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Law, Literature, and the Celebration of Authority

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INTRODUCTION

Richard Posner's new book, *Law and Literature: A Misunderstood Relation*,[1] is a defense of "liberal legalism" against a group of modern critics who have only one thing in common: their use of either particular pieces of literature or literary theory to mount legal critiques.[2] Perhaps for that reason, it is very hard to discern a unified thesis within Posner's book regarding the relationship between law and literature. In part, Posner is complaining about a pollution of literature by its use and abuse in political and legal argument; thus, the "misunderstood relation" to which the title refers. At times, Posner suggests that this is the major thesis of the book—he simply wants to rescue literature from its misuse by critics of legalism.[3] By the end of the book, however, it is clear that Posner has no real passion for his claim that great literature is never *really* about law, that it is always about more exalted things, and that its use in legal or political arguments therefore is improper. Rather, Posner's real concern is the celebration and vindication of liberal legalism, and he is as happy using literature to celebrate liberal legalism as are its critics in making their attack.

I will argue that *Law and Literature* ought to be read primarily as an impressionistic and impassioned celebration of legalism—liberal or

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1 R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988) [hereinafter R. POSNER, LAW AND LITERATURE].

2 *See, e.g.*, S. FISH, IS THERE A TEXT IN THIS CLASS? (1980); R. WEISBERG, THE FAILURE OF THE WORD (1984); West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); *see also* Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Fish, *Working on the Chain Gang: Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 554 (1982).

3 R. POSNER, LAW AND LITERATURE, *supra* note 1, at 13-31, 209-11.

conservative—and that the book contributes little to an understanding of either the works of literature or the legal and literary theories which it discusses. Although Posner's interpretations of pieces of literature that deal with legal themes are sometimes surprising and often interesting, those interpretations are transparently dependent on his main agenda, which is a spirited celebration of legalist virtues. Posner's book nevertheless should be of great interest to professional and academic legal audiences. It tells us something important about the distinguishing commitments of liberal legalism and the type of personality which it attracts. That alone, and entirely apart from the merits or demerits of the literary interpretations Posner presents, makes the book's celebration of legalism of great interest.

More specifically, I will argue that the "liberal legalism" celebrated and passionately defended in *Law and Literature* rests on two essentially conservative convictions: (1) that our present law is, for the most part, as it *should* be, and (2) that our present law is, for the most part, as it *must* be. Legal authority, as it is presently constituted, Posner teaches, is generally both *necessary* and *desirable*; neither can we, nor should we, make fundamental changes in our law. Indeed, the book's impassioned celebrations of legal authority and of what Posner calls the "morality of obedience"[4] to legal authority well illustrate the Critical Legal Studies movement's central and most controversial claim about liberal legal orthodoxy: that it is an essentially conservative and "Panglossian" faith in the virtue and necessity of existing authority—including, but not limited to, legal authority—that motivates as well as defines liberal legalist thought. The lasting importance of *Law and Literature* may turn out to be that its celebratory and conservative endorsement of authority unwittingly proves at least this aspect of the critics' case.

I will also argue in this review that *Law and Literature* tells us something important about what *motivates* liberal legalism and what kind of personality is attached to it. It is often assumed, at least in the Critical Legal Studies movement, that the "Panglossian attitude" unique to liberal legalism—the distinctive faith in the virtue and necessity of legal authority—is motivated by "sentimentality," and, more specifically, by a sentimental view of the relation between our ideals and our law. According to the critics, this sentimentality is reflected in a paradigmatic *type* of argument, which I will call the "sentimental argument," in liberal legalist discourse.[5] Thus, liberal legal arguments, according to their critics, typically begin with some independent value or moral ideal, such as efficiency,[6] procedural fairness,[7] or legal equality,[8] as the first premise.

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[4] *Id.* at 252.

[5] *See, e.g.*, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

[6] *See, e.g.*, R. POSNER, THE ECONOMICS OF JUSTICE (1981).

[7] *See, e.g.*, H.L.A. HART & A. SACKS, THE LEGAL PROCESS (1958).

[8] *See, e.g.*, R. DWORKIN, A MATTER OF PRINCIPLE (1985).

They then make an apparently historical—but, in fact, sentimental—claim that our present law perfectly or approximately actualizes that ideal: the common law *is* efficient,[9] our present procedures *are* fair,[10] or our Constitution *does* guarantee equality.[11] The liberal legalist then draws the "Panglossian" and comforting conclusion that our present law is as it more or less ought to be.

It is true that many liberal legalist arguments do fit precisely this sentimental form. Let me illustrate with two examples. First, Ronald Dworkin's early and extremely clever argument that the United States Constitution simply *does* contain an analogue for every possible good faith moral claim about government, such that a sincere civil disobedient always has a viable *constitutional* as well as moral argument (and therefore really is not a law-breaker),[12] rests quite explicitly on this sort of sentimental vision of our constitutional history.[13] Because of an extraordinary convergence of luck, bravery, and wisdom, the Constitution, at least when "properly" read, converges perfectly with a moral scheme of foundational law. Similarly, the legal economists' early arguments that common law rules of contract and property are efficient rested on sentimental claims about our common law history. Efficiency is to the economists what equality and justice are to Dworkin. The implicit sentimental premise of the economists' arguments was that, through an extraordinary combination of luck, wisdom or foresight, common law judges semimiraculously hit upon efficient solutions to legal issues. Thus, these two liberal legal arguments, despite their widely divergent moral ideals and political orientations, share the same logical structure. Both begin with a particular ideal (equality; efficiency) and then make the *further* sentimental claim that our present law (constitutional; common), when properly understood, embodies that ideal. It is that logical structure which I call "sentimental."

Using *Law and Literature* as evidence, I will argue in this review that, while modern liberal legalism—the faith that legal authority is as it ought and must be—does indeed frequently rest on a sentimental view of legal authority, liberal legalist arguments also often rest on an altogether different and decidedly non-sentimental world-view, which liberal legalist literature has not well articulated and which critical legal scholars have not well critiqued. Indeed, this second world-view has been somewhat suppressed and supports a very different type of liberal-legalist argument than those summarized above. This second sort of argument—which I

9 For a critical appraisal, see Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

10 For a critique, see M. KELMAN, *supra* note 5.

11 FREEMAN, *Anti-discrimination Law: A Critical Review*, in THE POLITICS OF LAW 96 (D. Kairys ed. 1982).

12 R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

13 *See* Kennedy & Michelman, *supra* note 9.

will call the "authoritarian argument"—contends that our law approaches the ideal, not because legal authority miraculously converges with some moral ideal, but because the contingent legal authorities in our world—the "authors" of our law—authoritatively *dictate* what our moral ideals are to be. Our law is morally perfect, not because it miraculously converges with our ideals, but because our legal authorities mandate the content of our moral ideals as well as the content of our legal obligations.

Although it may appear to be only an unimportant or semantic distinction, there is a world of difference between the sentimental and authoritarian arguments and their motivating world-views. The authoritarian argument for the perfection of law rests, not on the *apparently historical but essentially sentimental* claim that our presently constituted legal rules happen to map onto some stated ethical ideal, but on *the apparently descriptive but essentially authoritarian* claim that whatever attributes our presently constituted legal rules happen to exhibit *are therefore* moral ideals. Legal authority dictates, in effect, what our moral truths and ideals are to be. It determines the ideals to which we pledge our allegiance and will devote our energies. Whether legitimate or illegitimate, legal authority dictates our collective moral ideals and our individual moral worth as well as our individual and collective fate. It dictates what we should be as well as what we will be.

Whatever world-view grounds this authoritarian argument, it most assuredly is not sentimentalism. To the extent that the authoritarian argument underlies liberal legalism, it is therefore a mistake to identify liberal legalist ideology with a sentimental urge to see the world through rose-colored glasses. Rather, what finds expression in this second argument that law is good because law defines the good is not sentimentality but a cluster of authoritarian commitments: a nihilistic embrace of the authority of the powerful; a resigned admission that might makes right; a deterministic and Calvinist acquiescence in the "givenness" of authority, even where that authority turns out to be entirely arbitrary; a steadfast certainty that our individual moral worth is to be judged as well as determined by arbitrary, but powerful, pregiven authorities; and an uncritical embrace of "the order of things" imposed by the dominant but largely invisible legal, political, cultural, and epistemological actors of our past. The emotional need expressed by this second argument for liberal legalism—and the need which, I will argue, Posner's book makes fairly explicit—is not the sentimental need to see actual authority as perfectly congruent with our moral ideals; rather, it is the need to constrain the individual will by an external authority. If Posner's account of liberal legalism is at all representative, then the appeal of liberal legalism may be that it gives voice to the deep and human need to identify the individual's will, worth, power, and fate with the judgment of a higher, nonnatural, or simply "other" authority. If so, then liberal legalism may continue to

resonate in the law school culture despite the barrage of debunking criticism directed against it, because it is the only ideology to do so.

Thus, the underexamined and undercriticized argument for liberal legalism revealed in *Law and Literature* is that we should respect and obey given authority, not because that authority is or is perceived to be *good*, but because it is good to subordinate one's individual will to the dictates of a powerful, nonnatural, impersonal authority. The claim that impersonal, external, nonnatural authority has intrinsic value independent of its content is hardly new. Nor is the need that it satisfies unique to liberal legalism. For many in our culture, the need to subordinate one's self to an impersonal, nonnatural, and external source of power and moral judgment is met through allegiance to some sort of Judaic or Christian God. For those who cannot or choose not to make the leap of faith, that source of power and external judgment instead might be found in the nonnatural will and normative influence of institutional, cultural, historical authorities. For the economic legalist, for example, economic markets may fill precisely this need for binding, normative authority: markets, like gods, are powerful, impersonal, ultimately arbitrary, external, and nonnatural authorities which simultaneously determine an individual's fate as well as judge his moral worth. For the liberal legalist, however, it is the Rule of Law, particular laws, legal systems, or legal institutions, rather than markets or gods, that fill the same authoritative need. Thus, the mandates of institutional legal authority to the liberal legalist, like the commands of God to the Calvinist and like market-dictated choices to some normative legal economists, are good and are to be obeyed, *not* because they are perceived to be just or are possessive of any particular virtue, but solely because they are authoritative.

