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Law and Fancy

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LAW AND FANCY

*Robin West**

POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE. By *Martha C. Nussbaum*. Boston: Beacon Press. 1995. Pp. xix, 143. Cloth, \$20; paper, \$12.

Martha Nussbaum's¹ graceful book *Poetic Justice* is an elegant brief for the importance of our capacity for imaginative "fancy" to our moral and legal lives.² Imaginative fancy, Nussbaum argues, allows us to know the internal substance and quality of the lives of others. It allows us to come to appreciate, to understand, to share, and ultimately to resist others' suffering (pp. 72-77). It is, in short, the means by which we come to care about the fate and happiness of others. It is a part, but not the whole, of our capacity to transcend a narcissistic and infantile egoism. It is therefore central, not peripheral, to our capacity for moral judgment, and it is accordingly central, not peripheral, to our lives as public citizens (pp. 1-12). Fancy is a part, not the whole, of what prompts us toward a generous, humanistic, egalitarian, and democratic stance toward others. Fancy is a part, not the whole, of what enables us to give a due regard to the individuality, the dignity, and the irreducible worth of our fellows.

Given its importance to our moral, political, and legal lives, Nussbaum argues, we should not only study our capacity for imaginative fancy, but we should also value, nurture, and encourage it. Reading modern realistic fiction, particularly (but not only) in novel form, is central to that end (pp. 1-12, 49-52). The modern realistic novel, Nussbaum argues, is the fanciful genre, *par excellence*. Through reading realistic novels — and only to a lesser extent watching films or reading history — we come to understand

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2. This short book contains a number of promises of work to be developed in the future. The most important promise the book contains, however, may be implicit rather than explicit. In this work and elsewhere, Nussbaum acts on her clearly deeply felt conviction that the western literary and philosophical canon, correctly and critically read, suggests a case for a moral and political structure that is at once humanistic, egalitarian, generous, and liberal in its respect for individuals and communities alike. If sustainable, this is a claim of tremendous importance and great hope, not only to law-and-literature or law-and-humanities scholars, but obviously for all engaged citizens in liberal societies. *Poetic Justice* does not directly argue for this claim although the first two chapters in particular — which rest almost entirely on interpretations of Dickens's *Hard Times* — suggest it.

the subjectivity and the perceptions of others, and we move some distance toward actually sharing in that subjectivity (pp. 4-7). More striking, though, we come to *care* about these fictional characters. If written well, the characters are so richly detailed that we actually concern ourselves with their projects, we share in their assessments of their lives and life situations, and we worry about their fate (pp. 7-9). This care for the fictitious lives of others is an important part — maybe the most important part — of the distinctive experience of reading realistic fiction. Because care for the real lives, fates, and projects of others is such an important part — maybe the most important part — of the moral point of view, it follows that the capacity to read and respond to narrative fiction is related, perhaps quite intimately, to our capacity for moral reflection and action. The experience of reading a novel and then engaging in the flight of fancy it engenders is not just a reminder of our moral capacities; it is training for them. Learning to read novels sympathetically is a part of our moral education (pp. 13-52).

More specifically, although they are never spelled out quite this explicitly, at least three arguments run through *Poetic Justice* regarding the relation between fancy and our moral lives. First, Nussbaum directs her elaboration of the capacity for fancy, and its relation to novelistic realism, to an internal, decidedly friendly critique of utilitarianism (p. 66). Both classical utilitarianism and its twentieth-century cousin, the normative law-and-economics movement, could attain much more sound footing if they would recognize the necessity of sympathy to moral judgment (pp. 3-33, 46-49). Utilitarianism *at its best* counsels a due and equal regard for the interests and well-being of every person affected by a moral or legal decision. It also requires a tentative assessment of the components of well-being — of the nature of suffering and of the good life — which are independent of, and even at times contrary to, the felt desires of individuals or communities (pp. 46-49, 66). Knowing an individual's external circumstances or chosen "preferences" among a range of market options does not aid an understanding of either that individual's subjective interests or the nature of the good life. Rather, one must know something deeply individualistic about the experiences, perceptions, and aspirations of the other, and at the same time know something deeply universal about the conditions of general well-being or of the ideal life. To *know* both the subjectivity of another human being and to know something of the objective content of the good life requires the capacity for fancy. Classical utilitarianism and modern normative economics both run aground when they try to eschew fancy and supplant it with more readily quantifiable sources of data. The gain in quantification, predictability, and precision is nowhere near the cost to moral *depth*. The behavioral criterion of well-being at the heart of normative economics

or utilitarianism is superficial when stripped of its relation to the internal subjective experience of life. By eschewing concern for subjective experience, both classical utilitarianism and twentieth-century law and economics gain a facility for precise quantification, but they do so by running a very real risk of inhumanity — of maximizing a sterile and behaviorally defined value without regard for the organic, lived consequences of legal or moral decisionmaking.

The second argument, elaborated upon in the third chapter, is in my view the heart of the book (pp. 53-78). In this chapter, Nussbaum argues that fancy relates not just to utilitarianism or to sound normative economics, but to moral decisionmaking generally. Fancy, Nussbaum argues, sharpens the capacity for those rational emotions — sympathy, fear, and revulsion — that in turn inform the moral sentiments of the judicious spectator. Doing the right thing and knowing the right thing to do require an understanding of the value of the consequences of actions to those affected by them, and that value is in turn partly a function of the quality of the *feelings* of the persons affected. Our own sympathetic feelings, or responses to the dilemmas of others, are windows to a rich assessment of others (pp. 72-77). To borrow from Adam Smith's original elucidation of this idea, when I see someone getting hit in the shins with a stick, I wince in pain because I am sympathetically sharing in the pain of the victim.³ I share in the subjective, psychic, sensory experience of *pain*; I do not share in the bruising of the skin, muscle, and bone. That sympathetic echo of the victim's *feeling* — his pain — is a central component of my moral conviction that it is wrong to hit people in the shins. Our own sympathetic feelings — our capacity to share in the actual experience, albeit not with the same intensity, of the feelings of others, particularly their unpleasant feelings — are barometers of the emotional or simply the subjective well-being of others. Since feeling is in turn a central component of well-being — the subjective misery that goes with the experience of *hunger*, for example, detracts from well-being, just as does the objective reality of malnourishment — the capacity for sympathetic engagement in the emotional or subjective experiences of others is a necessary, not peripheral, component of moral judgment.

