

197

Donald N. McCloskey

THE ESSENTIAL RHETORIC OF LAW,
LITERATURE, AND LIBERTY

Three recent books—Richard Posner's Law and Literature, Stanley Fish's Doing What Comes Naturally, and James Boyd White's Justice as Translation—struggle over the relationship of law and literature. Fish and White defend the relevance of literature to law; Posner tries to kill the nascent law and literature movement by hugging it to death. Posner's literary criticism is belles-lettristic, concerned chiefly with how "great" a work is. Fish's is social, emphasizing the interpretative community. White attempts to make a new community, in which we come to understand one another by an effort of translation. White's vision is attractive, though it surrenders Science to non-translation. As the sage said, even in science it is translation, and rhetoric, all the way down.

Imagine a public competition: "Write an immensely erudite book on the connections between law and literature." Three contenders for the laurels would be Richard A. Posner's *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988), Stanley Fish's *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary*

CRITICAL REVIEW, Spring 1991. ISSN 0891-3811. © 1992 Center for Independent Thought.

Donald N. McCloskey, John F. Murray Professor of Economics, Professor of History, and Director of the Project on Rhetoric of Inquiry, 700 Seashore Hall, University of Iowa, Iowa City, IA 52242, phone (319) 335-2290, fax (319) 335-1956, is most recently the author of *If You're So Smart: The Narrative of Economic Expertise* (Chicago, 1990) and, with George K. Hersh, Jr., *A Bibliography of Historical Economics to 1980* (Cambridge, 1990). He wishes to thank the editors and the anonymous referees for their helpful comments.

and *Legal Studies* (Durham, N.C.: Duke University Press, 1989), and James Boyd White's *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

Richard Posner is a federal judge, a formidable legal and economic scholar, who reads ancient Greek well and who has led the application of Chicago-style economics to the law. Stanley Fish is a Milton scholar, a literary theorist, and the creator of the remarkable English department at Duke University, where he is also a professor of law, and has led the application of literary criticism to law and of rhetorical criticism to literature. James Boyd White is a professor of law and of English at the University of Michigan, where he is also adjunct professor of classics (he and Posner studied Greek together when they were on the faculty at Chicago), and a leader in the application of rhetorical theory to law and literature.

The law and literature movement is a group of law and English professors, among them Fish and White, who believe that interpretation in law is related to interpretation in literature, that life in literature has relevance for law in courts, and that the humanities speak to lawyers on the job. Posner, Fish, and White are contending over the matter.

The three men know each other and have been contending together for some years. They are all three prolific (their books are collections of published essays, following the rule of the prolific: never publish only once). In person they make an amusing study in contrasts, each a volatile mixture of American types from Midwest populist to Eastern Brahmin. Don't be too sure which is which. Only Fish has appeared as a character in a novel (two, substantively: he is said to resemble Morris Zapp of David Lodge's academic novels, *Changing Places* and *Small World*, with a cameo in *Nice Work*). The Posner-Fish-White trio deserve a joint appearance in fiction, and await their Balzac.

Summaries of the plots of the three books, such as take up a good portion of Posner's own, would go as follows. The first part of Posner's book examines hundreds of pieces of "Literature on Legal Themes," ranging from Homer to Genet, and asks whether literature contributes to an understanding of law. No, he answers, against what he takes to be the claim of the law and literature movement. The second part examines the literature of criticism, arguing that nothing is to be gained from reading law and literature with similar techniques—especially in view of the alarming theories of interpretation favored in departments of English and comparative literature. After a tour of the law of copyright, he concludes with a call for the academic professionalization of law schools, so they can do the study of law and literature properly.

Stanley Fish is also concerned with professionalism. To him it means the creation of speech communities, these being the only foundations for law

necessary—or possible. Meaning in law or literature or life is created in such communities. He finds repeatedly that the speakers do not know what they (that same Posner, for example) are speaking about, blinded usually by theory. Good practice is what we need, not more theories. The interpretive theories of academics have no consequences. Law is rhetoric (the name of his last section) all the way down. We “do what comes naturally” when we speak within a serious community of speakers about Books XI and XII of *Paradise Lost* or the legal compensations for emotional injury: that is all ye need to know.

James Boyd White speaks much of community, too. He begins by scrutinizing the “language of concepts” (that is to say, philosophy) and the language of economics, as in the law and economics movement, led by Posner. He finds them bad for the speech community, since they try to shut everybody up. The large middle of the book then turns to the language of law, in particular American constitutional law. White finds in a rhetorical analysis of opinions the materials for a third language. Making texts out of other texts, as the law does, is “translation.” A good translation acknowledges the nontransparency of language, but tries anyway. It adjusts the rights of the original text to the rights of the reader, a model for justice, *le mot juste*.

To continue the imitation of Posner’s methods of literary criticism, the books can be characterized and given stars, on a scale of * to **** thus:

Posner’s book is an embarrassingly obvious attempt to kill law and literature by hugging it to death. The book is embarrassing in other ways, too, showing the limits of even a very intelligent and diligent mind. Still, he is very intelligent, is very diligent, writes lucidly, and occasionally escapes long enough from aping his high-school English teacher to say things worth saying, such as his illuminating discourse on law and equity in light of *The Merchant of Venice* and *Measure for Measure* (Posner 107–110). So the book gets: *1/2.

Fish writes brilliantly, taking chances that leave earthbound writers gaping with admiration. His titles convey the flavor. Two of several responses to the legal philosopher Ronald Dworkin are called “Wrong Again” and “Still Wrong After All these Years.” His attack on Posner takes its title from a rock and roll song, “Don’t Know Much about the Middle Ages.” The essays are consistently brilliant, in more than style. Still, they do rather tend to go over the same ground again and again. It’s a lot of Fish at one sitting, though you don’t have to clean your plate. For present purposes, then: ***, well worth watching.

