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# THE JUDICIAL OPINION AND THE POEM: WAYS OF READING, WAYS OF LIFE†

*James Boyd White\**

This paper is an essay in what I want to call the poetics of the law. I begin with a largely autobiographical account of what seems to me a striking similarity in the ways in which poetry and law once were taught — and to some degree still are taught, though perhaps less comfortably so. My first object is to suggest some connections: between these two kinds of thought and expression; between the ways in which we are habituated to read texts of each sort; and between the dilemmas that confront readers and critics in each field. In doing these things I shall be pointing to connections between two branches of our culture that are often thought to have little to do with each other, and claiming that these connections teach us something about the way each branch can and should proceed. With particular reference to law, I mean to suggest that it can be best understood as a set of literary practices that create new possibilities for meaning and action in life and in doing so enable us to constitute human communities in distinctive ways. But my ultimate hope reaches beyond law, even beyond poetry: it is to work out some ways in which we who are engaged in the processes of cultural and communal life, lawyers and poets and critics among the rest, might better come to understand and to judge our own cultural situations and our own activities.

I shall speak for the most part of my own education, on the perhaps erroneous assumption that it is to some degree typical of the experience of others whose training also took place in the immediate postwar decades. In addition, I should warn the reader that my accounts both of literary and of legal education will of necessity be somewhat schematized and idealized.

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† Copyright © 1984 James Boyd White. This essay is a chapter from my forthcoming book, *Heracles' Bow: Essays in the Rhetoric and Poetics of the Law*, to be published in 1985.

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## I

The striking similarity to which I refer is that both legal and literary education, in my own experience at least, to a remarkable degree proceeded by drawing the student's attention to a series of discrete texts, one after another, and holding it there. In law the text was typically the judicial opinion; in literary studies usually, though not always, the poem. In both fields the emphasis was on the text as a self-justifying, self-explaining, self-authenticating object. The primary method of analysis was to focus on the text's language and form, rather than, for example, on its social or economic or other context. There is a sense in which my own literary education could almost be reduced to "how to read a poem," and my legal education to "how to read a judicial opinion." This emphasis, at one time widely predominant, is of course still a part of what we do; but in both fields it is also under increasing attack from many directions.

In English studies we did read things other than poems, of course, from novels and plays to histories and letters. But we were trained to read these things almost as if they were poems, or as if they aspired to become poems. Hence, for example, the paper assignments on the imagery of a Shakespearean play or of a Conrad novel, or the books we read on the imagery of Shakespeare's work more generally, or Sophocles', as if all of a writer's work could be read as one grand poem. Hence also the talk about the "movement" and "turning point" of a novel as though it had to have a moment of confusion and clarification, like that of the typical metaphysical poem; hence the analysis of Burke's prose style, or Samuel Johnson's, in terms of its metaphors and images. Even a history could be read as an imaginative design, with an eye to its shape and its metaphorical structure. Reading poems is what we knew how to do, or thought we did, and we assimilated our other literary experience to that model. It was all that we could do; but it was enough.

In law school our reading was not wholly confined to the judicial opinion, but the judicial opinion provided the context in which other things were read, if they were read at all, and it was the model by which we measured everything else. If we could understand the judicial opinion we would also learn how to perform our own roles as lawyers, for we thought our central task, which controlled all the others, was to learn to argue to a judge. There was of course some study of statutes, of constitutional provisions, of procedural rules, and of regulations, but for the most part only as these came up in the course of reading judicial opinions. Sometimes these were studied independently as well, but — and in this we were perhaps unlike our

continental contemporaries — we did not then, and if I may say so, do not now, know very well how to read a statute, a constitution, a scheme of regulations, or a contract as a whole, let alone how to teach our students to do so. Every once in a while we would look at legislative history, social science studies, or lawyers' briefs, but almost always from the perspective of the judicial process. In law school, what we knew how to do, or thought we did, was to read judicial opinions, and we assimilated our other experience to that model. It was all that we could do; but it was enough.

In both fields our education thus proceeded by reading a series of central texts. These texts were privileged both in the sense that they were made the centerpieces of an education and in the sense that one could always retreat to them as the testing grounds for ideas raised in other sorts of conversation. ("But how could that be recast as an argument for one side or another in an actual case?" Or: "I see what you mean: the terms 'nature' and 'civilization' are given by Gibbon a complexity of a kind we see in poetry.")

I suppose one reason why the poems and opinions were studied as they were is that they were small enough to be grasped all at once, to be held in the mind as wholes; they could thus serve both as manageable examples of a kind of thought and as material for a certain kind of criticism.<sup>1</sup> But, whatever the reason, we felt that mastery of these forms implied mastery of all, and we gave our attention for the most part to the particular form, the particular expressions, and did not wonder much — did it matter? — how the particular texts were chosen or in what sense the "series" they made corresponded to anything outside itself.

## II

How did such an education in reading actually work, in each of the two contexts?

## A

I will start with law school. The original idea of the case method (which is another term for what I have been describing) was simply-mindedly scientific: cases were studied as if they were plants or but-

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1. There is a kind of text the very meaning of which is tied to the fact that it cannot be grasped at once or read at a sitting. When Proust's *Remembrance* or Gibbon's *History*, towards the end, looks back on a "past" of which it has told, the reader likewise has a past, in his life with the text, that reaches back not hours but months, or even years, to a time when his own life outside the text as well as within it was in important ways different from what it is now. Part of the meaning of both texts lies in the way they evoke and act upon this sense of a past that is partly shared with the text, partly independent of it.

terflies in order to discover the laws of regularity by which they could be classified; those regularities in turn constituted "the law." By the time I was in law school the emphasis had shifted. Now cases were seen as problems, as pieces of law-life, to be taken apart and put together, to be imaginatively participated in. As I have said elsewhere,<sup>2</sup> the idea of this kind of education is like that of the apprenticeship system it supplanted: one learns law by doing law. Law school is thus a kind of language school, working by total immersion, that uses the "case" as its archetypal occasion for speech, and the judicial opinion deciding the case as its archetypal form. In reading a series of judicial opinions one imagines oneself arguing the cases on each side, or deciding them, and does so in combination with others similarly engaged. In this way one learns the practices that define the community of which one is to become a part.

This remarkable emphasis on the judicial opinion actually makes more sense than it may at first seem to do, for the reason that almost all legal disputes can end in judicial cases, even if they are in fact earlier settled by negotiation. Our sense of how the case might be argued and decided therefore does much to inform our other activities of negotiation, advising, and so on. And a set of judicial opinions naturally picks up or reflects much of the rest of legal life. Whatever is problematic in a contract, a statute, a regulation, or an administrative decision — indeed whatever is problematic in our collective life — is likely to end up in a judicial opinion. If it is not in principle or practice reflected in a judicial opinion, some would even say it is not the law.<sup>3</sup> It is for such reasons as these that the judicial opinion has been thought to be a proper model of legal thought and expression.

Law school asked of course an additional question: how do the judicial opinions we read fit together? For in law school (and in our world more generally) it was assumed or claimed that they did fit together to form a more or less coherent whole, a whole with a shape and a history. The shape was that of a field of law; the history, we were told, a movement from "conceptual jurisprudence" to "interest analysis" or "policy science." In my own law school days, at least, this movement was characterized as progress. Today there is much less shared confidence about the meaning of the changes that we see. But even now it is an assumption of legal education that to read one

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2. White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1, 5 (1982).