This review has four parts. Part One explores the celebration of authority, both legal and otherwise, within *Law and Literature* and argues that this celebration is rooted in a fear of nature and thirst for the certainty of external judgment. Part Two shows how these authoritarian commitments color Posner's readings of literature. Part Three criticizes Posner's arguments for the necessity and desirability of authority and the world-view upon which they rest. The Conclusion speculates very briefly on the possibility of an alternative feminist world-view.

I. THE CELEBRATION OF AUTHORITY

Posner celebrates the virtue and necessity of authority in all spheres of life, not just the narrowly legal. In many spheres of life, he suggests, authority is both good and necessary; the "good life" thus is the obedient life. The particular authorities Posner celebrates in *Law and Literature* include not only such obvious candidates as "law," the "founding fathers," military orders, and military commanders, but also more subtle authorities in our lives: the epistemological "authority" implied by the

meaning of words;[14] the legal authority of criminal law and tort law as normative restrictions on our will;[15] the political authority of the state of Virginia to restrict the irrational reproductivity of the mentally retarded (which was endorsed by the authoritative voice of Justice Holmes in *Buck v. Bell*);[16] the sociobiological authority of evolution over our fate;[17] the celestial authority of organized religion over our souls;[18] the cultural authority of the "classics" over our definitions of aesthetic value;[19] and the "civilized" authority of Apollonian and Christian values over our otherwise mutinous, Dionysian, and pagan subjectivity.[20] Similarly, Posner criticizes all that throws the virtue of authority into doubt. Here, the list is much longer. It includes such diverse critics of unbending conformity as Rousseau's politics,[21] romantic literature,[22] modern critics of legalism[23] (particularly the Critical Legal Studies movement[24]), the idealism of youth,[25] collective political activity,[26] Dionysian values,[27] both radical individualism and communitarianism,[28] the attempts to live our dreams,[29] the dreams themselves,[30] the deconstruction movement,[31] any philosophical movement that insists upon the necessity of choice,[32] Albert Camus' celebrated novel *The Stranger*,[33] the "morality of rebellion" and those who endorse it,[34] Ronald Dworkin's jurisprudential suggestion that judges ought to freely interpret the law so as to give it the best normative meaning possible,[35] and the application of all the major tenets of "new criticism" to judging.[36]

When we are young, Posner explains, we do not always understand the value of authority and the virtue of relentless and near-unbending

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14 R. POSNER, LAW AND LITERATURE, *supra* note 1, at 209-17.
15 *Id.* at 151-55.
16 *Id.* at 164-65.
17 *Id.* at 25-29, 141, 164-65.
18 *Id.* at 137-40.
19 *Id.* at 71-75.
20 *Id.* at 148-51.
21 *Id.* at 145.
22 *Id.* at 137-55.
23 *Id.* at 132-205.
24 *Id.* at 176-205, 211-20.
25 *Id.* at 67-68.
26 *Id.* at 69, 150, 202-05.
27 *Id.* at 149-50.
28 *Id.* at 150-51.
29 *Id.* at 67-68.
30 *Id.* at 69.
31 *Id.* at 211-20.
32 *See, e.g., id.* at 86-90, 98, 145, 151-55, 169, 217, 227-28, 258-59, 261.
33 *See id.* at 86-90, 98, 151, 169.
34 *Id.* at 145-55.
35 *Id.* at 217-19.
36 *Id.* at 220-47.

obedience to it.[37] We foolishly feel that our individual political will and collective political options are limitless and that our given "civilization" is both malleable and flawed. We naively think that, through our actions, we can make a better social world.[38] We are wrong on both counts. As we age, most of us come to understand both the futility and the impracticability of our youthful romantic dreams of a better society. Maturity, an unequivocal good for Posner, simply *is* the process of coming to grips with the "unpleasant truth" that we cannot really change things for the better and the much more pleasant truth that we do not really need to: that civilization—presently-constituted institutional, political, cultural, and epistemological authority—mostly is as it must and ought to be. We are not born with this wisdom, though, because, unluckily for us, man is the animal for whom it is the case that "the act," unlike the imagination, is a "slave to the limit."[39] As we mature, we learn to relinquish our naive idealism and acknowledge the desirability and necessity of this authority. Finally, we learn to appreciate the limits of our power to change our political, social, cultural, and linguistic world for the better. Thus, the key to the good life, Posner argues, is discipline and a mature obedience—hence Posner's endorsement of what he calls a "morality of obedience."[40] The individual should resign himself to the limits of individual action, the futility of collective politics, and the impossibility of social change. The individual must be disciplined to accept the constraints of pregiven authority. He must learn to obey the mandates of those who are more powerful than he, and as he matures, should learn to do so cheerfully.

"Romanticism" is Posner's label for the mistaken assumption, forgivably common among the young, and less forgivably recurrent in a strand of low-quality—because immature—literature and philosophy, that human nature is potentially and naturally good, or even redeemable, and that it is societal authority which is corrupting.[41] Contrary to the teachings of romantic literature, romantic philosophy, and the false hopes of the young, our human nature is neither inherently good nor malleable. Rather, Posner explains, we are essentially, naturally, and unchangeably vengeful.[42] We are, by nature, inclined to irrational violence.[43] In a word, we are "fallen."[44] Romantic beliefs to the contrary not only lead to dangerous radicalism and naive utopianism, but also pose the twin dangers of excessive individualism and excessive communitarianism: romanticism simultaneously posits a limitless, naturally trust-

37 *Id.* at 67, 98, 140-41, 145.
38 *Id.* at 67-68.
39 *Id.* at 67.
40 *Id.* at 252.
41 *Id.* at 145-51.
42 *Id.* at 25-70.
43 *Id.*
44 *Id.* at 164.

worthy individual will,[45] while, at the same time, threatens the "boundaries between individuals" by positing a limitless and naturally trustworthy human community.[46] The romantic dangerously trumpets a return to nature,[47] the triumph of pagan over Christian values,[48] and the victory of Dionysian over Apollonian virtues in the false hope of achieving utopia.[49] Should this campaign succeed, Posner claims, the result will be holocaust, not utopia.[50] The romantic's heedless, reckless quest for the ideal will usher in the death of law—which Posner characterizes repeatedly as the "bastion of Apollonian values"[51] and the "symbol of civilized values"[52]—the ruination of civilization, the specter of mutiny, a reversion to a social order premised upon endless cycles of revenge, and an unleashing of man's barbaric, hostile, and vengeful instincts, and not, as he naively believes, the good, the communitarian, the individualistic, or the free.

Let me give six examples of Posner's celebration of the necessity and desirability of authority, each drawn from a different sphere of life, before discussing the commitments on which that celebration seems to depend. First, and perhaps most strikingly, particularly to the nonlegal audience, is Posner's celebration of what might be called "institutional authority"—which Posner calls "civilization"—and his severe chastisement of all who would question or change it in any sort of fundamental way. Civilization, at least in its present democratic form, constitutes the orderly antithesis of a fallen, irrational, evil, and random human nature.[53] It is therefore *desirable*.[54] Civilization is also *necessary*: the institutions that comprise our civilization are mostly unchangeable.[55] Dreams of better institutions thus are futile—you can't, after all, *really* change anything—and to act on our dreams is even worse; when we were to act on such dreams, we quickly would see them become nightmares.[56] With only rare exceptions (such as Nazi Germany) the individual ought therefore to embrace a "morality of obedience"[57] rather than a "morality of rebellion" with respect to the institutional authority in our lives: Each of us ought to appreciate the value of our civilization, our institutional authority, and come to grips with our inability to improve it.

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45 *Id.* at 150-51.
46 *Id.*
47 *Id.* at 145.
48 *Id.* at 144-51.
49 *Id.* at 149-50.
50 *Id.* at 144-51.
51 *Id.* at 16, 155, 307.
52 *Id.* at 90.
53 *Id.* at 25-40.
54 *Id.* at 25-70.
55 *Id.* at 67-68, 74-75.
56 *Id.* at 69.
57 *Id.* at 252.

Second, Posner celebrates what might be called "hierarchical authority." Authority firmly embedded in "hierarchy" shares the necessity and desirability of authority firmly embedded in civilized institutions. Hierarchical authority is as it must and should be: orders from on high cannot be challenged, and those orders generally are good. The individual in a hierarchy is both powerful and, *in turn*, obedient. He orders others but also obeys the authority of others. The military hierarchy perfectly embodies this dual ethic of authority and obedience; Posner accordingly praises military virtues[58] and uses the military hierarchy as a metaphor for virtue in other spheres of hierarchical personalized authority, such as judging.[59] The good commander commands obedience and is himself obedient, just as the good judge commands obedience and obeys the legal mandates of higher legal authorities. In a perfect hierarchy, every actor is both obedient and authoritative. Power is personally exercised, but it is always exercised pursuant to still higher authority. At no point can or should hierarchical authority be challenged.

Third, Posner celebrates "cultural authority." His argument here for the virtue of authority is most explicit. The criterion by which we should judge a piece of art, Posner argues, is its survival over time in the institutionalized cultural marketplace.[60] A piece of writing has aesthetic value—it is a "classic"—if it survives across time and becomes encased in institutional culture. "Classics," in turn, authoritatively define aesthetic value:[61] if a piece of literature has survived, then it is great. Aesthetic value thus is a function of what survives in a Darwinian cultural battle of the fittest. Aesthetic value is not "up for grabs," so to speak. It is not up to us to decide what we value in art or why. Our assessments of artistic value must be disciplined to the authority of our classics. If *Hamlet* is a classic—if it has survived—then we learn from *Hamlet* what is and isn't of aesthetic value. Consequently, in culture, as in institutions and the military, authority turns out to be invariably "desirable." Classics are, *by definition*, great. What we ought to do, then, is discipline our aesthetic judgment to the mandates of history. We should value whatever attributes classics exhibit and should resign ourselves to the futility of active aesthetic judgment.