White’s writing is engaging, if not as engaging as Fish’s. The argument seems to have more forward motion than Fish’s. White wants to change the way we think about law and literature for the good of both, and for

the good of human communities generally, whereas Posner wants us to stop instead with law and economics. Nobody's perfect: White is addicted to anticipations and summaries of what he is saying. But if I were going to put one of the three books into the hands of a law student it would be White's. So: ***1/2, and save it for your Christmas list.

If I may be personal for a moment, a reader might naturally assume that someone like me would lean towards Posner's book. I am an economist, and furthermore a quantitative, neoclassical, Chicago school economist. Posner's intellectual world is mine, down to details of our educations. We were colleagues at Chicago for twelve years, are on cordial terms as acquaintances (which will I expect survive even this review). We both love economics dearly and apply it with enthusiasm to subjects hostile to it, such as history and law. We agree at least superficially in politics and share an amateur passion for the classical world. I do not have anything like the reaction to Posner's works on law and economics, regular *** and **** items, as to this book. What is going on?

What is going on is that Posner depends in *Law and Literature* on a theory of theory, in literature and in science, that any reasonable person must reject, if the reasonable person has had the time to think it through. The erroneous theory in brief is that literature and science are two cultures, the one about value, the other about fact, the one for entertainment, the other for knowledge. On this theory the law and literature movement and the law and economics movement are contending for the soul of law. Should law be literature or science, value or fact? I am sorry to say that most intellectuals mouth such things. Fish and White and I do not. We are reasonable. Posner is not.

Posner's conviction that science and literature come from different hemispheres dominates his criticism. What most people, and certainly the reporters from *The New York Times* sniffing out scandal in departments of literature, understand as "literary criticism" is in fact a particular branch of criticism, regarded by Posner as the only natural way to criticize. Its modern founder was Matthew Arnold, whom I might as well admit I admire extravagantly (this is a shameful admission in some literary circles, so you can see that I am trying to be fair). Arnold said, in the days before there was anything like an English Department or a Department of Comparative Literature, not to speak of modern Law Schools, that high culture is "acquainting ourselves with the best that has been known and said in the world." The purpose of the critic, therefore, is to determine what is best.

As I say, most people take this as obvious, because they haven't heard of the other things that criticism can do. They think it must be all like movie criticism of the six-line sort (a truncated version even of Matthew Arnold), ending with an award of stars. They have not heard that a critic

might uncover, like a social scientist, the human patterns of imagination (thus the late Northrop Frye of Toronto); or that a critic might analyze the moral consequences of literature (thus recently the venerable Wayne Booth of Chicago); or, *horribile dictu*, that a critic might expose the political context of literary production (thus the wicked and terrible Jacques Derrida of Paris).

What a "critic" means to most people is a writer, as Northrop Frye put it, engaged in "odious comparisons of greatness," "unproductive platitudes," the "itch to make weighty judgements" which has "made the word critic a synonym for an educated shrew."¹ That is, a critic is a grader. Four stars. Two thumbs up.

An ignorant version of such belles-lettrism is what supports the fury in the press against Paul de Man, deconstruction, Stanford University, and other enemies of the Great Books. People who don't know much about the Middle Ages, /Look at the pictures and turn the pages;/Don't know much about no rise and fall;/Don't know much about anything at all may be found courageously defending the canon against the enemies of Western civilization. On a higher level than reporters for *The New York Times*, Posner's book participates in the reactionary fury.

You can spot a belles-lettristic critic by his evaluative adjectives. Posner seldom mentions a piece of literature without feeling called on to assess it as "immensely distinguished," "classic," "best," "great," or "greater." He awards Jane Austen, for example, the title of "distinguished moralist," as though she too served on the appellate bench. He is fixated on the issue of establishing the canon, reading Eliot or Hemingway mainly for the purpose of granting or withholding "the status of classic writers," as he puts it. Posner says in his footnotes that he has read Frye, Fish, Booth, Bloom, de Man, and other critics who show how literature works rather than saying over and over which of it belongs on the reading list. But he has not taken their point. It has been said that to offer gratuitous opinion is to assume that the demand for it is brisk. Posner makes an economic error in overestimating the demand for his literary gradings.

It is interesting to note that in these three writers the belles-lettristic talk of "greatness" in literature decreases in proportion to how believable the writer is as a judge of literature, at least by Posner's standards of distinction. Fish is a full-time literary critic (Posner would call him "immensely distinguished") who has done work many admire on Milton. He offers few opinions of greatness. White has long taught courses in the English department, and has taught literature by English-department methods to law students, but unlike Fish would not pretend himself to be a major critic of literature as such. He notes that "it is now thought to be old-fashioned . . . to ask whether a novel or poem is great, or greater than

some other" (White 98), but he nonetheless itches to make weighty judgments, and from time to time scratches where it itches. Posner is an impressively omnivorous reader (or perhaps I am being fooled again by the footnoting style of the legal profession) but has no professional credentials as a critic. Yet he is the most judgmental of the lot. A sense of an ending is reached in a Posnerian criticism at the star-giving ceremony. As I say, going further down the line one would encounter the deep literary minds at *Newsweek*, issuing grades weekly for the GPA of public opinion.

Beyond grading literature, Posner is anxious to know what it is "about," in a sense that could come from Cliffs Notes as easily as from the work itself: the *Iliad* and *Hamlet* are about "youthful idealism [that] becomes tempered with realism through a series of crises" (Posner 81). What literature is "about" is to be found, says Posner, in the plot and characterization, as though they were some sort of puzzle. Two pages summarize *Pudd'nhead Wilson*, followed by a discussion of what it is "about." Another two pages summarize the plot of the *The Merchant of Venice*, finding "the key" to Shakespeare's "greatness" (Posner 98) in his "brilliant plots," which will surprise most readers of *Hamlet* or for that matter of the *The Merchant of Venice*. After Posner's plot summaries and theme summaries come character summaries, again in Cliffs Notes style. It is all most distressing, for hundreds of pages of useless fluency. How could anyone, the vexed readers ask, cast his eye over so much literature and criticism and yet misunderstand it so completely?

