

# Michigan Law Review

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Volume 88 | Issue 6

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1990

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### Recommended Citation

John D. Ayer, *"Aliens are Coming! Drain the Pool"*, 88 MICH. L. REV. 1584 (1990).

Available at: <https://repository.law.umich.edu/mlr/vol88/iss6/18>

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## “ALIENS ARE COMING! DRAIN THE POOL”†

John D. Ayer\*

DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES. By *Stanley Fish*. Durham: Duke University Press. 1989. Pp. x, 613. \$37.50.

LAW AND LITERATURE: A MISUNDERSTOOD RELATION. By *Richard A. Posner*. Cambridge: Harvard University Press. 1988. Pp. xi, 371. Cloth, \$25; paper, \$12.95.

### I

Who said that an expert is a guy with a briefcase, twenty miles from home? It's a pretty tired wheeze,<sup>1</sup> but every tired wheeze is founded on some small truth, and in an age where everyone is twenty miles from home, it makes a lot of sense. You can't say to the Wizard of Oz: "Act right or I'll tell your mother." You don't *know* his mother, and if you did know her, you'd probably find that she had set herself up as a professor of nail polishing science at the New University of Cosmetology in a concrete block building on Van Nuys Boulevard.<sup>2</sup> The temptation to that sort of pretension is just too powerful. It gets you from two directions: pull and push. The pull is that people (at least if they don't know your mother) tend to take you at your own valuation, and a very small expenditure in effrontery can get you a very large return in creature, and sometimes even spiritual, comfort. In academe — at any rate, in the humanities and social sciences — the push is sheer panic. More and more people huddling around a smaller and smaller stewpot, everybody grasping at the rope ladders as the helicopters lift off from the embassy roof, all fearful that they'll be left behind among the barbarians. For the professoriate, the most obvious consequence of these convergent forces is that everybody chooses to act as if the bluebird of happiness nests in the yard next

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\* Professor of Law, University of California at Davis. B.A. 1963, J.D. 1968, University of Louisville; LL.M. 1969, Yale Law School. — Ed. Some of the insights and some of the one-liners in this essay I owe to Joel Dobris. I benefited also from conversations with Tom Grey and Bob Weisberg.

1. One problem is the briefcase — is the briefcase still the mark of an expert? Is the Filofax? Laptop? Cellular telephone?

2. I don't *think* there is a New University of Cosmetology in a concrete block building on Van Nuys Boulevard, but these days, I wouldn't bet on it. If there is one, please have your lawyer send the letter of groveling apology to my home address and I will sign and dispatch it by return mail.

door. Under the circumstances, it's a caution when you find scholars still doing what they were brought up to do: philosophers doing philosophy, literary critics doing literature, or lawyers doing law.

This reflection on the bureaucraties of academic life will help to situate, and make sense of, that field wretchedly misnamed "law and literature." Despite the increasing currency of the term, no single field of inquiry deserves that name.<sup>3</sup> Presently, several disparate topics sometimes pass, singly or severally, under that name. These include:

1. The study of works of literature (typically novels) for the light they may throw on ethical questions. A well-known recent example is Richard Weisberg's *The Failure of the Word*.<sup>4</sup>

2. The study of the method whereby the reader interprets the text — including the study of whether any such interpretation is possible at all. This is the central topic of Stanley Fish's *Doing What Comes Naturally*, one of the subjects of this review.<sup>5</sup>

3. The study of argumentation, anciently known as "rhetoric."<sup>6</sup> The vast range of examples here almost defies enumeration: from straightforward "instrumental" manuals on exposition, like Richard Wydick's *Plain English for Lawyers*,<sup>7</sup> through far more ambitious studies on the place of rhetoric in human affairs.<sup>8</sup>

4. The study of human self-definition. This fourth line of inquiry has aspirations which are far more ambitious, if not any more obscure, than the others, and thus is far more likely to escape notice. This approach argues that we are (in large measure) what we imagine ourselves to be, and law and literature are alike methods of defining who we are and how we live in the world. This theme lurks in the literature of the left, but its reach is far more extensive and its politics far more equivocal. The most obvious proponent of this view in the literature of the law would be James Boyd White.<sup>9</sup>

These four lines of inquiry often overlap and, at the right level of abstraction, may be amenable to unification. Thus, both interpretation and rhetoric may be understood as "ethical" activities, and the making of ethical decisions may comprehend the act of self-definition. But for the most part, they are discussed separately (even if between the same

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3. For an argument that there is such a field, see Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 VAL. U. L. REV. 267 (1989).

4. R. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984).

5. See *infra* Part II.

6. After Aristotle, of course.

7. R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (2d ed. 1985).

8. See, e.g., *THE RHETORIC OF THE HUMAN SCIENCES* (J. Nelson, A. Megill & D. McCloskey eds. 1987).

9. See, e.g., J.B. WHITE, *THE LEGAL IMAGINATION* (1973).

book covers), and certainly no modern consensus exists on how, if at all, they might be brought into coordination.

What these inquiries do have in common, and what brings them together under the heading of "law and literature," is not so much intellectual as structural or institutional: they represent the convergence between people who draw their paychecks through the law school and those who are employed down the hall (or around the block) in the Department of English. In academic life, bureaucracy is destiny. The people you go to lunch with, the people with whom you wrangle over appointments, promotions, and even secretarial help, are the people who shape the universe of thought in which you reside — what Stanley Fish would call your "interpretive community." Clearly, the boundaries of that community are shifting today. Fish and Richard Posner, whose new books I discuss in this review, represent two remarkable modern instances of how, and with what consequence, this process may occur.

## II

"I don't know who it was that discovered water, but I know it wasn't a fish." Which I take to mean: you will not be conscious of those things of which you are unconscious. Or, more sedately: it is virtually impossible to understand, when you are resting on a presupposition, what that presupposition might be. For present purposes, this old wheeze is true in only the most limited sense. If to be a "discoverer," you must be the first to know something, then Stanley Fish certainly did not discover the presupposition; others have discovered it before him, right back to the beginning of history. But if you accept the idea in a broader sense, then it is not unfair to regard Fish as the Columbus of this New World — the man who introduced a generation of law-academics to just how tightly bound we all are by our assumptions, and how difficult it is even to identify, let alone to articulate and understand them.

Fish is also one of the more conspicuous examples of the new world of academic claim-jumping outlined above. In his youth he labored away in the back forty of the literary plantation, chopping critical cornstalks and grubbing academic tubers out of the pastures of the seventeenth century: Milton, most notably, but also George Herbert and other lesser morsels.<sup>10</sup>

Along the way, Fish hit upon two principles that formed the basis for a far less constrained academic career. The first insight is that if you write like you talk — talk to your friends, that would be, on the basketball court or in the chili parlor — then getting published is not

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10. See, e.g., S. FISH, *SURPRISED BY SIN: THE READER IN "PARADISE LOST"* (1967); S. FISH, *THE LIVING TEMPLE: GEORGE HERBERT AND CATECHIZING* (1978).

only no harder, but actually a good deal easier. You get in print more often, you have a broader audience, and one suspects you have a much easier time getting the stuff off your desk — seeing as how you can ship out most of what you produce pretty much as it comes from the dictaphone.<sup>11</sup>

The second insight was far more momentous, and, for Fish, must have been far more surprising. Much of his early (or at least his “middle”) work qualified as, if you use that kind of language, metatheory — theory *about* theory, the study of how it is that stories, etc., get created and translated. Fish was hardly alone in this endeavour, of course; in the literary world, the swamps and bogs of metatheory are at least as crowded (one wants to say “suffocating”) as the windswept escarpments of the Milton stake. What Fish discovered (how, I do not know<sup>12</sup>) was the whole universe next door, where academics were better paid, where publication outlets were far more plentiful, where scholarly standards were far more elastic,<sup>13</sup> and where people didn’t have the slightest clue about how to play the metatheory game. And the wonder of it is that they *cared* what he was up to, that they thought he was cute, and fun. For generations, law professors had given themselves sour stomachs over the problem of *explication du texts*, although they certainly didn’t have that name for it. Quite the contrary, nothing in legal circles had gone much further than the notion that judicial opinion sometimes might be dictated by “hunch.”<sup>14</sup> Fish must have felt like Professor Harold Hill when he discovered the pool table. Now at last, he could walk through a field full of texts barefoot and never get so much as a callous.

Fish practices his craft largely, although not entirely, along the lines set forth in the second category above: the study of strategies for the interpretation of texts. He is the founder, or at least the proprietor, of the idea of the “interpretive community” — the notion that *all* meaning is context-bound, energized and limited by the society from which it emerges. Fish outlined the doctrine in an important book published in 1980,<sup>15</sup> to which *Doing What Comes Naturally* can be regarded as a sequel. The point of the “interpretive community” is to

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11. The dictaphone is even more dated than the briefcase, I know. But remember, this all started 20 years or so ago.

12. *But see infra* text accompanying note 60.

13. Certainly it must seem so. If you have never tried it, imagine what it is like to encounter the mixture of incredulity and greed that you inspire when you, as a law professor, tell a professor of English (say) that we let *students* make publication decisions. Surely, it is an exquisite form of humiliation to have some infant who can’t earn a C in criminal law tell you that you really don’t grasp the contours of *mens rea*. But for anyone who has suffered under the vengefulness and pomposity of a peer review system, the regime of the law review must look like a sinful indulgence.

14. See, e.g., Hutcheson, *The Judgment Intuitive: The Function of “Hunch” in the Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

15. S. FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

provide an escape from "formalism," or "foundationalism," or any similar doctrine of fixed meaning, without plunging into the abyss of nihilism. Whether it succeeds or not is, of course, the issue to which we will return later.

