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The Poetics of the Pragmatic: What *Literary Criticisms of Law* Offers Posner

Guyora Binder*

Is it practical to evaluate law aesthetically, as if it were a kind of literature? In reviewing *Literary Criticisms of Law*,¹ Judge Richard Posner argues that it is not instrumentally useful to view law as a kind of literature.² He thereby reasserts his long-held position that law should be evaluated economically rather than aesthetically.³ In this response, I argue that Posner's pragmatism *requires* that he evaluate law aesthetically, if he wishes to evaluate it at all.

Famous as a tireless promoter of conservative law and economics, Judge Posner has more recently restyled himself as an equally energetic exponent of "pragmatism,"⁴ thereby placing himself in the unlikely company of such progressive social critics as Richard Rorty, Cornel West, Margaret Radin, and Stanley Fish.⁵ This has been a welcome development. Pragmatism is an appealingly flexible doctrine that makes the test of any action or belief the difference it makes in practice. Pragmatism asks us to compare the

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1. GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000).

2. Richard A. Posner, *What Has Modern Literary Theory to Offer Law?* 53 *STAN. L. REV.* 195 (2000) (book review).

3. See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 16, 140-41, 144-46, 150 (1988) [hereinafter POSNER, *LAW AND LITERATURE*] (identifying science, economics, and law with mature acceptance of the constraints of reality and of social authority, and identifying law and literature scholarship, literary romanticism, literary modernism, and Nietzsche with infant narcissism, aestheticism, and political radicalism); RICHARD A. POSNER, *OVERCOMING LAW* 387-405 (1995) (same).

4. POSNER, *OVERCOMING LAW*, *supra* note 3, at 4-15; RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227-65 (1999) [hereinafter POSNER, *PROBLEMATICS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26-33, 239-44, 308, 384-87, 454-69 (1990) [hereinafter POSNER, *JURISPRUDENCE*].

5. See Richard A. Posner, *What has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW AND SOCIETY* 29-46 (Michael Brint & William Weaver eds., 1991) [hereinafter *PRAGMATISM*] (discussing Posner's agreements and disagreements with these scholars); see generally Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner*, Richard Rorty, and Ronald Dworkin, in *PRAGMATISM*, *supra*, 47-82; Margaret Jane Radin, *The Pragmatist and the Feminist* in *PRAGMATISM*, *supra* 127-54; Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM*, *supra*, at 89-98; Cornel West, *The Limits of Neopragmatism*, in *PRAGMATISM*, *supra*, 121-26.

consequences of any action or claim with the consequences of available alternative actions or claims. But unlike other consequentialist doctrines, such as utilitarian policy analysis or verificationist epistemology, pragmatism does not prescribe further criteria for comparing alternative bundles of consequences.⁶ It treats the justification of action and belief as a matter of situated practical judgment and denies that justification must rest on a foundation of indubitable knowledge.

Judge Posner's pragmatic turn has placed a rhetorically able and visible advocate in the service of this sensible doctrine. It has helped him think through the complex practical responsibilities of his role as a judge, while tempering his claims for efficiency analysis and adulterating that analysis with other values.⁷ It has coincided with a great broadening in his intellectual interests, and in his articulated values and sympathies. It has produced one very good book of legal philosophy, *The Problems of Jurisprudence*,⁸ and another containing many excellent arguments, *The Problematics of Moral and Legal Theory*,⁹ which is, however, marred by an intemperate tone. Pragmatism has benefited Judge Posner in many respects, but it has not overcome one disabling idiosyncrasy: His persistent antipathy toward the humanities seems to blind Judge Posner to the role of aesthetic value in practical judgment and justification. It also impedes his ability to assess, or even absorb, the argument Robert Weisberg and I offered in *Literary Criticisms of Law*.

In his recent review of *Literary Criticisms of Law*, Judge Posner reiterates his long-held position that literary theory is irrelevant to law. Offering our book as an example, Judge Posner characterizes scholarship applying literary theory to law as an unpragmatic, even "decadent" enterprise, pursued only by enervated leftists left behind by the march of free enterprise. Readers of his review essay do not learn that *Literary Criticisms of Law* offers a pragmatic critique of the law and literature field more extensive, but more balanced, than Judge Posner's own. More importantly, readers do not learn about our argument that a literary analysis and evaluation of law is indispensable to the kind of pragmatic jurisprudence Judge Posner professes to favor.

In the balance of this essay, I explicate the polemical impulses that appear to have shaped Judge Posner's crabbed reading of our book. And I argue that a pragmatic jurisprudence, whether progressive or conservative, must recognize

6. See DON HERZOG, WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY 110-217 (1985) (comparing utilitarianism and pragmatism in political theory); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 306-11, 336-38 (1979) (giving a pragmatic critique of verificationism).

7. See, e.g., POSNER, JURISPRUDENCE, *supra* note 4, at 26 ("I shall argue . . . against overarching conceptions of justice such as . . . 'wealth maximization'—though not against modest versions of these normative systems . . .").

8. *Id.*

9. POSNER, PROBLEMATICS, *supra* note 4.

that law cannot be viewed simply as an instrument. Law is the art of composing society, and normative legal argument therefore is a rhetoric of aesthetic value, properly understood as a kind of cultural criticism.

In *Literary Criticisms of Law*, Robert Weisberg and I critiqued scholarship applying the theory and methods of literary studies to law. We showed that much literary criticism of law is flawed by one of two unpragmatic premises: the *skeptical* premise that legitimate law must rest on objective foundations,¹⁰ and the *sentimental* premise that it must fully appreciate the feelings of its subjects.¹¹ We also showed that some scholarship attempts to parry both skeptical and sentimental critiques with a *genteel authoritarianism* that calls on legal decisionmakers to present their own refined characters as symbols of the law's virtue.¹² We argued that these vices of skepticism, sentimentalism, and authoritarianism often depend on simplistic caricatures that reduce literature to a metaphor for irrationality, sympathy, or refinement. We added that in portraying literature as necessarily subverting, correcting, or saving law, literary criticism of law also mischaracterizes law as crudely mechanical. By thus opposing literature to law, such scholarship tends to obscure the expressive and aesthetic concerns inherent in making, using, and evaluating law.

Along with these criticisms of the field, we offered a program for reform. A more illuminating literary criticism of law, we concluded, would explicate and evaluate the expressive meaning and effects of law. It would acknowledge legal institutions as constitutively important elements in a culture, and strive to understand, evaluate and improve their cultural consequences.¹³ While our approach draws on "cultural studies" and "the new historicist" literary criticism, our aim is not to urge the application of a particular literary theory to law, but to insist that any adequate normative theory of law's legitimacy and its purposes must read and evaluate law's meaning. We argued not simply for a cross-disciplinary importation of literary theory into law, but for a genuinely interdisciplinary cultural criticism of law.

Our argument for thus integrating literature and law relied on capacious

10. BINDER & WEISBERG, *supra* note 1, at 16-17, 462.

11. *Id.*

12. *Id.* at 17-18.

13. *Id.* at 18-19, 26, 462-539. See also Binder & Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997) (arguing that legal disputes are forums for contesting and claiming identities and that legal rules defining markets necessarily involve cultural representations of wealth and worth—as well as of competent market actors); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991) (claiming that different legal mechanisms for distributing public burdens and benefits imply different values and confer different identities on the recipients even when policymakers do not intend these expressive effects, and arguing that public policy analysis should consider these expressive effects).

conceptions of both. Strictly speaking, literature is language presented or appreciated for the aesthetic experience of its sense and sound. Figuratively speaking, however, any activity is "literary" that involves creatively expressing and arranging meanings. That law is a discursive enterprise increases the plausibility of the law-as-literature trope, but law, like drama, creates meaning through action as well through language. Legal scholars have likened aspects of law to such diverse literary practices as interpretation, narration, dramatic performance, rhetorical figuration, lyric self-expression, and mimetic representation.¹⁴ In *Literary Criticisms of Law*, we view any practice as literary in so far as it makes new social meanings out of received cultural materials, and presents them for expressive or aesthetic purposes.¹⁵

We argued that literature, thus conceived, is inherent in law, which we conceived as the activity of making and justifying legal institutions, laws, legal claims, and legal decisions. We include within law the reasons, large and small, appealed to in making legal decisions and arguments. Thus, law includes claims about the ultimate purposes (liberty, public welfare, self-government, moral perfection) and founding origins (divine will, contract, majority will, heroic sacrifice, crisis resolved, evil overcome) that legitimate legal institutions and systems.¹⁶ When law is defined in these broad terms, "legal" decisionmaking is not the narrow preserve of the judiciary or the legal profession. Legal decisionmakers of course include the legislators who make and officials who apply law. But legal decisionmakers also include, in a democracy, the citizens who elect and influence lawmakers, who confer legitimacy upon legal institutions, who support or acquiesce in their enforcement efforts, and who ultimately must decide whether to obey the law, and how.¹⁷ So to say that "law" is an expressive or aesthetic activity is to say that the decisions we face in collective self-governance are partly, but unavoidably, expressive or aesthetic.

By "expressive" and "aesthetic" I refer to two noninstrumental motives for human action, commonly thought to motivate artistic creation. Expressive actions are undertaken to identify the actor with a certain value, or character, or identity.¹⁸ The term "aesthetic" refers to value that is final rather than

14. BINDER & WEISBERG, *supra* note 1, at 22-27.

15. *Id.* at 26-27.

16. See RONALD DWORKIN, *LAW'S EMPIRE* 47-70 (1986) (arguing that practices of constructive interpretation, like legal argument and literary criticism, involve developing and invoking theories of the purpose underlying the particular practice).

17. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617-18 (1986) (arguing that law's coercive force depends on the acquiescence and active cooperation of large numbers of those subject to it).