Here is an example of Posner's touch in literary matters: "If I am reading Antonio aright, the providential appearance of Portia casts a remarkable light on Shakespeare's own values" (Posner 95). Note the literary turn in the choice of "aright" (reading literature increases your Word Power), the nice passion in "remarkable," the use of novel metaphor in "casts a light," and the fine literary use of "reading," literature being a secret code whose purpose is to give us a fun time digging out the author's "values." These values, well worth the price, are cleverly hidden in symbols, such as Portia as "the spirit of equity." Literature is like *Where's Waldo?* The upshot is the immensely distinguished insight, "Apparently Shakespeare was not the kind of Christian who thinks it is possible to manage society by using the Sermon on the Mount as one's blueprint of social engineering (not that the Sermon on the Mount was intended to be used for that purpose)" (Posner 98). There's the subtlety that comes from long study. Shakespeare, it turns out, was attacking late twentieth-century social progressives and American Catholic bishops, with their silly notions that the economy is a matter of morality (and in a two-for-one sale we get some fine biblical criticism from Posner, too). Shakespeare is made into a bourgeois conservative. There's a use for literature.

The book consists of such exercises in barbarity. The plot summary of *Antigone* concludes "we are made to understand that Creon has acted with dreadful impiety and must be terribly punished" (Posner 11). "We are made to understand" a moral, summarizing The Point of the Play (note the pieties of "dreadful impiety" and "terribly punished," thrilling to write). The phrase "we are made to understand" conveys Posner's theory of literature, namely, that writers make us understand this or that quasi-scientific finding by indirection. Posner views literature as a method of conveying encoded messages, directing the reader to conclusions easily summarized: don't be backward (*Pudd'nhead Wilson*); don't be bourgeois (*L'Étranger*; you can imagine what he thinks of that one).

Posner's idea of what law can learn from literature is not a way of life or the ethics of persuasion, but "findings" of a scientific character about, say, human nature or legal procedure. The premise of the exercise is that the literature relevant to the law would be the literature that is *about* the law (the arithmetic relevant to the law, then, would be word problems *about* evidence and tort). One is not startled therefore at his argument against reading *L'Étranger* for legal purposes, delivered without irony (irony is not Posner's strong suit): "If one wanted to make a comparative evaluation of American and French criminal procedure, one would not do so on the basis of novelistic descriptions; one would study actual trials" (Posner 88).

So it goes. He argues at length, for example, that law is a common theme in literature because the literature that survives a test of time will deal with universals, and law is a universal, at least within Western civilization. After all, "few people are willing or able to immerse themselves in an alien or forgotten culture" (Posner 75).

Posner's chief literary vulgarity is what may be called the Roto Rooter theory of communication. People communicate, the theory says, through pipes between minds. I send over to you a little pellet of meaning, fully formed in my head before transmission and, we hope, unchanged when you receive it. If not, we have "a communication problem." Call up the Roto Rooter people to ream out the pipe. Then "clear" communication will be restored.

Repeatedly Posner begins to talk like he understands what is wrong with the Roto Rooter theory. "It . . . is too obvious by now that a work of literature is doing something more than conveying to the reader a paraphrasable meaning conceived in the author's mind" (Posner 214). Enlightenment dawns. But then the mind grows slack, and literature becomes again a collection of sententia, pleasant nuggets of wisdom about love or war or, bless us, both, to be transmitted as information from one mind to another like a telephone number: "For most critics, however, that some-

thing more is a depiction of or commentary on some aspect of reality, such as love or war" (*ibid.*). Posner has a mimetic and sentential theory of literature that would startle "most critics" after Aristotle.

What is more important than the many amateurisms of the book (after all, who among us does not make that mistake, if not perhaps at such self-confident length?) is its moral failure. Posner's work is rhetorically flawed, exhibiting a gap between speech and intentions. He says repeatedly that he wishes to see the joint study of law and literature flourish. But it is apparent from the first page that in fact he wishes it to die. He does everything in his power to kill it, in order that his kind of social engineering may flourish in its stead.

A good example of Posner's rhetorical technique is his discussion of the schools of criticism. The trick is crudely obvious: identify criticism with deconstruction, as in the title of the first section (Posner 211), "Deconstruction and Other Schools of Criticism." Deconstruction, which by chance is the most frightening version of literary criticism that could be brought before conservative readers, is "least well understood by lawyers, and . . . is therefore an appropriate starting point. . . ." (*ibid.*). Ho, ho. Posner pretends to be fair to the positions he is attacking, but only the innocent will be taken in by his rhetoric. One wonders if his legal opinions have the same transparently rigged quality.

It is plain as a pikestaff that Posner wants his reader to think that all literary thinking beyond belles-lettrism is unintelligible nonsense from Paris. One can sympathize with his distaste for French opacity. But why then train one's gaze on it? Stanley Fish (who according to Posner is a close substitute for the Parisians) is utterly lucid. What he is utterly lucid about is that law and literature both require interpretation, and that interpretation takes place within communities. (The Parisians say this, too.) Posner quotes *Burnt Norton* most appropriately: "Words strain, / Crack and sometimes break, under the burden, / Under the tension, slip, slide, perish, / Decay with imprecision, will not stay in place, / Will not stay still. . . ." But again he can't quite get to the finish line. He concludes that "The relevance of all this for law is obscure" (Posner 215). An appellate judge who does not see the relevance of "Words strain . . . will not stay in place" is a worry.

As I said at the outset, the key to all this is the dichotomy of Science and Literature. Posner is determined to keep up the wall of demarcation, with snorts of "the relevance of all this for law is obscure." One is reminded of how Michael Polanyi described the outcome of Europe's three-century long embrace of skepticism, as an "inversion." Each philosopher since Descartes has worked "with the whole force of his homeless moral passions within a purely materialistic framework of purposes."² Posner's homeless moral passions work within a purely materialistic framework.

