

## Law, Invention, and the Literary Imagination: Toward a Rhetorical Understanding of Martha Nussbaum's "Poet-Judge"

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Law is composed, in large part, of stories and storytelling. Even before litigation begins, clients tell their lawyers the stories that made them seek (or require) professional legal aide. In their closing remarks, lawyers both for the prosecution and the defense craft competing narratives that draw attention to particular elements of the case in order to entice judges and juries to agree with them. Decisions issued by judges often establish the facts of a case and the legal issue being contested through a narrative form that caters to their conclusions. As decisions become precedent, these narratives are told and retold with new characters and new scenes being added whenever an issue is revisited. Perhaps more than legal professionals, the lay public also understands the law through stories and narratives with heroes and villains, plot twists and climactic conclusions. Responding to the detached reasoning prevalent in analytic jurisprudence, constitutional originalism, and law and economics, disenchanted legal scholars and interdisciplinary academics have turned to literature and literary studies for insight into the purpose, practice, and analysis of law. Ignited by James Boyd White's publication of *The Legal Imagination* in 1973, the law and literature movement has proved to be a compelling counter to the systematization and standardization of legal discourse. Rather than view the law as a set of rules and cases as sets of facts, law and literature stresses the importance of narratives as they operate under the auspices of law.

Although there are several different manifestations of the literary approach to law, Paul Gewirtz captures the general spirit of the movement well: "[T]reating law as narrative and rhetoric means looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed . . . . It means examining

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not simply how law is found but how it is made, not simply what judges command but how the commands are constructed and framed.”<sup>1</sup> As a vocal advocate for the important relationship between philosophy and literature, Martha Nussbaum has been championing the benefits of literature for law for nearly three decades. Drawing from (and arguably improving upon) an Aristotelian conception of practical judgment, she claims that literature is not only a comparative lens through which one may assess law (i.e. a hermeneutic approach), but also as a vital resource for legal training and the process of cultivating good legal judgment. Whereas other approaches to law and literature focus on law *in* literature,<sup>2</sup> law *as* literature,<sup>3</sup> and literature *in* law,<sup>4</sup> Nussbaum proposes a *literature for law* approach rooted in the idea of the “literary imagination.”

As I will argue in this essay, Nussbaum’s conception of the literary imagination offers an invaluable contribution to the rhetoric of law by situating it as a resource for rhetorical invention and practical judgment. In order to do so, I will first outline the idea of the literary imagination and its relationship to rhetorical invention. With this connection established, I will argue for the vital role that literature and the literary imagination play in the process of legal judgment, in particular the ability to offer judges insight into the cultural diversity and emotional complexity of the lives their judgments impact. The literary imagination opens up new avenues of rhetorical invention that complement (and sometimes challenge) traditional legal resources, thus cultivating a more nuanced, humanistic interpretation of the law and its role in society. The result is an approach to legal judgment that offers a robust response to one of the preeminent legal theories of the day, Richard Posner’s law and economics.

While Nussbaum recognizes the different relationships between law and literature, borrowing from and contributing to them in various ways, her most compelling contribution strays from the pack, and begins with a seemingly simple question: what does literature—particularly the novel—do *for* the act of legal judgment? Borrowing from Walt Whitman’s depiction of the “poet-judge,” which hearkens back to “a normative conception of equitable judgment” advanced by Aristotle, Nussbaum argues that literature helps a judge to address a “diverse

population” while negotiating issues of fairness and historic precedent.<sup>5</sup> More importantly, a judge steeped in good literature is able to “read the contrast between being an ‘arguer’ and being ‘judgment’” by providing “equitable judgments, judgments that fit the historical and human complexities of a particular case.”<sup>6</sup> The poet-judge prizes judicial neutrality, but Nussbaum moves the idea of neutrality away from “remote generality” and “quasi-scientific abstractness” and toward “rich historical concreteness” and “a vision of the human world.”<sup>7</sup> Stressing the importance of the novel over academic and theoretical texts, Nussbaum contends that good novels provide an engaging style and level of depth absent in other discourses. Literature offers both “horizontal” and “vertical” extensions of life; horizontal in its ability to “[bring] the reader into contact with events or locations or persons or problems he or she has not otherwise met,” and vertical in its ability to “[give] the reader experience that is deeper, sharper, and more precise than much of what takes place in life.”<sup>8</sup> Simply put, good literature *improves* judgment, something that should pique the interest of all judges. Its ability to induce readers to critically reflect upon the struggles of achieving the flourishing life is especially important for the poet-judge.

According to Nussbaum, good literature reflected upon thoughtfully cultivates a literary imagination, a way to expand the scope of one’s worldview so as to imagine the lives of others, especially those with whom one may not identify. Nussbaum argues that both the form and the content of narrative literature illuminate the robust complexity and profound vulnerability of human life more accurately than a strictly theoretical approach understood without the aid of literature. Nussbaum claims that literature returns practical philosophy, especially moral and legal philosophy, to its roots by focusing on what it means to live a good life by “being human and speaking humanly.”<sup>9</sup> In *The Fragility of Goodness* Nussbaum argues, “Literature, with its stories and images, enters in as an extension of our experience, encouraging us to develop and understand our cognitive/emotional responses.”<sup>10</sup> Literature grabs our “moral attention”<sup>11</sup> and exposes us to the lives of others in moving and meaningful ways that are simply unattainable in abstract academic writing. Attaining and directing our moral attention is also highly rhetorical: “the novel . . . is a morally controversial

form, expressing in its very shape and style, in its modes of interaction with its readers, a normative sense of life. *It tells its readers to notice this and not this, to be active in these and not those ways. It leads them into certain postures of the mind and heart and not others.*"<sup>12</sup> Echoing the classic definition of a rhetorical trope, Nussbaum values literature's ability to direct attention in particular ways and to examine particular issues that are at the core of what it means to live a flourishing life. Analytic approaches to judgment that ignore the benefits wrought from literature fail to understand the human being *qua* human being.