18. In Croce's influential aesthetic theory, "expression" has the broader meaning of any cognition or articulation of concrete, particular, or aesthetic intuitions. See generally, BENEDETTO CROCE, *THE AESTHETIC AS THE SCIENCE OF EXPRESSION AND THE LINGUISTIC IN GENERAL* (Colin Lyas trans., Cambridge Univ. Press 1992) (1902). I am using the term in

instrumental, but that nevertheless depends upon subjective judgment. Aesthetic judgment is concrete and particular: It can be governed by no general standard of value given in advance. In this sense, aesthetic judgment is free. When we value aesthetically we value what we are not ethically bound or logically compelled to value. Yet aesthetic value is not the same as pleasure. It is conferred by an act of judgment, so that we can appreciate what we do not enjoy, and enjoy what we do not appreciate.¹⁹ Aesthetic judgment does not apply standards of value, but instead assesses values. Aesthetic criticism identifies values expressed by human creations, judges those values, and also judges the creations as better or worse expressions of those values.²⁰

In defining aesthetic value in this way, I mean to leave open the

the narrower but less technical sense of "self-expression," that is, the articulation or representation of an individual, group, or institutional character in a concrete medium.

19. This conception of the aesthetic as a noncategorical judgment premised on a disinterested satisfaction is attributable primarily to Kant. See IMMANUEL KANT, *THE CRITIQUE OF JUDGEMENT* §§ 5, 9, 10, 33 (James Creed Meredith trans., Oxford Univ. Press 1986) (1790) (arguing that aesthetic judgment establishes a relation between a representation and a disinterested satisfaction, rather than a concept or category; reasons may give rise to this disinterested satisfaction, but cannot substitute for it; objects of aesthetic judgment are viewed as ends in themselves, without instrumental purpose). A similar conception of aesthetic judgment is found earlier, however, in the moral sense philosophers Shaftesbury and Hutcheson, who analogized aesthetic and moral responses. See generally ANTHONY ASHLEY COOPER, *THIRD EARL OF SHAFTESBURY, AN INQUIRY CONCERNING VIRTUE, OR MERIT* (David Walford ed., 1977) (1699) (claiming that aesthetic and moral judgment both result from sensation and are unmediated by standards; aesthetic judgment is disinterested); FRANCIS HUTCHESON, *AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE* (1725) (describing the sense of beauty as unreflective and not mediated by concepts or instrumental goals). The notion that aesthetic judgment plays a role in legitimating the institutional constraints of social order is a theme in the Kant-influenced aesthetic theories of Schiller and Schelling. See F.W.J. SCHELLING, *SYSTEM OF TRANSCENDENTAL IDEALISM* (Peter Heath trans., 1978) (1800) (arguing that artistic creation models the integration of freedom and constraint realized by the good society); FRIEDRICH SCHILLER, *ON THE AESTHETIC EDUCATION OF MAN: IN A SERIES OF LETTERS* (Reginald Snell trans., 1954) (1795) (arguing that the capacity for aesthetic appreciation and imagination enables humans to form institutions by submitting to rules, and to form social relationships by accommodating others).

20. Ronald Dworkin's "Aesthetic Hypothesis" about literary interpretation is that it aims at a reading of the literary text which makes it the best possible work of literature. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 149 (1985). "[A]nyone who interprets a work of art relies on beliefs of a theoretical character about . . . formal properties of art, as well as on more explicitly normative beliefs about what is good in art." *Id.* at 152. Dworkin applies this "aesthetic hypothesis" to legal judgment, concluding that "[a] plausible interpretation of legal practice must also, in a parallel way, satisfy a test of two dimensions: it must both fit that practice and show its point or value." *Id.* at 160. This analogy treats legal judgment and literary criticism as similar practices of what Dworkin calls "constructive interpretation." DWORKIN, *supra* note 16, at 50-53, 87-90. Dworkin's formulation implies that a work of literature might imperfectly embody an idea or value, whereas Croce's system implies that an imperfectly expressed aesthetic idea was imperfectly intuited and hence was a confused idea. See CROCE, *supra* note 18.

relationship between aesthetics and ethics. If ethical value means simply "value," it of course includes aesthetic value. But ethics can refer to evaluative judgments made by subsuming a particular under some category or concept, in which case it is distinct from aesthetic value. It can refer more narrowly to the duties governing human action, or more narrowly still, to the duties that flow from an attitude of impartiality, or equal concern for the welfare or dignity of all persons. To the extent that ethical judgment involves applying a universal standard of value, formulated in advance of the act of judgment, it is different from aesthetic judgment.

Accordingly, I do wish to distinguish aesthetic value from one conception of ethical value prevalent among moral philosophers and legal theorists. According to this conception, an ethical theory must be built on the foundation of some universally applicable conception of the good. Such an ethical theory applies this universal standard to all human actions, including those actions that enact and apply law (and presumably those that produce art and literature as well). According to this foundationalist conception of value, a legal theory is just a special application of an ethical theory, which in turn is just an application of an overall conception of the good. This foundationalist model of value leads to fallacious criticisms of legal institutions and legal theories, based on the ethical values they supposedly entail.

By contrast, a pragmatic approach to value presumes that justifying a practice does not require a general theory of value—it requires only comparing that practice to feasible alternatives. Value, in this sense, is local. A utilitarian approach to punishment, for example, need not entail a utilitarian ethic.²¹ Thus, from a pragmatic standpoint, justifying legal institutions does not necessarily require evaluating them *ethically*. But pragmatism does not authorize us to perpetuate legal institutions without evaluating them at all. Nor may we evaluate legal institutions in a purely instrumental way, without assessing our ends. Thus, the pragmatic evaluation of law will involve judgment that is neither foundationalist nor instrumental. Such judgment is *aesthetic*, in the sense indicated. To say that legal decisions are inevitably aesthetic and expressive is to say that we cannot simply fashion our law to serve our purposes without also judging those purposes worthy and claiming them as our own.²²

In reviewing *Literary Criticisms of Law*, Judge Posner poses the question, "What has literary theory to offer law?" This is a variant of his standard

21. See Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 *RUTGERS L.J.* 115 (2001).

22. See DWORKIN, *supra* note 16, at 50-53, 69, 73, 87-90, 93 (developing the aesthetic hypothesis that, in constructive interpretation, purposes ascribed to enterprise must be judged worthy and must fit interpretive data); *id.* at 78-83, 189-90 (claiming that judgments of legal validity are internal to a legal system).

jurisprudential interrogatory: He has elsewhere asked, "What has moral philosophy to offer law?"²³ After posing his favorite question about the law and literature movement, Judge Posner also gives his favorite answer: "Nothing."²⁴ In asking and answering this question he apparently restricts literary theory to ideas about the form and aesthetic value of imaginative literary works, and thereby excludes any implications for law and politics. Judge Posner's notion of literary theory appears to exclude even the writings of literary critics like Jacques Derrida and Stanley Fish about language, politics and culture.²⁵ Likewise, he seems to use the term "law" quite narrowly to refer only to the application of law by judges and lawyers, but not to lawmaking.²⁶ Judge Posner insists on reading our book as an attempt to determine the utility of literary theory, narrowly defined, in practicing law. This, he says, in opening his review, "is the question that the authors of *Literary Criticisms of Law* set out to answer in more than 500 pages of tightly packed print dense with learning."²⁷

Needless to say, Judge Posner finds much in our long and wide-ranging book that falls outside his procrustean concern with the utility of literary theory for courts. First, *Literary Criticisms of Law* is not a defense of law-as-literature scholarship but a critical and reformist work. Second, the book proposes a broader kind of literary theory than Judge Posner contemplates, one that cannot

23. POSNER, JURISPRUDENCE, *supra* note 4, at 348.

24. See Posner, *supra* note 2, at 195.

25. See *id.* at 200 (claiming that Fish "writes as a philosopher in the debate over interpretation"); *id.* at 205 (arguing that Derrida's critique of Rousseau's ideas about political and linguistic representation has a merely "tenuous" connection "to either law or literature"). While Posner chooses to define literary theory quite narrowly, so as to restrict its relevance to law and politics, he defends the application of economics to nonmarket behavior by saying:

"[E]conomics" . . . has neither a fixed intension nor a fixed extension. . . . Definitions of economics are hopeless. One cannot say that economics is what economists do, because many noneconomists do economics. . . . One cannot call economics the study of markets, because other disciplines study markets . . . and because it begs the question of the proper domain of economics to define economics as the study of markets and refuse to defend the definition.

POSNER, JURISPRUDENCE, *supra* note 4, at 368.

26. See POSNER, JURISPRUDENCE, *supra* note 4, at 6-9 (identifying "law" with courts and jurisprudence with the search for constraints on judicial decision); POSNER, OVERCOMING LAW, *supra* note 3, at 8 (stating that a major goal of his book on "legal theory" is to influence judges to pay more attention to social science); Posner, *supra* note 2, at 196 ("The first and more straightforward way [to treat law as a subject of literary criticism] would be to analyze legal texts, such as statutes, wills, contracts, briefs, and judicial opinions (the most obvious candidate, given the literary distinction of some of our famous judges) as if they were literary texts."); *id.* at 198 (implying that the focus should be on "practical benefits" to "the legal system"). But cf. POSNER, OVERCOMING LAW, *supra* note 3, at vii ("My conception of legal theory is broad, sweeping within it matters that might be thought to belong to political or social theory . . .").

27. Posner, *supra* note 2, at 195.

be separated neatly from cultural history or political and social theory. Third, our constructive argument for a more culturally and historically situated law-as-literature scholarship rests not on its utility in applying law, but on the necessity of expressive and aesthetic criteria in evaluating (and so in reforming) law. All this is ancillary to the one question Judge Posner claims we set out to answer.