Literature is great fun, to be sure, amusement for an idle hour, but no home for moral passions.

I turn with relief to Fish. But there is not much to say. He is lucid because, as the Preface announces, he has only one thing on his mind: "each chapter finally reduces to the argument in which the troubles and benefits of interpretive theory are made to disappear in the solvent of an enriched notion of practice" (Fish ix). Fish opposes formalism about language, of the sort Posner espouses and practices. "Theory has no consequences," says Fish over and over again.

What he means by this is that a mechanical account of language and its extensions, such as law and literature, is impossible. The British sociologist of science Harry Collins has written a book called *Artificial Experts: Social Knowledge and Intelligent Machines* which makes Fish's point another way.³ "Expert systems" are the computer programs that doctors use to diagnose diseases and that chemists use to grow crystals. Do the systems think? Sure, when "thinking" means "imitating a machine." When it means "participating in a society," as Collins and Fish and I would prefer to say, then, no, systems and machines do not think. Collins enunciates a "sociological uncertainty principle": "When a system is completely understood, it is too late for practical purposes" (Collins 220). That is, mechanized understanding, useful as it is, is not the "situated particularity" of a skilled person.

This argument was made with great rigor by (the later) Wittgenstein, who argued that any attempt to understand reason, mathematics, language, law, etc. solely in terms of articulated, universal rules must break down as soon as one raises the question of the *application* of rules to particular instances. If the application of rules is itself governed by meta-rules then we are caught in an infinite regress, for logically the application of first-order rules must be governed by meta-meta-rules, and so forth. The only way out of the regress is to recognize the existence of a kind of intelligence that cannot be articulated in terms of rule-following, but instead involves insight into particular situations, a kind of insight that is cultivated through apprenticeship within a particular speech community or form of life.

The limit on calculability and sayability applies to language and rhetoric itself. If anyone could get what they wished by shouting, for example, then everyone would shout, as at a cocktail party, arriving by the end hoarse but without having gotten what they wished. H. P. Grice affixed an economic tag to the trumping of speech conventions: "exploitation." As the linguist Stephen Levinson put the point in his book *Pragmatics*,

There is a fundamental way in which a full account of the communicative power of language can never be reduced to a set of conventions for the use

of language. The reason is that wherever some convention or expectation about the use of language arises, there will also therewith arise the possibility of the non-conventional exploitation of that convention or expectation. It follows that a purely conventional or rule-based account of natural language usage can never be complete.⁴

To put it economically, if anyone was so smart as to have a formula for language they would be rich. Or to put it as Michael Polanyi did, skill depends on a "tacit dimension." There is nothing humanistic or airy-fairy about the argument, which arises naturally out of the least humanistic parts of economics, linguistics, sociology, artificial intelligence, analytic philosophy, and the philosophy of science.⁵

So Fish argues that practices are everything. Rules are merely aids to memory embedded in a practice, not transcendental Truths. This is how one learns economics or crystal-making or judging: "The new judge would soon find that she was unable to read the rules without having a working knowledge of the practices" (Fish 123), and later, "Of course, there will eventually come a time when the novice player (like the novice judge) will no longer have to ask questions; but it will not be because the rules have finally been made sufficiently explicit to cover all cases, but because explicitness will have been rendered unnecessary by a kind of knowledge that informs rules rather than follows from them" (Fish 124). Fish has not read Collins or Polanyi (though he cites Kuhn who mentions Polanyi), but he might as well have.

I do not know if Kenneth H. Ashworth, Commissioner of the Texas Higher Education Coordinating Board has read Collins or Polanyi, but like Fish he sounds like he has. According to him, the critics of university administrators these days

want to know where they can find the formal and written plans, the operating manual . . . the controls that will prevent you from doing anything wrong (or right). . . . It is easy to see why auditors have been called "those who come on the field after the battle and execute the wounded." . . . Is neatness what really counts? Baloney! Judgment counts, creativity counts, experience counts, courage counts, integrity counts, fairness counts, sensitivity counts, and intuition counts.⁶

Interpretation frightens people. People want rules, procedures, mechanized thinking, anything but judgment and the tacit dimension. Without artificial languages and carefully filled-in forms they think we stand at the abyss.

Like many of us, Fish is amazed by this fear, because he sees ordinary practice keeping us rooted enough for practical purposes. The fear is that interpretation is a license to say anything that comes into one's head

(Posner wants to reduce interpretation to a determinate puzzle on just these grounds). In confronting such fears in the law professor Owen Fiss, for example, Fish writes, "for [Fiss's] system to work there must be at least some texts—that is, disciplining rules—that have only one meaning. . . . We have seen . . . that (1) there are no such texts, and (2) the fact that there are no such texts is not fatal to the goal of principled interpretive behavior" (Fish 128). The reason it is not is that in practice a text always has a determinate meaning socially and contextually—but only socially and contextually, not in itself. As Fish puts it, texts do not "have" or "not have" single interpretations. Interpretations come from the interaction between text and reader, not from the text alone.

One obstacle to grasping the point is the dichotomy of objective and subjective, popular for a couple of centuries now (since Kant most explicitly, but also since Descartes, and in English, says *The Oxford English Dictionary*, since Coleridge brought Kant to England). The logical empiricist who does not understand interpretation will start shouting that then we would have no "standards," by which she means God's objectivity. Her irrationalist double, on the other hand, welcomes the putative lack of standards, being a devotee of the subjective and the touchie-feelie. Both of these people by a happy chance live in Santa Monica, one working for the Rand Corporation and the other for the Santa Monica City Council.⁷

Both miss the point, in the same way. They are slaves to a solipsistic theory of knowledge, in which the lone person is the test of truth. The solipsism is most characteristic of Descartes, but apparent everywhere in Plato, too, from the *Meno's* slave boy proving mathematical theorems to Plato's uniform contempt for persuasion. After 2,500 years of trying we might as well acknowledge that we cannot find a way to the Objective, the viewpoint of God. Nor is there a solipsistic way of proving that you are not a figment of my imagination. Nor again can we make use of the Subjective: after all, I cannot see into your mind, either.

