer approaches (some of course merely a recycling of very old approaches) generate greater excitement. Most literary teaching and literary studies, however, are New Critical in emphasis. New Criticism, like utilitarianism, is at once unfashionable and inescapable.

⁴⁴ On the dispute between New Critics and intentionalists regarding the author's intention see Beardsley & Wimsatt, *The Intentional Fallacy*, in W. Wimsatt, *supra* note 43, at 3; E. Tillyard & C.S. Lewis, *The Personal Heresy: A Controversy* (1939). The most prominent contemporary intentionalist is Hirsch. See *supra* note 41. For a concise criticism of his approach from an approximately New Critical standpoint, see F. Kermodé, *The Classic* 77-78 (1975).

likes.⁴⁵

My definitions of intentionalist and New Critic may seem somewhat denatured, so let me give examples of their application to a statute and a work of literature. My statute will be the provision in the eighth amendment that forbids "cruel and unusual punishments." The New Critic would ask what meaning can be assigned to this interesting verbal artifact. He might reason that capital punishment is cruel because taking life is cruel, and unusual because modern people feel such tenderness for human life that very few people who commit "capital" crimes are in fact executed. He might conclude that capital punishment is therefore cruel and unusual and should be forbidden. The intentionalist would ask what the framers of the Bill of Rights were trying to get at in forbidding cruel and unusual punishments. Unfortunately he would not get an altogether clear answer. He might conclude that all they were trying to do was to forbid punishments that were in some sense barbaric or unnatural,⁴⁶ or he might conclude that they also wanted to forbid criminal punishments that were grossly disproportionate to the particular crime and criminal punishments of any severity for conduct that should not be criminal at all.⁴⁷ None of the intentionalist readings, however, supports a conclusion that capital punishment is unconstitutional.

For my literary example I shall use Yeats's poem *Easter 1916*.⁴⁸ From the title and some surprisingly oblique references in the poem itself, it is evident that the poem is in some sense about the Easter Rebellion in Ireland during World War I, which the British repressed with great firmness. A strict New Critic (most actual New Critics are more eclectic) would hold that one need not know any more about the circumstances of the poem to extract its full meaning. An intentionalist, on the other hand, would point out that the four unnamed people discussed in the second stanza were

⁴⁵ See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983). Vulgar deconstructionism in law is illustrated by Professor Peller's recent article in which he "deconstructs" the provision in article II, section 1 of the Constitution that requires that the President be at least 35 years old. See Peller, *supra* note 12, at 1174.

⁴⁶ See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839, 840-42 (1969).

⁴⁷ See Justice Powell's discussion of the eighth amendment in *Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).

⁴⁸ W.B. Yeats, *Easter 1916*, in *The Collected Poems of W.B. Yeats* 177 (def. ed. 1956).

in fact real people (and three of them, the three men, were executed); that one, described in the poem as “[a] drunken, vainglorious lout,” was the husband of Yeats’s inamorata Maud Gonne; that Yeats, like many of his Anglo-Irish brethren, believed in Irish independence but never did anything for it and in fact lived most of his life in England; and so forth and so on.⁴⁹ From all this a personal and political meaning of the poem might be constructed.

I find the intentionalist approach to the eighth amendment congenial, and the intentionalist approach to *Easter 1916* otiose. The difference in my reactions lies in the reasons why the two documents were written and continue to be read. The prohibition against “cruel and unusual punishments,” which had appeared in the English Bill of Rights of 1689, was added to the United States Constitution with very little debate or discussion, to mollify those who were worried that the strong central government created by the Constitution might imitate the British government’s practice of using severe criminal punishment to intimidate opponents.⁵⁰ There was concern about barbarous methods of punishment for legitimately criminal behavior and (perhaps) attaching criminal penalties to trivial or even completely inoffensive conduct,⁵¹ but no effort to particularize the prohibition of bad punishments was made, and the term “cruel and unusual” was simply adopted as a summary formula.⁵² An effort to particularize would not only have been time-consuming but might have sparked controversy, for it is of course easier to agree on generalities than on particulars. The framers almost certainly realized that the courts would be available to particularize the prohibition if and when that became necessary. Sufficient unto the day is the evil thereof might be the motto of the legislative process.⁵³

When a court reads the eighth amendment it is looking for some authoritative guidance about how to decide a case. If a court adopted a New Critical or poststructuralist approach that left it free to assign to the words “cruel and unusual punishments” whatever meaning those words, wrenched free of their historical

⁴⁹ See H. Kenner, *A Colder Eye: The Modern Irish Writers* 25, 103 (1983).

⁵⁰ See Granucci, *supra* note 46, at 852-53.

⁵¹ See *id.* at 840-42.

⁵² See *id.* at 840.

⁵³ See the superb brief discussion in E. Levi, *An Introduction to Legal Reasoning* 30-31 (1949).

context, might suggest, the eighth amendment would become an uncanalized delegation of power to the courts to regulate criminal punishments. It is unlikely that the framers contemplated the vesting of such a free-wheeling power in the courts. In addition, a New Critical approach to the Constitution would probably be a good deal more disorderly than the New Critical approach to literature. The canons that Professor Dworkin would use to interpret legal enactments are of course not literary canons; they are philosophical. He would read the enactment in a way that would make it the best possible statement of political philosophy. But there is no agreement in political philosophy. There are extreme libertarian philosophers such as Robert Nozick, extreme egalitarians such as Dworkin, and all shades in between—all equally respectable. On the specific issue of capital punishment, there are philosophers who believe that justice requires it (this was Kant's view) and those who believe that justice forbids it. There is more agreement among New Critics about the meaning of most works of literature.

To discover what the words of a constitutional provision meant to the framers, a responsible judge in the intentionalist tradition will want to find out what he can about what the framers actually intended, even if this means looking outside the constitutional text. Of course when the judge does so he will run up against the familiar problem of intent about intent: the framers may have understood "cruel and unusual punishments" to mean something fairly precise but intended the courts to be free to depart from that understanding. While this is undoubtedly true to some extent, it becomes implausible when carried to the point of making the prohibition against cruel and unusual punishments a delegation of undefined lawmaking power. If the framers of the Constitution had wanted to delegate a plenary power of judicial review to the federal courts, they would have chosen some method other than the enactment of ten separate amendments, many with several clauses and some with highly specific language.

I am not suggesting that the prohibition against cruel and unusual punishments should be limited to punishments known in 1791 when the eighth amendment was adopted. A legislator can intend a law to apply to circumstances that he cannot foresee. Given the limits of human foresight, a rational legislator would not want to confine a general law—a constitutional provision meant to last—to circumstances that he could then picture in his mind. But

there is an important difference between intending to limit unforeseen punishments in particular ways and giving the federal courts a blank check to regulate criminal sanctions. The latter intention is implausible—just as it is implausible (to put it mildly) to think that when the framers wrote that the President must be thirty-five, they meant only that he must have the maturity of the average thirty-five-year old, so that my very mature twenty-three-year-old and twenty-year-old sons would be eligible.

Let me turn to my literary example. Although Yeats may have had some political intentions in writing *Easter 1916*, he certainly did not write it to provide authoritative guidance to anyone, and it has no legal or even political significance to most people who read it today. For us, it is simply a beautiful and moving poem. We read it for pleasure and perhaps for instruction—not about the circumstances of the Easter Rebellion, which are only alluded to, but about the impact of political movements on human personality. The “message” of the poem, very crudely put, is that commitment to a political cause both lifts a person above personal limitations (“He, too [the drunken, vainglorious lout], has been changed in his turn,/ Transformed utterly”⁵⁴) and destroys his essential humanity (“Too long a sacrifice/Can make a stone of the heart”⁵⁵). Although I have read fairly extensively about the background of this poem since coming to love it, I cannot say that this has deepened my understanding of or appreciation for the poem. That the “drunken, vainglorious lout” is the alcoholic Major MacBride who had married Maud Gonne years earlier and left her shortly afterwards is an interesting bit of historical gossip, but it adds nothing to my interest in the poem. Nor have I learned anything about the poem from reading the letters in which Yeats alludes to its composition. Indeed, the history of literature contains relatively few insightful comments by creative writers on their own work, though there is no shortage of obtuse self-assessment (such as T.S. Eliot’s dismissal of *The Waste Land* as “only the relief of a personal and wholly insignificant grouse against life; it is just a piece of rhythmical grumbling,”⁵⁶ or Kafka’s description of *The Metamorphosis* as a

⁵⁴ W.B. Yeats, *supra* note 48, at 178.