This is Fish's doctrine, and he presents it with gusto, as I shall try to demonstrate later. Oddly, this is about *all* of it. I say "oddly," because Fish's critique, if correct, is really only a beginning. Fish writes as if he is writing about readers and texts. But if Fish is anywhere near right about his "strong-form" interpretive communities, then interpretation is not merely a matter of rhetoric; it is something far more. Truly, what Fish is describing are the ways we not only find but also *make* our world. Humans thus function as "self-interpreting animals,"<sup>16</sup> and what Fish is studying are "ways of worldmaking."<sup>17</sup> If you like Fish's argument, this is exactly what you would hope for; if you dislike it, it is what you would fear or suspect. But, in either event, you will have to go elsewhere for the larger implications. With Fish, you are limited to a presentation, however forceful or elegant, of the narrower case.

*Doing What Comes Naturally* bears the subtitle "Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies." That covers three concepts and two fields: six permutations by my count, enough to suggest a suspicious catholicity in the criterion of inclusion. And I surmise that only a person with a rarified taste (other than a commissioned reviewer) would care *both* about how Dennis Martinez' philosophy of baseball informs Mark Kelman's elucidation of Roberto Unger (ch. 17) *and* about what Waddington said in 1972 about what Lewis said in 1942 about what Milton said in 1667 about the Devil.<sup>18</sup> The book's inclusiveness is partly a matter of style, I suspect; Fish probably likes being thought of as the kind of with-it guy who can tell you stories about Dennis Martinez<sup>19</sup> and Randy Newman<sup>20</sup> just as well as he can about John Milton.<sup>21</sup> You can almost picture a little stone church up in the Berkeley hills somewhere (the First Church of Stanley?) with one of those black notice boards out front saying "Sunday! 'Strikes, Balls, and Immortality,' the Rev. S. Fish, prop., the Hippy Preacher who Talks to the Young."

Perhaps inevitably, given the conventions of current academic

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16. The phrase is Charles Taylor's. See C. TAYLOR, *Self-Interpreting Animals*, in 1 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 45 (1985).

17. The phrase is Nelson Goodman's. See N. GOODMAN, *WAYS OF WORLDMAKING* (1978).

18. Ch. 12. The captious reader might suggest that it takes a rarified taste to care about *either* of them, but let that be.

19. The ballplayer. See ch. 17.

20. The singer-songwriter. See ch. 9.

21. The essayist and poet. See chs. 12, 18, 20. Fish does seem to understand that it is more likely a Milton fan will be reading Fish on Martinez than a Martinez fan will be reading Fish on Milton, and provides identifying data accordingly.

writing, something like eighty percent of it has been previously published, perhaps half in the law reviews. Indeed, the very fact that you have joined that tiny sliver of humanity actually reading this review suggests that you probably have photocopied a few of these chapters already and placed them in a cardboard carton in the corner, perhaps bearing the inscription "TO BE READ SOMEDAY" in water-soluble Magic Marker.<sup>22</sup> *Doing What Comes Naturally* is billed as one (the first?) of a series called "Post-Contemporary Interventions," the editors of which are Fredric Jameson<sup>23</sup> and (surprise!) Stanley Fish.<sup>24</sup>

"At last," you might say, "together in one convenient place." No, I was kidding. *You* wouldn't say it, but the publisher's publicist might. And she would have missed the point. Work like Fish's may *lose* just as much as it *gains* by "collected" publication. Virtually everything Fish writes is part of a *conversation*, or at the very least a context, and you can't really appreciate it unless you see the context as a whole.

To stress the "conversational" nature of Fish's work can hardly be a complaint — as Fish would delight in explaining, the whole academic enterprise is in its essence conversational. But the mode of presentation defeats, or belies, the premise upon which it purports to rest. You only get half the story here — Fish's answer to *X*, his comment on *Y*, and so forth. Certainly Fish summarizes his opponents, and not always unfairly. But they never get a chance to speak for themselves.

The absence of context might be a problem with anyone, but it is a special problem with Fish. It is rooted in — I almost said his "style," but style in the sense that style is the man. Indeed, Fish's whole epistemology is built around localized, particular thought. The most cursory survey makes the point. His adversaries frequently appear in chapter titles.<sup>25</sup> Aside from his titles, in fully fifteen out of the twenty-two chapters, there is a proper name in the first sentence — not always an adversary, sometimes a conversation partner or the subject of a

22. Is this another trademark term? Why can't I do without them today?

23. An odd match: Fish the ebullient relativist with Jameson, the high priest of Marxist essentialism. Fish seems to recognize the disparity. See p. 501 ("Jameson opens up the narrativity of history in order to proclaim one narrative the true and unifying one."). But the principle of portfolio diversification presumably works here the same as it does in a law firm: not even the WASPiest law firm limits itself to an all-Republican partnership.

24. Fish's role as the editor of a series does not mean he is going soft on the establishment. Discussing the craving for "theory" in literary studies, he says:

Theory will stop only when it has played out its string . . . This is already happening in literary studies, and there could be no surer sign of it than the appearance in recent years of several major anthologies . . . and of series that bear titles like *New Accents* but report only on what is old and well digested.

Pp. 340-41. The point sounds very much like a "literary" version of the efficient capital market hypothesis — the idea that once packaged in a series, it is, *by definition*, no longer interesting or important.

25. See chs. 2, 3, 6, 13, 17, 18.

story, but a specific, identified human being nonetheless.<sup>26</sup> And it's not just the other fellow: Fish is not at all shy about the first person singular. The preface begins: "I can imagine . . ." (p. ix). In individual chapters, we have "Nothing I wrote . . ." (p. 315) and "I was led to this paper by . . ." (p. 525). And inevitably, author and subject sometimes make it to the first sentence together: "In the summer of 1977, as I was preparing to teach Jacques Derrida's *Of Grammatology* . . ." (p. 37); "I propose to take Roberto Unger as seriously . . ." (p. 399); "Before turning to Ronald Dworkin's response to my critique, I would like . . ." (p. 103).

Fish is not only unabashedly personal, he is cheerfully anecdotal. Chapters begin at a particular time: "In the summer of 1977, as I . . ." (p. 37); "In September 1982 columnist Peter A. Jay . . ." (p. 197); "In 1972 Raymond Waddington . . ." (p. 247); "On June 24, 1985, Dennis Martinez . . ." (p. 372). Or, almost as specific: "Not too many years ago Randy Newman . . ." (p. 180); "In the past twenty years . . ." (p. 342); "Every so often one hears . . ." (p. 215) — only a breath away from "once upon a time." Just as he localizes you in time, Fish also likes to localize you in place, or at least in a particular document. We have: "In his essay *Law as Interpretation* Ronald Dworkin . . ." (p. 87); "On the first page of his essay *Objectivity and Interpretation* Owen Fiss . . ." (p. 120); "In an essay entitled 'The Construal of Reality,' Stephen Toulmin . . ." (p. 436); "In the opening chapters of his magisterial study, *The Concept of Law*, H.L.A. Hart . . ." (p. 503).

Finally, aside from the details of structure and syntax, consider the overall title: *Doing What Comes Naturally*. Fish seems to think his choice is more or less fortuitous; as if the book could just as well have been entitled, say, *The Number One Best Seller*, or *Bird Thou Never Wert*. The fact, of course, is quite otherwise: in this book Fish does exactly what comes naturally; indeed it is hard to picture him doing anything else. Birds gotta fly, as the fellow says, fish gotta swim. Fish needs to swim in the mainstream of literary shoptalk, where there are conferences and grants and cocktail parties and nice little restaurants and sympathetic journals, and even (oh, rapture!) a series with a sympathetic editor who keeps his editorial scissors locked in the bottom drawer out of harm's way. Someone once asked an old editor what he liked to read. "Read?" (harrumph). "Well, yes, Dickens, of course, and the Bible, oh yes, the Holy Writ, the Song of Songs, our little sister has no breasts, that sort of thing. But most of all I like to crawl down between the sheets and read me *Own Stuff*!" This is a believable, but not an inevitable, reaction. Some people react with revulsion to their Own Stuff, but others like to run it through their fingers, slap it up against the wall, anything to reexperience the moment of creativity.

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26. See chs. 2-6, 9-10, 12-13, 16-21. He waits until the second sentence in chapters 1 and 22.



Thus Fish's internal approach is nearly always "dialectical" in the Socratic, as distinct from the Marxist, sense of the term,<sup>27</sup> as he tries to nail the other guy's butt to the wall in a rhetorical half nelson. It's all real enough: you wouldn't say that he's faking it like the guys in the Friday night wrestling. On the other hand, you wouldn't call him really contentious, either; he's so good-natured about it all, and you get the sense that he doesn't pick on people smaller than he is. The picture is rather one of a basically sociable eleven-year-old who finds roughhousing to be an essential form of human contact.<sup>28</sup>

This is refreshing, at least for a time, and it has a number of practical virtues. For one, by stating things in context, you always know exactly what the fight is about. Almost any idea makes sense only in terms of what it is *not*. Take a more austere, structured work like Rawls' *A Theory of Justice*, for example, and the enemy is always off-stage.<sup>29</sup> Unless you are adept at the whole tradition of social philosophy, you don't know where to begin. By contrast, no one will ever have to write a guide called "Understanding Fish."<sup>30</sup> Situating himself among his friends and his enemies, he saves you all the trouble.

