

All the opinions in *California v. Brown* acknowledge this precedent, thus validating the role of the norm of judicious spectatorship, and also its connection with following the entirety of a complex narrative history. They differ only about whether the instruction as stated (which asks jurors to disregard "mere" sympathy) would naturally be interpreted to demand the exclusion of appropriate sympathy. The majority opinion holds that jurors would readily see that they were being asked only to disregard "untethered" sympathy, while the dissenters argue that the jurors would not be clear about this, given the way in which prosecutors standardly represent the instruction. My argument indicates that the dissenters are correct: there is great confusion in many people's thought on this point, and a corresponding need to clarify the boundaries of appropriate and inappropriate sympathy. Sympathetic emotion that is tethered to the evidence, institutionally constrained in appropriate ways, and free from reference to one's own situation appears to be not only acceptable but actually essential to public judgment. But it is this sort of emotion, the emotion of the judicious spectator, that literary works construct in their readers, who learn what it is to have emotion, not for a "faceless undifferentiated mass," but for the "uniquely individual human being." This means, I believe, that literary works are what Smith thought they were: artificial constructions of some crucial elements in a norm of public rationality, and valuable guides to correct response.

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Poets as Judges

I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontës, I think her Jane Eyre. He says you go and look out at the city—I think he was looking at London—and he said you know, you see all those houses now, even at the end of the nineteenth century, and they look all as if they're the same. And you think all those people are out there going to work and they're all the same. He says, but what Brontë tells you is they're not the same. Each 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. Each of those stories involves a man, a woman, children, families, work, lives—and you get that sense out of the book. And so sometimes I've found literature very helpful as a way out of the tower.

Stephen G. Breyer, to Senate Judiciary Committee in hearings on his nomination to the U.S. Supreme Court

By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence.

Justice Stevens, *Hudson v. Palmer*, 1984

The Arbiter of the Diverse

In 1867, standing "by blue Ontario's shore," Walt Whitman "mused of these warlike days and of peace return'd, and the dead that return no more."

And as he mused, a "Phantom gigantic superb, with stern visage, accounted him, demanding poets for the public life of America. This Phantom defused presence, I think, of the young war dead and their dead president claims that only poets are fully equipped to embody norms of judgment that will hold these states together as a nation. "Their Presidents," comments the Phantom, "shall not be their common referee so much as their poets shall."

The Phantom goes on to describe the poet as a certain sort of judge. But this poet-judge embodies a very particular norm of judgment, one that sets him at odds with many of the conventional models of judging that Whitman finds prevalent on the public scene. Here is part of the Phantom's normative description:

Of these states the poet is the equable man,
Not in him but off from him things are grotesque, eccentric, fail of their

full returns . . .

He bestows on every object or quality its fit proportion, neither more nor less,

He is the arbiter of the diverse, he is the key,
He is the equalizer of his age and land, . . .

The years straying toward infidelity he withholds by his steady faith,

He is no arguer, he is judgment (Nature accepts him absolutely),
He judges not as the judge judges but as the sun falling round a helpless

thing . . .

He sees eternity in men and women, he does not see men and women as dreams or dots.

Whitman calls the poet-judge "the equable man," thus setting his ideal in a tradition of thought about legal and judicial reasoning that stretches directly back to Aristotle, who developed a normative conception of equitable judgment to take the place of an excessively simple or reductive reliance on abstract general principles. Whitman, like Aristotle, claims that this flexible context-specific judging is not a concession to the irrational, but the most complete expression of the politically rational: not "in him" but "off from him" things "are grotesque, eccentric, fail of their full returns." The poet is no capricious whimsical creature, but the person best equipped to "bestow on every object or quality its fit proportion," duly weighing the claims of a diverse population, with his gaze fixed both on norms of fairness ("he is the equalizer of his age and land") and also on history ("the years

straying toward infidelity he withholds by his steady faith"). Both fairness and history are always to some extent at risk in democracy; the poet-judge is their protector.

Whitman's Phantom now says some obscure and apparently contradictory things about the poet for whom he longs. First, "he is no arguer, he is judgment"; then, "he judges not as the judge judges but as the sun falling round a helpless thing." Why is the poet not an "arguer," but "judgment"? How can he be judgment, if he does not judge "as the judge judges"? And what mode of judging is suggested in the strange metaphor of light?

I suggest that the key to these puzzling lines is contained in the later line in which the poet "sees eternity in men and women, he does not see men and women as dreams or dots." Here the contrast is between an abstract pseudomathematical vision of human beings and a rich and concrete vision that does justice to human lives. This, I think, is also the way to read the contrast between being an "arguer" and being "judgment": the poet does not merely present abstract formal considerations, he presents equitable judgments, judgments that fit the historical and human complexities of the particular case. This, the Phantom now goes on to point out, is not the way of most current judges: thus the poet does not judge "as the judge judges." We can best get an idea of what his procedure is like, he suggests, by thinking of the way sunlight falls around a "helpless thing." This bold image suggests, first, enormous detail and particularity. When the sun falls around a thing it illuminates every curve, every nook; nothing remains hidden, nothing unperceived. So, too, does the poet's judgment fall, perceiving all that is there and disclosing it to our view. (The image is thus similar to Aristotle's image of the architect's flexible ruler that bends to suit the shape of the stone.)¹ In particular, the sun illuminates the situation of the helpless, which is usually shrouded in darkness. But this intimacy is also stern and rather pitiless: by comparing judgment to sunlight rather than gentle shade, Whitman indicates that the poet's commitment to fairness and fitness does not yield to bias or favor, that his confrontation with the particular, while intimate, is unswerving. There is a certain ideal of judicial neutrality here—a neutrality, however, linked not with remote generality but with rich historical concreteness, not with quasi-scientific abstractness but with a vision of the human world.