3. For the classic statement, see J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909). But the life, say, of the Washington lawyer, engaged in legislative lobbying and administrative argument, very little of which would ever reach a courtroom, shows how incomplete such a view must be in practice.

judicial opinion well will lead you to others, which when read well, will define the cluster of opinions that count, and will mark out among them some that count with special force. Each item implies the series of which it is a part. In this sense at least the individual judicial opinion is thought to define a field, by reference, by example, and by implicit connection. Indeed, it may even be thought to define the whole of law.<sup>4</sup>

In our literary education, poems were read for deeply analogous purposes: in part as apprenticeship pieces, upon which to train the eye, the sensibility, to see what the educated reader should see; in part to train the tongue, to say what an educated reader might say; and in part as a constituent item of what we now call the canon, the collectivity of texts that count. Taken together the poems of the canon were said to form a whole, a central segment of our high culture, perhaps its highest segment.<sup>5</sup> This had its history too, reflected in the sequence of authors and of periods in which it was talked and thought about, and it was sometimes thought to be a history of progress. Once again each item was seen to be intimately connected to the rest of the series: T.S. Eliot could say, for example, that the poet should feel "that the whole of the literature of Europe from Homer and within it the whole of the literature of his own country has a simultaneous existence and composes a simultaneous order."<sup>6</sup>

In both law and poetry, as I was taught them, there was a conception, culturally defined and reinforced, of what a "good lawyer" or "educated reader" would see and say and do. The texts were taken to define a cultural ideal to which it was part of the student's task to assimilate himself. The especially creative student would also modify that ideal, or perhaps ultimately reject it, but he had to respond to it somehow, and respond intelligibly, if he was to succeed at his courses and the profession for which they prepared him.

In both law and literature the field was defined by the texts we read and it had a structure of its own, a structure that perhaps reflected a structure in the world, or defined a safe and imaginary place away from it, or expressed a goal to strive for.

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4. The possibility that there is no such coherence in the law as this kind of education assumes is almost never considered, even — or especially — by academic debunkers of law, who usually claim to see even more simple patterns upon even less persuasive evidence than lawyers traditionally have done.

5. In literary criticism there is currently considerable turmoil about the nature of this canon, the validity of its criteria of inclusion, and the implicit claims to authority made by those who maintain the canonic hegemony. See, e.g., the recent symposium in *10 CRITICAL INQUIRY* 1-223 (1983).

6. T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS* 3, 4 (1932).

## B

How were these poems and cases actually read? In both instances the heart of the process was attention to language and to form of a kind that engaged the reader in an imaginative reconstruction of the process by which the text was made. In this kind of reading one learned to see each text as a composition, made by a series of choices of word and phrase and image and issue, each of which could be exposed by asking: What else could have been said here? What is this expression *instead of*? (In *McCulloch v. Maryland*,<sup>7</sup> Chief Justice Marshall said in a famous phrase, emphasizing the key terms, "we must never forget, that it is *a constitution* we are expounding."<sup>8</sup> This kind of teaching says: "we must never forget, that it is *a composition* we are reading.") When it is seen as a composition, from the point of view of the composer, a text no longer seems simply necessary, as its presence in type on the page of a book seems to announce, but contingent or artificial; it is an artifact made by another mind, with a meaning of its own.<sup>9</sup>

Among other things, this kind of reading leads us to see that the text can make its own language of meaning, its own internal discourse, out of the larger materials the writer has inherited. One function of a text in both fields is in fact to give special and related meanings to sets of words that carry with them in ordinary usage a wide and uncertain range of possible significances and to make these new meanings available to others. For the most part the text gives these meanings to its terms not by stipulative definitions but by the way it uses them: by association and contrast with other terms, by location in a larger imaginative and purposive design, and by the tensions it establishes among them and among their various uses. It is a commonplace about poetry that the terms and images by which it works interact to create new patterns of association and contrast. (Thus Wordsworth's "Ode on Westminster Bridge" celebrates the "city" by seeing it as a part of "nature"; thus "Rome" and "Egypt" are given new and contrasting meanings in *Antony and Cleopatra*; and so on.) But this is true in law as well: freedom of "speech" is defined in part by contrast with "conduct," and both terms derive

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7. 17 U.S. (4 Wheat) 316 (1819).

8. 17 U.S. at 407 (emphasis in original).

9. For a contemporary statement, see Helen Vendler in her well-known *THE ODES OF JOHN KEATS* 3 (1983):

I know no greater help to understanding a poem than writing it out in longhand with the illusion that one is composing it — deciding on this word rather than another, this arrangement of its masses rather than another, this prolonging, this digression, this cluster of sentences, this closure.

their significance in part from their exemplification in the cases. The associations upon which a text draws are not only internal but external. In this sense the language it remakes is the common language that defines the audience of the text — the associations, allusions, and references that make us what we are.

Two brief examples. When Walt Whitman wishes to write a poem about the source of his poetic art, his muse, he naturally enough (“naturally” for one in his culture, that is) sings about a bird, and in doing so acknowledges his place in a tradition that includes odes to skylarks and nightingales (and later, thrushes): but being an American, and Whitman, the bird he sings about is not of the usual poetic variety, but, a mockingbird — a mockingbird defined in part by the implicit allusion to other ornithological images of the muse, in part by his American transfiguration of that tradition, and in part by the way the poem itself is made: by the story of loneliness and desertion and song that give this bird and its cry a special sort of pathos.<sup>10</sup> In *Katz v. United States*,<sup>11</sup> the police place an electronic “bug” on the top of a phone booth, without a warrant, and seek to use the overheard conversation in evidence. The Supreme Court holds that the evidence should be excluded as the fruit of an unreasonable “search” — even though there is no trespassory invasion, as the word “search” was once thought to imply. In so doing the Court transforms a precedent — the muse is not a nightingale but a mockingbird — and gives new meaning to its key term: a search is an interference not with a possessory interest but with a reasonable expectation of privacy.

To look at the way the poem or the opinion is made, and at the ways it makes and remakes its language, as this kind of education requires, is to conceive of oneself, whether teacher or student, as a maker of compositions too, as one who also remakes language and reconstitutes form. This kind of training thus at once both informs and confirms one’s own capacities for composition and language-making — for making expressions of one’s own, a language of one’s own, that will work in the world in new ways. It affirms the power of the individual imagination: the possibility of an originality that can work a change in our cultural circumstances. The task of the law student is not simply to understand and describe the law, but to make it and remake it in practice; the work of the critical reader is not merely to understand and to describe the poem but to give it new

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10. W. WHITMAN, *Out of the Cradle Endlessly Rocking*, in *LEAVES OF GRASS AND SELECTED PROSE* 198 (J. Kouwenhaven ed. 1950).

11. 389 U.S. 347 (1967).



meaning and a new place in his or her own world. The sort of education of which I speak, in law and in literature, constantly tells us to recognize that we are makers of texts and remakers of culture. This is in fact its major lesson.

### C

I have so far been speaking about attention to language, but, as I said above, in both fields our attention was directed to form as well. How did this work and what did it mean?

In the reading of poetry, at least in my own training, the idea of form seems to have been that of organic design. The proper poem formed a complex and organic whole in which all parts belonged, nothing was missing, and everything counted somehow — preferably, everything counted in a comprehensibly hierarchical manner. To have a piece that doesn't fit or doesn't count the right way is to be, so far, defective. This has been an idea for us not only of literature, of course, but of painting and music and architecture as well: wholeness, harmony, and shape.