The third argument, alluded to throughout the book but most explicitly stated in the final chapter, *Poets as Judges*, is that fancy informs not just our moral sense, but, more specifically, our sense of justice. Accordingly, the judge who employs her capacity for fancy will simply be a better judge (pp. 79-122). Another way to put the point, I think, is that fancy and the knowledge it facilitates are com-

3. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3-5 (George Bell and Sons 1875) (1790).

ponents of *justice*. To judge common law cases, the judge must engage the subjectivity of the litigants if she is to do a good job. If deciding the constitutionality of a state law prohibiting homosexual sodomy, for example, she must ascertain the impact of such laws on homosexual citizens (pp. 111-19). When deciding a sexual harassment case, she must decide whether a pattern of behavior might reasonably be expected to prove unsettling to female workers (pp. 104-11). When determining whether a state is liable under civil rights acts for its failure to protect its youth against violent assaults by family members, she must assess the consequences, for a particular child, of that failure. Such a judge will have to enter the world, the sensibilities, the attachments, the projects, the sensitivities, the vulnerabilities, the anguish, and, yes, the suffering of the closeted gay or lesbian citizen, the sexually harassed female worker, or the violently abused four-year-old boy. That in turn requires, by necessity, not legal deduction and not even rational calculation, but rather a *flight of fancy* for almost any judge. She, of course, may have *experienced* being closeted, harassed, or violently abused. But very likely she has not. The judge deciding virtually *any* legal question will encounter at some point the need to understand, assess, weigh, and sometimes give voice to the subjective experiences of others. The fanciful ability to live momentarily the life of the other is an obvious prerequisite for our ability to do so, and to do so well rather than poorly. The ability to do so, then, is a part of our ability to do justice.

I will not comment here on the arguments of the first chapter of Nussbaum's book — that utilitarianism or normative economics, or both, uninformed by narrative wisdom risk being sterile, and that a sensitive reading of both Dickens's *Hard Times* and Wright's *Native Son* underscores that truth. Nussbaum has written elsewhere at greater length on the pitfalls of both utilitarianism and normative economics when not informed by what she calls "love's knowledge."⁴ I have written on related topics elsewhere,⁵ and I do not want to use a book review format simply to repeat myself. I have also commented elsewhere on Nussbaum's use of canonical fiction toward egalitarian and progressive political ends, broadly speaking, and the quite stark differences between the ways that she and others within the law-and-literature movement tend to read canonical fiction.⁶ Instead, I will focus on the arguments of the middle two chapters, arguments concerning the role of imaginative fancy in moral and judicial decisionmaking. I should stress at the outset that I am largely sympathetic to the general claims Nussbaum makes.

4. MARTHA NUSSBAUM, *LOVE'S KNOWLEDGE* (1990).

5. See ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993).

6. See Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1200-02 (1996).

Nevertheless, I think there are a number of very real and deep problems with them. The book would have been more powerful had potential objections received more of an airing. In the remainder of this review, I want to raise three objections and attempt to answer them.

The first objection goes to Nussbaum's quasi-psychological claim about the nature of moral reasoning. In the end, it is simply not at all clear that reading realistic novels strengthens one's ability to even appreciate, much less sympathetically engage, the sufferings of others in a morally meaningful way. Let me try to make a bit more concrete what I take to be Nussbaum's claim by drawing on my own reading experience. Last summer, I read a novel, *Mason's Retreat* by Christopher Tilghman,⁷ about a family on Maryland's eastern shore that contained, among much else, a well-written and gripping description of the accidental drowning of an adolescent youth in the Chesapeake Bay. The boy was attempting to run away from his family before their departure for England — ironically so that he could stay on the dilapidated farm that his family had barely managed to run for the prior two years and that he, alone among the family members, had come to love. The boat he had constructed for himself was not seaworthy, and he drowned. The same summer, I read in the newspaper of an accidental drowning of two very real children in the Chesapeake Bay. They had gone canoeing with their uncle, and that canoe similarly proved not up to the test of an unexpectedly strong gust of wind. The uncle not only survived the accident, but struggled unsuccessfully to keep the two children alive and afloat. One of the children died in his arms. Both stories were terrifying to me and indescribably sad. I well remember sitting in my back yard crying truly inconsolably — “like a baby” — for the small children, their parents, and their devastated uncle. I also remember tearing up, although not so hysterically, to be sure, for the young boy so artfully drawn in Christopher Tilghman's fine novel. The details of both the fictional and real stories of these dead children have stayed with me more than I would wish. It is, to be sure, quite interesting that my emotional reactions to these two stories, albeit different in intensity, were so very *similar*, given that the fictional drowning never occurred while the newspaper story most assuredly did. But it does not at all seem right that I reacted as strongly as I did to the newspaper story because of my ability, honed by the reading of realistic fiction, to engage in fancy. Rather, it seems closer to the truth to say that I sympathized with the children and the adults in both the real and fictional stories because I am a mother of young children, because I am myself frightened of large bodies of water, and because I have

7. CHRISTOPHER TILGHMAN, *MASON'S RETREAT* (1996).

warm feelings and memories of early childhood that encourage empathetic responses to stories regarding children, their vulnerabilities, and the tragedy of their suffering. I suspect that my emotional responses, my moral sentiments, and my style of reading are *all* more influenced by other and more basic experiences — primarily early childhood experiences of nurturance, love, and connection — than by one another.