Second, in this case at least, the style is clearly the man. Fish's world is particular, personal, concrete: a world of lived lives, where people dream up projects for themselves, and then succeed or fail at them; a world of dreamers and charlatans, of loyalties and betrayals. In this world, people have ideas and take responsibility for them, and ideas matter enough to be worth talking about. It is a world, in short, where *rhetoric* makes a difference.<sup>31</sup>

So what is the problem with the style? There are several. The first problem is that by embracing the concrete, Fish misses precisely those virtues that belong to the abstract. When Rawls tells us that "[j]ustice is the first virtue of social institutions, as truth is of systems of thought,"<sup>32</sup> it may require an exercise of cogitation or exposition to know what he means by "justice," "virtue," "social institutions," "truth," and "thought." But at least you have that darling of the old-style composition teacher, the Topic Sentence, by which to gauge the

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27. And as distinct from the Platonic. It's the Socrates of, say, the *Protagoras*, where adversaries still dust it up with each other, rather than the Socrates of, say, the *Republic*, where people seem to spend their whole time saying "yes, Socrates," and "no, Socrates," and "now you're cooking, Socrates."

28. Maybe a better metaphor is the knight in the Monty Python movie who insists on going on with the fight even after his arms, legs, and body have been cut off.

29. J. RAWLS, *A THEORY OF JUSTICE* (1971). Patricia White tells a wonderful story about the collapse of the Rawls market at a particular school, as insufficiently prepared students discovered they simply didn't get the point. White, *Teaching Philosophy of Law in Law Schools: Some Cautionary Remarks*, 36 J. LEGAL EDUC. 563, 564-65 (1986).

30. Cf. R. WOLFF, *UNDERSTANDING RAWLS* (1977).

31. For a close examination of the Fish style *qua* style, see Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987).

32. J. RAWLS, *supra* note 29, at 3.

text. With Fish's discussion of Randy Newman or Dennis Martinez, you have good stories, but it is not always so clear what the stories tell.

Fish seems to try to rectify this defect in an introductory chapter that has a certain instructive irony all its own. One immediately notable feature of this chapter is stylistic; unlike the chatty familiarity of the other chapters, this first chapter begins with a tone of stern academic formalism that is almost a parody of *another* kind of academic writing, quite different from Fish's.<sup>33</sup> Thus, unlike all the displays of anecdote in the later chapters, Fish's Chapter 1 begins: "It is one of the theses of this book that many of the issues in interpretive theory can be reduced to a few basic questions in the philosophy of language." (p. 1). No "I"; "it is." No anecdote; a "thesis." No appeal to another person or event, but rather to the austere abstraction of the "philosophy of language."

Now, the second sentence of this same first chapter: "Consider, for example, the discussion of 'presupposition' in Ruth Kempson's *Presupposition and the Delimitation of Semantics*."<sup>34</sup> Ruth *who*? Oh, it isn't important. Anyway, the mind is occupied in trying to remember what a "presupposition" might be; also a "delimitation," just as if reading Rawls. Fish continues from there with a page and a half of exposition, most of it direct quotation from Kempson, the rest a seemingly conscientious effort at paraphrase.

But then, on page two: "[O]nce you start down the anti-formalist road, there is no place to stop . . ." (p. 2). Argh, the poor fellow, he just couldn't help himself. A page and a half of abstraction (and most of that, direct quotes) and we are back to the quintessential Stanley — chatty and informal. If there is any doubt, the next paragraph, begins: "I would not be misunderstood" (p. 3) — only the first appearance of the first person pronoun in the essay, ending what is very nearly the most remarkable instance of self-abnegation in the entire book. But now, the mask is off: there are five more "I's" and three "my's" in the next paragraph. (Okay, I didn't count every word, but take a look for yourself and see if I don't get the drift.)

In other words, it's a trick, that sober beginning. A spoof, of course, harmless in itself, but it does give Fish a chance for something very close to a topic sentence: "[R]emove the connection between observable features and the specification of meaning, and you also remove everything else that is supposedly independent of context; entailment, contradiction, grammaticality itself, all become as variable and contingent as presupposition" (p. 2).

Enter, then, Fish, accompanied by the "interpretive community" — or "communities," given the richness and complexity of modern

33. Indeed, for a few moments, I wondered if Fish was going to offer a little anthology of *pastiche*, on the order of James Joyce in *Ulysses*.

34. P.1; R. KEMPSON, *PRESUPPOSITION AND THE DELIMITATION OF SEMANTICS* (1975).

experience. Such communities create and energize, but they also govern, language (and thus thought). In Fish's analysis, the notion serves to solve the problem of meaning, but it solves the problem of meaninglessness, as well. "[T]he question 'is everything then indeterminate?' loses its force," says Fish, "because it would make just as much sense to say that everything is determinate" (p. 83).

In its mild form, this is a perfectly innocuous idea. But Fish does not take it in its mild form. *He really means it*. In Fish's eyes, *everything* is context-bound ("entailment, contradiction, grammaticality itself . . .") (p. 2). In this strong form, the assertion is far more contentious. Thus, for example, it may be obvious that his "relativism"<sup>35</sup> is going to be a weapon against "right"<sup>36</sup> thinkers like Posner. But Fish emphatically applies it just as well to self-conceived "left" theorists like Robert Gordon, Mark Kelman, and Duncan Kennedy, whose critical X-ray vision, in many ways so like Fish's own, seems to lose its focus once they have transferred their scrutiny from the establishment and trained it on revolution.<sup>37</sup> After 554 pages of Fish (plus a selection of his adversaries), either you believe it or you do not. I happen to believe it, but then I pretty much did before I read the book, so mine may not be a very considered judgment. On the other hand, I can make a number of points around the periphery to clarify or inform Fish's argument.

One concerns the matter of antecedents. In that first sentence, previously quoted, Fish says that "many of the issues in interpretive theory can be reduced to a few basic questions in *the philosophy of language*" (p. 1; emphasis added). This is not precisely wrong, but it is misleading almost to the point of perversity. Yes, they are issues in "the philosophy of language," in a broad sense. But they are equally issues of anthropology, of sociology, of political science — in short, of epistemology itself (if there is such a thing) as an effort to create foundations for knowledge. I am not clear why Fish singled out the philosophy of language for special honors on page one: perhaps mere fortuity because he had Ruth Kempson's book at hand, or perhaps because Kempson made a convenient subject for harmless merriment, like Margaret Dumond in a Marx Brothers comedy.

In any event, the issue does not begin or end with the philosophy of language. The idea of the primacy of the presupposition far antedates Fish and his work. Fish, of course, knows this. At various places in the book, he cheerfully introduces other stalwarts of the anti-foundationalist company, like Thomas Kuhn, J.L. Austin, and Richard Rorty (whom he calls "a champion of . . . antiessentialism . . .").<sup>38</sup>

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35. My word, not Fish's.

36. Me again.

37. See pp. 226-30.

38. P. 501. For Kuhn, see especially pp. 486-88. For Austin, see especially pp. 37-61. Fish's

But these references are casual, improvisational — the way you would expect to get introduced to your kids' housemates when you came to call. A more comprehensive lineage would have mentioned Wittgenstein, for heaven's sake.<sup>39</sup> Or Nietzsche. Or any of a number of combatants, right back to the Sophists. It is like the dance of the seven veils: every time you remove a veil, there are seven more behind.<sup>40</sup>

If the battle is so old, and the combatants so numerous, one might well ask why Fish keeps up the fight? There seem to be several reasons. One, obvious enough, is that the anti-foundationalists never really seem to carry the day: essentialism rears its head, one place or another, over and over. A second, for Fish I suspect, is sheer sociability. Conflict is a form of intimacy, and he likes to be down there on the field where he can feel the crack of bodies. A third is that Fish is so blessed *good* at it. He knows how to identify, and make hash out of, the ultimate foundationalist argument: the one that says, look, you guys *can't* be right. Otherwise, why go on? This is the gist of his tussle with poor Ruth Kempson. She says, in effect, that any theory which rests on anti-foundationalist premises must of necessity be a pretty inconvenient theory and therefore "must be relinquished" (p. 2; quoting Kempson). Once Fish sees that one coming, he lays into it with almost indecent glee.<sup>41</sup>

As to the game itself: Fish is ready to play this game on the flimsiest excuse with just about anybody. But his most extensive and, to my mind, most interesting argument is with Ronald Dworkin. Fish and Dworkin are interesting, surely in part because both have been so willing to return to the fray, defining and refining their own positions. Fish persists in catching Dworkin off base in presuming a kind of certainty that he persistently denies. For his part, Dworkin clearly (and quite rightly) understands that anti-foundationalism can be an invitation to all kinds of vulgar hooliganism. He and Fish have been engaged in a running debate<sup>42</sup> over the issue that is instructive by any measure; clearly, Dworkin and Fish need each other like King Pelli-

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book is littered with acknowledgments of this sort, betraying the kind of overlap you have to expect from collected essays, but which can be so discomfiting to the reader. I wonder if Fish knows or cares that he used the same quotation (from Israel Scheffler) three times at three different places, always to make the same point. See pp. 322 & 487, both of which appear in the index, and p. 345, which does not.

39. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscomb trans. 1953). Richard Posner, in the other book under review here, dismisses Fish as "deploying an analytical apparatus that he got from Wittgenstein." R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 263 (1988).

40. For an admirable summary of this philosophical tradition in law, see Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 791-815 (1989).

41. Posner leaves himself open to virtually the same objection. "Skepticism is an interesting and perhaps irrefutable philosophical stance," he says, "but, when pushed as far as Fish pushes it, one incapable of guiding action or interpretation." R. POSNER, *supra* note 39, at 263-64.

42. See *infra* note 47.

nore and the Questing Beast.<sup>43</sup>

In Fish's current book, Dworkin comes under scrutiny in three chapters and part of a fourth.<sup>44</sup> Sometimes he is dealing with Dworkin "as he is generally understood."<sup>45</sup> But the reader who really wants to understand what is going on is left to his own devices to fill in the Dworkin gap. This is a serious shortcoming even though, as I say, I think Fish gets the better of the argument. The point, of course, is that nothing is more instructive than a competent failure, and if Dworkin can't succeed, not much of anyone can. Indeed, rather than read Fish straight through, one might be well advised to get a copy of Dworkin's *A Matter of Principle*<sup>46</sup> to go with Fish, and read the original articles in sequence. Better, if you still have the Fish originals in that cardboard "to-be-read" box, you probably have the Dworkins there, too.<sup>47</sup> What you want to do is to get out one of those big, black, beetly paperclips and bind them all together in order. The temptation will be overwhelming to put them into a brown manila envelope with the inscription "TO BE READ — DWORKIN-FISH." Resist the temptation. This is the best debate on interpretation going.