In many ways, Nussbaum's poet-judge is employing a creative rhetorical invention that follows the sophistic tradition. Drawing from John Poulakos' analysis of *dissoi logoi* and sophistic rhetoric, Nathan Crick argues for the importance of examining the "process by which *novelty* arises from the clash of competing perspectives."<sup>13</sup> Invention thrives when one has a "wealth of available knowledge to produce desirable results."<sup>14</sup> Good judicial judgment requires a wealth of knowledge, too; nobody can honestly deny that fact. But when such knowledge is only derived from historic precedent, legal statutes, and an economic worldview, the prospect of robust invention becomes impotent. Crick claims, "The sophistic attitude thus approaches the arts and sciences as resources for rhetorical invention to master contingencies and reduce uncertainty in the midst of conflict and turmoil."<sup>15</sup> Although Nussbaum would no doubt oppose being characterized as a sophist,<sup>16</sup> her approach to literature and its influence on judgment nonetheless reinforces the sophistic invention Crick and Poulakos articulate. Literature serves as a means of cultivating an ability to imagine the position of another and to genuinely consider their motivations and arguments. The poet-judge is not a flatterer, as Plato derided the sophists. She acknowledges that another's experiences can be very different than her own and understands that others' experiences must be taken into account before good judgment is possible.

Despite the important role of invention in practical judgment, Nussbaum's poet-judge faces resistance amongst legal scholars and acting judges. One reason is its inherently humanistic approach that remains highly resistant to more systematic

approaches to law like Richard Posner's law and economics or Antonin Scalia's textual originalism.<sup>17</sup> James Crosswhite hails invention as the most valuable element of rhetoric, "the one that historically dignifies rhetoric and lifts it from the occasional declines to which it has been subject," but he's also quick to note its "resistance to modeling."<sup>18</sup> In other words, invention—especially the type of invention that is inspired by literature—lacks the standards that the competing models of judgment value so much. But should it be standardized? *Can* it be standardized? Herein lies the problem. Society demands that judges be well prepared for their duties and be able to perform said duties with a certain degree of uniformity lest we have the unpredictable judge, which undermines John Adams' famous idea that we enjoy "a government of law, and not of men." Crosswhite attempts to articulate a model of invention by utilizing Chaïm Perelman and L. Olbrechts-Tyteca's *The New Rhetoric*, but struggles to pin down a definition that would satisfy an economist or analytic philosopher. He notes that invention cannot be inspired "from isolated facts or values"<sup>19</sup> because "worlds are not inert systems."<sup>20</sup> Although legal theorists may not conceive of legal issues operating in an inert world, Nussbaum's target—Posner's economic model of judgment—relies upon a number of fixed assumptions about human motivation; namely, a rational self-interest that strives for wealth maximization. In short, Posner argues that legal decisions are best when they embrace the objectivity and efficiency derived from economic analysis. He argues that good legal judgment follows the strictures of economics by examining the intended or unintended consequences of laws, surmising whether these consequences are valuable for society, and predicting the behavior of citizens within a particular legal system assuming they are rational agents pursuing their own self-interest.<sup>21</sup> In doing so, he advances worldview that distills human actions and choices into economic formulae, universal procedures, and abstract principles. One of the dangers of this approach, however, is that human agents are treated as though they have the same cultural backgrounds, personal histories, and driving motivations. Individual and group identities fall to the wayside, which becomes quite problematic when the legal system ignores the vastly different experiences of marginalized groups in favor of a hegemonic status quo. Whereas the

economic judge ignores these differences, the poet-judge is drawn to them and calls upon a literary imagination to illuminate a wider array of rhetorical possibilities.

Despite the inventive potential of literary imagination, it can be sporadic and ephemeral. Even within literary experiences, two well-read individuals can read from two very different libraries. Judges have no doubt read a common repository of cases, but outside of such reading how much overlap can we expect? Is there a way to *train* a literary imagination capable of adequate creative invention? As Crosswhite notes, rhetorical invention, on its own, cannot be trained. Similarly, one cannot simply take a class to learn how to be funny. Teaching someone how to be rhetorically inventive or humorous by distributing a list of attributes that constitute invention or humor will fail miserably. Yet, both invention and humor can be *cultivated*. Crosswhite notes three particular requirements necessary for invention: an awareness of one's surroundings, a sense of the actions and motivations taking place, and the ability to organize this knowledge and put it toward the most appropriate course of action. "These are capabilities that are acquired in a *broad education* that involves both knowledge of the world and repeated practical experience with arguments that arise in real situations."<sup>22</sup> Like any art, whether it is painting, acting, composition, or motorcycle maintenance, rhetorical invention is not learned through a set of formulae. There is no *one* way to paint or act or write or tend to your boss hog. There are better and worse ways of approaching these arts, but they all depend on one's experience, the contextual nuances of the situation, and the desired result. Thus, the call for a broad education becomes all the more important, which is similarly at the heart of Nussbaum's project.