⁵⁵ *Id.* at 179.

⁵⁶ T.S. Eliot, *The Waste Land* 1 (V. Eliot ed. 1971).

failure because of its ending,⁵⁷ which is in fact brilliant). Crowning all is Shakespeare's apparent failure to realize that his plays had any lasting merit, evidenced by his failure to revise them for publication or to get them published.⁵⁸

The reason for this startling lack of self-knowledge on the part of persons of genius may be that much, apparently the greater part, of literary creation occurs unconsciously. Some literature is actually written in an unconscious blur. The great fifth part of *The Waste Land* spilled out in a rush and required virtually no correction,⁵⁹ and Kafka's great story *The Judgment* was written uninterruptedly in one night.⁶⁰ Shakespeare did little editing of his plays (though not none,⁶¹ as was once believed) and, given the time constraints under which he labored, much of the great poetry in those plays must have been written down simply as it came into his head. Automatic writing of this sort is unusual; most great works of literature show painstaking revisions. But the revisions seem not to be according to conscious plan. They are done out of some unconscious sense of feel and fitness, and when the author has completed his revisions he is usually unable to explain why he did what he did.

If the conscious intentions of the author of a work of literature usually are banal, trying to dig them out is unlikely to enhance our appreciation of the work. Remember too why we read literature: we read for pleasure and to a lesser extent for instruction; we do not read to unlock the author's secret thoughts. Not only do we know nothing whatsoever about the author or authors of the greatest single work in the Western literary tradition, the *Iliad*, but we know almost nothing about the society in which it was conceived and created, except what we can infer from the work itself (and from the *Odyssey*). Yet the void in our knowledge has not dimin-

⁵⁷ See R. Gray, *Franz Kafka* 91 (1973).

⁵⁸ See Bevington, General Introduction, in *The Complete Works of Shakespeare* 2, 79 (D. Bevington 3d ed. 1980).

⁵⁹ See T.S. Eliot, *supra* note 56, at 82-91, 129; see also P. Ackroyd, *T.S. Eliot* 116-17 (1984) (reporting Eliot as having said that much of the final part of *The Waste Land* was written in a trance).

⁶⁰ See R. Gray, *supra* note 57, at 57. A famous example of largely unconscious writing is the composition in three frenzied days of 26 of Rilke's *Sonnets to Orpheus*. See J. Hendry, *The Sacred Threshold: A Life of Rainer Maria Rilke* 137 (1983).

⁶¹ See Honigmann, *Shakespeare as a Reviser*, in *Textual Criticism and Literary Interpretation* 1 (J. McGann ed. 1985).

ished the prestige of the work or the pleasure and instruction it yields.

As another example, consider the debate⁶² over the meaning of the following brief and unnamed lyric poem by Wordsworth:

A slumber did my spirit seal;
I had no human fears:
She seemed a thing that could not feel
The touch of earthly years.

No motion has she now, no force;
She neither hears nor sees;
Rolled round in earth's diurnal course,
With rocks, and stones, and trees.⁶³

The debate is over whether Wordsworth meant the reader to feel consoled or distressed at the death of Lucy.⁶⁴ There is extrinsic evidence, as a lawyer might say, that Wordsworth was a pantheist at the time he wrote the poem—that is, that he thought the rocks, etc. alive. This reinforces the interpretation that he meant the reader to be consoled rather than distressed at the prospect of Lucy's being rolled around with rocks and stones.⁶⁵ But it seems fairly clear, without knowing anything about Wordsworth's theology, that the intention realized in the poem is more sensitive and intelligent than any conscious intentions Wordsworth the pantheist may have had. Although there is consolation in the thought that Lucy is part of the revolving earth, part of nature, the impression created is not of a hymn to pantheism. The tone is somber, because of the observation that Lucy "neither hears nor sees" and the hard, gray feeling created by the rocks and stones.

I suggest that knowing that Wordsworth was a pantheist actually detracts from rather than adds to one's pleasure in the poem. Pantheism will strike most readers today, as in 1799, as a silly religion. The poem is more moving when conceived of as a complex

⁶² See E. Hirsch, *Validity in Interpretation*, supra note 41, at 227-30; Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 *Poetics Today* 23, 29-30 (1979).

⁶³ W. Wordsworth, *Untitled Poem*, in 2 *The Poetical Works of William Wordsworth* 216 (E. de Selincourt 2d ed. 1967).

⁶⁴ The poem is number XI in a series; number X is explicit about the death of Lucy. See id. at 214-16. On the apparently unanswerable question of who Lucy is, see M. Moorman, *William Wordsworth: A Biography, Early Years 1770-1803*, at 423-28 (1957).

⁶⁵ See Michaels, supra note 62, at 30.

and ambivalent reflection on the fact that when we die we return to nature, rather than as a pantheist tract. After all, it is death that the poem is about, not an after-dinner snooze. As is so often true in literature, the poem is diminished when conceived of not as an artifact but as a window into the often quite shallow conscious mind of the poet. But we do not read the Constitution or statutes for beauty; we read for guidance.

Nor is there any need for readers to agree on what a work of literature means. Much literature, especially but not only that composed in this century, is exceedingly enigmatic. I must have read Eliot's *Four Quartets* at least fifty times, and I have read several commentaries on it, but I do not pretend to understand more than bits and pieces of it, though I am convinced that it is great art. Kafka's writings have frequently been called the literary equivalent of the Rorschach test. With many great works it is impossible to tell whether the reader is intended (if that means anything) to take them literally or as irony—impossible to tell, in other words, whether the work means one thing or its diametric opposite.⁶⁶ This ambiguity is the characteristic of literature (and of many classics of philosophy) that gives deconstruction its purchase. Although it would be going too far to say that ambiguity is the hallmark of great literature, it is a frequent characteristic of it for a reason that should be obvious from my earlier discussion of literary survival. Works are called great because they transcend boundaries of period and culture, because they have a certain generality⁶⁷ and even universality, which is to say that they mean different things to different people.

⁶⁶ An excellent example is Marvell's ode to Cromwell. It seems like straightforward praise, yet there are hints and more than hints of criticism. See A. Marvell, *An Horatian Ode upon Cromwell's Return from Ireland*, in *Andrew Marvell: Complete Poetry* 55-58 (G. Lord ed. 1968). There is the magnificent picture of Charles on the scaffold ("*He* nothing common did, or mean/ Upon the memorable Scene") about which the poet comments, "*This* was that memorable Hour/ Which first assur'd the forced Pow'r." Id. at 56-57. And there is (besides much else) the somber closing couplet: "*The same Arts that did gain/ A Pow'r must it maintain.*" Id. at 58. I share with the New Critics the belief that the greatest literature tends to be ironic in the sense of recognizing and reconciling contradictions. More about that later.