The central standard of poetic judgment was related to, perhaps derived from, this conception of an organic whole: it is that of complexity controlled or contraries comprehended. The poem comprises, brings together in one place and within one form, voices or feelings or languages (or facts or ideas or attitudes or wishes) that are normally not placed together and among which severe tensions or contradictions can be found. Much of the life of the poem — of its drama — lies in the reader's uncertainty whether the contraries will in fact be comprehended within a larger form or, rather, refuse to be contained and tear the form to pieces. From this point of view the model of the poem was naturally enough the "metaphysical poem," in which, in Samuel Johnson's famously disparaging phrase, "[t]he most heterogeneous ideas are yoked by violence together"<sup>12</sup> (though we would deny the "violence" and celebrate the daring). A more approving statement of this aesthetic can be found in Coleridge's definition of the imagination of the poet as revealing itself "in the balance or reconciliation of opposite or discordant qualities."<sup>13</sup>

The conception of excellence as the comprehension of contrariety or contradiction is an idea that leads out of poetry, as the idea of organic form does too, but perhaps less in the direction of art and

12. S. JOHNSON, *Cowley*, in *RASSELLAS, POEMS, AND SELECTED PROSE*, 353, 358 (B. Bronson 3d ed. 1971).

13. S.T. COLERIDGE, *Biographia Literaria*, in *THE SELECTED POETRY AND PROSE OF SAMUEL TAYLOR COLERIDGE*, 109, 269 (D. Stauffer ed. 1951).

architecture and music than that of drama, history, psychiatry, anthropology, and law. In each of these fields it is a commonplace that the most significant truth is a simultaneous statement of opposing truths. It is the very function of certain kinds of drama, for example, to present within one world implacable oppositions that are in the very act of representation comprehended within a single order: in *Antigone*, for example, the opposition between Antigone and Creon, or perhaps more profoundly still, the opposition between the self-righteous and legalistic way of thinking that those two share and the openness to human reality that characterize the ways of thinking and feeling we see in Ismene and Haimon. Or in *Richard II* consider the opposition between King Richard and Henry Bolingbroke, and the wholly different conceptions of kingship and authority — of the purpose and nature of government — that they represent, an opposition that deeply characterizes the English public world of Shakespeare's day and (in transmuted form) of our own, for it is about what it means for a governor or a government to give up its claim to an authority external to itself. The play thus gives a common place to two things that are in their own terms implacably opposed. It comprehends them. When the oppositions cannot be comprehended into one larger thing, with a form of its own, as is perhaps the case with *Troilus and Cressida*, the play is said to fail.

Similarly, the good historian does not present a single view of the past as though that was all there was to it, but tries to make sense of competing views; the psychiatrist brings to the surface where they can be recognized (and as it were, made a drama of — both pulls felt at the same time) certain conflicts in the patient that are too deep and significant to be comprehended without that aid; the anthropologist studies the cultural systems by which oppositions are at once defined and contained; and the law, as we shall see below, is an institution that at its center works by the practice of the open hearing, in which two opposed parties tell their opposed stories, make their opposed claims, in a common language that is, in the very process of disagreement, agreed to by both sides and thus made to comprehend their opposition.<sup>14</sup>

14. Another way to put this point is to say that to frame a choice between two oppositions — between form and substance, for example, or liberty and restraint, or fact and fiction — is often to pose a false question, for neither alternative can sensibly be chosen in exclusion of the other. The way to think about such oppositions is not as choices but as topics: as statements of the polar opposites between which it is the task of each person, each "composer," to make a position of his own every time he speaks.

For more on the false question, see J.B. WHITE, WHEN WORDS LOSE THEIR MEANING 114-37 (1984) (dealing with Jonathan Swift's *A Tale of a Tub*) and White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

In the language of poetic criticism, the principle of "contraries comprehended" can be found, for example, in the claim of Cleanth Brooks that the center of poetic experience is the paradox: a way of comprising into one thing elements that seem of necessity to belong apart.<sup>15</sup> Others have made analogous claims for other tropes — irony, ambiguity, and metaphor — and the radical idea of all of them is the same, the uniting in one order of what seem, when regarded alone, to be impossibly contrastive differences: different voices, different languages, different points of view. This is the explicit idea, for example, of Robert Frost's essay, *The Constant Symbol*, which defines poetry as metaphor — as "simply made of metaphor" — and defines metaphor as "saying one thing and meaning another, saying one thing in terms of another."<sup>16</sup> Likewise it is the implicit idea of Empson's ambiguity<sup>17</sup> and of Leavis's irony.<sup>18</sup> It perhaps has been given most complete philosophic form in Bakhtin's conception of "heteroglossia," which roots all education, all cultural competence, all sound criticism and all cultural change, in "many-voicedness."<sup>19</sup> I have myself, in another context, claimed to define good writing as "writing two ways at once."<sup>20</sup>

The standards by which we learned to judge judicial opinions are remarkably similar to those I have just described, at a certain level of generality at least, and are also related to a similar conception of form. The opinion must in the first place be a coherent whole. All the parts must belong, all work together, and none be missing. As with a poem, a judicial opinion can be taught by asking how it would be different if this part, or that, were absent. The idea of "comprehending contraries" is if anything even more plainly essential to the judicial opinion, for the very idea of the legal hearing and of legal argument (of which the judicial opinion is intended to be a resolution) is that it works by opposition. Each party tells his story from his point of view, and in doing so he reconstructs the facts and redefines the law so as to give his story a particular meaning. The hearing places these meanings in contrast; it is a measure of the excellence of a judicial opinion how far it recognizes what is valid or

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15. C. BROOKS, *THE WELL-WROUGHT URN* (1947) (especially ch. 2).

16. R. FROST, *The Constant Symbol*, in *THE POEMS OF ROBERT FROST* xv, xvi (5th ed. 1946).

17. W. EMPSON, *SEVEN TYPES OF AMBIGUITY* (1930) (especially chs. 1 & 8).

18. Leavis, *The Irony of Swift*, in 2 *SCRUTINY* 364 (1934); see also W. BOOTH, *A RHETORIC OF IRONY* (1974) (especially ch. 1).

19. See M. BAKHTIN, *THE DIALOGIC IMAGINATION* (1981) (especially ch. 4).

20. J.B. WHITE, *THE LEGAL IMAGINATION* 76, 792-93 (1973) (for a general discussion see chs. 1 & 6).

valuable in each side and includes that within itself. (An opinion that simply adopted one side's brief without more would not be worthy of the name.)

Of course it is not always possible to include in a coherent structure points that are diametrically opposed, and something must be left out at last. But here and elsewhere in the history of thought it is a measure of achievement how much of what seems ineradicably opposed can be comprehended within a larger order.

This means that the opinion can be criticized for failing to comprehend its contraries in two distinct ways: it can fail to place them in coherent structure; or — perhaps more common — it can fail to include an element that belongs, or can fail to give it the force it deserves. The same is true of the poem. It may disintegrate under the forces it includes, or may wrongly exclude a part of the truth it touches on or speaks to. (One version of this vice, in literature as well as politics, is sentimentality.) In both cases, the conception of form as comprising contraries relates to the earlier point that one function of the text is to remake its language. For in both poetry and law (as well as in other forms of expression, including drama and history) the conjunction of two contraries is seen to give both a new meaning.

## D

It is therefore never enough to read a poem or an opinion for its main idea, which is often, when simply stated, simply trite or meaningless. (I must die; I am in love; I constantly fool myself; life is tragic but basically good; etc. Or: the police may interfere with liberty when the needs of the public outweigh the interest of the citizen; free speech may be interfered with only in cases of manifest necessity; etc.) In both cases the interesting question is not what the main idea is but how it is given meaning by the text, and given meaning in particular by the oppositions that are its life. It is not the restatable message that is the most important meaning of the poem or the judicial opinion, but the reader's experience of the life of the text itself.