Like some, but certainly not all, readers of fiction, I am easily captured by realistic novels. I readily and willingly suspend disbelief and get caught up in the net of fictional characters. I fully see myself as Nussbaum's reader of narrative, realistic fiction. Just as Nussbaum suggests I should, when I read fiction I quickly come to care — and care a lot — about what happens to the central characters (pp. 30-36). I know, though, that other readers of fiction, including many readers who care deeply and sympathetically about the very real suffering of others, just are not easily captured readers: they always *know* they are reading fiction, they maintain distance from the characters, they are more aware of the craft of the story than immersed in it, they witness rather than participate in the tragedy or irony of the characters' lives. They do not get caught up.

Furthermore, whether or not one gets caught up in narrative fiction may be *inversely* correlated with expertise. It may be that I get as caught up in narrative fiction as I do precisely because I do not read much of it and have no expertise regarding it. But I have no idea whether or how that does or does not relate to the depth of my responsiveness to real tragedies experienced by those either close to or far removed from me. I am not claiming that they are unrelated; I just do not know. Similarly, I am not saying that there is no relationship between our moral sensitivities to others and the way in which we do or do not read realist novels, but rather, and only, that it is not obviously true that there is any such relation. The existence of one needs to be argued or shown, rather than simply asserted.

By contrast, it *does* seem fair to say that reading some narrative fiction will broaden the moral sensitivities of readers for a quite different reason: such reading may teach us something about the subjective realities of the lives of others about whom we would otherwise know very little. This knowledge, in turn, may lead us to care about people whom we otherwise would not. We may be moved to care more about the plight of the working poor by reading Dickens. E.M. Forster might have caused a sea change in attitudes toward imperialism or homosexuality, and Harriet Beecher Stowe might indeed have been partially to blame, or credit, for starting the Civil War. Upton Sinclair's *The Jungle* and Steinbeck's novels might have made a difference during and after the Depres-

sion. Toni Morrison's and Alice Walker's and Richard Wright's fiction may yet affect, and positively, our contemporary moral sentiments across and within the divides of color. Indeed, Nussbaum most assuredly insists on this political point (pp. 90-118). Literature — at least the right kind of literature — can and does teach us about, and teach us to care about, the lives of those we are otherwise inclined to keep at a distance, and for that reason alone it is of value.

But Nussbaum's claims for reading narrative fiction clearly go deeper. Reading realistic fiction, she argues, is central to our capacity for sympathy, not only because it teaches us about otherwise inaccessible peoples or cultures, but also because it develops our capacity for sympathetic engagement with others and hence hones our moral sensibilities. This is a more difficult claim to make, and it is a much more difficult claim to prove. Nussbaum succeeds in *making* the claim in this book — which is no small accomplishment. I am not convinced, however, that she moves any appreciable distance toward proving it.

The second and perhaps more central problem I want to discuss lies in the book's basic moral claim. Let us assume the causal claim discussed above: that imaginative fancy, honed by reading realistic novels, does indeed influence our capacity for sympathy and hence our moral judgement. But is it true that fancy *improves* judgment? Fancy, Nussbaum urges, enables us to see the grave error in the calculating utilitarian's willingness to sacrifice one life or one person's suffering for the sake of a greater societal gain (pp. 67-70). Through fancy we come to better appreciate the irreplaceable uniqueness of the individual, as well as the sheer magnitude of one person's suffering. Such knowledge — which, following Nussbaum, we might call love's knowledge — better enables us to assess the costs to suffering individuals of a proposed course of action. This might well be true. I think it is.

The objection I want to raise, which I think is not adequately handled in the text, is that even if fancy does enable us to better appreciate the magnitude and meaning of the suffering of one individual, it may also be the case that the use of imaginative fancy to guide moral judgment might from time to time *overcommit* us to the suffering individual. Precisely because of its discriminating nature, in other words, fancy might overcommit us to the project of alleviating the suffering of the finely rendered, detailed, compelling individual, and might unduly blind us to, or distance us from, the relatively ill-defined interests, sufferings, or lives of those who compose a collectivity. Imaginative fancy might well enable a full understanding of the plight of particular individuals — that is its strength, but it is also, quite clearly, its weakness. Because it not

only gives us a window to the plight of the individual, but commits us to alleviating the individual's plight, fancy may obscure the legitimate demands, needs, desires, or ends of the not-so-finely-rendered collective. Imaginative fancy may lead us astray for the most basic of moral reasons: an *overly* sympathetic response to the dilemma or situation of one individual may cloud rather than crystallize a moral decision, where the actor must balance the interests of an individual against those of a group.

Nussbaum of course knows this, but she seems somewhat unwilling even to clearly define the problem. Her ambivalence goes not only to how the problem should be resolved but to whether it is a problem at all, and if so, of what sort. Her ambivalence becomes most pronounced toward the middle of the central chapter of the book, when she returns to Dickens's *Hard Times* to illustrate the sort of moral insight that is facilitated by imaginative fancy. The passage is worth quoting in full, as it nicely illustrates a tension that reappears throughout the book — as well as throughout law and throughout public moral deliberation:

Sissy is told by her utilitarian teacher that in "an immense town" of a million inhabitants only twenty-five are starved to death in the streets. The teacher, M'Choakumchild, asks her what she thinks about this — plainly expecting an answer expressing satisfaction that the numbers are so low. Sissy's response, however, is that "it must be just as hard upon those who were starved, whether the others were a million, or a million million." Again, told that in a given period of time a hundred thousand people took sea voyages and only five hundred drowned, Sissy remarks that this low percentage is "nothing to the relations and friends of the people who were killed." In both of these cases, the numerical analysis comforts and distances: what a fine low percentage, . . . and no action, clearly, need be taken about that. Intellect without emotions is, we might say, value-blind: it lacks the sense of the meaning and worth of a person's death that the judgments internal to emotions would have supplied. Sissy's emotional response invests the dead with the worth of humanity. Feeling what starvation is for the starving, loss for the grief-stricken, she says, quite rightly, that the low numbers don't buy off those deaths, that complacency simply on account of the low number is not the right response. Because she is always aware that there is no replacing a dead human being, she thinks that the people in charge of sea voyages had better try harder. Dealing with numbers it is easy to say, "This figure is all right" — for none of these numbers has any nonarbitrary meaning. (And really, notice that 500 deaths out of 100,000 is incredibly high for ocean crossings, whether by sea or air). Dealing with imagined and felt human lives, one will (other things equal) accept no figures of starvation as simply all right, no statistics of passenger safety as simply acceptable (though of course one might judge that other factors make further progress on these matters for the present unwise or impossible). The emotions do not tell us how to solve these problems; they

do keep our attention focused on them as problems we ought to solve.
[pp. 68-69]

There is obviously considerable tension in this passage between Sissy's claim — partially embraced by Nussbaum — and Nussbaum's parenthetical concessions, which are more mature, more balanced, and indeed more utilitarian. The starting, critical point is clear enough: the utilitarian teacher is wrong to insist that the numbers and only the numbers matter — Sissy's direct empathic knowledge of the suffering of the shipwrecked or the starving makes clear that one accidental death or one malnourished baby is one too many, whatever may be the social gains. Parenthetically, though, we learn that perhaps the utilitarian's mistake is not so much in thinking that the numbers matter, but simply in using the wrong proportions. Five-hundred deaths per 100,000 passages, Nussbaum suggests in the passage's first parenthetical, is just too high a number. But this objection is quite different from Sissy's. If *this* is M'Choakumchild's error, the debate is *entirely* intra-utilitarian. In the last two parentheticals, as if to drive the point home, Nussbaum entirely concedes away Sissy's position — or whatever is left of it. Nussbaum acknowledges that only when "other things are equal" — an arithmetic relation, of course — is one life lost too many, and furthermore that it may not be practically possible to actually improve the numbers at any particular point in history anyway.

In the next paragraph, when Nussbaum purports to argue directly for Sissy's position and against the utilitarian, this confusion between argument and parenthetical aside comes to a head, and the collapse of the anti-utilitarian position becomes total:

This does not mean that one would not use economic models of the familiar type. Frequently in such cases they can provide valuable information. But one's use of them would be steered by a sense of human value. Nor need emotion-based reasoning hold that human life is "sacred" or "of infinite value," vague notions that probably do not capture many people's intuitions when these are closely examined, and that have generated much confusion in arguments about animal rights, the termination of life, the treatment of severely handicapped humans. We may concede that in some of these cases the emotion-based vision of a single death might distort judgment if steered by such a vague notion of infinite value, and that the "cold" techniques of economics might give more accurate guidance. (For example, we certainly should be ready to accept a relatively low risk of death or disease to attain considerable social gains.) But in this case, I claim, what we are saying is not that the calculation per se is more reliable than emotion per se: we are saying instead that a certain degree of detachment from the immediate — which calculation may help to foster in some people — can sometimes enable us to sort out our beliefs and intuitions better and thus to get a more refined sense

of what our emotions actually are, and which among them are the most reliable. If we had only numbers to play with, and lacked the sense of value embodied in emotions of fear and compassion, we would not have any nonarbitrary way of answering such questions. [p. 69; footnote omitted]

Poor Sissy! By the last parenthetical — the insistence that “we certainly should be ready to accept a relatively low risk of death or disease to attain considerable social gains” — Nussbaum has embraced M’Choakumchild’s position in its entirety. They differ, if at all, only in their assessment of what is and is not a “relatively low risk” of death. Clearly, by the end of this paragraph, Sissy has lost her advocate.

What is the sympathetic reader to make of this? Perhaps we can sum up Nussbaum’s point in the following way: M’Choakumchild and Sissy are *both* mistaken, but in opposite directions: M’Choakumchild puts too much weight on the numbers and not enough on fancy, Sissy the inverse. To be sure, as between Sissy’s view (one death is too many), M’Choakumchild’s (500 per 100,000 is pretty good), and Nussbaum’s (one death is too low, but 500 too high), Nussbaum is probably right. But to reach this conclusion we are engaging in the M’Choakumchild-like reasoning that we are being simultaneously urged to disdain.

I want to return in a moment to explore whether or not Sissy’s view is mistaken, and if so how. First, though, let me comment briefly on M’Choakumchild’s mistaken judgment, since his mistake, not Sissy’s, is the real target of both Dickens’s fiction and Nussbaum’s argument. Again, the central argument of Nussbaum’s book is that M’Choakumchild tolerates a death toll that is too high because he lacks empathic capacity: he underestimates the sheer misery entailed by even one accidental drowning. If he better understood that anguish, if he could somehow imaginatively share it, he would not so cavalierly dismiss the twenty-five people starving in the streets, or sacrifice on the altar of societal convenience the 500 lost at sea.