⁶⁷ See *supra* note 22 and accompanying text. A similar point has been made in explaining why specific legal precedents depreciate (are cited less) more rapidly than general precedents. See Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 *J. Law & Econ.* 249 (1976). My emphasis on the generality of the work of literature parallels the discussion of the meaning of literature in J. Ellis, *The Theory of Literary Criticism: A Logical Analysis* 24-53 (1974). Ellis points out that the word "literature" is a "use" word

But what could be more irresponsible than for a body of legislative draftsmen to sit down to create a beautiful and mysterious artifact that would resonate through the ages, combining in new and mysterious ways with the changing atmospheres of the times? Not only are legislators not artists by talent or temperament, but they must be concerned with communication, not merely suggestion. Though generality has its role in legislative drafting—as the condition for getting agreement in circumstances where the participants may not agree on the particulars—it plays a much smaller role there than it does in literature. For this reason, interpretation of statutes and constitutions must similarly be more confined. It is a fairly harmless enterprise for New Critics to propose startling new readings of old works of literature, but if every lawyer and judge were free to imprint his own reading on any statute, what incredible chaos would ensue! Of course the Supreme Court's reading would ultimately be authoritative, but only in the sense that a jackboot on the neck is authoritative. If statutes are just invitations to the reader to supply meaning, then a court's "deconstruction" of the eighth amendment to find, say, a prohibition against sexually segregated prisons would be as irresponsible as a literary critic's reading of Virgil's *Fourth Eclogue*, written before the birth of Christ, as a Christian allegory—which, as a matter of fact, is how it was read during the Middle Ages.⁶⁸

The difference has also to do with power. A literary critic may be an influential person, but he is a private individual in a competitive market. Unlike a judge, he wields no governmental power. In our society the exercise of power by appointed officials with life tenure (true of all federal and, practically speaking, many state judges) is tolerated only in the belief that the power is somehow constrained. The principal constraints are authoritative texts. A judge who proclaimed himself a deconstructionist or even a New Critic would properly be excoriated for having cut himself loose from moorings that are part of the fundamental design of American government. Literary texts, on the other hand, need not be

rather than a "reference" word. *Id.* at 26. There is nothing in a piece of writing that marks it as literature. Literature is simply the set of writings that are read outside of the context in which they were originally written—that somehow transcend that context. *Id.* at 43-44.

⁶⁸ See, e.g., F. Kermode, *supra* note 44, at 28-29.

authoritative to perform their function in society.

This difference between the audiences for legal and literary work is neglected in a literary critic's recent discussion of the parol evidence rule, the rule that a writing intended to be the complete expression of the parties' contract may not be contradicted by oral testimony.⁶⁹ Professor Michaels's point is that before a court can decide whether oral testimony about the meaning of a contract contradicts the written contract, it must interpret that contract; and because interpretation always requires resort to extrinsic evidence—if only to the judge's knowledge of language and life—it is arbitrary to exclude any other extrinsic evidence that might bear on interpretation.⁷⁰ But like someone who tries to find an ambiguity in the provision of the Constitution that requires that the President be at least thirty-five years old,⁷¹ Michaels is being too clever and missing the point. If a document states that it is the complete integration of the parties' contract, and the price stated in the document is \$100 per pound, the parol evidence rule will prevent the seller from later offering testimony that in the negotiations leading up to the contract the parties had agreed that the price would be \$100 per pound only for the first ten pounds, after which it would be \$120 a pound. The document is not ambiguous and the parties meant it to control in order to reduce the impact of lying or forgetfulness should the parties ever get into a lawsuit over the meaning of the contract. Oral evidence will have to be admitted if the document is not clear, but it is silly to think that every document is unclear. Yet every great work of literature may well be unclear. Perhaps, as I have suggested, this is a precondition to calling a work of literature great. And even if critics go too far, by putting equivocations and contradictions into the simplest, purest lyric poem, they are doing little enough harm; we need not clip their wings by promulgating the literary equivalent of the parol evidence rule.

⁶⁹ See Michaels, *supra* note 62, at 26-29. Michaels is an intentionalist in both law and literature. I am certainly an intentionalist when it comes to the interpretation of contracts, with exceptions not necessary to get into here. See R. Posner, *supra* note 13, at 83-85, 89-91. But it seems to me that the parol evidence rule admirably carries out the contracting parties' relevant intention, which is that neither of them be allowed to deny the integrated written expression of their contract later on, when a dispute arises.

⁷⁰ Michaels, *supra* note 62, at 26-28.

⁷¹ See Peller, *supra* note 12, at 1174.

I want to go back for a moment to my remark that legislative draftsmen do not have the talent or temperament of artists. The men who drafted the Constitution and the Bill of Rights, as well as many of the later amendments, were for the most part highly capable professionals. But the relative handful of people who have written the literature that is still being read avidly hundreds or even thousands of years after it was written (or chanted, in the case of Homer) are for the most part geniuses, and it is their best work, not necessarily all their work, that survives and is read. In dealing with work of this quality it is quite natural to follow the procedure suggested by Professor Dworkin, which is to interpret the work so as to make it as good as possible. To put his point slightly differently, a useful method of reading literature is to adopt a hypothesis of total coherence—that is, to presume that no detail of the work is an accident, that everything contributes in some way to its meaning and emotional impact. Through the study of details one begins to understand how great literature casts its spell. It is worth noticing, for example, how Yeats, in another great poem, *The Wild Swans at Coole*,⁷² makes us *feel* the mystery and remoteness of nature by a surprising yet somehow “right” juxtaposition of the words “cold” and “companionable” (a juxtaposition emphasized by enjambment) in a description of swans on a lake:

Unwearied still, lover by lover,
They paddle in the cold
Companionable streams or climb the air;
Their hearts have not grown old;
Passion or conquest, wander where they will,
Attend upon them still.⁷³

The same interpretive technique—that of attributing significance to every detail—is, when used on statutes, a familiar source of absurdities. Statutes and constitutions are written in haste by busy people, not always of great ability or diligence, and we are not privileged to ignore those provisions that are hackneyed or unclear and reserve our attention for the greatest. Moreover, statutes and constitutions are products of a committee rather than of a single mind—a committee whose members may have divergent objec-

⁷² W.B. Yeats, *The Wild Swans at Coole*, in *The Collected Poems of W.B. Yeats*, supra note 48, at 129.

⁷³ *Id.*

tives. Hence the run-of-the-mill statute is apt to contain redundant language—language that has in fact no function except possibly to make some other language hit the reader more emphatically—and internal contradictions. To postulate that every word in a statute has significance, that every statute is a seamless whole, misconceives the nature of the legislative process.⁷⁴ To suggest, as Professor Dworkin does, that a court should interpret a statutory or constitutional provision so as to make the best rule of law it can imagine assumes that legislators themselves are striving to create the best rule of law they can, as Yeats no doubt strove consciously and unconsciously to make *The Wild Swans at Coole* the best poem he could. But that is an unrealistic view of legislative intention. The effect is to substitute the judge's will for that of the legislature—a result considerably more serious than a critic's substituting his will for that of Wordsworth or Yeats.

The problem of legal interpretation seems to resemble that of literary interpretation most closely in two cases: where the legislature intends to delegate the lawmaking function to the courts and where the legislature's intentions are simply inscrutable. In the first case, the court has been instructed to make common law, that is, judge-made law; and the formulation of common law principles is not, it seems to me, a task that literary criticism can assist or literary analogies illuminate. In the second case, where it is impossible to reconstruct the original intentions of the people who wrote and voted for the statute or constitutional provision in question, Professor Dworkin's procedure may seem apt—perhaps judges must perforce “interpret” the provision so as to make it the best possible statement of political principle or social policy. But the parallelism with the literary criticism of ambiguous works is deceptive. The critic who interprets an ambiguous work of literature is not imposing his view on anyone else; the court that interprets an ambiguous provision, especially of the Constitution (so that it is very difficult to correct the interpretation legislatively), is imposing its view on the rest of society, often with far-reaching practical consequences. This makes free legislative and especially constitutional interpretation problematic in a way that the free interpreta-

⁷⁴ See, e.g., R. Posner, *supra* note 9, at 261-93; Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 534 (1983).

tion of works of literature can never be. Critical self-restraint is less important than judicial self-restraint.