This is a commonplace about poetry but perhaps a word would be useful about the way it works in law. First and most obviously, a series of cases elaborating the tensions implicit in a central statement of value — say that of freedom of the press — gradually gives to its key terms a kind of richness and complexity and clarity, a location in our experience, that they could not otherwise have. The world often presents cases no mind could anticipate, in circumstances no one could wholly foresee, and in such instances the meaning the law

gives to its governing words must be new (however the case is decided) for the meaning is in large part derived from a context that is new. And the meaning given by the law to its central terms has a deeply performative aspect as well. It is one thing, for example, to utter unchallenged pieties about freedom of speech in times of peace; it is quite another, as a matter of courage and self-confidence, to protect speech that one loathes or fears. The most important message is the one the judge performs, not the one he states.

There is another, perhaps less obvious, sense in which the meaning of an opinion lies in its performance rather than its message, suggested by the fact that our practices of judicial criticism often focus less upon the result of an opinion (its "message") than upon something that happens in the text, which we see as its more important meaning. The judicial critic of the sort I was trained to become learns to ask not only, "Do I agree with this result in this case?" — this affirmance or this reversal — but also "What do I think of this opinion *as an opinion*, as a piece of lawmaking?" The first question, however important, is "merely substantive," and on it legitimate opinions can vary widely; the second is our uniquely professional question. "Within the widest range judges are entitled to vote as their conscience directs," says the critic; "my kind of criticism is not about their vote, but about their performance as judges." This is a claim to neutrality on political issues, to professionalism, and to a special kind of knowledge. In order to focus students' attention on this aspect of judicial criticism, I have sometimes asked them to explain, in writing, what it is that they admire in a particular opinion the result of which they would vote against; and what they condemn in a particular opinion which "comes out" in a way they approve. This is a way of defining excellence not in terms of votes or "results" but in terms of the composition: what the case is made to mean; how the judge defines himself or herself as a judge; what possibilities for argument and life the opinion holds out to the future; and so on.

To look at the opinion this way is to open up a set of questions about "excellence" in the judicial opinion: as a form of thought and life, on such topics as fidelity to facts and to law; openness to the contraries in the case, and hence to what can fairly be said against one's own result; the processes of reasoning by which the past is interpreted and brought to bear on the present; the degree to which the court recognizes the legitimacy and humanity of the litigant (especially the losing litigant) and fairly judges the legitimacy of his point of view; the way the court defines the legislature, the lower court, the jury, and the lawyer, and the sort of relations it establishes among

them; and so on. From this point of view the most important "result" in an opinion is not the judgment it reaches on a particular issue but the character the court gives itself in its writing and the opportunities for thought and community that it creates. The truest meaning of the opinion is not its message, but the experience of mind it holds out as a model of legal thought: the language it makes as it places one item next to another.

## E

The kinds of contraries or tensions at work in poetry and law are, at a certain level of generality, strikingly similar. In each, there is a tension between the restateable idea — the message, the result — and the enacted experience; between the language of the world and the language remade in the text; between form and substance; between the text's discrete design and the text in its larger context; and between the individual mind and the cultural inheritance, or what Eliot called "tradition and the individual talent."<sup>21</sup> Both poetry and law unite the particular and the general: the image and the idea, the general principle and the particular case. (Each is, by Sidney's famous test, for this reason equally superior to mere philosophy or mere history.<sup>22</sup>) Each has movement or shape: it starts out one place, ends up another, and between these points, if there is any life at all, is a surprise, a new clarification, or a series of them.

In each there is also a radical tension between these assumptions of the form and the recognition, or the fear, of the formlessness of life itself. Each is, in Frost's phrase, "a momentary stay against confusion."<sup>23</sup> Each form thus defines a place that is a part of yet cut off from the rest of its world: a place in which its inherited resources for claiming meaning — its language — can be reconstituted in a text that is itself a hopeful but tentative claim of coherence; a text from which the rest of the culture, and its various possibilities for expression and action, can be viewed. Each is open to the possibility of shifts in language and perception; more than that, each seeks to achieve such changes. Each has hopes of permanence: of being re-read, even memorized, and being collected. Each has hopes of be-

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21. T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS 1917-1932*, at 13 (1932).

22. SIR PHILIP SIDNEY, *The Defense of Poesie*, in 3 *THE COMPLETE WORKS OF SIR PHILIP SIDNEY* 4-5, 13-14 (A. Feuillerat ed. 1923).

23. R. FROST, *The Figure a Poem Makes*, in *SELECTED PROSE OF ROBERT FROST* 17, 18 (H. Cox & E.C. Lathem eds. 1966).

coming one of the central texts by which the rest of us will define our own world.

There are, of course, differences between these two forms of expression and between the the forms of life they entail; and these differences are worthy of attention. But for the present my attention is directed to what they share: to the more general activity of which each is a species and to the kind of education, the kind of reading, of which each has been the occasion.

### III

This sort of reading and education obviously has its limits and defects. Some would say that the practices of criticism and judgment I describe are insufficiently theoretical in character. That is in my view very far from being a defect, as I shall say at greater length below. But I do think that in both law and poetry this kind of reading includes a bias towards the complex that renders us inadequately receptive to the occasional text that states a simple but important and integrated truth. ("All men are created equal.") Of course a simple but powerful statement of this kind is "simple" only on the surface. It works as it does in large part because it forcefully evokes a rich and shared knowledge of language and culture. (Thus in the quoted sentence the word "men," once perhaps thought simple enough, today presents us with special complexity and difficulty.) Also, speech that is apparently simple — as in the American plain-talk tradition at its best — often expresses a rare and living awareness of the limits of language. It can be a sophisticated way of respecting the autonomy and experience at once of one's auditor and of oneself. A simple voice may in fact be very far indeed from simplistic or simpleminded (or what I earlier called sentimental). And even where the voice is in every sense simple, a human cry of pain or loss or despair, its very simplicity should give it a sort of standing to which we are too often deaf. It need not be interesting to be important when it expresses another's deepest needs.

Consider in this context a child's unbelieving horror at being told about war, and how suddenly empty seem our accounts of the justifications that engage our grown-up world so completely; or how lamely one explains to such an audience why some of our neighbors are without adequate medical care or schooling. What the child feels at such times is the fundamental equality and value of all people. For the moment he or she identifies with others, especially other children, acknowledging the importance of their experience. Of course this impulse is not all, in the child or the adult, and in the

child it is not integrated into a mature personality. This capacity for complete, if momentary, identification with others will to some degree be left behind as the child grows up. But in all of us the memory at least should remain of a simple voice stating, a simple self hearing, a central truth.

In all of these senses there are in our world simple voices saying simple things that ought to be heard and attended to in ways for which the training I describe does not adequately prepare us. We require our complexity to be explicit, spelled out, and we call it an aesthetic value and a test of truth. But in its own way this can itself be a kind of simplemindedness — an avoidance of the complexity that underlies and is evoked by some simple texts, or a denial of the importance of what simply matters most. This tendency has obvious political consequences, for it closes our ears to kinds of speech, and kinds of speakers, that do not meet our criteria of explicit complexity, and can thus be a way of drawing our attention away from inexcusable injustice, ugliness, and stupidity, and of unconsciously defending them.

