

# Article

## The City and the Poet

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## INTRODUCTION

Three decades after James Boyd White's *The Legal Imagination*<sup>1</sup> inaugurated it, the law-and-literature enterprise presents conflicting symptoms of health. On the one hand, the field appears to be flourishing as never before. Recent years have seen a spate of books taking law-and-literature approaches.<sup>2</sup> The enterprise has penetrated the legal academy.<sup>3</sup> Conferences on the subject occur with some frequency and attract renowned literary scholars, legal scholars, and jurists.<sup>4</sup>

On the other hand, the field continues to be plagued by skepticism. Although law and literature is a contemporary of law and economics,<sup>5</sup> and arguably a response to it, scholarship in law and literature lags far behind that in law and economics, at least in quantity.<sup>6</sup> It is telling that the book most adopted in law-and-literature courses,<sup>7</sup> Richard Posner's *Law and Literature*,<sup>8</sup> was penned by a scholar best known for law and economics approaches. This book takes the stern line that law and literature have less to say to each other than might be thought<sup>9</sup> and observes that courses in the

1. JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

2. *E.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000); PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000); JEROME S. BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* (2002); *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); RICHARD A. POSNER, *LAW AND LITERATURE* (rev. & enlarged ed. 1998); IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* (1995); RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992).

3. According to Elizabeth Gemmette, 38 out of 135 law schools responding to a 1987 survey offered classes in law and literature, while 84 out of 196 law schools responding to a 1993 survey offered such classes. Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 665-66 (1995). This represents a rise from 28% to 43%. I could find no more recent survey, but there are anecdotal claims that this trend has not abated. *See, e.g.*, Deborah Luyster, *Lawyering Skills in Law and Literature*, MICH. B.J., Jan. 2002, at 56, 57 (noting Gemmette's survey and stating that today "[t]he websites of Michigan's six law schools show three offer courses relating to law and literature"); Harold P. Southerland, *Law, Literature, and History*, 28 VT. L. REV. 1, 8 n.21 (2003) ("As the work of Elizabeth Villiers Gemmette has shown, law and literature offerings have significantly increased in law schools in the last twenty years or so. Today, there are probably close to 100 such courses in law schools around the country, each quite different in make-up and orientation . . . ." (citations omitted)).

4. *E.g.*, *LAW'S STORIES*, *supra* note 2 (publishing the proceedings of a 1995 conference on "Narrative and Rhetoric in the Law"); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

5. BINDER & WEISBERG, *supra* note 2, at 3.

6. The Appendix contains a comparison of citations to "law and literature" and "law and economics," showing that "law and economics" has been cited six to eight times as often as "law and literature" in recent law review articles.

7. Gemmette, *supra* note 3, at 671 n.46.

8. POSNER, *supra* note 2.

9. *Id.* at 5-6.

field are still considered “soft.”<sup>10</sup>

Every field has supporters and skeptics. But law and literature has been caught in limbo for a particularly long time. It has achieved more status than other interdisciplinary curiosities like law and music<sup>11</sup> or law and mathematics.<sup>12</sup> Yet it has never achieved the status of law and economics, legal history, and jurisprudence. Why is this?

We might begin with a diagnosis: Law and literature is a markedly schizophrenic discipline. In a seminal essay, Robert Weisberg contrasts two branches of the field: “law-*in*-literature” and “law-*as*-literature.”<sup>13</sup> Law-*in*-literature “involves the appearance of legal themes or the depiction of legal actors or processes in fiction or drama.”<sup>14</sup> Law-*as*-literature, in contrast, “involves the parsing of such legal texts as statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works.”<sup>15</sup>

This schism derives from two radically different conceptions of the word “literature.” In *The Meaning of Literature*, Timothy Reiss distinguishes pre- and post-seventeenth-century conceptions of the term.<sup>16</sup> Derived from the Latin word for “letters,” literature in classical times meant “writing” or “the alphabet.”<sup>17</sup> By the second century, the term had narrowed somewhat to signify general erudition, a sense that predominated through the Renaissance.<sup>18</sup> I call this conception of literature a “generalizing” conception, because it encompasses all texts of scholarly value or, in its fullest ambit, all texts. According to Reiss, the currently dominant sense of literature arose only in the late seventeenth century.<sup>19</sup> This new definition held that literature was a belletristic discourse, containing “works having formal beauty and emotional effect.”<sup>20</sup> I call this conception of literature a “particularizing” conception, because it limits its scope to genres such as fiction, drama, poetry, and so on.<sup>21</sup> The particularizing conception is nested in the generalizing one, making the word “literature” a synecdoche for itself.

While the particularizing conception dominates popular discourse

10. *Id.* at 4.

11. *See, e.g.*, Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (book review).

12. *See, e.g.*, John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992 (1992).

13. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1988).

14. *Id.*

15. *Id.*

16. TIMOTHY J. REISS, *THE MEANING OF LITERATURE* (1992).

17. *Id.* at 229.

18. *Id.*

19. *Id.*

20. *Id.* at 230.

21. The particularizing conception has not, of course, remained static in its contours over time. *See, e.g.*, TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 1, 15-16 (2d ed. 1996).

today, the generalizing definition has not disappeared. When an economics scholar talks of doing a “literature” review in her field, she speaks in the older, broader sense. Moreover, the historical wheel may be turning back toward the generalizing definition, at least in the academy. Poststructuralist literary theorists have contested the popular notion that literature is “a distinct, bounded object of knowledge” given “that literary theory can handle Bob Dylan just as well as John Milton.”<sup>22</sup> The boundary question of what, if anything, distinguishes literary texts from nonliterary ones is central to modern literary scholarship.<sup>23</sup>

The distinction between particularizing and generalizing conceptions of literature pervades law and literature, as can be seen in Weisberg’s distinction between law-in-literature and law-as-literature. Law-in-literature relies on a particularizing definition of literature—law is enough outside literature to arouse comment when represented within it. Law-as-literature, on the other hand, relies on a generalizing discourse of literature—law is recognized as a form of literature and is, as such, deemed susceptible to literary modes of illumination. The difference between the two branches lies not only in the preposition placed between the words “law” and “literature” but also in different conceptions of the word “literature.”

This distinction between particularizing and generalizing conceptions of literature cuts more deeply than Weisberg’s distinction. Categories that cannot be subsumed within Weisberg’s binary can be subsumed under the particularizing/generalizing binary. The legal regulation of literature through obscenity, defamation, and copyright regimes—which could be called “law-of-literature”—is neither law-as-literature nor law-in-literature. Yet law-of-literature can be classified as a particularizing discourse of literature, because it understands law to be an external discourse that in this instance takes literature as its subject.

The tension between particularizing and generalizing conceptions of law and literature helps us understand why law and literature is anemic and why it will not die. In its particularized form, literature is marked by qualities stigmatized within the law, such as falsity, irrationality, and seductiveness. This explains why law and literature has limped along after law and economics, legal history, and jurisprudence: Economics, history, and philosophy are not generally thought to suffer from these debilities. The question then becomes why law and literature has more life than law and mathematics. One answer is that literature has another, more expansive incarnation, a generalized form of which law is a part. Law is a machine made of words, not numbers.

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22. *Id.* at 178.

23. See STEVEN KNAPP, LITERARY INTEREST: THE LIMITS OF ANTI-FORMALISM 1 (1993). Knapp’s work argues against the generalizing conception on a ground I take up later. See *infra* notes 104-108 and accompanying text.

Law's simultaneous need and inability to banish literature makes law and literature a distinctively fraught enterprise. Banished from law as a polluted discourse, literature keeps surfacing in the wake of its enforced departure. Indeed, law's failed banishment of literature is such a foundational anxiety that it has itself become an archetypal story. In this Article, I take up one version of that story—Plato's banishment of the poet from the city. I then apply the model developed in that context to two modern instances.

In Part I, I consider the banishment of the poet from the city in Plato's dialogues. In Book III of the *Republic*,<sup>24</sup> Plato's Socrates evicts the poet from the city because the poet is inimical to the functions of the state. This is a classic articulation of the particularizing view—literature must be banished for its falsity, irrationality, and seductiveness. Over the course of subsequent dialogues,<sup>25</sup> such as the *Phaedrus*<sup>26</sup> and the *Laws*,<sup>27</sup> doubts arise about whether poetry can or should be banished. Plato implicitly considers two different defenses of poetry—an *ineradicability* defense and a *virtue* defense—which correspond to the generalizing and particularizing conceptions of literature. The ineradicability defense asserts that literature *cannot* be banished because it is impossible to separate from other textual practices, including philosophy and law. The virtue defense asserts that poetry, while a discrete discourse, *should not* be banished because it has the capacity to serve, rather than merely to subvert, the proper ends of the state. Plato rejects the first defense, and, while leaving the door open to the second one, never fully entertains it. He denies the poet a place in the city.

This position has enraged generations of Plato's successors. In Part II, I defend Plato's position on poetry, with one significant caveat. I accept

24. PLATO, THE *REPUBLIC* OF PLATO (Allan Bloom ed. & trans., 2d ed. 1991) [hereinafter PLATO, *Republic*].

25. Platonic chronology is a subfield of its own. See, e.g., LEONARD BRANDWOOD, THE CHRONOLOGY OF PLATO'S DIALOGUES (1990); HOLGER THESLEFF, STUDIES IN PLATONIC CHRONOLOGY (Commentationes Humanarum Litterarum, No. 70, 1982). Thesleff lists 131 chronologies compiled by scholars over the last two centuries. See THESLEFF, *supra*, at 8-17.

The chronology of the dialogues assumed in this Article—*Ion*, *Republic*, *Phaedrus*, *Laws*—is defensible. In summarizing current opinion on Platonic chronology, Graeme Nicholson divides the dialogues into three groups—placing the *Ion* in the first group, the *Republic* and the *Phaedrus* in the second (and also noting evidence that the *Phaedrus* was the last dialogue in this group), and the *Laws* in the last group. GRAEME NICHOLSON, PLATO'S *PHAEDRUS*: THE PHILOSOPHY OF LOVE 6-8 (1999).

Nonetheless, I am not unsympathetic to John Cooper's point that residual uncertainty about the order of the dialogues means that "chronological hypotheses must not preclude the independent interpretation and evaluation of the philosophical arguments the dialogues contain." John M. Cooper, *Introduction* to PLATO, COMPLETE WORKS, at vii, xiv-xv (John M. Cooper ed. & G.M.A. Grube et al. trans, 1997). Because my chronological narrative is pursued primarily for purposes of exposition, the substantive arguments of this Article survive most reorderings of the dialogues.

26. PLATO, *Phaedrus*, in COMPLETE WORKS, *supra* note 25, at 506 [hereinafter PLATO, *Phaedrus*].

27. PLATO, *Laws*, in COMPLETE WORKS, *supra* note 25, at 1318 [hereinafter PLATO, *Laws*].

Plato's three basic tenets: (1) Poetry cannot be permitted to conflict with the core functions of the state; (2) poetry cannot evade accountability to these functions on the ground that it is ineradicable; (3) poetry can only defend itself by affirmatively demonstrating that it does not conflict with such functions, a demonstration that will often entail reliance on poetry's virtues. My only criticism of Plato is that he fails to apply the third tenet—while he twice invites the virtue defense of poetry, he never considers it. I call this paradigm, including my emendation, the "Platonic paradigm."

In Part III, I show the contemporary relevance of the Platonic paradigm by applying it to the U.S. Supreme Court's treatment of victim-impact statements. A victim-impact statement is a statement made during the sentencing phase of a criminal trial by a victim of the crime. In the 1987 case of *Booth v. Maryland*,<sup>28</sup> the Supreme Court banished these "literary" statements from capital trials on the ground that they are false, irrational, and seductive. This banishment rests on a negative particularizing conception of literature. Yet a scant four years later, the Court reversed itself in *Payne v. Tennessee*.<sup>29</sup> The *Payne* Court justified its reversal by drawing on both defenses of poetry. At times, it relied on the ineradicability defense, maintaining that victim-impact statements are indistinguishable from narratives routinely admitted into trials. Because I never accept the ineradicability defense, I naturally reject it here. At other times, the Court asserted the virtue defense, arguing that victim-impact statements should not be excluded because they serve the functions of capital sentencing. While I believe the question is a close one, I ultimately reject this virtue defense as well. Instead, I agree with *Booth* that victim-impact statements should be excluded.

In Part IV, I turn to a final context: the status of law and literature in the legal academy. I argue that the inaugurating question of this Article—why law and literature is such a peaked discipline—is answered by the Platonic paradigm. To show this, I focus on a particularly controversial strand of law and literature, the use of storytelling in law. The 1980s and 1990s saw a rise in legal storytelling, with scholars using personal narratives to argue for legal conclusions.<sup>30</sup> This genre has occasioned the predictable Platonic backlash. A response deploying the ineradicability defense would posit that these narratives are indistinguishable from classical legal scholarship. Again, I reject this defense. Others have relied on the virtue defense,

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28. 482 U.S. 496 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

29. 501 U.S. 808 (1991).

30. *E.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

suggesting that these narratives serve the ends of legal scholarship. Because I accept the virtue defense here, I argue for the inclusion of such forms of legal scholarship.

For millennia, Plato's banishment of the poet from the city has been almost uniformly reviled. Such reactions scant the enduring force of the Platonic account. Plato not only deftly diagnoses our contemporary ambivalence about law and literature but also fashions a viable way of managing that ambivalence. He helps us understand why law and literature is ailing and suggests a way to cure it.

### I. THE PLATONIC PARABLE

It is one of our oldest stories. In Book III of Plato's *Republic*, Socrates banishes the poet from the city.<sup>31</sup> More precisely, he banishes one kind of poet, because Plato's Socrates distinguishes two branches of the profession.<sup>32</sup> The first contains the imitative poet, who inhabits and performs the roles he represents.<sup>33</sup> The second contains the narrative poet, who recites poetry from a third-party perspective.<sup>34</sup> The imitative poet pretends to be Achilles, while the narrative poet describes the hero. Socrates drives the imitative poet from the city but permits the narrative poet to stay.

Socrates does this even though he obviously loves the imitative poet more than the narrative one. He observes that if an imitative poet came to the city, we would "fall on our knees before him as a man sacred, wonderful, and pleasing."<sup>35</sup> Yet Socrates states that after doing so, "we would say that there is no such man among us in the city, nor is it lawful for such a man to be born there."<sup>36</sup> Socrates would have us expel the poet from the city even as we honor him: "We would send him to another city, with myrrh poured over his head and crowned with wool, while we ourselves would use a more austere and less pleasing poet and teller of tales for the sake of benefit."<sup>37</sup>

The force of the Platonic parable lies in the poignancy of casting out that which one most dearly loves, a banishment that demonstrates the intrication of the sacred and the sacrificial. Socrates' admiration of the imitative poet permits him to apprehend the poet's rhetorical power to shape our views against our rational judgments. This power makes the

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31. PLATO, *Republic*, *supra* note 24, at \*398a-b. Throughout this Article, star pages refer to the traditional Stephanus numbering system for Plato's works.

32. See IRIS MURDOCH, *THE FIRE AND THE SUN: WHY PLATO BANISHED THE ARTISTS* 1 (1977).

33. PLATO, *Republic*, *supra* note 24, at \*397a-b.

34. *Id.* at \*397b.

35. *Id.* at \*398a.

36. *Id.*

37. *Id.* at \*398a-b.

imitative poet a figure of misrule.

I read the Platonic banishment of the poet from the city as an ancient analogue for the banishment of literature from the sphere of law. I must reconcile my terms, which I do provisionally here and more extensively later. Plato's conception of poetry is not the same as our modern conception of literature. In Plato's time, written and spoken speech of value was divided among several genres, of which the most relevant for my purposes are rhetoric, poetics, and dialectic. Classical rhetoric encompassed all arts deployed in the service of persuasion; as such, it included the speeches of the sophists as well as the arguments of lawyers.<sup>38</sup> Classical poetics subsumed verbal mimesis, including epic, lyric, and dramatic forms of such imitation.<sup>39</sup> Finally, classical dialectic described a discourse aimed at the systematic apprehension of knowledge, with philosophy being the paradigm case.<sup>40</sup>

Poetry in Plato's time was thus broader than the current category of poetry (including, for example, drama) but narrower than the current category of literature (excluding, for example, the novel). More significantly, classical poetry differed from poetry in our time in its social standing (of which more later).<sup>41</sup> Nonetheless, many of Plato's concerns about poetry are extant concerns about literature.

The city of the *Republic* is also not a direct metaphor for law. Plato views the banishment of the poet from the city as reflective of the "old quarrel" between poetry and philosophy, not poetry and law.<sup>42</sup> Here I have fewer qualms. As the famous figure of the philosopher-king suggests, Plato's ideal state compacts the function of philosophy with the function of statecraft.<sup>43</sup> Hence the banishment of the poet is justified in Book III on the ground that his birth in the city would not be "lawful."<sup>44</sup> By the *Laws*, thought to be the last of Plato's dialogues,<sup>45</sup> the polis is clearly figured as a realm of law. In that dialogue, the tragedians return to the city to ask its lawmakers for readmission.<sup>46</sup>

That said, we can explore why Plato might view law and literature as incompatible. Plato banishes poetry from the city for three reasons—its falsity, its irrationality, and its seductiveness. While distinct, these objections are related, and they magnify one another through their interrelationship.

In Plato's most radical formulations, the poet always misrepresents the

38. NICHOLSON, *supra* note 25, at 35-55.

39. ERIC A. HAVELOCK, PREFACE TO PLATO 3-31 (photo. reprint 1980) (1963).

40. NICHOLSON, *supra* note 25, at 56-74.

41. See *infra* notes 95-103 and accompanying text.

42. PLATO, *Republic*, *supra* note 24, at \*607b.

43. *Id.* at \*473c-d.

44. *Id.* at \*398a.

45. See Cooper, *supra* note 25, at xi.

46. PLATO, *Laws*, *supra* note 27, at \*817d.



truth. In the *Republic*, Plato describes the existence of immutable, abstract, and invisible Forms.<sup>47</sup> These Forms are the ideals to which Plato seeks to anchor the state and the human soul, which is the microcosm of the state.<sup>48</sup> The highest Platonic aspiration for human beings is to bring us closer to these Forms.<sup>49</sup> The difficulty is that our ordinary modes of perception—such as our senses—cannot seize these ideas.<sup>50</sup> Only right reason, as exercised through dialectic, can do so in any systematic way.<sup>51</sup>

At times, Plato describes poetry, and indeed all art, as intrinsically incapable of bringing us closer to the Forms. In Book X of the *Republic*, Plato explains the Forms through the instance of the couch. He observes that we can conceive of three different couches—the Form of the couch made by the gods, the physical couch made by the carpenter, and the painting of the couch made by the artist.<sup>52</sup> The Form of the couch is what the couch *is*.<sup>53</sup> The physical couch made by the carpenter, for all its existential heft, is but a shadow of the Form. It is not *the* couch, but *a* certain couch, and “a dim thing compared to the truth.”<sup>54</sup> This leaves the artist’s couch at a second remove from the truth—an imitation of an imitation.<sup>55</sup>

As a matter of logic, artistic representation need not be further from the truth of the Forms than physical representation is.<sup>56</sup> The artist could be imitating the Forms directly rather than physical representations of them.<sup>57</sup> If he were, he might be better than the carpenter at apprehending the Form of the couch. Plato must therefore make an affirmative case that artistic representation is inferior to physical representation.

That case turns on the point that artistic representation is so broad it must be shallow. Plato believes in the division of labor—he repeatedly holds that a man can do only one thing well.<sup>58</sup> This makes the artist suspect, because the artist can imitate many things. The artist’s virtuosity does not

47. See, e.g., PLATO, *Republic*, *supra* note 24, at \*507b.

48. *Id.* at \*500b-d.