Fourth, Posner impliedly argues that a widely shared and long-standing ethical convention also becomes authoritative, and thereby acquires normative force as well as institutional power. Posner does not argue the point explicitly, but it is implicit in much of what he says about literature. In his interpretation of *Merchant of Venice*, for example, Posner accepts *without argument* the moralistic premise that a loan contract which uses a pound of flesh as collateral is morally abhorrent and, there-

58 *Id.* at 161.
59 *Id.* at 252-53.
60 *Id.* at 71-76.
61 *Id.*

fore, unenforceable.[62] Posner sees no need to argue that such an agreement *is indeed* immoral even if both contractors clearly desire to make it. The fact that the conventional *belief* that it is immoral is both widely shared and has been widely shared *for a long time* apparently is sufficient to establish that the conventional belief is also correct. The convention has *survived*, so it must be right. Historical conventions of what is right and wrong thus authoritatively govern our morals and values.[63]

Fifth, and perhaps of greatest importance to his ultimate views on law, Posner celebrates what might be called "epistemological authority;" the authoritative meanings which words, especially legal words, acquire through their use and survival over a long period of time. Survival over time confers authority, and authority confers a "correctness" to the meanings of words which we are powerless to change. All users of language, but particularly judges and lawyers, must obey the meanings of words laid down. The judicial interpreter of texts, Posner argues, is like a field officer; the textual word is a command from his superior.[64] The judge, like the officer, must exercise intelligence and judgment—but *not* creativity—in understanding the command. Once understanding is achieved, however, his obligation is clear: he must obey. The judicial interpreter must and should obey the meaning of the word, just as the officer both must and should obey his superior. Obedience to the authoritative meanings of words laid down is a linguistic imperative. The interpreter is not to participate in the construction of legal meaning.

In a lengthy chapter on the interpretation debate,[65] Posner accordingly rejects both Ronald Dworkin's claim that judges should participate in the creation of the meanings of those texts[66] and the deconstructionists' claim that such participation is inevitable.[67] Posner's argument is political and philosophical. First, Posner tells us that a judge's obedience to the meaning of words and his resulting "subordinate status" are "conditions of judicial legitimacy."[68] The judge is an "interpreter" of others' commands. The legitimacy of his exercise of the power of government depends upon his willingness to obey these commands. The "others" giving the commands are, at various times, the framers of the constitution,[69] the legislature,[70] and such relatively disembodied "texts" as contracts or prior case law.[71] In all cases Posner maintains that the judge's task is interpretive: he must ascertain the meaning of the given impera-

62 *Id.* at 93-106.
63 *Id.*
64 *Id.* at 253.
65 *Id.* at 209-68.
66 *Id.* at 217-19, 227-28, 258-59, 261.
67 *Id.* at 211-20.
68 *Id.* at 245.
69 *Id.*
70 *Id.* at 240.
71 *Id.* at 246-47, 251.

tive and then obey it. Like the military officer, the judge's morality is essentially the "morality of obedience:"[72] The judge is like the officer on the field who first must understand so that he then may act on the commands of his superiors. The responsible judicial exercise of power depends upon judicial obedience to the commands of higher authority.

Even more fundamentally, Posner suggests that legal actors *must* obey the authoritative meanings of the words laid down. The result of linguistic disobedience—of deconstructing "given meanings" to illuminate the choices upon which they rest—would be chaos.[73] Legal actors cannot *choose* the meanings we ascribe to laws any more than we can "choose" our code of ethics or criteria of artistic excellence. Our culturally constructed language consists of a cluster of meanings which are authoritative "givens" to be obeyed. Texts, words, and sentences all have meanings, and the listener's role, at least in the legal culture, is to understand and obey them, not create them. Thus, it is not just the "commands" of legislators, framers, or political communities that must be obeyed, but also the "command" implicit in the meanings of legal words themselves.

Finally, Posner celebrates legal authority. Although law is positive—it is manmade, not natural—it is fundamentally *unchanging* and fundamentally good. As Posner tells us again and again, it is the "bastion of Apollonian values."[74] Law is both *necessary* and necessarily desirable. *Unlike* tool-making (which also is manmade), Posner explains, law does not change significantly from time period to time period, nor should it. Not just the "rule of law" or the "idea of law," but *the broad features of the laws themselves*, are, for the most part, as they always have been. Thus, law, like the meanings of words, literary classics, our ethical commitments, and civilization itself, is a part of the culturally contingent but nevertheless necessary and relatively unchanging pregiven authoritative world.[75] The "idea of law" and the particular laws themselves are "things" that have been culturally created and have historically survived. Like other such things, they have become "authoritative." Like other authorities, they exhibit virtue; and, like all other virtuous authorities, they should be obeyed.

Thus, in all spheres of life—institutional, hierarchical, cultural, moral, linguistic, and legal—Posner first finds authority in the brute fact of survival, and then finds moral or normative significance in the brute fact of authority. If a work of art survives long enough, it is a "classic" and therefore must have aesthetic value.[76] If a moral convention is widely shared over a long period of time, it must be authoritative and,

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72 *Id.* at 245, 252-53.

73 *Id.* at 215, 242, 249.

74 *Id.* at 155. *See generally id.* at 137-55.

75 *Id.* at 74-76.

76 *Id.* at 70-75.

therefore, right.[77] If a legal word acquires a certain meaning, that authoritative meaning must align with the intention of its authors and not the linguistic convention of its hearers.[78] If a political practice survives, it thereby has become an authoritative tradition and, thus, is justified.[79] Finally, if a legal regime survives, it too acquires authority and therefore is worthy of allegiance.[80] Pregiven, manmade, cultural, linguistic, institutional, hierarchical, and legal authorities simply *have* meaning, truth, justice, and moral force. That which survives has authority and thereby defines value and directs our will. The right action for the subordinate individual in all of these spheres of life is to obey the mandates of that pregiven authority. Our social, political, legal, epistemological, and ethical authorities are mostly as they ought to be.

What lies behind this relentlessly celebratory view of authority? One possible explanation for this phenomenal faith in the convergence of the ideal and the actual is that Posner insists upon the morality of given authorities because he sentimentalizes their virtues. This explanation aligns with the increasingly standard view in the CLS literature regarding the "Panglossian" and sentimental core of liberal legal thought. By this account Posner identifies aesthetic value with aesthetic survival because he believes that it just so happens—semimiraculously—that that which has survived to become "authoritative" actually possesses literary or artistic value, which is defined by criteria independent of that which has survived. Similarly, Posner might insist that our authoritative moral conventions just so happen to be right as well as conventional, that the authoritative meanings we employ have hit upon the truth, that the political institutions we inherit are wise, that our laws are just, and that the values of civilization are good ones, where truth, wisdom, the good, and the just all are independently defined. The history of the world could have been otherwise, but, by strokes of miracle, or the cumulative effects of particular acts of bravery, genius, and wisdom, it is not. Our history fortunately has bequeathed us near-perfect normative authority in all spheres of life. Under this "standard" sort of CLS critique, Posner celebrates authority because he views that authority through rose-colored glasses.

A few parts of *Law and Literature* do rely on overtly sentimental or quasi-sentimental arguments.[81] What is most striking about this book, however, is that Posner largely does not sentimentalize either legal authority or the other forms of authority that he celebrates. At no point does he argue, for example, that literary "classics" actually have literary

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77 *Id.* at 91-99.

78 *Id.* at 240-47.

79 *Id.* at 67-70.

80 *Id.* at 74-75, 137-65.

81 *Id.* at 93-113. Particularly notable, in this regard, is Posner's treatment of *Merchant of Venice*.

or aesthetic value which can be independently defined. In fact, he argues the inverse: that "aesthetic value" should be defined by the literary works that survive to become classics. Similarly, Posner neither argues for the "rightness" of our moral conventions nor sentimentalizes political authority. The mandates of our "civilization," Posner teaches, should be obeyed *because they are civilized*—because they reflect as well as constitute the Apollonian value of order—not because our particular civilization possesses some virtue which renders it worthy of respect.

Most importantly, Posner does not sentimentalize law.[82] Indeed, it is important to emphasize that Posner is aggressively *un*sentimental about law and legal authority. Posner insists throughout *Law and Literature* not only that a line should be drawn between law and politics (a familiar claim), but that an even more absolute line must be maintained between law and *justice*.[83] Law has no necessary connection with justice. Legalism—that "bastion of Apollonian values"—is necessary, unchanging and generally desirable, *regardless of whether or not its laws are just.* This insistence on a firm distinction between law and justice leads Posner to one of the most profoundly troubling claims in this book: that "lawyer's law" is utterly devoid of moral content. There is no necessary connection between "lawyer's law" and justice. Lawyers do not know any more about the nature of justice than any of the rest of us—*nor should they.* Legal education inculcates neither understanding of nor respect for justice, *nor should it.* Justice is not the subject, target, or ideal of law. Although law "touches on" deep issues regarding the nature of justice, "lawyer's law"—the stuff learned in law school—Posner tells us, has no more to do with justice than it has to do with any other set of moral or political ideals.[84] Legal education, law schools, and the legal profession are not directed toward the creation of a just society, nor should they be; instead, they are directed toward the creation of an orderly one. The aim of law, Posner explains, is to mediate, not aggravate, conflict.[85] Its goal is order, not justice. Law, the Rule of Law, legalism, and laws are desirable solely because they order nature, not because their mandates are just.[86] Law's value has no necessary or even incidental connection to the justice of the world it authoritatively dictates. Indeed, law's value has no connection to any virtue. Law is good because and only because it is authoritative.[87]

Rather than sentimentalize authority, Posner supports his celebration of authority with what might be called a "Calvinist" or Darwinian world-view, which suggests that human, contingent, pregiven authority

82 *Id.* at 76-79.
83 *Id.*
84 *Id.*
85 *Id.* at 79.
86 *Id.* at 25-70.
87 *Id.* at 27-33, 56-67.

itself is the ultimate good, regardless of its content, justice, or morality. Appropriately enough, Posner's description of the world begins with a narrative account of life in the prelegal Hobbesian state of nature. In his natural, prelegal habitat, Posner argues, man was a vengeful and irrational animal who inhabited a world of perpetual and vicious bloodletting.[88] Although efficiency was the teleological and sociological goal in this state of nature, revenge, rather than the rule of law, was the method by which efficiency was achieved; anger, rather than reason, was the emotion by which the spirit of revenge was sustained.[89] Revenge, however, turned out to be a grossly inefficient mechanism for achieving either collective or individual goals. Retribution is just too violent, and violence is just too costly. Thus, against this unstable backdrop, the Rule of Law, as well as other forms of authority, made their appearance. The Rule of Law constituted an all-around gain. Vengeance was channeled into legal recourse, reason replaced anger as the means by which order was achieved, and life became somewhat longer, a little less brutish, and considerably more efficient. The Rule of Law turned out to be everything the Rule of Vengeance was not: efficient, rational, nonviolent, unemotional, and cheap.[90] When contrasted with the vengeance and bloodletting that were unleashed in the state of nature, the rule of law was and has remained a godsend.

