

## Law, Culture, and Humility

Steven L. Winter

Hermeneutics seems to me to be animated by this double motivation: willingness to suspect, willingness to listen; vow of rigor, vow of obedience. In our time, we have not finished doing away with *idols* and we have barely begun to listen to *symbols*.  
 – Paul Ricoeur<sup>1</sup>

If there was a moment when the study of Law and Humanities came of age, it was at the 1989 Annual Meeting of the Association of American Law Schools. In a packed Grand Ballroom B, Margaret Jane Radin talked about how she uses the poetry of Wallace Stevens in her first-year law, language, and ethics course. Martha Minow read a poem by Adrienne Rich. James Boyd White talked about the Cathedral of Chartres and the generations of workmen who toiled in its construction without, of course, any expectation of ever seeing the completion of their handiwork.<sup>2</sup> Law, I recall him saying, was a similar communal work of art that calls on us to engage with it in dialogue.

Or something like that... The synopsis in the meeting program was only marginally more helpful. It described the panel's subject as "that of personal and community wholeness, characterized by dialogue, the translation of disciplinary languages, and the grasping together of scattered realities."<sup>3</sup> In fact, I distinctly remember Martha Minow saying afterward that she had been on panels with White before and that still she had no idea what he was talking about. I could relate to her

<sup>1</sup> Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation*, Denis Savage trans. (New Haven & London: Yale University Press, 1970), 27.

<sup>2</sup> According to the *New York Times*, he also talked about Shakespeare's sonnets, Burmese art, Dante, Picasso, and Gertrude Stein. David Margolick, "Conclave in Herringbone Ponders Lofly and Mundane in Legal Education's Muddled Mission," *The New York Times*, January 13, 1989, B6. I discuss Radin's reading of the Stevens poem, among others, in "Death Is the Mother of Metaphor," *Harvard Law Review* 105:3 (Jan. 1992), 745, 750–53, 769–72.

<sup>3</sup> Margolick, "Conclave in Herringbone" at B6.

bemused reaction, having taught from *The Legal Imagination*<sup>4</sup> in my criminal law class the previous year. I was nevertheless intrigued.

Later that year, White reviewed Judge Posner's book on law and literature.<sup>5</sup> In that review, he reprised the themes of his Association of American Law Schools address.<sup>6</sup> More importantly, White noted the emergence of a loose sort of Law and Humanities movement –

not in the political sense of the term, for there are no leaders, no manifestoes, no agendas, and no common program, but in a larger sense, as one might think of movements of the earth. What has happened is that many minds . . . have turned from the language of social science that has so dominated legal thought for the last fifty years to the humanities, and in doing so have expressed a widespread sense of the inadequacy of our current languages (and texts) to our experience of law and legal criticism (p 2026).

It is a terrific essay, and reading it again almost twenty years later I am struck by the clarity of its exposition, the sophistication of its worldview, the incisiveness of its critique, and the gracefulness of its language. Its pivotal insight, familiar to anyone acquainted with White's work, is that legal texts (like all forms of expression) are *constitutive*: “The contribution of rhetoric here, from Aristotle onwards, is to help us see that in all our talk we define ourselves, our audience, and a relation between us; that our talk is constitutive of a social and ethical reality” (p 2037).

In the twenty years since, Law and Humanities scholars have produced some fine scholarship of this sort. Gene Garver's exploration of the interrelationships among reason, character, and friendship and Marianne Constable's marvelous book about the meaning and possibilities that reside in our silences are noteworthy examples.<sup>7</sup> In my view, however, the real promise of Law and Humanities scholarship lies

<sup>4</sup> James Boyd White, *The Legal Imagination* (Boston: Little Brown & Co., 1973).

<sup>5</sup> James Boyd White, “What Can a Lawyer Learn from Literature?” *Harvard Law Review* 102:8 (June 1989), 2014 (reviewing Richard A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988)). Subsequent page numbers are given in the text.

<sup>6</sup> The following passage captures the sense of that earlier talk:

Think of the way one engages with a literary text, or other artifact to be read in a humanistic way: a poem or a painting, say, or a church, or perhaps a ritual, drawn from another culture, or from another moment in our own culture. The central question one asks is about its meaning, to the maker and to us. This is not reducible to a summary or other propositional statement but lies in the experience of the original: it is specific to its form, to its materials, to its language, to its cultural and even to its physical context. The makers of a Gothic cathedral, for example, could not say in words what their building meant – for that they needed stone and space, light and dark – and much the same is true of the musical composition, the drama, the poem. The meaning of such a text cannot be reproduced in other terms without loss (pp 2018–19).

<sup>7</sup> Eugene Garver, *For the Sake of Argument: Practical Reasoning, Character, and the Ethics of Belief* (Chicago: University of Chicago Press, 2004); Marianne Constable, *Just Silences* (Princeton & Oxford: Princeton University Press, 2005).

elsewhere. It can be observed in the Nietzschean and Heideggerian influences in Constable's work.<sup>8</sup> It is on display more generally among scholars who gather under the banner of the Association for the Study of Law, Culture and the Humanities – many of whom are collected in this volume – as they work toward a post-Enlightenment, hermeneutically grounded understanding of the nature and efficacy of human knowledge.<sup>9</sup>

When I was first thinking about this chapter, I happened by a local church whose sign read: "When truth becomes relative, all things are doubtful." This is the fear that drives all fundamentalisms, secular as well as religious.<sup>10</sup> It is why even the most enlightened secularists adhere so steadfastly to an understanding of the world as amenable to human reason through ever more precise definition and description. It is a mainstay of postmodern or antifoundationalist thought that everything about humanity is socially contingent and, therefore, open to the work of interpretation. Taken radically, however, this way of apprehending the world risks atavism to the extent that it (wittingly or otherwise) implicates the Enlightenment schema of subject and object. It is precisely that way of thinking about the world which must be overcome if we are to achieve a genuine humanism.<sup>11</sup>

Consider, for example, White's fundamental (and highly conventional) opposition between the humanities, on one hand, and the language of social science, on the other. Rather than marking a new direction or "movement," this way of characterizing the issue remains firmly anchored in the Romantic past. Thus, as Charles Taylor observes, "the best and most sensitive minds" from J. S. Mill to Nietzsche

<sup>8</sup> Constable, *Just Silences* at 175 (invoking "the metaphysical problem of nihilism and the devaluation of values that Nietzsche and Heidegger identify with our particular age.").

<sup>9</sup> According to its website, <http://www.law.syr.edu/academics/centers/lch/main.html>, the Association is "an organization of scholars engaged in interdisciplinary, humanistically oriented legal scholarship" that "brings together a wide range of people engaged in scholarship on legal history, legal theory and jurisprudence, law and cultural studies, law and literature, law and the performing arts, and legal hermeneutics."

<sup>10</sup> Cf. Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983), 16–18 (describing as the "Cartesian Anxiety" the fear that: "Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.").

<sup>11</sup> What is, for me, the *Ur*-text is Merleau-Ponty's remark in *Signs* that:

There were values and, on the other hand, realities; there was mind and, on the other hand, body; there was the interior and, on the other hand, the exterior. But what if it were precisely the case that the order of facts invaded that of values, if it were recognized that dichotomies are tenable only this side of a certain point of misery and danger? Even those among us today who are taking up the word "humanism" again no longer maintain the *shameless humanism* of our elders. What is perhaps proper to our time is to disassociate humanism from the idea of a humanity fully guaranteed by natural law, and not only reconcile consciousness of human values and consciousness of the infrastructures which keep them in existence, but to insist on their inseparability.

have since the end of the eighteenth century decried modernity's Philistine quality in just these terms:

In different ways these critics castigate modern society as expressively dead, as stifling expressive fulfilment through the power of conformity, or through the all-pervasive demands of utility, of producing a world in which all acts, objects, institutions have a use, but none express what men are or could be. This stream of opposition has its source in the expressivist current of the late eighteenth century.<sup>12</sup>

Personal and community wholeness cannot come from an expressivist stance that merely attacks or supplements what is lacking in the relentlessly utilitarian modern identity because it is that very opposition which is the problem. Rather, what is needed at the current moment is a mode of understanding – more accurately, a mode of being – that could plausibly transcend the deeply etched oppositions that characterize modernity.