All of this is a description of judgment. It is also a description of the literary imagination. It is Whitman's startling claim that the literary imagination

should play an important role in supplying "these States" with norms of legal and, especially, judicial reasoning, through an Aristotelian conception of practical judgment. In this chapter, I shall defend that claim. I shall not accept Whitman's claim without qualification, for I shall insist that technical legal reasoning, knowledge of law, and the constraints of precedent play a central role in good judging, suppling the bounds within which the imagination must work. The judge cannot be simply a poet, or even simply an Aristotelian equitable man. Whitman neglects the institutional constraints on the judge's role, treating him as free to follow his own fancy, and this is surely wrong. But I shall argue that, properly restricted, the sort of imagining I have described in chapters 2 and 3 can often supplement the other aspects of judicial reasoning in a valuable way. I shall argue the literary/Aristotelian conception, combined with institutional constraints, yields a complex ideal of judicial neutrality that is a powerful rival to other influential conceptions of that norm.

In particular, I shall contrast the literary judge with three rivals: a judge who cultivates skeptical detachment, a judge who conceives of judicial reasoning on the model of formal reasoning in the sciences, and a judge who cultivates a lofty distance from particulars for reasons of judicial neutrality. I shall argue that the literary judge has good reasons for eschewing skeptical detachment and for preferring to quasi-scientific models an evaluative humanistic form of practical reasoning; these reasons are deeply rooted in the common-law tradition. She does pursue neutrality, but in a manner that coheres with our account of the judicious spectator in chapter 3, requiring, rather than forbidding, sympathetic knowledge of value-laden human facts.

Turning next to Whitman's claim that the poet is "the equalizer of his age and land," I shall develop the connection between the experience of the literary imaginer and a concern with social equality. Finally, I shall examine some judicial opinions that give both good and bad examples of the kind of judging Whitman recommends.

It must be borne in mind that I consider the specifically literary aspects of my "literary judge" to be just one aspect of the thinking of a real-life judge. The real-life judge must also have other abilities and knowledge and is constrained in many ways by her institutional role and by the demands of statute and precedent, which already establish what she may and may not consider salient. The literary aspects of judging can most easily be incorpo-

rated into an understanding of judicial reasoning that derives from the common-law tradition, with its already Aristotelian emphasis on the particular. But that tradition does not permit a judge to exercise untethered sympathy or fancy. We must ask, then, how fancy operates within the strict confines of a formal judicial role.

Neither Skepticism nor Scientism

When we read a novel such as *Hard Times*, reading not as literary theorists asking about theories of interpretation, but as human beings who are moved and delighted, we are, I have argued, judicious spectators, free from personal bias and favor. At the same time, we are clearly not skeptics. We do not all react in exactly the same way to the characters and their situation. But the structure of the novel—its ways of presenting the world to us and its enticements to identify ourselves with certain characters rather than others—set us up, if we respond to them, in a posture of the heart and mind that is not one of skeptical indifference, that does not feel that anything at all that happens to these people is as good as every other thing. We can, of course, withhold ourselves from the novel's invitation to engage ourselves with it in the ways it suggests (though then it is not evident why we would continue to read). But if we follow the story with eager attention, succumbing to its invitations and being moved by its people, then we are, in the process, making judgments—about the industrial revolution, about utilitarianism, about divorce law, about the education of children—confident in the process that some reasons are indeed stronger than others, that some ways of treating human beings are themselves better than others and can be justified as better by the giving of such reasons.

We are, in effect, being constituted by the novel as judges of a certain sort. As judges we may dispute with one another about what is right and proper; but insofar as the characters matter to us, and we are active on their behalf, we do not feel that the dispute is about nothing at all that we are merely playing around. Such judgments (for example, our judgments about the moral education of Louisa Gradgrind, and of children more generally) are usually not based on transcendent extrahistorical standards. Indeed, our experience as readers leads us to think that such standards would be unnecessary for our search, for as concerned readers we search for a human good

that we are trying to bring about in and for the human community, and it is not evident why norms external to the experience of human striving should be required for such a project. Our search is guided, as well, by the judgments and responses of our fellow readers, who themselves are seeking such a comprehensive fit. What we are after is not just a view of moral education that makes sense of our own personal experience, but one that we can defend to others and support along with others with whom we wish to live in community. This, too, anchors our reading and makes it fundamentally different from the free play of interpretive faculties.²

It is important to emphasize the nonskeptical character of ordinary reading, since a highly skeptical approach to legal reasoning has recently been defended from within literary theory, using the activity of literary interpreting as an alleged paradigm. Stanley Fish, perhaps the leading proponent of this sort of view in the law, holds that without standards that transcend history and human interpretive activity—which he thinks we have failed to find—we are left with the play of political and historical forces which cause us to believe certain things but which can give no principled justifications for those beliefs.³ In other words, take away extrahistorical justification and you do away with all rational justification. You are left with causes but no good reasons.⁴ But this leap—as it were, from the heavens to the abyss—is not entailed by any argument that Fish has presented or that can easily be imagined. Even if it should be shown that we lack extrahistorical standards for public and legal reasoning, this should not disturb us very much, for the law has always based its reasoning on history and social context and has rarely attached importance to establishing an eternal basis for its judgments. Fish has not shown, nor could he, I think, show that within the tradition of human reasoning about ethics and law we cannot single out some arguments as stronger than others, some positions as more defensible than others. The experience of the reader of literature shows how we do this: by bringing our evolving sense of principle and tradition to bear on a concrete context. Fish arrives at detachment from normative argument only by setting the goal of argument so unreasonably high that it can never be met by human beings. In real life, however, we set more modest goals, and frequently we meet them. If this is so in ethical reasoning generally, it is all the more clearly so in the law, for the system of precedent and legal constraint contribute to

the defeat of indeterminacy, even more powerfully, perhaps, than the moral imagination itself.