Nussbaum's defense of the liberal arts and her worry about the decline of the humanities in American schools and universities is well documented.<sup>23</sup> For our present purposes, the literary education of the law-student-turned-judge is of the utmost importance. In *Poetic Justice*, Nussbaum recounts a number of experiences she has had while teaching at the notably conservative University of Chicago School of Law. Highly critical of rational-choice theory and the economic model of judgment, Nussbaum focuses most of her attention on Charles Dickens' *Hard Times*. The novel

satirically illuminates the blindness Nussbaum argues is inherent to the economic way of seeing. As Nussbaum and the students navigate through the text, the deficiencies of the economic mindset become apparent. Noting the criticisms cast against literature as a form of argument—that it is “unscientific and subversive of scientific social thought,” that it is “irrational in its commitment to the emotions,” and that it “has nothing to do with the impartiality and universality that we associate with law and public judgment”<sup>24</sup>—Nussbaum responds by highlighting good literature’s ability to disrupt and disturb misguided conventions,<sup>25</sup> especially those instantiated by economic thinking.

Nussbaum’s aspirational account of literature’s contribution to legal judgment faces an early challenge when pressured to define what constitutes “good” literature. Nussbaum regularly turns to the works of Charles Dickens and Henry James, with Marcel Proust and Samuel Beckett making frequent appearances as well. A common theme connecting these authors is the crushing density and length of their works. Unless one is vacationing on the hard, uncomfortable beaches of Maine, these are not stereotypical summer beach reads, but rich explorations into the lives of complex characters. Although these writers and the others that Nussbaum incorporates in her scholarship have been widely celebrated, she nonetheless selects novels that align with her liberal worldview, predisposing the reader toward her political ideology and philosophical aims. Dickens’ *Hard Times* is intended to disrupt the reader’s faith in utilitarianism. Henry James’ *The Golden Bowl* is intended to illuminate the complexity and importance of human emotions, especially within intimate and familial relationships. These novels have been lauded for their perspicuity and are often considered part of the general canon of great western literature along with other mainstays like Geoffrey Chaucer, William Shakespeare, Herman Melville, and James Joyce. Yet, popular novels such as Fyodor Dostoevsky’s *Crime and Punishment*, Franz Kafka’s *The Trial*, Albert Camus’ *The Stranger*, and Stephen Crane’s *The Red Badge of Courage* challenge her preconceived notions about what a good society and what a good life entail. Crane’s work, for example, downplays the role that compassion plays in acts of courage, starkly contrasting Nussbaum’s position. Although one cannot fault

Nussbaum for selecting texts that support her argument—we all do this—her characterization of good literature may operate as a self-serving bias, edifying readers on *her* conception of the flourishing life and the role of law therein while ignoring or downplaying others.

Her constant return to Dickens and James places her in an interesting rhetorical bind. On the one hand, such choices reflect an academic elitism wherein good literature is almost inaccessible to the casual reader. Anyone who has read (or *attempted* to read) James' *The Golden Bowl* will understand. At over 400 dense pages, even the most stout of heart no doubt will struggle through the labyrinth of prose as James waxes literary. Dickens is little different, although slightly more accessible. And this says nothing about excavating and understanding the deeply important meanings Nussbaum finds in these texts. Must these near impenetrable tomes constitute good literature? Is there no room for something more approachable yet nonetheless profound? Kurt Vonnegut prided himself on such a writing style and his works have been equally celebrated.

On the other hand, Nussbaum is also susceptible to attacks from feminist and critical theorists for supporting traditional social norms through the selection of patriarchal literature.<sup>26</sup> After all, Dickens, James, and her other favorites are a collection of dead white men writing about dead white issues. For her part, Nussbaum is aware of the criticisms surrounding the literary canon, but does not find them very convincing. She accepts the fact that her choices represent a thin demographic slice, but that does not mean the works lack significant value. Moreover, the literature Nussbaum chooses to cite in her work by no means constitutes a complete reading list. Rather, they serve as important examples amidst a vast array of others. Isabel Allende's *The House of the Spirits*, Ralph Ellison's *Invisible Man*, Toni Morrison's *Beloved*, Christopher Isherwood's *A Single Man*, Margaret Atwood's *The Handmaid's Tale*, Alice Walker's *The Color Purple*, Zora Neale Hurston's *Seraph on the Suwanee*, James Baldwin's *Giovanni's Room*—all (and many more) help people gain insight into the myriad of complex, nuanced lives outside of their own lived experience. Nussbaum notes that a “central role of art is to challenge conventional wisdom and values,”<sup>27</sup> which serves as

a useful guide and suggests that the literary canon is less of a definitive list and more of an ever-growing, ever-changing compilation of helpful suggestions. The divide between Nussbaum and her critics is less about which books ought to be read for edification (although she certainly has her favorites) and more about the teleological objectives she finds part and parcel with reading “good” literature. *Why* do we read? In short, Nussbaum suggests we read to become better people and better citizens. We read to expose ourselves to people and situations that we would never encounter in our day-to-day lives. We read to explore complicated situations and imagine ourselves trying to work through them. All jurors, not just the most privileged, should be avid readers and make selections that help to inform their personal blind spots. Nonetheless, her wariness of postmodernism and deconstructionism is rooted in a fear that they are abandoning the moral and civic dimensions of cosmopolitan human living. This is one of her starting premises, which sets her at odds with some of her critics.

Despite the arguments concerning the literary canon, Nussbaum argues that literature, at its best, has the ability to ignite our imaginations, granting us an opportunity to experience a life quite unlike our own with a depth and nuance that only a well-crafted narrative can produce. Literature allows an individual “the ability to imagine what it is like to live the life of another person who might, given changes in circumstance, be oneself or one of one’s loved ones.”<sup>28</sup> Echoing a recurring theme in sophistic rhetoric, she continues, claiming, “*Literature focuses on the possible*, inviting its readers to wonder about themselves . . . literary works typically invite their readers to put themselves in the place of people of many different kinds and to take on their experiences.”<sup>29</sup> Such consciousness-raising may be possible through philosophical discourse, but the *impact* of a novel is often much more profound. Good novels have a rhetorical force with which few philosophical treatises can compete. Progress, argues Nussbaum, is not taught; rather, one is led to it “by a word, by a story, by an image—to see some new aspect of the concrete case at hand.”<sup>30</sup> If law is a progressive and moralizing force in society, which Nussbaum heartily defends, then literature serves as a vital resource for guiding judges, who in turn guide society.