I've already said that I think Fish gets the better of it. But as Fish would surely concede, Dworkin gives him the toughest time, which is reason enough to pay attention. But beyond the core argument, there are a couple of propositions on which Fish is either suffering from polemical blindness or flatly wrong.

In discussing the manner of "interpretation," Dworkin seems to want to distinguish between judges (in the 1810s, say), who are "unconstrained" in that they have no past practice to bind them, and others (in the 1980s, say), who are constrained by such a past. Wrong, says Fish: you are *always* constrained, in the sense that life always comes to you interpreted, predetermined. And you are always uncon-

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43. That would be T.H. WHITE, *THE ONCE AND FUTURE KING* (1958) (*i.e.*, the post-Disney segment). Readers will remember that when the Beast thought Pellinore was dead, it languished almost to extinction. They needed each other like, well, Dworkin and Fish.

44. Ch. 4, "Working on the Chain Gang"; ch. 5, "Wrong Again"; ch. 16, "Still Wrong after All These Years"; and ch. 17, "Dennis Martinez and the Uses of Theory." By putting two chapters near the beginning of the book and two at the end, Fish seems to feel he has recast the debate into a larger framework. He is mistaken. They are still best read as prescribed here.

45. This is a steal from a story I heard years ago about Professor Friedrich Kessler at Yale. "How would Wittgenstein approach the issue?" Kessler asked the student. "Do you mean the early Wittgenstein," the student parried, "or the late?" "Oh," said Kessler, "just Wittgenstein as he is generally understood."

46. See R. DWORKIN, *A MATTER OF PRINCIPLE* chs. 6-7 (1985).

47. See, e.g., Dworkin, *Law as Interpretation*, 60 TEXAS L. REV. 527 (1982), reprinted in *THE POLITICS OF INTERPRETATION* 249 (W. Mitchell ed. 1983); R. DWORKIN, *supra* note 46, at 146 (as "How Law is Like Literature"); see also Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Anymore*, in *THE POLITICS OF INTERPRETATION*, *supra*, at 287. The original Dworkin-Fish exchange appeared in 9 CRITICAL INQUIRY 179 (1982) and 9 CRITICAL INQUIRY 201 (1982). A revised version of Dworkin's response is in R. DWORKIN, *supra* note 46, at 167 (as "On Interpretation and Objectivity").

strained in that you can choose whether or not to be bound by a particular practice.

I think Fish is right on both particulars, but I think his polemical enthusiasm carries him past two essential subtleties. For one, granting that I am always constrained, there are still vast differences in the way that I may *understand myself* as being constrained: sometimes I may (choose to?) be aware of my past, sometimes not. Sometimes I may (choose to?) rebel against it, sometimes not. The differences are palpable, and, I think important. Fish apparently would disagree: he devotes a fair-sized chapter<sup>48</sup> to arguing that "theory," as he defines it, makes *no* difference — nada, zero, bupkas, zilch — which would seem to exclude precisely the kind of distinction that I am insisting on here. I must say I found this material the least persuasive in the book, and not at all essential to his main argument. Fish seems to show only that the *effects* of this kind of self-consciousness are unpredictable, or at least very hard to predict. Fish evidently thinks of this as a "retreat" from a "strong" position on theory to a "weak" one (p. 331). I would have called it an "advance" from a "weak" position on theory to a "strong" one. To say that a position is untenable because it is difficult or elusive is no answer at all: it is very close to the position of Fish's critics who say that the world *can't* be as he describes it, because all that would be too inconvenient.

Fish also overlooks another possibility with Dworkin, although concededly it is not the kind of possibility that Dworkin would take as a compliment. Specifically, Fish's charge against Dworkin is an indictment for aggravated ambivalence: that Dworkin insists and persists on running with the hare while hunting with the hounds — that he tries to be an essentialist and an anti-essentialist, all at once. But suppose (as I imply) that Fish is right? Where are we? The leftists seem to assume self-evidently that "contradiction" is a disabling vice; and Dworkin himself certainly strives for consistency and coherence, nothing less. But at the end of the day, Dworkin's "ambivalence" may remain as, if not the most respectable, the most interesting thing about him.

With other commentators, Fish does a respectable but ultimately somewhat more tedious job.<sup>49</sup> There are some interesting insights. Fish offers a fine short summary of Unger's *Knowledge and Politics* (pp. 404-11). Also, Fish the Milton scholar shows the ultimately absolutist character of Unger's (like Milton's) thought. And he savors the irony of a scholar who begins with a clarion call to "politics" and ends with an anguished entreaty to "God." On others — Fiss, for example, or Hart — he does his usual stunt, but after a while, it sounds routine.

I've probably said enough here to make clear my bottom-line judg-

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48. Ch. 14; see also chs. 15, 17.

49. Ch. 6. The text is Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

ment on Fish: right as I think he is, I think it is time that he wrote another book, and this time, a different one, perhaps in the hands of a more detached and skeptical editor. There are any number he is up to: grand metaphysics, I suppose, or baseball. But I should note one possibility that is tucked away in the interstices of the current collection, ripe to be dusted off and spruced up for presentation in its own light. Fish shows that he can be one of the funniest, because most accurate, commentators on the political and social conventions of the academic life. It's essential to his point, of course: in order to understand the idea of an "interpretive community," you have to know what one is, and how it works. Fish does some of his best work fleshing it out. He has a priceless essay on receiving a book by Derrida carrying a card inscribed "with the compliments of the author" (ch. 2). He comes up with half a dozen or more possible sources and meanings, including one where Derrida says "Stanley Who?" He's equally good on how he fell behind on his dues to the Spenser Society before he knew there was such a thing (pp. 169-72). And more in that vein. If Fish is disposed to do more of that sort of thing, I count myself as an expectant, even an eager, market.

Speaking of "markets," let me make just one more point about Fish, this by way of transition. I indicated above that Fish strikes me as a good-natured sort of roughhouse, and that however sharp his jibes, I suspect he isn't really eager to wound. But there is one exception: one case where Fish seems to work up a Johnsonian kind of indignation, and to let loose with something close to fury.<sup>50</sup> "[A] slight and flawed piece," says Fish, "full of misinformation and blunders . . . uncomprehending of the positions to which it is opposed, finally less an argument than a collection of outdated pieties" (p. 310). That is, to put it mildly, atypical Fish, harsher, more savage, than anything else in the book. He saves that kind of abuse for the other subject of this review, Richard Posner.

### III

The way I heard it was this: Posner was visiting at a major law school one year when he complained he didn't seem to be making any friends. From out of the bowels of the common room, a voice growled: "Why don't you *buy* a friend?"

Sad to say, it appears not to be true. Just lately I talked to a chap who claims (plausibly, I think) to have originated the jibe. He says it wasn't Posner at all but Aaron Director, the spiritual grandfather of that brand of economics of which Posner is only an offshoot. I guess it stands to reason. Director was, by many accounts, a proud sort of guy

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50. See, e.g., Johnson, *Review of Soame Jenyns*, *A Free Enquiry into the Nature and Origin of Evil*, LITERARY MAGAZINE (1757) reprinted in 7 WORKS OF SAMUEL JOHNSON 217 (1912).

with a good knack for hurt feelings. Posner, by contrast, is at home anywhere, ready to be (as they said of Teddy Roosevelt) the bride at every wedding, the corpse at every funeral. Not the kind of guy who would have to think about purchasing friendship.

Except, as they say, academically. For Posner certainly *is* the chap who holds (with only mild vulgarization) that there can be a market for *anything*, and that the world will be a better, happier place if only you create one — a world where, as we used to say of the bankruptcy court, there are no problems that money can't solve.

Taken in context, Posner's success at putting himself on the agenda is no mean feat. One of the great risks of the cross-disciplinary academic is that he becomes what the feminists and the lefties call "marginalized":<sup>51</sup> critspeak for "out of the action," like the kid with the Coke-bottle glasses who always gets picked last in the sandlot softball game.<sup>52</sup> At the beginning of his career, Posner risked marginalization in a big way: he not only risked doing economics in the law school, he did it unencumbered by proper credentials.<sup>53</sup> Nonetheless, Posner virtually created the subdiscipline of "law and economics," or better, "law-and-economics," or still better, "lawandeconomics." The result is legal scholarship as we see it before us today. And of all the charges you might hurl at Posner now, "marginalized" is not among them. Not content with merely organizing the province, he populated it as well, in (already) one of the most productive careers that ever an academic enjoyed. Posner almost certainly exceeds any other modern scholar, both in terms of amount written and in terms of amount written about. But marginalization is not the only possible fate (or status) of the cross-disciplinary scholar. He *might* flourish, perhaps by functioning (and perhaps quite successfully) as a simple garden-variety fraud who picks, for example, an obscure topic in an obscure language and speaks loudly where there is no one around to contradict him, *stultus in eruditis, eruditus in stultus*.<sup>54</sup> Still another possibility for the

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51. You will see if I am right if you run "marginalized" or its equivalents through Westlaw or Lexis. Go ahead. Try it.

52. I suspect that an important reason for the appeal of "marginalization" is that most "soft" academics (humanities, social sciences, law) *were* kids with thick glasses and no knack for softball (present company agonizingly included). Heaven knows how the world would be different if just a few of them had ever gotten out of right field.