Rather than forcing Judge Posner to revise his understanding of the book and engage its argument, all this countervailing data merely annoys him and provokes him to impatience. Thus, he complains that "[t]he authors are fascinated by, and minutely examine, a set of scholarly literatures that have no practical significance for law; some of them are not about law at all."²⁸ True, he concedes, "*Literary Criticisms of Law* is an interesting book,"²⁹ but a degenerate one. Indeed, he compares it to Oscar Wilde's *The Picture of Dorian Gray*,³⁰ and characterizes it as a work of "decadent" literature: "intricate, subtle, ornate, self-indulgent, and disdainful of utility."³¹ While the book is full of "shrewd"³² and "penetrating criticisms,"³³ and passages which are "pungent,"³⁴ and even "wonderful,"³⁵ the properly self-disciplined reader will resist these temptations to dally and reflect, and will hew to Posner's criterion of "utility." In so doing she will read with economic efficiency, attending only to her own purposes, learning only what she consents to learn. Although tirelessly prolix himself,³⁶ Posner confessed to finding our book "fatiguingly long."³⁷ It is no wonder he found it fatiguing to read so much with such narrowly restricted attention. Readers must judge for themselves whether it is indeed "efficient" to consume books in this bulimic fashion.

Judge Posner suspects he knows why our book and our subject are so impractical. Modern literary theory, he feels, is the useless plaything of enervated leftist intellectuals, combining unrealistic politics with unrigorous method.³⁸ Judge Posner suggests that literary theory has a natural appeal for

28. *Id.*

29. *Id.* at 196.

30. OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* (Oxford Univ. Press 1999) (1908).

31. Posner, *supra* note 2, at 195.

32. *Id.* at 196.

33. *Id.* at 208.

34. *Id.* at 196.

35. *Id.* at 203.

36. POSNER, *OVERCOMING LAW*, *supra* note 3, is 597 pages, and RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) is 802 pages.

37. Posner, *supra* note 2, at 195.

38. Modern literary theory involves a turning away from the classic works of literature to texts and practices . . . that provide easier vehicles for making political points, invariably of a left-wing cast . . . but decked out in a forbidding vocabulary drawn from a kaleidoscope of overlapping theories. . . . These theories in their number and famously obscure jargon place a barrier rather than a magnifying lens between the literary scholar and the work of literature. They . . . [channel] left-wing intellectual energies into politically inert obscurantism and

left-wing academics because of its impracticality—that they amuse themselves with such irrelevancies because, in the wake of the Cold War, they no longer have any credible practical program to offer. Judge Posner invokes Richard Rorty, everyone's favorite pragmatist (mine too), who has criticized left-wing literary theorists for giving up on democracy and withdrawing into useless ideology critique.³⁹ One might think that the remedy for this situation would be for literary theorists to turn their attention to law and consider the normative dilemmas confronting our democracy. This is what our book urges them to do.

But Judge Posner is convinced that there really are no such normative dilemmas. There is very little that popular majorities can or should accomplish by changing the law.⁴⁰ As far as Judge Posner is concerned, the left's redistributive aims are inherently impractical and can only be maintained through a childish refusal to acknowledge economic reality.⁴¹ Thus, in a market economy, redistribution of wealth will always be undone by transactions that put wealth in the hands of the socially productive rather than the needy.⁴² Hence, Judge Posner concludes, visions of social justice can only be imposed by the economically suffocating and politically repressive process of government planning.⁴³ Since all important decisions must be left to market transactions, there is very little that law can or should do, other than clarifying and enforcing property and contract rights.⁴⁴ Law should not embody any scheme of values, but should simply provide a framework within which individuals can pursue their own ends, thereby yielding an efficient allocation of resources and maximizing wealth. From this perspective, democratic decisionmakers have no real normative discretion, so there is no practical point to normative legal theory of any kind.

Judge Posner tries to show that our book is really addressed only to left-wing academics (he complains, for example, that it ignores the contributions to

faculty intrigue

Id. at 197.

39. See *id.* (quoting Richard Rorty, *Intellectuals in Politics: Too Far In? Too Far Out?*, *DISSENT*, Fall 1991, at 483, 489-90 and Richard Rorty, *The End of Leninism and History as Comic Frame*, in *HISTORY AND THE IDEA OF PROGRESS* 211, 223 (Arthur M. Melzer, Jerry Weinberger & M. Richard Zinman eds., 1995)).

40. POSNER, *OVERCOMING LAW*, *supra* note 3, at 25-26 (asserting that democratic majorities and democratically controlled legislatures are prone to support wasteful, "inine" legislation).

41. POSNER, *JURISPRUDENCE*, *supra* note 4, at 384-86 (accusing Rorty of romantic naiveté for entertaining Roberto Unger's socialist proposals).

42. See *id.* at 337-38 (criticizing Bruce Ackerman's arguments for redistribution of wealth); *id.* at 359 (arguing that judges can do little to redistribute wealth); *id.* at 375 (arguing that initial distributions would be quickly undone by market exchanges); *id.* at 383-84 (calling Brian Barry's redistributive proposals "a prescription for economic disaster").

43. See *id.* at 386.

44. *Id.* at 359-60.

law and literature of Frank Easterbrook!).⁴⁵ What Judge Posner seems to mean is that our criticisms of the predominantly left-liberal law and literature movement are respectful and reformist rather than dismissive. Rather than just showing off our caustic wit, we endeavor to explicate the work with which we disagree and make the strongest case we can for it (we have avoided directing the reader's attention to work for which little can be said). We then try to frame our criticisms in ways that we hope could convince even the authors themselves. In some cases this means pointing out inconsistencies between the author's normative aims and her methodological means. Where we find an author's methods well-serving values we find objectionable, our approach is usually to explicate those values as clearly as we can and leave them for the reader to judge. Judge Posner finds this careful critical method tedious, which is a fair criticism—careful thought about questions of value is indeed “fatiguingly”⁴⁶ hard work for authors and readers alike. But perversely, Judge Posner also finds this critical method “self-indulgent” rather than self-disciplined. He would prefer that we spare readers this work and just sling some epithets.

This is what Judge Posner himself does when he dismisses literary theorists as “laughingstocks.”⁴⁷ His recent *The Problematics of Moral and Legal Theory*⁴⁸ employs this same bullying style of argument against another branch of the humanities, moral philosophy. *Problematics* argues that academic moral philosophy has not contributed useful arguments to policy debate.⁴⁹ I am in sympathy with this position, since I do not think pragmatic policy arguments need be premised on systematic moral philosophies. And as Judge Posner correctly points out, too often philosophers try to answer consequentialist policy arguments by criticizing the supposed (but often nonexistent) ethical premises of those arguments.⁵⁰ But not content to outsell the interdisciplinary competition, Judge Posner wants to put them out of business as well. He is too pragmatic to waste his valuable time trying to change the minds of philosophers. He does not urge them to become more interested in political and legal theory, and less interested in ethics; or to become more interested in the virtues and vices of institutions and less interested in the virtues and vices of individuals. He does not urge them to become more careful, perceptive and sympathetic readers, who interpret policy arguments as expressions of situated projects rather than of disembodied principles. Instead, he argues that moral philosophy is a waste of social

45. Posner, *supra* note 2, at 198.

46. *Id.* at 195.

47. *Id.* at 197-98.

48. POSNER, *PROBLEMATICS*, *supra* note 4.

49. *Id.* at 17 (concluding that “academic moralism is a useless endeavor”).

50. *See id.* at 15-16, 51-53, 89-90, 111-12, 124.

resources,⁵¹ which would die a useful death if forced to make its way in the market.⁵² He portrays its exponents as social parasites,⁵³ inexorably drawn by the gravitational pull of their downward sloping demand curves, to a soft life of unproductive speculation.⁵⁴

This social Darwinist approach to intellectual debate reduces opponents to the status of social costs rather than addressing them as fellow scholars or citizens. It cheapens its author's ethos even as it demeans his targets. It thereby undercuts his otherwise persuasive defense of pragmatic policy analysis and suggests that pragmatism is underwritten by repugnant ethical attitudes after all. In light of his decision to exclude the humanities scholars he attacks from his audience, Judge Posner's complaint that *Literary Criticisms of Law* addresses only leftist intellectuals is an ironic rhetorical flourish. Although portraying himself as democratically inclusive, Judge Posner is really complaining that we addressed such people at all. Judge Posner's ironic accusation of exclusiveness recalls his perverse characterization of careful reading and respectful criticism as self-indulgence. Both charges bring to mind his own witticism that "people tend to be highly sensitive to their own weaknesses when they see them in other people."⁵⁵

Judge Posner's charge that *Literary Criticisms of Law* addresses only leftists is not just ironic, but also false. He correctly points out that we think literary theory is "a potentially rich resource for leftist critique,"⁵⁶ but suppresses the fact that we think it may also be a rich source of conservative critique. We advocate a Nietzschean cultural criticism of law, corrosive to the individualist premises of liberalism and critical of liberalism's aspirations to value neutrality. Such a criticism could promote radical⁵⁷ or conservative⁵⁸

51. See *id.* at 17.

52. See *id.* at 88 (characterizing moral philosophy as a "weak academic field" that is able to persist because universities are non-profit institutions, because of tenure, and because of information barriers); *id.* at 285 (claiming that because the humanities are a "natural target for cost-cutting administrators" humanists are being driven into law, which is a development "not entirely to be welcomed").

53. See *id.* at 80 ("Academic moral philosophy . . . has no customers . . . and makes no falsifiable claims . . . [T]he academic moralist has no incentive to be useful to anybody . . . [Moral philosophers] need not, and . . . usually do not, generate a positive social product.").

54. See *id.* ("[T]hey take few professional risks, and never any personal risks. They live a comfortable bourgeois life, with maybe a touch of the bohemian. They either think Left and live Right, or think Right and live Right"); *id.* at 69 (asserting the reluctance of moral philosophers to teach students).