For a sitting judge, this ability to imagine the lives of others is not just important, it is *necessary* for good judgment. Judges have an immense responsibility in and to our society. As the final arbiters and interpreters of law, they hold the fates of our country's most vulnerable denizens in their decisions. As Robert Cover stresses, they can quite literally author a life or death decision, a constant reminder of the violence undergirding justice.<sup>31</sup> As the gatekeepers of the Constitution, their decisions also shape and reshape our shared democratic culture. The literary imagination can inspire "identification and sympathy in the reader,"<sup>32</sup> traits that Nussbaum finds essential for good judgment. The narratives found in good literature cultivate habits that make a strange "other" an object of unselfish intrigue and genuine concern, rather than fear, paranoia, disinterest, or disgust. Nussbaum asserts that the literary imagination also reflects a "*public* imagination" in its ability to "steer judges in their judging."<sup>33</sup> Reading literature makes one better prepared to author better decisions and recent research in psychology bears out this point.<sup>34</sup>

Important to note, Nussbaum's turn to imagination should not be construed as a flight of fancy one often associates with the term. Rather than an imagination that conceives of that which is unbelievable, erroneous, or delusional, Nussbaum suggests that an *attuned* imagination that remains contained by the strictures of reality does quite the opposite; it has the ability to expand one's perspective in order to see *more* of the realities that surround us. In *From Disgust to Humanity*, Nussbaum argues that it is only through imagination that one could ever "become able to see another as human . . . Only by imagining how the world looks through that person's eyes does one get to the point of seeing the other person as a someone and not a something."<sup>35</sup> She continuously claims that one's imagination can bring others into view and allow us to perceive them more readily and more fully.<sup>36</sup> By embodying an attuned imagination that has expanded her perception, the poet-judge is better situated to employ good legal judgment, which Nussbaum characterizes as "the wise supplementing of the generalities of written law by a judge who imagines what a person of practical wisdom *would* say in the situation, bringing in the business of judging the resources of a rich and responsive personality."<sup>37</sup> When deployed effectively, the literary imagination

illuminates those paths of persuasion that tend to be blocked or obfuscated by rigid standards or experiential naiveté.

Nussbaum certainly is not the first advocate of law and literature to acknowledge the importance of imagination. James Boyd White's *The Legal Imagination* tackles the issue head-on, although his method differs from Nussbaum's. Reflecting an approach focused on law *as* literature more than literature *for* law, White argues that the legal style of argumentation and persuasion is intricately connected to that of literary writing. He describes his project as "a study of what lawyers and judges do with words," which includes "counseling, arguing, brief-writing, [and] negotiating."<sup>38</sup> Like literature, legal language is confined by an inherited tradition that guides its meaning and unites users under a shared history. Words and their meanings, however, are not fixed, and altering them requires a different set of rhetorical appeals, a different way of employing one's legal imagination.

White highlights legal education as training students to think and, more importantly, *to speak* like a lawyer. Such training includes the law's unique history and a technical, often idiosyncratic discourse. Yet, as White notes, legal language operates within a broader social world. As such, it is "a sort of social literature . . . a way of talking about people and their relationships."<sup>39</sup> He turns to the legal imagination as a way to illustrate this important connection and to reinforce its vital place within law. Lawyers and judges, poets and novelists—they all construct and reconstruct their communities through rhetoric and persuasion. White argues that the law has the ability to create, maintain, undermine, and recreate different worlds with different possibilities, much like a great work of literature. Even though the parameters of legal argumentation may be narrower than that of a literary work, they nonetheless share a common interest in a community of readers.

In subsequent works, White has clarified and built upon his conception of the literary imagination. In *Heracles' Bow*, White claims that "the law is a language, a set of resources for expression and social action, and that, accordingly, the life of the lawyer is at its heart a literary one—a life both of reading the compositions of others (especially those authoritative compositions that declare law) and of making

compositions of one's own."<sup>40</sup> Legal writing is but the other side of the same literary coin. Both involve an author attempting to convey a particular message while still aware of the challenges inherent to interpretation. Both use a shared language to give ideas weight and significance, imbuing them with a power to move the mind and the will of others. Both adopt particular words and phrases that "acquire their meaning from their gradual redefinition."<sup>41</sup> And unlike the ephemerality of private conversation, both "speak to a range of readers, not just one, and . . . operate across a spectrum of contexts. They seek to establish the meaning of terms not merely for one conversation, for the present moment, but for a class of conversations across time. Every legal and literary text implies a reader who will use it in circumstances that cannot now be known."<sup>42</sup> Unlike Roland Barthes' assertion that the "author is dead," White asserts that the author and the audience are vibrantly alive and matter greatly both for law and for literature.

Interestingly, White's scholarship on law and literature is all but absent in Martha Nussbaum's work. Aside from an exceptionally brief footnote citing *The Legal Imagination*, Nussbaum almost entirely ignores his important contribution.<sup>43</sup> Her omission aside, the two share a few key points in common. Much like James Boyd White's conception of legal interpretation, Nussbaum argues that one must read legal doctrines in a similar way as one would read literature. Although the subject matter and desired effect may be different, law and literature involve assessing and passing judgment on individuals. Viewing law as the creation and recreation of communities, White claims that "a purely conceptual and logical language. Like that of modern analytic philosophy, will always be incomplete or defective."<sup>44</sup> Like Icarus flying toward the sun, the more that analytic legal theorists attempt to create a systematic, (pseudo-) scientific language of law, the quicker they fall from their heights. Rather than turning solely to science and logic for inspiration and influence, White argues that literature provides a more fitting example of what law is and does for a community.