The alternative to the pointless quarrels between the objective and the subjective is, to coin a term, the conjective. The conjective is what we know together, in society, by virtue of common speech. It is all we can argue about. We have a history together or apart, and this is what makes interpretation possible. If we want to prevent people from being nihilists or authoritarians we should argue against their particular interpretations, not against their theories. "Rational debate," writes Fish, "is always possible; not, however, because it is anchored in a reality outside it, but because it occurs in a history, a history in the course of which realities and anchors [Fish might better have put quotes around the words "realities" and "anchors"] have been established, although it is always possible, and indeed inevitable, that they will have to be established again" (Fish 196).

One would think that legal scholars would have no trouble with such an idea. That law is socially constructed, one would think, is uncontroversial. No one denies that a lot of legal interpretation takes place routinely, as do other speech acts. If there were no interpretation of law in precisely the sense that there is interpretation of literature then we would not need lawyers, judges, and professors of law.

Of course it is possible to misuse theories of interpretation and of the social construction of truth, as it is possible to misuse arithmetic. As Fish observes while attacking the irrationalist half of the rationalist/irrationalist dance team in law, in the usage of some members of the Critical Legal Studies movement "all of a sudden 'constructed' means 'fabricated' or 'made up'" (Fish 227). The protections for truth, says Fish, lie not in rules or methods but in professions and communities, by which he means morality. The law is conjective. The choice is not "civilization and order versus the anarchy of the individual will," the objective versus the subjective, as Posner and other conservatives would like us to believe. The third thing, the conjective, is what we know together and can in fact argue about to a conclusion. We do so every day, in courts of law and in kitchen councils and in other communities.

The old joke is that the guru (in the person of William James) finally has to explain to his disciple that the world is supported on elephants, and "it's elephants all the way down." Likewise, law is rhetoric all the way down. This is the ancient way of speaking, "rhetoric" being not mere advertising fluff (which was Plato's damning contribution to the debate), but as Aristotle said, "the faculty of discovering the possible means of persuasion."⁸ The means of persuasion can include logic and fact as much as metaphor and story. Rhetoric can be misused, of course, but as Aristotle then pointed out: "If it is argued that one who makes an unfair use of such faculty of speech may do a great deal of harm, this objection applies equally to all good things except virtue [*aretēs*], and most to those things most useful."⁹

We can protect ourselves, said Cato the Elder (according to Quintilian), by raising up *vir [mulierque] bonus dicendi peritus*, the good man [and woman] skilled in speaking.¹⁰ The protection from evil in science and other human affairs is not theory, whether philosophical or rhetorical, but education and ethics, matters of practice. The skilled physicist can lie about the experiment if he is a bad man, no matter what method he claims. In the uproar about "cold fusion" the bad young men of physics, coasties all, were willing to use any device of rhetoric to punish Pons and Fleischman, who had the double disability of being chemists and being from Utah. Replication was the least of the physicists' weapons (admittedly, the principals had made it difficult, though difficulty of replication is more usual at

the scientific frontier than the critics averred). One physicist from Cal Tech said cleverly that he would believe the replications when they came from a university without a good football team. Another young physicist, from Yale, and himself given ready access to the columns of *The New York Times*, complained about the University of Utah's unscientific access to the media. *Vir malus dicendi peritus*.

The sociology and history of science have shown that methods are not mechanical, for all that Bacon wanted them to be so and for all that later scientists have claimed them to be so in pursuit of persuasion. Take the supreme good of method, controlled experiment. The choice of the experiment, its operation, its interpretation, and its use all depend on human contexts of argument.¹¹ The human contexts, happily or not, can be tilted. In fact there is no way to untill them. Better to be aware that argument is going on than to pretend that theory can protect us from evil as though by machine.

If a scientist or a scholar or a judge is not good in a wider sense—not merely *peritus* but *bonus*—only by accident will good method lead to good results. On judicial or authorial intent Fish notes: “One cannot understand an utterance without *at the same time* hearing or reading it as the utterance of someone with more or less specific concerns, interests, and desires, someone with an intention” (Fish 100). Here Fish is using the philosopher J. L. Austin’s notion of “speech acts,” namely, the things we do with language. Speech-act theory is another of the many modern rediscoveries of rhetoric, speech with intentions. An intention is not good merely because it is expressed in the right form, no more than a prayer is efficacious merely because it follows the right rules.¹² Says Fish, “Rules *are* texts. They are in need of interpretation” (Fish 121).

White is the more profound on the present subject—unsurprisingly, for it his central concern, being merely tangential to Posner (mainly concerned with law and economics) and Fish (mainly concerned with literature). White could have been speaking of Posner and Fish when he wrote: “I want to put aside both the ‘findings’ conception of interdisciplinary work—which here mainly consists of using literature to establish truths about the inhumanity of law [Posner with a minus sign]—and the ‘technological’ conception—which here mainly consists of using the terminology developed in the current critical theory debates to carry on preexisting arguments about the way legal texts should be interpreted” (White 16–17). Posner and Fish are using the trope of law as literature as a weapon in other battles, Posner against the economics-spurning left and Fish against the theory-spurning right. White concerns himself with the matter of law as literature itself.

He is good on the interdisciplinarity of law and literature, to which Fish

is indifferent and Posner deaf, and he complains of the ways we talk about it: the "findings" of one "field" should, it is often said, be "made available" to another, "as though history or economics or philosophy, say, should pass a plate with the truth on it over to the law" (Fish 13). His alternative is "composition," that is, using two different things to make a third. He wants to use literature and law, changing both by their conversation and making thereby a third thing.