To muddy the waters still further, a free interpretation of statutory and particularly constitutional provisions may occasionally be necessary to avoid some great catastrophe. The limitations that the Constitution seems to place on the powers of the President and the Congress have in fact been considerably relaxed in order to accommodate the perceived needs of modern government. This kind of pressure for free interpretation is absent in the case of literature: the only reason for a free interpretation of a work of literature—an interpretation that makes it mean something quite different from what it meant to its original audience—is to enable a modern reader to derive greater pleasure and insight from the work.

I conclude that the functions of legislation and literature are so different, and the objectives of the readers of these two different sorts of mental product so divergent, that the principles and approaches developed for the one have no useful application to the other. The type of intentionalism that seems, to me at least, the natural and sensible approach to take in reading statutes seems to be a bad way to read literature, and the New Critical approach to literature that I find congenial would be a bad way to read statutes. This is not to say that literary training and interests are irrelevant to the judge or lawyer who has to interpret legislation. Reading is reading, and the more skillful and experienced one becomes as a textual analyst the better one will be able to read legal texts with sensitivity and imagination. It is the specific techniques of literary criticism that seem to me not transferable to the legal arena, not the reading skills that come from experience in the close study of difficult texts.

I do not want to seem too complacent about intentionalism. I freely admit that there are many cases where the applicable statute or constitutional provision is so unclear in relation to the issue at hand that the case cannot be decided by reference to the intentions, even broadly interpreted, of the framers. What a judge should do in such a case is a vigorously contested question that I will not attempt to answer here, but I do not see how literary criticism can help in such cases. In emphasizing the variety of possible interpretations of texts, literary critics may perhaps help judges to see that some seemingly obvious interpretations are in fact debata-

ble, but I am not sure if they can teach judges any constructive lessons.

IV. LITERATURE AND THE JUDICIAL OPINION

A. *Rhetoric and Knowledge*

I turn now to the use of literature in understanding and improving judicial opinions. To frame the discussion, I must distinguish between literary form and literary meaning. The former refers to style, structure, and other formal elements; the latter not only to paraphrasable content, usually the least interesting thing in a work of literature (a paraphrase of *Easter 1916* or *The Wild Swans at Coole* would be absurdly trite), but also to the knowledge the reader can hope to carry away from reading the work. In literature, meaning is inseparable from form; the meaning of *The Wild Swans at Coole* is something we pick up more from surprising juxtapositions such as "cold/ Companionable," which is a kind of oxymoron and thus a stylistic device, than from anything the poem overtly "says" to the reader. But literary form is not perfectly coextensive with literature, for it is found in other genres as well. One of the great rhetorical tricks in literature is the plain style, notable in such works as *Gulliver's Travels*. The greatest modern master of that style is George Orwell, but his style is exhibited to greater perfection in his essays and journalism than in his novels. Abraham Lincoln was not a creative writer, though he wrote a few decent poems; many of his speeches, however, have great literary quality,⁷⁵ and the *Gettysburg Address* and the *Second Inaugural Address* are masterpieces.⁷⁶ Justice Holmes wrote many opinions that have great literary distinction.⁷⁷

Someone interested in style will naturally want to study literature, not only because of the variety of distinguished styles that he will encounter but also because literary scholars have made the study of style a specialty, as lawyers and historians and political scientists have not. But first it is necessary to establish the rele-

⁷⁵ See E. Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* 120-23 (1962).

⁷⁶ For the text of the *Gettysburg Address*, see 7 *Collected Works of Abraham Lincoln* 22-23 (R. Basler ed. 1953). For the text of the *Second Inaugural Address*, see 8 *id.* at 332-33.

⁷⁷ See E. Wilson, *supra* note 75, at 779-82. For a good selection of Holmes's opinions, see *Justice Holmes Ex Cathedra* (E. Bander ed. 1966).

vance of style to law. Can it not be argued that style should have no role in legal writing? That it is at best a minor ornamentation and at worst, and indeed on average, an impediment to understanding? This seems to be true with regard to statutes, wills, contracts, and most other forms of legal writing, but false with regard to judicial opinions (and also to briefs, but I shall confine my attention to opinions). Judicial opinions, like literature, belong to the branch of communication known as rhetoric, and rhetoric is style.

Not all modes of discourse are rhetorical. The scientist proposes a hypothesis and then reports the design and result of an experiment designed to test it. The style in which such a paper is written is of very little interest to the reader. Style is even less important in a work of deductive logic, where the author states his premises and derives conclusions by logical operations, so that in principle—and often in practice—the entire demonstration is mathematical. In these two areas, Orwell's stated goal of writing prose as clear as a windowpane⁷⁸ is both appropriate and attainable. This helps to explain why survival works differently in science and other exact fields than in literature and the other rhetorical disciplines. Newton will survive at least as long as Homer, but the Newton that will survive, the essential Newton, is not the language in which he described his theories and findings but the theories and findings themselves. The essence of Homer, on the other hand, cannot be detached from his language.

When science was not very scientific, we had science poets (Democritus, Lucretius, Erasmus Darwin), a point consistent with the fact that poetry and other forms of literature generally deal with subjects not yet taken over by the more exact sciences. We think we can still learn something about ambition from reading *Macbeth*, about social class from reading the Victorian novelists, about religious feeling from reading Dante, about terrorism from reading *The Possessed*, about despair from reading T.S. Eliot, and about obsession from reading Kafka. These are areas where scientific thought is still not very advanced, and the creative writer can still perhaps hold his own with the sociologist, the political scientist, the historian, and the psychologist.

I know I am advancing a debatable proposition. It has been ar-

⁷⁸ G. Orwell, *Why I Write*, in 1 *Collected Essays, Journalism and Letters of George Orwell*, supra note 21, at 1, 7.

gued that literature is not concerned with knowledge at all, but with emotion;⁷⁹ that what one learns from reading *Macbeth* is how it feels to have the attainment of a great ambition almost within grasp, only to see it slip away because imagination has been allowed to outrun reality. But I think literature also persuades, though obliquely. It does not, at least not characteristically, preach to the reader, and when it uses the syllogism the purpose is more likely to be ironical than logical, as in Marvell's *To His Coy Mistress*. This is why paraphrases of works of literature tend to be so trite and why so many works of literature are destroyed by translation. One economist can restate the contribution of another in different words with no loss of meaning or impact, but the cognitive, informing, and persuading part of literature operates rather by presenting the reader with a dramatic scene that stirs imagination and emotion and leaves a residue of insight that the literary critic can talk about but cannot reproduce.

Take Keats's *Ode to a Nightingale*,⁸⁰ as great a lyric poem as the English language contains, and paraphrase it. The same trite summary—the narrator, contemplating avian beauty, is moved to reflect that while individual birds die, nature as symbolized by the swan or the nightingale is immortal—could do for *The Wild Swan at Coole* as well. Yet the two poems derive their force from different sources, and the impacts they have on the reader are totally different. For the narrator of the *Ode to a Nightingale*, the beauty of the nightingale's song is somehow both justification and consolation for wishing to be dead (something so much lovelier and happier will live on forever). The point of *The Wild Swans at Coole*, on the other hand, seems to be that nature has the cool, formal, aesthetic—and silent—pattern of a work of art. Because the imagery and tone of the poems are completely different, their meanings are also different, despite the similarity of their overt themes. Indeed, I would say that they have nothing of importance in common.

To show how literature persuades and builds a bridge to the rhetoric of judicial opinions, I want to consider one of the supreme

⁷⁹ See T.S. Eliot, *Shakespeare and the Stoicism of Seneca*, in *Selected Essays* 107, 115-18 (new ed. 1960).