Nussbaum and White part ways in the role that imagination plays in judgment. White hopes the turn to imagination would remove the blinders placed on law

students (and, subsequently, lawyers and judges) to think, write, and speak about law within the confines of the technical tradition. Actual literature—Dickens, James, Joyce, and the like—only plays a tangential role within this scheme; it serves as an example, albeit a profound one. Throughout his work, White draws from literature, usually classical works by the great tragedians, in order to illustrate how legal argumentation parallels the rhetorical situation of literary characters. White’s interpretation of the legal imagination strives to make this connection lucid. Nussbaum would certainly agree, but takes a more panoramic view of the legal system. Whereas White’s legal imagination is narrow, focused on a select group of people, Nussbaum expands the idea of the legal imagination and its connection with literature. Her arguments are not specifically intended for judges, although they are a group of individuals who could greatly benefit from a literary imagination.

One such benefit is an increased sensitivity to the moral function of law, something many legal scholars resist. As Nussbaum argues, the moral imagination is part and parcel with the literary imagination, both of which ought to function in legal judgment.<sup>45</sup> Drawing heavily from Aristotle, Nussbaum believes that practical reason and, consequently, good judgment are derived from human perception, which recognizes a certain degree of *incommensurability* that legal philosophies like law and economics lack. If rhetoric is a “way of looking at things” as Thomas Farrell suggests, then the economic model is blinded by its adherence to economic rationality and the discursive confines therein. According to Nussbaum, “Frequently a reliance on the powers of the intellect can actually become an impediment to true ethical perception, by impeding or undermining these responses.”<sup>46</sup> An economically minded judge, for all of his vast intelligence, does not miss the forest for the trees, but rather the trees for the forest.

Nussbaum highlights the importance of imagination and the contribution that literature plays therein by stressing the narrow perception and altogether lack of imagination employed by competing models of judgment, especially Richard Posner’s law and economics approach. She notes that the law and economics movement wants to eschew the humanistic elements of its “science” in favor of an ephemeral neutral

position, but at what cost? Ideally, the transition would be seamless. In reality, however, the economic model attempts to quantify the unquantifiable. Noting the “economist’s way of thinking,” Nussbaum is wary of economizing the non-economic. Citing Posner’s economic cost-benefit analysis of different types of sexual intercourse as a prime example,<sup>47</sup> she questions not only the ability to distill something as intimate as sex into such terms, but also wonders what happens to the situation and individuals involved when an economic discourse is adopted. Where does emotional involvement come into play (and is that a cost or a benefit)? What about the history of the individual? Does it matter if someone was raised in a strict, conservative religious tradition that stigmatizes sex? What about individuals who were molested as children or raped at any point in their lives; ought we consider such traumatic experiences in a cost-benefit analysis? If so, how could one measure it? More importantly, *should* one measure it?

Describing the economic approach as an “as if” model in that it only works if people are acting *as if* they are rational wealth maximizers,<sup>48</sup> Nussbaum fears the many ways in which economics has seeped into all manner of discourse. Creating an allure via its “elegant simplicity,” economic rational-choice theory boils down individual decisions to (overly) simple economic terminology. Characterizing the economic model of judgment as “extreme,” she worries about an “across the board” application of economic rational-choice theory because it leaves out important elements of our humanity. “First,” Nussbaum argues, “it reduces qualitative differences to quantitative differences . . . by a process of abstraction from all in people that is not easily funneled into mathematical formulae.”<sup>49</sup> It involves the whole range the humanistic, unquantifiable, incommensurable experiences that give normative character to a person and her community. Whereas Posner’s law and economics approach to adjudication develops equations to maximize “correct” decisions, Nussbaum’s poet-judge asks questions to elicit narratives that better illuminate the situation.

Nussbaum’s second critique of law and economics is a variation on the same theme: “The [economic] mind, bent on calculation, is determined to aggregate the

data gained about and from individual lives, arriving at a picture of total or average utility that effaces personal separateness as well as qualitative difference.”<sup>50</sup> Under the auspices of fairness, a person becomes a list of statistics. Quantitative assessment *requires* us to speak *as if* our lives fit the economic model. Yet, in order to function properly it must neglect or manipulate the qualitative, humanistic pegs to fit in the much smaller economic holes. Even Ronald Coase doubted that his now-famous Coase Theorem, which undergirds much of Posner’s jurisprudence, could adequately assess the qualitative, contextually-based nuances of real-life scenarios. Nussbaum wants to reverse the process. Instead of sanding down the pegs to a smaller size (losing a lot of peg in the process), she wants to expand the hole and preserve the true pegginess of the peg.

Part of Nussbaum’s rhetorical strategy is to highlight the ways in which economics reaches too far in its attempt to justify judicial decisions on economic grounds, which reminds me of a good joke I heard the other day. A mathematician, a statistician, and an economist apply for the same job. The interviewer calls in the mathematician and asks, “What does two plus two equal?” The mathematician replies, “Four.” The interviewer asks, “Four, exactly?” The mathematician looks at the interviewer incredulously and says, “Yes, four, exactly.” Then the interviewer calls in the statistician and asks the same question, “What does two plus two equal?” The statistician says, “On average, four—give or take ten percent, but on average, four.” Then the interviewer calls in the economist and poses the same question, “What does two plus two equal?” The economist gets up, locks the door, closes the shade, sits down next to the interviewer and says, “What do you want it to equal?” All joking aside, Nussbaum worries about the economic judge’s eagerness to decide cases based on a pseudo-scientific process that eschews humanistic perception and the imaginative ability to understand others. “The intellect is not only not all-sufficient, it is a dangerous master. Because of its overreaching, knowledge can be ‘dragged around like a slave.’”<sup>51</sup> One can rationalize all manner of sins. The poet-judge must possess extensive knowledge and articulate well-reasoned arguments, but she must

also be able to place that knowledge in conversation with an imaginative rhetorical invention in order to reach a sound judgment.