49. *Id.* at \*500b-e; see SUSAN B. LEVIN, *THE ANCIENT QUARREL BETWEEN PHILOSOPHY AND POETRY REVISITED: PLATO AND THE GREEK LITERARY TRADITION* 151 (2001).

50. PLATO, *Republic*, *supra* note 24, at \*509d-10d.

51. *Id.* at \*511b.

52. *Id.* at \*597b.

53. *Id.* at \*597d.

54. *Id.* at \*597a.

55. *Id.* at \*597e.

56. *Id.* at \*598e-99e (entertaining the question of whether Homer is at a first or a second remove from the Forms).

57. See ALEXANDER NEHAMAS, *Plato on Imitation and Poetry in Republic X*, in *VIRTUES OF AUTHENTICITY: ESSAYS ON PLATO AND SOCRATES* 251, 260 (1999) (“It has long been claimed both by opponents and by defenders of Plato’s views on art that artists need not imitate only sensible objects (which they do, according to Plato, by reproducing their appearance) but also that they can somehow directly imitate the Forms.”). Nehamas goes on to negate the proposition that Plato himself held this view. *Id.* at 260-61.

58. See, e.g., PLATO, *Lesser Hippias*, in *COMPLETE WORKS*, *supra* note 25, at 922, at \*368b-69a [hereinafter PLATO, *Lesser Hippias*]; PLATO, *Republic*, *supra* note 24, at \*369e-70a, \*398a.

flow from universal mastery, which is impossible, but from a willingness to speak without mastery. Plato's Socrates maintains it is because "imitation is surely far from the truth" that "it produces everything—because it lays hold of a certain small part of each thing, and that part is itself only a phantom."<sup>59</sup> The painter "will paint for us a shoemaker, a carpenter, and the other craftsmen, although he doesn't understand the arts of any one of them."<sup>60</sup> Nonetheless, if he is a good imitator, he can "deceive children and foolish human beings into thinking that it is truly a carpenter."<sup>61</sup>

This objection to poetry's falsity has a progenitor in the *Ion*,<sup>62</sup> an early dialogue in which Socrates confronts a rhapsode (a reciter of epic poetry) of the same name. Socrates encounters Ion just after the rhapsode has won a major poetry competition with his renditions of Homeric poetry.<sup>63</sup> Ion is flush with hubris, which Socrates punctures by querying what rhapsodes (and by implication poets) actually know. He asks Ion to recite lines from the *Iliad* in which Nestor advises his son on how to race chariots.<sup>64</sup> Ion eagerly obliges. "Lean," he says,

"Lean yourself over on the smooth-planed chariot  
Just to the left of the pair. Then the horse on the right—  
Goad him, shout him on, easing the reins with your hands.  
At the post let your horse on the left stick tight to the turn  
So you seem to come right to the edge, with the hub  
Of your welded wheel. But escape cropping the stone . . ."<sup>65</sup>

Even across gaps of time and translation, we can hear the suppleness of this description. But Socrates interrupts with some hardheaded questions. Who could better evaluate this advice, Socrates asks, Ion or a charioteer? Ion admits the charioteer would be more expert. Socrates then multiplies examples: Who would know more about the accuracy of Homer's depiction of medicine, Ion or a doctor? Who would know more about the aptness of Homer's description of fishing, Ion or a fisherman? Who would know more about the truth of Homer's description of divination, Ion or a diviner?<sup>66</sup> In each case, Ion is forced to confess he knows less of these subjects than the charioteer, doctor, fisherman, or diviner.<sup>67</sup>

What then, Socrates asks, does a rhapsode know? Unlike the *Republic*, the *Ion* permits the artist to defend himself. Ion answers that "he'll know

59. PLATO, *Republic*, *supra* note 24, at \*598b.

60. *Id.* at \*598b-c.

61. *Id.* at \*598c.

62. PLATO, *Ion*, in COMPLETE WORKS, *supra* note 25, at 937 [hereinafter PLATO, *Ion*].

63. *Id.* at \*530a-d.

64. *Id.* at \*537a.

65. *Id.* at \*537a-b (ellipsis in original) (quoting HOMER, *ILIAD* bk. XXIII, ll. 335-40).

66. *Id.* at \*538b-39d.

67. *Id.* at \*538b (charioteer); *id.* at \*538c (doctor); *id.* at \*538d (fisherman); *id.* at \*539d (diviner).

what it's fitting for a man or a woman to say—or for a slave or a freeman, or for a follower or a leader.”<sup>68</sup> The rhapsode is not expert in any art that he imitates but in the art of imitation. This answer, however, does not satisfy Socrates. Each of the underlying professions imitated by the poet or rhapsode represents a *technē*, or craft. To imitate these crafts without possessing them—and no one could possess them all—is not in itself a craft but a distortion of the others.<sup>69</sup>

Plato's criticism is not absolute. If it were, he would exclude *all* poetry. Yet Plato never advocates such wholesale eviction.<sup>70</sup> He stops short of an absolute ban in part because he concedes in some dialogues—such as the *Meno*<sup>71</sup> and the *Apology*<sup>72</sup>—that poetry sometimes represents the truth. Even in the *Republic*, Plato distinguishes in Book II between true and untrue poetry and directs his concern almost entirely toward the latter.<sup>73</sup>

While truth may be a necessary condition for poetry's acceptance, it is not a sufficient one. If truth were the only criterion, poetry could be judged solely on its content, and Book II would be the final word on poetic regulation. Yet as we have seen, Book III introduces a further criterion. There Plato permits the narrative but not the imitative poet to stay in the city, regulating on the basis of style. This suggests a different objection.

Plato objects to poetry's irrationality. Plato's Socrates repeatedly follows an admission that poets can speak truth with the plaint that they cannot explain the truth they speak. In the *Meno*, Socrates compares poets to prophets, who “say many true things when inspired, but . . . have no knowledge of what they are saying.”<sup>74</sup> In the *Apology*, he reiterates that poets are like “seers and prophets who also say many fine things without any understanding of what they say.”<sup>75</sup>

Like the banished poet worshipped as holy in Book III of the *Republic*, here again the poet is a sacred figure. We now learn, however, that the poet must be banished in part because of his divine inspiration. The poet fails the test of dialogic rationality—he does not own what he knows. This leads Socrates to exclude poets from dialectical conversation in the *Protagoras*,

68. *Id.* at \*540b.

69. The unarticulated premise here is that the *technai* are mutually reinforcing. This is why an activity that interferes with a *technē* cannot be a *technē*. We know medicine and fishing are *technai* in part because the doctor's practice of medicine does not interfere with the fisherman's practice of fishing. And we know poetry is *not* a *technē* in part because poetic representations impede the doctor from plying his trade.

70. *Cf.* MURDOCH, *supra* note 32, at 1 (“To begin with, of course, Plato did not banish all the artists or always suggest banishing any.”).

71. PLATO, *Meno*, in COMPLETE WORKS, *supra* note 25, at 870 [hereinafter PLATO, *Meno*].

72. PLATO, *Apology*, in COMPLETE WORKS, *supra* note 25, at 17 [hereinafter PLATO, *Apology*].

73. PLATO, *Republic*, *supra* note 24, at \*377c-e.

74. PLATO, *Meno*, *supra* note 71, at \*99c.

75. PLATO, *Apology*, *supra* note 72, at \*22c.

on the ground that they “cannot be questioned on what they say.”<sup>76</sup>

Plato makes the crucial importance of rationality explicit in Book IV of the *Republic*. Socrates there explains that the polity and the soul mirror each other—just as there are classes within the polis, so are there classes within the soul.<sup>77</sup> Specifically, Socrates observes that there are rational, emotional, and appetitive parts to the soul, which war against one another.<sup>78</sup> In the well-ordered individual or city, the rational part holds the emotional and appetitive parts in check.<sup>79</sup>

This tripartite distinction strengthens Socrates’ resolution to banish the imitative poet when he revisits the issue in Book X: “For that the imitative [poet], more than anything, must not be admitted looks, in my opinion, even more manifest now that the soul’s forms have each been separated out.”<sup>80</sup> Socrates reiterates that the rational part is “the best part of the soul,”<sup>81</sup> and condemns imitative poetry for its failure to speak *of* or *to* this rational part. It does not speak *of* the rational part because “the prudent and quiet character . . . is neither easily imitated nor, when imitated, easily understood.”<sup>82</sup> It does not speak *to* the rational part because it addresses “the soul’s foolish part.”<sup>83</sup> The poet “awakens this part of the soul and nourishes it, and, by making it strong, destroys the calculating part, just as in a city when someone, by making wicked men mighty, turns the city over to them and corrupts the superior ones.”<sup>84</sup>

Plato here reveals that he cares not only about our destination but also about how we travel. Truth must be compassed conceptually rather than perceptually, linearly rather than metonymically. A truth hit upon by accident or inspiration is not—as the *Apology*, the *Meno*, and the *Protagoras* suggest—sufficient. This brings us closer to understanding why Plato cares not only about the content of poetry (as in Book II of the *Republic*) but also about its style (as in Book III). Imitative poetry is more likely to disrupt the rational faculties than narrative poetry because it more deeply engages the emotions.

To say philosophy is superior to poetry because reason is superior to the emotions is to beg the question of why, for Plato, reason enjoys that priority. We cannot answer that question without understanding the Greek view of the rational arts and sciences as a bulwark against the uncontrolled dimensions of human existence. In her magisterial book *The Fragility of Goodness*, Martha Nussbaum notes that the late fifth century in Athens

76. PLATO, *Protagoras*, in COMPLETE WORKS, *supra* note 25, at 746, at \*347e.

77. PLATO, *Republic*, *supra* note 24, at \*435e-36a.

78. *Id.* at \*436a-b.

79. *Id.* at \*441e.

80. *Id.* at \*595a-b.

81. *Id.* at \*603a.

82. *Id.* at \*604e.

83. *Id.* at \*605c.

84. *Id.* at \*605b.

“was a time both of acute anxiety and of exuberant confidence in human power.”<sup>85</sup> On the one hand, the political turmoil of the time suggested human life was governed by forces beyond human control, which the Greeks called *tuchē*, or “what just happens.”<sup>86</sup> On the other hand, “Athenians were also more than ever gripped by the idea that progress might bring about the elimination of ungoverned contingency from social life.”<sup>87</sup> The Greeks saw the *technai*, or human arts, as the way to manage such contingency.<sup>88</sup>

Plato’s prioritization of reason over emotion is part of a broader prioritization of the *technai* over *tuchē*. The *technai* were distinguished by the characteristics we associate with rational discourse—universality, teachability, precision, and concern with explanations.<sup>89</sup> The classic *technē* was perhaps mathematics,<sup>90</sup> as exemplified by the *Meno*, where Socrates leads a slave boy toward the universal truth embodied in a geometric proof.<sup>91</sup> Other disciplines were measured against such norms.

Poetry miserably fails that test. Poetic knowledge is personal rather than universal, inspired rather than taught, variant rather than precise, and concerned with sensations rather than explanations. Attempts to figure poetry as a *technē* take on the tincture of travesty, as in the contest between Euripides and Aeschylus in the *Frogs*,<sup>92</sup> where a scale is rolled out and the subjects of each poet are placed in each pan to determine who has more gravitas.<sup>93</sup> Poetry’s greatest mimetic sin occurs at the level of genre—it is *tuchē* masquerading as *technē*. It does not help us live.

While serious, the charges of falsity and irrationality seem inadequate to warrant the banishment of the poet. If poetry were the decorative enterprise it is today, its falsity and irrationality would do little harm. Plato must have still another, more fundamental objection.

That final objection relates to the seductive power of the poet. After describing poetry’s irrational aspect in Book X, Socrates states that “we haven’t yet made the greatest accusation against imitation. For the fact that it succeeds in maiming even the decent men, except for a certain rare few, is surely quite terrible.”<sup>94</sup> Poetry is dangerous because it is compelling, capable of corrupting all but the most virtuous of men.

85. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 89 (rev. ed. 2001).

86. *Id.* at 89 n.\*.

87. *Id.* at 89.

88. *See id.*

89. *See id.* at 95-97.

90. *See* PLATO, *Republic*, *supra* note 24, at \*511b (analogizing the process of dialectic used to apprehend the Forms to “geometry and its kindred arts”).

91. PLATO, *Meno*, *supra* note 71, at \*82a-85c.

92. ARISTOPHANES, *Frogs*, in *THE COMPLETE PLAYS OF ARISTOPHANES* 394 (Moses Hadas ed. & B.B. Rogers et al. trans., 1962).

93. NUSSBAUM, *supra* note 85, at 108 (describing this scene as “ridiculous”).

94. PLATO, *Republic*, *supra* note 24, at \*605c.

To apprehend this danger, we must free ourselves of contemporary preconceptions. It is hard to imagine anyone today censoring poetry (here defined as the kind of fine art found in the *American Poetry Review*)<sup>95</sup> because it is hard to imagine anyone caring enough to do so. We live in the age that spawned Auden's dictum that "poetry makes nothing happen."<sup>96</sup> In stark contrast, poetry in Plato's time was a foundational discourse through which the young were reared to become Guardians.<sup>97</sup> In that era, poetry was established and central; philosophy was the upstart discourse. As Iris Murdoch points out, "The poets had existed, as prophets and sages, long before the emergence of philosophers, and were the traditional purveyors of theological and cosmological information."<sup>98</sup> And as Allan Bloom observes, "At the time of Socrates's trial, philosophy was new to the cities, and it could easily have been crushed."<sup>99</sup> In imagining the banishment of the poet, we should not imagine the small receding back of an already marginalized person. We should instead conceive of a towering figure pushed out of the city to permit the survival of weaker residents.

Poetry in Plato's time, then, was less like poetry today than like other, more popular contemporary discourses. As Alexander Nehamas puts it, "Plato's argument with poetry concerns a practice that is today paradigmatically a fine art, but it is not an argument directed at it as such a fine art."<sup>100</sup> To the contrary, Plato objects to poetry as a mass medium appealing to the lowest and most common tastes.<sup>101</sup> Along this dimension, the modern analogue of Greek tragedy is not poetry but television.<sup>102</sup> And in fact, Nehamas notes that many contemporary objections to television are "uncannily close" to Plato's attitude.<sup>103</sup>

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95. The restriction on the definition is significant. If we define contemporary poetry more broadly to include popular song lyrics, we will find many attempts at censorship. See, e.g., *Yale Broad. Co. v. FCC*, 478 F.2d 594 (D.C. Cir. 1973) (upholding a notice and order issued by the FCC reminding licensees of their duty to control broadcast material and to determine prior to broadcast whether lyrics were "drug oriented"); *Skywalker Records v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990) (holding that 2 Live Crew's album *As Nasty as They Wanna Be* violated community obscenity standards); David Bauder, *Ice-T Flap Casts Lingering Chill over Lyricists*, CHI. SUN-TIMES, Oct. 9, 1992, § 2, at 43 (discussing artists' decisions to delete song lyrics about violence against law enforcement authorities after police protested Ice-T's song *Cop Killer*); Clea Simon, *Attacks Prompt List of 'Banned' Songs*, BOSTON GLOBE, Sept. 20, 2001, at D3 (discussing the list of 150 songs that the Clear Channel radio empire recommended be barred from airplay after the attacks of September 11, 2001). This observation shores up the intuitive premise that the urge to censor speech rises in proportion to the power that speech is perceived to possess.

96. W.H. AUDEN, *In Memory of W.B. Yeats*, in THE COLLECTED POETRY OF W.H. AUDEN 48, 50 (1945). As Posner points out, the claim is belied in the poem itself, but can be taken as diagnostic of contemporary perception. See POSNER, *supra* note 2, at 305.

97. See HAVELOCK, *supra* note 39, at 13; NUSSBAUM, *supra* note 85, at 124-25.

98. MURDOCH, *supra* note 32, at 1.

99. Allan Bloom, *Interpretive Essay to PLATO*, *supra* note 24, at 307, 307.

100. ALEXANDER NEHAMAS, *Plato and the Mass Media*, in VIRTUES OF AUTHENTICITY, *supra* note 57, at 279, 287.

101. *Id.* at 290.

102. *Id.* at 285.

103. *Id.* at 285, 285-87.

What Greek poetry did share with poetry today is what Steven Knapp calls “literary interest.”<sup>104</sup> Literary interest is the absorptive quality of literature (and all mimetic arts), a network of associations that draws us from the actual world into the world of representation. Such interest causes us to be “more interested in a story than in what the story is about, in a poem than in what it imitates, in a symbol than in what the symbol ostensibly refers to.”<sup>105</sup> It explains why looking at a landscape painting may keep us indoors<sup>106</sup> or why sympathizing with a victim on the stage may keep us from sympathizing with actual unfortunate people.<sup>107</sup>

It is no accident that Knapp repairs to the *Ion* to elaborate the case against literary interest.<sup>108</sup> Plato rails against literature not just because it speaks falsely and irrationally but because it makes falsehood and irrationality so much more interesting than their opposites. We left the *Ion* at the point where Plato’s Socrates established that the poet spoke untruths—that the poet knew less about charioteering than the charioteer, less about fishing than the fisherman.<sup>109</sup> We did not articulate an important response to this charge—that we might not care! We might not care that Homer knows less about charioteering than the charioteer, because Nestor’s speech from the *Iliad* holds a literary interest no technical speech by a charioteer could ever possess. But this, for Plato’s Socrates, would be the most damning statement of all—that poetics could make us indifferent to a statement’s truth or falsity, that aesthetics could act as an anesthetic on the rational part of the soul.

To make matters worse, Plato believes that unscrupulous poets are particularly endowed with seductive power. In Book III of the *Republic*, Plato’s Socrates notes that the virtuous poet will only imitate superiors.<sup>110</sup> So “when the sensible man comes in his narrative to some speech or deed of a good man, he will be willing to report it as though he himself were that man and won’t be ashamed of such an imitation.”<sup>111</sup> But the same man “won’t be willing seriously to represent himself as an inferior . . . ; . . . he’ll be ashamed, both because he’s unpracticed at imitating such men and because he can’t stand forming himself according to, and fitting himself

104. KNAPP, *supra* note 23, at 2.

105. *Id.* at 49-50.

106. W.K. WIMSATT, JR., *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 273 (1954). Knapp discusses this instance. KNAPP, *supra* note 23, at 50.

107. JEAN-JACQUES ROUSSEAU, *POLITICS AND THE ARTS: LETTER TO M. D’ALEMBERT ON THE THEATRE* 25 (Allan Bloom ed. & trans., 1960) (1758) (“In giving our tears to these fictions, we have satisfied all the rights of humanity without having to give anything more of ourselves; whereas unfortunate people in person would require attention from us, relief, consolation, and work, which would involve us in their pains and would require at least the sacrifice of our indolence, from all of which we are quite content to be exempt.”).

108. KNAPP, *supra* note 23, at 54-60.

109. *See supra* notes 62-69 and accompanying text.

110. PLATO, *Republic*, *supra* note 24, at \*396c-e.

111. *Id.* at \*396c.

into, the models of worse men.”<sup>112</sup> Socrates endorses that restraint, observing that virtuous men should not imitate women, slaves, bad men, madmen, beasts, or inanimate objects.<sup>113</sup> In contrast, the more common a man is, Socrates says, “the more he’ll narrate everything and think nothing unworthy of himself; hence he’ll undertake seriously to imitate . . . thunder, the noises of winds, hailstorms, axles and pulleys, the voices of trumpets, flutes, and all the instruments, and even the sound of dogs, sheep, and birds.”<sup>114</sup> Good men are more likely to be narrative poets, bad men to be imitative poets.