55. POSNER, PROBLEMATICS, *supra* note 4, at 276.

56. Posner *supra* note 2, at 195.

57. See, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); William E. Forbath, *Class, Caste and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

alternatives to liberalism, or it could resurrect liberal institutions on a foundation of virtues and values rather than rights and preferences.⁵⁹ What it cannot do is pretend that liberal institutions are simply instruments of individual preferences. That kind of liberal individualism cannot withstand the challenges of Nietzschean perspectivism, Aristotelian perfectionism, or even Rortyan pragmatism. If science cannot simply be nature's mirror,⁶⁰ neither can law serve as society's mirror.⁶¹ Just as we now think of science as an institutionally situated practice of organizing nature for human purposes, law is an institutionally situated practice of organizing society for human purposes. In neither case are the governing purposes simply given in advance: they are identified within the practice. Law does not simply reflect society's preferences, it *represents* them.

That literary critics of law have mostly been left-wing does not authorize right-wing scholars to ignore their arguments. Nor does the fact that value questions are hard absolve the ordinary citizens of a democracy from the tedious obligation to think about them. Judge Posner's standard critical question (What does normative legal theory offer?) and his answer (Too much work!) essentially reduces democratic deliberation to the plane of consumer choice. And when he frames the question as what does normative legal theory offer courts, he denies that the choice is one for democratic majorities to make.

While Judge Posner's attack on leftist humanities scholars is intemperate, his suspicion that much contemporary literary theory serves as an obscurantist substitute for a political program is well founded. As our book shows, especially in Chapters One, Two, and Five, much literary criticism of law, although advertised as politically progressive, amounts to normatively empty skepticism. But not all literary theory is normatively empty, and not all literary theory is left-wing. Our fourth chapter, "Rhetorical Criticism of Law," considers the legal applications of a tradition of literary theory, classical in origin and conservative in normative implications. Unfortunately, Judge

58. See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* (Univ. of Chi. Press 1982) (1959); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); LEO STRAUSS, *THE CITY AND MAN* (1964); LEO STRAUSS, *ON TYRANNY* (1963).

59. See, e.g., DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995); RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989); CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

60. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 131-39 (1979) (criticizing the philosophical project of trying to show some connection between the world and our representations of it).

61. Fish, *supra* note 5, at 57-60 (arguing that attempts to free legal doctrine and terminology of values and concepts are futile).

Posner's assumptions about what left-leaning literary theorists of law like us must be saying prevents him from grasping the critique of left-wing skepticism we offer in Chapters One, Two, and Five. Judge Posner's procrustean assumptions also prevent him from seeing the serious challenge to his own value-neutrality posed by the right-wing literary theories discussed in Chapter Four.

Literary Criticisms of Law explores five different genres of law-as-literature scholarship: hermeneutic, narrative, rhetorical, deconstructive, and cultural criticism of law. Each is distinguished by a different version of the law-as-literature metaphor and a different set of theoretical sources, problems, and purposes. Chapters One and Two develop a critique of the most prevalent application of literary theory to law, the hermeneutic criticism of law. This genre treats interpretation as the paradigmatic activity of lawyers and analogizes legal interpretation to free-wheeling literary criticism in asserting, attacking, or defending its subjectivity. Skeptical critics use this analogy in attacking adjudication as illegitimate because not constrained by the objectively discernible meaning of legal texts. Sentimental and authoritarian defenders of adjudication respond with a flattering portrayal of the activist judge as a kind of literary artist, whose otherwise illegitimate exercise of subjective judgment is justified only by artistic genius, virtuous character, or refined taste. Both skeptical critics and sentimental or authoritarian defenders of legal interpretation accept the same unpragmatic premise: that legal interpretation cannot be legitimate unless it rests upon a foundation of objective knowledge about meaning. Proceeding from this faulty premise, hermeneutic criticism presumes that lawyers always claimed that legal texts had determinate meaning until modern literary theory discredited that claim.

Chapter One, "Interpretive Crises in American Legal Thought,"⁶² debunks this presumptive history and shows that American lawyers have not had to learn about interpretive discretion from literary theorists. It provides a history of American legal thought on interpretation showing that generations of American lawyers saw legal interpretation as an institutionally situated practice of using texts, rather than as a hunt for a determinate preexisting meaning. It also shows that American lawyers and legal theorists have experienced little anxiety about the legitimacy of interpretation except in rare situations of institutional and cultural crisis. It argued that the civil rights movement provoked such a crisis in constitutional interpretation because it forced liberal lawyers and judges—who increasingly had come to see themselves as interpreters and agents of public will—to apply the Constitution in defiance of cultural norms and prevailing opinions. This placed the judge in the unlikely role of cultural iconoclast and inspired legal theorists to reconceive the

62. BINDER & WEISBERG, *supra* note 1, at 28-111.

constitutional interpreter as a kind of avant garde artist.

Chapter Two, "Hermeneutic Criticism of Law,"⁶³ traces developments in literary theory that provided legal scholars with a new conception of the literary reader and critic as a creative artist, who was as responsible for the aesthetic experience of the literary work as its author. And Chapter Two shows how legal scholars took up this idea of the reader as creative artist and used it to make sense of the crisis in constitutional interpretation. Constitutional law was in crisis, legal scholars thought, because language was intractably alien, its true meaning unknowable. Chapter Two argues, however, that this view of language misconstrues literary theory, and ignores the wisdom of traditional legal theories of interpretation. Chapter Two shows that the most cogent accounts of literary meaning share with the best accounts of legal meaning a pragmatic understanding of reading and writing as institutionally situated practices of deploying conventions. Indeed, it argues that literary theories of interpretation would be improved by paying more attention to legal interpretation. A pragmatic approach to legal interpretation precludes both the giddy skepticism that has agitated interpretation's detractors and the genteel authoritarianism that has beguiled interpretation's defenders. Such a pragmatic approach acknowledges that crises in constitutional interpretation derive from the contradictions of American political culture, not the inscrutability of language.

Given his professed pragmatism, Judge Posner should be attracted to this argument. But he seems to have thoroughly and insistently misunderstood it. He misidentifies legal interpretation as a sixth genre of literary criticism of law,⁶⁴ and he therefore reads Chapter One as a "lame" attempt to show that theorists of legal interpretation have always been influenced by literary theory.⁶⁵ To the contrary, Chapter One demonstrates that American lawyers have no need of literary theories of interpretation because they have their own philosophically sophisticated accounts of interpretation. What seems to have confused Judge Posner is that, in the interest of full disclosure, we presented whatever evidence we found of literary influence on American legal thought before the 1970s. Our story would be simpler without this evidence, but less true.

In reading Chapter Two, Judge Posner seems unable to distinguish explication of works from endorsement of them. Thus, Judge Posner understandably ridicules the idea that judges should be conceived as avant garde artists and protests that the analogy is so imprecise as to reduce art and literature to mere "honorifics."⁶⁶ But instead of crediting us with these

63. See *id.* at 112-200.

64. Posner, *supra* note 2, at 198.

65. See *id.* at 199.

66. *Id.*

objections to hermeneutic criticism of law, he identifies us with the works we criticize. Apparently, Judge Posner is an ardent believer in the adage that to understand is to forgive, because he assumes we would not bother explicating these works carefully unless we agreed with them. And true to this principle, he has resisted understanding a chapter he did not expect to agree with.

Chapter Five, "Deconstructive Criticism of Law,"⁶⁷ explains Jacques Derrida's "deconstruction" as a combination of three logically independent elements: (1) a sensibly pragmatic epistemology of reading, (2) a manipulative, intellectually dishonest technique for reading essentialist metaphysical commitments into any text, and (3) an elitist hostility to popular mobilization and participatory democracy.⁶⁸ Derrida's critique of Rousseauan democracy implies a preference for the rule of law, which involves exhausting popular will in representative institutions and professionally interpreted legal texts. Although Judge Posner finds this analysis "very interesting," he insists that Derrida's famous critique of Rousseau in *Of Grammatology*⁶⁹ has naught to do with literary or legal theory.⁷⁰ Yet a conception of modern literary theory that excludes the central argument of Derrida's most influential book is, to say the least, eccentric. Judge Posner is simply reasserting the dogmatic position he took in *Law and Literature: A Misunderstood Relation*, that literature can have nothing to do with politics or law.⁷¹ Similarly, a conception of legal theory that excludes Rousseau's views on the sovereign basis of legitimate law is impoverished and—in a world where most legal systems trace their intellectual origins to the French Revolution—parochial. Here, Judge Posner reveals his premise that law is properly conceived as a framework of rules for the pursuit of private interest, rather than as an instrument of popular will.

Chapter Five proceeds to criticize the skeptical application of deconstruction by critical legal scholars ("crits") who claim legal doctrine is indeterminate.⁷² Judge Posner misreads our argument as a claim that

67. BINDER & WEISBERG, *supra* note 1, at 378-461.

68. See *id.* at 380-408.

69. JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967).

70. Posner, *supra* note 2, at 205.

71. See POSNER, *LAW AND LITERATURE*, *supra* note 3, at 13-17.

Some practitioners [of law and literature] have exaggerated the commonalities between the two fields In their hands literary theory, or particular works of literature, are contorted to make literature seem relevant to law, and law is contorted to make it seem continuous with literature. . . . [T]he legal matter in most literature on legal themes is peripheral to the meaning and significance of the literature. . . . [B]y its very nature, literature—especially great literature—deals with the permanent and general aspects of human nature and institutions. . . . [L]aw as depicted in literature is often just a metaphor for something else [L]iterature tends to deal with basic, timeless features of human existence. . . . [T]he problems of literary and of legal interpretation have little in common except the word "interpretation."

Id.