A prime example of the literary imagination's role in judicial decision-making is the 1967 antimiscegenation case, *Loving v. Virginia*. The landmark Supreme Court case examined the legality of marriage prohibitions between races. In 1958, Richard Loving, a white man, married Mildred Jeter, a black woman, in Washington, D.C. The couple moved to Virginia, which was one of sixteen states with laws that prohibited interracial marriage, and they were indicted by a grand jury. After pleading guilty, they turned to the state trial court to vacate the judgment and set aside the sentence on the grounds that it violated the Fourteenth Amendment. Failing to persuade the state court and the Supreme Court of Appeals of Virginia, the Lovings appealed to the U. S. Supreme Court. In the unanimous decision authored by Chief Justice Earl Warren, the court held that the state had no legitimate interests in racial classifications that were "independent of invidious racial discrimination."<sup>52</sup> Consequently, the opinion found Virginia in violation of the Due Process clause of the Fourteenth Amendment.

Nussbaum's interest in this case not only concerns the significant step taken by the Supreme Court in expanding equality, a democratic virtue she sees as a ramification of a conscientious imagination.<sup>53</sup> The case also serves as a judicial response to Herbert Wechsler's "Toward Neutral Principles of Constitutional Law," a landmark essay in jurisprudence. Wechsler, who served as an Assistant Attorney General during the infamous *Korematsu v. United States* case and argued for the *New York Times* in *Times v. Sullivan*, asserted that judicial decisions should be based on "neutral principles," or principles that "transcend any immediate result that is involved."<sup>54</sup> Wechsler cited *Brown v. Board of Education* as a case that flouted the idea of neutral principles in favor of political opportunism, later arguing that the case "extended far beyond its rationale."<sup>55</sup> Although highly contested, the reliance on neutral principles continues to hold sway in the American judiciary.

Nussbaum introduces Wechsler's idea of neutral principles because it highlights the insidious nature of a judge devoid of imagination. "From Wechsler's

lofty distance from the human experience of discrimination,” argues Nussbaum, “he fails to notice perfectly articulable and universalizable principles that do include the asymmetrical meaning of segregation and the history of segregation as stigma.”<sup>56</sup> Consequently, his “failure of imagination” leads him to specious conclusions; namely, that “any law framed in a verbally neutral manner . . . cannot possibly be discriminatory.”<sup>57</sup> The literary minded poet-judge, however, has a panoramic view of citizenship and humanity, enabling her “to imagine situations of hierarchy and to appreciate their human meaning.”<sup>58</sup> In *Loving v. Virginia* and *Brown v. Board of Education*, the poet-judge would claim that the judges issuing the opinion were able to see *through* the purportedly neutral language. Their perceptions had been opened to include a greater swath of human experience. Law, as a normative construct created by humans for the guidance and control of humans, can never be entirely neutral. Thus, our imaginations serve an important rhetorical function by opening up more paths of argumentation and cultivating a keen sense of rhetorical invention.

Critics may assert that Nussbaum’s poet-judge is more of an antagonist than a balanced judiciary figure, a jurist at the margins who utilizes her literary imagination in order to admonish established precedent without reflecting on the reasoning and restraints of the original decision. On the contrary, Nussbaum asserts that imagination plays a vital role in understanding both (or multiple) sides of an issue, even those an individual may find uncomfortable.<sup>59</sup> Although Nussbaum focuses on the literary imagination’s ability to vicariously experience the disenfranchised, emphasizing cases concerning African-Americans (*Loving* and *Brown*), women (*Roe v. Wade* and *Planned Parenthood v. Casey*), and the LGBTQ community (*Bowers v. Hardwick*), the poet-judge must imaginatively engage the histories, traditions, motives, social pressures, and expectations of the opposition as well. What sorts of experiences shape a white supremacist or an anti-LGBTQ bigot? What rhetorical appeals do they make? How do they frame their position? Much like the impetus driving Kenneth Burke to examine Hitler’s rhetoric in “The Rhetoric of Hitler’s Battle,” the poet-judge must attempt to grasp those positions she finds abhorrent. To disregard them out of hand would be a failure to address their narratives, a failure to imagine the web of

experiences and relationships that create narrow-mindedness, a failure to understand the situation before issuing a judgment.

Robert Pirsig's analogy of reason and experience chugging along as a freight train captures this sentiment well. In *Zen and the Art of Motorcycle Maintenance*,<sup>60</sup> Pirsig likens humans to mile long freight trains filled with all of the concepts that we have inherited from the past—from language, culture, and experience. These concepts and experiences fill the boxcars being pulled along. The older we get, the more experiences we have, the heavier the freight becomes. Consequently, it has a lot of momentum, a lot of weight behind it, but the front of the train is constantly breaking into new, unexplored territory. This “pre-intellectual” experience is well funded not only by one's own experience, but also by the collective cultural experience in which we learn to think and to speak. We all have a mile long train full of weight that comes to bear on our experiences. In order to do something well, we need to have a lot of experience in our boxcars such that the front of the train is prepared for new horizons.