⁸⁰ J. Keats, *Ode to a Nightingale*, in *John Keats and Percy Bysshe Shelley: Complete Poetical Works* 183 (Modern Library ed. 1932).

moments of modern poetry, the two lines that conclude the first stanza of Yeats's *The Second Coming*:

The best lack all conviction, while the worst
Are full of passionate intensity.⁸¹

Although written in 1920, these lines seem to foreshadow the confrontation in the 1930's between the fascists and the appeasing democracies—a foreshadowing made all the more uncanny by the poem's overtly prophetic theme. The lines could just as well describe the situation in most American universities during the student uprisings of the late 1960's. Other readers will supply other referents. But historical confirmation aside, the lines strike the reader with a self-evident sense of rightness. They seem true, though Yeats makes no effort to demonstrate their truth.

How can a writer persuade, without an effort at logical or empirical proof? The answer is that in areas of uncertainty, areas not yet conquered by exact science, we are open to persuasion by all sorts of methods, including some that are remote from logic and science. The point is not that people are irrational, but that in the absence of direct confirmation of an assertion they do not just suspend judgment—they seek indirect confirmation or refutation. The clearest and perhaps the most common of all rhetorical devices is the speaker's attempt to convey a sense that he is a person you ought to believe—a device rhetoricians call the "ethical appeal." If the audience cannot verify the truth of what the speaker says, then it will grant or withhold belief according to how probable it seems that what he says is true, and this probability will increase if he seems the sort of person likely to tell the truth.⁸²

The ethical appeal is not used in *The Second Coming*, but plenty of other rhetorical devices—probability-enhancing devices—are. One is the placement of the prophetic words quoted above at the end of a stanza. They are thus in the normal position for a conclusion, suggesting that the writer has previously set forth premises supporting them. Yet the preceding lines do nothing of the sort. They simply present an incantatory series of images, such as "[t]he blood-dimmed tide is loosed, and everywhere/The cere-

⁸¹ W.B. Yeats, *The Second Coming*, in *The Collected Poems of W.B. Yeats*, supra note 48, at 185.

⁸² See E. Corbett, *Classical Rhetoric for the Modern Student* 35, 73 (2d ed. 1971); R. Posner, supra note 2, at 173.

mony of innocence is drowned."⁸³ Nevertheless, the concluding lines gain authority from being offered as the culmination of a cascade of emotionally powerful—though not logically sequential—images.

Also important to the persuasiveness of these lines is the lack of qualification. Yeats does not say that some of the best people are perhaps this and many of the worst doubtless that; he does not hedge. Very few people have the courage of plain speaking, so when we hear it we tend to give the speaker a measure of credit. Only a big man, we might say, would put it so bluntly, without equivocations that he could retreat behind if attacked.

Still another rhetorical device is the absence of any "poetic" diction in these two lines, in contrast to the preceding ones. It is as if the poet, overwhelmed with sudden insight, were moved to drop all poetic craft and subtlety in order to announce the simple truth that had been revealed to him. Finally there is the contrast between the liquid multisyllabic richness of "passionate intensity" and the matter-of-factness of "lack of conviction." We are made to feel the stronger emotions of the "worst" people, and this somehow makes us more convinced of the opposition asserted by the poet.

Well, you may say, a child might be taken in by such tricks—but an adult? Surely these devices would not persuade him of the truth of the proposition asserted if he did not believe it already, on the basis of other and more rational evidence. I am not sure this is true. People who are open to the appeal of poetry feel the force of genius in this poem and are willing to accord the author some presumption of insight. I do not mean they can be persuaded by all the things that poets tell us, many of which are false and even absurd, like the passages in Pound's *Cantos* (some of them quite beautiful) that denounce usury. If what a poet tells us is false and absurd we are not likely to rate his work so highly. If what he tells us is plausible, however, the way in which it is told may make it more persuasive.

I offer now a judicial counterpart to *The Second Coming*—the most famous opinion by our most famous judge: Holmes's dissent in *Lochner v. New York*.⁸⁴ The decision invalidated, as a depriva-

⁸³ W.B. Yeats, *The Second Coming*, in *The Collected Poems of W.B. Yeats*, supra note 48, at 184-85.

⁸⁴ 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

tion of liberty without due process of law, a state statute limiting the hours of work in bakeries.⁸⁵ The most famous sentence in the dissent—one of the most famous in law and as precious to those of us who think the majority opinion was sound public policy if highly dubious law as it is to advocates of regulating the employment relation—is: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁸⁶ This proposition is offered without proof, and it is also possible to agree with it yet think the case correctly decided. Yet somehow these points seem not to detract from the authority of the dissent, now eighty-one years old. Only a few opinions survive from that period, and a disproportionate number were written by Holmes. Yet as Professor Currie has shown recently, Holmes’s opinions often (and, as we shall see, in this instance) are not thorough or closely reasoned.⁸⁷ What then is the source of their power?

The first paragraph of the dissent in *Lochner* begins: “This case is decided upon an economic theory which a large part of the country does not entertain.”⁸⁸ The proposition is not elaborated. We are told neither what the economic theory is, nor of what relevance is the fact (similarly unelaborated) that a large part of the country does not entertain it. The serious charge that the majority is deciding the case on economic rather than legal grounds is not defended. Instead of explaining and supporting what he has just said Holmes changes the subject, to remark that “[i]f it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind.”⁸⁹

The force of the opening sentence lies in the calm assurance with which it is made. It puts the reader on the defensive. Dare he doubt the truth or pertinence of a statement made with a conviction so confident and serene? We know how an ordinary judge would put the same thought; many have, and a fair composite would be: “I must respectfully but earnestly dissent from the majority’s unwarranted substitution of its own views of public policy

⁸⁵ *Id.* at 64-65.

⁸⁶ *Id.* at 75.

⁸⁷ See, e.g., Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 *U. Chi. L. Rev.* 867, 900 (1985); Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 *Duke L.J.* 1111, 1145-55, 1161.

⁸⁸ *Lochner*, 198 U.S. at 75.

⁸⁹ *Id.*

for the more flexible mandate of the Constitution," followed by pages of argument and citations documenting the assertion.

The next sentence in the *Lochner* dissent ("If it were a question . . .") is the ethical appeal. An ordinary judge might say, "I deem it irrelevant what my own views on the truth of the majority's view of policy might be." This is the essential content of Holmes's sentence, but by putting it as he does he has slipped in the additional suggestion that he is a man slow to jump to conclusions. This suggestion makes the sentence more credible. It is a masterful touch. It happens also, as is commonly the case with the ethical appeal, to be false. Holmes was not slow to jump to conclusions and as a matter of fact had years ago decided that laissez faire was the correct economic philosophy.⁹⁰ He undoubtedly thought the statute in *Lochner* nonsense. Many judges voting to uphold statutes that they personally dislike will say so, to make themselves sound more impartial. This is an ethical appeal, but of a somewhat crass and self-congratulatory sort. Holmes is subtler, and therefore disarming and effective. His is a version of the "simple man" style used so effectively by Orwell. The "I" in Orwell's essays and journalism is not Eric Blair; it is the the very model of a plain-speaking, decent, honest Englishman. The plain style is an artifice of sophisticated intellectuals, and the idea that if Holmes had thought that a case turned on an economic theory he would have conducted a patient study of the theory is a fantasy.

While Holmes is making his ethical appeal, the reader's suspense is building to find out what the "economic theory" of the majority is, because of course the majority opinion does not use any such term. We discover at last that it is indeed the theory of laissez faire, "which has been a shibboleth for some well-known writers, [and which] is interfered with by school laws, by the Post Office, by every state or municipal institution which takes [the citizen's] money."⁹¹ Notice the nicely understated derision in "shibboleth," and how it is reinforced by portraying the advocates of laissez faire, with some exaggeration, as people who would abolish the Post Office: This provides the lead-in to the climactic sentence of

⁹⁰ See, e.g., Gordon, Holmes' *Common Law as Legal and Social Science*, 10 Hofstra L. Rev. 719, 739-40 (1982); Wall, *Social Darwinism and Constitutional Law, with Special Reference to Lochner v. New York*, 33 Annals Sci. 465, 475-76 (1976).