Contemporary Law and Humanities scholarship is one of the more promising venues for that project. This is, in part, because it is situated at the juncture of the practical and the interpretive. It is also, in part, because of the wealth and scope of its dispositions and methodological commitments. It has been a mainstay of the humanities at least since the Romantics that the object of understanding is to make the familiar strange and the strange familiar. Humanities scholarship, in other words, participates in a tradition of inquiry that is critical and iconoclastic. At the same time, its methodological commitment to an interpretive conception of “truth” as that which emerges from the complex of human meaning, purpose, and goals places it beyond the facile objectivity of the more technical discourses that dominate legal studies today.

The project I have in mind is a formidable one, too ambitious in scope to more than sketch in the space of a single chapter.<sup>13</sup> Here, I situate that project critically by exposing the hegemony and distortions that characterize the current social and intellectual landscape. In doing so, I am following Constable's critique of what she identifies as the positivist, sociolegal worldview that monopolizes legal studies today.<sup>14</sup> I begin by observing the primacy of the fundamentalist view of subject/object relations at this moment in history and explore its purest form in law and economics. I then take up work in philosophy, seen by some as congenial to Law and Humanities and show how it is afflicted by this same schema with all of its characteristic reductionism, essentialism, and abstractionism. In the final section, I explore the value

<sup>12</sup> Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), 543–44.

<sup>13</sup> At the least, it would seem to me to require attention to our embodiment (*see* note 11 *supra*) and its pivotal role in cognition and imagination. *See* Steven L. Winter, *A Clearing in the Forest: Law, Life, & Mind* (Chicago: University of Chicago Press, 2001).

<sup>14</sup> Constable, *Just Silences* at 89 (“[I]s law other than a tool of social self-constitution, a social policy produced by social knowledges that gauge the social options in, and social preferences of, a society governed by social policy? What else could law be?”).

and potential of Law and Humanities scholarship. I, first, review and, then, dismiss the debate over the emergence of law and literature scholarship on the ground that it merely recapitulates, rather than advances, the fundamentalist understanding of subject/object relations. In its place, I offer an alternative account of what defines an approach to inquiry as humanist. I conclude with a sketch of the parameters that would provide sense and shape to a genuinely humanist scholarship.

## Rationality and Circularity

After the linguistic, hermeneutic, and cultural turns of the twentieth century, the idea of an unmediated reality to which we have direct and accurate access should seem like the kind of primitive belief that the West once reflexively imputed to “less civilized” societies. Yet everywhere one turns, this kind of fundamentalism seems to characterize the times in which we live.

By “fundamentalism,” I refer to a set of presuppositions about human reason and its relation to the world that assumes transparency, hierarchy, linearity, and universality.<sup>15</sup> On this view, reason is propositional, rule-governed, and independent of language or culture; people everywhere have the same inherent capacities and values; and the world – both physical and social – is reducible to the laws or principles that determine its shape. Fundamentalism, of course, is a term conventionally applied to religious movements; for us, as children of the Enlightenment, science and rationality stand in opposition to religion and received dogma. But, as I have argued elsewhere, rationalism too can be a form of idolatry.<sup>16</sup> The point of bringing these otherwise disparate forms of thought together under a single rubric is to draw attention to the common conceptual schema at work in both cases. With or without a deity, both assume a “God’s-eye” point of view with respect to a world that is straightforwardly open to understanding.

Already at the midpoint of the twentieth century, Merleau-Ponty warned “fear of contingency is everywhere ” and that the “vertiginous idea” that the entire human undertaking rests upon nothing but itself spawns its own anxious rejection:

It is understandable that our contemporaries, faced with this idea (which they glimpse as well as we do), retreat and turn aside toward some idol. It is the fear of the new which galvanizes and reaffirms precisely the very ideas that historical experience has worn out.<sup>17</sup>

<sup>15</sup> The characterization is from Mark Johnson, “Ain’t No Fun in Fundamentalism” (ms. 2003). Johnson identifies fundamentalism in morality and law as resting on the assumptions that: 1) reason is universal; 2) there are universal principles or laws; 3) there are absolute values and laws; 4) concepts are literal; 5) categories are classical in structure (i.e., defined by necessary and sufficient criteria); 6) principles and values are arranged hierarchically; and 7) subjects are radically free.

<sup>16</sup> Winter, *A Clearing in the Forest* at xiv, 9–11 (“In academic circles, the rationalist model has something of the status of an ideology. As such, it is largely impervious to refutation on empirical grounds.”).

<sup>17</sup> Merleau-Ponty, *Signs* at 241.

For most people, uncertainty gives rise to feelings of vulnerability and dread that make the appeal of certain truth seem all the more alluring. Indeed, there is much to be gained from the sense that one has a firm grasp on the truth. Not only is it a comfort, it can be quite enabling. When you are sure of your bona fides, all things seem possible. When one has confidence in one's methodology, every conclusion it produces will appear robust.

To a large extent, American foreign policy in the Bush years was driven by convictions of just this sort. However one understands the underlying notion – whether the assumption that the desire for freedom is an essential aspect of human personhood, that a rational actor would choose Western-style democracy and a market economy, or that democracy is God's gift to humanity – the premise of American engagement with the world has been that Western-style political and economic freedom is an objective, universal good. Indeed, some version of this idea has been the underlying assumption of our policy toward Russia, China, and the former Communist bloc for over two decades.<sup>18</sup> Despite the mixed results in those countries, it was also the refrain behind United States policy in Iraq where, we were assured, we would be “greeted as liberators.” Former President Bush went so far as to claim that the events of September 11, 2001, require us to affirm that our commitment to freedom is not a mere “reflection of convention and culture,” but a necessary response to “the universal demand of conscience and morality.”<sup>19</sup>

It may be that the change of administrations will bring a change in these assumptions; the more general phenomenon of certainty about the truth and instrumental efficacy of our knowledge is, nevertheless, a characteristic of modernity that is widely entrenched. Despite the fact that we have barely more genes than a fruit fly, the cracking of the human genome has led to widespread expectations and enthusiastic claims about the ability to identify the genetic determinants of everything from breast cancer to capitalism.<sup>20</sup> Notwithstanding the developments in second-wave cognitive

<sup>18</sup> During both the first Bush and Clinton Administrations, the basic idea behind American policy toward China was that the development of free markets should provide the ground for the emergence of democracy (and vice versa). David E. Sanger “Opening to China: New Realism Wins the Day,” *The New York Times*, Sept. 20, 2000, A1.

<sup>19</sup> George W. Bush, “Securing Freedom's Triumph,” *The New York Times*, Sept. 11, 2002, A33.