If the literary view strongly repudiates detachment from good reasons, it also repudiates the idea that the law can or should be understood on the model of natural science. The scientific view keeps on appearing, in various forms, throughout the history of Anglo-American law, primarily as an attack on what appears to be the messy, unsystematic character of the common-law tradition. In a revealing autobiographical passage, Benjamin Cardozo compares the hope for a scientific system to a quest for paradise, for something different from the human world that we actually inhabit:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found with the voyagers in Browning's "Paracelsus" that "the real heaven was always beyond."⁵

One can see how someone who clings to that ideal (as Cardozo did not) could easily fall into Fish-style detachment out of discouragement at failures to attain it. Such a conclusion would betray, however, a kind of shame about the historically grounded and yet principled reasons that the law actually uses.

One can see a similar repudiation of practical reason in Christopher Columbus Langdell, founder of the modern conception of legal education, who argued that the law would have a place in a great university such as Harvard only if it could justify its claim to be a science. "If it be not a science," he wrote, "it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it." To Langdell, showing that law was a science required showing that it was constituted by a Platonic hierarchy of simple and general principles that were fixed in advance of cases (though built up in the first place by examining cases), and that would yield an almost mechanical decision procedure. "The true lawyer is one who has such a mastery of legal principles as to be able to apply them with constant facil-

ity and certainty to the ever-tangled skein of human affairs."⁶ In more recent times, the scientific aspiration has been focused on the assimilation of law to the science of economics—an idea some of whose application I have criticized in chapters 2 and 3.

The idea that the law is a respectable academic field only if it is a science in one of these senses ignores an obvious possibility: that the law is a humanistic as well as a scientific field, and that its excellences include the special excellences of practical reasoning as they are understood in the humanities. As Aristotle long ago argued, reasoning in ethics and politics is and ought to be different from the deductive reasoning some seek in the sciences, for it must be concerned in a more fundamental way with historical change, with the complexity of actual practical contexts, and with the sheer diversity of cases. For all of these reasons, though it will certainly seek and use rules as guides, it will also attend to the details of cases and will not simply assume in advance that the rule as stated antecedently will be fully adequate to cover the cases. Although fixed rules have a very important place to play in legal judgment—for example, in ensuring stability, in preventing bias, and in reducing errors of judgment, legal judgments must also accommodate changing circumstances and changing values, confronting the case that is actually at hand.⁷ Aristotle's norm of practical reason is well exemplified in the characteristic procedures of the common law, with its rich attention to history and circumstance.

Judicial Neutrality

The literary judge—like Whitman's beam of sunlight—is committed to neutrality, properly understood. That is, she will not tailor her principles to the demands of political or religious pressure groups and will give no group or individual special indulgence or favor on account of their relation to her or her affiliations. She is a judicious spectator and does not gush with irrelevant or ungrounded sentiment. On the other hand, as I have argued here, her neutrality does not require a lofty distance from the social realities of the cases before her; indeed, she is enjoined to examine those realities searchingly, with imaginative concreteness and the emotional responses that are proper to the judicious spectator—or to his surrogate, the novel-reader. In chapter 2, I suggested that the literary judge would look in particular

for evidence that certain groups have suffered unequal disadvantages and therefore need more attention if they are to be shown a truly equal concern.

This concern for the disadvantaged is built into the structure of the literary experience, which was, as we saw, Adam Smith's model for the experience of the judicious spectator. The reader participates vicariously in numerous different lives, some more advantaged and some less. In realist social novels, which are my focus, these lives are self-consciously drawn from different social strata, and the extent to which these varied circumstances allow for flourishing is made part of the reader's experience. The reader enters each of these lives not knowing, so to speak, which one of them is hers—she identifies first with Louisa and then with Stephen Blackpool, living each of those lives in turn and becoming aware that her actual place is in many respects an accident of fortune. She has empathetic emotions appropriate to the living of the life and, more important, spectatorial emotions in which she evaluates the way fortune has made this life conducive or not conducive to flourishing. This means, as I argue in the next section, that she will notice especially vividly the disadvantages faced by the least well off. In the case of Dickens's novel, for example, she is likely to feel that Stephen Blackpool, given the disadvantages under which he labors, requires a special degree of attention if he is to be shown a truly equal concern as a citizen.

This conception of the spectator goes to the heart of the famous and controversial argument of Herbert Wechsler in "Toward Neutral Principles of Constitutional Law."⁸ The literary judge strongly agrees with the general view of judgment articulated by Wechsler near the beginning of the article: judges need criteria that are not arbitrary or capricious, "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will." A good decision is indeed one "that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." The reasons should meet a standard of public articulability and principled consistency. We should strongly resist the idea that the courts do or should operate as a "naked power organ." It is in fact a similar idea of neutrality and freedom from situational bias that motivates Smith's construction of the judicious spectator, through the device of thinking about the reader of narrative fiction. Where legal reasoning is concerned, we need to add to Smith's model the fact that there will also be powerful institutional constraints on the

judge's reasoning, and this will give us yet further reasons to agree with Wechsler in his demand for principled neutrality.