Posner next gives a parallel description of our modern-day *internal* nature. Like the natural world that preceded civilization and the external natural universe with which we must still contend, our modern *internal* nature, even post-Rule of Law, continues to be irrational, unintelligible, impenetrable, and malignant. Man is, by nature, "fallen."[91] He is inevitably inclined toward evil. Indeed, that our inner life is chaotic, irrational, evil, and unknowable and that it thus contrasts sharply with our objective, rational, knowable, external behavior surely constitutes the major descriptive claim of this book. The individual, Posner tells us again and again, is born into a chaotic, utterly senseless, cruel, and essentially unknowable natural universe, and brings with him into the world an equally instinctual, irrational, essentially unknowable, and irreducibly evil, inner affective world.[92] Neither the natural universe nor man's internal affective life, Posner tells us, are susceptible to man's understanding and control.[93] Thus, even in a modern society governed by the Rule of Law, our inner, affective lives, like the hostile natural

88 *Id.*

89 *Id.*

90 Posner's defense of the Rule of Law reaches its peak in ch. 3, *The Literary Indictment of Legal Injustice*. *Id.* at 132-75.

91 *Id.* at 164.

92 *See generally* the indictment of natural man, *id.* at 137-55, and the description of nature, *id.* at 25-70.

93 This underlies Posner's dislike of Nietzsche. *See id.* at 145-55.

universe around us, are irrational, unknowable, and implacably evil.[94]

Now, although Posner does not make the connection himself, the perfectly sensible response to this horrific state of internal and external nature is to seek out the clarity of institutional, cultural, and hierarchical authority. Once a human *command*—authority—becomes part of the cultural, institutional, and hierarchical world, it is no longer part of the chaotic inner nature of any particular human being or group of human beings from which it originated. When internal desires become external, authoritative commands, they become conducive to order and thus are rational. Institutional and hierarchical authority, in other words, is everything that both inner and external nature are not. Authority is objective rather than subjective, reasonable rather than emotive, rational rather than irrational, cultural rather than natural, and created rather than given. It "rationalizes" the natural world because it literally and figuratively "orders" it. It makes communal life predictable and civilized rather than arbitrary and natural. It makes the world knowable, clear, and certain. It dictates results. Whatever else it is, *and regardless of the worth of the social world it either presupposes or promotes*, institutional authority that has persevered over time constitutes a relief from the chaos of inner and external nature. Thus, obedience to contingent authority is more comfortable and comforting than survival in the natural universe. If, like Posner, the liberal legalist believes or experiences his internal nature to be dangerous, unknowable, and evil, then it is not surprising that virtually every form of manmade, culturally contingent authority is tremendously appealing and that obedience to it is a tremendously comforting way of life.

The theory of value implicit in Posner's celebration of legal authority is perfectly suited to precisely this comforting, accommodating, psychic response to the chaotic evil of internal and external nature. That theory is startling, even alarming, in its simplicity: whatever of human creation manages to survive across time gains authority, and whatever has such authority shapes our lives and determines our values. In the entire range of social, political, aesthetic, militaristic, and legal contexts canvassed above, that which survives across time has "authority." The directives that bind us are those that are provided by history. The happy consequence of this authoritarian theory of value is that we need not rely on our own dangerous, vengeful, instinctual, inner life to form our values. Authority, provided by history's victors, directs our conduct and shapes our values. We are powerless to change this fact, but there is no reason we should want to do so. That which has survived across time to become "authoritative" is, for that reason, more trustworthy than we. In contrast to the horrific state of nature, that which has been created across time—that which history gives us—is *good*. Unlike the natural realm,

[94] *Id.* at 176-208.

institutional authority is not contaminated by our incomprehensible and incomprehensibly evil natural inclinations and instincts. Historical and cultural "authority" is therefore always good, where "authority" is simply whatever person, institution, or value which has had the strength to dominate. Far from constituting illegitimate infringements upon some utopian (or constitutional) ideal of equality, the powerful amongst us are our moral, political, legal, aesthetic, and linguistic teachers. They are our authorities.

Authority, in Posner's world, is always good, not because authority is generally just or generally benign, but simply because it imposes order on an irrational nature. Authority is rational, coherent, and knowable. In fact, *of all worldly phenomena, only* authority is rational and coherent. In contrast to the external natural world, and in stark contrast to the inner world, authority of all sorts, including the social, religious, and institutional forms in which it manifests itself, is rational, efficient, stable, knowable, relatively unchanging, and dependable. While our internal life, like the natural universe, is irrational, chaotic, and evil, external authority is perfectly rational, objectively intelligible, generally knowable, and entirely coherent.

Before moving on to Posner's readings of literature, let me briefly restate my original question and the answer I want to suggest. What, if anything, motivates the liberal legalist's insistence that contingent, historical, legal authority is convergent with morality, justice, and value? If Posner's latest book is at all representative—and I suspect it is—then the liberal legalist's insistent and distinctive Panglossian faith that legal authority is necessary and good may have its roots not in a sentimental tendency to see authority through rose-colored glasses but in a Calvinist insistence that contingent authority should dictate not only our actions, but also our moral ideals, legal norms, linguistic meanings, aesthetic values, and, ultimately, our individual moral worth. Empowered, pregiven institutions of legal, economic, military, political, social, and cultural authority—like the Calvinist's empowered, pregiven, authoritarian God—thus dictate authoritative judgments about our moral worth while, at the same time, they authoritatively determine our place in life. They mandate the justice of their judgments as they judge. They demarcate the value of their demarcations as they demarcate. The authoritative institutions of our past—markets, laws, language, conventions, and politics—dictate, albeit arbitrarily, not only who we shall be, but also that we *ought* to be what they dictate we *shall* be. The liberal legalist believes that these authorities are good. A sentimental inclination to see our authorities as morally better than they in fact are may play little, if any, role in the liberal's belief that pregiven, historical, contingent, institutional human authorities are good. Instead, the liberal legalist simply may believe that the constriction of individual will to external mandate—

obedience to authority, resignation to its necessity, and a disciplined response to its requirements—constitutes a good way of life.

Finally, that need—the need to restrict the individual will—may, in turn, be rooted in a fear of the alternatives to obedience and discipline: on the one hand, existential, linguistic and cultural freedom; on the other, nature and subjectivity. If we can trust Posner's account, then it seems fair to say that the liberal legalist is inclined to celebrate authority at a very deep level of being. The liberal legalist *wants* external necessity (whether law, economic markets, or God) to dictate his ideals just as its commands most assuredly dictate his fate. The liberal legalist eschews *participation* in the creation of the authoritative sources of value that determine his ideas and judge his moral worth. He is not to participate in the creation of the meanings of words, the determination of aesthetic value, the definition of moral right and wrong, or the institutions of legal authority. It is not for him to decide what to value and why. Rather, the authorities that make and judge him must exist entirely *outside* of him; he has no control over the substance of the norms and commands which dictate his values. The legalistic individual gives himself to the dictatorial control of authority because the alternative is abandonment to a chaotic, unpredictable, and evil state of internal and external nature. The liberal legalist gives away his freedom to human authority because the alternative is evil, chaotic, vengeful, unpredictable, and malignant. He willfully gives away his freedom because he does not trust himself.

II. Interpretive Constructs

Posner's two major interpretive constructs—his celebratory view of authority on the one hand, and his Calvinistic fear of nature on the other—heavily predetermine his interpretations of great literature and his understanding of critical literary theory. In Posner's view, most great literature concerns the virtue of authority, the futility of politics, or our evil human nature as revealed through the private process of individual maturation. More pointedly, great literature—whatever its purported subject—is almost always truly about the private attainment of the wisdom of age: that human nature is evil, random, and unknowable, that authority is generally both good and necessary, and that subordinates ought resign themselves to the "givenness" of society and the limits of their capacity to change it. The message of serious literature, *when it is good*, Posner teaches, is like the message of life itself: given authority is necessary and eternal, human nature is irrational, and a life spent trying to improve our nature or challenge authority is either a failed life (in which case it is simply hopelessly misguided), a pathetic and ultimately embittered life (such as, he suggests offhandedly, the life of the legal aid lawyer or public defender), or a dangerous life as its false hopes threaten civilization itself.

Posner's love of authority, particularly hierarchical authority, and

his fear of nature are nowhere so clearly revealed as in his striking reading of *Billy Budd, Sailor*.[95] In *Billy Budd*, the protagonist Captain Vere executes the morally innocent Billy Budd, whose illegal action—striking a superior officer—appears to the reader as entirely excusable and arguably justified. Unsurprisingly, Posner's interpretation of *Billy Budd* exonerates Captain Vere, the commander, of all legal and moral wrongdoing. In Posner's view, Vere's execution of Budd, rather than Budd's act, is what is justified. Vere suppressed his sentimental inclination toward mercy to do what he justifiably and legitimately had to do as commander of a naval ship threatened by mutiny—execute the morally innocent Billy Budd.[96] This exoneration alone is not unusual. Exonerations of Vere are fairly standard in the critical literature on *Billy Budd*.[97] What is peculiar about Posner's reading of *Billy Budd* is not that Posner forgives Vere, but that he *venerates* him. Posner finds *absolutely* no illegality, injustice, or moral wrong in Vere's execution of Budd despite not only legalistic errors in Vere's arguments, which Richard Weisberg has documented,[98] but also the glaring injustice inherent in Vere's multiple service in Billy's case as commander, judge, witness, prosecutor, juror, and defense counsel.[99] Posner sees no glimmer of insanity, delusion, envy, sadism, or resentment in Vere's inner character despite Melville's meticulous description of Vere to the contrary and the narrator's repeated urgings that the reader should question Vere's motives and his mental stability. Posner sees no manipulation of the objective legal text for personal, subjective, or vindictive ends in Vere's interpretation and application of the Articles of War. Instead, Posner sees in Vere only a man worthy of praise. His Vere is not just forgivable; he is exemplary. Vere embodies a mature sense of duty and Rule of Law Apollonian virtues.[100] Vere did his duty. He was a noble authority who squelched private feelings of sentiment and mercy to fulfill his public duty.[101] He admirably bore the responsibilities of command and performed the obligations imposed upon him by law.