<sup>20</sup> Cf. Gregory Clark, *A Farewell to Alms: A Brief Economic History of the World* (Princeton: Princeton University Press, 2007), 186–88. Indeed, a highly publicized recent study has overturned the finding – previously widely celebrated – that a single gene determines the risk of depression. Benedict Carey, “Report on Gene for Depression, Widely Hailed in '03, Is Now Found to be Flawed,” *The New York Times*, June 17, 2009, A17. This really shouldn't be surprising, however. As Eric Turkheimer notes, “the one-gene-one disorder” model is now “universally recognized as inadequate for medical disorders as complex as diabetes or heart disease, to say nothing of schizophrenia or delinquency.” Despite the obvious limitations of the linear, reductive model, it nevertheless “acquires a crisply technological, optimistically modern ring when exactly the same mistake is made in a genetic context.” Eric Turkheimer, “Mobiles: A Gloomy View of the Prospects for Developmental Behavioral Genetics,” in *Wrestling with Behavioral Genetics: Science, Ethics, and Public Conversation*, Erik Parens, Audrey R. Chapman, & Nancy Press eds. (Baltimore: Johns Hopkins University Press, 2006), 107.

science, much of the field's mainstream remains mired in a rigidly mechanistic view of mind that notoriously has gone decades without being able to make much progress on artificial intelligence.<sup>21</sup>

Perhaps nowhere is this hubris more firm than in the legal academy, where decades of sophisticated, skeptical critique have yielded quickly and without much of a fight to the scientism and relentless instrumentalism of economics and rational choice theory.<sup>22</sup> More broadly, as Constable argues, modern sociolegal studies are dominated by a common form of legal and social positivism that tends to view law as an autonomous, ahistorical set of practices, which functions effectively and authoritatively "as instrument or strategy within a field of social power."<sup>23</sup>

There is, perhaps, no more reductive, powerful, and self-confident methodology in legal studies today than economics. The basic idea is simple. People are assumed to be rational actors who maximize their utility. Accordingly, they respond to incentives (or disincentives) in relation to the desirability of the preferred behaviors, goods, or ends. The more they value the end result, the higher the cost they are willing to incur. Correspondingly, as costs rise, those who value the ends less will desist. If markets are left unfettered, resources will gravitate through exchange toward those who value them most (as manifested by willingness to pay). It does not matter, moreover, that people may be psychologically more complex as long as the model in fact has predictive power.<sup>24</sup>

There is no denying the elegance and frequent usefulness of this model. But it can also fail quite spectacularly. The financial meltdown of 2008 was not only shocking in its magnitude, but also in its provenance. At the highest levels of government, it was assumed as an article of faith that rational market actors would not extend risky subprime loans or invest in exotic (later toxic) derivatives unless it were in their long-term interests. The determination, which followed ineluctably from the economic model, was that "the self-interest of lending institutions" would lead to decisions that "protect shareholders' equity." When it did not turn out that way, no less a figure than Alan Greenspan was forced to admit publicly that he had "found

<sup>21</sup> As Douglas Hofstadter observes: "I get a huge kick out of laughing at the hilariously unpredictable inflexibility of the computer models of mental processes that my doctoral students and I codesign. It helps remind me of the immense subtlety and elusiveness of the human mind." An Interview with Douglas R. Hofstadter, [http://tal.forum2.org/hofstadter\\_interview?NewOnly=2&LastView=2008-06-19%2006:25:38](http://tal.forum2.org/hofstadter_interview?NewOnly=2&LastView=2008-06-19%2006:25:38), June 11, 2008, reprinted in *The New York Times*, June 15, 2008, WK4. See Hubert L. Dreyfus, *What Computers Still Can't Do: A Critique of Artificial Reason*, 2nd ed. (Cambridge: MIT Press, 1992).

<sup>22</sup> See Steven L. Winter, "When Things Went Terribly, Terribly Wrong," in *On Philosophy in American Law* Francis J. Mootz, III, ed. (Cambridge: Cambridge University Press, 2009), 35–43. See also Steven L. Winter, "John Roberts's Formalist Nightmare," *University of Miami Law Review* 63:2 (Jan. 2009), 501.

<sup>23</sup> Constable, *Just Silences* at 10–11.

<sup>24</sup> Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown and Co., 1986), 15–16.

a flaw” and was “in a state of shocked disbelief.” As he conceded before Congress: “The whole intellectual edifice collapsed.”<sup>25</sup>

There is no real mystery, however, about the source or nature of the flaw. It lies in the radical reductionism of the rational actor model and all that follows from it. The rational actor model takes a remarkably one-dimensional view of human behavior. It is not a claim that, in the financial sphere, people operate to maximize wealth; it is, rather, a claim that we can model all of human behavior on the basis of this single motive of maximizing preferences. As Posner puts it: “‘Economic man’ is not . . . a person driven by purely pecuniary incentives, but he is a person whose behavior is completely determined by incentives; his rationality is no different from that of a pigeon or a rat.”<sup>26</sup> Moreover, the claim is not that this is true some of the time in some circumstances, but all of the time in all circumstances. Thus, Posner asserts that “people are rational maximizers of their satisfactions – *all* people (with the exception of small children and the profoundly retarded) in *all* their activities (except when under the influence of psychosis or similarly deranged through drug or alcohol abuse)” (p 353).

Posner (p 366) defends against the “reductionist” criticism by pointing out that: “All science involves abstraction. Newton’s law of falling bodies abstracts from many of the particulars of such bodies (for example, was the apple red?).” This analogy, however, is both revealing and inapt. It is revealing because to compare human subjects to apples is a kind of parapraxis: It is only within the Enlightenment schema of subject and object that one would conceive of humans as transparent “objects” of study like bodies falling through space (or rats in a maze). It is also inapt because the color of the apple is irrelevant to the rate that a body falls through a gravitational field (as is the fact that the falling body happens to be an apple). Human beings, however, are not apples; they are remarkably complex psychosocial systems.

True, Posner’s point about abstraction in science is correct. Scientific method (like any methodology) makes it easier to tackle a problem or organize data because it foregrounds those elements that are most relevant to the job at hand, relegating to the background the welter of other details. In simplifying a task to make it more manageable, however, one may also be *falsifying* it – that is, omitting factors which actually matter.<sup>27</sup> When we are talking about humans, we are talking

<sup>25</sup> Edmund L. Andrews, “Greenspan Concedes Flaws in Deregulatory Approach,” *The New York Times*, Oct. 24, 2008, B1. Similarly, Posner observes that “The movement to deregulate the financial industry went too far by exaggerating the resilience – the self-healing powers – of laissez-faire capitalism.” Richard A. Posner, *A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression* (Cambridge: Harvard University Press, 2009), xii. But cf. *ibid.* at 235 (declaring that “Bankers and consumers alike seem on the whole to have been acting in conformity with their rational self-interest.”).

<sup>26</sup> Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), 382. Subsequent page numbers are given in the text.

<sup>27</sup> This is the insight that underlies Kuhn’s observation that science progresses not by achieving better and better descriptions of reality, but rather by shifts in scientific paradigms that better solve the problems

about complexities of behavior that traverse a terrain in which primitive drives interact with sophisticated systems of symbolic meaning. Reductionism in this context is almost certain to matter. Indeed, Posner concedes (as he must) that the basic assumption of economics is “seriously incomplete. People have difficulty in dealing with low-probability events, which are important in many areas of behavior studied by economists; and much human behavior appears to be impulsive, emotional, superstitious – in a word, irrational” (p 365). His more modest conclusion is that economics “seems to capture an important part, though possibly only a small part, of the phenomena it seeks to explain” (p 366).

The profound problem with the reductionism of the economic model is not that it is descriptively inaccurate, but rather that it leads to inaccurate descriptions. An economist is like the proverbial person with a hammer for whom everything looks like a nail. Because the model allows for only one dimension of human motivation, it can logically see only that single dimension. Consider the case of the substance abuser. It is always possible to reformulate such behavior in rational actor terms.<sup>28</sup> Thus, one could say that substance abusers value their high so much that they are willing to pay the cost in ruined lives and health.<sup>29</sup> But such reformulations beg the question in at least three ways. First, if the goal of the substance abuser is to maximize his or her pleasure, then the severity of the medium-to-long-term costs means that the enterprise (judged only from the perspective of maximizing pleasure) is ultimately self-defeating.<sup>30</sup> Second, the reformulation is both artificial and highly inappropriate. It is not just that the substance abuser is overvaluing current utility over long-term utility. Rather, as anyone with personal experience or professional familiarity knows, those afflicted with such pathologies often act out in counterproductive ways and engage in repeated cycles of self-destructive behavior. “Rational” action is neither an a priori nor a metaphysical faculty that individuals just “have,” but a psychological and socially contingent capacity that depends

at hand. Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago: University of Chicago Press, 1970). Because scientific formalizations simplify in just this way, more than one method or theory may actually work (and, in that sense, be “true”) – albeit depending on one’s purposes.