Translation, says White, is the better image than passing the plate of findings. A trade language that is no one's native language is called a "pidgin." If it then becomes a mother tongue, taught to children from infancy, it is called a "creole." The philosopher and historian of science Peter Galison has recently talked about "pidgins" that develop between disciplines. White's main point is that we have separate communities of lawyers and economists or of lawyers and litterateurs, and that putting together the speech of the two will create a third language, a pidgin. In time it may develop into a creole. The linguistic metaphor is better than that of "connecting fields," the metaphor that would occur most naturally to Posner, who lies in the grip of the Roto Rooter theory of communication.

White attacks the very concept of a concept, things behind words, transmitted *à la* Roto Rooter. What he objects to in the political (and other) philosophers is their fixation on concepts, alleged to sit behind words. He is objecting, in other words, to Platonism. His nightmare of conceptual talk is the talk of the worldly philosophers, the economists, with its "implicit imperialism, its erasure of other ways of talking" (White 40). And later: "Literary texts are therefore not propositional [Posner, take note], but experiential and performative . . . not reducible to other terms . . . but expressing their meanings through their form" (White 42). Observe the affinities with Fish. In calling for a literary as against a philosophical analysis, White says, "The modern philosopher's question is, 'What proposition are you advancing?' A better one would be, 'What text are you making?'" (White 39). As he and Fish affirm, texts like the United States Constitution make communities and the communities make the text. That's a good reason for taking law and literature seriously.

White worries that our modernist talk has stripped meaning away from the translation and retranslation of texts. The speech act of making cultures is silenced by method and theory. He calls for "the end of all attempts to treat political or cultural questions as if they were language free" (White 44). In his interesting ruminations on translation towards the end of the book (yet be warned that I find any ruminations on translation interesting) he notes that "there is no position outside of culture from which the original can be experienced or described" (White 252). He calls justice

translation, but denies that the world can be translated directly into a universally translatable language. On the contrary, translation is "an art of assertion within acknowledged limits" (White 45).

And so to the Supreme Court of the United States. Judicial opinion is "a form of life," recommended for wider use. The justices' opinions enact a "conversation in which democracy begins," as Dewey put it. In Chapters 4 through 10 White gives a rhetorical analysis of certain important cases in American law. These are skillfully done, so far as a legal ignoramus like me can judge, and make the point repeatedly that the justices had to make audiences for their language, earning anew the right to judge. White's question is rhetorical: who is the implied reader of judicial opinions? That is to say, what kind of community do they create with their words? White is fearful that the totalizing conversations of economics or political philosophy will destroy democracy, by making words lose their meaning, losing their power to make communities.

White has two obsessions, American law and Greek literature. He brings them together here, as he has before, making them serve a common purpose. Fish and Posner, by contrast, seem clever monolingualists, Fish of literature, Posner of law. White is bilingual.

But not trilingual. His voice is unsure when he speaks of economics, often descending to the level of bumper stickers: People Not Profits. (True, many professional economists—for example, E. F. Schumacher, whom White admires—do not get much further.) White sneers at economic growth, "that is to say, the expansion of the exchange system by the conversion of what is outside it into its terms. It is a kind of steam shovel chewing away at the natural and social world" (White 71). This misunderstands exchange in the usual way, taking it to be a zero sum game. White cannot master his distaste for the vulgarity of economic growth, which ruins the streams for fly fishing albeit turning the water into (doubtless most vulgar) goods for the poor. I am sorry to report that he misunderstands economics to almost the same degree that Posner misunderstands literature.

White objects against economics that it does not describe features of reality that he, as a non-economist, is, remarkably, able to see plain before his eyes. He views economics as imperial, uninterested in translation—which admittedly does describe the economists and economist wannabes he knows best, his former colleagues in law at Chicago. "The radical intellectual vice of our day is to insist that everything can be translated into one's own terms. This is the vice of economics, which has no way of seeing itself as one language among many, and of much modern philosophy, too" (White 259).

I must convey what is right and wrong in this remark. I believe it to be

right about modern philosophy, which has shown repeatedly that it cannot deal with all the reasons for loving wisdom. I admit that modern economics on its face looks monolingual, too, but I know it is not—which in turn gives me pause in believing the charge against philosophy.

I am in a better position than White to decide. With respect to economics he is like someone who does not know Greek criticizing a translation of the *Iliad*. All the lawyers I have read attacking the law and economics movement have this problem. It comes out in their tendency to attack the economics on its own grounds, where the economics is strongest. They attack welfare economics or the assumptions of maximization, and their attacks never rise above the amateurish. The lawyers would do better to exploit their comparative advantage.

The lawyers who love economics, by the way, have the same problem, of not knowing quite what they are talking about when they commend economics to the world. They were socialized elsewhere. Posner, for example, knows nothing of the empirical side of economics and therefore has never been humbled by the data. (This remark takes nothing away from his astonishing command of the parts of economics he does know; and it applies with equal force to many partially educated economists.) Quite naturally, Posner supposes that his friends in economics have taken care of all that. George Stigler told him so, daily. Both the enemies and the friends of law in economics take a naïve view, naturally.

Economics from this naïve perspective looks fiercely monolingual, but I say it is perfectly capable of a cordial bilinguality. White says that we achieve justice as translation “if we can learn to be conscious at once . . . of the languages we use and the intentions we wish to realize through them” (White 260). I call this self-consciousness “rhetorical,” and believe economics can achieve it. Many economists have. In fact I would claim that many economists, whether or not they are entirely self-conscious about it, have a mature appreciation of their language and their intentions—I would instance Milton Friedman and Robert Solow, James Buchanan and Kenneth Arrow. Perhaps White needs to widen his circle of acquaintances among economists.