As his argument continues, however, Wechsler turns sharply away from the Smith ideal of neutrality to a more remote and abstract norm. He seems to understand neutrality to demand that one stand so far away from present circumstances and their history that one will ignore many specific social and historical facts—facts that seem highly relevant to the equal and principled application of the law. Although in the theoretical part of the article he does insist that his conception of principle does not entail disregarding history and legal precedent, in his reading of the school-desegregation cases, he appears to disregard some highly pertinent social data in the name of sticking to "the facts." In particular, he suggests that judges deciding cases relating to "separate but equal" facilities should refuse themselves concrete empathetic knowledge of the special disadvantages faced by minorities and the asymmetrical meaning of segregation for blacks and whites, in order to ensure that their principles are applied without political bias:

[T]he separate-but-equal formula was not overruled "in form" but was held to have "no place" in public education on the ground that segregated schools are "inherently unequal," with deleterious effects upon the colored children in implying their inferiority, effects which retard their educational and mental development . . .

I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed. . . . But this position also presents problems. . . . In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose "to put that construction upon it"? Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male? Is a prohibition of miscegenation a discrimination against the colored member of the couple who would like to marry?

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of free-

dom to associate, a denial that impinges in the same way on any groups or races that may be involved. . . . In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess.

Wechsler claims, notice, to state not only the constitutional but also the "human" meaning of the laws in question. He is wrong on both counts. There is such a lofty distance from the human facts of the matter that the principles are not correct. Had Wechsler imagined the lunch incident in the manner of a novelist, considering the meaning, for Houston, of knowing that he could not lunch with Wechsler at a downtown restaurant, he would quickly have seen that the meaning of that denial of the freedom to associate is strongly asymmetrical—for Wechsler, an inconvenience and (as he elsewhere notes) a source of guilt; for Houston, a public brand of inferiority. One cannot consider the history of race relations in this country closely and sympathetically, in the manner of Smith's judicious spectator, without noticing this asymmetry. Wechsler's claim that the issue is not one of discrimination at all has about it a bizarre sort of Martian neutrality. From his enforced distance from the emotions involved in the experience of oppression, he fails to notice perfectly reasonable and universalizable principles that do include the asymmetrical meaning of segregation and the history of segregation as stigma. These notions are highly relevant to the interpretation of the Constitution, and to the formulation of appropriate constitutional, as well as human, principles. Wechsler's failure of imagination is equally evident in the gender example, which, it would seem, is intended to serve as a *reductio ad absurdum* of his racial point: if separate-but-equal is wrong for race, it must be wrong for gender. But we know that people who complain about gender-separation are women who are complaining on account of a political agenda, not on account of reasons that can be articulated in a principled way. This seems to be the message of his argument. Once again, however, there are many ways in which the historical asymmetry between men and women can be made the subject of principled argument, argument that rests on reasons and is not simply tailored to achieve a particular result.

The literary judge, by contrast, holds that such social and historical facts are relevant, and that the judge in such a case should develop as rich and

comprehensive an understanding as possible of the situation of the groups involved in the case. She should not be swayed by any personal connection or any partisan goal. Her emotions should be those of the judicious spectator, not personal emotions bearing on her own profit or loss in the case at hand, or any other personal taste or goal that is grounded in her own situation rather than the situation of which she is the spectator. They should not simply be the emotions of the actors involved, though empathy with the actors will usually be one important part of the process of judicious spectatorship, through which the judge takes the measure of the suffering of the people. The judicious spectator must go beyond empathy, assessing from her own spectatorial viewpoint the meaning of those sufferings and their implications for the lives involved. People can be wrong about what is happening to them in many ways. As spectators, we may find that Stephen Blackpool exaggerates the wrong done to him by society, or we may find—as I think we really do when we read Dickens—that his political deprivations have made him if anything too well adapted to his misery, too ready to accept a small relief rather than demanding full equality. So detached evaluation is at the heart of the activity of the literary imaginer as judicious spectator. But this does not mean being ignorant of, or refusing to acknowledge, sufferings and inequities that are all too much a part of history. Literary neutrality, like Whitman's sunlight, like the reading of a novel, gets close to the people and their actual experience. That is how it is able to be fair and to perform its own detached evaluation correctly.

The Equalizer of His Age and Land

Whitman calls his poet-judge an "equalizer." What does he mean? Why should the literary imagination be any more connected with equality than with inequality, or with democratic rather than aristocratic ideals? Why is the sunlight of judicial vision specially concerned with the "helpless thing"? When we read *Hard Times* as sympathetic participants, our attention has a special focus. Since the sufferings and anxieties of the characters are among the central bonds between reader and work, our attention is drawn in particular to those characters who suffer and fear. Characters who are not facing any adversity simply do not hook us in as readers; there is no drama in a life in which things are going smoothly. This tragic sensibility

leads the reader to investigate with a particularly keen combination of identification and sympathy lives in which circumstance has played an impeding role. Sometimes, of course, the baneful circumstances are necessary and inevitable. Loved ones die; natural disasters destroy property and cities. Frequently, however, the tragedy that moves us is not necessary. Not all wars are inevitable; hunger and poverty and miserably unequal conditions of labor are not inevitable. Since we read a novel like *Hard Times* with the thought that we ourselves might be in a character's position—since our emotion is based in part on this sort of empathetic identification—we will naturally be most concerned with the lot of those whose position is worst, and we will begin to think of ways in which that position might have been other than it is, might be made better than it is.