<sup>28</sup> Cf. Posner, *Problems of Jurisprudence* at 363–64:

[E]conomic theory has become so rich, so complex, that almost any hypothesis, even one that appeared to deny a fundamental implication of the theory such as the law of demand, could be made to conform to the theory. In fact, it is distressingly easy to explain away empirical findings that appear to conflict with the basic theoretical assumptions and propositions of economics.

<sup>29</sup> Posner’s caveat would seem to exclude this example. In fact, however, this illustration is adapted from the observation of another well-known law and economics scholar (who for obvious reasons will go unnamed) who once explained to me that the homeless mentally ill who abuse alcohol are just rational actors choosing to “self-medicate.”

<sup>30</sup> Which is to say that, even when people are maximizers, they are often quite irrationally so. Although the example of the substance abuser may seem extreme, it is in many ways more typical of human behavior than the economist’s idealized rational actor.

on such factors as proper development, education, and mental and emotional health.<sup>31</sup>

Third, and most critical, the reductionism of the rational actor model sets up a circularity of the *post hoc ergo propter hoc* sort: Whatever the activity at whatever the price, the very fact that someone made the choice is itself evidence that that person valued the activity highly and, thus, acted rationally. In this way, economic theory becomes entirely self-confirming. Thus, in the context of the financial markets, the understanding was that because market actors continued to buy and sell derivatives it must be the case that the market had determined that they were sound investments. When it turned out that the market was actually engaged in a very human mix of fallible judgment, greed, and herd behavior,<sup>32</sup> true believers like Alan Greenspan were simply caught unawares. In cases such as that of the substance abuser, the self-confirming quality of the theory makes it all too easy to rationalize suffering.

The greater the complexity of the psychological and social phenomena, the more the economic model falls victim to its own reductivism and becomes prone to such errors of precommitment and misrecognition. Several recent economic studies of the death penalty, for example, claim to demonstrate that executions save lives by deterring other murderers. One goes so far as to claim that each execution prevents eighteen murders.<sup>33</sup> As Donohue and Wolfers explain: “The theoretical premise underlying the deterrence argument is simple: raise the price of murder for criminals, and you will get less of it.”<sup>34</sup> But, after carefully reviewing these studies (including analyses of the underlying data sets), Donohue and Wolfers conclude that the data are quite equivocal:

The U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect. The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to

<sup>31</sup> Significantly, Damasio has found that subjects with injuries to their ventromedial prefrontal lobe who have lost the capacity for emotion are also unable to make rational plans or projections about the consequences of their actions. Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Harcourt Brace & Co., 1994), 1–62.

<sup>32</sup> The same might be said of the postcrash phenomena of corporate and financial managers continuing their accustomed profligate behaviors – fancy new corporate jets, large year-end bonuses, extravagant junkets – after accepting huge taxpayer bailouts and long after the popular backlash had taken hold. See, e.g., Joe Nocera, “It’s Not the Bonus Money. It’s the Principle,” *The New York Times*, Jan. 31, 2009, B1; Stephen Labaton & Vikas Bajaj, “Executive Pay Limits Seek To Alter Corporate Culture,” *The New York Times*, Feb. 5, 2009, A1; Alan Feuer & Karen Zraick, “It’s Theirs and They’re Not Apologizing,” *The New York Times*, Jan. 31, 2009, B4.

<sup>33</sup> Hashem Dezhbakhsh, Paul H. Rubin, & Joanna M. Shepherd, “Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data,” *American Law & Economics Review* 5:2 (2003), 344.

<sup>34</sup> John J. Donohue & Justin Wolfers, “The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate,” *Stanford Law Review* 58:3 (Dec. 2005), 791, 795.

whether executions raise or lower the homicide rate, we remain profoundly uncertain.<sup>35</sup>

Part of the problem is that crime is a sociologically complex phenomenon; it is affected by many other factors (particularly demographics) besides the incentive structures of the criminal justice system. For example, despite the fact that Canada carried out its last executions in 1962 and completely abolished capital punishment in 1976, during this period homicide rates moved “in lockstep” with those in the United States; after abolition, homicide rates in the United States remained high but fell in Canada.<sup>36</sup> Part of the problem is the complexity of the data itself. Thus, detailed examination of the methodology of the various studies of the U.S. data demonstrated that the results “change dramatically even with small changes in econometric specifications.”<sup>37</sup> Nonetheless, Donohue and Wolfers note that the confident claims of proof are not really surprising: Because basic principles dictate that the amount of an activity drops as the cost of that activity rises, economic studies of capital punishment are predisposed toward finding a deterrent effect.<sup>38</sup> As one of the authors later noted: “To say anything else is to brand yourself an imbecile.”<sup>39</sup>

### The Prison-House of Reason

Law and economics is a perfect avatar of the modern age in which, as Constable observes, the “world threatens to become” nothing more than “an object or resource for the social human being who would master it through knowledge.”<sup>40</sup> In the contemporary legal academy the lines between analytic philosophy, on one hand, and instrumentalist approaches such as law and economics, on the other,

<sup>35</sup> *Ibid.* at 841. As Donohue and Wolfers explain:

Year-to-year movements in homicide rates are large, and the effects of even major changes in execution policy are barely detectable. Inferences of substantial deterrent effects made by authors examining specific samples appear not to be robust in larger samples; inferences based on specific functional forms appear not to be robust to alternative functional forms; inferences made without reference to a comparison group appear only to reflect broader societal trends and do not hold up when compared with appropriate control groups; inferences based on specific sets of controls turn out not to be robust to alternative sets of controls; and inferences of robust effects based on either faulty instruments or underestimated standard errors are also found wanting (*ibid.*).

<sup>36</sup> *Ibid.* at 799–800.

<sup>37</sup> *Ibid.* at 843.

<sup>38</sup> “Alternatively, to frame the issue as a Bayesian would, one’s posterior belief about the deterrent effect of the death penalty surely looks a lot like one’s prior belief.” *Ibid.* at 844.

<sup>39</sup> Adam Liptak, “Does Death Penalty Save Lives? A New Debate,” *The New York Times*, Nov. 18, 2007, A1 (quoting Wolfers).

<sup>40</sup> Constable, *Just Silences* at 175.

are sharply drawn.<sup>41</sup> In the circumstance of modernity, however, even a discipline once so central to the humanities as philosophy takes the same distorted form as its instrumentalist rivals. Ronald Dworkin, for example, employs the tools of moral and analytic philosophy to argue against instrumentalism in law and to claim that there is a principled, “right answer” to all legal questions that a suitably intelligent judge endowed with unlimited time – Hercules – would be able to work out.<sup>42</sup> This is a vision of a transparent moral and social world, open to human mastery; more accurately, it is a *belief* in such a world. Famously, Dworkin makes no affirmative argument to justify his “right answer” claim, but mostly argues against the viability of skeptical views.<sup>43</sup>

A more detailed example, however, will provide us with a clearer view of the surprising isomorphism between these otherwise disparate disciplines.

In *Democracy and Equality*,<sup>44</sup> Robert Post examines the relationship between those two core values. He begins by “fixing” a definition of democracy in terms of autonomy understood in the Kantian sense of being governed only by those rules one gives oneself.<sup>45</sup> A democratic form of government is one committed to the value of collective self-determination. This definition is problematic, though, because in a diverse, heterogeneous society, people often disagree; under a system of majority rule, the losers will by definition be bound by a rule other than the one they would give to themselves. This gap can be bridged, however, if the dissenters can nonetheless identify with the decisions of the polity and view those decisions somehow “as their own.” This identification can be achieved, according to Post, if people are treated equally as autonomous participants in public discourse. In that case, people can have “the warranted conviction that they are engaged in the process of governing themselves” (p 144) because the state is potentially responsive to their values and ideas. “This form of equality,” he concludes, “is foundational because it follows from the very definition of democracy” (p 147).