Posner, more bluntly, accepts Vere's own account of his obligations hook, line, and sinker. According to Posner as well as Vere, Vere, the powerful commander, is innocent of moral wrong; his obligation was to obey the law, which he did unflinchingly and fairly. According to Posner and Vere, then, Vere ought to be admired for his strength of character for doing so. Posner sees no reason to question this. In Posner's reading, Vere is simply a one-dimensional authoritarian hero. The "givenness" of

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95 *Id.* at 155-66.

96 *See* WEISBERG, *supra* note 2.

97 *See, e.g.*, Reich, *The Tragedy of Justice in Billy Budd*, 56 YALE REV. 368 (1967).

98 *See* WEISBERG, *supra* note 2, at 154.

99 R. POSNER, LAW AND LITERATURE, *supra* note 1, at 155-65.

100 *Id.* at 160-65.

101 *Id.*

Vere's personal power and authority constitutes a sufficient condition for the morality and necessity of his dominion over Billy's fate. Vere is heroic because he is authoritative, and authoritative because heroic.

The need to exonerate, vindicate, celebrate, and glorify Vere's authority, like Vere's execution of Billy itself, is predetermined by Posner's and Vere's insistence on our necessarily malignant natural internality, and, hence, by a fear of Billy's nature. Posner sees in Billy's prelegal and childishly innocent spontaneous nature not a refreshing counterpoint to Vere's pedantic and "bookish" legalism, but a nature dangerously prone to the illegal act of homicide. Like Vere, Posner is quick to see in Billy's naturalism and spontaneous subjectivity the danger of mutinous, murderous, and unconstrained chaos. Like Vere, Posner too quickly concludes that the spontaneous and morally pure Budd is legally guilty;[102] and, like Vere, Posner accepts with almost no scrutiny the legal and military necessity of Billy's execution. Posner's own fear of mutiny, distaste of romanticism, contempt for youth, and distrust of nature blinds him to the possible illegality in Billy's execution and to the disingenuousness of Vere's explanation to both himself and his officers of its necessity. Thus, while Posner is surely driven to his overidentification with Vere through his insistence on the morality of authority and law, the underlying reason for *that* compulsion is that Posner views Budd's naturalness through the same prism as did Vere. Where other readers see in Billy a sharp and refreshing natural counterpoint to Vere's pedantic and cultured bookish ethics, Posner, like Vere, sees in Budd's spontaneous, natural, nonverbal subjectivity the danger of mutiny and the villainous, vengeful, and murderous instincts of the unconstrained natural man.

The consequence is that the conventional reading of *Billy Budd, Sailor* is literally stood on its head. *Billy Budd* becomes not a tract against the abuses of legalism, as it has been conventionally understood, but an aggressive justification of a rigid, militaristic, and decidedly unjust Rule of Law. *Billy Budd* becomes a warning to those charged with authority to resist the temptations of their dangerous, childish, and womanly inclinations toward mercy, equity, sentiment, and leniency. In a society in which natural subjectivity threatens to erupt into public mutiny, and internal awareness could at any moment have become external chaos, Vere stands firm for the Apollonian values of rigidity, rule, and control. All of this, Posner implies, is what Melville himself intended.[103] Turning conventional biography as well as critical understanding on its head, Melville, Posner tells us, understood the necessity of law in a fallen world rife with the consequences of human fallibility. That law is necessary and necessarily desirable in a world riddled with the irremediably

102 *Id.* at 156.
103 *Id.* at 164.

evil instincts of natural subjectivity, Posner concludes, is the sobering, bitter, and cold lesson to be learned from *Billy Budd, Sailor.*

Three more examples demonstrate the various ways that the fear of the unpredictability, irrationality, and malignancy of the natural realm drives Posner's literary interpretations. First, fear of nature explicitly governs Posner's substantive interpretations of a group of classics he calls collectively, "revenge literature." Thus, in the first chapter of his book, Posner argues that *The Iliad, The Oresteia, Hamlet, Michael Kolhaus,* and its modernist adaptation, Doctorow's *Ragtime,* collectively stand for the proposition that civil life under the Rule of Law is much better than natural life under the Rule of Vengeance.[104] They are all literary briefs for the Rule of Law. *Hamlet,* for example, is a brief against sovereign immunity. If Hamlet had only had recourse to legal process, Posner suggests, he would not have had to seek violent revenge against his uncle. Much of the resulting bloodletting thus could have been prevented.[105] All of these works unerringly demonstrate that the bloodletting that follows from the unleashing of human emotion which accompanies the absence of law and authority is not worth the spontaneity of action it permits.

Second, the irrationality, malignancy, and impenetrability of nature and of inner life almost inevitably turn out to be the "real" referent of most of the decidedly nonbenign and irrational depictions of law that unquestionably appear in great literature. Law, of course, is never *itself* irrational or malignant. But it is often *depicted* in literature as profoundly irrational and malignant. This fact needs explaining. The reason for it, Posner explains, is not that so many authors mistakenly think law to be what it is not. In fact, we are reassured that Shakespeare, Melville, and Kafka, all of whom depict law in a less than flattering light, led respectable, lawful, and thoroughly bourgeois lives.[106] The reason these authors represent law as malignant (even though it is not so) is because they use law as a *metaphor* for that which is *truly* irrational and malignant: inner life.[107] Furthermore, the reason law *works* as a metaphor for the profoundly irrational internal life, in spite of law's own irrationality, is that it often mistakenly appears to the lay person to be irrational. For example, Posner explains, a statute of limitations may appear to the lay person to be an irrational constraint on someone's rights in cases in which the underlying purposes of the statute are manifestly not being served.[108] Although the lay belief that the statute is therefore irrational is understandable, it nevertheless is mistaken. The certainty of statutes of limitations serves the entirely rational and defensible end of order.

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104 *Id.* at 25-70.

105 *Id.* at 54-71.

106 *Id.* at 98 (Shakespeare), 135 (Melville), 179 (Kafka).

107 *Id.* at 81, 85, 90, 115-25, 179-86, 196-201.

108 *Id.* at 77.

Thus, though mistaken, the lay perception that the law is irrational and sometimes oppressive serves the literary artist's needs. Because of its *apparent* irrationality, law becomes the perfect metaphor for what the literary artist is always at pains to describe: the irrationality, malignancy, and incoherence of our inner souls.

The irrationality of our inner life also turns out to be, for Posner, the referent for the apparently irrational legal punishments depicted in great literature.[109] Lawfully mandated punishments, like statutes of limitations, are generally rational, even when they appear to be otherwise. Therefore, when a literary work depicts an irrational punishment, that punishment ought be read as a metaphor for internal irrationality, not a description of external reality. This is particularly true of Posner's understanding of depictions of submissive and masochistic citizen consent to the malignant and irrational punitive authority that pervades Kafka's parables about law.[110] Each such embodiment of punitive authority and each corresponding act of submissive consent, he argues, is not "about" the external world in any significant sense at all. Instead, it always is about some utterly private, internal, and most frequently Freudian obsession. For example, Posner insists that Kafka's *The Penal Colony*,[111]—where a military officer first tortures a prisoner, and then kills himself on a torture machine of his own design which "writes" the crime in the body of the accused, writing in his own body the sin of injustice—is not *really* about punishment, justice, or sadism, as it certainly appears to be. Plot notwithstanding, the story is not about anything so banal as the morality or motivation of punitive authority. Rather, Posner argues, the story is a metaphor for the impenetrability of our subjective lives.[112] *The Penal Colony* is about the officer's inability, which is shared by many ambitious, inventive people, to get his visitor to share his passion for the engineered intricacies and technological complexities of his torture machine. Like many other depictions of irrational, malignant authority, *The Penal Colony*, in Posner's hands, turns out to be about nothing more than the "human inability to get others to share in our plans and passions."[113]

Third, the contrast between the rationality of our external and authoritatively controlled behavior and the swirling, chaotic, internal irrationality that motivates it is sharply revealed in Posner's understanding of both law and contract. His discussion of the agreement in *Merchant of Venice* between Shylock and Antonio in which Antonio pledges a "pound of flesh" as security for a loan of money illuminates the con-

109 *Id.* at 35-36, 106, 124-25, 185.

110 *Id.* at 196-201.

111 *Id.* at 115-18.

112 *Id.*

113 *Id.* at 118.

trast.[114] Posner acknowledges and even insists upon the irrationality of both of the contractors' inner lives. Antonio is driven by vaguely suicidal as well as altruistic urges, and Shylock's internal soul is marred by sadism and a thirst for vengeance. Still, Posner fails to condemn the contract *itself*—the external behavioral manifestation of these characters' internal lives—as irrational. Rather, Posner argues, the "spirit of the Bond," when charitably read, is that it is a wealth-maximizing attempt to insure repayment of a loan.[115] Thus, the contract is rational, despite the vividly irrational inner lives of both contractors. Our external contractual choices—indeed, our entire external legal lives—are invariably rational although our inner selves are in utter chaos.