The contrast between the poets raises a serious concern, because it means decency and power are misaligned. The imitative poet is less decent but more powerful than the narrative poet because he has a broader repertoire. Socrates’ description enlivens the contrast, because he sets the narrative poet’s literally monotonous delivery against the imitative poet’s protean representation of hailstorms, pulleys, flutes, and sheep. We experience directly that the imitative poet is “by far the most pleasing to boys and their teachers, and to the great mob.”<sup>115</sup> This misalignment cannot be recalibrated, because the imitative poet’s power flows from his lack of decency. Moreover, the misalignment cannot be regulated during its enactment. The imitative poet is like the siren who seduces ships off their courses with her song—we cannot repudiate the poet once he begins to speak, because to listen is to be deprived of the reason necessary to regulation. Like the siren, then, the imitative poet must be controlled before he begins to speak. Odysseus protects himself against seduction by tying himself to the mast of his ship. Socrates chooses to restrain not himself but the poet, banishing the imitative poet from the city.

112. *Id.* at \*396d-e.

113. *Id.* at \*395d-96e. It is worth pausing to understand why Plato believes that individuals should not “imitate down.” In contrast to his general focus on listeners, Plato here concerns himself with poetry’s speakers. Those who would be Guardians are prohibited from imitating down “so that they won’t get a taste for the being from its imitation.” *Id.* at \*395c-d. “Or haven’t you observed,” Plato’s Socrates asks, “that imitations, if they are practiced continually from youth onwards, become established as habits and nature, in body and sounds and in thought?” *Id.* at \*395d; see also MURDOCH, *supra* note 32, at 5 (observing that, according to Books III and X of the *Republic*, “[w]e are infected by playing or enjoying a bad role”). While many thespians fear they will not be able to get fully inside their roles, Plato worries they will not be able to get out of them. This is a performative conception of identity, in which one becomes what one practices being.

114. PLATO, *Republic*, *supra* note 24, at \*397a-b.

115. *Id.* at \*397d. Rousseau echoes this concern:

[L]et a man, righteous and virtuous, but simple and crude, with neither love nor gallantry and who speaks no fine phrases, be put on the French stage; let a prudent man without prejudices be put on it, one who, having been affronted by a bully, refuses to go and have his throat cut by the offender; and let the whole theatrical art be exhausted in rendering these characters as appealing to the French people as is the Cid: I will be wrong, if it succeeds.

ROUSSEAU, *supra* note 107, at 21 n.\*; see also *id.* at 18 (“A man without passions or who always mastered them could not attract anyone.”).



All three objections to poetry—that it is untrue, irrational, and seductive—surface directly before the banishment of the poet in Book III. In Book III, Socrates primarily objects to poetry about heroes and gods engaged in unworthy acts. He would prohibit descriptions of heroes and gods that cast them as untruthful;<sup>116</sup> overcome with laughter or grief;<sup>117</sup> or overmastered by excessive appetites, like lust.<sup>118</sup> (Notice that Socrates objects to representations that imbue heroes and gods with *poetic* traits—being untruthful, emotional, and (literally) seductive.) This prohibition implicates the criticism that poetry is untrue—either these accounts of the gods are literally inaccurate, in which case they are blasphemous, or they are accurate but impious, untrue to the concept of what a god should be.

Plato also objects to poetry's irrationality in Book III. Socrates there argues that all poetry figuring death as fearsome should be expunged. He begins with Achilles' speech in the *Odyssey*: "I would rather be on the soil, a serf to another, / To a man without lot whose means of life are not great, / Than rule over all the dead who have perished."<sup>119</sup> Achilles compares being the least of the living favorably with being the greatest of the dead. Socrates finds this passage subversive because it will give men the shivers, and "our guardians, as a result of such shivers, will get hotter and softer than they ought."<sup>120</sup> Achilles' shiver in the face of death is transmitted through these lines to the listener. Through such empathetic engagement, the listener becomes "hotter and softer" than he ought to be, straying from the cold, hard rule of reason.

Finally, Plato permits us to experience the seduction of poetry as readers of the *Republic*. Censorship is marked by a paradox, insofar as it is hard to discuss the material one wishes to suppress without risking its dissemination.<sup>121</sup> Yet Socrates makes the poetry he would ban abundantly available to the reader—Book III is more bedizened with imitative poetry than any other book of the *Republic*.<sup>122</sup> Socrates permits us, and himself, to hear the siren song of poetry before expelling it.

Poetry, then, is facially particularized in Book III as a discourse easily differentiated from dialectic. Such differences permit and justify the poet's banishment. Even as this case is made, however, doubts arise about the efficacy of this eviction. We know that those who listen to the siren's song become unable to resist it. For this reason, we should doubt whether Plato's

116. PLATO, *Republic*, supra note 24, at \*389b-d.

117. *Id.* at \*387d-89b.

118. *Id.* at \*390b-c.

119. *Id.* at \*386c (quoting HOMER, ODYSSEY bk. XI, ll. 489-91).

120. *Id.* at \*387c.

121. See JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 104 (1997) (describing how speech "regulation redoubles the term it seeks to constrain").

122. See, e.g., PLATO, *Republic*, supra note 24, at \*386c (quoting HOMER, supra note 119, bk. XI, ll. 489-91); *id.* at \*388c (quoting HOMER, supra note 65, bk. XVIII, l. 54); *id.* (quoting HOMER, supra note 65, bk. XXII, ll. 168-69).

Socrates—even the stern Socrates of the *Republic*—can steel himself to banish the imitative poet. This skepticism is also fueled by Socrates' clear love and admiration for the poet, whom he finds “sacred, wonderful, and pleasing.”<sup>123</sup>

When we shift the focus from the Socrates of the *Republic* to his creator, we find more cause for skepticism. It is said that the historical Plato turned away from a promising career as a tragic poet to become a philosopher.<sup>124</sup> We might query how categorically he relinquished his earlier career. Philip Sidney observes that “whosoever well considereth [Plato] shall find that in the body of his work, though the inside and strength were philosophy, the skin, as it were, and beauty depended most of poetry.”<sup>125</sup> Percy Shelley agrees that “Plato was essentially a poet—the truth and splendour of his imagery and the melody of his language is the most intense that it is possible to conceive.”<sup>126</sup>

To live in these doubts long enough is to see the most subversive point of all—that the Socrates who banishes the imitative poet is himself nothing more than the imitative poet Plato pretending to be the historical Socrates.<sup>127</sup> If Plato were truly to banish all imitative poets from the city, he would have to banish himself. This raises the question of whether any of the lawmakers banishing the poets can be distinguished from them.

Viewed in this light, the poet's anonymity assumes new salience. Like all textual gaps, this one stimulates the reader's imagination.<sup>128</sup> While readers often fill the gap with Homer,<sup>129</sup> Plato's younger self might be a better candidate. More broadly, the poet may remain nameless to allow the philosopher to banish the poet but still retain the possibility that they are aspects of the same person.

In this spirit, Socrates revisits the banishment of poetry from the city in the last book of the *Republic*. There he reiterates that imitative poetry is properly banished from the city, observing that “if you admit the sweetened muse in lyrics or epics, pleasure and pain will jointly be kings in your city

123. *Id.* at \*398a.

124. See MURDOCH, *supra* note 32, at 14; ALICE SWIFT RIGINOS, *PLATONICA: THE ANECDOTES CONCERNING THE LIFE AND WRITINGS OF PLATO* 43-48 (1976).

125. PHILIP SIDNEY, *A DEFENCE OF POETRY* 19 (Jan Van Dorsten ed., Oxford Univ. Press 1966) (1595).

126. PERCY BYSSHE SHELLEY, *A Defence of Poetry*, in *SHELLEY'S POETRY AND PROSE: AUTHORITATIVE TEXTS, CRITICISM* 509, 514 (Donald H. Reiman & Neil Fraistat eds., 2d ed. 2002).

127. I thank Carol Rose for this point.

128. See Peter Brooks, *Storytelling Without Fear?: Confession in Law and Literature*, in *LAW'S STORIES*, *supra* note 2, at 114, 117.

129. See, e.g., Elizabeth Asmis, *Plato on Poetic Creativity*, in *THE CAMBRIDGE COMPANION TO PLATO* 338, 349 (Richard Kraut ed., 1992) (“[E]verything points to Homer.”). Paul Shorey points out that Homer is cited in the Platonic corpus more than 120 times, while no other poet is cited more than twelve times. PAUL SHOREY, *WHAT PLATO SAID* 7-8 (1933). Because Homer mixes imitative and narrative modes of poetry, however, he is arguably not the kind of poet who is at the core of Plato's critique.

instead of law.”<sup>130</sup> Ramona Naddaff believes this “second censorship” of Book X is more severe than the “first censorship” of Book III because it excludes *all* mimetic poetry.<sup>131</sup> Yet this time, Socrates elaborates its provisional nature:

All the same, let it be said that, if poetry directed to pleasure and imitation have any argument to give showing that they should be in a city with good laws, we should be delighted to receive them back from exile, since we are aware that we ourselves are charmed by them.<sup>132</sup>

As Bloom observes, “Socrates banishes poetry once more, but this time offers it a return if it can learn to argue, to justify itself before the bar of philosophy.”<sup>133</sup>

Two subsequent dialogues—the *Phaedrus* and the *Laws*—demonstrate that poetry’s case remains on Plato’s docket. Following Nussbaum’s analysis, I argue that the *Phaedrus* makes the argument for poetry’s readmission into the city by questioning each charge against it.<sup>134</sup> I then maintain that the *Laws* renders a verdict on that argument.

Socrates foreshadows his own transformation when he leaves the city at the beginning of the *Phaedrus*, in pursuit of the beautiful youth for whom the dialogue is named. Phaedrus, a lover of rhetoric, has left the city to walk and practice speeches.<sup>135</sup> He entices Socrates to follow him with the promise of a speech Phaedrus’s lover Lysias has made on love.<sup>136</sup> Falling into step and conversation with the youth, Socrates strolls with him to the banks of the river Ilissus.<sup>137</sup> Phaedrus persuades Socrates to wade barefoot into the stream with him, and then to lie with him on the grass under a plane tree.<sup>138</sup>

Reading this change of venue to reflect a change in view might seem sentimental.<sup>139</sup> Yet Socrates participates in no other dialogue outside the city walls.<sup>140</sup> Phaedrus himself observes that Socrates appears “totally out of place”—indeed, as far as Phaedrus knows, Socrates has “never even set foot beyond the city walls.”<sup>141</sup> Socrates responds that this is because he is

130. PLATO, *Republic*, *supra* note 24, at \*607a.

131. RAMONA A. NADDAFF, *EXILING THE POETS: THE PRODUCTION OF CENSORSHIP IN PLATO’S REPUBLIC 2* (2002).

132. PLATO, *Republic*, *supra* note 24, at \*607c.

133. Bloom, *supra* note 99, at 434.

134. NUSSBAUM, *supra* note 85, at 200-33.

135. PLATO, *Phaedrus*, *supra* note 26, at \*227a, \*228b.

136. *Id.* at \*227b-c.

137. *Id.* at \*229a.

138. *Id.* at \*229a-b.

139. For an extended defense of the significance of place in this dialogue, see G.R.F. FERRARI, *LISTENING TO THE CICADAS: A STUDY OF PLATO’S PHAEDRUS 1-25* (1987).

140. CHARLES L. GRISWOLD, JR., *SELF-KNOWLEDGE IN PLATO’S PHAEDRUS 8-9*, 33 (1996).

141. PLATO, *Phaedrus*, *supra* note 26, at \*230c-d. The accusation in the *Crito*, whose justice

“devoted to learning; landscapes and trees have nothing to teach [him]—only the people in the city can do that.”<sup>142</sup> Yet Socrates is not only full of praise for his surroundings, which he describes in knowledgeable and sensuous detail, but settles comfortably into them.<sup>143</sup> He has moved into the zone to which he banished the poet.

In this pastoral idyll, Socrates qualifies each objection he has made to poetry in the city. When they arrive at a plane tree on the riverbank, Phaedrus asks whether this is the spot where Boreas, the personification of the north wind, carried the princess Orithuia away.<sup>144</sup> Phaedrus’s question has a hint of entrapment to it: Asking *where* an event took place vaults over the antecedent question of *whether* it took place at all. Socrates bites, saying the spot is a few hundred yards downstream.<sup>145</sup> Phaedrus then inquires whether Socrates believes the myth is true.<sup>146</sup> Socrates responds that he could argue the story is false, “as our intellectuals do,” by saying the myth is a fanciful explanation of how a gust of wind blew an actual princess over the rocks.<sup>147</sup> After supplying this explanation, however, Socrates retreats from it. He observes that anyone seeking to provide the “true” accounts underlying myths would assume an endless task, because he would have to explain an interminable train of chimeras, gorgons, and other monsters.<sup>148</sup> The task might be described as Sisyphean, and Socrates declines it, observing he has “no time for such things,” because he seeks to know himself.<sup>149</sup> Instead, Socrates says he is willing to “accept what is generally believed.”<sup>150</sup>

Socrates’ failure to explain away the myths can itself be explained away as prioritization. He would debunk mythology had he world enough and time, but self-knowledge takes precedence. Nonetheless, this exchange should not be discounted. Like the change in scenery, it betokens transformation. In sensibility, the contention that Socrates will accept “what is generally believed” rather than independently seek truth is hard to square with the claims made by the Socrates of the *Republic*. The Socrates of the *Republic* seems more aligned with the rationalists who seek the truth

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Socrates accepts, largely bears out Phaedrus’s claim:

You have never left the city, even to see a festival, nor for any other reason except military service; you have never gone to stay in any other city, as people do; you have had no desire to know another city or other laws; we and our city satisfied you.

PLATO, *Crito*, in COMPLETE WORKS, *supra* note 25, at 37, at \*52b-c (internal quotation marks omitted).

142. PLATO, *Phaedrus*, *supra* note 26, at \*230d.

143. *Id.* at \*230b-c, \*230e.

144. *Id.* at \*229b.

145. *Id.* at \*229c.

146. *Id.*

147. *Id.* at \*229c, \*229c-d.

148. *Id.* at \*229d-e.

149. *Id.* at \*230a.

150. *Id.*

underlying the myth. Yet here those rationalists are portrayed as furious pedants.

Deeper in the dialogue, this indifference toward factual truth shifts into a critique of rationality.<sup>151</sup> Phaedrus delivers the speech by Lysias with which he lured Socrates from the city. Lysias's speech paradoxically argues that in choosing a mate, a boy should choose the man who does not love him rather than the man who does.<sup>152</sup> The speech maintains that the nonlover is superior to the lover because, among other things, the nonlover is more constant, discreet, and trusting.<sup>153</sup> In terms reminiscent of the *Republic*, the speech argues for the priority of rationality over the emotions or the appetites.

After he recites the speech, Phaedrus challenges Socrates to go it one better.<sup>154</sup> Socrates accepts and argues in a similar vein that the nonlover should be preferred to the lover.<sup>155</sup> This speech culminates by classing eros among the base appetites: "You should know that the friendship of a lover arises without any good will at all. No, like food, its purpose is to sate hunger. 'Do wolves love lambs? That's how lovers befriend a boy!'"<sup>156</sup>

The Socrates of the *Phaedrus*, like the Socrates of the *Republic*, seems in these words to privilege the rational part of the soul over its emotional or appetitive counterparts. Nonetheless, the manner in which Socrates delivers the speech is again a departure. Socrates associates the rural spot in which he and Phaedrus lie with the divine inspiration of poetry: "There's something really divine about this place, so don't be surprised if I'm quite taken by the Nymphs' madness as I go on with the speech. I'm on the edge of speaking in dithyrambs as it is."<sup>157</sup> The speech celebrating rationality is poetic in form.

The style of Socrates' first speech renders credible the stunning break that occurs directly after it. After finishing his paean to rationality, Socrates prepares to leave the riverbank.<sup>158</sup> But then he is arrested. Turning to Phaedrus, Socrates says that as he was about to return to the city, he "heard a voice coming from this very spot" that forbade him to leave until he atoned for some wrong.<sup>159</sup> Socrates immediately intuits his offense—he, like Lysias, has made an impious speech. The speech is impious because it denigrates Love, who is one of the gods.<sup>160</sup> In atonement, Socrates follows

151. See NUSSBAUM, *supra* note 85, at 214-15.

152. PLATO, *Phaedrus*, *supra* note 26, at \*230e-34c.

153. *Id.* at \*231a-b, \*231e-32a, \*232c-d.

154. *Id.* at \*235d-e.

155. *Id.* at \*237b-41d.

156. *Id.* at \*241c-d (internal quotation marks omitted).

157. *Id.* at \*238c-d.

158. *Id.* at \*242b-c.

159. *Id.* at \*242c.

160. *Id.* at \*242d-e.

the example of a fellow offender, the poet Stesichorus.<sup>161</sup> After defaming Helen of Troy, Stesichorus was struck blind until he composed a Palinode—a poem retracting a statement made in an earlier poem. Socrates avers that he will now compose his own Palinode to avoid being blinded himself.<sup>162</sup>

The Palinode is a Platonic masterpiece. Socrates begins by observing that madness is the sine qua non of prophecy, mysticism, poetry, and love.<sup>163</sup> Thus, “[i]f anyone comes to the gates of poetry and expects to become an adequate poet by acquiring expert knowledge of the subject without the Muses’ madness, he will fail.”<sup>164</sup> Once again we see that poetry’s power stems from its irrationality. While this would damn poetry for the Socrates of the *Republic*, the *Meno*, the *Apology*, or the *Protagoras*, the Socrates of the *Phaedrus* goes on to celebrate such madness, because it is sent by the gods. The turn in his attitude toward love is an aegis-creating move for poetry. If love must be defended because it is a madness sent by Eros, poetry must be defended because it is a madness sent by the Muses.<sup>165</sup>

This reassessment of love leads Plato to revise his figuration of the soul. In the Palinode, Socrates compares the soul to a charioteer who controls two horses—one white and docile, the other black and intemperate.<sup>166</sup> These three figures echo the division of the soul into reason, emotion, and appetite in Book IV of the *Republic*.<sup>167</sup> While the hierarchy among the terms is preserved, much has changed. In Book IV, Plato sounds as if he would eliminate the emotional and appetitive aspects of the soul if he could. In the Palinode, Plato describes all three aspects as necessary to progression toward the good. The three aspects are also integrated—the goal is not to eliminate any one of them but to harmonize them all.

The shift that occurs in the *Phaedrus* is one of degree. The Socrates of the *Phaedrus* is still suspicious of poetry—at one point he describes poets as far inferior to philosophers.<sup>168</sup> Nonetheless, Plato is clearly in a “softened mood” toward poetry.<sup>169</sup> The genius of the shore has been creeping up on Socrates, making successively more powerful claims upon him. First, it exacts admiration of its sensual beauty from him; second, it secures a benign indifference to the truth of its mythologies; third, it makes him profess the case for rationality in a self-consciously poetic form. When he is physically arrested by the spirit of the river, Socrates’ seduction is complete. It is particularly ironic that a commitment to the truth makes him

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161. *Id.* at \*243a.

162. *Id.* at \*243a-b.

163. *Id.* at \*244a-45c.

164. *Id.* at \*245a.

165. *Id.*

166. *Id.* at \*253d-e.

167. PLATO, *Republic*, *supra* note 24, at \*436a-b.

168. PLATO, *Phaedrus*, *supra* note 26, at \*248d-e.

169. MURDOCH, *supra* note 32, at 35.

recant the case for rationality—the impulse toward truth leaves mythologies intact but interrupts his paean to reason.

We must therefore ask what happens when Socrates leaves this *locus amoenus*, as he does at the end of the dialogue.<sup>170</sup> Is the *Phaedrus* a dialogue composed in an antic mood, which will evanesce when Socrates returns to the city?

Come we now to the *Laws*, by consensus Plato's last work.<sup>171</sup> The dialogue is a tract on legislation for a hypothetical colony to be established on Crete. The players in the dialogue are an Old Athenian (who replaces Socrates as Plato's avatar), the Spartan Megillus, and the Cretan Clinias. The dialogue occurs as these three characters journey from Cnossus to Ida on a summer's day.