53. An acquaintance of mine who is a major player in another brand of interdisciplinary scholarship, when asked, "where did you train?" likes to answer, "On the john."

54. "A fool among scholars and a scholar among fools." In fact, I don't know any Latin; I got my research assistant, Steve Hanken, to scare this up. But I thought it added the right note of brooding portent. As for perpetrating cross-boundary fraud, I suspect that too much (although not all) of comparative law is guilty, and always has been. Of course, I am not certain, because I do not know the language, nor do I know the topic. But if you spend any time in the sidewalk cafes along the Mediterranean, listening to European academics expatiate on American law, you come away with two things: (1) a favorable disposition toward the indigenous food, drink, and climate; and (2) a deep-seated skepticism about the whole comparative-law enterprise. Of course, I do not in the least way mean to single out *European* academics for opprobrium here.



cross-disciplinary scholar is that he can make the creative breakthrough — demonstrating, say, that linguistics really does have something to say about archaeology, or geology about animal evolution, or whatever.

The last possible fate, more elusive and intractable than the rest, is the situation where you just can't tell what the guy is worth. You can't put your finger on the right — well, the right "interpretive community" — to evaluate it against. Even if you have to accept that he isn't a fraud, you may be able to avoid declaring him a genius because there is no one around who can convincingly certify him as a genius. As a scholar of law and economics, Posner seems to me to fall into this last category. You simply cannot convincingly dismiss him as a fraud — although heaven knows, the faculty clubs are full of sulky professors who would cheerfully push their grandmothers in front of a train for the privilege of doing so.

There is no doubt at all that he sets the agenda and dominates the debate. But dominating the debate is not quite the same as carrying the day. Whenever the Posner juggernaut steams through, aside from the true dissenters, a much larger contingent of careful and critical commentators always is on hand to say, "Well now, it's just not that simple . . . ." <sup>55</sup>

Part of the problem is the sheer volume. Anyone who writes faster than most people read is bound to leave readers more out of breath than out of words. But it is more than that. For while it is not often remarked upon, Posner in fact fits rather well into a tradition of Anglo-American intellectuals whom we have all come to know and not entirely to trust. I am thinking of Herbert Spencer, for one. <sup>56</sup> And more particularly, Jeremy Bentham. <sup>57</sup>

Bentham, Spencer, and Posner are alike in a number of respects, they are cheerful and fluent, they swim the stream of their times, they make a difference. But with both Bentham and Spencer, at least, it is clear in retrospect that they did not get it quite right. A student of

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There is every reason to believe that the problem is transcultural. The spiritual progenitor here is not the Wizard of Oz, but rather more the king or the duke from *Huckleberry Finn*.

55. See, e.g., Brennan, *Mistaken Elasticities and Misleading Rules*, 95 HARV. L. REV. 1849 (1982); Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645 (1983); Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 HARV. L. REV. 1817 (1982); Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789 (1982).

56. Suggestive of Spencer's place in social thought is the relative paucity of recent commentary, contrasted with the rich store of older material. A modern introduction is J. KENNEDY, *HERBERT SPENCER* (1978). For Posner's own appreciative remarks on Spencer, see pp. 284-85.

57. The recent literature on Bentham is far richer. Noteworthy works of direct relevance to the law include W. TWINING, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE* (1985) and D. LYONS, *IN THE INTEREST OF THE GOVERNED* (1973). Posner has gone to some length to distance himself from Bentham. See, in particular, R. POSNER, *THE ECONOMICS OF JUSTICE* 31-47 (1981).

mine once said that he didn't think Bentham liked being a human being. I think Bentham may have *liked* it well enough, but I'm not sure he knew exactly what it was *all about*.<sup>58</sup> He played the role of a human being like George Bush plays the role of a good ol' boy: as if he learned all the moves just last week in a total-immersion cram course for foreign visitors. Much the same analysis would seem to apply to Spencer. And Posner has something of the same tone: cheerful, but not quite good-humored; self-assured, even if not serene. Probably not as clubbable as, say, Stanley Fish.

So it is no surprise that, when the word got out that Posner was doing a book on literature, there were sighs of exasperation (oh, not again!) from the faculty lounge, among the grumbles of envy (how *does* he do it?). And a lot of breathy voices whispering: *This* time will he get it badly wrong? *This* time will he fall flat on his face?

The quick answer is: not really. Posner's *Law and Literature: A Misunderstood Relationship*, has some real merits and some interesting insights, although certainly not up to the absurd overpraise on the jacket.<sup>59</sup> But, taking all things together, it's a bit of a mishmash — more the first draft of a book than the final product. For the fact is that Posner, the great *simplificateur*, has not even the pretense of a thesis. No, that is too strong. He has the *pretense* of a thesis — that the relationship between law and literature is overrated and can be overdone. But that's pretty thin soup for Posner, and he wasn't able to do that much until the conclusion, after he had all his evidence available to survey (pp. 353-64). Before the very end lies an uncharacteristically ill-digested gruel. I will try to explain that point in some detail below. But in order to understand it, I think we need to begin by considering just how the book came to be.

Stanley Fish's entry into legal theory seems to have come through his encounter with Dworkin.<sup>60</sup> Posner's story is similarly specific, but seemingly more instructive. It starts with Robin West, who wrote a paper on "authority, autonomy, and choice" in modern life. Quite aside from the merits of the paper (which are many), West faced a

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58. Is it a cheap shot to recall Bentham's enthusiasm for the "auto-icon" — the process of preserving one's own (or perhaps one's ancestor's) physical remains and having them propped up around the place as statuary? Bentham directed that his own remains be preserved and displayed in this way. Apparently the preservation process did not work as well as intended, but at University College, London, his bones (filled out with straw) sit in his original clothes in a glass box. The head, alas, is a wax replica, but my ex-wife, who normally can be trusted with this sort of thing, advises that the genuine article did survive, if somewhat the worse for wear, and that if you say to the guard, "May I see the head?" you will be accommodated. See generally J. DINWIDDY, BENTHAM (1988).

59. Though what could be? "Lucid, witty, brilliant"; "I am filled with admiration"; "should be on everyone's bookshelf"; "the most searching and inclusive treatment of the subject I've ever read." It makes you wonder whether the English professors of America (a) suffer from an epidemic of softening of the head, or (b) expect to have business pending shortly in the Seventh Circuit Court of Appeals.

60. See *supra* notes 42-47 and accompanying text.

number of hurdles in seeking publication. She was an unknown beginner at a thoroughly forgettable law school, and she had cast her paper almost on the model of an undergraduate essay exam: as a comparison between the works of two writers. The two she chose were Franz Kafka and Richard Posner.<sup>61</sup>

Faced with these stiff odds, West got lucky. Twice. First, she got the paper accepted by the *Harvard Law Review* — no mean trick at all, when you reflect that, in the age of the photocopy machine, it is far harder to get into the *Harvard Law Review* than it is to get into the school proper.

Second, she got what every young scholar dreams of — an “attack” (or at least a response) by the Great Man Himself. Harvard published Posner’s “The Ethical Significance of Free Choice,” subtitled (sweetness multiplied!) “A Reply to Professor West.”<sup>62</sup> West, of course, has gone on to establish herself as one of the important young feminist legal scholars.<sup>63</sup> Posner’s role in West’s career probably can be understood as a generous gesture.<sup>64</sup> But what interests me is not the place of Posner in the career of West, but the place of West in the career of Posner.

For the fact is, the Golden Age of Posnerian law-and-economics has just about run its course. Oh, certainly, there will continue to be economics in legal work. One is tempted to say “just as there always has been,” but that implies that law and economics changed nothing. Of course it changed a great deal, and the world is, at least in some respects, a better place for it. And there will always be someone around to argue that, say, rich prisoners suffer more than poor prisoners because they have higher opportunity cost.<sup>65</sup> And if some economist wants to sell the argument, some law professor will buy it (the market at work!). But the recent literature on economics in law exhibits at least three tendencies that augur ill for the Posnerian strain. One is the emergence of studies which, while ambitious and highly sophisticated in their economics, make a more modest claim for the place of

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61. The paper is 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).

62. 99 HARV. L. REV. 1431 (1986). West’s response is West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

63. See, e.g., West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

64. The academic grapevine reports that when West was under consideration for a post at Chicago last year, one of her great advocates was Posner — evidently he likes young people with spunk. I don’t mean to belittle West’s work which, as I suggest, has many merits. But one of the ingredients of success is good luck, and she has had some of it.

65. Lott, *Should the Wealthy be Able to “Buy Justice”?*, 95 J. POL. ECON. 1307 (1987). This example came to my attention through Donohue, *Law and Economics: The Road Not Taken*, 22 LAW & SOC. REV. 903 (1988).

"economic" solutions in life. The recent work of George Priest is a conspicuous example.<sup>66</sup> The second is the development of "corporate finance" — a "dialect" of law and economics, perhaps, but a dialect with more modest pretensions, more credibly achieved.<sup>67</sup> Finally, a growing number of articles contribute not merely technical, but broad-based criticisms of law and economics from sophisticated insiders.<sup>68</sup>

Even more remarkable, there is a growing body of what you might call "post-economic" material in the law reviews — material that may build on, but departs from and goes beyond, economics as conventionally defined. I will be discussing this material after examining Posner's book in more detail, when I can put it in some kind of context. For the moment, what all of this amounts to is a demonstration that Posnerian law and economics stands accused of the worst of all academic or intellectual vices — it has become a bore.<sup>69</sup>

I suspect, in other words, that more than the spirit of abstract inquiry prompted Posner's response to West; if you like, you might call it self-interest.<sup>70</sup> That is, I suspect Posner was smart enough to understand that there wasn't much ore in the old vein and that he didn't want to be left alone. By responding to West, he established two things at once. First, he made it clear that he was a hip guy, that no moss grew on him, so that when someone announced (rightly or wrongly) the death of law and economics, he could say he knew it all along. And second, he makes his way into the right Rolodexes, so he gets cited in the right articles, invited to the right conferences, the whole works.