Posner's commitment to a stark contrast between the irrationality, impenetrability, and malignancy of our inner lives and the rationality, objectivity, and coherence of our external behavior is evident not only in his interpretations of literature, but also in his readings of historical fact. Historical figures such as Shakespeare and Kafka, as well as fictional characters such as Antonio and Shylock, Posner explains, had chaotic, emotional, impenetrable, and indescribable inner lives even though their external behavior was thoroughly rational and bourgeois.[116] At some points, he carries this contrast to comical extremes. For example, much of our objectively great artistic writing, Posner explains, occurs in a kind of mechanical whirling-dervish, internal, subjective state. The inner process of a great writer is so unknown, impenetrable, irrational, and emotional—*i.e.*, such a mystery—that the writer himself often has no conscious memory of the process of writing.[117]

The need to exonerate, venerate, and celebrate legal authority also leads Posner to erroneous and even absurd readings of legal critics who rely on literature and literary theory. To mention just a few examples, Posner misreads Richard Weisberg's critique of legalistic resentment and his supporting interpretation of Camus' *The Stranger* as a celebration of murder,[118] misreads my critique of the ethical relativism that underlies some forms of liberal legalism and my supporting interpretation of *Pudd'nhead Wilson* as an attack on legal education,[119] and misreads Terry Eagleton's critique of formalism and supporting interpretation of *Merchant of Venice* as a misguided attack on Venetian contract law.[120]

Finally, although Posner explicitly disavows a moralistic approach to literature, Posner's fear of nature and commitment to the virtue of authority skews his evaluations as well as his interpretations of literature.

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114 *Id.* at 93-96.
115 *Id.* at 97.
116 *Id.* at 98.
117 *Id.* at 231-32.
118 *Id.* at 151-55.
119 *Id.* at 85-86.
120 *Id.* at 105-07.

When literature is good, he suggests, it teaches the lessons of maturity. Dostoevsky's work, for example, is great because it preaches the wisdom of religious resignation as a response to the perceived evils of the world.[121] Correlatively, when literature questions the wisdom of individual resignation, obedience, and discipline and seems to suggest the viability of politics as a mode of life—as does, for example, some of Camus' work—then it simply is not very good.[122] Posner's bottom interpretive line is straightforward. Authority is celebrated in great literature even when it appears not to be (Shakespeare and Melville); when it is depicted as malignant, it is a *metaphor* for something *truly* malignant, such as inner life (Kafka); and, lastly, if authority is inescapably the author's target, then the literary work itself just is not any good (Camus). Those who would suggest otherwise are wrong or worse.

III. The Morality of Authority: One Critique

There is obviously much that could be said about the celebration of authority put forward in this book, and there is even more that could be said about Posner's use of literature to stage it. First, let me register a minor and self-interested complaint. Posner's use of literature to mount his celebration of authority is hypocritical. One of the oft-stated, if minor, themes in this book is that literature ought not be sullied through use and abuse in political debate.[123] Literature, according to Posner, like law itself, is and ought remain apolitical and its use in political debate is entirely reprehensible. Great writers, Posner tells us repeatedly, always have "other fish to fry"[124] than the merely political. Indeed, the misperception common to legal critics that literature which purports to be about law is sometimes *truly about law* constitutes the "misunderstood relationship" referred to in the title. But, surely, Posner's own interpretive and evaluative claims that great literature asserts the futility of collective political action, the superiority of Apollonian values, the rightness of given authority, and the superiority of law over natural vengeance are themselves political claims. In the end, it is simply irritating to see Posner so aggressively doing what he relentlessly scolds others for doing: using literature to make political arguments and reading literature through a political lens.

For example (and this is the only time I'll mention it), the interpretive claim that Posner first made in his answer to my article on Kafka and now expands upon in this work—the claim that Kafka's multiple depictions of law as irrational or malignant are not *really* about law because law is rational and benign, but are about something else which

121 *Id.* at 169.
122 *Id.* at 86-90, 98-99, 169.
123 *See, e.g., id.* at 15-17, 356-57.
124 *Id.* at 355.

truly is irrational and malignant—namely, inner life[125]—may be transparently predetermined by Posner's motivating view of law, but it nevertheless is a coherent claim about a particular author, built upon a consistent if uninspired theory about the nature of law and literature. Literature which depicts irrational law, on this view, must be read as being about something of far greater interest—such as internal irrationality and malignancy—than merely *law*. When that claim, however, is then *coupled* with the claim that works of literature nominally descriptive of the irrational, malignant life of the powerful in nonlegal contexts (such as *Hamlet*) are disguised arguments for the Rule of Law,[126] the first claim that great literature is never about a subject so banal as law looks suspect, to say the least.

This inconsistency is ultimately no more than irritating, however, simply because Posner doesn't take his own admonitions all that much to heart. Posner is clearly more comfortable participating in this new interdisciplinary movement than in trashing its fundamental premise. Of far greater import than Posner's inconsistent claims about the "misunderstood relationship" between law and great literature is the motivating vision that drives both his literary and legal analyses. That motivating vision is more than simply irritating. It is both wrong and profoundly disturbing. For surely, in none of the spheres with which Posner is concerned—institutional, aesthetic, cognitive, moral, or legal—should the powerful forces which have survived across time to become dominant, and thus "authoritative," be permitted to define that which we choose to value. The authorities in our world indeed are forces to be reckoned with. They most assuredly have power. But they do not *ipso facto* define the good. Might really does not make right. Moreover, in none of the spheres of life with which Posner is concerned is resignation, discipline, and obedience to authority—whether the authority be one's elders, the ruling conventions of one's community, a word, a chain of command, or a legal text—a morally acceptable way to live one's life.

Let me address each of the spheres of authority I've identified above separately, for they each give rise to slightly different sorts of problems. First, there are at least two problems with Posner's sobering and parental political claim that, unpleasant as it may seem to the idealistic young, our given institutional world of authority is the best and only of all possible worlds, and that what we ought to do, as we mature, is learn to obey its mandates and accept its flaws. Not only is this "unpleasant truth" not true, but it also is not at all unpleasant. It is a pleasant fiction, not an unpleasant truth. For too many of the relatively privileged, it is not at all unpleasant to learn that there is little or nothing one can do to make a better world. Such a lesson may be unpleasant to the truly powerless;

125 *Id.* at 176-87.

126 *Id.* at 54-62.

but, for the powerful and the privileged, it is a welcome release from responsibility for the consequences of one's actions and inactions. Posner's "unpleasant truth" about how we cannot really do much of anything to change a more or less perfect social world is a paralyzing and false excuse for inaction for those for whom it just is not so.

Although I have no "proof" (and could have no proof), I believe that Posner's corollary phenomenological claim that "young people" inhabit a fool's paradise in which they falsely believe they can change the world because they have not faced up to the "unpleasant truth that the act is a slave to the limit" is also simply false. It may be true that young people sometimes overrate their ability to create a perfect world. My sense, however, is that Posner's claim is almost entirely false for the "young people" who are the most likely audience of Posner's book: law students, young lawyers, and young legal academics coming of age in the last quarter of this century. My sense (acquired anecdotally), is that law students and young teachers and lawyers believe not in their own omnipotence, as Posner claims, but rather in their own *impotence*. Young lawyers at large firms, for example, notoriously describe themselves as "slaves" with virtually no power; they rarely claim to believe they are gods with endless influence. The young person who thinks he is a slave *but is not*—who thinks his power is more limited than it is—is being ruled by a pleasant falsehood, not an unpleasant truth. The young people that I encounter, teach, and work with in the law schools these days are making themselves complacent (and to some degree, undoubtedly, miserable) over a false sense of impotence, rather than making themselves giddy, as Posner seems to think, over a false sense of power.

Second, the people that Posner discusses in this work—both fictional characters and real historical individuals—are mostly lawyers, judges, and legislators who have the very real legal or political power to act other than as they do. Whether pleasant or unpleasant, the fact is that these people have the power to change the world for the better, and they are responsible for either their efforts to do so or their failure to try. The reader of this book should pinch herself every twenty pages to remind herself, notwithstanding Posner's insistence on the necessity of authority and the futility of action, that lawyers, judges, and legislators—not to mention kings and princes of Denmark—are powerful people. Posner's claim that the authority of civilization and its civilized values are beyond reproach and that neither the subjects of the legal fiction Posner discusses nor the primary audience of this book—lawyers, judges, and professors—has the power to change that civilization for the better is simply absurd.

Third, Posner's aesthetic claim that literary value is a function of a work's survival across time and that we ought respect the authority of classics as we respect the authority of civilization, is equally indefensible. Two implications, both troubling, follow from this peculiar argument

that, if something survives, it is therefore *good*. The first is simply that, in the aesthetic world as in the political, we are being asked to relinquish our powers of choice and judgment, our very real and human capacity to determine our own criteria of aesthetic value. That which survives, according to this argument, appropriately dictates our standards of value. Aesthetics, like private life, becomes a sphere of life in which the obedient, constrained act is the good act and in which independent, reactive aesthetic judgment is as wicked as independent political action. The aesthetic good is equated with the strong; cultural might makes right. But this is just wrong. There is no legitimate reason (outside the reasons generated by the peculiar internal logic of the morality of obedience) to believe that in art, any more than in life, that which survives some bizarre Darwinian fight is therefore that which is good.

Even more troubling is the implicit parallel ethical claim that the criterion of moral right and wrong is to be found in the survival potential of particular moral conventions. Again, such a claim is just not true. It simply does not follow from the fact that a practice is widely held to be morally reprehensible or morally acceptable that it is morally reprehensible or acceptable (unless, of course, we simply *define* right and wrong as congruent with that which is widely believed). The conventionalist's claim that shared conventions dictate moral truth simply shields us from the responsibility for our own choices. When we abide by the conventions of our peers and our ancestors (or, more accurately, the conventions of those peers and ancestors who have proven sufficiently powerful to achieve influence) because we feel them to be authoritative, rather than because we have judged them to be right, we actively deny our freedom to do otherwise. We deny our freedom, our power, and our obligation to live truly moral lives when we do nothing but abide by the moral conventions of our time and culture.