The placement of the *Laws* at the end of Plato's career might lead us to read it as a culminating moment in his corpus. Criticism, however, has not been kind to the *Laws*, characterizing it as a product of Plato's dotage: "It has been a commonplace of criticism to contrast its prosy preachments and tediously minute prescriptions with the fresh, dramatic charm of the minor dialogues and the large, poetic idealism of the *Republic*."<sup>172</sup> While many passages of the *Laws* are admittedly dry, such criticisms miss a fundamental aspect of the dialogue.

The importance of the *Laws* lies precisely in its contrast with the *Republic*. While the *Republic* figures an ideal state, the *Laws* represents a real one. The *Laws* is dry in part because it operationalizes the ideals of the *Republic*, considering how they might be embodied in torts, contracts, and criminal law. Plato does not leave his utopia spinning in space but brings it down to a world we can recognize. The Old Athenian says that "reflection and experience will soon show that the organization of a state is almost bound to fall short of the ideal."<sup>173</sup> For this reason, "the right procedure is to describe not only the ideal society but the second and third best too, and then leave it to anyone in charge of founding a community to make a choice between them."<sup>174</sup> The *Laws* thus seeks to describe "the absolutely ideal society, then the second-best, then the third."<sup>175</sup>

This shift from best to second best is reflected in the physical setting. As in the *Phaedrus*, location is important. The characters are again not in the city but in a pastoral setting. Yet this is no idyll: They are not traveling *to* nature, but *through* nature. With one exception,<sup>176</sup> their surroundings are not intimately described; their walk is purposeful, a pilgrimage. This literal

170. PLATO, *Phaedrus*, *supra* note 26, at \*279c.

171. See Cooper, *supra* note 25, at xi.

172. SHOREY, *supra* note 129, at 355.

173. PLATO, *Laws*, *supra* note 27, at \*739a.

174. *Id.* at \*739a-b.

175. *Id.* at \*739b.

176. *Id.* at \*625b-c.

transit from Cnossus to Ida reflects the figurative transition the characters make from the Splendid City of the *Republic* to the Magnesia of the *Laws*. Both the Splendid City and Magnesia are fictions, but the former is unrealizable while the latter is not.

The *Laws*, then, is a culminating tract, despite also being a chastened one. It is not a repudiation of the ideals of the *Republic*, but a mature attempt to consider the varying levels at which those ideals can be achieved.<sup>177</sup> I focus here on how the dialogue functions as such a synthesizing and realist document with regard to Platonic attitudes toward poetry.

The *Laws* shares many of the *Republic*'s harsh attitudes toward poetry. The Old Athenian reaffirms the conclusion of the *Republic* that poetics must be subordinated to ethics to protect both listeners and speakers. To protect listeners, the Old Athenian advocates censoring all poetry contrary to the ends of the state.<sup>178</sup> He says that just as the physician must make wholesome foods tasteful and unwholesome foods distasteful, so must the poet use his creative gifts to make virtue attractive and vice unattractive.<sup>179</sup> The *Laws* also echoes the *Republic*'s concern about the corrupting effects of mimesis on speakers. The Old Athenian admits that bad characters must sometimes be imitated for heuristic purposes. However, he avers that such characters should be portrayed only by those of lower status, such as slaves.<sup>180</sup>

It may seem that Plato has left his softened mood toward poetry on the bank of the Ilissus. Nonetheless, Plato articulates a sympathy toward poetry in the *Laws* discernibly different from his overt attitude in the *Republic*. Part of Plato's realism in his last dialogue is that poetry—indeed all the arts—are assumed to be part of the state. The Old Athenian also underscores the parallels between law and the arts: He compares legislators to painters,<sup>181</sup> describes music as a kind of law,<sup>182</sup> and recommends that laws have preambles like the proems of poems or the preludes of music.<sup>183</sup>

The parallel between poetry and law comes to the fore when the Old Athenian considers the claim of the tragic poets, who seek admission to the city. He asks what we should do if the "serious poets," or tragedians, were to say, "'Gentlemen, may we enter your state and country, or not? And may we bring our work with us? Or what's your policy on this point?'"<sup>184</sup> Recall that Socrates banishes the imitative poets in Book III of the *Republic* but

177. See SHOREY, *supra* note 129, at 307-59.

178. PLATO, *Laws*, *supra* note 27, at \*816d-e.

179. *Id.* at \*659e-60a.

180. *Id.* at \*816e.

181. *Id.* at \*769b-e.

182. *Id.* at \*799e-800a.

183. *Id.* at \*722d-23b.

184. *Id.* at \*817a.



leaves the door open for their return in Book X if they can make a philosophical case for themselves.<sup>185</sup>

The poets, having made this appeal, await the verdict of the lawmakers. The Old Athenian delivers it as follows:

What would be the right reply for us to make to these inspired geniuses? This, I think: ‘Most honored guests, we’re tragedians ourselves, and our tragedy is the finest and best we can create. At any rate, our entire state has been constructed so as to be a “representation” of the finest and noblest life—the very thing we maintain is most genuinely a tragedy. So we are poets like yourselves, composing in the same *genre*, and your competitors as artists and actors in the finest drama, which true law alone has the natural powers to “produce” to perfection (of that we’re quite confident). So don’t run away with the idea that we shall ever blithely allow you to set up stage in the market-place and bring on your actors whose fine voices will carry further than ours. Don’t think we’ll let you declaim to women and children and the general public, and talk about the same practices as we do but treat them differently—indeed, more often than not, so as virtually to contradict us. We should be absolutely daft, and so would any state as a whole, to let you go ahead as we’ve described before the authorities had decided whether your work was fit to be recited and suitable for public performance or not. So, you sons of the charming Muses, first of all show your songs to the authorities for comparison with ours, and if your doctrines seem the same as or better than our own, we’ll let you produce your plays; but if not, friends, that we can never do.’<sup>186</sup>

In this extraordinary passage, the Old Athenian articulates a position that Plato has held with some consistency across his corpus. First, poetry will not be permitted to conflict with the core functions of the state. The statesmen will not let the poets “talk about the same practices . . . but treat them differently.” Second, poetry cannot evade being held accountable to those functions by asserting the defense that it is ineradicable. While the lawmakers call themselves “tragedians,” their political representation of the state clearly differs from the poetic representation of those who stand as supplicants before them. Finally, poetry will only be permitted if it can affirmatively show that it can fulfill state functions. One way this can be done is by demonstrating its virtues, by showing that its “doctrines seem the same as or better than” those of the state. I call these three tenets the “Platonic paradigm.”

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185. See *supra* note 132 and accompanying text.

186. PLATO, *Laws*, *supra* note 27, at \*817b-d.

## II. THE PLATONIC PARADIGM

Plato's treatment of the poet has reverberated down the corridors of aesthetic theory, influencing such thinkers as Aristotle,<sup>187</sup> Sidney,<sup>188</sup> Rousseau,<sup>189</sup> Shelley,<sup>190</sup> Nietzsche,<sup>191</sup> Tolstoy,<sup>192</sup> and Gadamer.<sup>193</sup> Sidney's 1595 *Defence of Poetry* addresses four objections to poetry. Three are substantive: "[P]oetry [is] a waste of time," "poets are liars," and "poems are sinful fancies."<sup>194</sup> The fourth is that "Plato banished poets."<sup>195</sup> Rousseau's only known preparation for his 1758 *Letter to M. D'Alembert on the Theatre* was to make a paraphrase of Book X of the *Republic*.<sup>196</sup> Shelley's 1821 *Defence of Poetry* attributes the "extinction of the poetical principle" to the fact that "the three forms into which Plato had distributed the faculties of mind underwent a sort of apotheosis, and became the object of the worship of the civilized world."<sup>197</sup>

With the notable exception of Rousseau, these accounts have been highly critical of Plato. Modern commentary has also treated Plato's censorship with "condescending horror and dismay."<sup>198</sup> It is time for a modern defense of the Platonic paradigm.

Plato's first tenet—that poetry can be permitted only if it does not conflict with state functions—is likely to be controversial. To reside in the city, the poets must "show [their] songs to the authorities" and demonstrate their doctrines to be "the same as or better than" those of the state.<sup>199</sup> Such state censorship of art conjures the specter of socialist realism<sup>200</sup> or of dark periods in our own obscenity jurisprudence.<sup>201</sup> It disrespects the autonomy of art and subordinates it to the state.

But why should politics and the arts be autonomous? Michael Walzer's

187. 2 ARISTOTLE, *Poetics*, in THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 2316 (Jonathan Barnes ed., 1984).

188. SIDNEY, *supra* note 125, at 57-61.

189. ROUSSEAU, *supra* note 107, at 116, 120.

190. SHELLEY, *supra* note 126, at 514.

191. FRIEDRICH NIETZSCHE, *Homer on Competition*, in ON THE GENEALOGY OF MORALITY 187, 191-94 (Keith Ansell-Pearson ed. & Carol Diethe trans., Cambridge Univ. Press 1994).

192. LEO TOLSTOY, WHAT IS ART? 61 (W. Gareth Jones ed. & A. Maude trans., Bristol Classical Press 1994) (1898).

193. HANS-GEORG GADAMER, *Plato and the Poets*, in DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO 39 (P. Christopher Smith ed. & trans., 1980).

194. SIDNEY, *supra* note 125, at 52, 54, 57.

195. *Id.* at 57, 57-61.

196. See Allan Bloom, *Introduction to ROUSSEAU*, *supra* note 107, at xv, xxv.

197. SHELLEY, *supra* note 126, at 524.

198. NADDAFF, *supra* note 131, at xi (describing rather than endorsing this view).

199. PLATO, *Laws*, *supra* note 27, at \*817d.

200. See, e.g., MONROE C. BEARDSLEY, AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT 360-61 (1966); GLEB STRUVE, RUSSIAN LITERATURE UNDER LENIN AND STALIN, 1917-1953, at 253-313 (1971).

201. See, e.g., FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 8-29 (1976).

*Spheres of Justice*<sup>202</sup> provides one approach to this question. Walzer argues that the spheres of life are plural and that each sphere has its own integrity.<sup>203</sup> For this reason, the principles of justice are also plural, operating internal to each sphere.<sup>204</sup> To apply one sphere's principles to another would be a category mistake, as when the wise wrestle the strong.<sup>205</sup> Walzer posits that many of our intuitions about injustice flow from such jarrings of the spheres.<sup>206</sup> Nepotism is wrong because it improperly commingles the spheres of kinship and office;<sup>207</sup> prostitution is wrong because it commingles commerce and intimacy;<sup>208</sup> simony is wrong because it commingles commerce and office.<sup>209</sup>

So, we might say, censorship is wrong because it commingles the spheres of politics and art. Plato's figuration of the conflict as one between the city and the poet suggests as much. The city stands for the sphere of politics not only in being true, rational, and measured, but also in being collective, coercive, traditional, institutional, and serious. The poet stands for the sphere of art not only in being false, emotional, and seductive, but also in being individual, persuasive, original, iconoclastic, and pleasure producing.

Because it separates the spheres of politics and poetics, Plato's banishment of the poet might seem to respect the autonomy of the spheres. But this is incorrect. If the spheres of politics and art were truly autonomous, it would not be obvious whose values should cede when the two clashed. For Plato, though, it is obvious that politics has priority over poetics—it is always the city's welfare, not the poet's, that he has in mind.

Yet censorship can still be justified within a Walzerian framework, because censorship involves the sphere of politics. Politics is a unique sphere for Walzer because it is not only an activity in its own right, but also one that defines the contours of the other spheres.<sup>210</sup> It is through politics that we limn the boundaries of such spheres as "commerce" and "art." This means that politics cannot be distinguished from any other sphere and must also take precedence over any other sphere.

Of course, we might decide *through* politics to delineate an autonomous sphere for art. The state might elect to stay out of art as it stays out of religion. (The analogy is deliberate, because the belief that art is a secular

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202. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

203. *Id.* at 6.

204. *Id.*

205. *Id.* at 18.

206. *Id.* at 19.

207. *Id.* at 146-48.

208. *Id.* at 103.

209. *Id.* at 9.

210. *Id.* at 281.

form of religion has been well rehearsed.)<sup>211</sup> But it will be the state that will make that determination. Art, then, always exists only at the sufferance of the state. Because these spheres inevitably clash, censorship is also inevitable. As Michael Holquist puts it, “To be for or against censorship as such is to assume a freedom no one has. Censorship *is*.”<sup>212</sup>

We may seek to avoid that brute reality by reserving the word for suppressions with which we disagree: Suppression of *Lady Chatterley’s Lover* is more likely to be dubbed “censorship” than suppression of child pornography.<sup>213</sup> But both are forms of state censorship, formally defined as governmental suppression of speech. Our objection, then, is not to censorship per se, but to censorship unsupported by a state interest. Yet this view—that the state can censor art when it has a compelling reason—is a simple restatement of the Platonic paradigm. Those who reject Plato’s framework along the functionalist dimension are also committed to rejecting contemporary First Amendment jurisprudence.

It might be argued that Plato’s aesthetic theory fails not in its functionalism but in its choice of function. Plato believes the function of the state is to bring its citizens closer to the Forms. The debate about whether this is a correct view is far beyond the scope of my inquiry. Because I take Plato’s function to be at least colorably compelling, I assume for the sake of argument that it is legitimate.

Now poetry is on the defensive. Plato makes a powerful *prima facie* case that poetry’s falsity, irrationality, and seductiveness impede citizens from apprehending the Forms. This is a negative particularizing view of poetry. Two defenses present themselves—the ineradicability defense and the virtue defense.

The ineradicability defense maintains that poetry is inevitable, such that arguments for its banishment are moot. It responds to a negative particularizing conception of poetry with a neutral generalizing conception. A proponent of the defense could paraphrase Holquist: “To be for or against poetry is to assume a freedom no one has. Poetry *is*.”

Such a defense could draw on the Platonic corpus. We might observe

211. See EAGLETON, *supra* note 21, at 20-26; see also MAURICE BEEBE, *IVORY TOWERS AND SACRED FOUNTS: THE ARTIST AS HERO IN FICTION FROM GOETHE TO JOYCE* (1964); BARBARA J. BUCKNELL, *THE RELIGION OF ART IN PROUST* (1969); ROGER SCRUTON, *DEATH-DEVOTED HEART: SEX AND THE SACRED IN WAGNER’S TRISTAN AND ISOLDE* (2004).

212. Michael Holquist, *Corrupt Originals: The Paradox of Censorship*, 109 PMLA 14, 16 (1994).

213. As one lawyer puts it,

The concept of censorship is irrelevant to child pornography. It is not censorship to outlaw (and punish) certain activities. . . .

In truth, when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight-of-hand used by organized paedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights.

Andrew Vachss, *Age of Innocence*, OBSERVER (London), Apr. 17, 1994, at 14.

that Plato's own text is spangled with poetic quotations from Homer;<sup>214</sup> that the Socrates who banishes the poet is himself the imitative poet Plato mimicking the historical Socrates;<sup>215</sup> that Plato prosecutes his arguments by drawing on "poetic" fables like the story of the ring of Gyges,<sup>216</sup> the allegory of the cave,<sup>217</sup> or the myth of Er;<sup>218</sup> and that the statesmen in the *Laws* explicitly refer to themselves as tragic poets.<sup>219</sup>

But Plato correctly rejects this defense. While poetry may sometimes blur into philosophy for him, the two discourses are ultimately distinguishable. We could respond on his behalf to the claims made above. Plato's quotations of Homer do not attest to the impossibility of evicting poetry. Even if such selective quotations are necessary to ban the work as a whole, this does not mean the work is incapable of being censored. Similarly, Plato's imitation of Socrates is a bad example of poetic ineradicability. Plato believes the state should not bar imitation per se, only imitation that degrades the speaker or the listener. Plato is "imitating up" in mimicking Socrates; there is no evidence that Plato would object to this form of imitation, and therefore no evidence that he tried to evict poetry and failed. We could also easily distinguish between Plato's parables and poetry, as Nussbaum does when she contrasts Plato's "anti-tragic theater" with the tragic theater of the poets. What makes Plato's fables "anti-tragic" is that they are played out in the "pure crystalline theater of the intellect," appealing to our reason rather than our emotions.<sup>220</sup> Even his most charming stories are always placed in the service of argument. Finally, while the lawmakers describe themselves as "tragedians," they manifestly do not view themselves as identical to the tragedians before them. To the contrary, the lawmakers can banish the tragedians at will.

My rejection of the ineradicability defense of poetry, which I reiterate across contexts, may suggest an antipathy to literature. But the opposite is true. I dislike the ineradicability defense not only because it is false, but also because it is feeble. Such a defense buys literature a place in the polis only at sufferance. It preempts celebration of poetry as a positive good. We

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214. See *supra* note 122 and accompanying text.

215. See *supra* note 127 and accompanying text.

216. See PLATO, *Republic*, *supra* note 24, at \*359d-60c.

217. See *id.* at \*514a-17b.

218. See *id.* at \*614b-21d.

219. PLATO, *Laws*, *supra* note 27, at \*817b-d. In this Article, I associate the ineradicability defense with the generalizing conception of literature. There are, however, forms of the ineradicability defense that rest on the particularizing conception. Consider Nehamas's comparison of poetry in antiquity to television today. NEHAMAS, *supra* note 100, at 293. Many might argue that television should be banished from the polity. But we know such arguments would be futile, because "television has conquered." *Id.* (internal quotation marks omitted). Television's ineradicability does not stem from the fact that it is indistinguishable from philosophy or law. This suggests that an ineradicability defense can sometimes be made even on a particularizing conception of the discourse in question. I do not treat this version of the ineradicability defense in this Article.

220. NUSSBAUM, *supra* note 85, at 133.

should respond to the negative particularizing conception of poetry not with a neutral generalizing conception but with a positive particularizing one.

Plato leaves room for such a virtue defense. He invites the poets to make the affirmative case for poetry both in Book X of the *Republic* and in the *Laws*. If the poets can make such a defense, he promises them a place in the city. But here is my critical disagreement with Plato: While he (twice) invites the virtue defense of poetry, he never entertains it. He focuses so intently on literature's vices that he blinds himself to its virtues.

If we want a virtue defense of poetry, we must build it ourselves. I do not construct the entire edifice, but rather one scaled to Plato's critique. I adopt not only his functionalist viewpoint, but also (and this just for argument's sake) his function. I assume poetry can have a place in the city only if it brings the polity closer to the Forms. And in making the argument that poetry fulfills this function, I restrict myself to the three dimensions of poetry Plato deems relevant, showing that each Platonic vice can be urged into its nearest virtue.

The first labor—showing that poetry, which is false, can bring us closer to the truth of the Forms—might seem Herculean. That difficulty dissolves when we realize two varieties of truth are in play here. The poets lie insofar as they do not tell the factual truth. Yet the truth Plato seeks is the truth of the Forms. The “falsehoods” told by the poets might be superior to factual truth in securing that end. Aristotle observes that poetry is more philosophical than history, because history only shows us “the thing that has been,” while poetry shows “a kind of thing that might be.”<sup>221</sup> He distinguishes between an imaginative world and a real one and argues that the former is closer to philosophical truth.

Sidney elaborates on this distinction by showing how poetry (the imaginative world) can improve on nature (the real world). Among his many instances is the literary hero. Although nature's “uttermost cunning is employed” in creating men, she has never been able to create “so right a prince as Xenophon's Cyrus, so excellent a man every way as Virgil's Aeneas.”<sup>222</sup> In rebutting the claim that nature's men are at least real, Sidney moves into a Platonic register: “Neither let this be jestingly conceived, because the works of the one be essential, the other in imitation or fiction; for any understanding knoweth the skill of each artificer standeth in that *idea* or fore-conceit of the work, and not in the work itself.”<sup>223</sup> Nature, no less than art, is attempting to capture an idea—a Form—antecedent to it. And in answering the question of which modality is better at capturing that “fore-conceit,” Sidney follows Aristotle: Poetry “worketh, not only to make a Cyrus, which had been but a particular excellency as nature might have

221. 2 ARISTOTLE, *supra* note 187, at 2323.