I also think that each of these two educations has a kind of high-culture blindness. It is assumed as a premise of the reading that sooner or later everything that really counts will be brought within the poems or the judicial opinions that we read, especially within the very best of them. There is much to support this view, for in fact the really great text can reflect its context in remarkably rich and self-challenging ways. (Here one thinks of tiny things: the fact that Fanny, in Jane Austen's *Mansfield Park*, asked Sir Thomas "a question about the slave trade": what question we do not know, but we know Fanny, and it cannot have been a question reflecting a view of the world with which that trade, or that institution, was consistent; even though the house and community of Mansfield Park, the ideal form of which is a true ideal of the novel, is itself acknowledged to be dependent upon slavery.) And in the law what is *not* to be talked about is in fact often given a presence within the discourse, in an explicit refusal to talk. The denial of standing, which silences a particular voice; the adoption of a rule excluding certain evidence or denying a particular jury instruction, which renders a claim unsayable; the denial of a cause of action; all these are speech acts that incorporate for the moment what they will exclude. But not everything is proposed for inclusion, and in both cases there is a world that is ultimately beyond the text and its discourse, and what about *it*? What relation should exist between the privileged world defined by the legal or literary canon and the other world of expression and



action that lies outside it? (One thinks here of the recent interest in slave narratives, which may move them from one class to another; but beyond even those narratives is an unnarrated life, and what about *that*?) One great merit of reading texts as compositions, made by composers, is that we affirm that we are composers too; one consequence of that is that we affirm our essential equality with the composer whose work we are reading; and as a consequence of *that* we affirm our equality with all composers — that is with all people — and their equality with us. What, then, of the voices we do not hear in the texts that we read, what of the composers to whom we do not attend?

A final difficulty has to do with the ground or standard upon which we make critical judgments of merit and demerit about the poems and judicial opinions that we read. The test of “comprehending contraries” has an appealing neutrality, but this is also, from one point of view, its weakness. The danger is that one will avoid substantive questions about the elements comprehended in the form, or excluded from it, and focus only on the relation that it gives them. Or, even more seriously, that our argument about inclusion and exclusion will itself be incomplete, because it will begin and stop with our sense of what belongs as that sense is formed by the text itself, or by other similar texts. This method seems to afford no reliable way for talking about what is left out or for criticizing the cultural context in which these forms occur: their unstated premises, their enacted but implicit values, their relation to their larger world, the nature of that larger world itself, and so on.

What is needed here is not a “demystification” of a usual kind — which simply replaces one set of complex fictions with another simpler set of even more impossible fictions (about the fact that the judge functions out of prejudice, for example, or the poet out of class interest, as though nothing else need be said) — but a responsible way of paying attention to what is before us: to the social and cultural context of the text, in as much fullness and detail as we can manage; to the “unsaid” that can render a simple statement complex, or a superficially complex one foolish; to the nature, in short, of the relation between text and world. What is needed is cultural or ideological criticism of the sort that anthropologists dance around but refuse to engage in (on the ground that it is incompatible with their claims to be scientists): a criticism of the merits and demerits of different civilizations, different stages of civilization, and so on. This project is resisted, perhaps because it threatens a return to a Whig view of history or to an imperialistic view of cultural difference, and

we have worked hard to distance ourselves from these things; or it is embraced by ideologies committed to simplistic versions of experience that themselves do not meet our standards of comprehending contraries, or including what should be included. But without some attention to such topics, our conversations about poems and opinions, poetry and law, one author and another, are incomplete. Can we get to this kind of conversation from the kind of reading I describe — from a New Critical base? Or is something else entirely called for?

#### IV

As a way of working my way toward these questions I want now to say something about the merits of the way of reading I have been describing, beginning with the law. One way to define the kind of reading I have described would be to say that it is reading law as a kind of literature (as opposed, for example, to reading law as a kind of policy science or economics or social process). For me, as you can tell from what I have said, this is not a metaphorical claim: there is an important sense in which the law *is* literature, and can properly be understood and taught and practiced only when that fact is fully recognized.<sup>24</sup>

To read the legal text as a composition made by one mind speaking to another, constructed out of innumerable choices of word and phrase — as a text whose author decides what belongs within it, and what shall be left out, and how its elements shall be characterized and related — is, as I suggested earlier, to read not merely as a reader, but as a writer or composer. It is to acknowledge that the life of the law we practice, and to which we wish to introduce our students, is at its heart a life of composition: a life of making meaning with words about the world. To see the text as made in this way is to see the writer as a maker of his or her language, his or her language therefore as made in part by him or her; this in turn is to break down the conceptual, mechanical and theoretical views of language and the mind that form such powerful forces in our own intellectual world. The way of reading I describe is in this sense profoundly *antitheoretical*.

The language of the law, in hands trained this way, can be at its heart what Owen Barfield calls a poetic language, not a theoretical

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24. This is not to say that other ways of reading law are invalid: they may of course have much to contribute, but like my own way of reading they must ultimately meet standards external to themselves, standards of a kind it is my present object not to identify, but to claim as a subject for conversation, and for conversation of one sort rather than another.

one — a language that works by association and connotation, by allusion and reference, by the way words are put together to make a whole.<sup>25</sup> In this way it can maintain connections with the terms and processes of ordinary life and ordinary language. This in fact is a source of much of its political authority and significance: since it must ultimately make sense to a jury it must ultimately make sense to us, and can therefore remain our law, not the possession of a bureaucracy or a cult.

In this sense, the kind of reading I describe is profoundly *anti-bureaucratic*. It rejects the idea, for example, that the judge can properly make herself merely an analyzer of costs and benefits, or merely a voice of authority, or merely a comparer of one case with another, or merely a policymaker or problem-solver. The judge is always a *person* deciding a case the story of which can be characterized in a rich range of ways; and she is always responsible both for her choice of characterization and for her decision. She is always responsible as a composer for the composition that she makes. One great vice of theory in the law is that it disguises the true power that the judge actually has, which it is her true task to exercise and to justify, under a pretense that the result is compelled by one or another intellectual system. Our way of reading takes aim at those pretenses, and seeks to destroy them, by defining the work of the law as the work of individual minds, for which individuals are themselves responsible.

The acknowledgment of inconsistency and tension, the openness to ambiguity and uncertainty, that are essential to good writing under this standard, define the individual mind as aware of its limits and in need of instruction, from the past and from others, and as tentative in its own claims to assurance and to vision. It makes the speaker doubt the adequacy of any language, and seek to be aware of the limits of her own forms of thought and understanding. In committing her to an acknowledgment of the various ways in which stories can be told, claims made, and values characterized, it commits her to what can be called “many-voicedness”: it is profoundly against monotonal thought and speech, against the single voice, the single aspect of the self or culture dominating the rest. In forcing us to the limits of expression and of our minds, it is a commitment to openness, to the recognition of mystery, to the value of what no one has yet found the words to say. In all of this we must perpetually acknowledge that we have something to learn. This kind of reading

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25. O. BARFIELD, *POETIC DICTION: A STUDY IN MEANING* (1928) (especially chs. 7 & 8).

thus forces the attention inward as well as outward: one learns in part from what happens as one tries to make an order and fails. This sort of reading is an engine of introspection, and self-criticism, and hence of education. It recognizes, in short, that the law, to be worthy of the name, and of the respect that is its due, must be regarded — and practiced — as one of the humanities.

To look at law this way, as I suggested above, is to affirm the equality of all legal actors, and by implication the radical equality of all people, for in a life of composition and reading each of us is at least potentially present as an individual mind ready to speak and ready to listen; and between such minds, recognized as such, equality is the only possible relation. As composers of texts addressed to those who will read what we write not as commands or declarations but as compositions, and as readers who insist upon reading in that way, we create for the moment a world together in which our common circumstances, and with them our common humanity, are confirmed.

## V

But how does this help us with the questions raised above, about how we are to talk about what the poem or opinion “leaves out,” about the meaning of a text in its larger context, and about that context itself — the political background and ideological basis of the text? (For only when we understand these things can we understand what the text really means as a contribution to that context and to the people who inhabit and constitute it.) I do not have a simple or programmatic answer to these questions, but implicit in what I have said are certain things that bear upon it, and it may be worthwhile to bring them to the surface.