Almost certainly, I'm overstating the case here. Posner is, after all, the very quintessence of a legal academic, and now he has a lifetime job with the police to collect his salary. Surely he cannot be accused of such narrow utility-maximization? Well, maybe and maybe not. Now to the book.

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66. See, e.g., Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987). It is true that Priest's Yale colleague, Guido Calabresi, has long practiced a brand of economic analysis more subtle and thus less conspicuous than some of the Posnerian excess. But as the fellow says: That was then; this is now. In the early days, Calabresi, however modest in his pretensions, seemed astonished at the breadth of his own vision, and unclear as to where it might take him. See Calabresi, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

67. See, e.g., Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984); Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693 (1985).

68. See, e.g., Cooter, *Liberty, Efficiency, and Law*, LAW & CONTEMP. PROBS., Autumn 1987, at 141; Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25 (1989).

69. For another, not exactly parallel, account of Posner and the world beyond law and economics, see Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988).

70. I know I'm trying to bait Posner into denying that he is a rational maximizer. Only in my dreams, I suspect.

For the connoisseur of Posnerianism, much of the book will be familiar. It includes many of the distinctive markings by which we can easily identify Posner: superabundant energy, vast (if patchy) erudition, the crust of a burglar. The rhetorical strategies are likewise familiar. Here, as elsewhere, Posner likes to disarm his critics by proliferating his learning almost offhandedly ("Oh, *everybody* knows that!").<sup>71</sup> Similarly, he likes to preempt criticism by suggesting that he understands *all* the possible defects in his position (without really showing exactly how he escapes them).<sup>72</sup> Along the way, he scatters a few elementary self-contradictions that betray the casualness of his construction. Thus, on page ninety-eight he says that "the key" to Shakespeare's greatness is found *inter alia* in his "brilliant plots" — a wholly implausible suggestion that is effectively countered by much of Posner's own plot analysis. Similarly, he says that "[a]nyone who to-day took seriously the implied moral values of . . . *The Iliad* . . . would be a public menace" (p. 300). Yet two pages later, he is saying that "the *Iliad* is the oldest surviving expression of awareness that foreigners who are your mortal enemies might nevertheless have feelings as you" (p. 302). Exactly; that is why it is a heroically *moral*, rather than immoral, piece of work.<sup>73</sup>

71. Posner seems to take particular delight in parading his skill in foreign languages, offering his own renderings of German (pp. 115, 120, 124), French (p. 86), Greek (pp. 212, 278), and English (p. 254). The Greek seems particularly gratuitous. The passage is five lines from the *Iliad*, where Chryse appeals for the return of his daughter. Posner says he translated "literally, to preserve the word order, which is important . . ." P. 277. Apparently he wants to show the "tit-for-tat" structure of the passage: you get your wish, I get mine. But in fact, the structure is almost inescapable and any of a dozen translations would have made the point. E.V. Rieu renders it: "May the gods that live on Olympus grant your wish — on this condition, that you show your reverence for the Archer-god Apollo Son of Zeus by accepting this ransom and releasing my daughter." See HOMER, *THE ILIAD* I (E. Rieu trans. ed. 1950). And Alexander Pope's classic translation uses the same structure:

Ye Kings and Warriors! may your Vows be crown'd,  
And Troy's proud Walls lie level with the Ground.  
May Jove restore you, when your Toils are o'er,  
Safe to the Pleasures of your native Shore.  
But oh! relieve a wretched Parent's Pain,  
And give Chruséis to these Arms again;

HOMER, *THE ILIAD* 44 (A. Pope trans. 1965). It is also unclear why Posner, in transliterating the Greek (p. 278) adds emphasis to the first "A" and the first "o" in "Apollo" (Gr. "Apol-lona"). The "o" in this case is "omicron," unlike the second "o," which is an "omega" and thus correctly lengthened. The first "A" bears a *spiritus lenis*, but is not otherwise distinguished. Posner may have failed to recognize that this is a penultimate spondee, rather than the far more common dactyl.

72. See, for example, his discussion of "intentionalism" in ch. 5, and compare his yes/no relation to utilitarianism in R. POSNER, *supra* note 57, at 48-87.

73. Posner might have understood the full impact of his own remark had he paid more attention to James Boyd White's essay and absorbed what White was saying, rather than what Posner wanted him to say. See J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 24-58 (1984); cf. pp. 52-54. The seminal modern appreciation of the *Iliad* as a distinctively moral work is Novis, *L'Iliade ou le poème de la force*, *CAHIERS DU SUD*, Dec. 1940, at 561, Jan. 1941, at 21. Concededly, other critics make a case to the contrary, but the point stands in Posner not so much as a settled dispute as an unnoticed contradiction.

Probably of greater entertainment value, the book is dappled with some of those swaths of economic reductionism that so outrage Posner's foes. I remember the story of a fellow who toured the great cities of Europe discovering exotic caterpillars. How do you find caterpillars in, say, the heart of Paris? "Oh, it's easy — you just look for their trails."<sup>74</sup> Posner, likewise, can find the economic caterpillar where the rest of us can't even see the slime. "Revenge," for example, is a caveman version of the felicific calculus (p. 28). Literary value is survival in the competitive marketplace (p. 71). Alcoholics "choose" alcoholism over sobriety in much the same way that you or I choose widgets over blivets, chintz over lace (p. 195). And my own favorite: discussing *The Merchant of Venice*, Posner remarks that "no one asks why Antonio did not protect himself from default by insuring his cargoes . . . ."<sup>75</sup> Nobody asks why Ahab didn't have a sharper harpoon, either, but it certainly would not have done much for the plot.

There is a good reason for this particular kind of absurdity. Posner, by training if not by temperament, comes from a tradition that makes him peculiarly ill-qualified for literary studies. The first principle of Posner's economics is its *positivism*, here distinguished by its fealty to what you might call "the great as-if," known more technically as "the Alchian thesis."<sup>76</sup> The Alchian thesis holds, in effect, that if my *prediction* of your behavior turns out to be accurate, then it *makes no difference* whether my assumption of your motivation is the same as your interpretation of your motivation. You say you are building a cathedral; I say you are maximizing utility. If the hypothesis of utility-maximization proves fruitful, then that is all there is to it: no self-respecting "science" need go further.

It takes only the briefest reflection to suggest how momentous this "as-if" might be, as a methodological hypothesis. If the great as-if is going to hold, then the "interpretative" studies, including virtually all of literary studies, are irrelevant. For "interpretation," and not prediction, is what literary studies are about.

Now, the notion of an "interpretative" science is a contentious idea, to put it mildly, and the controversy bristles with abstruse exegesis, technical jargon, the works. And at the end of the day, the Alchian hypothesis might even be right. But Posner, giving testimony to

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74. If you don't like that one, remember the tailor who went to visit the king. "What was he like?" his friends asked. "Oh, about a 42-long."

75. P. 94 n.34. Posner adds: "as he could have done," giving him the opportunity to festoon the manuscript with citations to two histories of insurance law — thus assuring us that actuarial, as well as literary, history, falls within the purview of his competence. Is it captious to inquire just where Posner might be locating the hypothetical Antonio — *i.e.*, in "Venice," or in "Shakespeare's *idea* of Venice" (*i.e.*, "London")?

76. After A.A. Alchian. A concise explanation and criticism is in M. BLAUG, *THE METHODOLOGY OF ECONOMICS* 115-19 (1980).

his security in the positivist tradition, doesn't seem to notice it is a problem.

This fact alone is enough to suggest the familiar Posner, full of cheery indifference to second thoughts or criticism. But do not be deceived by the surface. Despite all the similarities in tone between this Posner and the Posner we have known, something subtle but important stands revealed before us. On close scrutiny, I think this book presents a Posner far more placating, more eager to please, more uncertain of his own position. The parade of intellect is a bit too urgent, the cocksureness a bit shrill. It's not so much "*everybody* knows that." It's more like "*I* can play with the big kids, *too*." If Fish is stout Cortes gazing at the Pacific, then Posner is Liza crossing the ice.

You can get the picture, for example, in the very first line, where Posner speaks of "Law and literature, the subject of this book" (p. 1). Now any sophisticated academic — certainly Posner — is aware of just how critical the matter of turf is to the academic enterprise. After all, Posner built his career on creating his own subdiscipline. And much of his work can be understood as just that: not just *exploring* law and economics and claiming it for the queen, but *declaring its existence* and demonstrating and justifying the same.<sup>77</sup> I have suggested above that there is not *one* field called "law and literature," but rather several, more or less rudely thrown together. Posner seems to recognize this, but he responds in a curious and instructive way. He *itemizes* a great number of things that might *pass* as law and literature. Indeed, his introduction is heavy with lists: five "most important connections between law and literature" (pp. 5-9), together with four "potential links" that are "superficial or misleading" whatever that may mean,<sup>78</sup> and finally *nine* "principal omissions" — *i.e.*, fields that "I have not tried to explore . . ."<sup>79</sup>

But how would a young man of spirit (*i.e.*, Posner circa 1967) have responded to this disarray? He would adopt one of two postures, both drawn from the model of the Italian city-states. These are: (a) Louis XII seeking conquest by invasion and annexation; or (b) Cesare Borgia seeking the same by mobilizing the home folks.<sup>80</sup> Posner adopted model (a) when he invaded the precincts of the law with the shock troops of economics twenty years ago; a younger and more energetic Posner might have undertaken either model today. But Posner does

77. It is customary, for example, to treat his coursebook as "seminal," with the sense that it created the field.

78. P. 1. It is not clear, for example just who is superficially misled, but one has the sense it may have been Posner himself as he set out to assemble materials for this book.