222. SIDNEY, *supra* note 125, at 24.

223. *Id.*

done, but to bestow a Cyrus upon the world to make many Cyruses, if they will learn aright why and how that maker made him."<sup>224</sup>

We can lift this Aristotelian lamp over Plato's couch. Recall that Plato's argument was that the carpenter is at one remove from the Form of the couch, while the poet is at two removes.<sup>225</sup> The Aristotelian rebuttal would posit that mimetic representations might be better suited than material ones to the task of discovering the couch's ontology. The carpenter, like the historian, can give us only the couches that exist, rather than the couches that might. Instead of looking at a carpenter's creation, we could imagine existent and nonexistent couches, varying the concept in the imagination until we discovered what was invariable about it.

To be fair, Plato worries less about truth-seeking poetry than truth-disregarding poetry. Plato's target is not poetry that represents myriad couches to find the One True Couch, but poetry that says a cow is a couch. Or, to take the target Plato actually hits, his objection is to the lines about charioteering from the *Iliad* recited by Ion without care as to whether they reflect the *technē* of charioteering.

But assuming that the poet, like Ion, is not presenting what he says as truth, it is hard to see why he must shoulder the burden of ensuing confusion. Sidney defends against the charge that "poets are liars" by arguing "that of all writers under the sun the poet is the least liar, and, though he would, as a poet can scarcely be a liar."<sup>226</sup> To be a liar, one must first affirm something to be true. The poet "nothing affirms, and therefore never lieth."<sup>227</sup> Of course, some may take these lies to be true. But Sidney questions their claim on our solicitude: A person who takes Aesop's fables "for actually true" should "have his name chronicled among the beasts he writeth of."<sup>228</sup> He also questions how many such people there are: "What child is there, that, coming to a play, and seeing *Thebes* written in great letters upon an old door, doth believe that it is Thebes?"<sup>229</sup>

Contemporary critics share Sidney's dim view of those who cannot distinguish fiction from fact. Posner compares using literature about law as a guide to legal decisionmaking to "reading *Animal Farm* as a tract on farm management."<sup>230</sup> This comparison supports Plato in observing the gap between representation and reality. A person who reads *Animal Farm* as a tract on farm management is confused, just as the person who reads the *Iliad* as a tract on charioteering is confused. But Posner, like Sidney, places

224. *Id.*

225. See *supra* notes 52-56 and accompanying text.

226. SIDNEY, *supra* note 125, at 52.

227. *Id.*

228. *Id.* at 53.

229. *Id.*

230. Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1433 (1986).

the burden of making that distinction on the reader. Orwell is not responsible for the confusion of “children and foolish human beings.”<sup>231</sup>

Having made falsehood the handmaiden of Platonic truth, we can now do the same for irrationality. Plato objects to the emotional dimension of poetry because it causes poets to fail the test of dialogic rationality. The irrationality of poetry keeps it from being one of the *technai*, because these crafts were marked by universality, teachability, precision, and concern with explanation. This assumes that the *technai* are always the best way to approximate the Forms.

Yet even Plato invites skepticism about that assumption in the *Phaedrus*, the dialogue in which he comes closest to a virtue defense of poetry. Love is a Form, but it is not a Form that can be apprehended through reason. Lysias’s ideal lover—who approaches love rationally and without passion—seeks to make love into a *technē*. But Plato’s Palinode shows this endeavor to be self-defeating. It is no accident that Lysias’s lover is called the “nonlover,” because love cannot be apprehended through dialogic rationality. Standing in the stream, Socrates realizes he cannot see through the sparkling youth Phaedrus to the colorless abstraction behind him. To love Phaedrus in his particularity is not to be distracted from the Form but to seize it in the only way it can be seized.

It would fall to later commentators to show that love is not distinctive in this regard. It is now a commonplace across a range of disciplines that distinctions between reason and emotion—such as those drawn by Plato or Kant<sup>232</sup>—have been overdrawn. Neurologists like Antonio Damasio have argued that “emotions and feelings may not be intruders in the bastion of reason at all: they may be enmeshed in its networks, for worse *and* for better.”<sup>233</sup> Moral philosophers like Nussbaum have similarly argued that the emotions have a cognitive dimension that makes ethical thought impossible without them.<sup>234</sup> Under this view, emotions are not stupid, but a profound part of human cognition. Plato’s recognition that love could not be apprehended through a reason purged of emotion is not the exception but the rule.<sup>235</sup>

231. PLATO, *Republic*, *supra* note 24, at \*598c.

232. See, e.g., IMMANUEL KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS* 67-68 (James Ellington trans., Bobbs-Merrill Co. 1964) (1797) (“[Man] should bring all his capacities and inclinations under his authority (that of reason). And this is a positive precept of control over himself; it is additional to the prohibition that man should not let himself be governed by his feelings and inclinations (the duty of apathy.)”; see also ILHAM DILMAN, *FREE WILL: AN HISTORICAL AND PHILOSOPHICAL INTRODUCTION* 142 (1999) (“[F]or Kant ‘conformity to reason’ and ‘subjection to passion’ represent two exclusive and exhaustive conditions of the will, and indeed of humanity.”).

233. ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN*, at xii (1994).

234. See generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001).

235. Moreover, if we understand Plato’s yearning for rationality as an attempt to control



It remains to show that the seductive power of the poet can be placed in the service of the Forms. To call the poet's power seductive is to cast it as persuading us toward a bad end. But persuasion can be used toward good ends as well, as Plato admits in the *Laws* when he suggests that poets can be like doctors who make wholesome foods attractive.<sup>236</sup> Plato's objection is more subtle: He believes that while poetry can be used for good ends, it is more likely to be abused. This is because only unscrupulous poets will have true persuasive power, because only they will be willing to "imitate down." That act of imitation causes both speakers and listeners to inhabit lower characters.

Later thinkers would regard the empathetic identification stimulated by literature as its cardinal virtue. In his *Defence of Poetry*, Shelley argues that "[a] man, to be greatly good, must imagine intensely and comprehensively; he must put himself in the place of another and of many others; the pains and pleasures of his species must become his own."<sup>237</sup> Because it "enlarges the circumference of the imagination," poetry "strengthens that faculty which is the organ of the moral nature of man, in the same manner as exercise strengthens a limb."<sup>238</sup>

Tolstoy similarly sees empathetic identification as the crux of art: "Art is a human activity consist[ing] in this, that one man consciously by means of certain external signs, hands on to others feelings he has lived through, and that others are infected by these feelings and also experience them."<sup>239</sup> He acknowledges that Plato repudiates art because it "is so highly dangerous in its power to infect people against their wills."<sup>240</sup> But Tolstoy then observes that Plato "denied what cannot be denied—one of the indispensable means of communication without which mankind could not exist."<sup>241</sup> In Tolstoy's view, the primary goal of the state, or of human existence, is "brotherly union among men."<sup>242</sup> Because art alone can make us experience the feelings of others as our own, "it is only art that can accomplish this."<sup>243</sup>

Unlike the others, this argument requires us to update Plato's

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*tuchē*, we can also make the case for poetry's inclusion. *Tuchē* translates into "what just happens," the ungovernable contingency the *technai* are meant to control. Yet we will never be able to remove ungovernable contingency from human life. Sometimes, our only mastery of irreducible contingency is the capacity to describe it. When Seamus Heaney praises a song's capacity to capture "the music of what happens," he is making that claim. SEAMUS HEANEY, *Song, in OPENED GROUND: SELECTED POEMS 1966-1996*, at 181, 181 (1998) ("There are the mud-flowers of dialect / And the immortelles of perfect pitch / And that moment when the bird sings very close / To the music of what happens.").

236. PLATO, *Laws*, *supra* note 27, at \*659e-60a.

237. SHELLEY, *supra* note 126, at 517.

238. *Id.*

239. TOLSTOY, *supra* note 192, at 59 (emphasis omitted).

240. *Id.* at 61.

241. *Id.*

242. *Id.* at 224.

243. *Id.* at 223.

conception of the Forms. Plato believes that imitating down is bad because he supports the Athenian social hierarchy. He believes in empathy among citizens, but not between them and others. If we were to extend that aspiration, though, literature would be crucial to its achievement. Contemporary advocates of literature as an instrument of ethical imagination engage in precisely that extension.<sup>244</sup>

Even a modest form of the virtue defense demonstrates that art is fully capable of serving, rather than subverting, Plato's asserted state function—bringing citizens closer to the Forms. I therefore disagree with his banishment of the poet from the city. Yet because my analysis locates Plato's error in his application of the paradigm rather than in the paradigm itself, this critique of Plato is also a defense of his paradigm. Plato is correct that art must be banished if it conflicts with core state functions. He is also correct that art cannot evade such a conflict by positing its own ineradicability. Finally, he is correct that art can only defend itself by affirmatively arguing that it is consistent with core state functions. Plato's sole error is in failing to entertain that virtue defense.

While Plato's paradigm could speak to any number of modern legal contexts, such as the regulation of allegedly obscene texts, it is most immediately applicable to instances in which the state judges whether a text will be admitted into its own discourse. Plato banishes the poet in part because the poet's language, if admitted, will become indistinguishable from the language of the state. This is not what happens in the obscenity context: Regardless of whether the Supreme Court deems *Fanny Hill*<sup>245</sup> obscene, no one will think the Court wrote it.<sup>246</sup> But it is what happens when the state considers the admissibility of narratives into the domain of legal discourse.

### III. VICTIM-IMPACT STATEMENTS

A modern analogue of Plato's ambivalence toward poetry can be seen in the Supreme Court's vacillating treatment of victim-impact statements. A victim-impact statement is a statement introduced at the sentencing phase of a trial that describes the effects of the crime on its victims. All states permit some form of victim-impact evidence to be introduced in noncapital

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244. See, e.g., NUSSBAUM, *supra* note 2, at xvi ("I defend the literary imagination precisely because it seems to me an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own."); WEISBERG, *supra* note 2, at 46 ("Poethics, in its attention to legal communication and to the plight of those who are 'other,' seeks to revitalize the ethical component of law.").

245. JOHN CLELAND, *FANNY HILL, OR, MEMOIRS OF A WOMAN OF PLEASURE* (Peter Wagner ed., Penguin Books 1985) (1749).

246. See *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413 (1966).

sentencing.<sup>247</sup> Currently, thirty-five of the thirty-eight states with the death penalty,<sup>248</sup> as well as the federal government<sup>249</sup> and the military,<sup>250</sup> permit the use of victim-impact evidence in capital trials.

Despite their current ubiquity, the use of victim-impact statements in death penalty cases has been controversial. In the 1987 case *Booth v. Maryland*, the Supreme Court banned victim-impact statements from capital trials because it found that their inflammatory nature distracted the jury from sentencing the defendant in a rational manner.<sup>251</sup> The Court extended that ban to victim-impact evidence adduced by prosecutors in the 1989 case of *South Carolina v. Gathers*.<sup>252</sup> In 1991, however, the Supreme Court reversed *Booth* and *Gathers* in *Payne v. Tennessee*.<sup>253</sup>

I imagine many Platonists reading these cases for the first time would experience what French literary wags call *déjà lu*—the uncanny feeling that one has read a text before, knowing one has not. The *Booth* Court figures the courtroom as a space from which a narrative with highly literary qualities must be banished, and for Platonic reasons. The *Payne* Court, in contrast, maintains that victim-impact statements should be readmitted on two separate grounds. It asserts the ineradicability defense, arguing that the statements cannot be meaningfully distinguished from the narratives that comprise law. It also raises the virtue defense, maintaining that the statements serve rather than subvert the functions of the state.

Let us begin with *Booth*. In 1983, John Booth robbed and murdered his elderly neighbors, Irvin and Rose Bronstein, in their West Baltimore home. Booth tied up the couple and repeatedly stabbed them in their chests with a kitchen knife. The Bronsteins' son discovered the bodies two days after the murder. The prosecutor charged Booth with first-degree murder and robbery and requested the death penalty.<sup>254</sup>

Maryland law at the time required the presentence report in all felony

247. PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 84 (2001).

248. Writing in 2003, John Blume stated that thirty-three of the thirty-eight states with the death penalty permitted some form of victim-impact evidence. John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267 (2003). Montana was incorrectly omitted from his list. See MONT. CODE ANN. § 46-18-302(1)(a)(iii) (2003) (providing for the consideration of “the harm caused to the victim and the victim’s family as a result of the offense” in capital sentencing). Since his accounting, victim-impact evidence became technically inadmissible but practically admissible in Wyoming. *Compare Olsen v. State*, 67 P.3d 536, 600 (Wyo. 2003) (holding that, in the absence of an authorizing state statute, victim-impact evidence is technically inadmissible), *with Harlow v. State*, 70 P.3d 179, 196, 196-99 (Wyo. 2003) (holding that victim-impact evidence is permitted under harmless error analysis unless it “inflamed the jury and was so unduly prejudicial that it rendered the trial fundamentally unfair”). This brings the tally to thirty-five states.

249. 18 U.S.C. § 3593 (2000).

250. R. COURTS-MARTIAL 1001(b)(4) (permitting introduction of victim-impact evidence in trials); *id.* 1004(b)(2) (permitting introduction of such evidence in capital trials).

251. 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

252. 490 U.S. 805 (1989), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

253. 501 U.S. 808 (1991).

254. *Booth*, 482 U.S. at 497-98.

cases to include a victim-impact statement.<sup>255</sup> The *Booth* Court depicts the statement as having two aspects—a descriptive element setting forth “the personal characteristics of the victims and the emotional impact of the crimes on the family” and a normative element detailing “the family members’ opinions and characterizations of the crimes and the defendant.”<sup>256</sup> In *Booth*, the victim-impact statement draws on interviews with the Bronsteins’ son, daughter, son-in-law, and granddaughter.<sup>257</sup>

In the descriptive portions of the statement, the son describes how “his parents had been married for fifty-three years and enjoyed a very close relationship.”<sup>258</sup> He notes “that his father had worked hard all his life and had been retired for eight years”<sup>259</sup> and that his mother “was young at heart and never seemed like an old lady,”<sup>260</sup> having taught herself to play bridge in her seventies. The son states that because he found his parents dead at 4:00 p.m., he “is always aware when 4:00 p.m. comes every day, even when he is not near a clock.”<sup>261</sup> He relates how “[h]e sees his father coming out of synagogues, sees his parents’ car, and feels very sad whenever he sees old people.”<sup>262</sup> The daughter describes how “she had to clean out her parents’ house and it took several weeks.”<sup>263</sup> She states that when she saw the bloodstained carpet, “she felt like getting down on the rug and holding her mother.”<sup>264</sup> She maintains that “[s]he cannot look at kitchen knives without being reminded of the murders.”<sup>265</sup> The granddaughter states that “[f]or a time she would become hysterical whenever she saw dead animals on the road.”<sup>266</sup> She maintains that “[s]he saw a counselor for several months but stopped because she felt that no one could help her.”<sup>267</sup>

In the normative portions of the statement, the victims’ son states that “his parents were not killed, but were butchered like animals.”<sup>268</sup> He asserts that “[h]e doesn’t think anyone should be able to do something like that and get away with it.”<sup>269</sup> The daughter states that “[s]he can’t believe that

255. *See id.* at 498 (citing MD. CODE ANN., CRIM. LAW § 4-609(c) (1986)).

256. *Id.* at 502. This is the Court’s distinction. The Maryland statute does not distinguish between these two kinds of victim-impact evidence, *see* MD. CODE ANN., CRIM. LAW § 4-609(c) (1986), and the statement in this case makes no effort to distinguish them. *Payne* makes the distinction relevant by overruling *Booth* with respect to the first kind of information but not with respect to the second. *Payne*, 501 U.S. at 830 n.2.

257. *Booth*, 482 U.S. at 499.

258. *Id.* app. at 510.

259. *Id.*

260. *Id.*

261. *Id.* app. at 511.

262. *Id.* app. at 511-12.

263. *Id.* app. at 512.

264. *Id.*

265. *Id.* app. at 512-13.

266. *Id.* app. at 513.

267. *Id.* app. at 514.

268. *Id.* app. at 512.

269. *Id.*

anybody could do that to someone”<sup>270</sup> and “that animals wouldn’t do this.”<sup>271</sup> She states that “[s]he doesn’t feel that the people who did this could ever be rehabilitated and she doesn’t want them to be able to do this again or put another family through this.”<sup>272</sup>

After hearing the statement, the jury sentenced Booth to death.<sup>273</sup>

In his five-member opinion for the Court, Justice Powell held that the introduction of victim-impact statements in capital trials violates the Eighth Amendment,<sup>274</sup> which proscribes “cruel and unusual punishments.” Powell bases this banishment on three attributes of the excluded genre—its falsity, irrationality, and seductiveness.

Powell only touches on the possibility that the statements might not be true. The analogy between Platonic poetry and the victim-impact statement is weakest here, because the statements are presented as true and generally assumed to be so. This is what makes the case a hard one—presumably the Court would have no problem excluding purely fictional works describing the impact of murders on their victims. Nevertheless, Powell does observe that the defense might be prevented from deploying the regular truth-seeking mechanisms of a trial. He notes that “victim impact information is not easily susceptible to rebuttal,” because of “the strategic risks of attacking the victim’s character before the jury.”<sup>275</sup> We could read these diffident phrases as products of the constraint they describe, because it would be equally impolitic for the Court to call the veracity of a victim-impact statement into question. This may be an attempt by the Court to voice a concern through the defense rather than asserting it directly from its own mouth.<sup>276</sup>

The *Booth* majority also argues that victim-impact statements must be prohibited because of their emotional register. Like Plato, Powell quotes extensively from the material he would suppress:

“[The daughter of the victims] could never forgive anyone for killing [her parents] that way. She can’t believe that anybody could

270. *Id.* app. at 513.

271. *Id.*

272. *Id.*

273. *Id.* at 501.

274. *Id.* at 509.

275. *Id.* at 506-07.

276. In *Gathers*, the defendant attacked a prosecutorial victim-impact description as a “manipulation of the evidence and outright fabrication.” *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (O’Connor, J., dissenting) (quoting respondent’s brief), *overruled by Payne v. Tennessee*, 510 U.S. 808 (1991). The fact that the evidence was challenged when provided by a prosecutor gives credence to Powell’s contention that victims are difficult to challenge directly. In *Booth*, the defendant did not challenge the evidence but asked the prosecutor to read the victim-impact statement in lieu of putting the victims on the stand. See *Booth*, 482 U.S. at 501. This distinction roughly tracks the Platonic distinction between narrative and imitative poetry, insofar as it takes third-person narration to be less volatile than first-person narration. For a further discussion of *Gathers*, see *infra* notes 331-341 and accompanying text.

do that to someone. The victims' daughter states that animals wouldn't do this. [The perpetrators] didn't have to kill because there was no one to stop them from looting. . . . The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this."<sup>277</sup>

After letting the reader have an emotional response to this text, the opinion predicates its exclusion on what it imagines that response to be. It maintains that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."<sup>278</sup> The opinion then makes explicit that this is a distinction between reason and emotion: "As we have noted, any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'"<sup>279</sup> Applying that standard, the majority concludes that "[t]he admission of these emotionally charged opinions . . . clearly is inconsistent with the reasoned decisionmaking we require in capital cases."<sup>280</sup>

Just as Plato's Socrates worries that poetry about Achilles' fear of death will infect listeners with that fear, Powell worries that the victim's "grief and anger" will infect listeners with grief and anger.<sup>281</sup> Just as Socrates fears emotional poetry will make citizens "hotter" than they should be, Powell fears emotional testimony will "inflame" the jurors.<sup>282</sup> Just as Socrates banishes imitative poetry as irrational and unlawful, Powell banishes the victim-impact statement as "inconsistent with the reasoned decisionmaking we require in capital cases."<sup>283</sup>

Powell's opinion notes that reasoned decisionmaking is an antidote to "caprice or emotion."<sup>284</sup> It is helpful to hear those words separately. Powell's commitment to reason is not just a commitment to purifying the trial of emotion, but to purifying it of other forms of arbitrariness. Powell describes three different forms of arbitrariness that victim-impact statements inject into the trial. He cites the arbitrariness of holding the defendant responsible for matters "wholly unrelated to [his] blameworthiness," because "the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics

277. *Booth*, 482 U.S. at 508 (second and third alterations and omission in original) (quoting the victim-impact statement).