## A

In the first place, it would be inconsistent with everything I have said to expect or hope to work out a kind of cultural criticism that was conceptual or theoretical in character; that was mechanically rational (or bureaucratic) in operation (so that the granting of general premises entailed a concession of particular conclusions); that was not open to the discovery of its own limits and thus to the possibility of its reformulation; that was a program rather than a process. In other words, just as I argued above that the law should be true to its humanistic character and should be practiced on that model rather than the model of social science, of policy studies, or of analytic philosophy, so — and for the same reasons — we should seek a cultural

criticism that is literary rather than theoretical in character. It should take place in the space between abstract theoretical argument on the one hand and particularized judgments of individual texts or actions on the other. Like the ideal of law, it should be tentative and poetic, recognizing the limits of its own terms and open to possible shifts in perception and in the very language in which it is constituted. But also — again like both law and literature — it should be responsive and responsible to the tradition of which it is a part, to the larger cultural community in which it takes place. It should acknowledge that it has much to learn from the past and should seek to be neither idiosyncratic nor wholly novel but publicly shareable in a meaningful way. We should expect our generalizations to be presumptive or incomplete and to derive their full meaning not from stipulative definitions but from the way they are put to work in the process of judgment as that is reflected in our compositions.

## 1

The trouble with what I call theoretical or conceptual discourse is that it makes seriously wrong assumptions about language, about knowledge, and about the reader. The wrong assumption about language (shared by some linguists) is that the way words work is by carrying bits of meaning, or information, from the speaker to the audience; usually one bit to a word, but sometimes multiple bits (and then the writer must take care to see that only the right bits are carried by the word). The image is of the word carrying something, like a raft carrying a passenger across a river or a container on a conveyor belt carrying sand or gravel. The object is to get “it” and nothing else “across.” Good writing is writing that achieves this end. It is “clear.” This sort of talk about language often assumes that ideas can be represented in single terms, or sets of terms, which can in turn be pushed about on the page, or in the mind, in varying patterns of equivalence and disequivalence, and that this kind of rudimentary mathematics is the proper model for all human thought.<sup>26</sup> In formal terms, this sort of writing turns everything it can into a noun, reducing the verb to a copula (or perhaps words for “increasing” and “decreasing”). It objectifies the world by nominalizing it; once nominalization has taken place, quantification naturally follows as the obvious, or only, way to establish and describe relations among the objects the language has created.

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26. For an interesting statement of this position, see T. HOBBS, *LEVIATHAN* 12-22 (London 1651).

The wrong assumption about knowledge made by what I call theoretical discourse is that the reader need know nothing (except the English language, here reduced to a code) to read the text, which will teach him, directly or by reference, all he needs to know to get its meaning. Knowledge will in this way be acquired from the text: it can of course be checked against other texts, and against experience, but if it is not in this way falsified, it is in the text itself and by it made equally available to all other readers. As for the reader, he or she is reduced to the functions of cognition and ratiocination; and the world is reduced to what can be talked about in these terms. The political community created by such a text is necessarily bureaucratic and authoritarian, for there is no way in which this kind of language can recognize the autonomy and difference of others.

## 2

How might we proceed differently? First, we should have a conception of language not as an apparatus for conceptual elaboration or information exchange but as the living material from which meaning is made in our individual and collective lives. Language is the center of that part of our life that is concerned with the meaning of events and the quality of relations, past and prospective. Information exchange is only a tiny part of what it is about, and even that part does not work in the machine-like way described above. In one direction language is continuous with culture, for it provides the terms of social and factual description, of motive and value, that make our culture what it is. (Think, for example, of the degree to which the heroic culture of the *Iliad* is embedded in its language.) In another direction language is continuous with the mind and with the self, for language is the material of our thought and the register of our experience. We are ourselves to some degree formed by the languages that we use, for they imply criteria of selection, grounds of motivation, dispositions of mind and feeling, ways of telling the stories of our individual and collective lives, and so on, all of which become part of ourselves. When we learn our language, as children, we participate in practices that have meanings far beyond our conceptions of them; we learn more than we know, and in this way, among others, we are formed by what we learn. What distinguishes us from each other, both as cultures and as individuals within cultures, is our language: our ways of claiming meaning for experience and of giving ourselves experience to claim meaning for. But language is also the ground on which we meet; since it exists before and after us, it gives us a sense of participation in the immortal.

Our language of criticism should not be theoretical or conceptual but what I have called poetic or literary, that is rooted in the sense that meaning is complex, not unitary; that meaning is acquired partly from the language, partly from the text; and that meaning is not restateable in other terms — “for purposes of discussion” — but must be reestablished whenever we talk. The declarative proposition cannot be the center of this sort of discourse, as it is of conceptual talk, for we know that our words and our thoughts cannot be reduced to the sort of unitary meaning, nor the world be reduced to the sort of fixed and knowable categories, required by that kind of thought. The meaning of our words, and of our world, is always shifting, always incomplete; we not only acknowledge but embrace that fact and the possibilities it entails.

Unlike conceptual language, literary language relies heavily upon the verb, or more precisely upon the relation between actor and action that the normal English sentence expects. The verb, with its noun, invokes a sense of action, usually of human and social action — it is itself action of both these kinds — and thus engages us in a world of action and activates the kind of knowledge proper to that world. By reference and by performance it incorporates a world of practice.

This set of understandings about language says something as well about the kind of knowledge we shall assume our readers to have. We shall not assume our reader to be a *tabula rasa* (except for the capacity to decode an utterance) but will assume, what is true of all of our readers, that she has a full competence at the social and linguistic practices by which our world is defined. It is thus on our knowledge of language as practice and art, on our shared social and linguistic competence, that we will most rely; this is not infirmity, but strength, for this is the knowledge we most securely have.

Another way to put this is to say that we shall undo two mistakes often made in modern philosophy: to think of the individual as primary, the social as secondary (made by individuals interacting with each other); and, within the individual, to think of cognition and logic as primary, the emotive, associative, and imaginative as secondary (to be replaced if possible by the superior primary modes). Actually our earliest experience is social, not individual (the conception of self as distinct from family and community comes rather late in life); and our earliest and deepest knowledge is not in the usual sense cognitive or logical but expressive and social. It is knowledge about the meaning of words and gestures; knowledge of the languages by which community is established and managed. The fact that this

knowledge is not explicitly translatable into conceptual terms does not affect its reality or its importance. It is with this, our most certain knowledge, that we shall start: not with the imagined isolation of the self, as Locke or Hobbes are said to do; not with the *cogito* of Descartes; but with our knowledge of our own competence at language and the management of social relations through language. Not "I think," then, but "I speak." But speaking always implies an audience and hence a kind of social action: so "I speak, and I hear and I respond." But there must be room for you, too: so not "I think," or even "I speak"; but "we talk," or "we compose," making our world and our selves and our language together.

This is all a way of saying that while we cannot have the certainties we yearn for we ought not on that account be afraid, for we have in fact always lived, and can only live, with radical uncertainty. We make the best sense we can of things, the best judgments we can make, always checking our account against experience, against our sense of our own dispositions to err, against the suggestions and imaginations of others. We are always tentative or presumptive, always revising; in all of this we are always making and remaking our culture. This is what we know how to do.

This means, of course, that we will abandon the metaphors of language as code or machine, of meaning as bits of information, and of reader as receptacle. Rather we shall seek to speak in our own voices to others, whom we address as knowing what we know they know. We shall not merely inform, but invite, surprise, tease, affront, offer, and so forth. We shall speak to our readers as we know they are, and we are too: in a world in which language is always bounded by the inexpressible; in which language is uncertain, always remade; in which we are always making and remaking our own characters and our communities.

All of this is implicit in the practices of reading I have described. To read in these ways is in fact to enact a certain kind of politics: not bureaucratic but personal; not hierarchical but egalitarian; not dominating but liberating. To speak to another as one who is surrounded by a sea of language, which he or she must use, and in using remake, is to create a political world in which there are others, beyond any simply authoritarian voice we might claim; others with their own lives to lead, their own meanings to make, their own capacity to join us in creating a community that deserves the name.