Let me return now to Sissy’s assessment of value. Ignorant in her innocence of the social gains to be reaped from transatlantic transport, oblivious to qualifications of the all-things-being-equal sort, and relying entirely on her knowledge, born of sympathy and love, of the magnitude and meaning of one child’s death or one human’s suffering, Sissy declares the cost of one life not worth the gain *whatever it may be*. In a moment, I will suggest that Sissy is mistaken in this immature and quite absolute judgment, as even Nussbaum apparently concedes, and that there may be something to M’Choakumchild’s cold-hearted pedagogical claim: Sissy may be inclined to make this sort of error precisely because she reads too much sentimental fiction. But first let me stress that the question of

whether she is mistaken or not should not be begged: it is not all that *obvious* that she is wrong, or that the Luddites, neo-Luddites, Amish farmers, Green Party members, and counter-cultural drop-outs who might agree with her would be wrong to do so. It may well be that if the bureaucrat, or the insurance claims adjuster, or for that matter the juror in a negligence action assessing compensatory damages, fully understood the depths of a parent's grief upon losing a child, the harm to a child of losing a parent prematurely, or the suffering of a hungry child on the street, the bureaucrat and the claims adjuster would quit their jobs. The juror would set damages at a point high enough to bring our convenience and commodity-driven engine of dangerously produced industrial goods and services to a grinding halt. And again, it may be that these people, imbued with Sissy's sympathetic knowledge, would be right to do so. In other words, we should not, in our mature collective judgment, dismiss out of hand the child's insistence that the loss of even one child, parent, brother, or husband to the assembly line belt is not worth the transport, the luxuries, the conveniences, and more generally the consumption that make up modern life. If this is Sissy's assessment — if this is what she means when she pronounces one lost life as too high a price to pay for M'Choakumchild's functioning city or for one passenger's ocean passage — she may be right.

But, as Nussbaum parenthetically suggests, she may not be right, and if she is not, it is worth asking what leads her astray. It may be that like all empathic knowers — my label — Sissy commits herself, perhaps overcommits herself, to the sufferer with whom she sympathizes. Her capacity for sympathy alerts her to the existence of suffering, and her commitment to alleviate that suffering puts her on the path to moral action. Both are surely to the good, and Nussbaum might be right to locate narrative as a social activity which encourages and nurtures both reactions. But surely an absolute commitment to alleviate the suffering of the one regardless of the costs to many is not *always* warranted. Even if Sissy and Nussbaum are right to think that M'Choakumchild has stacked the deck in favor of industrialism by undercounting the suffering of individuals, surely there are many circumstances in which excessive attention to the exquisite anguish of one simply obscures the greater suffering of a greater number.

Whether *fancy* can or cannot be fairly charged with leading to this sort of mistake, I do not know, but it does seem clear that commitments born of sympathetic attachments, whatever their origin, run precisely this risk. Indeed, *whatever* may be the cause of our ability to make individualistic commitments to others — early childhood attachment, honing our capacity for fancy, or some combination — such commitments are *by their nature* exclusive, unbalanced, and *profoundly* discriminating. When we are committed,

truly committed, to the well-being of another, we necessarily violate the utilitarian-egalitarian mandate to treat all equally. When we are so committed to our child, our neighbor, or for that matter to the fate of a character in a work of fiction, we simply cannot equate the interests of the one with whom we have aligned ourselves and all other affected persons. What it means to care for one, in a sense, is to care less for all others. If love's knowledge truly and completely guides moral judgment, the result will not be a better informed and more humanistic utilitarianism. Rather, the result will be profoundly anti-utilitarian, and inequalitarian and undemocratic to boot.

Let me expand a bit on this objection, and then offer a response. Nussbaum, as noted above, suggests that empathic knowledge of the quality of the internal lives of others is honed by narrative and is a corrective to modern utilitarians' and economists' focus on quantifiable data. To this extent, in my view, her argument seems entirely correct. Read this way, her contribution is an internal and decidedly friendly critique of utilitarianism, and to a lesser extent of normative economics. Utilitarianism requires that we weigh the interests of all equally and that we aim to alleviate suffering. Love's knowledge, or fancy, helps us ascertain the nature of the latter and inclines us to do the former where we may otherwise be indifferent. But at least in this book, at least some of the time, Nussbaum seems to be intending a critique that goes further and is not so friendly: she posits a deep and arguably irresolvable conflict between the dictates of utilitarianism and the dictates of love's knowledge (pp. 3-19, 30-33, 46, 48-49, 66-67). The utilitarianism that was the object of Dickens's scorn in *Hard Times* and in some places the object of Nussbaum's critique dictates an equal regard for the interests of all, democratically equated and agnostically entertained: The interests of all count as one, no more and no less, regardless of content. The dictates of love's knowledge, by contrast, are profoundly discriminating and inequalitarian. Like Sissy, when our moral sensibilities and judgments are steered by our sympathies, they are focused rather than egalitarian, and discriminating rather than agnostic. We wish to alleviate the suffering of the individual with whom we sympathize, regardless of interest-toting calculations to the contrary. Sometimes fancy may indeed simply operate as a corrective of an overly quantified utilitarian calculus. But sometimes, as Nussbaum's ambivalence reveals, love's knowledge will conflict with the judgments of even the most enlightened and sympathetic of utilitarian decisions. This captures, perhaps, the conflict between Sissy's pure identification and commitment to the suffering of the individual and Nussbaum's own more balanced — more utilitarian — willingness to weigh that suffering against abstract social gains enjoyed by the undescribed multitude. When such a conflict arises,

it is not at all clear that the utilitarian is wrong or cold-hearted to count the gains to the many in the calculus, or that the empathic knower is right to focus so exclusively on the suffering of the individual.