This very narrow conception of equality creates a very large problem for democratic theory. Historically and conceptually, the democratic ideal carries with it

<sup>41</sup> See Richard A. Posner, *Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge: Harvard University Press, 2006).

<sup>42</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 110–30, 279–90; Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 119–45.

<sup>43</sup> See Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000), 268–69.

<sup>44</sup> Robert Post, “Democracy and Equality,” *Law, Culture and Humanities* 1:2 (2005), 142–53. Subsequent page numbers are given in the text.

<sup>45</sup> It is not enough, he argues, to identify democracy with popular sovereignty and majority rule because the former “is a normative idea” while the latter two “are descriptive terms that refer to particular decision-making procedures” (p 143).

strong notions of equality.<sup>46</sup> This is evident in the Declaration of Independence's pronouncement that "all men are created equal"; the French revolutionary's slogan *liberté, égalité, fraternité*; and the American revolutionary desire to live "by no man's leave." Conceptually, the democratic ideal implies strong egalitarianism because hierarchy is antithetical to self-rule: The subordinated *do* live by some other man's leave; they live under conditions of heteronomy. For Post, however, the only form of equality democracy permits is "an equality measured in terms of the autonomous agency required by democratic legitimacy" (p 151). This pits democracy and equality against each other because "many forms of equality can actually interfere with the individual liberty required by this project" (p 152).

One can see the conflict in the case of private property: The autonomy to acquire property entails both the right to accumulate it and, of course, to exclude others from using or otherwise appropriating it.<sup>47</sup> Much the same is true with respect to other aspects of individual autonomy. In the context of public discourse, "the relevant equality of agency inheres in the liberty to express oneself in the manner of one's choice" (p 148). Egalitarian claims of fairness and distributive justice such as prohibitions of hate speech, regulation of corporate speech, or limitations on campaign expenditures are in tension with democracy because they threaten that autonomy. Post concludes, "the logic of democratic legitimacy" (p 151) implies that strong egalitarian principles must yield whenever they "compromise the autonomous participation of persons within democratic self-governance" (pp 149,150). Otherwise, citizens would no longer be able to sustain the necessary identification with the process of creating the social order in which they live.

Democratic theory resolves the conflict between autonomy and equality by recasting the latter as formal equality. Thus, Post notes that the "one person, one vote" principle "signifies that each person is to be regarded as formally equal to every other in the influence that their agency can contribute to public decisions" (p 148). Famously, however, formal equality both conduces to and underwrites substantive

<sup>46</sup> Post recognizes that "it is generally thought that implicit within the idea of democracy is a notion of strong substantive equality that flows from the moral equality of all citizens (pp 151–52)." He insists, however, that the concept of democracy "does not itself entail these principles (p 153)."

<sup>47</sup> The inevitable inequality that follows from protecting the right of property was forthrightly acknowledged by the Supreme Court during its infamous substantive due process era. *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) ("since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights."). It was a mainstay of Legal Realism that this inequality is in no way "private" or "natural," but rather a product of the background distribution of entitlements enforced by the legal system. See Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38:3 (Sept. 1923), 470; Morris Cohen, "Property and Sovereignty," *Cornell Law Quarterly* 13:1 (Oct. 1927), 8.

inequality: The law, in all its majesty, prohibits the rich as well as the poor from sleeping under the bridges of Paris. Democratic equality, Post concedes, “can easily be experienced as thin and formal” (p 150).

A humanist might well shrink from this conclusion, and Post seems obviously uncomfortable with it. Accordingly, he suggests that there might yet be a role for strong egalitarian principles. Imagine, he says, a group of citizens with the autonomy to participate in public discourse but who are so destitute, marginalized, and stigmatized by the majority that they are alienated from the polity and can no longer view its decisions as their own. In that case, democracy requires rectification of those inequalities: not because it is fair and right to do so, but because it is necessary to restore the sense of identification needed for democratic legitimacy. “The distinction is significant,” he warns, because it means that democracy “does not require the full rectification of these inequities, but only the rectification necessary to maintain democratic legitimacy” (pp 152,153). Post recognizes that his argument is “unsettling” because it implies that “democracy is quite compatible with important forms of status subordination” (p 153).

Unsettling, indeed. And ahistorical too. The democratic revolutions of the modern era were all about the overthrow of ancient hierarchies. The successive democratization of American society – the abolitionist movement, the universal suffrage movement, the public school movement, the women’s suffrage movement, the labor movement, the progressive movement, the New Deal, the civil rights movement, the women’s movement, the gay and lesbian liberation movement – has been the result of egalitarian assaults on the various forms of social, political, and material subordination. Even the word “democratize” connotes the intimate conceptual connection between democracy and equality: To democratize a practice, resource, or capacity is to make it more fully available to everyone, without regard to status, on terms of equality. Any theoretical account of democracy that puts democracy in conflict with equality and comfortably in bed with subordination is an account that has somehow gone terribly, terribly awry.

The flaw in Post’s argument is not logical, but methodological. The problem, as Heidegger teaches, is that “conceptual definitions of terms, while necessary for technical and scientific purposes, are by themselves unfit to assure, much less advance, the soundness of language.” When adopted by “academic philosophy,” it makes a total hash of things: “thought in the sense of logical-rational representations turns out to be a reduction and an impoverishment . . . that beggar the imagination.”<sup>48</sup> To start with an analytic, one-dimensional definition of democracy, as Post does, and then systematically unpack its implications is inevitably to distort the concept

<sup>48</sup> Martin Heidegger, *What Is Called Thinking?* J. Glenn Gray trans. (New York: Harper Row, 1968), 139–40.

precisely because it is abstracted from the social and historical contexts that give it meaning.<sup>49</sup>

There is, in sum, a striking isomorphism between analytic philosophy and its putative rival, economics. Both adopt an acontextual and ahistorical view of the social world as straightforwardly open to definition. Both assume that the process of definition should proceed by identifying the unique, *essential* quality of the “object” of study. Both are, thus, fundamentalist and reductive in exactly the same way. Although one takes a strongly normative stance toward that world and the other an instrumentalist one, both end in authoritative prescriptions to the field of social practice. Moreover, neither approach can “capture the practices, let alone serve to regulate them, because it must redescribe and simplify them in order to make them the subject of scientific investigation.”<sup>50</sup>

This affinity between the normative and the instrumental becomes an identity the minute that one moves from analysis to prescription. To invoke the concept of democratic autonomy as a regulatory principle is to *instrumentalize* the idea of democracy as a strategic intervention in the field of ongoing social relations. It is, inevitably, to take sides in a power struggle – and not just any side, but the side of hierarchy and status subordination. Post chides egalitarians for not recognizing that in a democracy, we “decide the meaning of moral equality in the context of public discussion and debate” (p 152) and complains that they instead defend equality employing “the idea of rights . . . defined by reference to various forms of philosophical reason” (*ibid*). Post, however, is guilty of the very same error. There is, in his argument, no normative discussion of how best to mediate between conflicting values; no question of “who are we?” or “whom should we become?” There is, rather, the assertion of a particular principle as “definitional” and the insistence on submission to the power of a purely deductive, abstract argument.<sup>51</sup>

Post’s argument, moreover, illustrates the way in which this devaluing of values becomes infectious. It is not just that his notion of democratic autonomy is expected to regulate the social field, but Post entirely instrumentalizes equality as a mere tool for maintaining the identification with the polity necessary for his conception of democratic legitimacy. In relegating equality to a mere means, his argument robs equality of any independent normative force: Equality becomes relevant – that is, tolerated – only to the extent that it operates as a tool of legitimation. By the same

<sup>49</sup> The ungroundedness of this kind of abstract argument from principle also assures its indeterminacy. Thus, one can easily imagine a parallel argument in which one starts with the equality of all citizens as foundational to democracy and then unpacks the implications of that principle to conclude that various forms of autonomy are inconsistent with democracy.