79. P. 19. But they are fields that he wants to assure us he knows about, and has thought about. Clever students do the same sort of thing on the last part of their law school essay exams.

80. If the analogy of Renaissance buccaneering seems ungracious, consider the discussion of the revival of individualism and the rise of Renaissance humanism in J. BURKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* (1958). See in particular pp. 163-74.

neither. Indeed, at the bottom of page one, he refers to the "potential links between law and literature" as a "rich but confusing array." A younger Posner would have said "a rich but *seemingly* confusing array," and then gone on to show us how, in fact, it was not confusing at all.

And so the theme of the "misunderstood relationship" turns out, on closer scrutiny, to be no theme at all. That subtitle really gives the game away: it is sufficiently abstract to cover almost anything, correctly betraying the inference that almost anything is what the author intends to cover. The earlier chapters bear the mark of the "Type 1" or "ethical" approach to law and literature, criticizing other writers, or criticizing other critics criticizing other writers. Later chapters examine, by turns, strategies of interpretation (Type 2) and judicial rhetoric (Type 3). The final chapter deals with issues of defamation, obscenity and copyright — topics which, as Posner seems to concede, are not normally discussed under the rubric of "law and literature" at all. While he has scattered worthwhile insights in this final chapter, they really belong more to the law of property than to anything associated with literature and I will not discuss them further in this review.

Further inquiry fails to quash the earlier suspicion of disorder. Chapter 1, entitled "Revenge as Legal Prototype and Literary Genre," sounds like it promises a theme, but in fact, it offers a peculiarly random grab-bag of material — a collation of Cliffs' Notes-style plot summaries, together with a good-natured chiding of Posner's former colleague, James Boyd White, for *not* discussing revenge in an instance where Posner seemingly feels he should have.<sup>81</sup> At best, the chapter reads like a continuation of the theme Posner pursued more or less perfunctorily in the second quarter of *The Economics of Justice*.<sup>82</sup> Still, in both that work and his new one, it is not entirely clear what Posner is up to. In fact, I think Posner does have the germ of a unifying theme for all this material, although I suspect that he, himself, has not understood it yet. In footnote forty-eight on page 161 of the present book, Posner discusses the (possible) role of revenge in establishing the divergence between the tradition of positivism and the tradition of natural law. Now, *that* is a topic with some potential. And, Posner might be able to use all the material he seems to have collected on revenge. But the notes alone are not sufficient to constitute a text, or even an essay on the subject.

Chapter 2, called "The Reflection of Law in Literature," plows some familiar ground: a discussion of literary works that take (or purport to take) law as a theme. Posner's choices of subject are for the

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81. The culprit text is an essay by White on the *Iliad*, though why in heaven's name White should be taken to task for not writing about Issue B when he did (concededly) write about Issue A is nowhere disclosed. See J.B. WHITE, *supra* note 73, at 24-58.

82. R. POSNER, *supra* note 57, at 119-227.



most part pretty predictable — *Crime and Punishment*, *The Merchant of Venice*, that sort of thing. Once again, however, the crux of the matter seems to be tucked away in another chapter. Specifically, Posner says: "The occupational hazard of lawyer-critics is to suppose that literature on legal themes represents law more literally than other literature represents its themes" — one "might as well read *Animal Farm* as a tract on farm management, or *Moby Dick* as an exposé of the whaling industry" (p. 180). But this passage represents precisely the trap Posner sets for himself: he seems to think that "legal" literary works can be judged *on the basis* of their factual accuracy. On this analysis, a work that fails to represent the legal universe with factual accuracy is impaired in its relevance to the lawyer's life. Thus, Posner dwells at length on *The Merchant of Venice* and "[t]he lack of realism in the play's treatment of law . . ." (p. 94). In the same vein, he tries to show how Kafka's *Trial* is a dream-like parody of the "real" judicial process, not the thing itself.<sup>83</sup>

Suppose for a moment that Posner is correct in his assessment of factual accuracy in books of this sort.<sup>84</sup> What are the implications? They are surely interesting and complex; but Posner touches on them only indirectly and in the most ill-formed way. Without attempting to dispose of the issue as a whole, let me offer two possible lines of approach.

First, even assuming that a particular work (the *Merchant of Venice*, say) is *factually* inaccurate, it does not follow in the least way that the work is inaccurate in spirit or texture or tone. It may be, and it may not. The issue is difficult, and the possibilities are explosive — it is certainly easy to play fast and loose with notions like "spiritual" accuracy, as any decent lawyer will understand. But it *is an issue* — or if it is not, it rests on the opponent (as it were, Posner), to show just why it is not. And Posner here has done nothing of the sort.

Second, Posner seems to assume (although he doesn't spell this out) that if a work has no factual relevance to the life of the lawyer, then it can have no more relevance to the life of a lawyer than it may to any other person.<sup>85</sup> But this also is undemonstrated. It may be that the "ethical core" of each and every great novel is universal. Or it

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83. See, e.g., pp. 119-27. He seems similarly concerned to stress the differences between Anglo-American and continental legal procedure, to the disadvantage of the latter. Thus, Camus' *L'Etranger* provides "a reason, however inadvertent on Camus' part, for preferring the Anglo-American system" (p. 88). In passages like this, one is tempted to infer that the measure of literary merit is the degree to which a work gives grounds for self-congratulation about the superiority of the Anglo-American legal system.

84. In fact, I think that Posner has rather the better of things on matters of fact.

85. Also (and more tentatively), I would venture that Posner has no very clear notion of why literature might be important to *anybody*. He is generous with words like "marvelous" in labeling the works that he is skewering (see, e.g., p. 122). But one has the sense that he thinks of literature as little more than an entertainment, with no conviction that it might play a part, say, in a person's moral education.

may be that the ethical challenges presented in certain works of art are specially or even peculiarly relevant to the life of the law — *whether or not* they present the law as their “nominal” subject. On this model, *Billy Budd* may be an “important” lawyer novel independent of what it may say about the law, or *Middlemarch* may be an important lawyer novel even though it is not “about” law and lawyers at all.<sup>86</sup> They may be — but you won’t get any discussion on the point, *pro or con*, from Posner, who doesn’t seem to have thought of the idea.<sup>87</sup>

Chapter 3 is a deception, but a kind of deception familiar in academic work, for which Posner is no more culpable than anyone else. The chapter is called “The Literary Indictment of Legal Injustice.” In fact, it is no more than an extended book review: the true subject is Posner’s criticism of *Richard Weisberg’s criticism* of the literary indictment of legal injustice — similar to, but hardly the same as, the topic promised. Adding my own two cents’ worth to these *arcanae* would be unfairly burdensome on the reader here; suffice it to say that I took my own shot at Weisberg in a review apparently published about the same time as Posner’s, and that I think Posner and I parallel each other at a number of points.<sup>88</sup>

Chapters 1 through 3 seem to belong more or less to the ethical or Type 1 branch of legal studies. The rest of the book largely reposes elsewhere. Chapter 6, on “The Judicial Opinions as Literature,” seems to me to belong to Type 3, or rhetorical studies. This chapter seems more superficial than much of the rest of the book, not inviting extended comment. Anyone seriously interested in the rhetoric of law and economics would do better to start with Donald McCloskey’s fine article published in this journal two years ago (certainly too late for consideration by Posner in his book).<sup>89</sup>

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86. Yes, of course, *Middlemarch* is “about” the law to the extent it is, for example, about a society in which divorce is nearly impossible. But by this measure, *everything* is “about” the law, and neither Posner nor I would accept so expansive a definition.

87. Posner does seem to recognize the possibility in a more or less incidental way at the end of the book, but this is so far from his main discussion that it bears all the earmarks of an afterthought. Something to improve on in the next draft, if he ever gets to it.

88. The original of this chapter is Posner, *From Billy Budd to Buchenwald*, 96 YALE L.J. 1173 (1987). Ayer, *The Very Idea of “Law and Literature,”* 85 MICH. L. REV. 895 (1987). Risking tedium, I must add that I think Posner’s interpretation of Nietzsche in this chapter is superficial in the extreme. While he correctly accepts Nietzsche as the author of the notion of *ressentiment*, he seems unclear on whether Nietzsche is the *critic* of the “resentful” man or is himself the man he criticizes. Nietzsche himself had no doubts on the point: he thought the “resentful” man was a great betrayal of human possibility. Nietzsche may have been wrong, but the point, like many others raised in Posner’s book, remains unexplored because it goes unnoticed. I also think he is far too simplistic in his analysis of Camus’ *L’Etranger*. For one thing, it may be true that Mersault was a culpable wrongdoer (Posner and I agree here). But the fact remains that Mersault may have been executed for the wrong reason (Posner seems not to consider the point). Moreover, while Camus may or may not be culpable for the views imputed to him on the basis of *L’Etranger*, it seems to me that at least he had adopted a more sociable point of view by the time he wrote *La Chute* and *L’Homme Révolté*.

89. See McCloskey, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752 (1988).

In Chapter 5 on interpretation, Posner at once seems to embrace and to deny a theory of original intent<sup>90</sup> the idea that we must, or can, be "bound" by the "intent of the drafter" in construing a legal directive. In this discussion, Posner focuses on two issues while largely ignoring (as if unnoticed) a third. The two that he discusses are: (1) whether "original intent" is doable — *i.e.*, whether we can determine intent in any useful way; and (2) whether the task of determining intent is the same for literature as it is for law.