For a judge, the boxcars are filled with some expected cargo: knowledge of the legal system and how it operates, the role of the judiciary within our democratic republic, historic precedent, the facts of the case, and so on. But the judge's personal and cultural experiences also come into play, whether conscious of them or not. One of Nussbaum's greatest concerns is the blind devotion to legal and intellectual experience accompanied by a narrow set of personal and cultural experiences that remain within the confines of a judge's lived life. Most likely, these experiences will not adequately represent the broad swath of the American public, many of whom have a set of experiences markedly different than those of the judges. Yet, law constantly affects these people and their experiences. Most judges come from privileged backgrounds. Oliver Wendell Holmes, Jr., one of the most celebrated judges in American history, was part of the so-called “Boston Brahmin.” And he was no exception. Even contemporary judges who come from meager beginnings attain privilege in their adult lives. One need look only at the schools that most federal judges have attended: Harvard, Stanford, Yale, Columbia, Berkeley. Yes, they had to

work incredibly hard, but their hard work is markedly different than the hard work of the single mother cleaning hotel rooms or the coalminer going into the depths of the earth. If they were not privileged in their youth, judges are certainly privileged by the time they become judges. As a senior judge in the British legal system recently asserted, most of her colleagues live “sheltered lives” that negatively influence their capacity for good legal judgment.<sup>61</sup>

Good judges must be attentive to the whole of the citizenry, which includes people remarkably different than them. Alas, they cannot go out and experience their lives so easily. They have limited time and resources. And their mere presence may alter how others act and react to them. Literature, however, offers judges a rich set of experiences that they may not otherwise have. Literature grants access into the highly emotional and deeply nuanced inner dialogue of characters, an experience anyone rarely, if ever, enjoys in their day-to-day interactions. The poet-judge *is* an artist because she must take all of this knowledge and experience and put it to good use. Anyone can fill in a formula and get an answer, as the economic model of judgment proposes. But only the attentive, sensitive, compassionate person who strives to understand the defining characteristics, histories, and experiences of those different from her will embody the practical wisdom necessary to render good judgment.

## Notes

<sup>1</sup> Paul Gewirtz, “Narrative and Rhetoric in the Law,” in *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 3.

<sup>2</sup> The law in literature approach focuses on those works of literature that incorporate law as part of the dramatic narrative, which includes works by Sophocles (*Antigone*), Melville (*Billy Budd*), Dostoevsky (*The Brothers Karamazov*), and Kafka (*The Trial*). For examples of the scholarly analysis of law in literature, see Margaret Atwood, “Justice in the Literary Tradition,” in *Justice Beyond Orwell*, ed. Rosalie S. Abell and Melvin L. Rothman (Les Editions Yvon Blais: Montreal, 1985); Robin West, “Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner,” *Harvard Law Review* 99 (Dec. 1985), 384-428; and Gewirtz, 1996.

<sup>3</sup> The inverse of the law in literature approach, the literature in law vein of research, tends to the various ways in which judges incorporate literature in their decisions. The most sparse of all the angles of the law and literature movement, partly due to the rare occasions when literature is evoked in a legal decision, the driving motivation behind this approach is to understand when judges incorporate a citation to a literary text in a decision and to what end. Justice William Brennan cited Orwell’s *1984* in *Florida v. Riley*, 488 U.S. 445 (1989); Justice Harry Blackmun

called upon Charles Dickens' *Pickwick Papers* to criticize debtors in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 156 (1972); and in order to evoke sympathy for whales, Justice Thurgood Marshall turned to *Moby Dick* in *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986).

<sup>4</sup> Unlike the law in literature and literature in law approaches, the law as literature approach takes a step back and assesses the role of hermeneutic interpretation inherent both to law and to literature. Acknowledging the fact that law and literature draw from a shared language that lends itself to ambiguity and evolves over time, proponents of this approach appropriate the interpretive methods developed in literary studies are "imported into the study of law." <sup>4</sup> See, for example, Peter Brooks, "The Law as Narrative and Rhetoric," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996); Robert Ferguson, "The Judicial Opinion as a Literary Genre," *Yale Journal of Law* 2 (1990), 201-219; Sanford Levinson, "The Rhetoric of the Judicial Opinion," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996); James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1989); and James Boyd White, *Justice in Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

<sup>5</sup> Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995), 80-1.

<sup>6</sup> *Ibid.*, 81.

<sup>7</sup> *Ibid.*

<sup>8</sup> Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1992), 48.

<sup>9</sup> *Ibid.*, 53.

<sup>10</sup> Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, 2d ed. (Cambridge: Cambridge University Press, 1991), 186.

<sup>11</sup> Nussbaum, *Love's Knowledge*, 149.

<sup>12</sup> Nussbaum, *Poetic Justice*, 2, emphasis added.

<sup>13</sup> Nathan Crick, "The Sophistical Attitude and the Invention of Rhetoric," *Quarterly Journal of Speech* 96.1 (Feb. 2010), 36. See also John Poulakos, *Sophistical Rhetoric in Classical Greece* (Columbia: University of South Carolina Press, 1995).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, 39.

<sup>16</sup> See, for example, Martha C. Nussbaum, "Sophistry about Conventions," *New Literary History* 17.1 (Autumn, 1985), 129-139.

<sup>17</sup> Although Posner's law and economics and Scalia's textual originalism approach legal judgment quite differently, they nonetheless share a common theme in that both perceive their methods to be objective such that anyone applying the method would get the same result. As such, the onus is on the *process* of judgment, rather than the judges themselves. They differ in that Posner relies upon a quasi-utilitarian notion of "wealth maximization" and cost-benefit analysis to determine the outcome, whereas Scalia argues that the judge must interpret the text of a law based on the meaning of the words at the time the law was put into place.

<sup>18</sup> James Crosswhite, "Awakening the *Topoi*: Sources of Invention in *The New Rhetoric's* Argument Model," *Argumentation and Advocacy* 44 (Spring 2008), 169.