⁹¹ *Lochner*, 198 U.S. at 75.

the opinion, the one about Herbert Spencer (one of the "well-known writers"), which gains its force from its bluntness and concreteness. Imagine how much weaker the sentence would have been if for "Mr. Herbert Spencer's Social Statics" Holmes had written "laissez faire," or even if for "enacts" he had written "adopts." The absurdity of the idea that the Constitution would enact a book with a weird title, written by an English sociologist, lends emotional force to the sentence and—my essential point—operates as a substitute for proof. Holmes has made a book the metaphor for the philosophy of laissez faire; and metaphors, because of their concreteness, vividness, and (when they are good) unexpectedness, are more memorable than their paraphrasable content. This is one reason why the dissent in *Lochner* not only contributed to the shift of opinion that culminated many years later in the repudiation of "Lochnerism," but also became the symbol of opposition to the judicial philosophy embodied in the majority opinion.

After this sentence Holmes does at last give some evidence for his position. He cites, for example, the case in which the Supreme Court sustained a compulsory vaccination law.⁹² But that case is readily distinguishable. Vaccination confers an external benefit—that is, protects not only the person vaccinated but also other persons who might otherwise catch the disease from him—and compulsory vaccination is therefore consistent with most versions of laissez faire, whereas a law fixing maximum hours of work is paternalistic and therefore inconsistent with laissez faire. Holmes moves quickly again to the general, remarking that a constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."⁹³ But of course the majority had never said it should—it merely said the statute was an unreasona-

⁹² Id. at 75 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Next and more pertinently, as Professor Currie points out, see Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. Chi. L. Rev. 324, 380 n.332 (1985), Holmes cites a case in which the Supreme Court had upheld an eight-hour day for miners and a case in which it had upheld the prohibition of sales on margin. *Lochner*, 197 U.S. at 75 (citing *Holden v. Hardy*, 169 U.S. 366 (1898); *Otis v. Parker*, 187 U.S. 606 (1903)).

⁹³ *Lochner*, 197 U.S. at 76.

ble restraint on freedom of contract.⁹⁴ Of this virtually all Holmes has to say is that “[a] reasonable man might think it a proper measure on the score of health.”⁹⁵

Would the dissent in *Lochner* have received a high grade in a law school examination in 1905? I think not. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched,⁹⁶ does not exploit the factual record, and is highly unfair to poor old Herbert Spencer, of whom most people nowadays know no more than what Holmes told them in *Lochner*. It also misses an opportunity to take issue with the fundamental premise of the majority opinion, which is that statutes that are unreasonable violate the due process clause of the fourteenth amendment.⁹⁷ The dissent has nothing to say about the origins or purposes of the fourteenth amendment; indeed, at the end of it Holmes seems to concede the majority’s fundamental premise and to object merely to the conclusion that New York’s maximum hours law is unreasonable. The sweeping assertions at the beginning of the dissent are thus discordant with its conclusion. Read as a whole, the opinion appears not to challenge *Lochnerism*, but merely the abuses of *Lochnerism*. It is not, in substance, a “good” judicial opinion. It is merely the greatest judicial opinion of the last hundred years. To judge it by “scientific” standards is to miss the point. It is a rhetorical masterpiece, and evidently rhetoric counts in law; otherwise the dissent in *Lochner* would be forgotten.⁹⁸

Rhetoric is important in law because many legal questions cannot be resolved by logical or empirical demonstration. After eighty-one years it is impossible to *prove* that *Lochner* was wrongly decided.⁹⁹ The statute struck down in *Lochner* was paternalistic, and

⁹⁴ Id. at 64.

⁹⁵ Id. at 76.

⁹⁶ Currie mentions two important cases that Holmes failed to cite in support of his position. See Currie, *supra* note 92, at 380 n.332.

⁹⁷ See id. at 381.

⁹⁸ Compare with the dissent in *Lochner* the subdued, almost perfunctory opinions of the dissenting Justices in the abortion cases—the modern *Lochner*. See *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

⁹⁹ A growing scholarly movement regards it as correctly decided. See, e.g., R. Epstein, *Takings: Private Property and the Power of Eminent Domain* 108-09, 128, 280-81 (1985),

by striking down such statutes (though fitfully) until finally overwhelmed by political pressures in the late 1930's, the Supreme Court probably made the United States marginally more prosperous than it would otherwise have been. True, there is considerable doubt whether the fourteenth amendment was intended to authorize the kind of free-wheeling federal judicial intervention in the public policy of the states that *Lochner* has come to symbolize, thanks to Holmes's dissent. Yet this doubt is no greater than that which attends the federal judiciary's more recent interventions in state public policy in such areas as abortion, capital punishment, and obscenity. While some observers think both forms of intervention improper, the majority of judges and academic lawyers do not. So those who think "Lochnerism" (a word whose currency is, again, due entirely to Holmes's dissent) had law continue to draw comfort and support from the enchanting rhetoric of the *Lochner* dissent. Maybe the dissent was one of the things that persuaded them—and even after they have exposed all its tricks continues to persuade them—to adopt that view.

The dissent in *Lochner* is more than a symbol, however, and more than a literary *tour de force*. The first sentence that I quoted—"This case is decided upon an economic theory which a large part of the country does not entertain"—was one of the opening salvos in the legal realist movement, whose essential teaching was that many cases are decided on the basis of the judges' own policy preferences, rather than on legal principles imposed on the judges from without. Holmes had said such things before, of course, but when he repeated them as a Supreme Court Justice they carried extra weight.

The dissent in *Lochner* is a document of legal realism in a deeper sense. It is not only a masterpiece of rhetoric; it is essentially all rhetoric, as I have tried to suggest. Holmes's implicit view of judicial decisionmaking, it has been argued recently,¹⁰⁰ is that the decision of a hard case is a policy judgment rather than a de-

and references cited in R. Posner, *supra* note 9, at 209 n.25. It has also been argued that the Supreme Court's recent movement toward bringing commercial advertising under the umbrella of the first amendment is a revival of the jurisprudence of the majority opinion in *Lochner*. See Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 30-33 (1979).

¹⁰⁰ See G. White, *The Integrity of Holmes's Jurisprudence*, 10 Hofstra L. Rev. 633, 650-52, 664, 668-71 (1982).

duction from authoritative materials. (This was his "legal realism.") The characteristic abruptness of Holmes's opinions is consistent with a belief that an elaborate effort to prove the correctness of his result (even to the extent of exploring the intent behind the due process clause of the fourteenth amendment) would be false. Evidently there is something to this conception of law. The dissent in *Lochner* does not make its point by a patient, careful marshaling of facts and authorities, yet we seem somehow not to miss these things. Perhaps logic and reason really cannot decide the hard cases. Thus does the literary style of the dissent in *Lochner* invite reflection on the most profound issues of legal process.¹⁰¹

Of course I am not the first person to examine the literary properties of a judicial opinion. Cardozo did it in his essay on "Law and Literature" that I cited at the outset of this paper. Walker Gibson, in an unjustly neglected essay, did a fine job on a Learned Hand opinion.¹⁰² More recently, Professor Weisberg has analyzed several of Cardozo's opinions, as well as one by Justice (now Chief Justice) Rehnquist, in literary terms,¹⁰³ and Professor White has done the same for John Marshall's opinion in *McCulloch v. Maryland*.¹⁰⁴ Weisberg's analysis of the Rehnquist opinion advances, though with redeeming urbanity and good humor, the alarming thesis that Rehnquist used the same unworthy rhetorical devices of which Weisberg accuses Captain Vere in *Billy Budd*. The purpose of such an analysis is of course not to hold up a model of good rhetoric for judges to emulate. Regarding Weisberg and

¹⁰¹ Compare the recent highly critical rhetorical analysis of Holmes's opinion in *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("[t]hree generations of imbeciles are enough"), in Dudziak, Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law, 71 Iowa L. Rev. 833, 859-67 (1986).