## B

Can more be said about the method by which we should pro-



ceed? It will not have escaped you that in this paper I have done what I earlier said literary people are inclined to do: I have assimilated the legal experience to the literary experience, the judicial opinion to the poem. But in talking about the politics of composition and of reading have I not in a sense begun as well to assimilate the poem, and other literary forms, to the judicial opinion? Is it indeed perhaps possible to find a way to analyze both forms at once that will reflect what is common in their nature, as the similarities in reading described above seem to imply? Here let me propose two points upon which in such an effort we might focus our attention; two points that are somewhat different from "language" and "form" as I described those terms above.

The first point of attention I mean is the relation between the text and its cultural context. As a judicial opinion more or less explicitly reads, criticizes, accepts, and modifies earlier judicial opinions and other sources of the law, and reconstitutes them by giving these items a new order, in a new text, so also does the poem or novel act on its tradition: its culture, its language. It employs the expectations established by other works, and modifies them; it incorporates by allusion or imitation, and in doing so it modifies what it refers to. In both cases the text can be seen as a kind of argument with its culture; or, better, as an argumentative reconstitution of it, for what I have called "the culture" never exists in fixed and certain form, but only in performances each of which involves both reaffirmation and transformation (at least the kind of transformation implicit in repetition). What this means for our purposes is that in looking at the relation between text and culture our emphasis will be on the modification, not the continuity. We shall regard it as of little interest to say, "see, here he reproduces his ideology in this respect or that, unthinkingly or unaware"; instead, our interest will be given to the criticisms and transformations and modifications: the directions in which the resources of the culture are shifted by the text. For this is where the art is, the gift, of the text.

This focus of attention provides a basis for comparing not cultures themselves, which are in a practical sense incomparables — no one culture can turn itself into another, however much its members might think they wish to do so<sup>27</sup> — but comparing responses to the cultures: ways in which the patterned resources of meaning that define all cultures, and their limits, are remade. These *are* comparable, for all of us share the problem that our language, and the culture it

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27. The question for any culture, community, or institution is not, "What is the best way to be?" but "What is the best we can be?"

defines, are inadequate to the purposes, experiences, and actions we can sense in ourselves. To look here is to touch a universal characteristic of human experience.

The process of examination should in the first instance at least be comparative and integrated, calling upon the kind of thought that works not by argument from general premise to conclusion, but by a process of analogy and disanalogy, perceived similarities and differences. This process of thought, while alien to certain disciplines, is wholly familiar to the common lawyer, who has always proceeded in an uncertain world in which he or she is comparing one case, defined one way, with an array of other cases, defined another way; in which the definition of both items is always arguable; and in which, moreover, these definitions themselves determine the class of items on both sides that will be relevant. An impossible task, viewed mathematically; perfectly possible, viewed practically. And of course analogical reasoning runs deeper in our experience than that. It is how we first organize the world and our language. The conditions of uncertainty which so distress our academic selves are in fact not strange or anomalous and should not be regarded as threatening. They are familiar, natural, and should be felt to be comfortable. Actually, as I suggested above, to be confident in our capacity to work on such conditions is to be confident in what we know most deeply.

A second focus for attention, when we look at poems and opinions through the same lenses, is suggested by what might be called the rhetorical character of judicial opinions and of legal discourse more generally. What I mean by that remark is that legal literature is always produced by actual speakers in actual social contexts, addressing actual audiences whom they wish to persuade or influence. In so doing the speakers constitute, or reconstitute, through their performance, a social universe in which they and their audience are the principal actors; they define and make real a set of values or motives to which they appeal; and they create a sense of the facts of the world and what counts as reason within it. The judicial opinion is in this sense a socially constitutive literature. But so, of course, is the poem or the novel, which of necessity defines both its author (as well as its various "narrators") and its reader (as well as its various "readers") and establishes a relation between them. This is an actual relation, made through language but not wholly expressed or expressible in it. Most obviously where the text is ironic, but in a sense always, the relation is not expressible in the language in which the

text is made.<sup>28</sup> Just as we have read law as a kind of literature, so we can read literature as a kind of law, or at least as a kind of rhetoric, and thus devote explicit attention to its politics: to the character the writer gives herself, to the way she talks about others, to the way the reader is constituted; to the language of value or motive that is employed, and its adequacy for the purposes of general social life.

To look at textual relations from this point of view is to suggest a set of questions about human relations more generally: to what degree does this speaker recognize and speak to the situation of her audience? To what degree does she recognize, validate, and seek to promote the autonomy of the reader, in this relation or in relation to others about whom the text speaks? For example, to establish relations between a slaveholder writer and a slaveholder reader — say in an antebellum Southern novel — that validated the principles of freedom and equality, as these are united in the act of reading, would create a reality that would work to destroy the slavery itself. This is in a sense the point of Fanny's question. It is what Sartre means when he says it is impossible to imagine a good anti-Semitic or racist novel:<sup>29</sup> the premises of the art are directly opposed to the ideological position claimed.

Or our questions can focus on the reader's integration rather than his autonomy: to what extent does this text ask the reader to reduce herself to a certain aspect of her mind or spirit only, to what extent does it urge her on the contrary to respond with all that she is and knows? Does it offer a ground that increases the integration of self and experience by bringing tensions and contraries into simultaneous view? Or does it tend to disintegration, by omitting relevant facts, appealing simply to logic, or simply to feelings? Is it what I earlier called sentimental?

When these questions are asked of a text they have the kind of meaning, and permit the kind of learning, that comes from immediacy of context. We are asking questions not about the general nature of autonomy or integration, as abstract matters, but about the way a particular text advances or impedes them. This rootedness in experience can give to what are otherwise rather bland and empty terms a richness and specificity of meaning that can carry over to our more general, more explicitly political talk. We shall know that it is not enough to use "autonomy" or "equality" as self-defining words, or as words stipulatively defined at the level of concepts, but that re-

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28. For a fuller statement of what I mean by this kind of "textual community," see White, *supra* note 14, at 3-23.

29. J.P. SARTRE, *WHAT IS LITERATURE?* 63-65 (B. Frechtman trans. 1949).

sponsible political thought requires that we accept responsibility for the meaning we give such words both within our own compositions and by performance in our relations with our readers.

Many-voicedness; the integration of thought and feeling; the acknowledgment of the limits of one's own mind and language (and an openness to change them); the insistence upon the reality of the experience of another person, and upon the importance of her story, told in her words — these values, implicit in the kind of reading I have described above, are all in fact essential to our own best ideas of justice. They are political as well as intellectual and aesthetic virtues. And they are political virtues not only in the reading and writing of law, but in the reading and writing of anything, including poetry and political speeches and novels and billboards and newspapers. When we thus teach law properly, we teach a kind of literature as well; when we teach literature properly, we teach politics as well; and both activities can be seen as serving the same values, under the same standards. In this way we can hope to find a point at which rhetoric and poetry are themselves seen to fuse, or at least to be comprehended in a single field of vision; at which the concerns of law and art, and of justice and beauty that they represent, can be seen not as competing or divergent or unconnected but as one; and at which we are engaged in an activity that can serve as the center of life.