There is a further problem here. Moral conventionalism distances us from self-understanding. We have the moral conventions we have (*e.g.*, prostitution is wrong, contracts for the sale of flesh are reprehensible, surrogacy contracts are immoral) *for some reason*. We deny ourselves the self-knowledge to be gleaned from a thorough appraisal of our conventions when we view them as authoritative solely because they are widely shared. This distancing from self-understanding has a very real effect upon lawyering; for, without self-understanding of the grounds of our conventions, we cannot possibly accomplish the fundamental lawyerly task of "reasoning by analogy" from that which is settled to that which is novel. It is striking, for example, how few of us have settled intuitions regarding surrogate parenthood even though we have entirely settled cultural conventions over the propriety of contracting for the sale of babies, the sale of body parts, or the use of a pound of flesh as collateral for a loan. The current debate engendered by the *Baby M* decision vividly demonstrates the cost of denying self-understanding. When we

blind ourselves to an understanding of the basis of our conventions so as to maintain their authoritative control over our decisions, we have no basis for deciding (or even discussing) less clear cases for which our conventions are not so settled.

Fourth, Posner's celebration of hierarchical authority as both necessary and necessarily desirable is also indefensible. The particular manner in which personal authority within a hierarchy is exercised is sometimes "necessary" and sometimes not. Captain Vere, for example, could have decided Billy's case differently; consequently, Vere's claim (reiterated by Posner) that the law, and not the man, executed the morally innocent Billy is transparently unjustifiable. That personal authority in a hierarchy is held subject to higher authority does not necessarily exonerate it. Hierarchical authority is neither more nor less moral than the person who wields it, just as legal authority is neither more nor less just than those who create and apply it. Even well-intentioned authority is susceptible to peculiar pathologies. In hierarchical life, as in family life, when we wield authority over the fates of less powerful "others," we endanger those futures with the remnants of our own psychic pasts. We ought be held responsible for whatever damage we thereby do.

Fifth, if the Critical Legal Studies movement and the deconstructionist and indeterminacy critiques which that movement has elicited, have taught us anything at all, they have shown that Posner's insistence on the pregiven authority of the order imposed by the meanings of words is linguistically indefensible. In the legal sphere, perhaps more than elsewhere, the authoritative textual interpreters who decide constitutional, common law, and statutory cases—judges—are not constrained by either the framers, precedent, or by the statutory text in anything like the way Posner's repeated use of a military metaphor suggests, nor should they be. The meaning of a legal command, like the meaning of any word, is, of course, partly a function of the will of its originator. But it also is a product of the will of its interpreter and the commitments of its interpreter's community. The *extent* to which meaning is a product of interpretation is a legitimate question for debate; in no event, however, is meaning simply *communicated*, as Posner insists. The judge does not simply *obey* a communicated "text" when she decides a case according to law. Rather, judges quite overtly and quite properly choose a meaning from a range of possible meanings. This range of meanings similarly is not "given" from the past. It is a function of her community, her milieu, her world view, her personal history, and the history she shares with her community.

More generally, what emerges as one of Posner's central claims in the latter part of his book—that a judge's moral legitimacy hinges on her willingness to obey and that judicial morality is essentially a "morality of obedience"—is just wrong. If judicial morality is, as Posner insists, essentially a morality of obedience to communicated textual authority,

then judicial morality is in trouble. There simply are no pregiven meanings of legal texts. Judicial interpretation, like all interpretation, requires *either* the interpretive constraints of the judge's community or active judicial choice. The meanings of all legal texts are products of the relationships of power that produce, hear, and interpret them. Every "law" and "legal decision" is composed of words whose meanings are a function of the choices of the powerful, whether those powerful be their drafters or their interpreters. The judge does and should participate in the construction of legal meaning.

But the difficulties with Posner's militaristic image of the nature of interpretation go well beyond the distinctiveness of the judicial sphere. It is not only the meanings of the overtly imperative commands of constitutional framers which are not "given." Rather, the meanings of all of our words and concepts—from the exalted and disembodied "moral principles" that Dworkin and Fiss insist constrain judicial choice to common words and concepts of both legal and nonlegal discourse—are created, not given, and contingent, not necessary. It is because they are created that they are open to challenge, change, and choice. There is nothing "given" about the linguistic meanings of even nonlegal words. Words mean what they mean because of the hidden (or not so hidden) choices of contingently powerful subgroups in our linguistic culture. The linguistic and social bonds created by the "shared meanings" of our language, consequently, are either "communities" of choice or "hierarchies" of power. Either way, just as the judge participates in the construction of the meaning of a precedent, we all participate in some fashion in the creation of linguistic meanings to the extent of our power. The "order of things" reflected in our words and their meanings is, to varying extents, chosen by us, imposed upon us, or a combination of the two. Never is it simply "given."

In a lovely preface to his book *The Order of Things*,[127] Michel Foucault captures the difficulty of analyzing the freedom we create when we glimpse the order in things to which we are otherwise blind because we have mistaken that order for the things themselves. That passage is worth quoting:

> This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought—*our* thought, the thought that bears the stamp of our age and our geography—breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a "certain Chinese encyclopedia" in which it is written that "animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification,

[127] M. FOUCAULT, THE ORDER OF THINGS (1973).

(i) frenzied, (j) innumerable, (k) drawn with a very fine camel hair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies". [sic] In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.

But what is it impossible to think, and what kind of impossibility are we faced with here? . . .

The fundamental codes of a culture—those governing its language, its schemes of perception, its exchanges, its techniques, its values, the hierarchy of its practices—establish for every man, from the very first, the empirical orders with which he will be dealing and within which he will be at home. At the other extremity of thought, there are the scientific theories or the philosophical interpretations which explain why order exists in general, . . . and why this particular order has been established and not some other. But between these two regions, so distant from one another, lies a domain which . . . is . . . fundamental . . . . It is here that a culture, imperceptibly deviating from the empirical orders prescribed for it by its primary codes, instituting an initial separation from them, causes them to lose their original transparency, relinquishes its immediate and invisible powers, frees itself sufficiently to discover that these orders are perhaps not the only possible ones or the best ones; this culture then finds itself faced with the stark fact that there exists, below the level of its spontaneous orders, things that are in themselves capable of being ordered, that belong to a certain unspoken order; the fact, in short, that order *exists*. . . . Thus, between the already 'encoded' eye and reflexive knowledge there is a middle region which liberates order itself: it is here that it appears, according to the culture and the age in question, continuous and graduated or discontinuous and piecemeal, linked to space or constituted anew at each instant by the driving force of time . . . . This middle region, . . . in so far as it makes manifest the modes of being of order, can be posited as the most fundamental of all: anterior to words, perceptions, and gestures, which are then taken to be more or less exact, more or less happy, expressions of it (which is why this experience of order in its pure primary state always plays a critical role); more solid, more archaic, less dubious, always more 'true' than the theories that attempt to give those expressions explicit form, exhaustive application, or philosophical foundation. Thus, in every culture, between the use of what one might call the ordering codes and reflections upon order itself, there is the pure experience of order and of its modes of being.[128]

One small piece of evidence for my claim that it is a "celebration of authority," and not a sentimental inclination to see authority as better than it is, which underlies liberal legalism generally, and not just Posner's version of it, is the relentlessly hysterical reaction of liberal legal theorists to the essentially linguistic insights of the interpretive and her-

128 *Id.* at xv-xxi.

meneutic wing of the Critical Legal Studies movement.[129] Significantly, *but for* its implicit embrace of Posner's "morality of obedience" and the Darwinian theory of value on which it rests, traditional liberal legal theory, far more than literary theory, should have proven a distinctively congenial and fertile field for deconstructionist and hermeneutic interpretive insights. More than other scholars, and certainly more than literary scholars, legal academics should understand and even insist upon the claim that propositional claims about the "nature of things" are, in fact, semidisguised imperatives about the "order of things," about how things *shall be*.

Some mainstream liberal legal theorists, of course, embraced the central insights of hermeneutics, interpretivism, and critical theory far before it was fashionable to do so. No less a "mainstream" scholar than H.L.A. Hart has argued again and again that propositional claims about the "nature of things" in the legal realm are disguised imperatives issued by the powerful. Lawyers, perhaps more than other professionals, should be sympathetic to the claim that, *at least in the legal realm*, behind claims to truth, order, and nature lie claims to power. Indeed, the legal culture, more than any other, exists "between the use of what one might call the ordering codes and reflections upon order itself, [in which] . . . there is the pure experience of order and of its modes of being."[130] The antipathy between liberal legalism and deconstructionism is not, at root, theoretical. The liberal legalist understands and, indeed, *does* exactly what Foucault describes:

> [he] emancipat[es himself] to some extent from . . . [the culture's] linguistic, perceptual, and practical grids, [and] . . . superimpose[s] on them another kind of grid which neutralize[s] them, which by this superimposition both reveal[s] and exclude[s] them at the same time, so that the culture, by this very process, [comes] face to face with order in its primary state. It is on the basis of this newly perceived order that the codes of language, perception, and practice are criticized and rendered partially invalid. It is on the basis of this order, taken as a firm foundation, that general theories as to the ordering of things, and the interpretation that such an ordering involves, will be constructed.[131]

There may be no better description of traditional legal and judicial reasoning than this.

If this is so, then why, in the last fifteen years, has the critical scholars' insistence on hermeneutic indeterminacy generated such hysteria from liberal legal theorists? If nothing else, Posner's lengthy refutation of the Critical Legal Studies movement lays utterly bare the emotional basis of liberal legal antipathy to the critical scholars' tireless demonstra-

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129 *See, e.g.*, Carrington, *Law and the River*, 34 J. LEG. EDUC. 222 (1984); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

130 M. FOUCAULT, *supra* note 127, at xxi.

131 *Id.* at xx-xxi.

tions of legal indeterminacy. By insisting on the necessity of interpretive choice, the critical scholar uniquely insists that the interpreter *actively participate*, and not simply acquiesce, in the creation of meaning. According to the critical scholar, the interpreter, like the originator, participates in the creation of the "order of things" assumed by and constituted by the text to a degree dependent upon the amount of power the interpreter wields; in no event, however, does the interpreter simply "apply" a pregiven natural meaning. This central critical insight is threatening to liberal legalism not because it challenges the epistemological commitments of liberal legalism—it does not—but because it challenges the liberal legalist's moral and existential commitment to authority and obedience. If the critical scholar is right, there is simply no way that obedience to the commands contained in the disembodied meanings of pregiven "words" or "texts" is an even possible mode of life, much less a good one. For those who have had, in Foucault's words, "the pure experience of order and of its modes of being," obedience to the commands of others contained in the words we use is simply not a viable response to the individual's existential situation. If Posner's book can be taken as representative, then the critical theory movement is threatening to the liberal legalist because by laying that truth bare, it robs him of the power to deny freedom.