Where White is persuasive is where he is lawyerish. He is making a point about how communities of language are eroded by bad talk. One worries, of course, that the community he means is what most American left liberals mean, 250 million Americans presided over by our good friends in Washington. The left-liberal “community” is both less and more inclusive than it should be: less because it recommends economic nationalism; more because the communities in which most of us live are smaller by orders of magnitude.

And yet there is something in it. White’s main purpose is to make a non-

economic point—namely, that a world in which the rhetoric of law and economics or of law and philosophy is given full rein is not one in which people could actually live, because community would be ruthlessly undermined by self-interest on the one hand or the transcendental on the other. This is not a point that would occur to most economists or political philosophers (or, judging from the reception of economics and philosophy into modern jurisprudence, to many lawyers). White pushes it with full force, through his readings of Thucydides and Holmes, Robert Frost and Whizzer White.

So a rhetorical description of the law leads to a recommendation for better speech communities. My one objection is that White, and Fish as well, are too modest in one direction, the Scientific. Their case is stronger than they think. The legal and literary style of reasoning is already how scientists argue. The official descriptions and surface rhetoric of science obscure the fact, but fact it is. Science already exhibits the constitutive talk White and Fish admire.

White, like most people arguing this way (such as Jürgen Habermas), separates literature from science. That's the mistake. "As human beings," he says, "we live on artistic and rhetorical, not scientific, terms" (White 265). Then on the page following he makes the usual move, accepting the positivist notion that science consists of propositions. But the positivistic description of science is quite false. It is a premise in all three of these books that Literature and Science are distinct. They all three fail to see the rhetoric in science itself.

The result is that they fail to see the unity of the culture. In the blurb on White's book another legal scholar whom I admire, G. Edward White, speaking of James Boyd White's *The Legal Imagination* (1973, 1985), says that it "persuades one that legal writing, and indeed the 'law,' is not a science but an art." Science versus art. Oy vey.

The segregation of science runs against the declared theme in James Boyd White's book, "to integrate . . . aspects of our minds and beings that we normally separate" (White 3). He wants to integrate law and literature, enough of a stretch one might think. But he and Fish should translate the culture, do what comes naturally, and recognize the rhetoric of science and mathematics.

Why would I say such a provoking thing? All right, literature has something to contribute to law. But surely there is a separate thing called Science, with its well-known Scientific Method, involving numbers and lab-coats and so forth, isn't there? To speak of a "rhetoric of science" is surely oxymoronic, or maybe just moronic. "Rhetoric of law," maybe. But Science goes beyond mere rhetoric, doesn't it?

No, no: wrong again after all these minutes. Posner adopts a narrow

definition of rhetoric, consistent with his view that literature is mere ornament (Posner 271). The reason not to do so is that we need a word for "wordcraft." Rhetoric has been it since the fifth century B.C. You may ask indignantly, Why do we need such a word? (We do not get it if we waste "rhetoric" in the already crowded territory in English of adornment, affectation, balderdash, blather, bluff, bombast, bunk, charlatanry, deceitfulness, frills, floridity, flourishes, floweriness, fraud, grandiloquence, hoax, hot air, humbug, insincerity, lying, mendacity, misrepresentation, ornament, ornateness, ostentation, pretension, quackery, rant, sham, and weasel-words). We need a comprehensive word because we need one that does not have room for a distinction between mere persuasion and actual demonstration. Under the wide definition as wordcraft (Aristotle's definition as against Plato's) first-order predicate logic or controlled experiments are "rhetoric," too.

Splutter, splutter. Why not such a distinction? Answer: If we do not have such a word, then someone will always try to claim the higher ground, and always falsely. It has been like that since Plato. His argument, he will claim, is demonstrative, as opposed to the "mere" rhetoric of his opponents, mere sophists. The philosopher is thus freed of having to give an account of why. It's Plato's Trope. I hold in my hand a proof, such as they have in mathematics—not the wretched opinions they trade in the courts of law—that kings should be philosophers and philosophers kings.¹³ "Don't you know that first-order predicate logic is enough to build a world upon?" the Platonist will ask in 1920. Or, "Don't you know that market capitalism is optimal, according to this blackboard proof?" Or, "Don't you know that capitalism labors under contradictions?" These all have been presented as demonstrative, because existing on a higher plane than mere persuasion. But in each case the so-called demonstration has been accompanied by the indignant, sneering, "merely" rhetorical dismissal of rival positions as unworthy of being discussed. Witness for instance the positivists' dismissal of metaphysics, or the analysts' dismissal of "Continental obscurantism," or the Marxist dismissals of bourgeois ideology—or the biochemist's dismissal of his opponent's understanding of oxidative phosphorylation and the problem of stoichiometry.¹⁴

You will say: scientific and philosophical argument of the demonstrative sort is nothing but such an account of its own argument. Wrong yet again. Consider the philosophers arguing. The cost of the philosophers' contempt for rhetoric has been a naïveté about how they as philosophers argue. Simon Blackburn (editor of *Mind*) gave a speech at the University of Iowa a couple of years ago on the necessity of philosophy. He used the ancient *topos*, familiar from Plato, that one is committed anyway to philosophizing, whether one knows it or not. It's the usual argument for a

philosophical education. Quite a good one, actually. In the question period I tried to get him to see that the same *topos* applied to his own talk, that is, that we are committed to rhetorizing, whether we know it or not, since we all argue. I tried to get him to admit, therefore, that rhetoric was as inclusive a discipline as philosophy, since both were necessary for each other. He couldn't understand, and could only repeat the usual Platonic calumnies against free speech, so thick was his philosophical carapace against rhetoric. (It is a rare philosopher, I have determined by scientific sampling, who has read as much as Aristotle's *Rhetoric* on the subject; the philosophers take their "knowledge" of rhetoric from Plato neat.)