¹⁰² See Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 928-30 (1961).

¹⁰³ See Weisberg, *Law, Literature and Cardozo's Judicial Poetics*, 1 Cardozo L. Rev. 283, 320-41 (1979); Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor** with an Application to Justice Rehnquist, 57 N.Y.U. L. Rev. 1, 42-58 (1982) [hereinafter Weisberg, *How Judges Speak*]. The Rehnquist opinion is *Paul v. Davis*, 424 U.S. 693 (1976).

¹⁰⁴ See J. White, *When Words Lose Their Meaning*, supra note 29, at 247-63 (analyzing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). White offers literary analyses of Justice Frankfurter's opinion in *Rochin v. California*, 342 U.S. 165 (1952), and of the Taft and Brandeis opinions in the wiretapping case, *Olmstead v. United States*, 277 U.S. 438 (1928). See White, *Judicial Criticism*, 20 Ga. L. Rev. (forthcoming Fall, 1986) [hereinafter White, *Judicial Criticism*].

White's analyses of opinions by Cardozo and Marshall, limitations of space and time prevent my doing more than registering the view that, as stylists, these great judges have been somewhat overrated. The masters of judicial style in the American tradition are not Marshall, Cardozo, or Brandeis; they are Holmes, Learned Hand, and Robert Jackson.¹⁰⁵ It would be a fascinating project for literary analysis to show why these men were great stylists and the more overtly stylish Cardozo was not, and why, for example, the sledgehammer style of Brandeis has less emotional impact than the plain style of Jackson. We need more comparative study of judicial opinions in the manner of Walker Gibson. We need canons of judicial style. Of course I do not mean to suggest that style is the only ingredient of judicial greatness.

It is no accident that Weisberg and White devote so much more attention to writers than to judges; I would guess in the ratio of nine to one. One who appreciates great writing is not likely to dwell too long on judicial opinions. This makes the neglect of Holmes all the more surprising. Of all the judges in the Anglo-American tradition he may be the only one who belongs in the very first rank of prose writers, as Lincoln is the only American politician who belongs there. Holmes was a grand master of metaphor. Many examples, like the climactic sentence in *Lochner*, are familiar to lawyers. I shall give a less familiar example, from a speech Holmes once gave to students at the Harvard Law School:

[T]he Professors of this School have said to themselves more definitely than ever before, We will not be contented to send forth students with nothing but a rag-bag full of general principles—a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures.¹⁰⁶

Notice how Holmes makes his point memorable first by casting his thought in a dramatic mode (“the Professors of this School have said to themselves . . . , We will not be contented,” rather than “the Professors of this School are not content”), and then by piling on a crescendo of images—two metaphors (“a rag-bag full of general principles” and “a throng of glittering generalities”), the second employing consonance (akin to alliteration), and finally the

¹⁰⁵ For examples of Jackson's style, see, e.g., *Brown v. Allen*, 344 U.S. 443, 532 (1953) (Jackson, J., concurring); *Johnson v. United States*, 333 U.S. 10 (1948).

¹⁰⁶ O.W. Holmes, *The Use of Law Schools*, in *Collected Legal Papers* 35, 42 (1920).

climactic simile ("like a swarm of little bodiless cherubs fluttering"). The "swarm of little bodiless cherubs" is a master stroke. Cherubs are in fact (if one can speak of them thus) little and bodiless, but describing them so makes them seem the very quintessence of ineffectuality. The fact that they are fluttering at the top of the picture, which is to say at the edge of the viewer's focus, further sharpens the image. Notice how the progression—general principles, glittering generalities, bodiless cherubs—enables the reader to accept a simile that without any preparation might have seemed merely grotesque. Thus is an abstraction ("general principles") made perfectly visualizable. Law has never been more securely a form of literature.

But of what value is it, you may ask, to know that some great judges are distinguished rhetoricians? Knowing what is in their bag of rhetorical tricks does not enable the ordinary person to emulate the masters. Although I think I have a fairly good idea why both *The Second Coming* and the dissent in *Lochner* are great rhetoric, I could no more write an opinion like the *Lochner* dissent (except perhaps in point of carelessness) than I could write a poem like *The Second Coming*. But if it were generally accepted that rhetoric is an important part of the judicial opinion—that the importance, one might even say the meaning, of the *Lochner* dissent lies almost entirely in how it says what it says rather than in what it says—our judges might pay more attention to style. It is not possible to learn to write greatly, but it is possible to learn not to write poorly. I do not want to turn this paper into an essay on style. The stylistic shortcomings of judicial opinions—as of legal writing generally—are too well known to require comment here. But perhaps they can be ameliorated by more general realization that style is organic to judicial writing, as it is to literature but not to science; and that in the areas of law that matter, by which I mean the areas of disagreement, to divorce style and content is not yet an attainable ideal.

The reader may object that only a small minority of judicial opinions survive; that in most the content and not the style really is the meaning, and so the content is taken over in subsequent cases and the husk, as it were, discarded. But of course most works of literature do not survive for even a few years after their composition. Because judicial opinions deal with subjects of narrower and

more transient interest than most works of literature,¹⁰⁷ they are bound on average to have less survival value even when written by someone as able as a great poet or novelist. That does not make them less rhetorical—it merely reminds that literary survivorship is a function of generality.

B. *The Values in Literature*

I have said that the study of literature teaches us to understand the nature of judicial opinions better and that it might enable us to reduce the number of poorly written opinions. The study of literature is also valuable to the judge, the academic lawyer, and the practitioner in another way. We can gain some insights from literature that have nothing to do with rhetorical devices or with being able to construe (or to “deconstruct”) texts. I do not mean to say that great works of literature are characteristically preachy or even that they make us better people for reading them. In fact there is a fair amount of literature that is downright immoral, reflecting cultural change, the political extremes to which creative people tend to be drawn, and the personal irresponsibility that some creative people consider to be their badge of office. Anyone who took seriously the implied moral values of literature like the *Iliad*, the novels of Gide, and the later poems of Yeats would be a menace to civilized society. Neither personal experience nor historical evidence persuades me that those steeped in the humanities are better people than those steeped in science or social science—or indeed than those quite without any higher education at all. I have in mind the craft values rather than the moral values of great literature—in particular descriptive scrupulousness, concreteness, and complexity, which I mean to stand for an awareness of the possibility of other perspectives than the writer’s own. These values are vital to sound judicial decisionmaking, but are frequently ignored.

Let me give a few examples. One who reads *The Merchant of Venice* carefully can have no doubt that Shylock is meant to be a thorough villain, as is Satan in *Paradise Lost*. One who reads the *Iliad* carefully can have no doubt that the Trojans’ impending doom is meant to be seen as a very fine thing. But in all of these

¹⁰⁷ This may, indeed, be implicit in the definition of literature. See J. Ellis, *supra* note 67.

cases the author has refused to load the dice, as it were, by depriving the villains of their essential humanity. To visualize a Jewish moneylender as fully—if wickedly—human was something that few Elizabethans could have done. To portray Satan as he did, Milton was bordering on blasphemy; and the *Iliad* is the oldest surviving expression of awareness that one's mortal enemy may have human feelings similar to one's own. Litigants have trouble developing empathy with their opponents, and judges characteristically score (short-lived) rhetorical triumphs by suppressing the facts and law favorable to the losing side.¹⁰⁸ These judges could learn something from the example set by the great imaginative writers.