Finally, and for all of the reasons recited above, Posner's claim that legal authority is both necessary and necessarily good and that a plan of life that centers upon obedience to lawful authority is a plan of life worth celebrating is plainly wrong. Legal authority is not necessary, stable, or unchanging. There is simply no rationally defensible reason to think of extant law as unchanging. Whether we view law as "relatively stable" (as does Posner[132]) or as in a state of "constant flux" depends entirely on our vantage point. If we stand far enough removed, law may appear to be relatively unchanging. From a closer perspective, however, it is just as obviously the case that law continually is being changed and recreated. There is nothing necessary about the particular legal institutions, legal decisions, or legal concepts and legal vocabulary within which we construct our lives and constrain our choices. Our law is entirely contingent; any and every part of it could most assuredly be and have been otherwise.

Just as clearly, nothing is necessarily just, benign, or desirable about our extant legal authority. Law reflects particular and changing political choices, commitments, and visions which may or may not constitute a desirable form of social life; it is communicated in words whose meanings are a function of the choices—no matter how deeply embedded—of the powerful members of particular interpretive communities which may or may not impose a decent order upon the nature of things; it is applied

132 R. POSNER, LAW AND LITERATURE, *supra* note 1, at 74.

through the mandates, edicts, and commands of particular judges who may be driven by wisdom, compassion, principle, sadism, or fetish; and it is interpreted against the backdrop of a civilization which may or may not be worth preserving. Whether law is good, bad, or generally worthy of our respect is a pressing question that constantly demands an answer. The lawful act is not necessarily the good act, and the legally obedient life is not necessarily the good life. In law, as in other spheres of life, authority is not necessarily just; obedience to authority *qua* authority is not a morally defensible plan of life.

IV. CONCLUSION: A FEMINIST ALTERNATIVE

Whether, as I have argued in this review, the celebration of authority endemic to liberal legalism is motivated by a Calvinist thirst for the certainty, clarity, and possibility for judgment presented by external authority, or by a sentimental inclination to see our authorities as better than they are, it nevertheless constitutes a profoundly misguided view of our potential, nature, past, and future. For that alone it surely ought to be resisted in law schools and elsewhere. No matter what motivates it, the celebratory attitude toward authority manifested in liberal legal discourse—its overtly authoritarian denial of the possibility of existential freedom, its nihilistic insistence on the futility of politics, its illiberal denigration of the false promise of youth and individuality, its militaristic battle cry against the dangers of communitarian ethics, and its complacent insistence on the desirability of the authoritarian status quo in political, ethical, cultural, legal, and epistemological life—constitutes an extraordinarily ugly delineation and limitation of our human potential.

Of course, that ugly denial of our freedom and our duty to recreate our present world is hardly limited to the legalistic mind set. Nor is it new. In fact, in a prescient passage, Bertrand Russell elaborates on Aristotle's similarly complacent, and similarly reactionary, ethics:

> The views of Aristotle on ethics represent, in the main, the prevailing opinions of educated and experienced men of his day. They are not, like Plato's, impregnated with mystical religion; nor do they countenance such unorthodox theories as are to be found in the *Republic* concerning property and the family. Those who neither fall below nor rise above the level of decent, well-behaved citizens will find in the *Ethics* a systematic account of the principles by which they hold that their conduct should be regulated. Those who demand anything more will be disappointed. The book appeals to the respectable middle-aged, and has been used by them, especially since the seventeenth century, to repress the ardors and enthusiasms of the young. But to [one] with any depth of feeling it cannot but be repulsive.[133]

For anyone with depth of feeling, Posner's denial of freedom, youth, spontaneity, romanticism, affect, and nature, and his relentless insistence on the virtues of authority and "prevailing opinion" in law and else-

[133] B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 172-73 (1945).

where, cannot but be repulsive. But our analysis obviously cannot stop there. The liberal legalism premised on an attraction to authority is not *only* "repulsive." Its implications are also demonstrably wrong. Our civilization is not perfect, and our individual and collective powers to change it are not so severely constricted as Posner insists. The critical scholars are right to insist that meaning is contingent, and that we might, can, and should use our language creatively to construct other, more true and more loving meanings than those presently reflected in all of our discourse, but particularly the legal. We ought not acquiesce to the limitations imposed by "the order of things." Moral skeptics as well as moral realists are right to insist on the contingency of our moral conventions and to insist that we might, can, and should use whatever power we have to question the "moral conventions" of our extant community. Those of us actively participating in North American collective life in the 1990s—which includes everyone in the U.S. law school community—ought not acquiesce in the presently stagnated moral conventions of our own national community.

Similarly, modern literary critics are surely right to insist on the contingency of aesthetic value and to insist that we might, can, and should use whatever power we have to question and destabilize the sanctity of "classics." We ought not acquiesce in the definitive vision of aesthetic value bestowed by the survivors of some Darwinian struggle. The CLS scholars are also surely correct in insisting on the contingency of law, in insisting that lawyers, judges, and legal academics might, can, and should use their legal power to create a more just and more loving community, and in insisting that as teachers we might, can, and should use our pedagogic power to insure that our students will do just that. We ought not acquiesce in a legal order that refuses to even articulate our ideals, much less strives to achieve them. Such acquiescence in the "order of things" is neither necessary nor desirable.

Yet if my analysis of liberal legalism's motivations is right, the CLS scholars' largely historical attack on liberal legalism's sentimentalism, while important, will be heard by many liberal legalists as simply beside the point. Of course, to whatever extent that liberal legalist complacency is grounded in a falsely sentimental view of the necessity and desirability of authority, a dose of critical history is surely the cure. We do indeed need to understand and teach law as the product of contingent choices made by particular people who could well have decided other than as they did. Only then will we understand that we can improve upon those decisions. However, to the extent that the liberal legalist's acquiescence in the status quo is grounded, not in a sentimental misconception about the virtue of extant law, but in a thirst for the certainty, clarity, and restraint upon the will facilitated by institutional authority, and, to whatever extent *that* thirst is itself rooted in a fear of nature, subjectivity, spontaneity, and emotionalism, the CLS scholars' historical demonstra-

tion that law is contingent and could well have been otherwise is simply nonresponsive. If the liberal legalist's nightmare depiction of our existential and natural circumstance is correct, then *any* authoritative legal choice, no matter what the social vision or lack of social vision it presupposes, is acceptable and ought to be respected. *Any* legal choice, after all, imposes order; order, regardless of content, is better than the random malignancy of our inner nature, which freedom and change continually threaten to expose. That those choices could have been different, and even could have been better, pales in significance when contrasted with the horrific state from which every legal order necessarily delivers us.

Thus, while critical legal scholarship has proven a tremendously powerful antidote to the sentimentality in liberal legal discourse, it has not proven responsive to liberal legalism's less explicit but equally foundational authoritarianism. Critical legal scholarship, particularly critical legal histories, offers a clear understanding of the historical contingency of legalism and an important antithesis to liberal legalism's sentimental view of the morality of extant power. It offers nothing, however, that even remotely counters the fear of nature, subjectivity, spontaneity, and freedom that is, at least in part, the emotional root of legal liberalism's authoritarian embrace of order. I suspect that this is because the critics do not yet well understand that fear, although it may be because they share it. But to combat the ignorance and complacency of false sentimentalism, we need knowledge, particularly of our past. To combat the fear that our malignant subjective nature will explode with every minuscule crack created by a change in the extant order, however, we need *hope*—a hope that is both mindful of history and firmly grounded in social vision. Critical Legal Studies is long on explosive and debunking histories. Its scholars have well shown the contingency and malignancy of many of our legal orders. But they are notoriously short on hope.

I suspect that it will ultimately be feminism, feminist jurisprudence, and feminist legal theory—not the Critical Legal Studies movement—that develops a vision and an account of law that is responsive to the authoritarian dimension of liberal legalism. It is too early—way too early—in the development of a feminist jurisprudence to say that feminism has already done so. Nevertheless, for several reasons I believe it is more likely to do so than the Critical Legal Studies movement. First, feminists share the CLS scholars' sensitivity to and criticism of liberal legalism's sentimental strand. Feminists understand both the contingency of legal choice and its malignancy. Feminist jurisprudence, however, unlike the Critical Legal Studies movement, promises more; it is in those promises, not yet fulfilled, that one can discern the beginning of a response to liberal legalism's authoritarian side and to the fear of both internal and external nature that is its affective root.

Most importantly, it is feminist jurisprudence (at least some strands), not critical scholarship, that values, rather than fears, the

beauty and necessity of both the external and internal natural order and argues for a world-view that seeks harmony with nature rather than dominance over it. Similarly, it is feminism, rather than critical scholarship, that values, rather than fears, subjectivity. It is feminism, rather than critical scholarship, that self-consciously grounds our moral capacity in our affective, empathic, and emotional subjective life; it does not regard that subjective affective life as something dangerous which must be controlled by either moral principle or legal mandate.[134] For all of these reasons, I believe that feminism, rather than critical scholarship, offers a truly expanded vision of what it means to be a human being, a natural human being, a moral human being, and a social human being. Thus, I see it as feminism, rather than critical scholarship, that is actively and self-consciously laying the groundwork for a vision of law in society that will be more loving, more natural, and more just than the Apollonian vision embraced by modern liberal legalism. It is feminism, and perhaps *only* feminism, in the modern legal academic world that teaches us to learn from our forgotten nature, to listen to our hearts, and to trust our deepest selves, and to thereby reclaim our lost and alienated authority over our collective as well as individual fates.

[134] For an excellent review of the relevant feminist literature, see Resnick, *On the Bias*, 61 S. CAL. L. REV. 1877 (1988).