Now, if it is true, as Nussbaum argues, that the experience of reading realistic novels hones the capacity for imaginative fancy, and if it is also true, as she argues, that the capacity for imaginative fancy improves our moral judgment, then we should indeed encourage and nurture the discriminating reading of fiction. But if it is also true — and I think it is — that at least some of the time, precisely the same capacity — the capacity for imaginative fancy, the ability to sympathetically understand and care for the internal well-being of the other — inclines us toward an excessive embrace of the demands of the one and an unjustified blindness to the sometimes competing interests, demands, or suffering of the multitude, then it follows that we ought to be wary of the project being urged upon us here: novel reading as moral training. Indeed, the tension that Nussbaum develops in this book — between the utilitarian's calculated concern for the pains and pleasures of the multitude and the empathic knower's directed and committed concern for the plight of the hurting individual — can just as readily be turned into a lesson diametrically opposed to the one Nussbaum imparts here. Thus, if fiction reading encourages not only sympathetic engagement, but also impermissible or unjustified bias, then what follows is not that we should read fiction to correct or soften the utilitarian mandate, but rather that we should embrace the utilitarian mandate as a corrective to our all-too-human, fanciful inclination to bind and connect with only a known few.

I would suggest, as a caveat to my endorsement of Nussbaum's argument, that this opposing lesson also is one to which it is worth attending. Realistic novels probably do strengthen our capacity for sympathy, commitment, and care. It is true that sympathy, commitment, and care are at the heart of our moral capacities. But nevertheless, it is also true that — regardless of how well, or how much, we read fiction — our ability to commit ourselves, to care, and to forge ties that bind is severely limited. Indeed, it is limited by definition. We sympathize, care for, and commit ourselves to the particular, the few, and the known. Unsurprisingly, those to whom we commit ourselves are generally those related to us or at least most like us. The result is not only that our beneficence is maldistributed — although that is obviously so. The problem is even deeper. In a world of radically unequal distributions of resources, those limitations on our sympathetic inclinations, on our imaginative fancy, and on our capacities for care further entrench injustice: We care for those most like us or for those with whom we most readily identify, and if we are relatively well off, so will be the objects of our solici-

tude. Even if our sympathetic attachments are extraordinarily generous, and whether or not they are undergirded by fiction reading, a world of moral judgment informed by them alone is likely to be an unjust one.

Now let me suggest a way out. It is true that if we assume as a baseline of the utilitarian mandate the cold indifference of M'Choakumchild and the ignorance of the nature of suffering which he embodies, then imaginative fancy is a sorely needed supplement. The utilitarian seeks to treat all equally and increase total happiness — there is nothing particularly hard-hearted about that. But it is true, as Nussbaum argues and Dickens shows, that if a utilitarian, even if sincere and genuine in his desire to do good, lacks basic empathic regard for the suffering and worth of individuals, the result will be a moral — and legal — calculus that verges on the monstrous. If the moral actor is truly oblivious to the nature — and hence the magnitude — of internal, emotional human pain, his efforts will go awry. What such an actor lacks is love's knowledge. What he needs to do and what he needs to learn is to inhabit the hearts and minds of others and to engage and align himself with their well-being. It is certainly worth contemplating the possibility that realistic fiction encourages that capacity.

On the other hand, if we assume as the heart and soul of the utilitarian mandate not a cold and ignorant M'Choakumchild, but rather a warm-hearted, flesh-and-blood, fully committed, sympathetic, empathic, well-nurtured, and well-read human being, then the risks, or possible errors, of utilitarian decisionmaking are quite different and call for a quite different corrective. The risk of error run by *this* decisionmaker, against which we must guard, is not that she will discount or undercount the magnitude or meaning of human suffering, but rather that she will be excessively and unjustly committed to those to whom she is most closely relationally tied, those with whom she most readily identifies, or those who capture her imaginative fancy. Such a person is not likely to make M'Choakumchild's mistake. But we should concede that such a person is *also* likely to care most passionately about the suffering of *her* children, siblings, parents, kin, neighbors, co-citizens, or, again, those who, for whatever reason, capture her fancy. She is likely to care considerably less for the suffering of strangers, foreigners, aliens, those not related to her, or those to whom she just does not connect. For this person — who is, one would hope, at least outside of the legal academy a more common sort than M'Choakumchild — the cold utilitarian mandate to *treat all equally* — not to favor the close over the far, the family member over the stranger, the national over the alien — is a corrective to her naturally skewed connections, biases, concerns, passions, and commitments. It is a corrective that both she and the rest of us should embrace, however

deep our revulsion at the M'Choakumchilds in our world. We need not worry that it is a mechanical formula that will steer us away from the harsh reality of human suffering or toward an inhuman disregard for our fellows. When embraced by a sympathetic soul, it is a corrective that points us toward the heart of justice.

Finally, the third objection one might pose to this very general claim — that imaginative fancy, nurtured by the reading of realistic novels, is central to moral and hence legal deliberation — is political. Nussbaum makes two claims in her book that can be roughly characterized as political. First, she suggests throughout that imaginative fancy and the realistic novels that spark it instill in readers a quintessentially liberal regard for the dignity, uniqueness, and worth of every individual. Second, she also insists, quite separately, that novel reading and imaginative fancy are central to a generally progressive and egalitarian political sensibility. The first claim — that novels in effect bolster liberalism — is a familiar one and is widely held, as Nussbaum acknowledges, not only by Nussbaum and other liberal defenders of novelistic sensibilities, but also by the novel's Marxist critics, who decry it for precisely the same bourgeois, individualistic, liberal tendencies.⁸ Nussbaum unequivocally endorses this claim: the novel, by virtue of its form, embraces “a liberal vision, in which individuals are seen as valuable in their own right, and as having distinctive stories of their own to tell” (p. 70; footnote omitted).

Of course, whether that is something to cheer or worry over depends on one's opinion of individual liberalism. I do not want to rehash that question here. What I want to focus on instead is Nussbaum's second political claim: that the novel embraces not only liberal individualism but egalitarianism as well. This claim is not so obvious or widely shared; in fact, it exists in considerable tension with the first. One would think that to whatever degree — and there is room for debate — liberalism conflicts with egalitarianism, the novel could not support both. Nussbaum makes at least two different arguments, I think, in support of the somewhat counterintuitive claim to the contrary.