278. *Id.*

279. *Id.* (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

280. *Id.* at 508-09.

281. Compare PLATO, *Republic*, *supra* note 24, at \*387c, with *Booth*, 482 U.S. at 508.

282. Compare PLATO, *Republic*, *supra* note 24, at \*387c, with *Booth*, 482 U.S. at 508.

283. Compare PLATO, *Republic*, *supra* note 24, at \*398a-b, with *Booth*, 482 U.S. at 509.

284. *Booth*, 482 U.S. at 508 (internal quotation marks omitted).

of the victim's family."<sup>285</sup> He also raises the arbitrariness created by the differential ability of victims to articulate their pain, given that "in some cases the victim will not leave behind a family, or the family members may be less articulate in describing their feelings."<sup>286</sup> Finally, he notes the arbitrariness of letting the sentencing decision "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."<sup>287</sup> In seeking to eliminate these forms of randomness, the Court draws on a conception of a law purged of contingency, of a "goodness without fragility."<sup>288</sup> The opinion presents law as a *technē* that will keep *tuchē* at bay.

The *Booth* opinion also discusses the seductiveness of victim-impact statements. Again, if the statements were not powerful, they would not engender so much concern. In fact, the statements occupy a position much closer to poetry in Plato's time than to poetry in our own. The majority views the statements as a matter of life and death.<sup>289</sup> Powell expresses concern that these inflammatory narratives will become the focal point of the trial: "The prospect of a 'mini-trial' on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate . . . ."<sup>290</sup>

Recall that Plato objects to poets because their power is inversely correlated to their virtue.<sup>291</sup> The *Booth* majority is similarly troubled by the imperfect correlation between persuasiveness and pain. The opinion notes that while the victims in this case were articulate, family members might be less so in other cases.<sup>292</sup> Powell finds this variation dangerous: "Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant . . . should live or die."<sup>293</sup> We need not read too deeply between the lines to see the Platonic distinction between good and bad poets—the good family may be less "willing" than the bad family to speak, just as the good man in Book III of the *Republic* is less willing than the bad man to use his full persuasive power.<sup>294</sup> In fact, Plato's Socrates specifically states in that book that decent men should not publicly mourn the death of loved ones.<sup>295</sup>

285. *Id.* at 504.

286. *Id.* at 505.

287. *Id.* at 506.

288. NUSSBAUM, *supra* note 85, at 85.

289. *Booth*, 482 U.S. at 505.

290. *Id.* at 507.

291. *See supra* notes 114-115 and accompanying text.

292. *Booth*, 482 U.S. at 505.

293. *Id.*

294. *See supra* notes 110-115 and accompanying text.

295. PLATO, *Republic*, *supra* note 24, at \*387d. Plato further states that in poetry, such laments are to be given "to women—and not to the serious ones, at that—and to all the bad men." *Id.* at \*387e-88a. The concern is again not for the listener, but for the speaker, who may become

In banishing the victim-impact statement from the courtroom for its potential falsity, irrationality, and seductiveness, the *Booth* Court argues that the statements are different in kind from the narratives that make up the law. Yet a close reading of the Platonic parable suggests the instability of this negative particularizing view of the “literary” statement. It should therefore come as no surprise that the Supreme Court overruled *Booth* only four years after deciding it.

In *Payne v. Tennessee*, a six-member majority of the Court reinstated the victim-impact statement in a capital case involving the brutal murder of a mother and her two-year-old daughter.<sup>296</sup> As Justice Marshall observes in an acid dissent, little had changed since *Booth* except the composition of the Court<sup>297</sup>—two members of the *Booth* majority (Justices Brennan and Powell) had been replaced by two new members (Justices Kennedy and Souter). These two new members voted in *Payne* with the four *Booth* dissenters.

Chief Justice Rehnquist’s majority opinion in *Payne* heroically rationalizes the sudden reversal by rebutting the three arguments against the victim-impact statement. Rehnquist first shoulders aside the *Booth* majority’s objection that victim-impact evidence is difficult to rebut. He observes that this tactical quandary “makes the case no different than others in which a party is faced with this sort of a dilemma.”<sup>298</sup>

Rehnquist spends more time on the contention that victim-impact statements are emotional. He agrees that the statement in Pervis Tyrone Payne’s case demonstrated the effects of the murder “quite poignantly.”<sup>299</sup> What Rehnquist contests is that the statement was distinctive in its poignancy, maintaining that character testimony for the defendant was just as emotional. He observes that the jury in *Payne* heard testimony from Payne’s girlfriend that the two met at church, testimony from his parents

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more of a victim by performing that role. See *supra* note 113.

Powell does not consider the effects of victim-impact statements on their speakers. He is right to curtail his discussion, because the constitutional challenge concerns the effects of the statements on jurors rather than on victims. Yet if this were a question of policy rather than one of constitutionality, these latter harms would surely merit consideration.

In that policy debate, some argue that such statements empower victims by providing catharsis and closure. See, e.g., Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 *FORDHAM URB. L.J.* 439, 451 (1993) (“Victim impact statements empower the victim and help judges to appreciate the invisible trauma of rape.”). Others, however, argue in a Platonic vein that victim-impact statements are not necessarily empowering for their speakers. See, e.g., Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 *NW. U. L. REV.* 863, 882 (1996) (“To tell the story of personal suffering requires the teller to relive that suffering, to retrieve it from repression, and to re-expose wounds that may have started to heal.”); Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1429 (1993) (“Victim talk can have a kind of self-fulfilling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter.”).

296. 501 U.S. 808 (1991).

297. *Id.* at 844 (Marshall, J., dissenting).

298. *Id.* at 823 (majority opinion).

299. *Id.* at 826.



that he was a good son, and testimony from his psychologist that he was extremely polite.<sup>300</sup> Having permitted the defendant to spin his own emotional narrative, the law, in Rehnquist's view, must permit the victim to do the same.

Justice O'Connor's concurrence in *Payne* deals more directly with the concern that the statements will inflame the jury. She observes,

The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony—who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived—only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process.<sup>301</sup>

O'Connor's contention is more subversive than Rehnquist's. Rehnquist maintains that the statement is no more inflammatory than another narrative *in* the law—testimony about the defendant's character. O'Connor contends the statement is no more inflammatory than the narrative *of* the law—the facts of the case. We can imagine a criminal trial without character testimony, but not one without facts. O'Connor's comment suggests that this lawmaker cannot banish this poet from the city without banishing herself.

Recall that the *Booth* Court also objects to the irrationality of the victim-impact statement because it opens the door to three different kinds of *tuchē*. The *Payne* Court responds by noting that a certain degree of arbitrariness is inevitable in law. For instance, Rehnquist observes that the criminal law routinely punishes people differently solely because of the effects of their actions, even if those effects are unforeseen.<sup>302</sup> He draws from Justice Scalia's *Booth* dissent: “If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.”<sup>303</sup> Rehnquist here

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300. *Id.*

301. *Id.* at 831-32 (O'Connor, J., concurring).

302. *Id.* at 819 (majority opinion).

303. *Id.* (quoting *Booth v. Maryland*, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting)),

acknowledges that the law permits this form of arbitrariness to matter, that the law cannot be purged of *tuchē*.<sup>304</sup>

The charge of arbitrariness runs deeper for the *Payne* Court than the arbitrariness introduced by the victim-impact statements. In overruling *Booth* and *Gathers* so soon after they were decided, the Court raises questions about the arbitrariness of its own decisionmaking. Marshall begins his *Payne* dissent with a charge of irrationality directed at the Court's discourse rather than the victim's: "Power, not reason, is the new currency of this Court's decisionmaking."<sup>305</sup> He observes that "[n]either the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years," then opines that the overruling of those cases is attributable only to a change in the Court's personnel.<sup>306</sup>

In his later analysis, Marshall repeatedly refers to Powell, who authored *Booth*, and to Brennan, who authored *Gathers*.<sup>307</sup> His incantatory references to these Justices (rather than to the opinions they wrote) underscore his objection to *Payne*, because these were the jurists who retired from the Court between *Booth* and *Payne*. Marshall's *Payne* dissent can be read as a victim-impact statement in its own right. Two precedents have been murdered—Marshall accuses the *Payne* Court of "dispatching *Booth* and *Gathers* to their graves."<sup>308</sup> It is now up to Marshall to avenge their authors by confronting the perpetrators with their crime.

That crime is the Court's ostensible departure from the doctrine of stare decisis. As Marshall points out, the doctrine embodies the conception of the "judiciary as a source of impersonal and reasoned judgments."<sup>309</sup> Marshall

overruled by *Payne*, 501 U.S. 808).

304. Rehnquist does not address the second form of arbitrariness—that victims will be differentially persuasive. But in his *Booth* dissent, Justice White calls this a "makeweight consideration," for reasons that resonate with Rehnquist's argumentation. *Booth v. Maryland*, 482 U.S. 496, 518 (1987) (White, J., dissenting), overruled by *Payne*, 501 U.S. 808. White argues that disparities in persuasiveness obtain across all legal genres: "No two prosecutors have exactly the same ability to present their arguments to the jury; no two witnesses have exactly the same ability to communicate the facts; but there is no requirement in capital cases that the evidence and argument be reduced to the lowest common denominator." *Id.*

Rehnquist does consider the final claim of arbitrariness—that of assigning punishment based on differential valuations of the victims—but rejects it on other grounds. Using *Gathers*, where a man who was homeless was nonetheless "valued" in a victim-impact statement, he claims that this form of arbitrariness does not infect the trial. *Payne*, 501 U.S. at 823-24 (citing *South Carolina v. Gathers*, 490 U.S. 805 (1989), overruled by *Payne*, 501 U.S. 808).

305. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting).

306. *Id.*

307. See, e.g., *id.* at 845 ("Speaking for the Court as then constituted, Justice Powell and Justice Brennan set out the rationale for excluding victim-impact evidence from the sentencing proceedings in a capital case."); *id.* ("The State's introduction of victim-impact evidence, Justice Powell and Justice Brennan explained, violates this fundamental principle."); *id.* at 846 ("I continue to find these considerations wholly persuasive, and I see no purpose in trying to improve upon Justice Powell's and Justice Brennan's exposition of them.").

308. *Id.* at 844.

309. *Id.* at 852 (internal quotation marks omitted).

acknowledges that the doctrine is not an “inexorable command.”<sup>310</sup> He maintains, however, that the overruling of precedent requires a “special justification,” such as a change in law, a change in fact, or a discovery that the precedent is incoherent.<sup>311</sup> Because Marshall believes none of these justifications is present in *Payne*, he casts the Court’s departure from precedent as an abrogation of rational decisionmaking.

Rehnquist’s majority opinion responds that overruling *Booth* and *Gathers* is fully consistent with stare decisis.<sup>312</sup> He notes that *Payne*’s overruling of *Booth* does have a special justification, insofar as *Booth* “defied consistent application by the lower courts.”<sup>313</sup> Rehnquist adds that cases involving constitutional law or dealing with procedural or evidentiary rules have traditionally received less deference from the Court.<sup>314</sup> He also provides a string citation of thirty-three cases in the preceding twenty Terms in which the Court overruled a prior decision.<sup>315</sup>

This startling catalog of vacillation might seem like a vivid demonstration of the arbitrariness of the Court’s decisionmaking. But Rehnquist adduces it to the opposite effect. Marshall is accusing the new conservative majority on the Court of bending stare decisis to serve its ideological purposes. Marshall sees *Payne* as a grim harbinger of things to come: “Cast aside today are those condemned to face society’s ultimate penalty. Tomorrow’s victims may be minorities, women, or the indigent.”<sup>316</sup> Rehnquist’s point is that even before the shift in the Court’s personnel, the doctrine of stare decisis was malleable. There is precedent for the practice of overruling precedent.

Finally, in discussing the persuasiveness of victim-impact statements, Rehnquist rejects the idea that the statements are inexorably seductive. That claim is hard to sustain at the level of genre. As Marshall observes, the Tennessee Supreme Court in *Payne* approved the admission of the victim-impact statement without any attempt to reconcile that result with *Booth*. In failing to reverse the lower court, Marshall argues, the U.S. Supreme Court places its imprimatur on such civil disobedience.<sup>317</sup> Justice Stevens similarly notes the “hydraulic pressure of public opinion” that “has played a role not only in the Court’s decision to hear this case, and in its decision to reach the constitutional question . . . , but even in its resolution of the constitutional issue involved.”<sup>318</sup> The victim-impact statement as a genre is just too compelling to keep out.

310. *Id.* at 848 (internal quotation marks omitted).

311. *Id.* at 849 (internal quotation marks omitted).

312. *Id.* at 827-28 (majority opinion).

313. *Id.* at 830.

314. *Id.* at 828.

315. *Id.* at 828 n.1.

316. *Id.* at 856 (Marshall, J., dissenting).

317. *Id.* at 855.

318. *Id.* at 867 (Stevens, J., dissenting) (footnote and internal quotation marks omitted).

Nonetheless, Rehnquist believes that the Court will be able to exclude individual statements. He states that if the evidence introduced is so prejudicial it would infect the proceedings, the Due Process Clause provides a mechanism for relief.<sup>319</sup> The shift from the *Booth* Court's Eighth Amendment analysis to the *Payne* Court's Fourteenth Amendment analysis is a shift from a per se ban to a case-by-case determination. That shift reflects the *Payne* Court's confidence that courts can hear the siren song of the statement yet remain unmoved.<sup>320</sup>

Having described the conflict between these two cases, I now apply the Platonic paradigm to prescribe a resolution. The first tenet of the paradigm is that the "literary" narrative must always be subordinated to the functions of the state. Both *Booth* and *Payne* satisfy this requirement, because both opinions agree that the victim-impact statement can be permitted only if it serves the functions of the capital trial. This is no college seminar on what distinguishes literary from nonliterary texts. Rather, it is an attempt to see if a particular narrative serves a particular legal end.

Like Plato, the *Booth* Court makes a powerful prima facie claim that the "literary" statements do not serve the ends of the state. This is a negative particularizing conception of the statements that casts them as false, irrational, and seductive. The victim, like the poet, may initially seem like a marginal figure worthy of our compassion. In actuality, she is immensely powerful and destructive. For these reasons, the victim, like the poet, must be banished.

In response, the *Payne* Court deploys both the ineradicability defense and the virtue defense. The *Payne* Court's ineradicability defense maintains that victim-impact statements are not meaningfully distinguishable from other narratives that pervade the trial. Rehnquist's opinion argues that the statements are not distinguishable from other forms of testimony in the truth-verification issues they raise,<sup>321</sup> that the statements are no less emotional than the character testimony proffered by the defendant,<sup>322</sup> that the statements are not distinctive in requiring the defendant to take

319. See *id.* at 825 (majority opinion). O'Connor separately endorses this solution. See *id.* at 831 (O'Connor, J., concurring).

320. The debate between *Booth* and *Payne* on the victim-impact statement mirrors the debate between Rousseau and D'Alembert on the theater. Rousseau, showing his Platonic colors, wants to ban the theater from Geneva altogether because he thinks it would be difficult to regulate once it was admitted. ROUSSEAU, *supra* note 107, at 65-66. D'Alembert, on the other hand, thinks it would be easier to regulate than to exclude altogether. *Id.* at 4. Because the jurisdiction being defended is always figured as a physical space, I cannot resist observing that a prominent property theorist has weighed in on the side of the Platonists. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327-28 (1993) ("A key advantage of individual land ownership is that detecting the presence of a trespasser is much less demanding than evaluating the conduct of a person who is privileged to be where he is. Monitoring boundary crossings is easier than monitoring the behavior of persons situated inside boundaries." (emphasis omitted)).

321. See *Payne*, 501 U.S. at 823 (majority opinion).

322. See *id.* at 826.

responsibility for the unforeseen consequences of his crime,<sup>323</sup> and that the statements are no more seductive than the other forms of testimony that the Court routinely reviews under its Due Process jurisprudence.<sup>324</sup> And Rehnquist is not alone—White,<sup>325</sup> O'Connor,<sup>326</sup> and Souter<sup>327</sup> all separately argue that no principled distinction exists between the statements and narratives indispensable to the criminal trial.

As the second tenet of the Platonic paradigm suggests, however, we should not accept this ineradicability defense. To begin with the basic point, the statements *are* a discrete genre that can be banished from the trial. O'Connor's comparison of the statements to the facts of the case—perhaps the strongest form of the ineradicability defense—is not to the contrary. The statements cannot be purely redundant with other narratives in the trial, because that would be an argument for retiring rather than retaining them. The statements are distinct, and they make a distinctive contribution to our understanding of the trial.

I earlier observed that just because Plato used fictions, this did not make him indistinguishable from the tragedians he sought to banish. A similar argument could be made here—just because the Court deploys narratives that are highly dramatic in nature does not mean its narratives are indistinguishable from victim-impact statements. This is a special form of a general argument. Law is a dramatic genre but one that distinguishes itself from actual drama, in the same way that Plato's dialogues are highly dramatic but distinguish themselves from tragedy. The adversarial nature of American law has made it an obvious subject of “courtroom dramas” on television,<sup>328</sup> but the banning of television cameras from courtrooms<sup>329</sup> can be understood as an attempt to preserve judicial proceedings from being framed as drama. The drama of an actual trial arguably more closely resembles what Nussbaum calls an “anti-tragic theater,” a “crystalline theater of the intellect” that imposes constraints on its performers: “We feel that it would be highly inappropriate to weep, to feel fear or pity. The self-possession of the dialogue makes us positively ashamed of these

323. *See id.* at 819.

324. *See id.* at 825.

325. *See Booth v. Maryland*, 482 U.S. 496, 518 (1987) (White, J., dissenting) (maintaining that victim-impact statements do not create differentials based on persuasiveness that are distinguishable from differentials that already pervade the nondiscretionary parts of trials), *overruled by Payne*, 501 U.S. 808.

326. *See Payne*, 501 U.S. at 831-32 (O'Connor, J., concurring) (maintaining that victim-impact statements are not distinguishable in their emotive force from the facts of the case).

327. *See id.* at 840-41 (Souter, J., concurring) (maintaining that victim-impact statements are not distinguishable from statements made to the jury in the guilt phase of a trial).

328. *See* RONALD L. GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* (1998).

329. *See, e.g.*, FED. R. CRIM. P. 53 (“Except as otherwise provided by a statute or these rules, the court must not permit . . . the broadcasting of judicial proceedings from the courtroom.”); *United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983) (upholding Rule 53 against First and Sixth Amendment challenges).

responses.”<sup>330</sup> Victim-impact statements, in contrast, seem more like the poems of the tragedians: They cannot be protected through the ineradicability defense.

As the third tenet suggests, the statements can only be protected through a virtue defense. Like Plato, though, Rehnquist presents only a fitful version of this defense. It falls to us to fill in the gaps.