<sup>19</sup> *Ibid.*, 172.

<sup>20</sup> *Ibid.*, 173.

<sup>21</sup> For his two clearest articulations of his position, see Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973) and Richard A. Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981). For rhetorical analyses of Posner, see Edward M. Panetta & Marouf Hasian, Jr., "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42.1 (1994), 57-74; James Arnt Aune, "On the Rhetorical Criticism of Judge Posner,"

*Hastings Law Review* 23.3 (Spring 1996), 658-69; and Joe Sery, "Richard Posner and the Rhetoric of (Economic) Common Sense," *Communication Law Review* 16.1 (2017), 1-23.

<sup>22</sup> Crosswhite, 173, emphasis added.

<sup>23</sup> See Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge: Harvard University Press, 1998) and *Not for Profit: Why Democracy Needs the Humanities* (Princeton: Princeton University Press, 2010).

<sup>24</sup> Nussbaum, *Poetic Justice*, 4.

<sup>25</sup> *Ibid.*, 5.

<sup>26</sup> For example, see bell hooks, "Postmodern Blackness," *Postmodern Culture* 1.1 (Sept. 1990); Judith Butler, "Imitation and Gender Insubordination," in *Inside/Out: Lesbian Theories, Gay Theories*, ed. Diana Fuss (New York: Routledge, 1991); Anne Babeau Gardiner, "Feminist Literary Criticism: From Anti-Patriarchy to the Celebration of Decadence," *Modern Age* 49.4 (Fall 2007), 393-9; and Mary Eagleton, *Feminist Literary Criticism* (London: Longman, 1991).

<sup>27</sup> *Ibid.*, 99.

<sup>28</sup> Nussbaum, *Poetic Justice*, 5.

<sup>29</sup> *Ibid.*, emphasis added. See also, "Literature and the Moral Imagination," in *Love's Knowledge*.

<sup>30</sup> Nussbaum, *Love's Knowledge*, 160.

<sup>31</sup> See Martha Minow, Michael Ryan, and Austin Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995).

<sup>32</sup> Nussbaum, *Poetic Justice*, 5.

<sup>33</sup> *Ibid.*, 3.

<sup>34</sup> See Maja Djikic, Keith Oatley, and Mihnea C. Moldoveanu, "Opening the Closed Mind: The Effect of Exposure to Literature on the Need for Closure," *Creativity Research Journal* 25.2 (2013), 149-54.

<sup>35</sup> Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010), xvii.

<sup>36</sup> Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), 7, 84.

<sup>37</sup> Nussbaum, *Love's Knowledge*, 100.

<sup>38</sup> James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1973), xxxi.

<sup>39</sup> *Ibid.*, 243.

<sup>40</sup> James Boyd White, *Heracles' Bow*, 77.

<sup>41</sup> *Ibid.*, 87.

<sup>42</sup> *Ibid.*, 88.

<sup>43</sup> Nussbaum, *Love's Knowledge*, 43n.

<sup>44</sup> James Boyd White, *Heracles' Bow*, 5.

<sup>45</sup> The Supreme Court's overturning Texas' anti-homosexuality laws in *Lawrence v. Texas* exhibits this function well. Nussbaum writes, "*Lawrence's* great achievement, then, was not conceptual clarity or sharp practical guidance, but a cast of mind, a judicial approach to liberty interests. In essence, it consists in a rejection of the politics of disgust so amply evident in *Bowers*, together with the Devlinesque conception of society dominated by tradition and solidarity, in favor of a politics of humanity that is the heir of John Stuart Mill both in its zealous protection of individual liberty and in its reliance on the ability to imagine a variety of human purposes. . . . That's the achievement of the moral imagination. *Because law is inseparably bound up with the moral imagination, it is also an achievement of law*" (*From Disgust to Humanity*, 89).

<sup>46</sup> Nussbaum, *Love's Knowledge*, 81

<sup>47</sup> Richard A. Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), 119-20, as cited in Nussbaum, *Poetic Justice*, 18.

<sup>48</sup> Nussbaum, *Poetic Justice*, 19.

<sup>49</sup> *Ibid.*, 20.

<sup>50</sup> Ibid., 21.

<sup>51</sup> Nussbaum, *Love's Knowledge*, 81.

<sup>52</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>53</sup> Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*. (Cambridge: Belknap Press, 2006), 323.

<sup>54</sup> Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), 1.

<sup>55</sup> Herbert Wechsler, "The Nationalization of Civil Liberties and Civil Rights," *Texas Quarterly* 12.2 (1970).

<sup>56</sup> Martha C. Nussbaum, "Narratives of Hierarchy: *Loving v. Virginia* and the Literary Imagination," *Quinnipiac Law Review* 17 (1997), 341.

<sup>57</sup> Ibid.

<sup>58</sup> Nussbaum, *Upheavals of Thought*, 444-5.

<sup>59</sup> She writes, "The idea that constitutional adjudication requires imagination does not turn the law into a soft morality of "*tout comprendre, c'est tout pardonner*." Indeed, notice that imagination was exercised, in the cases I have discussed, on both sides of the matter. Judges had to identify the purpose animating the antimiscegenation laws, and that required them to see into the ideas of contamination and taint that constituted "white supremacy," before they could articulate what that legal regime was all about Nussbaum," (*From Disgust to Humanity*, 49-50).

<sup>60</sup> Robert Pirsig, *Zen and the Art of Motorcycle Maintenance: An Inquiry into Value* (New York: Bantam, 1975).

<sup>61</sup> David Barrett and John Bingham, "Judges Lead 'Sheltered Lives', Warns Britain's Most Senior Female Judge," *The Telegraph*, April 6, 2013. Retrieved from [http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html#disqus\\_thread](http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html#disqus_thread).