As one example of the kind of criticism I mean let me point briefly to the achievement of William Faulkner. In his novels, especially *Absalom! Absalom!* and *The Sound and the Fury*, he managed to bring to the surface, where it could not be denied, the contradictions deep in the white attitude towards blacks, who were to whites at once inferior beings and members of their own families. Yet he did this in a way that was at once accepting of the history, loving towards people of both groups, and — of necessity — determined to effectuate change. He created a mythic past and present for his white community that implied a continuous and reformed future. In this way he moved his culture in the direction both of comprehending its contraries — all of them — in a whole view with a shape of its own, and of recognizing the essential humanity of its human members. To say this is necessarily to praise the work. One could praise quite different works, in different cultures, for the same essential reasons: Dickens and Austen, for example, or Aeschylus and Euripides; or even, I think, as I have elsewhere tried to show, such

apparently "conservative" writers as Burke and Gibbon.<sup>30</sup>

Let me now put the point in a couple of legal contexts. What are to be the standards by which custody is determined when two adults are quarelling over a child, or where the state seeks to intervene to protect a child? The "child's best interests," we are told (and this is indeed an advance over regarding the child as someone's property): but how on earth are those "best interests" to be determined? Or consider sentencing judgments: how is the punishment proper to an offense and an offender to be determined? To think in categories is to produce evident injustice: a fixed punishment for burglary will fail to distinguish among burglars; a variable punishment will produce different consequences for the "same" crime. Rules that further specify what is meant by the "best interests" or "proper sentence" have the defect that they too are categorical and will be both over-inclusive and under-inclusive. (Not all alcoholic mothers are bad mothers; not all third offenses are the same.) So what are we to do? To what ideal conception of law should we aspire?

The answer implicit in what I have said is that we conceive of the law less as a bureaucratic system than as a language and a set of relations. What we should demand in each case is that the judge give to the case attention of a certain sort and make it plain in writing that he has done so, for there, in the attention itself, is where justice resides. We are entitled not to "like results" but to "like process" (or "due process"), and this means attention to the full merits of a case, including to what can fairly be said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language. On this view it is not a bad but a good thing that sentences vary from any categorically determined precision and that custody decisions do too.

An example from domestic life may help clarify what I mean when I say that justice is at its heart a matter of relations and attitudes rather than results. Suppose the parents of a teenaged child ask, as they often and understandably do, what rules they should adopt governing such things as curfews, dating, housework, allowances, school work, conduct toward siblings, music lessons, and so on. What answer could you — or Dear Abby or anyone else — possibly give them? Obviously there is no one set of correct or just or wise rules. Many fine parents have resolved these matters with

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30. See White, *supra* note 14, at 192-230 (Burke); J.B. White, *The Roads of Rome* (June 1984) (unpublished manuscript) (Gibbon).

their children very differently; many bad parents have no doubt used rules that looked very much like those used by parents of whom one would approve. Within very wide bounds what is critical is not the content of the rules but the relationship out of which the rules grow and which they in turn help to reconstitute. *What* the parent decides matters less than *how*: with what attention to the child's needs and circumstances, with what respect for his or her feelings and claims, with what kind of listening (or "hearing"), and so forth. If this analogy is thought to be inappropriately paternalistic, the same point could be made in connection with relations more explicitly equal — in a marriage, a professional partnership, certain business relations, and so on. The point is that the heart of what we mean by justice resides in questions of character and relationship and community — in who we are to each other — for this is what determines the meaning of what is done. If these things are got right, the material manifestations — the rules, the results — will take care of themselves; if they are not got right, the rules and results will be wrong, and this is true in the family, in the custody hearing, in the sentencing proceeding, in the ordinary trial, in national political arrangements, and in international relations. Talk about justice is at its heart talk about character and relations.

How, then, are the judicial opinions of which I speak to be judged: by whom, and under what standards? In the first instance by appellate courts, but ultimately by the community as a whole, by the legal community and the community beyond it. The standards are implicit in what I have said: putting aside pathological extremes that can be disposed of summarily, we shall ask for attention to the case, to the parties, to what can be said on all sides; for openness to new characterizations; for a sense of the limit of one's own language and mind and for respect for the experience of others. The responsibility is ours, to make ourselves better judges and better critics. It is hard to discharge, hard even to contemplate. But it cannot be evaded, for example, by making the law bureaucratic, conceptual, systematic. For if we do that we are still responsible, and by the same standards, for who we become in our conversations with each other.

All this, I think, is built into the practices of reading and expression in which we have been schooled. What this means for the practice of criticism and judgment is that we can best begin, not by razing what we have been left and starting over, not by defining abstract principles and applying them to the world, but with what we know how to do already, with our social and linguistic competence,

with our reading of law and literature: with the kind of knowledge of our capacities and conditions that Plato perhaps means when he talks about knowledge as a species of remembrance.

## VI

This returns us to a point raised above, our discomfort with the claims of authority traditionally made for the literary and legal canon, indeed with our own claims to authority as teachers. If everything has a political dimension, and the essence of our political belief is the equal right of individuals to choose their own values, risks, and attitudes, how can we justify the sort of ideology-confirming education in which we engage? Should we perhaps rather strike an unremittingly rejecting stance towards all claims of authority? My view is that we need not fear such claims to authority, in ourselves or others, any more than we need fear the conditions of uncertainty that so distress the rationalistic mind. And the reason is much the same: the claims we make for the authority of the canon, of the past, of what we admire, are themselves tentative and presumptive, ready to be qualified and conditioned by other texts, other voices, and by our own conversations with other people. To become a universal skeptic is no answer at all, for that is also to choose to establish one kind of community and a culture rather than another. It implies a basis of preference for which authority is claimed, and authority of a kind that is inconsistent with the skepticism itself. In our world we must choose, and must do so under conditions of uncertainty; we are thus as a matter of necessity always acting on faith and making claims of authority. For my part it seems far better to start by choosing what others have learned to value, by trying to remake our world on the basis of what it is and what is presumptively best within it, rather than to assume that we can start completely fresh, in a place we alone have made, to realize our own ideal. For one thing, that cannot be done, for there is no such place, and our ideals are never purely our own. But even if it could, who are we to claim to know so much better than our predecessors and contemporaries? The truth is a simple but hard one, that neither our acceptance nor our rejection of our inheritance should be unquestioned; it is in the life of our questioning of it and of ourselves, in our remaking the language that defines us, that our true work goes on, and our true community is defined.

We need not fear the claims of authority we make for what we admire but should always be prepared to qualify them; and should in addition always recognize that what is truly authoritative, not au-

thoritarian, is so only by the free and informed acquiescence of others. Whatever presumptive authority we claim for ourselves and others is thus radically conditioned by our recognition that we always speak to those who are entitled to be persuaded, not commanded; that the most we can ask is a fair hearing; and that (whatever we may claim) whenever we speak we can never ask less. What our claims of presumptive authority call for, in law and literature alike, is not presumptive submission, not obedience, but trusting and responsible engagement.

## VII

But there is a problem with all this. For who is to say that the attitudes and methods of reading that I associate with the humanities, and with a certain kind of justice, are the right ones? Why should you believe me rather than a real or imagined adversary who takes an opposite position: locating justice in the maximization of net social utility, for example, or in equal distribution of material goods, rather than in the way in which the members of a community regard and speak to one another? Or literary excellence in the degree to which the text supports certain *a priori* truths, to such a speaker the most important truths of all, rather than in the way he or she exposes the resources and limits of the common language in a new way? Here we are at a great crux of modern discourse. There is no authority to which I can appeal higher than your own experience: to be persuaded you must agree that this way of talking, as I outline or practice it, or as you can imagine yourself doing it in an improved version, makes more sense of your experience than those posed as alternatives. But what kind of "sense" do we seek to make of our experience, and what can "more" mean? Here I can do no better than to call upon the standards at work in what I have already said, and ask which serves better the cause of truth by including relevant contraries; of beauty by placing them in organized relations with one another; and of justice by recognizing — by constituting — oneself and others as whole and autonomous persons.



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