One way in which the situation of the poor or oppressed is especially bad is that it might have been otherwise. We see this especially clearly when we see their situation side by side with the situation of the rich and prosperous. In this way our thought will naturally turn in the direction of making the lot of the worst off more similar to the lot of the rich and powerful: since we ourselves might be, or become, either of those two people, we want to raise the floor. This may not get all the way to complete equality (whether of resources or of welfare or of capability to function), but it does at least lead political thought in the direction of ameliorating persistent inequalities and providing all with a decent minimum. One might of course have these thoughts without being a "poet." But it is Whitman's point, I think, that the ability to imagine vividly, and then to assess judicially, another person's pain, to participate in it and then to ask about its significance, is a powerful way of learning what the human facts are and of acquiring a motivation to alter them. If one could not imagine what it was like to be Stephen Blackpool, then it would be all too easy to neglect his situation as Bounderby does, portraying workers as grasping insensitive beings. Similarly, to take a case that will figure in my next section, if one cannot imagine what women suffer from sexual harassment on the job, one won't have a vivid sense of that offense as a serious social infringement that the law should remedy. In neither case does the judicious spectator stop with the experience of the other person's pain: one must then ask, from the spectatorial viewpoint, whether that pain is appropriate to its target, whether it is such pain, or anger, or fear, as a reasonable person would feel in those circumstances. But the sense

of what was really experienced is a crucial step along the way, without which any spectatorial assessment may miss the mark.

The literary judge is also an equalizer in another closely related way. I have argued that the experience of novel-reading yields a strong commitment to regard each life as individual and separate from other lives. This way of seeing things is highly relevant to the questions of well-being I have just addressed: Stephen's misery is not bought off by Bounderby's exceeding good fortune. But it has another kind of relevance as well. Group hatred and the oppression of groups is very often based on a failure to individualize. Racism, sexism, and many other forms of pernicious prejudice frequently ground themselves in the attribution of negative characteristics to the entire group. Sometimes—as in the case of the Nazi depiction of Jews, as in the case of much of the “thinking” characteristic of American racism—this is carried to the extreme of portraying the group as altogether subhuman, as vermin, insects, even as “cargo,” an attitude that cannot survive the individualized knowledge of a member or members of that group. This does not mean that even in contact with an individual one cannot find many ways of dehumanizing him or her in thought. It means, however, that when one does manage for whatever reason to take up to the individual the literary attitude of sympathetic imagining, the dehumanizing portrayal is unsustainable, at least for a time.⁹ A memorable moment of this kind is the scene in the film *Schindler's List*, in which the German camp commandant holds his Jewish housemaid by the chin, as she stands terrified in her slip, and asks, torn between dogma and personal desire, “Is this the face of a rat?”

Literary understanding, I would therefore argue, promotes habits of mind that lead toward social equality in that they contribute to the dismantling of the stereotypes that support group hatred. For this purpose, in principle any literary work that has the characteristics I have discussed in chapter 1 would be valuable: in reading Dickens, we learn habits of “fancying” that we can then apply to other groups that come before us, whether or not those groups are depicted in the novels we have read. But it is also very valuable to extend this literary understanding by seeking out literary experiences in which we do identify sympathetically with individual members of marginalized or oppressed groups within our own society, learning both to see the world, for a time, through their eyes and then reflecting as spectators on the meaning of what we have seen. If one of the significant contributions of the novel to

public rationality is its depiction of the interaction between shared human aspirations and concrete social circumstances, it seems reasonable that we should seek novels that depict the special circumstances of groups with whom we live and whom we want to understand, cultivating the habit of seeing the fulfillment or frustration of their aspirations and desires within a social world that may be characterized by institutional inequalities.

One such novel is Richard Wright's *Native Son*. As I taught this novel to an almost entirely white group of law students in the very place where the novel is set, we recognized that most of us were, in effect, in the position of the novel's Mary Dalton, well-meaning but grossly ignorant and undeveloped in sympathy, desirous of knowing what it is like to live the other side of “the line,” but unable or unwilling to carry that desire into action. The experience of reading and discussing the novel at least begins to give white readers a knowledge of their ignorance, and to introduce habits of “fancying” that it is crucial to develop if we are to deliberate well about race.

Wright's novel is “equalizing” in both of the ways that I have mentioned—drawing attention to misery and focusing our attention on the individual. From the first, we see the world through the eyes of a particular person who encounters special and terrible disadvantages. We enter a squalid one-room tenement, where Bigger Thomas lives with his mother, his sister, and his brother. “Light flooded the room and revealed a black boy standing in a narrow space between two iron beds.”¹⁰ Bigger, seen by the sun—an image that strikingly recalls Whitman's sun “falling round a helpless thing”—is in prison already. Like the rat he shortly kills, he is trapped in a condition of helplessness. We see what it is to try to maintain self-respect and order when you have no privacy to change your clothes, when your pathetic “conspiracy against shame” can be interrupted at any time by a rat running across the floor. We note the way in which the rat, cornered, strikes viciously back, and we sense from then on what Bigger's relation to the world around him will be. In short, as we follow the world to some extent through Bigger's eyes, to some extent as onlookers, we see how at every point his hopes and fears, his sexual longings, his sense of himself, are conditioned by the squalor in which he lives.