72. BINDER & WEISBERG, *supra* note 1, at 408-40.

deconstruction does not approve of skepticism.⁷³ Of course it does: Derrida cynically deploys skeptical arguments all the time. But Derrida's pragmatic epistemological premises expose the poverty of such skepticism, and his antidemocratic conclusions show that skeptical argument does not necessarily serve the crits' political aims. Indeed, such skepticism does not *well* serve any political ends, because it is (1) politically empty, and (2) fallacious. We conclude that skepticism has distracted the crits from the social and cultural context that would help them discern the political meaning of legal doctrine. Such an understanding of law's underlying political values is requisite to any political critique of law, whether from the left or the right. In *Literary Criticisms of Law*, the goal of meaningful political debate about the values expressed and fostered by law takes precedence over the particular outcomes such debate might yield.

Chapter Four, "Rhetorical Criticism of Law,"⁷⁴ acknowledges that not all literary criticism of law is from the left. Chapter Four shows that the conservative rhetorician Leo Strauss and his followers thought the Nietzschean and Heideggerian challenge to liberal individualism was unanswerable.⁷⁵ We show that Strauss responded with his own authoritarian conservative challenge to liberal individualism, and argue that liberal rhetoricians like James Boyd White lack a convincing response to this kind of conservatism (and also partake of it). Judge Posner likes the discussion of Strauss very much,⁷⁶ in part, I think, because it presents Strauss' professedly "esoteric" rhetoric as an obscurantist response to the political unpopularity of Strauss's conservative ideas. Yet, once again, Judge Posner cannot figure out what it's doing in the book.⁷⁷ He seems puzzled to find the author of *Natural Right and History*⁷⁸ and *Persecution and the Art of Writing*⁷⁹ in a book on law as literature. Strauss, like Nietzsche and Heidegger, was a cultural critic of modern society, who drew an illiberal value theory from the creative and idiosyncratic interpretation of classical texts. Strauss' philosophy was centrally about the bases of legal authority and legitimacy. Judge Posner complains that we do not tell him whether there are any Straussian law professors or judges.⁸⁰ In fact, we show that Alexander Bickel, the most influential constitutional theorist of the twentieth century, drew some of his prudential conservatism from the Straussian well, by way of Harry Jaffa's Straussian reading of Lincoln's

73. Posner, *supra* note 2, at 205.

74. BINDER & WEISBERG, *supra* note 1, at 292-377.

75. *Id.* at 319.

76. Posner, *supra* note 2, at 203.

77. *Id.*

78. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953).

79. LEO STRAUSS, *PERSECUTION AND THE ART OF WRITING* (1952).

80. Posner, *supra* note 2, at 203.

rhetoric and political philosophy.⁸¹ We also discuss the Straussian law professor George Anastaplo, who has just published his own book on Lincoln.⁸²

Straussianism is not our only example of conservative rhetorical theory. We also explicate the conservative school of Aristotelian rhetorical criticism that developed at Chicago, and show its influence, via Wayne Booth, on White.⁸³ Judge Posner likes our criticisms of White, his old antagonist, and approves a passage in which we charge that White wants a politics that preserves the classical forms of debate about principle, while precluding commitment to any principle.⁸⁴ But Judge Posner does not appreciate that this criticism is premised on the previous discussions developing the Straussian interpretation of the classical worldview as a form of orthodoxy. For Strauss, and for some of the Aristotelian critics, it is the truth of that worldview which authorizes the wise to manipulate and deceive the simple by means of esoteric rhetoric. White seems to want the authoritarian practice of classical rhetoric, without the orthodoxy of principle which underwrote it, and so he gathers the classical worldview in a half-hearted, surreptitious embrace. The critique of White depends on the contrasting discussion of Strauss. Judge Posner seems convinced by both, but misses the connection between them.

Having thoroughly missed the point of Chapter Four, Judge Posner complains that it doesn't tell him how to use rhetoric more effectively in writing opinions, so as to fulfill his Bickelian role as a prudential judicial artist.⁸⁵ Once again, he mistakes a critical discussion—this time of Bickel—for an endorsement. He doesn't see that the immediately following discussion of Jaffa, Lincoln, and Strauss, which he dismisses as "veering off" into "excursus," is a criticism of Bickel's prudential conservatism. He doesn't grasp that Bickelian judicial rhetoric is a variant of Straussian "esoteric" writing, allied to an authoritarian jurisprudence of principle. Finally, he doesn't see that proponents of such a Bickelian rhetoric of principle face a dilemma between Strauss' orthodoxy and White's tepid civility. So if Judge Posner were reading more attentively, albeit less efficiently, he might be less eager to practice Bickelian judicial rhetoric.

In the *Problems of Jurisprudence*, Judge Posner identifies his own pragmatism with conservative prudentialism,⁸⁶ praising the legal traditionalism of Blackstone⁸⁷ and of Edmund Burke,⁸⁸ who is admired by both Bickel⁸⁹ and

81. BINDER & WEISBERG, *supra* note 1, at 309-21.

82. See *id.* at 322-23; GEORGE ANASTAPLO, ABRAHAM LINCOLN: A CONSTITUTIONAL BIOGRAPHY (1999).

83. BINDER & WEISBERG, *supra* note 1, at 323-29, 333-37, 339-45.

84. Posner, *supra* note 2, at 204.

85. *Id.*

86. POSNER, JURISPRUDENCE, *supra* note 4, at 442-45.

87. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1908).

White.⁹⁰ Judge Posner sees such traditionalism as a useful corrective to the tendency of Benthamite utilitarianism to promote ambitious social engineering.⁹¹ And what's wrong with social engineering? As an enthusiast of microeconomics, Judge Posner rejects the interpersonal comparison of utilities that suggests to utilitarians that social welfare increases when wealth is transferred from rich to poor.⁹² So the point of legal prudentialism in Judge Posner's scheme is just to contract the scope of democratic decisionmaking so as to expand the scope for transactional decisionmaking.

But for Burke, Strauss, and Bickel, the point of limiting public will is not to free private will, but to subject both to authoritative values. The prudential element in such conservatism consists in recognizing the need to flatter the public into accepting the rule of the wise by presenting it as some kind of self-rule. This program of popular manipulation is what necessitates rhetoric, the rhetoric Bentham sought to banish from law.⁹³ Thus prudentialism seems to preclude the value neutrality that economists like to claim, and to demand the obscurantism that Judge Posner likes to decry. Judge Posner's embrace of prudentialism suggests that his so-called "pragmatism" is not merely the clear-eyed consequentialism it professes to be. His interest in judicial rhetoric⁹⁴ and his admiration for Blackstone's obscurantism and Burke's romantic traditionalism alert us that his evaluative vocabulary of "efficiency," "rationality," "practicality," and "utility" and his matter-of-fact "economical" writing style constitute a *rhetoric*.⁹⁵ They persuade us of the efficacy of markets by establishing a certain character, the embodiment of bourgeois virtue, begging us to loose the fetters of regulation so that he can get busy for our benefit, banishing waste and fighting indolence.⁹⁶

88. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

89. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 11-25 (1975).

90. See JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 192-230 (1984).

91. POSNER, JURISPRUDENCE, *supra* note 4, at 444.

92. See *id.* at 346.

93. See JEREMY BENTHAM, 1 THE WORKS OF JEREMY BENTHAM 260-95 (John Bowring ed., 1962) (attacking the "Mystifying Terminology" of Blackstone's discussion of the British Constitution).

94. See RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION at xi (1990) ("Prominent judges like Cardozo are figures in the history and the practice of rhetoric and philosophy as well as of law."); POSNER, LAW AND LITERATURE, *supra* note 3, at 269-316 (1988) (evaluating judicial opinions as literature); POSNER, OVERCOMING LAW, *supra* note 3, at 498-530 (considering legal reasoning as rhetoric).

95. On economics as rhetoric, see DONALD N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1985); James B. White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1987).

96. See POSNER, JURISPRUDENCE, *supra* note 4, at 391 ("Wealth maximization is an ethic of productivity and social cooperation—to have a claim on society's goods and services you must be able to offer something that other people value . . .").

Judge Posner's characterization of our book as a decadent work of literature, to be judged aesthetically and convicted of self-indulgence, is an example of this rhetoric of self-congratulation. It is also a revealing variation on the law-as-literature trope. Judge Posner's implied opposition between decadent, self-indulgent literature and utilitarian, pragmatic, disciplined law is as reductive and myopic as any of the false dichotomies that plague the law and literature field. Like the familiar dichotomies between law as letter and literature as spirit, law as reason and literature as emotion, or law as objective and literature as subjective, Judge Posner's dichotomy between law as instrumental and literature as ornamental, denies that literature inheres in law.

This antinomy enables Judge Posner, with one turn of phrase, to segregate our cultural criticism of law from his own "efficiency" analysis of law. By labeling our interest in law's cultural meaning and aesthetic value wholly impractical, he insulates not only law in general, but also his own purportedly "pragmatic" legal theory, from cultural criticism and aesthetic evaluation. In presuming that a concern for aesthetic value entails a disdain for utility, he implies that his own appeals to such standards of value as utility, efficiency, and practicality are free of aesthetic judgment.

Yet, despite appearances, Judge Posner's "pragmatic" ethic of efficiency depends for its persuasiveness on an appeal to aesthetic value. To be sure, standards like efficiency, utility and practicality sound entirely instrumental. In promoting these values law presumably serves the preexisting preferences or interests of some group of people, whatever those preferences or interests might be. On such a theory, legally defined institutions like markets (or legislatures or courts or administrative agencies) have a merely technical or mimetic function. They are mere instruments of legal actors, reflecting and effectuating their desires. They neither embody nor express values of their own. By implementing people's desires, legal institutions will make people happy, or maximize their "utility." By facilitating market transactions, law will allocate goods "efficiently" to those who most value them. By accepting and reflecting rather than resisting preferences, legal decisionmakers show a "pragmatic" acceptance of economic "reality."