In the context of a trial, it might seem hard to argue that the potential falsity of the statements is a virtue. It is certainly understandable that the *Payne* majority chooses mostly just to deny that the statements are false. Yet the *Payne* Court also makes a subtle case for how false narratives might serve the ends of criminal justice. Consider its treatment of *Gathers*, the case that intervened between *Booth* and *Payne*. In *Gathers*, the defense challenged the veracity of the victim-impact statement made by the prosecution as a form of “manipulation of the evidence and outright fabrication.”<sup>331</sup> The defendant, Demetrius Gathers, had murdered Richard Haynes, an unemployed man with “mental problems” who referred to himself as “Reverend Minister” even though he had no formal religious training.<sup>332</sup> Little else was known about Haynes beyond the effects he had on him at the time, including a voter registration card and a tract titled “The Game Guy’s Prayer.”<sup>333</sup> Nonetheless, the prosecutor spun an extensive narrative that could at best be described as a riff on the facts. The prosecutor repeatedly referred to the victim as “Reverend Minister Haynes” and described Haynes—seemingly solely on the basis of the prayer—as a man who “took things as they came along” and “was prepared to deal with tragedies that he came across in his life.”<sup>334</sup> In addition, the prosecutor inferred from the voter registration card that “Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.”<sup>335</sup>

In *Payne*, Rehnquist celebrates the prosecutor’s statement in *Gathers* in responding to the charge that victim-impact statements introduce disparities among harmed individuals. He observes that “victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not.”<sup>336</sup> The statements are “designed

330. NUSSBAUM, *supra* note 85, at 131, 133.

331. *South Carolina v. Gathers*, 490 U.S. 805, 821 (1989) (quoting respondent’s brief, *overruled by Payne*, 501 U.S. 808).

332. *Id.* at 807 (internal quotation marks omitted).

333. *Id.* (internal quotation marks omitted).

334. *Id.* at 809 (internal quotation marks omitted).

335. *Id.* at 810 (internal quotation marks omitted).

336. *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

to show instead *each* victim's uniqueness as an individual human being."<sup>337</sup> He finds "the facts of *Gathers*" to be "an excellent illustration of this: The evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being."<sup>338</sup> Here Rehnquist agrees with O'Connor's concurrence that murder is "the ultimate act of depersonalization," in its transformation of "a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person."<sup>339</sup> He also agrees with her that "[t]he Constitution does not preclude a State from deciding to give some of that back."<sup>340</sup>

The act of reconstructing a human being from a corpse will always be an imaginative one. Yet *Gathers* shows it is a recuperative act that admits of degrees. Rehnquist lauds the statement's capacity to efface the distinction between Richard Haynes, about whom almost nothing was known, and Irvin Bronstein (one of the victims in *Booth*), whose biography was supplied by his large, articulate family. But if that difference has been elided, it is only because the prosecutor in *Gathers* engaged in a deeply imaginative recreation of the "Reverend Minister Haynes." It is not the "*facts of Gathers*"<sup>341</sup> but rather the *fictions* of the case that established Haynes's "uniqueness as an individual human being" in a manner comparable to Bronstein's. As Rehnquist's celebration of this case suggests, such a fictional recreation might not be such a terrible thing. We know that Haynes was a unique human being, and this imaginative recreation accesses that fundamental truth more directly than the facts we know. Aristotle would approve.

We might also point out that the emotional nature of victim-impact statements could help rather than hinder the pursuit of fairness in capital sentencing. The *Payne* Court again seeks to minimize the emotional nature of the statements. It is easy to see why—as a practice ostensibly based on reason, law might be undermined by admitting its reliance on emotion. Or, as Justice Frankfurter once said, "[F]ragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."<sup>342</sup> The *Booth* Court follows Frankfurter in insisting that capital sentencing be based on reason rather than emotion.<sup>343</sup> The *Payne* Court does not contest that claim.

Nonetheless, it seems naive to think that emotions cannot play a

337. *Id.* (internal quotation marks omitted).

338. *Id.* at 823-24.

339. *Id.* at 832 (O'Connor, J., concurring) (internal quotation marks omitted).

340. *Id.*

341. *Id.* at 823 (majority opinion) (emphasis added).

342. Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

343. *Booth v. Maryland*, 482 U.S. 496, 508 (1987), *overruled by Payne*, 501 U.S. 808.

positive role in the law, at least as a general matter. I earlier chose Nussbaum as one of my authorities for the intelligence of the emotions<sup>344</sup> in part because she has applied that insight to law.<sup>345</sup> Nussbaum justly observes that a “law without appeals to emotion is virtually unthinkable.”<sup>346</sup> Absent an “appeal to a roughly shared conception of what violations are outrageous, what losses give rise to a profound grief, what vulnerable human beings have reason to fear—it is very hard to understand why we devote the attention we do, in law, to certain types of harm and damage.”<sup>347</sup> Implicit in the *Payne* majority’s claim that the victim-impact statement demonstrates the effects of the crime “quite poignantly”<sup>348</sup> is an approval of emotion as an appropriate benchmark of the magnitude of an offense. Inherent in O’Connor’s concurrence, which asks “who would not have been” moved by the statement,<sup>349</sup> is a call to a shared conception of our vulnerability as human beings.

Finally, Rehnquist’s opinion challenges the idea that victim-impact statements are seductive. Recall that Plato suggests in the *Laws* that poetry can draw people to virtue, a seduction toward the good that is, in fact, no seduction at all.<sup>350</sup> Rehnquist similarly takes the position that the shift in attention from the defendant to the victim occasioned by the statements can be characterized as a distraction only if we believe the focus of the criminal trial must remain steadily on the defendant. Rehnquist resoundingly rejects that view, asserting that “there is nothing unfair about allowing the jury to bear in mind that harm [visited on the victim] at the same time as it considers the mitigating evidence introduced by the defendant.”<sup>351</sup> Indeed, it might be unfair to exclude the victim-impact statement. Rehnquist quotes the Tennessee Supreme Court’s opinion:

“It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.”<sup>352</sup>

The victim-impact statement may be necessary to overcome the seductions of the character testimony adduced by the defense.

344. See *supra* note 234 and accompanying text.

345. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004).

346. *Id.* at 5.

347. *Id.* at 6.

348. *Payne v. Tennessee*, 501 U.S. 808, 826 (1991).

349. *Id.* at 832 (O’Connor, J., concurring).

350. PLATO, *Laws*, *supra* note 27, at \*659e-60a.

351. *Payne*, 501 U.S. at 826 (majority opinion).

352. *Id.* (quoting *State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990), *aff’d*, 501 U.S. 808).



By applying the Platonic paradigm, then, we can respond to the negative particularizing view with a positive particularizing one. It remains to arbitrate between these two visions. This is a close question. It has been observed that left-wing scholars dislike the victim-impact-statement cases because they disrupt a perceived nexus between literature and liberalism.<sup>353</sup> Literary narratives in the legal academy tend to be “stories from the bottom,” that is, stories from oppressed groups about their plight.<sup>354</sup> Victim-impact statements could surely be described as such stories, but they are stripped of their liberal valence in their deployment against criminal defendants. Legal storytelling might be seen as an instance of “ideological drift,”<sup>355</sup> in which a tool of the left has drifted over to become a tool of the right.

It is precisely this dimension of victim-impact statements that drew me to them. As Susan Bandes points out, the “statements provide a particularly useful starting point for a broader examination of the uses of narrative and emotion in legal processes” because they “raise uncomfortable questions about both the empathy and narrative movements.”<sup>356</sup> The statements show that we cannot commit ourselves categorically to narratives on ideological grounds, because narratives can be used to support any ideology. This leads us to a functional analysis: “Whether a particular narrative ought to be heard, or a particular emotion expressed, depends on the context and the values we seek to advance.”<sup>357</sup>

The *Booth* Court believes that the function of capital sentencing is to truncate the triangular relationship between the state, the defendant, and the victim so that it is a direct confrontation between the defendant and the state. The *Payne* Court, in contrast, believes that the victim cannot be excluded from that confrontation. Under the *Booth* Court’s view, victim-impact statements *cannot* be allowed, while under the *Payne* Court’s view, they *must* (as a moral matter if not a constitutional one), in order to keep the balance between the victim and the defendant true. We cannot choose between *Booth* and *Payne* without choosing between these visions of the function of capital sentencing.

Both visions have some historical support. Proponents of the statements could point out that at common law, private prosecution was the norm: “The aggrieved victim, or an interested friend or relative, would personally

353. See POSNER, *supra* note 2, at 348.

354. See, e.g., William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 608 (1994); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 645 (2001); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

355. See, e.g., J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993).

356. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 363 (1996).

357. *Id.* at 365.

arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortious injury.”<sup>358</sup> Opponents could counter that the United States famously broke from that common law practice: “The fundamental, differentiating factor in American criminal law lies in our adoption of a system of public prosecution.”<sup>359</sup> And proponents could retort that the inability of victims to prosecute crimes does not mean they have no role in the criminal trial.

This is a complex debate, whose twists and turns are beyond the scope of this Article. I save my strong claim for the context of the capital trial, the context of *Booth*, *Gathers*, and *Payne*. The defendant’s narrative posture here is that of a Scheherazade, telling stories to the state so she may live.<sup>360</sup> In this context, I believe the function of sentencing is to permit the defendant to tell her story untrammelled by other voices. The Supreme Court has articulated its solicitude for that narrative posture in its death penalty jurisprudence. Indeed, a laser-sharp focus on the defendant was arguably the precondition of the Court’s reinstatement of the death penalty in *Gregg v. Georgia*<sup>361</sup> and its progeny.<sup>362</sup>

It will be said that my liberal predilections are pushing me toward *Booth*. Perhaps. But notice the juncture at which those inclinations surfaced. They did not ally me with literature as a genre, an alliance that would have pushed me toward *Payne*. Rather, they surfaced at the point where we were debating whether the narratives in question served the state end of fairness in capital sentencing. This is a virtue of the Platonic paradigm—it channels politics where it should be channeled. It reveals that we do not have political objections to literature per se. We have political objections to objectionable politics.

358. Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976).

359. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 7 (1980).

360. See *THE ARABIAN NIGHTS: TALES FROM A THOUSAND AND ONE NIGHTS* (Richard F. Burton trans., Modern Library 2001) (1884-1887); see also A.S. BYATT, *The Greatest Story Ever Told*, in *ON HISTORIES AND STORIES: SELECTED ESSAYS* 165, 165 (2000) (“And the prince’s narrative curiosity kept the princess alive, day after day. She narrated a stay of execution . . . . And in the end, the king removed the sentence of death . . .”).

361. 428 U.S. 153 (1976); see *id.* at 189 (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”); *id.* at 198 (“In short, Georgia’s new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant.”).

362. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (“What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.”); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.” (footnote omitted)).

Courts are often seen as followers rather than as leaders in legal theory because their situation generally leads them to pragmatic analysis. In this case, however, that disposition brings the courts closer to the kind of functionalist analysis represented in the Platonic paradigm than many academic theorists. The judicial insights represented in *Booth*, *Gathers*, and *Payne* can now be exported to the academy.

#### IV. STORYTELLING IN THE LEGAL ACADEMY

I wish to tell the story of the poet's banishment a final time. This time the forum is not the polity as a whole, as in Plato, nor the courtroom, as in the victim-impact-statement jurisprudence. It is the realm of scholarship, the realm of "law and literature." We are now equipped to understand why law and literature is such a contested discipline, and to come to a normative judgment about whether detractors of the field have a point.

To show that Platonic concerns about poetics recur in the academy, I take up Daniel Farber and Suzanna Sherry's 1993 essay on legal narratives.<sup>363</sup> These scholars begin by remarking on the florescence of legal storytelling in the pages of law reviews.<sup>364</sup> They take Patricia Williams's Benetton story<sup>365</sup> as their initial and paradigm instance.<sup>366</sup> In that account, Williams, an African-American law professor, describes her attempt to shop at a Benetton store in Manhattan.<sup>367</sup> Would-be shoppers had to be buzzed in by a clerk. The white teenager operating the buzzer refused Williams admission, even though there were other, white shoppers in the store. Williams infers that she was denied admission to the store on the basis of her race.<sup>368</sup>

In their essay, Farber and Sherry take aim at the canonization of such stories as major works of legal scholarship, voicing all three Platonic objections. First, Farber and Sherry observe that "[a] major difficulty with storytelling is verifying the truthfulness of the stories told," highlighting the "first-person agony narrative" as a particularly vexed instance.<sup>369</sup> They contend that "[j]ust as lawyers normally are not allowed to offer testimony at trial, or to vouch for witnesses, scholars should not be readily allowed to offer their own experiences as evidence."<sup>370</sup> The analogy is inexact. A closer analogue to the scholar speaking her pain in a law review would be

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363. Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

364. *Id.* at 807.

365. WILLIAMS, *supra* note 30, at 44-51.

366. Farber & Sherry, *supra* note 363, at 808.

367. WILLIAMS, *supra* note 30, at 44-46.

368. *Id.* at 44-45.

369. Farber & Sherry, *supra* note 363, at 835 (internal quotation marks omitted).

370. *Id.* at 835-36 (footnote omitted).

the victim speaking her pain in court. At the time the essay was written, *Payne* had already been decided, meaning that victims were authorized to make such speeches. A better argument would have noted that while the Court has found such speeches to be constitutionally unproblematic, the concern it raised in *Booth* nonetheless holds true—that such speeches are not susceptible to the normal truth-verification procedures used at trial. And in fact, Farber and Sherry make the point, if not the connection: “The norms of academic civility hamper readers from challenging the accuracy of the researcher’s account; it would be rather difficult, for example, to criticize a law review article by questioning the author’s emotional stability or veracity.”<sup>371</sup>

Farber and Sherry also attack the emotional nature of legal storytelling. “Reason and analysis,” they observe, “are the traditional hallmarks not only of legal scholarship, but of scholarship in general.”<sup>372</sup> The storyteller “challenge[s] this view of scholarship,” privileging “the emotive force of the stories” over “analysis or reasoned arguments.”<sup>373</sup> Farber and Sherry object to this prioritization because it impedes dialogue.<sup>374</sup> Recall that Plato objects even to true poetry because its emotional register causes it to fail the test of dialogic rationality—the poets spoke truths but could not explain the truth they spoke.<sup>375</sup> Similarly, Farber and Sherry complain that proponents of legal storytelling write of the “unequivocal shock of recognition” inspired by the stories or of their “resona[nce].”<sup>376</sup> They note that for those who remain unmoved, such stories can function as an “authoritarian conversation-ending move.”<sup>377</sup>

Finally, Farber and Sherry attack the power of such narratives, a power that can be seen not just in their proliferation but in their capacity to overwhelm better forms of evidence. Literary narratives may be so vivid that they will be favored over more systematic and typical data. Yet “if the story is being used as the basis for recommending policy changes, it should be typical of the experiences of those affected by the policy.”<sup>378</sup>

Even those more sympathetic to the law-and-literature enterprise take this point. Elaine Scarry cautions that we should not assume that stories are always a more compassionate modality than nonstories.<sup>379</sup> Rather, she argues, we should distinguish between two different forms of compassion—

371. *Id.* at 836.

372. *Id.* at 849.

373. *Id.*

374. *Id.* at 851 (“Without reasoned arguments, neither understanding nor dialogue are likely to flourish.”).

375. See *supra* notes 74-84 and accompanying text.

376. Farber & Sherry, *supra* note 363, at 851 (internal quotation marks omitted).

377. *Id.* (quoting Gerald Torres).

378. *Id.* at 838.

379. Elaine Scarry, *Speech Acts in Criminal Cases*, in *LAW’S STORIES*, *supra* note 2, at 165, 165-66.

narrative compassion and statistical compassion.<sup>380</sup> She gives the example of President Reagan, who “had a great deal of individual compassion (he responded to stories on *Sixty Minutes* with immediate feeling and action) but lacked statistical compassion (he could not hear in a set of figures about wages or housing the concrete realities embedded there).”<sup>381</sup> We may sometimes need to denude people of their stories, to reduce them to statistics, to have true compassion for them. And by arguing that people “assume that dramatic or easily remembered events are typical,”<sup>382</sup> Farber and Sherry suggest that Reagan’s sensibility is more typical.

Having made their case, Farber and Sherry argue that legal storytelling should be permitted only if it meets the criteria they set forth. This would presumably mean that Williams’s story should not have been published in the first place or, after publication, not disseminated by professors in the academy.

One predictable response to Farber and Sherry’s argument is the ineradicability defense. Such a defense might point out that the stories told by scholars like Williams are not distinguishable from other narratives accepted as an integral part of legal scholarship. The defense might point out that Farber and Sherry expressly exempt hypotheticals from their attack, without providing a ground for the exemption.<sup>383</sup> It might point out that this is odd given that hypotheticals are in some ways more “literary” than Williams’s story—for instance, they are usually clearly false.

Yet once again, the ineradicability defense fails as a matter of practical wisdom. We know that the Williams story can be distinguished from the run of legal hypotheticals in the same way that tragic poetry can be distinguished from Plato’s anti-tragic theater. This is true even of fully elaborated hypotheticals dealing with highly emotional scenes. Consider Lon Fuller’s *The Case of the Speluncean Explorers*,<sup>384</sup> a hypothetical so generative it spawned a symposium in the *Harvard Law Review* on the fiftieth anniversary of its publication.<sup>385</sup> Fuller’s text concerns a group of spelunkers who get trapped by a landslide in a cavern and end up eating one of their own to survive.<sup>386</sup> The hypothetical takes the form of a series of five judicial opinions adjudicating the prosecution of the survivors for murder.

Fuller’s article has been characterized as “[t]he most famous

380. *Id.* at 166.

381. *Id.*

382. Farber & Sherry, *supra* note 363, at 839.

383. *See id.* at 831 (“[A] story may be an extended hypothetical, used to work out in detail the consequences of a given position. Th[is] form[] of scholarship pose[s] no inherent challenge to conventional intellectual standards.” (footnote omitted)).

384. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

385. *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1834 (1999).

386. Fuller, *supra* note 384, at 616-18.

hypothetical used to illustrate legal thought.”<sup>387</sup> And this is the point: It is hard to imagine anyone reading this hypothetical failing to understand it as anything other than a heuristic. Like Plato’s parables, readers will doubtless find pleasure in Fuller’s account, which is well endowed with “literary interest.”<sup>388</sup> But they will also understand it as art in the service of a rational enterprise. As such, it is easily distinguishable from Williams’s narrative.

The ineradicability defense might also draw more broadly on the imperialistic claims of modern literary scholarship, which seeks to deconstruct the putative boundaries between literature and other textual practices, including law. Knapp opens his book by acknowledging the rising consensus in favor of this generalizing conception: “Recently the difficulty of arriving at any widely persuasive criteria for distinguishing literary from other kinds of discourse has helped to foster a growing agreement, among literary critics and theorists, that literature’s uniqueness is an illusion.”<sup>389</sup> Knapp may be thinking of Terry Eagleton’s celebrated intervention, in which he lofts up a series of potential distinctions between the literary and the nonliterary before shooting them down like so many clay pigeons.<sup>390</sup>

Eagleton’s attempt to transform a particularizing discourse into a generalizing one, however, smacks of the worst analytic mistake of the deconstructive approach. The method of argumentation is to take a conventional claim—“literature is false”—and to find an exception to it—“Bacon’s essays, which are literature, are true”—as a means of invalidating the claim *tout court*.<sup>391</sup> Yet exceptions can prove rules—to say that we might pause at the threshold of a bookstore wondering whether to go to the section marked “Literature” for a collection of Bacon’s essays does not mean that we no longer believe most works in that section are works of fiction.