Not only squalor. The predominant force in Bigger's self-conception and in his emotional life is racial inequality and hatred. He is aware of himself in images drawn from the white world's denigration of him; he defines him-

self as worthless because they have defined him in that way. And, like the rat, he strikes back, attempting to use violence as an escape from helplessness and shame. The novel avoids evoking an easy sympathy that would say, despite differences in circumstance, we are all brothers under the skin. The white reader has difficulty identifying with Bigger; not only his external circumstances, but also his emotions and desires, are the products of social and historical factors. But beneath the facile kind of sympathy lies the possibility of a deeper sympathy, one that says: This is a human being, with the basic equipment to lead a productive life; see how not only the external circumstances of action, but also anger, fear, and desire have been deformed by racial hatred and its institutional expression. The unlikeness that repels identification becomes the chief object of our concern.

The reader's experience here shows very clearly what role empathy does and does not play in the activity of the judicious spectator. We cannot follow the novel without trying to see the world through Bigger's eyes. As we do so, we take on, to at least some extent, his emotions of rage and shame. On the other hand, we are also spectators. As spectators we recognize the inappropriateness of some of his emotions to their object—for example, of his shame at the color of his skin, and of his tragic combination of longing and fear toward the white family. These emotions are all too plausible given his situation, and yet the novel shows their cruel and arbitrary social basis. This leads us as spectators to feel a further range of emotions—a deep sympathy, as I have suggested, for Bigger's predicament, a principled anger at the structures of racism that have made him as he is.

"He knew as he stood there that he could never tell why he had killed. It was not that he did not really want to tell, but the telling of it would have involved an explanation of his entire life." As "judicious spectator" of Bigger's story, the reader—unlike almost all of the characters—attends to the explanation of his entire life, and comes to an understanding of the genesis of his violent character. The novel suggests that this understanding is essential to the just determination of Bigger's crime and punishment. It thus takes up the position that I discussed in chapter 3 in connection with jury deliberation: the criminal must be seen as an individual with a story of his own to tell. This stance does not determine any particular outcome—although, as both *Woodson* and *California v. Brown* suggest, it is frequently connected with mercy in sentencing. Many other issues must be taken into account by both

judges and jurors, many of them technical in character. Even the constraints built into the ideal of judicious spectatorship need to be further constrained by specifically legal requirements. But the reader, while judging Bigger culpable (the degree of his culpability is certainly debatable), is likely to be, other things equal, inclined to mercy in the imposition of punishment, seeing how much of his character was the product of circumstances created by others.¹¹

What the narrative shows us, however, is that the world in which Bigger Thomas actually lives—with its institutional and legal barriers to mobility, with its racial estrangement and mutual fear and hate—this world, unlike the world of novel-reading, makes the novel-reader's empathetic individualizing stance unavailable across racial lines. Neither Bigger nor the white characters can see members of the other race as distinct individuals, each with their own story to tell. The racial branding of individuals eclipses personal identity. To Bigger, white people are a "mountain of hate." He cannot see them separately, and indeed, the prospect of an individual relationship with Mary Dalton arouses such fear and shame and loathing in him that he is led to the brink of rape and, subsequently, to manslaughter. Mary Dalton attempts to befriend Bigger as an individual, but in a clumsy, ill-judged way in which her perception of him as individual is usually obscured by stereotypes, he is little more to her than a means to rebel against her parents. The novel makes us doubt that any other more personal relationship would have been possible, except in the most unusual circumstances. The legacy of racism thus defeats literary judging, and with it, the hope of friendship and constructive partnership. In this sense the novel, like Dickens's novel, is about itself and recommends itself. Its most powerful charge against America is that its own modes of perception are almost never to be found.

The novel is well known for the speech making of Bigger's lawyer, who, borrowing from Fanon, sees violence as an inevitable response to Bigger's oppression, and perhaps a valuable sort of self-assertion. But it is not on this note that the novel ends, and the lawyer is shown to be just as deaf to Bigger's personal story as many of the other white characters. The novel ends, in fact, with the achievement of sympathy and friendship. During his long imprisonment, Bigger—struck by the courage and decency of Jan, the young communist who has every motive to hate him, but who alone seems to attend to him as a person in his own right—begins to think like a novel-

reader. He begins, that is, to think of the deep similarity in human aims and insecurities that may exist on both sides of the racial barrier, though concealed from view by the social deformation of character and desire. At last, in a sudden epiphany, he becomes able to see this common humanity:

He wondered if it were possible that after all everybody in the world felt alike? Did those who hated him have in them the same thing Max had seen in him, the thing that had made Max ask him those questions? And what motive could Max have in helping? Why would Max risk that white tide of hate to help him? For the first time in his life he had gained a pinnacle of feeling upon which he could stand and see vague relations that he had never dreamed of. If that white looming mountain of hate were not a mountain at all, but people, people like himself, and like Jan—then he was faced with a high hope the like of which he had never thought could be, and a despair the full depths of which he knew he could not stand to feel. . . . He stood up in the middle of the cell floor and tried to see himself in relation to other men, a thing he had always feared to try to do, so deeply stained was his own mind with the hate of others for him.

Racial hatred is a stain and an infection that prevents the individualized, and at the same time the common, view of the humanity of others. (These two perceptions are connected because seeing others as similarly and fully human entails seeing them as individuals with their own stories to tell.) To see white people not as a looming mountain of hate but as people—this is the beginning of hope. But in *Bigger*'s circumstances, as he faces death, it is also despair; for there is, then, a real human life and a human community. He discovers its worth at the same time as he knows his own irrevocable loss of it. The despair encompasses, as well, the knowledge that the forces that have doomed him persist unchanged, that the hope cannot now be realized for anyone, that it will take large-scale institutional and social changes that he cannot even imagine to make that hope a reality for others. His last words are, "Tell Jan hello . . ."—and then "Goodbye!" "He heard the ring of steel against steel as a far door clanged shut."