First, Nussbaum concedes that an awful lot of realistic fiction — including, importantly, Dickens's *Hard Times* — is overtly suspicious of collective action that originates on the political left. Nevertheless, she argues, reading about the suffering of the downtrodden and coming to care about them in the way encouraged by realistic fiction is a spur to left-wing or progressive political reform. Against

8. Pp. 70-72. For a discussion and refutation of Marxist critiques of the novel, see RAYMOND WILLIAMS, *Cinema and Socialism*, in *THE POLITICS OF MODERNISM: AGAINST THE NEW CONFORMISTS* 107, 116 (Tony Pinkney ed., 1989). See also pp. 71-72 (discussing and quoting Williams).

this general backdrop, Dickens's reservations about the wisdom of unionizing, for example, should be regarded as an anomaly:

[S]ometimes the novelist's suspiciousness of any form of collective action leads to error — as when, in *Hard Times*, Dickens seems to suggest that it would be better to divert and entertain the workers rather than to change, through trade union action, the conditions of their labor; as when he portrays trade unions as in their very nature repressive toward individual workers. But such a failure in no way indicts the whole approach. More often, I think, the vision of individual life quality afforded by novels proves compatible with, and actually motivates, serious institutional and political criticism — as when, in Sissy Jupe's lesson, the reader's emotions themselves indicate the meaning of the hunger and misery of millions, directing the calculative intellect to interpret the numbers in an urgently activist spirit; as when, in Tagore's mordant portrayal of Indian nationalism, we find the movement's leaders neglecting, in their abstract zeal, the real economic misery of the poor traders who cannot earn a living unless they sell the cheaper foreign wares, while we, with the author's surrogate Nikhil, understand better what it really is to make each life count for one. [p. 71; footnote omitted]

This argument, of course, is a circumscribed one: if we are going to read realistic novels to spur us on toward political action, then we should be very careful to pick the right novels. Only some — in point of fact, most likely only a handful — will point us in the right direction.

The second argument Nussbaum urges against the Marxist critic of the bourgeois novel cuts deeper. Regardless of content, the form of the novel itself — careful regard for the fates of multiple characters in a range of circumstances — implies or embodies a sort of utopian world which might be fruitfully regarded as the goal or ideal of progressive political action. Whatever the political orientation or stance of the novel itself, or of the novelist, the regard in which the novel urges the reader to hold each character, and the moral attitude of respect which the novel instills in the reader should be understood as a necessary component, at least, of the good society toward which the activist labors:

It seems appropriate, in fact, for any form of collective action to bear in mind, as an ideal, the full accountability to the needs and particular circumstances of the individual that the novel recommends, in its form as well as its content. . . . A story of human life quality, without stories of individual human actors, would . . . be too indeterminate to show how resources actually work in promoting various types of human functioning. Similarly, a story of class action, without the stories of individuals, would not show us the point and meaning of class actions, which is always the amelioration of individual lives. Raymond Williams put this point very well, defending traditional realist narrative against socialist criticism:

[I]f we are serious about even political life we have to enter that world in which people live as they can as themselves, and then necessarily live within a whole complex of work and love and illness and natural beauty. If we are serious socialists, we shall then often find within and cutting across this real substance — always, in its details, so surprising and often vivid — the profound social and historical conditions and movements which enable us to speak, with some fullness of voice, of a human history.

In a realist novel such as *Hard Times* we enter, I claim, that full world of human effort, that “real substance” of life within which, alone, politics can speak with a full and fully human voice. This human understanding, based in part on emotional responses, is the indispensable underpinning of a well-guided abstract or formal approach. [pp. 71-72; footnote omitted]

But this is, in the end, not a very satisfying response, either to the Marxist critic who worries that the realistic novel is unduly individualistic and bourgeois or to the liberal critic who worries that socialist art, precisely because it purports to be socialist art, is just not very good. Neither will be satisfied with Nussbaum’s argument here, for two reasons. First, if it is true that the novel is as she describes, then it is not clear, as either a political or an aesthetic matter, why we should value it. The Marxist, egalitarian, socialist, or, for that matter, the democrat can justifiably complain that if this moral stance is the point of the novel, then that is all the more reason the political activist should eschew it on the grounds that this is not time well spent. Instead, the activist should work toward creating a *society* that embodies norms of equality and dignity, not an art form that does so. On the other hand, the liberal can justifiably complain that the artist who aims for political progress, rather than good art, is equally misguided. If one’s goal is art, one should aim to produce good art; if one’s goal is progress, one should, arguably, work directly for the cherished city on the hill.

Second, and more importantly, it is not at all clear that the form of the novel *is* committed to the progressive egalitarianism Nussbaum posits. One can easily construct precisely the opposite case. Nussbaum is right, one might argue, to align the point of the formal novel and the point of liberal society, but she entirely misapprehends what that shared point might be. One might argue that the point of both the liberal society and the realistic novel is not egalitarianism at all but precisely its opposite: a world of opportunity in which the dramatically unequal talents, ambitions, intelligences, strengths, powers, drives, and insights of particular, concrete, valued-for-their-own-sake individuals are given full play. The point of liberalism, one might sensibly argue, is to construct a social world in which the individual, splendid in his unequally bestowed strengths, has a full canvas on which to display the product

of his individual vision. Furthermore, it is a world in which his product and vision will be not only tolerated, but embraced, applauded, and, in a word, *valued*. More to the point, it is a world in which the inequality of resources is more than simply tolerated. Rather, radical inequality — born of freedom — is aggressively, even constitutionally, protected against the opportunity and individualism-squandering egalitarian impulses of the masses. It is a world, to take some examples, in which William Randolph Hearst's mansions, his art collections, and his idiosyncratic and acquisitive vision are as treasured and protected against redistributive madness as Orson Welles's denunciatory depiction of the same in *Citizen Kane*. It is a world in which the inequalities prerequisite to the production of *both* Welles's and Hearst's masterpieces are accepted as integral and essential to expression. It is a world in which the noise and clamor and chaos of individual and unequal expression, productivity, and effort are not only more valued than, but are also quite consciously protected against, the acquisitive and demanding oppressive silence of an egalitarian mandate.