Admittedly this point is in tension with my analysis of the *Lochner* dissent, which gives short shrift to the counterarguments of the majority and the authorities marshaled by it. And for a literary exception I need only go back to the *Ode to a Nightingale*, where to heighten the contrast between the happy world of the nightingale and the world of human suffering Keats describes the latter as “[h]ere, where men sit and hear each other groan;/ Where palsy shakes a few, sad, last gray hairs”¹⁰⁹—and continues in this vein for several more lines. The effect, though very beautiful, conveys a one-sided, unrealistic, indeed hysterical picture of the human condition—almost as silly a one as Shelley's “I fall upon the thorns of life! I bleed!”¹¹⁰ Wordsworth's slight lyric about the death of Lucy, which I quoted earlier, is more mature. I do not contend that complexity, or maturity, which may be the same thing, is a necessary condition of great literature, or of great judicial writing, but simply point out that if we do not have the gifts of Holmes—and none of us does—we had best cultivate all the more carefully the literary

¹⁰⁸ See Weisberg's essential criticism of Justice Rehnquist's opinion in *Paul v. Davis*, Weisberg, *How Judges Speak*, supra note 103, at 43-49, and also a point stressed in both Gibson, supra note 102, and J. White, *When Words Lose Their Meaning*, supra note 29, at 269-70.

¹⁰⁹ J. Keats, *Ode to a Nightingale*, in *John Keats and Percy Bysshe Shelley: Complete Poetical Works*, supra note 80, at 183.

¹¹⁰ P.B. Shelley, *Ode to the West Wind*, in *John Keats and Percy Bysshe Shelley: Complete Poetical Works*, supra note 80, at 616, 617. In criticizing the values implied by such lines, I am confessing my affinity with the New Critics in the narrow sense of critics who set a high value on poetry that resolves complex tensions, reflecting the realities of the human condition. For classic statements of this position, see T.S. Eliot, *The Metaphysical Poets*, in *Selected Essays*, supra note 79, at 241; R.P. Warren, *Pure and Impure Poetry*, in *Selected Essays* 3, 27 (1958). For criticism of this position, see T. Eagleton, *Literary Theory: An Introduction* 46-53 (1983).

qualities that are within our reach.

I have spoken only of complexity. About scrupulousness—the search for the exact word and phrase—I shall merely refer the reader to Ronald Gray's fine book on Kafka,¹¹¹ which in its opening chapter, by contrasting Kafka with one of his imitators, shows how the power of Kafka results from his refusal to strive for the sensational effects that his subject matter seems to invite.¹¹² I will close this discussion with literally a word on concreteness. The second stanza of *The Second Coming* begins as follows:

Surely some revelation is at hand;
 Surely the Second Coming is at hand.
 The Second Coming! Hardly are those words out
 When a vast image out of *Spiritus Mundi*
 Troubles my sight: somewhere in sands of the desert
 A shape with lion body and the head of a man,
 A gaze blank and pitiless as the sun,
 Is moving its slow thighs . . .¹¹³

Do not worry about what all this might mean or what *Spiritus Mundi* is or how this is going to modulate into the great closing lines of the poem ("And what rough beast, its hour come round at last,/ Slouches towards Bethlehem to be born?"¹¹⁴). The word I want to direct attention to is "sight" in the fifth line. In recollection one is almost sure to think of it as "mind," for an ordinary person thinks a vision is something in the mind. Only to a poet it is something to be seen, because what is seen is real, whereas what is imagined is often not, and the poet wants to make his audience believe in the reality of this vision. It is a small touch, and admittedly there is an air of unreality in talking about the concreteness of what is after all a fantasy (like Holmes's "bodiless cherubs"). But it is a characteristic literary touch, this use of visual or tactile imagery to drive home a point. Touches like these give literature its artifactual quality—a quality that Holmes's writing had and that modern judicial opinions could use more of.

The degree to which the euphemism has displaced the concrete

¹¹¹ See R. Gray, *supra* note 57.

¹¹² *Id.* at 10-23.

¹¹³ W.B. Yeats, *The Second Coming*, in *The Collected Poems of W.B. Yeats*, *supra* note 48, at 185.

¹¹⁴ *Id.*

word in judicial opinions, and more generally the degree to which judges shy away from concrete description, is remarkable. A very able Supreme Court Justice who died recently will long be best remembered for having said of pornography that he could not define it "[b]ut I know it when I see it, and the motion picture involved in this case is not that."¹¹⁵ The candor and bluntness of this statement stood and stand in refreshing contrast to the characteristic evasions of the contemporary judicial style. It had the effect of opening a window in a stuffy room. It did for the legal discussion of pornography what Orwell had done for the literary discussion of revolutionary violence.¹¹⁶

A more typical example of judicial style, chosen almost at random, is the first sentence in the statement of facts in *Cox Broadcasting Corp. v. Cohn*.¹¹⁷ The case held that the first amendment forbids a state to allow the family of a rape victim killed by her assailants to seek damages for the invasion of privacy caused by broadcasting the victim's name. The sentence reads:¹¹⁸ "In August 1971, appellee's 17-year-old daughter was the victim of a rape and did not survive the incident."¹¹⁹ The rapists killed her; the words "did not survive the rape" are an unconscious borrowing of the standard phraseology for describing a medical procedure in the course of which the patient dies: "X was operated on for a massive tumor but did not survive the operation." No normal person says, "X was shot, and did not survive the incident"; he says, "X was killed." The Court shied away from stating the blunt truth bluntly. Instead, it euphemized, to pave the way for the startling conclusion of the opinion, which is that the first amendment protects the public dissemination of the macabre and irrelevant detail of the victim's name.

V. CONCLUSION

The claims I am making for literature as an aid to law are in the spirit of Professor White's writings, but more limited. White wants

¹¹⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹⁶ See G. Orwell, *Inside the Whale*, in 1 *Collected Essays, Journalism and Letters of George Orwell*, supra note 21, at 493, 516.

¹¹⁷ 420 U.S. 469 (1975).

¹¹⁸ *Id.* at 496-97.

¹¹⁹ *Id.* at 471.

to reclaim law from the economists and other social scientists; to reclaim it for the humanities. His writings on law and literature contain much on literature, but little on law beyond exhortation to lawyers and judges to be more sensitive, candid, empathetic, imaginative, and humane.¹²⁰ The exhortation is timely and eloquent; but what exactly White envisages for law as a humanity I do not know. His most recent effort to explain what he means is pitched at so high a level of abstraction that I have lost the thread of his discourse. I can get but little from a sentence like "The language that the lawyer uses and remakes is a language of meaning in the fullest sense," or out of being told that the judicial opinion

might be far more accurately and richly understood if it were seen not as a bureaucratic expression of ends-means rationality but as a statement by an individual mind or a group of individual minds exercising their responsibility to decide a case as well as they can and to determine what it shall mean in the language of the culture.¹²¹

I have the sense that Professor White is trying to make the legal profession feel better about what it does, by explaining that its work has affinities with the work of the writers and critics of great literature, but only when White is writing about literature are his words touched with fire. I myself do not think law is a humanity. It is a technique of government. But because, as White emphasizes, it is a technique tied to the creation and interpretation of texts, the practice of law can gain from sympathetic engagement with literature. I have tried to show how.

¹²⁰ See White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684 (1985) [hereinafter White, *Law as Rhetoric*]; supra notes 8, 29. In Chapter 6 of White's book *Heracles' Bow*, suggestively entitled "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life," there is a fine discussion of literature, but of the 13 texts referred to in the chapter only two are judicial opinions, and the discussion of them is perfunctory. See J. White, *Heracles' Bow*, supra note 29, at 107-38. White's discussion of the *Rochin* and *Olmstead* cases, see White, *Judicial Criticism*, supra note 104, may mark the beginning of a new phase of his work, in which the emphasis shifts from literary to legal texts.

¹²¹ White, *Law as Rhetoric*, supra note 120, at 692, 697.