Engaging the reader in this tragedy of social helplessness, the novel constructs a reader who is a judicious and neutral judge of Bigger Thomas, but a judge whose neutrality is different in kind from Wechsler's and far closer to Whitman's—though constrained, as Whitman's is not, by the specific institutional requirements of the judicial role. The stigma of racial hate and

shame emerges as fundamentally deforming of human personality and community, and the novel-reading stance calls out for political and social equality as the necessary condition of full humanity for citizens on both sides of "the line."

To indicate that the connection between literary spectatorship and a concern for equality is not an isolated phenomenon in the case of this novel, let me introduce one further example, which deals with one of the most pressing equality issues of our time. E. M. Forster's *Maurice* was written in 1913–14, but published only in 1971. It could not have been published earlier, its author tells us, because it shows two homosexual lovers ending happily. "Happiness is its keynote. . . . If it ended unhappily, with a lad dangling from a noose or with a suicide pact, all would be well, for there is no pornography or seduction of minors. But the lovers get away unpunished and consequently recommend crime."¹²

The strategy in *Maurice* is to select as hero a man of strong and exclusive homosexual tendencies who is in no other way "unnatural." In fact, he is a boring, snobbish, middle-class English stockbroker of mediocre talent and imagination. The reader is not thrilled by him, but his kindness and his general good nature evoke sympathy. The emotional structure of the novel relies on the ease with which the reader will see Maurice as average, and then see, year by year, how the treatment society accords to his desires—which revolve around rather tender imaginings of a comforting and quasi-marital "friend"—renders him terribly nonaverage and also deeply unequal. From the anatomy lecture on the beach, where the young teacher's quasi-biblical praise of the naturalness of heterosexuality makes the boy feel his own "nature" and impulses to be shameful and deformed, to the Terminal Note, in which Forster reminds us that even in 1971 homosexuals continue to be prosecuted for consensual sexual acts, the novel tells a story of average humanness forced into a situation of repression, fear, and guilt. This inequality is enforced by social prejudices that justify themselves with a language of nature that derives from religious tradition. Readers are led to recognize that Maurice as someone they might know, someone whose desires are not alarming or dangerous. He wants many of the same things heterosexuals want. They also recognize that the desires that lead Maurice to other

men are in their own way deeply "natural"—felt in him from an early age in a way he neither chooses nor controls. (The psychiatrist who fails to "cure" him recommends a move to France, saying "England has always been disinclined to accept human nature.") For the person who finds himself to be heterosexual, society gives respect and status; for the person who finds himself to be different, frustration, shame, and continual danger. When Maurice's friend Clive marries a young woman, "[b]eautiful conventions received them—while beyond the barrier Maurice wandered, the wrong words on his lips and the wrong desires in his heart, and his arms full of air."

Though in many ways this novel is extremely distant from *Native Son*—it is set in a sheltered middle-class world, its characters are refined and nonviolent—its common ground is also evident. The image of "the barrier" reminds us of "the line" that separates black from white in Biggar's world. In both cases, there is a division in society that marks some people as normal and good, others as shameful and evil. In both cases, this division brands and stigmatizes the excluded group in ways that are closely connected to systematic inequalities: Maurice may be able to hold a job, but he cannot express his sexual desires openly; he lives continually at risk of prosecution, and he cannot have honest relationships with his friends and fellow workers. In a very real sense, he is not a fully equal citizen. Clive, too, having chosen to forgo homosexual gratification and to enter a passionless marriage, is unequal—for he is forced to lead an essentially dishonest life in a matter of the greatest importance. The novel's last sentence tells us that Clive, having heard of Maurice's affair with Alec, "returned to the house, to correct his proofs and to devise some method of concealing the truth from Anne." Forster notes that Clive and Maurice are as close to equality as they are only because of class advantages that Maurice's lower-class lover lacks. In the Britain of 1971, unless consensual homosexual acts are decriminalized, "Clive on the bench will continue to sentence Alec in the dock. Maurice may get off." In that way, issues of class equality are shown to be linked to the novel's central issue of sexual equality.

The novel, like *Native Son*, like *Hard Times*, refers to itself. Again and again readers notice that they are perceiving Maurice in a very different way from the way of the people around him. Maurice's friends either refuse recognition of his difference or, recognizing it, shun him in horror as if he had suddenly become a monster. They simply cannot permit themselves to

imagine for a moment what it may be like to be him. The reader who does imagine is fully aware all along that he is neither the same nor a monster. This means that the reader as judicious spectator is aware in a way the characters are not of the stigmatizing effect of societal prejudice, and of the helplessness it creates. The novel makes its case for equal sexual liberty by showing the profound worth of that liberty in its portraits of the flourishing of Maurice and the stunted life of Clive; and it enlists readers as partisans of that equality by making it easy for them to see Maurice as someone they, or one of their friends or loved ones, might be.

Poetic Judging

My argument in this book is well captured in the quotation from Stephen Breyer's confirmation hearing that I cited as an epigraph to this chapter. The ability to think of people's lives in the novelist's way is, Breyer argues, an important part of the equipment of a judge. A part and not, obviously, the whole, or even the central part—but a vital part nonetheless. This claim is the more impressive in that it comes from a judge who is far from being a sentimentalist, whose technical proficiency is great, and who is, if anything, considered more intellectual than emotional. Even a judge so unsentimental, with such deep technical and intellectual commitments, then, grants that novel-reading is relevant to the judicial imagination. My approach—like, I believe, the approach that Breyer sketches in this statement—stresses the need for technical mastery as well as sentiment and imagination and insists, too, that the latter must continually be informed and tethered by the former.