<sup>50</sup> Linda Ross Meyer, “Is Practical Reason Mindless?” *Georgetown Law Journal* 86:3 (Jan. 1998), 652.

<sup>51</sup> Thus, one could just as well argue that, in a democracy that takes the equality of all citizens as foundational, we decide the meaning and proper scope of autonomy “in the context of public discussion and debate” and not, as he proposes, “by reference to various forms of philosophical reason.”

token, this instrumentalization of equality robs it of all substantive content because it makes legitimation rather than fairness the measure of its scope.

In the end, the method of analytic philosophy shares in the same fundamentalism, the same relentless abstractionism, the same desire for transparency and certainty, and the same distortions and dysfunctions as its more crassly instrumentalist rival. As White elsewhere observes, “The habit of mind that yearns for these methods and their certainties is bound to be delusive, and ultimately – despite its claims to superior rationality – to be irrational, because it will not be in accordance with the nature of our world and our experience.”<sup>52</sup>

### Culture, Contingency, Community

What is the alternative? What would a genuinely humanist approach look like?

From the earliest days of the law and literature movement, the most common claim on its behalf has been that the study of literature (or narrative or rhetoric) serves an edifying function. Various stated, the basic argument is: first, that by reading literature (or attending to narrative or to our constitutive rhetoric) we are able to develop and hone a capacity for empathy,<sup>53</sup> to understand the plight of the excluded and oppressed,<sup>54</sup> or to understand what it really means to treat the Other as an end in himself; and second, that these capacities cannot be captured in the deracinated logic of law, science, or moral philosophy.<sup>55</sup> The responses to this claim have been varied and often inconsistent. Some question the dichotomy between

<sup>52</sup> James B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985), 24.

<sup>53</sup> See, e.g., White, “What Can a Lawyer Learn” at 2036 (“the heart of the teaching of literature lies in the stimulation of our capacity to imagine other people, not only as they suffer or enjoy what we do not, but more deeply as they inhabit different universes of meaning, different spheres of language”); Lynne Henderson, “Legality and Empathy,” 85:7 *Michigan Law Review* (June 1987), 1574; Julius G. Getman, “Voices,” 66:2 *Texas Law Review* (Feb. 1988), 577.

<sup>54</sup> See, e.g., Richard Delgado, “Legal Storytelling for Oppositionists and Others: A Plea for Narrative,” 87:8 *Michigan Law Review* (Aug. 1989), 2411; Mari J. Matsuda, “Public Sanction of Racist Speech: Considering the Victim’s Story,” 87:8 *Michigan Law Review* (Aug. 1989), 2320; cf. Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 141–78 (discussing the sort of books that are “relevant to our relations with others, to helping us notice the effects of our actions on other people” and “relevant to the avoidance of either social or individual cruelty”).

<sup>55</sup> See, e.g., White, *Heracles' Bow* at 5 (“What does it actually mean . . . to treat another person as a ‘means’ to an end, or, by contrast, as an ‘end in himself’? [T]hese questions can best be addressed in a language of art, and that a purely conceptual and logical language, like that of modern analytic philosophy, will always be incomplete or defective.”); Martha C. Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1990). The strongest version of this claim, that there is a correlation between good writing and good decision making, appears in Richard H. Weisberg, *Poethics: and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992), 251.

empathy and reason or between the literary and the legal.<sup>56</sup> Others insist that the literary and the legal are so distinct as to have nothing of importance to say to one another.<sup>57</sup>

Perhaps the principal criticisms of the law and literature project, however, have focused on its perceived unreliability. Critics of narrative scholarship have pointed to its subjectivity, questioned the accuracy and representativeness of its accounts, and argued that there is no way in which it can be subjected to the rigors of verification and disputation.<sup>58</sup> Similarly, skeptics of the law and literature movement have argued that there is no necessary connection between literature and the ethical edification extolled by the movement's advocates. Books may be virtuous or evil.<sup>59</sup> Stories may subvert hierarchy or legitimate it.<sup>60</sup> Worst of all, different people will each bring their own preconceptions and experience to reading and, therefore, will come away from reading literature or narrative with very different understandings and conclusions.<sup>61</sup>

Although I paint here with a broad brush, the reason should be obvious: The entire debate merely reenacts the fundamentalist view of subject/object relations. This is apparent in the initial claims of the movement, which juxtapose the ways of empathy with the cold reason of law, science, and philosophy. It is apparent, too, in the critique of storytelling as unreliable. Thus, as I have argued elsewhere,<sup>62</sup> this critique presupposes strong notions of objectivity and subjectivity. On one hand, it assumes that there is some unadorned "true" account of the brute facts against which the narrator's "subjective" rendition must be substantiated. On the other, it treats

<sup>56</sup> Toni M. Massaro, "Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?" 87:8 *Michigan Law Review* (Aug. 1989), 2099, 2106–16; Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), 261–83, 287–91. I take a radical version of that position in "Death Is the Mother of Metaphor" at 749 ("[W]e do not have separate minds for poetry and for law. Necessarily, we do each with the same mind – indeed, the whole mind.").

<sup>57</sup> Posner, *A Misunderstood Relation*.

<sup>58</sup> Daniel A. Farber and Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives," *Stanford Law Review* 45:6 (April 1993), 807; Anne M. Coughlin, "Regulating the Self: Autobiographical Performances in Outsider Scholarship," 81:5 *Virginia Law Review* (August 1995), 1229; Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995), 369–80.

<sup>59</sup> See, e.g., Geoffrey P. Miller, "A Rhetoric of Law," 52:4 *University Chicago Law Review* (Winter 1985), 247, 257–59 (reviewing James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984)) ("No one would seriously argue, I suppose, that the relationship between the author and reader of *Mein Kampf* somehow establishes values of friendship and respect for humanity.").

<sup>60</sup> See Binder & Weisberg, *Literary Criticisms of Law* at 266–79. As Binder and Weisberg insightfully point out, the "covert authorial performance" of the standard clinical narrative reinforces the privileged position of the professional who narrates the encounter with her client. *Ibid.* at 254–57.

<sup>61</sup> See generally Norman N. Holland, *5 Readers Reading* (New Haven: Yale University Press, 1975). As White observes: "This experience of reading is not coercive or uniform in character, and will naturally be different for different readers. Indeed there is nothing automatic in the process at all: it is perfectly possible for someone to misread a text, or to fail to respond to it, or to put even the greatest literature to base or trivial purposes." White, "What Can a Lawyer Learn" at 2020.

<sup>62</sup> Winter, *A Clearing in the Forest* at 132–38.

authorial voice reductively as a function of pure, unfettered agency abstracted from the social context and cultural constraints that give that voice meaning. Similarly, the skeptics' concern that reading literature does not necessarily entail the sought after edification is premised on a totalizing essentialism: Either the capacity for ethical betterment is an essential quality of the literary experience or it may be dismissed entirely. As if a practice could only be worthwhile if it succeeds 100% of the time. As if any human endeavor – law, science, or medicine – could meet that standard.<sup>63</sup>

We will need to start elsewhere if we are to understand the full value and potential of Law and Humanities scholarship. A better place might be Merleau-Ponty's 1951 declaration:

Today a humanism does not oppose religion with an explanation of the world. It begins by becoming aware of contingency. It is the continued confirmation of an astonishing junction between fact and meaning, between my body and my self, my self and others, my thought and my speech, violence and truth. It is the methodical refusal of explanations, because they destroy the mixture we are made of and make us incomprehensible to ourselves.<sup>64</sup>

The form of scientific explanation that constitutes Enlightenment rationality is, on the view I have been elaborating in this chapter, antihumanist in that it radically separates the subject from the grounds of her own intelligibility.<sup>65</sup> It does so, as we have seen, through its reductionism, essentialism, abstraction from history and context, and pretension to an Olympian point of view. Actual human beings partake not of the absolute, but of the contingent. We are embodied creatures who exist in time, in culture, and in language. We are finite and fallible. We are socially situated and socially dependent. We are the products of particular forms of life and possessed of (and by) particular perspectives.