But this vision of law as a mere instrument of people's desires rests on psychological assumptions that modern economists reject as unscientific. It assumes that the choices offered by legal institutions can reflect people's "real" desires. For example, the claim that markets maximize welfare assumes that the amounts different people are willing and able to pay for a good reflect how much they value it.⁹⁷ Similarly the claim that majoritarian democracy enhances welfare presumes that voters actually share the views of the candidates they

97. For a useful critique of Pareto and Kaldor-Hicks efficiency as measures of welfare, see Patrick B. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501, 516-21 (1997).

vote for. The political economists of the nineteenth century, working in the utilitarian tradition, thought it was possible to learn and sum people's true desires. Some thought it was possible to design policies and institutions that could be shown to maximize the satisfaction of desire.⁹⁸ But the neoclassical economists of today are behaviorists, skeptical about the possibility of knowing other minds or comparing interpersonal utility. They reason that knowledge of subjective desires is unobtainable and unnecessary for the purely scientific project of modeling and predicting the movement of prices. They reject the psychological language of utility, happiness, or desire in favor of the behavioral language of "revealed preferences."⁹⁹ In so doing, they must abandon the normative claim that voluntary exchange enhances welfare¹⁰⁰—indeed, they must abandon the very idea of voluntariness as incoherent.¹⁰¹ Law

98. See S.A. DRAKOPOULOS, VALUES AND ECONOMIC THEORY 27-32 (1991) (discussing Bentham's theory of legislation based on measuring and aggregating pleasure); *id.* at 35-36 (discussing Nassau Senior's economics based on measuring pleasure); *id.* at 40 (noting that John Stuart Mill saw utility as measurable and subject to interpersonal comparisons); *id.* at 55-58 (discussing how W.S. Jevons saw utility as measurable in principle, if not yet in practice); *id.* at 67-69 (explaining that Leon Walras founded his marginalist economics on the notion that the satisfaction an individual derives from the marginal unit of a good consumed is measurable, as is the aggregate satisfaction achieved in a market); *id.* at 78-79 (noting that C. Menger's marginalist economics were premised on measurable satisfaction of desire); *id.* at 88-93 (noting that F. Y. Edgeworth based his economics on utility, saw utility as measurable and interpersonally comparable, was an enthusiastic utilitarian in ethics, and supported progressive taxation based on the declining marginal utility of money and the interpersonal comparability of utility).

99. The rejection of psychological hedonism in economics can be ascribed to the influence of logical positivism, and reflects an effort to render economics a value-free descriptive science modeled on physics. See *id.* at 99-100, 131-34. But it was also influenced by behaviorist psychology. *Id.* at 135. The first major step in this direction was the redefinition of utility as ordinal rather than cardinal (and hence as intrinsically incomparable across persons) by, among others, Vilfredo Pareto. *Id.* at 106-16. The next was the reconceptualization of economics as a science of choice or preference rather than welfare by Lionel Robbins. See LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (1932); Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 ECON. J. 635 (1938); see also J.R. Hicks & R.G.D. Allen, *A Reconsideration of the Theory of Value*, 1 ECONOMICA 52 (1934) (discarding "utility" in favor of the language of "preferences"). Finally, Paul Samuelson replaced "preference" with the fully behavioristic notion of "revealed preference." Paul A. Samuelson, *A Note on the Pure Theory of Consumer's Behaviour*, 5 ECONOMICA 61 (1938); Paul A. Samuelson, *The Problem of Integrability in Utility Theory*, 17 ECONOMICA 355 (1950). A famous defense of behaviorist method in economics is MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3 (1953).

100. Posner agrees. See POSNER, PROBLEMATICS, *supra* note 4, at 46 ("What economists can say . . . is that if a society values prosperity . . . , here are policies that will conduce the goal They cannot take the final step and say that society ought to aim at growth . . . or anything else.").

101. Posner seems not to see this. Compare the following two statements: "The concern of economics is not with states of mind, but with what people—even animals, who have no minds—do." POSNER, LAW AND LITERATURE, *supra* note 3, at 188 (citation omitted).

cannot simply enable or enforce consent, but must define it.

In place of satisfaction or voluntary consent, modern economists substitute the purely formal notion of "rationality," denoting consistency of behavior over time rather than consistency of behavior with desire. The difficulty is that economists can rarely observe such "rational" behavior patterns because choosers are rarely confronted with precisely the same set of options twice. Economic actors may persist in inefficacious behavior as a result of cognitive dissonance reduction or addiction or social expectations, so that consistency of behavior may mask changing or conflicted preferences. Nor does the rise and fall of prices in response to changes in supply and demand indicate that market actors are rationally maximizing the satisfaction of persistent tastes.¹⁰² Some economists think terms like rationality and utility maximization are simply inapplicable to transactors with imperfect information about the intentions of other transactors.¹⁰³ Yet if, as behaviorists, we can know *nothing* about dispositions of others, then the information on which rationality depends is simply unavailable.

As behaviorists, economists cannot presume that people hold preferences that are both independent of law and knowable to law.¹⁰⁴ But if we cannot presume that the choices people make in institutions like markets express or satisfy their desires, then we cannot treat these institutions as instruments of their desires. This means that terms like "efficiency" and "utility" are not the value-neutral, psychologically descriptive terms they appear to be. They do not refer to actual desires or preferences or interests at all. Instead, they are vague virtues that may be ascribed to different decision-making institutions like markets, electoral politics, legislation, litigation, and administrative rule-

"The economic analysis of fraud and duress does not treat fraudulent or coerced choices as consensual. Far from denying that fraud, duress, incapacity, and sometimes mistake should be defenses to suits to enforce contracts, economic analysis demonstrates that such defenses are necessary in order to make sure that inefficient transactions are not enforced." *Id.* at 191 (citations omitted).

102. Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1 (1962) (arguing that even if people are not rational, one would expect a higher price to lead to a reduction in the amount demanded); Ronald H. Coase, *Coase on Posner on Coase*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 96, 97 (1993) (discussing Becker's findings).

103. See Oliver E. Williamson, *Transaction Cost Economics Meets Posnerian Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 99, 109 (1993) (substituting "bounded rationality" to describe transactors with imperfect information).

104. Endowment effects, wealth effects, and adaptive preference formation may all condition preferences on the distribution of legal entitlements. See generally RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991) (exploring the implications of various empirically observed departures from rationality); Mark Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (same); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 422-29 (1981) (same); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1125 (1986) (discussing departures from rationality as justifications for regulation).

making. These institutions do not reflect preferences or interests that pre-exist the decision-making process. Instead they *assign* preferences and interests to persons.

Like the economists he admires, Judge Posner is a behaviorist, skeptical of our ability to know the pleasures and pains of others. He accordingly disapproves of legal standards conditioning liability on subjective mental states, and would substitute behavioral tests.¹⁰⁵ Consistent with these attitudes, he eschews psychological standards of value like welfare or utility. He rejects utilitarianism and praises allocative efficiency, not as welfare maximizing, but merely as wealth maximizing.¹⁰⁶ Yet it would be odd to value wealth intrinsically, without regard to its utility to human welfare.¹⁰⁷ So Judge Posner's replacement of welfare with wealth-maximization raises the further questions of why and how much to value wealth and how to compare it to other values.¹⁰⁸ Judge Posner's move to a "pragmatic" jurisprudence is compelled by his unwillingness to rest his ethic of allocative efficiency on the psychological foundations of welfarism.¹⁰⁹ He thinks the allocative and distributive outcomes of markets are desirable, but he wisely draws back from arguing that they are what we all, in fact, desire.

Accordingly, when pressed to defend his commitment to efficient markets,

105. POSNER, JURISPRUDENCE, *supra* note 4, at 167-86.

106. *Id.* at 356, 381-82.

107. See generally Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 220 (1980) (arguing that it is "preposterous" to value social wealth intrinsically rather than as a means to some other good); JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 221-27 (rev. ed. 1990) ("[T]here is no argument for Kaldor-Hicks from either utility or consent. There is an argument for Pareto superiority from utility, but not from consent."). Nor is Posner himself consistent on this score. In explaining why social wealth is enhanced when A purchases a stamp collection that he values at \$100 from B for \$90, Posner says "the real addition to social wealth consists of the \$10 increment in *nonpecuniary* satisfaction that A derives from the purchase, compared with that of B." POSNER, JURISPRUDENCE, *supra* note 4, at 356. This is a utilitarian conception of wealth. But how, as behaviorists, could we ever know the amount, if any, of A's consumer surplus? As institutional economist Thrainn Eggertsson writes, "The concept of value, defined as the maximum amount of one good that an individual is willing and able to give up for another good, is a theoretical construct that is not observable." THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 24 (1990). And how is the assumption that we could know the amount of such "value" consistent with Judge Posner's statement that "I may desperately desire a BMW, but if I am . . . unable to pay its purchase price, society's wealth would not be increased by transferring the BMW from its present owner to me"? POSNER, JURISPRUDENCE, *supra* note 4, at 357. But see *id.* at 380 (implying that society is better off after all if costly medicines go to those who need them rather than those who can pay for them).

108. *Id.* at 375-80 (attempting to reconcile wealth maximization with competing values).

109. *Id.* at 382-87 (stating that "the strongest argument for wealth maximization is not moral, but pragmatic" and arguing that free market societies are more successful than societies with planned economies).

Judge Posner does so on the bases of their consequences, but his consequentialism is pragmatic rather than utilitarian.¹¹⁰ Thus, rather than claiming that efficient markets make people happier, he paints alternative pictures of the types of societies likely to result from market and nonmarket methods of allocating resources. He reminds us that societies with planned economies are often economically poor, politically repressive, culturally dispirited, stagnant, and dull. Market societies, by contrast, are more dynamic, optimistic, creative, wealthy, and politically responsive.¹¹¹ This amounts to an argument that life in societies that depend relatively more on markets in allocating resources is relatively more decent.¹¹² This sort of "pragmatic" argument, asking us to compare alternative imagined societies without a metric, is fundamentally aesthetic.¹¹³

Thus, the dichotomy Judge Posner sets up between "decadent" aestheticism and legal pragmatism is a false one. It seems designed to obscure the aesthetic foundations of Judge Posner's legal economics and thereby to insulate those aesthetic foundations from scrutiny. Judge Posner has been defending himself against criticism from law and literature scholars for some time. He has had to endure the accusation that his economic analysis was an unprincipled, morally impoverished language of expediency from the likes of Ronald Dworkin¹¹⁴ and James Boyd White.¹¹⁵ But when he had to suffer Robin West's sardonic charge that his economic explanations of human behavior and his ethic of wealth maximization rested on an aesthetically impoverished fiction, he felt compelled to respond.