Philosophical and scientific argument have rhetorics, too, but largely unexamined and therefore unchallenged. Plato, though inventing a realm without rhetoric, is of course the leading case, as for instance in his wild leaps to mythmaking-as-argument in the *Phaedrus*. Cicero joked that Plato was the craftiest rhetorician when disdaining rhetoric. To expose the rhetoric in science and philosophy, capable of great mischief, we need to recognize that arguing, after all, is what is going on.

In other words, if we break argument into rhetoric and dialectic (here even solidier Aristotle erred), the dialectic immediately takes a superior position. The move is assured by the long and nutty human fascination with certitude, ever since the Pythagoreans showed by sheer force of reason that not all numbers are rational. The actual human argument of law courts is downgraded to "mere" persuasion or teaching or something else without the dignity of Truth Saying. The actual human argument of scientific laboratories and blackboards is elevated to Scientific Method, beyond rhetorical scrutiny. Philosophers and scientists, believing themselves in possession of certitude, are encouraged to sneer. They do not need such encouragement.

But, you may retort, why settle for mere persuasion? Why not go for Truth? Well, good luck. Truth with a capital T is that God's-eye view that we intellectuals lost sometime around 1859. The other, workaday truth with a small t is of course essential for life outside a lunatic asylum. But if you have found a way of distinguishing truth from falsehood more fancy than looking at the arguments and assessing how good they are, with whatever standards of argument we can think of in the conversation as it stands, please tell me, urgently, by express mail. If thou find'st one, let me know;/ Such a pilgrimage were sweet./ Yet do not; I would not go,/ Though at next door we might meet./ Though it were True when you met it/ And last till you place bet on't,/ Still it/ Counterfeit/ Truth, concealing there the hypocrite.

We must stop people like Posner and Plato from making off with the word "truth," relabeling it Truth, handing it to experts, and leaving out

most of the arguments that serious people use. Splitting Art from Science, Literature from Law, is part of the game. It is better to exhibit science as rhetoric all the way down. The rhetoric returns to a serious discussion of how we decide. It need not throw away a single finding of good science and is therefore not the program to soften up our minds and become more "artistic." On the contrary: it is harder, not easier, to look seriously into how arguments are actually made, as lawyers know.

Good rhetoric is what a free community lives by, in law or science or politics. The authoritarians since Plato have sneered at it, arguing that without authoritative and quasi-theistic foundations we are left with Anything Goes, which is their description of democracy. It is no minor detail in the long history of anti-rhetorical rhetoric that Plato banished poets from his totalitarian community. Remember that he banished lawyers, too.

NOTES

1. Northrop Frye, *Anatomy of Criticism: Four Essays* (New York: Atheneum, 1967), 27, 25.
2. Michael Polanyi, *The Logic of Liberty* (Chicago: University of Chicago Press, 1951), 106.
3. Harry Collins, *Artificial Experts: Social Knowledge and Intelligent Machines* (Cambridge, Mass.: M.I.T. Press, 1990).
4. Stephen Levinson, *Pragmatics* (Cambridge: Cambridge University Press, 1983), 112.
5. The philosopher John Searle says similar things about computation and thought in his "Chinese Room" example.
6. Kenneth H. Ashworth, "Academic Management Isn't the Fun It Used to Be," *Chronicle of Higher Education*, April 24, 1991: A48.
7. I am told that the Ayn Rand Institute is also there. I can hardly believe my luck.
8. *The Rhetoric*, trans. J. H. Freese (Cambridge, Mass.: Harvard University Press, 1926), I. II. 1. See John Nelson, Allan McGill, and D.N. McCloskey, eds., *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (Madison: University of Wisconsin Press, 1987), Charles Bazerman, *Shaping Written Knowledge: The Genre and the Activity of the Experimental Article in Science* (Madison: University of Wisconsin Press, 1988), and other books in the Series on the Rhetoric of the Human Sciences.
9. Aristotle, *Rhet.* I.I. 14.
10. Quintilian, *Institutio Oratoria*, trans. H. E. Butler (Cambridge: Harvard University Press, 1922), XII, i, 1; cf. I, Pr. 9.
11. See Bruno Latour and Stephen Woolgar, *Laboratory Life: The Social Construction of Scientific Knowledge* (London: Sage, 1979); Barry Barnes and

- David Edge, eds., *Science in Context: Readings in the Sociology of Science* (Cambridge, Mass.: M.I.T. Press, 1982); Steven Shapin and Simon Schaffer, *Leviathan and the Air Pump: Hobbes, Boyle, and the Experimental Life* (Princeton: Princeton University Press, 1985); Harry M. Collins, *Changing Order: Replication and Induction in Scientific Practice* (London: Sage, 1985); Michael Mulkay, *The World and the Word: Explorations in the Form of Sociological Analysis* (London: Allen and Unwin, 1985); Peter Galison, *How Experiments End* (Chicago: University of Chicago Press, 1987); Trevor J. Pinch, *Confronting Nature: The Sociology of Solar-Neutrino Detection* (Dordrecht: Reidel, 1986).
12. The best introduction I have seen to the significance of speech acts is Sandy Petrey, *Speech Acts and Literary Theory* (New York: Routledge, 1990).
 13. Plato, *Gorgias*, trans. W. R. M. Lamb (Cambridge, Mass.: Harvard University Press, 1925), 471E: "you attempt to refute me in a rhetorical fashion, as they understand refuting the law courts. . . . But this sort of refutation is quite useless for getting at the truth." Compare 474B, 475B, 487E; and less directly 502E and 516E. And see, among many other places where Plato expresses his contempt for law courts and democratic assemblies as against Those Who Know, *Phaedrus*, trans. W. R. M. Lamb (Cambridge, Mass.: Harvard University Press 1914), 275C and 277E.
 14. See the discussion in pp. 19-78 (ch. 1) of Mulkay, *The Word and the World*. Harry Collins has explored the rhetoric of the TEA-Laser and gravitational radiation, chs. 3 and 4 of his *Changing Order*.