The undiscussed third issue is whether *any* theory of original intent — naive or otherwise — makes sense. I don't want to be misunderstood here: I suspect that *some* version of originalism probably *does* make sense. But just what version that might be, or on what basis it might be justified, is far from clear. Posner, unfortunately, seems to regard the case for originalism as self-evident and therefore not in need of justification.<sup>91</sup>

Posner's failure to explain or justify his version of intentionalism cripples his discussion of the two other points. Thus, as to the first — the feasibility of intentionalism — Posner's answer seems to be: yes, there are feasibility problems with intentionalism, but you can do it "well enough" (my words). Posner's position seems to me at least arguable, but the critical issue is — well enough in terms of *what*? Particularly if you concede the feasibility problems (as Posner does), then the best you can do is a kind of cost-benefit analysis, showing what you gain by the compromises you must perforce make. And you cannot do that without knowing the benefits of the intentionalism you are trying to protect.

As to the second — the relation of "literary" interpretation to "legal" — Posner's presentation seems to me to betray a fundamental misunderstanding. His thesis is that the "literary" interpreter is free in a sense that a "legal" interpreter is not — *i.e.*, that the "legal" interpreter has a social obligation that the "literary" interpreter does not share. In a very restrictive sense, Posner is undoubtedly onto some-

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90. Once again, this seems to be a familiar Posner rhetorical technique: to make it clear that he understands all the sophisticated criticisms of a position, and to say that of course he wouldn't believe anything *that* naive — without ever showing exactly how, and in what way, his own position differs from the "naive" position just criticized. This is his tactic with originalism; he adopted somewhat the same strategy several years ago in showing why he was not a utilitarian. See R. POSNER, *supra* note 57, at 58-87.

91. Unless you count a single paragraph on p. 246, which I quote in full:

I cannot hope in this chapter, or in this book, to persuade doubters that the intentionalist or communicative view of statutory and constitutional interpretation is the correct one. That would require a book of its own. But I hope I have persuaded the reader that criticisms of an intentionalist approach to literature — criticisms I find convincing — do not undermine legal intentionalism.

That paragraph occurs something over halfway through the chapter, which probably is sufficient to demonstrate just how improvisational this presentation must be. In any event, it is not the least way plausible that a case for interpretation "would require a book of its own." Or at any rate, not for so capable a *simplificateur* as Posner.

thing here. That is, a "legal" interpreter can support his interpretations with violence far more easily than his literary counterpart: she can call out the bailiffs. But this shows only that she has an obligation to interpret *rightly*. It does *not* show what right interpretation might consist of. Posner, of course, assumes originalism. But he seems to assume that a failure to interpret according to original intent is a failure to interpret rightly. This is true only if originalism is itself right, which, to repeat, he has not shown, or even attempted to show.

Posner is also incorrect in assuming that the literary interpreter is as free as he seems to suppose. True, the *cost* of an error in interpretation may be lower when it is the error of some ink-stained scribbler in a law review than when it is the error of, say, a Seventh Circuit judge. But the ink-stained scribbler has just as great an *obligation* to truth as any judge, no matter how powerful. Posner seems to have confused the *consequence* with the rightness or wrongness of the *thing itself* — a vulgar kind of instrumentalism of which he likes to think himself free.<sup>92</sup>

This leaves me with Chapter 4, which lies at the (physical) center of the book, and seems to me central also to understanding whether it is possible that Posner will ever achieve a coherent notion of literature and the law. The chapter is called "Two Legal Perspectives on Kafka." This is, in a sense, a very odd title, and serves to show just how unformed Posner's thought must be. What we have here is Posner's side of the Posner-West debate, discussed above.<sup>93</sup> Presumably the "two" views are Posner's and West's, although here again (as with the Fish essays discussed earlier), we are up against the irritating problem that the adversary does not speak for herself: better to think of it as "Posner's view," and "Posner's view of West's view," and remember that within these covers, she does not get a chance to make her own case.

In any event, Posner writes as if the Posner-West debate was about *Kafka*. It is not. In fact, the full title of West's seminal essay is "Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner."<sup>94</sup> Thus, at the very least, it is about *Posner* just as much as it is about *Kafka*. In any event, as the title makes clear, it isn't really *about* either of them: it is *about* "Authority, Autonomy, and Choice," or "[t]he Role of Consent," with *Kafka* and *Posner alike* serving as no more than examples.<sup>95</sup>

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92. I leave aside the question whether the ink-stained scribbler may have more long-run influence than the circuit judge. Of course this may be true, but it is also true that I may win \$40 million in the lottery. True, and not worth losing any sleep over.

93. See *supra* notes 61-64 and accompanying text.

94. See West, *supra* note 61.

95. Posner got it better in his Harvard response, entitled *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986).

As a rhetorical ploy on West's part, it was grand, which the Harvard Law Review editors happily understood: everybody<sup>96</sup> knows about Kafka, and knows what poor, miserable wretches his characters are. Show that Posner's moral vision is Kafkaesque, and you have done a great deal to undermine it. It is therefore a matter of great interest that Posner chooses to respond with an essay about Kafka, rather than going straight to the larger issue.

A fair-minded reader might object that Posner should be allowed to play by West's rules. She tried to show that Posner *is* like Kafka; let him show that he *is not*. That might, indeed, have been a legitimate tactic. But it isn't what Posner has done. Rather, he tries to show that West misunderstands Kafka. Still, assume that he is correct in this assertion. Even then his decision has nothing to do with her underlying point, that Posner's universe is constructed on an impoverished model of choice. Put simply, what divides the Posnerians, on the one hand, from West and her ilk is the question whether all choices are alike. The Posnerians say "yes." Their opponents say "no."

There is a great gulf fixed here, and no one has yet figured out how to bridge it. You get it in sharpest relief in this passage, just a little over halfway through Posner's book: "An alcoholic surrenders an important part of his freedom, and, it might seem, gets little in return. Yet to prohibit people from becoming alcoholics would infringe their freedom to choose a particular, if to the sober a revolting, mode of life" (p. 195). One can pretty well say that if you buy that, then you are a confirmed Posnerian. On the other hand, if you believe that the Posnerian game makes no sense without some notion as to what it is to be a person; that some "choices" expand the person, while some diminish her; that interfering with the power to choose may be, however terrible a risk, still a necessary risk as part of our humanity, then you take a different view. The interesting stuff in current legal thought is the work (like West's) that is trying to develop just this sort of distinction.

Two points about this work are important. First, it probably owes a great deal to "vulgar" law and economics, in that it wouldn't have come into being without the spur and goad of a generation of naive Posnerians. Legal theorists didn't really worry about what it meant to be a person before the economists put the issue in doubt: in adversity lies opportunity.

Second — and this is very important — this new "personalism" is by no means the province of any particular political sect. West herself seems determined to position herself on the "feminist left."<sup>97</sup> Other important contributions come from other scholars whose "feminist"

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96. Or at least, the readers of the *Harvard Law Review*.

97. See West, *Jurisprudence and Gender*, *supra* note 63. By "feminist left," I mean the "left"

credentials are not open to doubt.<sup>98</sup> On the other hand, one of the first important attempts to outline a rights-based case against vulgar economism came from Charles Fried, certainly the *bête noir* of the politically correct.<sup>99</sup> And the most eloquent recent statement of a notion of personhood is Anthony Kronman's new essay on "Living in the Law."<sup>100</sup> Indeed, if anyone is missing from this catalog, it is the "conventional" (as distinct from the "feminist") left.<sup>101</sup>

In my mind, this new literature of "personalism" is very much the center of the action in the law reviews today, just as the center was with Coase and Calabresi — and the young Posner — a generation ago. Increasingly, Posner seems to meet the new critics with some very shopworn arguments. *Of course* it limits the freedom of an alcoholic to constrain his choice. *Of course* my helper may be my enemy. *Of course* resources are limited and *of course* paternalism has costs. We *know* that. But it's no longer sufficient as an *end* to the argument. Today, it is just the beginning.

I don't mean to evoke pity for poor Posner here: I recognize that Posner will still be at the head table, giving speeches and accepting plaques, while I am eking out my pension by emptying the ashtrays in the lobby. But I do think he understands that, in some important sense, the game is up, and that the play of Posner-economics will never be quite as much fun again as it was before. The boats, the cabs, and the donkey carts are loaded; the train is building up steam in the station, and Posner is rushing to get on board. He probably *will* get on board, too — no, he *is* on board, fumbling his way down the aisle ('scuse me; pardon me; 'scuse me please), lugging a fairly large briefcase full of paperwork, and finally he'll find himself a place in the club car, near the brandy and good cigars. And inevitably, he'll talk. And more and more, he'll talk about how things Used to Be. We all grow

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flank of "feminism" — if, indeed, feminism *recognizes* a left. The terminology is mine. West makes her own attempt to classify feminists in the article just cited.

98. Heading the list would be Margaret Jane Radin. See, in particular, Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

99. See C. FRIED, *RIGHT AND WRONG* (1978).

100. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987). In this essay, Kronman argues not just for a particular notion of personality, but also for the relevance of that notion to the life of the lawyer. It is possible to embrace the first of his two points while retaining reservations about the second. For the core of his notion of personality and choice, see *id.* at 850-52.

101. It seems to me that scholars on the left have been most effective in attacking "vulgar economism" when they surprised the enemy in its own tents — *i.e.*, when they undertook to show the incoherence of the economists' analysis from within the premises of economics itself. See, e.g., Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981). This is not the place to give an account of just why the left has been so silent on the concept of the person, but it probably has something to do with the left's skepticism about the idea of rights. See, e.g., Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

older, and the unlucky grow old. First you forget names, they say; then faces; then you forget to pull your zipper up; then you forget to pull it down. It's a miserable business, and you shield yourself from the misery by wrapping yourself in old times — the good times before the floods of feminism, of crypto-Marxism, of literary criticism, when Milton and Kafka scholars knew how to keep their place. Why, did I ever tell you the one about the market for babies? Yes? Well, it's a good story, so anyway, but here goes . . .