110. *Id.* at 391 (arguing that wealth maximization is "different" than and superior to utilitarianism in spirit).

111. *Id.* at 382-84.

112. *Id.* at 387.

113. Posner offers a similarly aesthetic argument for what he calls the "vague utilitarianism, or 'soft core' classical liberalism" of John Stuart Mill: "[I]t sketches a form of life that when properly understood is *attractive* to many people in the United States and similar wealthy modern societies, and not just to me." POSNER, *PROBLEMATICS*, *supra* note 4, at xii-xiii (emphasis added). Posner uses similarly aesthetic terminology in describing how other arguments succeed as pragmatic justifications. Of Judith Jarvis Thomson's famous problem of being forced to provide life-support to a comatose violinist for nine months, Posner writes: "What she is offering is not an argument but a *metaphor* designed to change the way in which we think about abortion—to make us see it in a new light. This is a valid technique of persuasion . . . but it owes nothing to what might be thought the discipline of moral philosophy. She might as well have written a *short story*." *Id.* at 350 (emphasis added). "The most important thing that law school imparts to its students . . . is neither method nor a doctrine, but . . . a *feel* for the degree and character of doctrinal stability, or, more generally, for the contours of a professional *culture*." *Id.* at 100 (emphasis added).

114. DWORKIN, *supra* note 16, at 107.

115. James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 162 n.1 (1987) (identifying Posner as the chief exponent of the conception of economics he attacks); *id.* at 172-85 (criticizing the moral and political implications of economics).

West argued that the economic assumption that market choice always reveals preference is an imaginative construct comparable to the motivational structures that authors assign to fictional characters. In a droll essay comparing Judge Posner's legal economics to Kafka's fiction, West presented both authors as "tragic ironists" portraying the subjects of modern society in an incurable state of isolation.¹¹⁶ While Kafka's characters are isolated by alienation, social anxiety, and paranoia, Judge Posner's characters are isolated by the assumptions of microeconomics, each rationally pursuing interests knowable only to themselves. According to West, Kafka's characters typically cajole themselves into consenting to a host of humiliating situations out of self-contempt, a need to please, or the urge to reduce cognitive dissonance. By offering readers recognizably albeit neurotically self-destructive characters, West cast doubt on the simplicity of the Posnerian picture of human motivation. She also reminded readers that because economists treat subjective experience as unknowable, their psychological assumptions are speculative fictions, not empirical claims. Finally, having redefined Posner's vision of the market as a literary artifact, she proceeded to criticize it from an aesthetic standpoint. As we remarked in *Literary Criticisms of Law*, "[B]y contrast to Kafka's fully integrated realization of tragic irony, Posner's narrative is . . . an aesthetic pastiche, which first envisions tragic alienation and conflict and then purports to resolve it all with glib happy-talk about rational consent and allocative efficiency."¹¹⁷ West's article provoked a series of responses from Judge Posner, culminating in his polemical attack on the law and literature movement, *Law and Literature: A Misunderstood Relation*.¹¹⁸ In this book, Judge Posner argued that imaginative literature had nothing to say about law, and that the aesthetic values preoccupying literary criticism and theory have no place in law.¹¹⁹ Thus, Judge Posner was first drawn into the law and literature field by his efforts to insulate his own legal economics from aesthetic criticism.

That Judge Posner's argument for markets relies on an aesthetic appeal is no criticism, since this is true of all pragmatic argument. Such an appeal to aesthetic judgment does not automatically render an argument unrigorous. But Judge Posner's defense of markets is not very rigorous and this is partly because it is so aesthetically impoverished.

Judge Posner's defense of markets is unrigorous because the proposition for which he would like our assent—that more markets yield more decent

116. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

117. BINDER & WEISBERG, *supra* note 1, at 285.

118. POSNER, *LAW AND LITERATURE*, *supra* note 3.

119. He has since repackaged this polemic as a textbook on the field he finds so tedious. RICHARD A. POSNER, *LAW AND LITERATURE* (rev. & enlarged ed. 1998). He apparently wishes that *Literary Criticisms of Law* had discussed this book more (and everyone else's books less). Posner, *supra* note 2, at 195-96, 202.

societies—is so hopelessly vague. It purports to array all societies before us on a single axis, but it does not really do so, because the concept of a market is so diffuse. Markets are not the mere absence of law, since they require a distribution of entitlements, and rules for identifying and enforcing voluntary transactions and for identifying and preventing involuntary transactions. Like the idea of democracy, the idea of the market is self-limiting. Thus majoritarian democracy requires ground rules that limit how majorities can distribute political power: otherwise majorities may subvert democracy by disfranchising, silencing, or even annihilating minorities. Similarly, markets require ground rules that set limits on how transactions can distribute economic power. Accordingly, Judge Posner's readers are unlikely to conclude that social decency precisely correlates with commodification: They will oppose slavery, bribery, and blackmail, and will wish to retain family attachments.¹²⁰ The market societies that we accept as decent are mixed societies, with regulation, social welfare, public services, nonprofit sectors, professions, and myriad organizations such as firms, families, schools, churches and clubs, within which goods are not allocated on the basis of price.¹²¹ Markets exist in the interstices among these legal structures, and their boundaries define realms of meaning.¹²² These mixed societies vary along too many dimensions to permit the kind of single-axis comparison that Judge Posner's pragmatic argument for allocative efficiency presupposes.

The general propositions that markets enhance wealth and that wealth is useful do not justify the conclusion that wealth should be maximized, and do not tell us how to weigh wealth against the expressive values we inevitably support or undermine when we define and regulate markets. Nobody thinks all Pareto optimal allocations of resources yield acceptably decent societies, and this means that societal decency must factor in other criteria besides allocative efficiency.¹²³ Indeed, Pareto optimal allocations of resources are not even

120. Posner concedes this. POSNER, *JURISPRUDENCE*, *supra* note 4, at 375-77 (admitting that even if prosperity could be promoted by enslavement, it would still be antithetical to Americans' moral intuitions); POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 36, at 30-31 (qualifying law and economics theory with the reminder that "there is more to justice than economics").

121. Again, as Posner admits:

All modern societies depart from the precepts of wealth maximization. The unanswered question is how the conditions in these societies would change if the public sector could somehow be cut all the way down to the modest dimensions of the night watchman state that the precepts of wealth maximization seem to imply.

POSNER, *JURISPRUDENCE*, *supra* note 4, at 387. This statement is even less precise than it appears, since it misleadingly implies that there is some single, determinate model, "the night watchman state" that the principles of wealth maximization entail. Would such a state permit self-sale? Markets in convict labor? Extortion? Would it specifically enforce contracts?

122. See generally SUNSTEIN, *supra* note 49, at 5-9.

123. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 36, at 15 (warning that

necessarily more wealth enhancing than all less "efficient" alternatives,¹²⁴ which is why Judge Posner substitutes Kaldor-Hicks efficiency, or "potential" Pareto superiority for Pareto optimality, as a policy standard.¹²⁵

In sum, Judge Posner's pragmatic argument for wealth maximization asks us to render an aesthetic judgment about alternative societies, imagined at the crudest possible level of detail, effacing all the distributive and expressive details. Because he has not rendered the alternative societies with any precision or concreteness, there is very little for aesthetic judgment to operate upon. Instead of accepting the aesthetic responsibilities of cultural criticism, he attempts to cover up the flabbiness of his normative arguments by affecting a brisk tone of self-professed tough-mindedness, saturated with self-flattering adjectives like "efficient" and "practical."

Judge Posner's putatively instrumental values are actually aesthetic. While I don't object to the fact that Judge Posner appeals to aesthetic value, I do object to the lazy imprecision and the stealth of that aesthetic appeal, and I think these two vices are connected. Thus my claim is that Judge Posner permits himself his aesthetic imprecision by presenting his values as purely instrumental, and by trivializing aesthetic concerns. But aesthetic valuation is unavoidable in legal reasoning, so that Judge Posner's aesthetic of efficiency is just one example of the pervasive role of aesthetic value in normative legal argument.

In a modern society, law is understood to be a creature of human will designed to serve human needs.¹²⁶ Law's content is seen as a function of the utility or choice of human beings or their institutional representations. Legal argument and decision therefore involve prospective reasoning about the interests of persons, groups, populations, institutions, and polities; and retrospective reasoning about the content and competence of their choices. In other words, in a modern society, almost all of legal argument is about the desires of legal actors, how best to measure, identify, or represent those desires, and whose desires should count. In *Literary Criticisms of Law*, we claimed that such argument depends on acts of literary imagination, fitting out these legal actors with characters, narrative histories, commitments, callings, and

economics cannot determine whether efficient legal rules are socially or ethically desirable).

124. See, e.g., MURPHY & COLEMAN, *supra* note 107, at 185, 220-22 (showing that some allocations within the Pareto frontier may produce more wealth and welfare than some allocations at the Pareto frontier). Strictly speaking, any existing allocation of goods is Pareto efficient by definition, otherwise transactions would reallocate goods. It is logically impossible to derive an inefficient allocation in a fully specified microeconomic model. See THRAINN EGGERTSSON, *supra* note 107, at 23-24; Steven N.S. Cheung, *A Theory of Price Control*, 17 J.L. & ECON. 53, 71 (1974); John Umbeck & Mike Staten, *Inefficiency: A Logical and Empirical Impossibility*, 7 SOC. SCI. REV. 1 (1986-87).

125. POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 36, at 13-16.

126. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66-67 (1921).

quests.

Prospective reasoning about the public interest or about social welfare involves imagining and comparing the future histories of alternative hypothetical societies, each with not only different legal regimes, but also different populations with different values and interests.¹²⁷ When different societies have different histories and institutional structures, they are likely to make available to their members quite disparate social identities and roles. These disparate identities and roles will encourage members of differently constituted societies to pursue different purposes and interests.

When we try to compare societies with different members, values, and interests from the standpoint of social welfare we face imponderables. Is Sweden better than Japan? For whom? Should you prefer a wealthier society in which you would have a different family or personality? Should you prefer a more peaceful society in which you would not exist? The choice among such incommensurable alternatives is not the simple matter of calculation presumed by cost benefit analysis.¹²⁸ Such a decision requires us to choose among the different personal, group, institutional, and societal identities that will shape the preferences of future generations. We cannot hold their future preferences fixed and choose policies that will best realize them. Instead, the design of the future society, its membership, and its values is a necessarily expressive or aesthetic choice we must make.

We face further value choices in reasoning about the future welfare of society. We must choose distributive standards both within and across generations. We must choose a time horizon: the future is infinite, our knowledge of it finite and diminishing. Should we maximize the happiness of the living, of the next generation, of all future generations?¹²⁹ We must choose how to compare aggregate and average utility, and how to evaluate populations of different sizes.¹³⁰ We must choose a geographic scope.¹³¹ All these choices are subjective. They are ours to make. We cannot simply enact the preferences

127. DEREK PARFIT, *REASONS AND PERSONS* 351-64 (1989) (pointing out that "our identity in fact depends on when we were conceived" so that alternative policies, in so far as they effect when persons are conceived, alter the composition of society. The result is that alternative policies cannot be compared by reference to their welfare consequences for the same people.).

128. See generally ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 44-73 (1993); MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 106-24 (1986); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 321-66 (1986); SUNSTEIN, *supra* note 49, at 70-107; Nick Smith, *Incommensurability and Alterity in Contemporary Jurisprudence*, 45 *BUFF. L. REV.* 503 (1997).

129. HERZOG, *supra* note 6, at 125-32 (showing that different time horizons can yield very different conclusions about which policies maximize utility).

130. PARFIT, *supra* note 127, at 381-441 (1989) (exploring the difficulties utilitarians face in balancing population size against standard of living).

131. Binder & Smith, *supra* note 21, at 222-24.

of future people, because we must decide which future people to consult, and what preferences they will have. These decisions inevitably depend on our value choices, which are interpretive and creative responses to the identities, roles, and traditions we have inherited. We express ourselves in making these choices. We fashion a design for the future that is our best vision of how to continue the historical narrative we have inherited.

The unguided discretion we have to shape the future imposes a frightening moral burden. In the face of the subjective, expressive, and arguably aesthetic value choices of prospective policy making, it is tempting to revert to some form of majoritarianism. If we cannot foist our responsibility to shape the future onto the preferences of future generations, perhaps we can simply foist it onto our fellow citizens. Why not simply enact the laws that the current generation wants? This response confronts three difficulties. First, notions like popular consent are incoherent without authoritative institutional definition; second, institutional authority depends upon legitimating narratives; third, we can only judge these narratives aesthetically.

Why does popular consent depend upon authoritative institutional definition? The political theorist Stephen Holmes argues that unless concretized in stable institutions, popular will is a pernicious fiction, authorizing rule by urban mobs or vanguardist parties.¹³² Relative to these volatile and dictatorial social choice mechanisms, competitive elections informed by public discussion are far more broadly representative. Yet, Holmes argues, these relatively more democratic processes "are highly artificial constructs, requiring patient acceptance of elaborate procedures, institutions, rules For a society with millions of citizens . . . there is no such thing as a collective choice outside of all prechosen procedures and institutions."¹³³ Holmes adverts here to the familiar paradoxes of social choice theory according to which no social choice mechanism can assure a coherent social preference-ordering of more than two alternatives that is determined by individual preference-orderings arrived at independently of the social choice mechanism.¹³⁴ Inevitably, then, democratic will depends upon preexisting political institutions.¹³⁵

But what, if not consent, legitimates these institutions? Such institutions can only be rendered authoritative by means of a legitimating narrative. A narrative of virtuous institutional origins is needed to cope with two familiar

132. HOLMES, *supra* note 59, at 9.

133. *Id.*

134. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963) (setting forth the famous "impossibility" theorem).

135. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197-98 (1990) (arguing that political institutions are preconditions to creating a collective will).

problems of liberal political theory: the problem of collective action and the problem of political obligation.

The problem of collective action is said to arise among individuals who are rationally self-interested, uncoerced and well-informed.¹³⁶ Such persons have no incentive to cooperate in producing or conserving public goods like renewable resources, common defense, or security of entitlements. By defecting, they can receive the benefits of the public good without bearing the costs of its provision. Hence all will find it rational to defect, with the perverse result that none will enjoy the public good. And so, the argument concludes, government is needed to coerce free riders into cooperating to produce public goods. Convinced by the security of government enforcement that one's fellow citizens will cooperate in the provision of public goods, each citizen will ungrudgingly cooperate in turn.

But this compliant attitude depends upon each citizen's faith in the stability, effectiveness, and civic responsibility of the institutions charged with enforcing cooperation. If government has already demonstrated these qualities over a period of time—if it has a creditable past—such faith may be warranted. But rational self-interest maximizers will be very skeptical of any government that lacks such a pedigree. For, as Carol Rose has argued, government is itself a public good requiring cooperation to establish.¹³⁷ So government arguably could never come into existence among people who were uncoerced, rationally self-interested, and well-informed, even if they desired it.

Launching a government therefore requires either prior coercion, or altruism, or myth. By altruism, I mean a disposition to cooperate regardless of the defection of free riders. By myth I mean faith that others will cooperate in obeying and defending government when this has not been proven by experience. Typically, myth takes the form of an invented past characterized by heroic altruism or solidaristic cooperation.

Of course, modern liberal states do not actually arise as a result of uncoerced contracting among rationally self-interested individuals. Instead, they emerge out of traditional societies ordered by myth, tribal loyalty, and authoritarian governance. Rationally self-interested individuals devoid of solidaristic commitments and authoritarian belief systems are only likely to arise in an up-and-running modern state. And they are only likely to seize control of that state if they organize—in other words, only if they can be mobilized to engage in collective action by some mythology of solidarity or altruistic virtue.

Some element of solidarity or heroic virtue must be part of the justificatory

136. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1-3 (1971).

137. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51-52 (1989).

ideology of such a revolutionary movement for two reasons: First, to solve the collective action problem by explaining why rational people should stake their lives and fortunes on an unproven government. Second, to solve the political obligation problem by explaining why these rational revolutionaries have a right to revolt, *but their successors do not*. Thus, as Robert Cover argued, the point of legal narrative is that "[e]very legal order must conceive of itself in one way or another as emerging out of that which is itself unlawful," and that this original transgression "always provides the typology for a dangerous return."¹³⁸

The liberal state cannot induce cooperation and provide public goods unless it is stable. But it cannot promise stability if it holds that citizens are only bound to obey law as long as they consent to do so. The disenchanted liberal individual, loyal only to his own property, cannot by himself sustain the polity that protects it. His security paradoxically—and parasitically—depends on the solidaristic commitment of others. Thus the authority of the liberal state can never be explained by reference to consent alone. To solve the problem of political obligation, the narrative mythology of the liberal state must offer a reason why the consent of the founders binds their successors. To distinguish the founding exercise of will from future defections, it must be remembered as virtuous, motivated by altruism rather than selfishness. As Dworkin's theory of law as integrity implies, the popular "consent" which legitimates new laws is not purely a matter of will: It is a matter of keeping faith with virtues that a patriotic mythology ascribes to a political founding.¹³⁹ When we make law, we do not simply reveal preference: we exercise the authority of office. Our consent can only authorize law if we have first characterized ourselves as authoritative, in an act of literary imagination.¹⁴⁰

To sum up: In modern society, legal arguments depend on representations of human will, taking the form of judgments about future social welfare or past popular consent. Yet these representations are not simply mimetic, because social welfare and popular will are constituted in the very act of representing them. The process by which we represent our society's will and welfare in the medium of law is an imaginative and expressive one, narrating the path from a virtuous past to a decent future, and informed by aesthetic judgment as well as instrumental reason. In *Literary Criticisms of Law*, Bob Weisberg and I reasoned that because law is inherently literary in this sense, legal and literary

138. Robert M. Cover, *Nomos and Narrative, Forward to the Supreme Court*, 1982 *Term*, 97 HARV. L. REV. 4, 23 (1983).

139. DWORKIN, *supra* note 16, at 225-28.

140. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 138-40 (1986) (arguing that agenda-setting rules and other procedural mechanisms clothe voters with authority to act as representatives of the polity); Jacques Derrida, "Declarations of Independence," 15 *NEW POLITICAL SCIENCE* 9 (1986) (describing how the Declaration of Independence and other foundational documents constitute the popular sovereigns whose authority they invoke).

scholars can use the methods of literary criticism to “read” the law and to subject it to critical evaluation and reflective aesthetic judgment.

That is why the “literary” thinking that Judge Posner disdains as useless to law is, in fact, necessary to it. The exercise of aesthetic judgment is an unavoidable aspect of the normative evaluation and reform of law. The self-conscious, reflective exercise of aesthetic judgment is, as Nietzsche insisted, a moral duty.¹⁴¹ To shirk that duty, as Judge Posner permits himself to do, is “self-indulgent.”

141. ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* 8, 38-39, 226-34 (1985); BINDER & WEISBERG, *supra* note 1, at 469-72.