The question, then, is whether Williams’s narrative can be defended on its virtues. To answer that question, we must identify what we see as the function of legal scholarship, because narratives will have virtues with respect to some functions but not others. We should be self-conscious here, because the function of legal scholarship is not as obvious as the functions we have considered in the Platonic context (bringing citizens closer to the

387. Scott J. Burnham, *The Hypothetical Case in the Classroom*, 37 J. LEGAL EDUC. 405, 406 (1987).

388. Fuller’s characters (both in the cave and on the court) are “round” rather than “flat,” WIMSATT, *supra* note 106, at 77-78. His narrative is replete with dramatic irony—the man who proposes the macabre scheme is its ultimate victim. Fuller, *supra* note 384, at 618. It is also laden with narrative tension—the death sentence is upheld because the court splits evenly, and the hypothetical closes with no resolution from the potential *deus ex machina* (the Chief Executive). *Id.* at 645.

389. KNAPP, *supra* note 23, at 1.

390. See EAGLETON, *supra* note 21, at 1-14.

391. See *id.* at 1-2.

Forms) or the victim-impact-statement context (fairness in capital sentencing).<sup>392</sup> Philip Kissam enumerates at least four functions legal scholarship could serve, including “play” (scholarship as a “game or ritual” that gives “sheer pleasure”), understanding (“the illumination of an interesting and difficult problem”), theoretical advancement (“scholarship that change[s] our way of thinking about the basic principles involved in difficult intellectual issues”), and “direct practical usefulness.”<sup>393</sup>

One of these things is not like the others. “Direct practical usefulness”—the function of helping legal actors do their work—is viewed by most as the dominant function of legal scholarship. It is not only the function that makes all lists, but also one that many defend as primary. Edward Rubin argues that “the most distinctive feature of standard legal scholarship” is “its consciously declared desire to improve the performance of legal decision-makers.”<sup>394</sup>

Some, of course, have challenged this view. Paul Kahn’s book *The Cultural Study of Law* exhorts legal scholars to resist the pull toward normative and doctrinal analysis.<sup>395</sup> But even his book acknowledges that he is arguing against the grain<sup>396</sup>—his subtitle *Reconstructing Legal Scholarship* archly poses itself against the canonical purpose of reconstructing legal decisionmaking. Moreover, when legal scholarship deviates from its practical function, voices will be raised to chivy it back. In an article that responds to the trend of which Kahn’s book is a culmination, Judge Harry Edwards expresses concern about the “growing disjunction between legal education and the legal profession.”<sup>397</sup> He advocates a return to “practical” scholarship, which he defines as scholarship that “analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise

392. The meta-scholarship about legal scholarship is voluminous. A 1998 bibliography of “scholarship about legal scholarship” contains references to approximately three hundred articles and nineteen symposia on the topic, most of which were published in the last twenty years. Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998). Edward Rubin has argued that the absence of a core methodology in law has led legal scholarship to continually debate its own aims and functions. Edward L. Rubin, *Legal Scholarship*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 562, 562 (Dennis Patterson ed., 1996).

393. Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 224, 226-27 (1988).

394. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847 (1988).

395. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999); see also Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL’Y 97 (1988).

396. See KAHN, *supra* note 395, at 91.

397. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

legislators and other policymakers on law reform."<sup>398</sup>

For the sake of argument, and against my own scholarly sensibility, I adopt this function for my analysis here. I do so not only because of its grip on the legal academy, but also because it is the function that is most colorably a *state* function. To the extent that legal scholarship is being pressed into service to help legal decisionmakers, it is serving a state end, a point that is clearer in other countries where scholarship is an explicitly recognized source of law.<sup>399</sup> Plato's functionalism asks us to measure poetry against the functions of the state. While we could *mutatis mutandis* extend his analysis to the functions of other entities, it seems unwise to do so where a state function is in fact present. Finally, I choose this function because it is the most challenging one against which to justify storytelling. If we were to adopt the function of "play," for instance, storytelling would be vindicated at the moment of adoption.

We can now explore whether storytelling in law reviews can serve the function of helping legal decisionmakers do their work. Again, my virtue defense is a limited one that seeks only to reverse the spin of literature's ostensible vices: its falsity, irrationality, and seductiveness.

We can see that the potential falsity of stories is not in itself a vice in legal scholarship by looking at the legal hypothetical. Paul Gewirtz's defense of this staple of legal scholarship observes that "[h]ypotheticals are useful supplements to life. If life were a more prolific generator of fact patterns, or if our researches into life's actual fact patterns were vast enough, we would not need hypotheticals. They use the imagination to supply what life has not yet presented."<sup>400</sup> Gewirtz is channeling Aristotle here, because he takes the imagination to be an instrument in the service of truth. Gewirtz makes this allegiance all the more clear in seeking to "build a small burial ground" for a particular type of hypothetical: the implausible hypothetical that implicitly denies the underlying premise of the doctrine that it challenges.<sup>401</sup> His objection is not to falsehoods but to falsehoods that do not help us approach the truth.

Williams's story can partially avail itself of this defense. Her story vividly instantiates the contemporary forms of American racism: A high-status African-American woman can still be subjected to racial humiliation by a social inferior, and, more subtly, she can be subjected to a constant state of uncertainty about her interactions with whites.<sup>402</sup> I am willing to stand by these points as truths seized by the story. But Williams cannot entirely gird herself in this Aristotelian armor. Ironically, the real problem

398. *Id.* at 42-43.

399. See KAHN, *supra* note 395, at 18-19.

400. Paul Gewirtz, *The Jurisprudence of Hypotheticals*, 32 J. LEGAL EDUC. 120, 120 (1982).

401. *Id.*

402. POSNER, *supra* note 2, at 356 (discussing Williams's anger as possibly reflective of "a pervasive uncertainty that confronts blacks in their encounters with whites").



with Williams's story is not that it is false but that it is not *clearly* false. If Williams's story were presented as an "extended hypothetical"—that is, a fiction—Farber and Sherry would withdraw their objection.<sup>403</sup> But Williams presents her story as fact, and Farber and Sherry, like Justice Powell, worry that we will be unable accurately to assess its veracity.<sup>404</sup>

This criticism is much less weighty in the context of legal scholarship than in the context of a trial. Norms of civility may hamper us to some degree from challenging victims regardless of context. Yet the chances to do so in court are limited, with respect both to time and to the individuals capable of bringing those challenges. In legal academia, the story is available in perpetuity for debate and contestation.

Chances are good that civility will not muzzle all challenges to legal stories. Posner, for instance, seems to experience no difficulty whatsoever in questioning the veracity of Williams's story.<sup>405</sup> After acknowledging the force of Williams's story, he peppers a paragraph with questions:

But is the story true? Did Williams, who is not a child, who is a mature woman, *really* press her face against the window (isn't that what "press to the window" means?). Or is she embroidering the facts for dramatic effect—making the insult to her seem graver because it shattered a childlike eagerness and innocence? And how does she *know* that the sales clerk refused to let her into the store because she's black?<sup>406</sup>

These are fair questions. As Posner points out, "Benetton is not a fiction. It is a real company. Williams has accused it in print of unlawful behavior. This is a serious accusation, especially when made by a lawyer. Indeed, it is potentially libelous."<sup>407</sup> But precisely because Posner is so effective, we should not be concerned that Williams's stories will be accepted at face value.

Like their imaginative appeal, the emotional appeal of these stories can also aid legal decisionmakers in their work. The canonical defense of law and literature is that it helps judges to be more empathetic and humane.<sup>408</sup> This defense applies to the Williams story, insofar as the story stimulates our faculty for narrative compassion. Just as importantly, the story challenges the predicates of legal scholarship. Through legal education,

403. See Farber & Sherry, *supra* note 363, at 831.

404. See *Booth v. Maryland*, 482 U.S. 496, 506-07 (1987) (expressing concern that tactical considerations may impede defense lawyers from challenging victim-impact statements), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

405. POSNER, *supra* note 2, at 356.

406. *Id.* at 355-56.

407. *Id.* at 356.

408. See generally NUSSBAUM, *supra* note 2; ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* (1993).

students and lawyers are socialized out of their emotions in the project of learning to “think like lawyers.”<sup>409</sup> Placing an emotional narrative in the context of legal scholarship undoes that learning process. The effect can be like “plac[ing] a jar in Tennessee”<sup>410</sup>—the artifact of emotion can transform the preexisting landscape such that we never see it the same way again. Given that, as I have already argued, emotion is a foundational component of law,<sup>411</sup> such scholarly revisions are to be prized.

Finally, the force of legal stories can only be characterized as seduction if directed to a bad end. That bad end might be the suspension of our disbelief. Kathryn Abrams claims that she is untroubled by the fact that such stories might not “track the life experiences of their narrators in all particulars.”<sup>412</sup> This enrages Farber and Sherry,<sup>413</sup> as it would have enraged Plato.<sup>414</sup> But Farber and Sherry do not point to a single legal outcome dependent on the Williams narrative. No judicial opinion, for instance, cites the Benetton story.<sup>415</sup>

In fact, legal decisionmakers can be fastidious about distinguishing among sources of authority. Consider the limited uptake of Susan Glaspell’s canonical 1917 story *A Jury of Her Peers*.<sup>416</sup> The story is a murder mystery set in a rural community. A man, John Wright, is found strangled in his bed, and his wife is taken into custody. The sheriff, Mr. Peters, is visiting the scene of the crime with Mr. Hale (whose son discovered Wright’s body) and the county attorney.<sup>417</sup> Both Mr. Hale and Mr. Peters bring along their wives, who are supposed to collect some of Mrs. Wright’s personal effects.<sup>418</sup> The separate spheres of men and women are quickly established. The women worry about the state of Mrs. Wright’s kitchen and are teased by the men for worrying over “trifles.”<sup>419</sup> The men begin to rove the house for clues, leaving the women alone together in the kitchen. Finding a quilt that Mrs. Wright was piecing, they wonder if she meant to “quilt it, or just

409. See David T. ButleRitchie, *Situating “Thinking like a Lawyer” Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29 (2002-2003); James R. Elkins, *Thinking like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511 (1996).

410. WALLACE STEVENS, *Anecdote of the Jar*, in WALLACE STEVENS: COLLECTED POETRY AND PROSE 60, 60 (Frank Kermode & Joan Richardson eds., 1998) (“I placed a jar in Tennessee, / And round it was, upon a hill. / It made the slovenly wilderness / Surround that hill.”).

411. See *supra* notes 345-347 and accompanying text.

412. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1025 (1991).

413. See Farber & Sherry, *supra* note 363, at 834-35.

414. See *supra* text accompanying note 109.

415. It will be said that narratives can affect legal outcomes even if they are not acknowledged to do so, because they shape the ambient culture in which legal decisionmaking occurs. This is true, but it is equally true of novels as of legal storytelling. Because Farber and Sherry inveigh only against the latter, they cannot avail themselves of this rejoinder.

416. Susan Glaspell, *A Jury of Her Peers*, in TRIAL AND ERROR: AN OXFORD ANTHOLOGY OF LEGAL STORIES 139 (Fred R. Shapiro & Jane Garry eds., 1998).

417. *Id.* at 143.

418. *Id.* at 146-47.

419. *Id.* at 145 (internal quotation marks omitted).

knot it.”<sup>420</sup> The men return momentarily to ridicule this discussion before leaving to search the barn.<sup>421</sup>

The women piece together a story. They observe that the sewing on the quilt goes from even stitches to erratic ones, note that the door of an empty birdcage has been wrenched off, and, finally, find the corpse of the bird in Mrs. Wright’s sewing basket.<sup>422</sup> They reconstruct how the isolated and childless Mrs. Wright retaliated in a rage against her husband when he strangled the canary that was her only comfort.<sup>423</sup> At this point, the men return, more inclined by the absence of proof against Mrs. Wright to credit the supposition that a vagabond might have committed the murder.<sup>424</sup> After a moment of vacillation, Mrs. Peters, the sheriff’s wife who is described as “married to the law,”<sup>425</sup> allies herself with Mrs. Hale and Mrs. Wright rather than with her husband by permitting Mrs. Hale to snatch the bird into the pocket of her coat.<sup>426</sup> The county attorney teasingly returns to the question of whether Mrs. Wright meant to quilt it or knot it. In the last line of the story, Mrs. Hale responds: “We call it—knot it.”<sup>427</sup>

The story is about how women and men may have different modes of perception and moral reasoning that arise from their different experiences. The two women, unlike the men, discover the “trifles” that permit them to reconstruct the story because they are, like Mrs. Wright herself, confined to the kitchen. Their own gendered experiences with loneliness and neglect also lead them to judge the evidence differently. Their decision to hide the evidence from the men is a nullification of Mrs. Wright’s guilt rendered by “a jury of her peers.” The last line of the story delivers the verdict, but again in a gendered idiom opaque to the men. The men ask the women to arbitrate whether Mrs. Wright meant to “quilt it or knot it,”<sup>428</sup> an unwitting pun on a request to a jury to decide whether she was “guilty” or “not.” In declaring “knot it,” Mrs. Hale renders a verdict by relying on the same common language that permitted her to reconstruct the crime in the first place.<sup>429</sup> The danger itself fosters the rescuing power: Only those who can identify enough with the crime to forgive it will be able to apprehend it.

Unlike the Williams story, the Glaspell story leads directly to a legal proposition—that women might be entitled to a “jury of their peers” because men and women might reason differently about moral or legal guilt. No surprise, then, that the story surfaces in the modern debate over

420. *Id.* at 149 (internal quotation marks omitted).

421. *Id.*

422. *Id.* at 149-50, 152.

423. *Id.* at 153.

424. *Id.* at 154.

425. *Id.* at 155.

426. *Id.* at 156.

427. *Id.* (internal quotation marks omitted).

428. *Id.* at 152 (internal quotation marks omitted).

429. *Id.* at 156.

sex-based peremptory challenges. In 1986, the Supreme Court prohibited the prosecutorial use of peremptory challenges on the basis of race.<sup>430</sup> This raised the question of whether peremptory challenges based on sex would be sustainable—that is, whether women might have a cause of action for being deprived of a “jury of their peers.” Legal scholarship on sex-based peremptory challenges, as well as on jury service more generally, often adverts to Glaspell’s story.<sup>431</sup> Judicial treatments of the issue, however, scrupulously avoid the Glaspell story.<sup>432</sup> Courts often limit how far canonical fictions are permitted to percolate up the legal structure.<sup>433</sup>

How does this virtue defense of storytelling in the academy compare with the virtue defense of victim-impact statements in the courtroom? Posner observes that commentary has linked legal storytelling to victim-impact statements and that “[t]he narratologists don’t like this point” because “they don’t like capital punishment.”<sup>434</sup> He suggests that victim-impact statements and outsider narratives should be treated consistently, and would be, absent the distortions of ideology.

This view elides a major difference in function. To put it gently, the function of a law review is different from the function of a capital trial. Legal scholarship can be seen as a venue in which reflection and experimentation can occur without threat to the consistency of the law. If it retains that function, it will always be more permissive of literary narrative than the capital trial. The value of Plato’s functionalist paradigm is that it both permits and requires us to make such distinctions according to the legal context in which such narratives are introduced.

430. *Batson v. Kentucky*, 476 U.S. 79 (1986).

431. See, e.g., Deborah L. Forman, *What Difference Does It Make? Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35, 53 & n.106 (1992) (citing Glaspell’s story for the proposition that “men and women may perceive and recall facts and events differently”); Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 698 n.177 (2002) (citing Glaspell’s “fictional account of how men and women viewed facts differently based on the separate spheres they occupied”); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 747 (1992) (describing Glaspell’s story as “a classic of the jury discrimination literature”); Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1929 (1992) (noting that early feminists such as Glaspell “were aware of the connection between women’s ability to serve as jurors [and] the issue of securing women’s suffrage”).

432. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-36 (1994) (citing Note, *supra* note 431, at 1921).

433. This is not invariably the case. See, e.g., *Floyd v. Lykes Bros. S.S. Co.*, 844 F.2d 1044, 1047-48 (3d Cir. 1988) (relying in part on Melville’s novel *White-Jacket* to hold that a merchant ship captain had discretion to conduct burial at sea for a seaman who died eight days from the next port of call); *In re Carlos P.*, 358 N.Y.S.2d 608, 609 (N.Y. Fam. Ct. 1974) (relying in part on Ellison’s novel *Invisible Man* to order the Board of Education to admit a juvenile delinquent to a vocational high school).

434. POSNER, *supra* note 2, at 348.

## CONCLUSION

Plato's banishment of the poet is one of his most reviled ideas. Yet it is time to revisit his framework, which illuminates many of our contemporary debates about law and literature. Applied rigorously, it can also help us improve those debates.

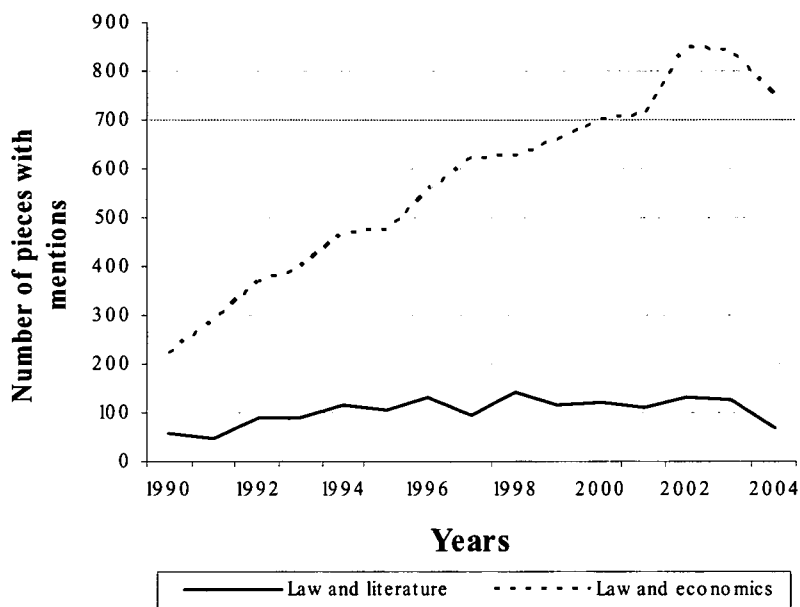
Contemporary evictions of literature from law frame literature in negative particularizing terms. The temptation for those who defend literature will always be to respond with an ineradicability defense, which stretches the particularizing definition of literature into a generalizing one. The Platonic paradigm suggests that we should resist this move because it is both wrong and weak. We need not adopt a firm view about literature's actual ontology to agree with Plato here. We need only point out that as a practical and social matter, we can generally distinguish between law and the texts we call literary. Arguing against the eviction on the ground that law is "always already" literature does not frontally meet the objections of those who criticize literature.

What is needed is a virtue defense, which responds to the negative particularizing vision of literature with a positive particularizing vision. Those mounting such a defense accept that literature cannot exist in the polity if it conflicts with a core state function, but they argue that such conflicts do not necessarily arise. They encourage us to proceed case by case, asking in a particular context whether literature's virtues actually conflict with the state end in question.

I have applied this Platonic paradigm three times, showing how literature was wrongly evicted in the Platonic context, rightly evicted in the victim-impact-statement context, and wrongly evicted in the storytelling context. My commitment, however, is less to a set of results than to the form of analysis embodied in the Platonic paradigm. Far from being an enemy of poetry, Plato should be seen as its most pragmatic advocate. He presses us to think about the various poems we might recite in the various cities we might inhabit.

## APPENDIX

FIGURE 1. LEGAL SCHOLARSHIP MENTIONING “LAW AND LITERATURE” AND “LAW AND ECONOMICS,” 1990-2004



Searches were conducted in the Journals and Law Reviews (JLR) database on Westlaw on February 24, 2005. Searches for each year took the following form:

LAW +1 “AND LITERATURE” & DA(AFT 01/01/[YEAR] & BEF 01/01/[YEAR PLUS ONE])

LAW +1 “AND ECONOMICS” & DA(AFT 01/01/[YEAR] & BEF 01/01/[YEAR PLUS ONE])