A humanist approach to inquiry, then, would be one that recognizes these as constitutive dimensions of the human condition. It would embrace at least the

<sup>63</sup> To be clear, there is little doubt that the study of literature has the *capacity* to edify. In literature (although not, certainly, in literature alone) we come into contact with the complexity of human understanding and can learn to appreciate the implications for our lives of the assumptions, postures, and institutional practices that characterize any particular society. A literary turn of mind, moreover, is vital to morality because it is through narrative enactment that we imagine how various situations might be carried forward and, thus, are able to assess their ethical implications. Mark Johnson, *Moral Imagination: Implications of Cognitive Science for Ethics* (Chicago: University of Chicago Press, 1994).

<sup>64</sup> Merleau-Ponty, *Signs* at 241.

<sup>65</sup> It was Nietzsche who pointed out that the traditional insistence on the absolute is nihilist and antihumanist because it devalues what we ourselves have wrought.

Here precisely is what has become a fatality for Europe – together with the fear of man we have also lost our love of him, our reverence for him, our hopes for him, even the will to him. The sight of man now makes us weary – what is nihilism if it is not *that*? – We are weary of *man*.

Friedrich Nietzsche, *On the Genealogy of Morals and Ecce Homo*, Walter Kaufmann trans. (New York: Vintage Books, 1969), Essay I, §12.

following five attitudes or positions: 1) hermeneutic suspicion and critical openness; 2) the affirmation of contingency; 3) reflexive subjectivity; 4) the indispensability of culture and community; and 5) humility.

First, to accept that what one understands as true may be a product of history and culture is to recognize that one's beliefs are corrigible not just to new information, but also to different perspectives, theories, values, assumptions, methods, and traditions of inquiry. This requires a hermeneutics of suspicion toward knowledge generally: one that probes beneath the surface, first, to disclose and, then, to question the underlying values and assumptions that enable it. It implies a critical attitude with respect to one's own beliefs and, at the same time, an openness toward those of others. The point of this critical posture is, simultaneously, to make the familiar strange and the strange accessible. In both cases, the goal is to unpack the conditions of intelligibility from which a perspective takes its shape to illuminate the ways in which it is distorting or revealing, attractive or problematic, challengeable or provocative.<sup>66</sup>

This attitude of critical suspicion stands in sharp contrast to the "hard" skepticism of the Enlightenment and modern science that submits truth claims to the insistent demands of reason and empirical proof. *That* approach introduces the epistemological problem of how as minds we can know the world: "For the enlightenment philosophers, thinking was only a reflection of the world in a consciousness, a consciousness that was alien to the world and hence could never understand the world 'in itself.'"<sup>67</sup> The Enlightenment schema that radically separates the subject from the objects of its inquiry enables science, but it simultaneously creates the philosophical problem of skepticism: It needs an absolute spectator – a God's-eye point of view – to assure the accuracy and reliability of its data. Merely human observation is always at risk of distortion by prejudice, particularism, and perspective.<sup>68</sup>

The hermeneutics of suspicion, in contrast, is a matter of deciphering.<sup>69</sup> In its paradigmatic form, the hermeneutics of suspicion unmasks surface meanings of a text – its false consciousness – as a concealment or mystification of the political, social, or psychological dynamics that it obscures. As Ricoeur explains, however,

<sup>66</sup> Cf. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 297–305.

<sup>67</sup> Meyer, "Practical Reason" at 658.

<sup>68</sup> Cf. Taylor, *Hegel* at 564 ("[T]he scientific objectification of human nature presupposes a subject of science whose activities and judgments about truth and depth of explanation cannot be accounted for in the reductive theory. He remains the angelic observer outside the objectified stream of life.").

<sup>69</sup> Ricoeur, *Freud and Philosophy* at 33. Writing of the "three masters of suspicion," Marx, Nietzsche, and Freud, Ricoeur says:

Descartes triumphed over the doubt as to things by the evidence of consciousness; they triumph over the doubt as to consciousness by an exegesis of meaning. Beginning with them, understanding is hermeneutics: henceforward, to seek meaning is no longer to spell out the consciousness of meaning, but to decipher its expressions (*ibid.*).

this is not a process of revealing a “true” meaning. Hermeneutics “consists not in the relation of meaning to thing but in an architecture of meaning.”<sup>70</sup> The fundamental relation is not true-false, but hidden-shown. It is a question not about what the text says or the author intended, but rather about the meaning the text *simulates* and the hidden meaning it *manifests*. We have seen, for example, how a text ostensibly about democracy both defended and enacted hierarchy by insisting on the authority of an argument that was itself ungrounded in anything but an abstract definition. In sum, hermeneutic suspicion shares with Enlightenment skepticism a disposition to do away with idols but departs from it – both substantively and substantially – in its commitment to listen critically and attentively to symbols.

Second, a humanist approach recognizes that contingency and historicity are the prerequisites for knowledge of the only sort we as humans can have:

Since we are all hemmed in by history, it is up to us to understand that whatever truth we may have is to be gotten not in spite of but through our historical inherence. Superficially considered, our inherence destroys all truth; considered radically, it founds a new idea of truth. As long as I cling to the ideal of an absolute spectator, of knowledge with no point of view, I can see my situation as nothing but a source of error. But if I have once recognized that . . . [history] contains everything which can *exist* for me, then my contact with the social in the finitude of my situation is revealed to me as the point of origin of all truth, including scientific truth.<sup>71</sup>

A humanist interested in the relationship between democracy and equality, for example, would begin with a critical examination of the social practices and historical struggles that ground our intuitions about those ideals. The resultant notions of democracy and egalitarianism are not, as the fundamentalist might have it, just some contingent historical facts that might have been otherwise. (Although they might have been.) They are, rather, precisely what constitute us as who we are. From our point of view, in other words, our historicity is not contingent at all; rather, it is necessary and *foundational*.<sup>72</sup> We may question, resent, challenge, resist, or modify our historical practices and beliefs. For us as situated humans, however, they are not optional. Our very ability to “have” a world is dependent on the preexisting social practices and conditions that form both the grounds of intelligibility for and the horizons of our world.

Third, it follows closely that subjectivity is a thoroughly social phenomenon: We are, as Merleau-Ponty says, “through and through compounded of relationships

<sup>70</sup> *Ibid.* at 18.

<sup>71</sup> Merleau-Ponty, *Signs* at 109.

<sup>72</sup> I elaborate this argument more fully in Steven L. Winter, “Human Values in a Postmodern World,” *Yale Journal of Law & Humanities* 6:2 (Summer 1994), 233–48.

with the world.”<sup>73</sup> For the fundamentalist, the claim that subjectivity is socially constructed seems to entail a determinism in which the subject, deprived of its originary agency, could only statically reproduce that which constituted it.<sup>74</sup> This conclusion, however, is mistaken for it reflects both a reductivism and an essentialism: It simultaneously reduces the subject to its social determinants and essentializes the conditions of its formation. In contrast, to see subjectivity as constituted in *relationships* is rather to emphasize its dynamic qualities. Subjectivity, in a word, is *reflexive*. Although it necessarily reflects the social context and history through which it is constituted, subjectivity is simultaneously that which expresses, enacts, and thereby changes that context. To be a “human subject,” is to be one “who, by means of a continual dialectic, thinks in terms of his situation, forms his categories in contact with his experience, and modifies this situation and this experience by the meaning he discovers in them.”<sup>75</sup>

Indeed, we can unpack just this conclusion about reflexivity from a critical analysis of each of two opposing instantiations of the conventional view of subjectivity: White’s expressivist claims for the value of rhetorical and literary studies, on one hand, and, on the other, the critique of narrative scholarship as unreliable and hopelessly subjective.