I see no reason, on the face of it, to think that the novel, by virtue of its form, favors an egalitarian over a libertarian conception of the point of liberal democracy. In fact, there are at least two good reasons to suspect that, if anything, the moral valence of the novel will tend toward libertarian over egalitarian excess. The first reason is utterly materialistic: the novelist is participating in a form of work which flourishes under either the protective support of a patron, the legislated subsidy of a government, or the profits driven by market consumption. Either the patron, the government, or the market must positively value the individual vision of the novelist, or like all other art forms, this one will vanish. Perhaps basic conceptions of equality can be used to generate an argument that either patrons, government, or the market should support the arts, although it is not at all obvious how. But whether or not that is possible, it is easy to see the argument from basic norms of liberty. What liberty facilitates is, precisely, imaginative, fanciful expression. On this view, art, including novelistic art, is the point of the entire liberal political project. Whatever may be the case of the artistic impulse, whatever may be the held political world view of the individual artist, and whatever may be the substantive political implication of particular novels, the material base of the novel suggests that its form, if anything, is likely to imply not just a liberal, but a decidedly libertarian and inegalitarian political orientation as well.

The second reason the novel's form may not be as conducive to egalitarianism as Nussbaum hopes is moral. Nussbaum herself hints at this often enough. The novel's form, as she insists, is profoundly solicitous of the individual, his projects, and his fate. It engenders

in the reader respect for the individual, and it is this respect for individualism that may just be incompatible with the egalitarian instincts with which she also wants to credit it. In other words, it may not be possible to insist, as Nussbaum wants to, that the novel is not only liberal and individualist, but *also* egalitarian and progressive as well. Dickens, as Nussbaum shows us, abhorred the misery brought on by poverty during the industrial revolution, but he also hated the single-mindedness of the labor-union movement. The same can be said of John Steinbeck in this country during the Depression. He abhorred the misery of poverty, but also feared the union organizer. Dickens's anti-union animus may not be, as Nussbaum wants to insist, simply a failure of a vision more overwhelmingly or more typically committed to egalitarian progress. It may not be an anomaly at all. Collective action such as union organizing is often frightening to individuals precisely because of its self-conscious insistence on the secondary and contingent status of the moral claims of particular persons over the imperatives of progress. There are many people who do not want to participate in a revolution if they cannot dance in it, and it surely would not be surprising if their number included a disproportionate number of readers and writers of realistic fiction.

I have no idea, upon finishing this book, why Nussbaum does not *insist* on this antithetical relation between the novelist and the Marxist, rather than strive somewhat artificially to deny it. The novel can, and sometimes has, exposed the ugliness of market capitalism obsessively driven by profit. Melville, Dickens, Twain, Sinclair, and any number of others quite explicitly tried to do so, and to no small measure they succeeded. It is also simply true, however, that the novel — indeed, often the same novel — can expose the ugliness of a political sensibility obsessively driven by high-minded progressive reform. The great anticommunist writers such as Arthur Koestler, Aleksandr Solzhenitsyn, Vaclav Havel, and Milan Kundera; American progressives such as John Steinbeck; libertarians such as Ayn Rand; and for that matter popular writers such as Joe Klein all quickly come to mind. The lesson we should draw from that might *not* be the easy claim that the novel can be put to any political end. Rather, it may be that the Marxist critic, the liberal enthusiast, and Nussbaum herself in other passages in this book has it quite right (p. 70) — the novel is indeed the handmaiden of liberalism. That is its strength, not its weakness. That does not make it useless to the progressive political actor. Rather, like liberalism itself, it makes the novel a potent and necessary moral corrective.

Let me conclude by briefly noting that the force of all three of these objections is lessened in the context of adjudication. Whatever may be the connection between imaginative fancy and

our moral intuition, the connection between storytelling and legal reasoning is self-evident. The common law especially, but indirectly all of our judge-made law, proceeds by way of stories, counterstories, and stories within stories far more than by way of logical deduction. As I have argued at length elsewhere and will not belabor here, the trade offs between the gains to the collective and the suffering of the individual are distinctive within the context of adjudication: the judge's mandate is to do justice, not maximize welfare, and to do so requires an astute attentiveness to the internal lives of individuals. It may be entirely proper for the judge to weigh the interests and well-being of the litigants before her differently, and more heavily, than the comparable interests and well-being of the collective. It may be proper for the judge to do so, even if it is not proper for a legislator to do so, simply because of their different institutional obligations. The judge's duty is to the parties before her; the legislator's is to his constituents. And finally, the egalitarianism to which imaginative fancy leads, if it does, is surely not as grave a concern for judges as for legislators. The judge is connected to individuals and to their stories more so than legislators. Justice Breyer was right when he testified before the Senate Judiciary Committee at his confirmation hearings that "what Brönte tells you is [that] . . . [e]ach one of those persons in each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion" (p. 79). He was also right to conclude that "sometimes . . . literature [is a] very helpful . . . way out of the tower" (p.79). To paraphrase, literature can be a help to the tasks of human understanding at the heart of judging. Professor Nussbaum is right, in this book, to endorse and expand upon Justice Breyer's finding. *Poetic Justice* can perhaps best be read as an attempt to help us understand that literature to which Justice Breyer referred, our passionate responses to it, and the role it plays and should play in our legal deliberations.