Consider White’s claim that our communicative practices are constitutive. To say that how we communicate and interact with one another shapes who we are is to say that our values and identities are contingent on nothing more than our own practices. The danger of this rhetorical focus, however, is that it elides both our historicity and cultural contingency. To say with White (or Aristotle) that we define ourselves in our talk is to focus attention on activities and choices in the present. For example, White offers a subtle account of the “dialectic process” of reading in which

we are constantly testing the person that the text is inviting us to become against the other things we are, or wish we were, and we must try to remain open simultaneously to the possibility that the shift is corrective of our own deficiencies and that it is not, that we are right to resist it.<sup>76</sup>

<sup>73</sup> Maurice Merleau-Ponty, *The Phenomenology of Perception*, Colin Smith trans. (London: Routledge & Kegan Paul Press, 1962), xiii.

<sup>74</sup> Robert Post, “The Relatively Autonomous Discourse of Law,” *Law and the Order of Culture*, Robert Post ed. (Berkeley: University of California Press, 1991), xiv.

<sup>75</sup> Maurice Merleau-Ponty, *Sense and Non-Sense*, Hubert Dreyfus & Paula Dreyfus trans. (Evanston: Northwestern University Press, 1964), 133–34. I elaborate this “double sense” of the situated subject as constituted and constituting, along with its relationship to law, in Steven L. Winter, “Indeterminacy and Incommensurability in Constitutional Law,” *California Law Review* 78:6 (Dec. 1990), 1485–94. On the inevitably dynamic nature of social reproduction, see Steven L. Winter, “Contingency and Community in Normative Practice,” 139:4 *University of Pennsylvania Law Review* (April 1991), 991–1001.

<sup>76</sup> White, “What Can a Lawyer Learn” at 2020.

This immediately raises the question of what motivates us either to assume or to resist the identity the text is inviting us to become. White offers only the platitude, “we are each responsible for what we make of these experiences.”<sup>77</sup> At this point, however, the reading process is no longer dialectic but originary and subjectivist. It may be, as White says, “what is most ineradicably different about us [is] that we see and construct the world through different languages.”<sup>78</sup> There can be, however, no such thing as a private language. Language “connects us to the past, not only our personal past but the past of our culture.”<sup>79</sup> If our communicative practices are constitutive, then it must also be true that whenever we read or write a text we come to that task already constituted by the social and ethical relationships enacted by the communicative and other social practices that precede us. So, too, it must also be that the ways in which we constitute that text will influence (and be reflected in) the social and ethical interactions that we understand it to authorize or inspire.

Much the same can be said with respect to the critique of narrative scholarship as unreliably subjective. Anne Coughlin, for example, argues that autobiographical narrative is a realist discourse “devoted to the distinction between events that are ‘in principle observable or perceivable’ outside the narrative and those that reside solely inside the world constructed by a storyteller.”<sup>80</sup> Yet, there is nothing that can be observed – “in principle” or otherwise – outside our frames of reference.<sup>81</sup> The converse, moreover, is also true: There can be no purely subjective perceptions free of the value-laden, culturally shared categories and understandings that constitute us and through which we experience our world. Indeed, anything that existed “solely” in the world constructed by a story would be incomprehensible to us.<sup>82</sup> True, the

<sup>77</sup> *Ibid.* In similar subjectivist terms, White notes that the process “will naturally be different for different readers (*ibid.*)” and that the value of a literary education for lawyers is “a question that can have no programmatic or automatic answer, but depends on the response of the individual mind.” *Ibid.* at 2028.

<sup>78</sup> *Ibid.* at 2036. He concludes, “so that what seems wholly natural to me is unseen by you, what moves you leaves me cold, and vice versa.”

<sup>79</sup> Meyer, “Practical Reason” at 661.

<sup>80</sup> Coughlin, “Regulating the Self” at 1271 (quoting Hayden White). Thus, she maintains that when the author of an outsider narrative “describes an event that she experienced, she is representing that the event in question had an existence independent of her textual reconstruction of the event.” *Ibid.* at 1272.

<sup>81</sup> As Nelson Goodman famously observes,

If I ask about the world, you can offer to tell me how it is under one or more frames of reference; but if I insist that you tell me how it is apart from all frames, what can you say? We are confined to ways of describing what is described. Our universe, so to speak, consists of these ways rather than of a world or worlds.

Nelson Goodman, *Ways of Worldmaking* (Indianapolis: Hackett Publishing, 1978), 2–3. See also Hilary Putnam, *Reason, Truth and History* (Cambridge: Cambridge University Press, 1981), 54.

<sup>82</sup> Cf. Donald Davidson, “On the Very Idea of a Conceptual Scheme,” in *Inquiries into Truth and Interpretation* (Oxford: Clarendon Press, 1984), 183.

narrator's account of her experience is an interpretation; but it cannot "in principle" be a purely subjective one. The narrator, no less than the reader, can only apprehend and communicate her experience in terms of the cultural understandings that give form to its events.<sup>83</sup> It is precisely because the subjectivities of both author and reader are constituted reflexively by shared perceptions and understandings that communication can take place at all.

Fourth, to affirm contingency and the reflexive nature of subjectivity is to resituate the human "in an order which is not that of knowledge but rather that of communication, exchange, and association."<sup>84</sup> Culture and community are indispensable aspects of being. This requires a different understanding of the relationship between the individual and the social, along with an entirely different conception of freedom.

The Enlightenment schema of subject and object not only isolates the subject from the objects of its inquiry, it also isolates the subject from other subjects. Its focus is on the individual consciousness and its relation to the world. (One can scarcely imagine Descartes proclaiming: "We think, therefore we are.") From the perspective of the Enlightenment schema, social context can only be understood as an external condition and, as such, it can only be seen as a source of constraint. Freedom, on this view, can only be conceptualized in terms of "a set of limits to be overcome, or a mere occasion to carry out some freely chosen project, which is all that a situation can be within the conception of freedom as self-dependence."<sup>85</sup>

On the humanist point of view I have here been elaborating, culture and community are indispensable and unavoidable aspects of being. They are not external constraints that the individual must overcome but the enabling conditions of possibility. "Society for man is not an accident he suffers but a dimension of his being. He is not in society as an object is in a box; rather, he assumes it by what is innermost in him."<sup>86</sup> It follows – paradoxical, though, it may seem – that freedom can only be a function of context, community, and constraint. Our freedom is constituted in the fact that we are situated beings who together both construct and transform the world in which we live. Which is not to say that culture and community are unalloyed goods. They can be restrictive or enabling, suffocating as well as liberating. The question with respect to any particular community or tradition is whether its social

<sup>83</sup> Thus, the value of such outsider narratives lies not in their facticity, but in their ability to convey in a powerful, affective way a social and psychological truth. Indeed, as I have argued elsewhere, the outsider narratives whose reliability the critics question would be no less true if they were unabashedly allegorical. Winter, *A Clearing in the Forest* at 134–35.

<sup>84</sup> Maurice Merleau-Ponty, *Adventures of the Dialectic*, Joseph J. Bien trans. (Evanston: Northwestern University Press, 1973).

<sup>85</sup> Taylor, *Hegel* at 563. See also *ibid.* at 555 ("to make the transition comprehensible to mainstream science we have to think of it not as a step from blind law to meaningful situation, but as simple sloughing off of restraints. We leave the nature of the subject and his agency in the new social form as an unexplored point of complete spontaneity.").

<sup>86</sup> Merleau-Ponty, *Sense and Non-Sense* at 128–29.

and cultural conditions stifle or promote human flourishing. That is a question not for categorical reason (e.g., which is better, communitarianism or individualism?), but for critical reflection.

Fifth, and finally, to reconceptualize freedom as an emergent condition of a cultural situation is profoundly to change our sense of self and place in the world. It is not just that our agency is dependent on the social practices and historical conditions through which we are constituted, but also that the hubris of the knowing subject who masters the world through reason cannot be sustained. Science and knowledge still have their value. But we need to approach those matters – as all else – with greater humility.