In order to go further, however, we need examples of judicial opinions that both do and do not manifest the virtues of the literary judge. I have selected two positive examples and one negative.

Hudson v. Palmer. U.S. Supreme Court. 1984.

[Dissenting opinion by Justice Stevens.]

This case was originally brought by Palmer, a prison inmate serving a sentence for forgery, grand larceny, and bank robbery, against Hudson, a police officer who had conducted a shakedown search of his cell.¹³ Palmer claimed that the search was conducted solely to harass or humiliate him.¹⁴ Though

claiming to search for contraband, Hudson in the process intentionally destroyed some of Palmer's legitimate personal property—photographs and letters. Palmer claimed that this destruction of property violated his Fourth Amendment right against unreasonable searches and seizures, and that the unauthorized deprivation of property constituted a violation of the procedural due process requirement of the Fourteenth Amendment. In an opinion written by Chief Justice Burger, the majority held that a prison inmate does not have "a reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches and seizures" (398), and that therefore even the modest notion that random searches should be conducted within certain established guidelines (the holding of the Court of Appeals) constrains prison authority too severely: "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions" (403). As for the intentional destruction of property, it does not violate due process given that the state provides "a meaningful postdeprivation remedy" (406).

Justice Stevens (joined by Justices Brennan, Marshall, and Blackmun) concurs in part and dissents in part. The dissenters agree about the due process issue, but claim that the Court's reasoning on the Fourth Amendment issue is "seriously flawed," indeed "internally inconsistent" (412–13). It is inconsistent because the Court grants the possibility of maliciously motivated searches and intentional harassment of prisoners, saying that these "cannot be tolerated by a civilized society" (413, citing 404), yet maintains "that no matter how malicious, destructive, or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable." The dissenters then spell out the implications of this inconsistency:

Measured by the conditions that prevail in a free society, neither the possessions nor the slight residuum of privacy that a prison inmate can retain in his cell, can have more than the most minimal value. From the standpoint of the prisoner, however, that trivial residuum may mark the difference between slavery and humanity. . . . Personal letters, snapshots of family members, a souvenir, a deck of cards, a hobby kit, perhaps a diary or a training manual for an apprentice in a new trade, or even a Bible—a variety of inexpensive items may enable a prisoner to maintain contact with some

part of his past and an eye to the possibility of a better future. Are all of these items subject to unrestrained perusal, confiscation, or mutilation at the hands of a possibly hostile guard? (413)

Stevens now continues with a legal argument. He first distinguishes between Palmer's privacy interest in his property and his possessory interest.¹⁵ While he does not accept the Court's general rule that a prisoner can have no expectation of privacy in his papers or effects, he is willing to assume it for the purposes of the argument. He then argues that the Fourth Amendment protects Palmer's possessory interest in the property, citing definitions of "search" and "seizure" in previous cases. He points out that Palmer's possession of the destroyed material was entirely legitimate as a matter of state law; therefore the Court is wrong in concluding that, as a prisoner, he could have no legitimate possessory interests. He points out that in its treatment of Palmer's due process claim the Court itself grants that the destroyed material was "property" within the meaning of the due process clause, and this entails that Palmer's claim to the material is a legitimate claim of entitlement (415–16).¹⁶

Hudson's actions, then, constituted a "seizure." Was the seizure "unreasonable"? This issue can only be resolved by "balancing the intrusion on constitutionally protected interests against the law enforcement interests justifying the challenged conduct" (417). Stevens argues that there is no legitimate penological justification for the seizure here. There is no contention that the property was contraband or posed any risk to institutional security. Hudson had already examined it before he took it and destroyed it. No motive but spite has been suggested for his conduct. Since the Court itself has acknowledged that the intentional harassment of prisoners cannot be tolerated by a civilized society, this seems to make the seizure unreasonable even by the Court's own lights. If we were now to argue that legitimate institutional goals outweigh Palmer's interests, this would not be a strong argument: "Depriving inmates of any residuum of privacy or possessory rights is in fact plainly *contrary* to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others, and therefore are more prone to violence toward themselves or others" (420). Although Stevens cites a number of recent studies that support this conclusion, in the final analysis, the argument that institutional needs outweigh Palmer's rights needs no such sociological evidence to rebut it. It is

sufficiently rebutted by the fact that prison rules themselves permitted Palmer to possess this property. There can be no institutional need for seizure and destruction of items that are defined by the rules themselves as non-contraband: "To accord prisoners any less protection is to declare that the prisoners are entitled to no measure of human dignity or individuality—not a photo, a letter, nor anything except standard-issue prison clothing would be free from arbitrary seizure and destruction. Yet that is the view the Court takes today. It declares prisoners to be little more than chattels, a view I thought society had outgrown long ago" (420).

Stevens ends with a more general set of reflections. Citing a 1974 case in which it was firmly asserted that prisoners are not wholly stripped of constitutional protections, he insists that traditionally the courts have a special duty to protect the rights of the powerless and the outcast against claims of mere expediency:

The courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a "discrete and insular minority." In this case, the destruction of Palmer's property was a seizure; the Judiciary has a constitutional duty to determine whether it was justified. . . .

By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence. (420)

My concern, in assessing this opinion, is not centrally with the merits of its constitutional argument. What, then, is the relevance of what might be called the literary aspects of Stevens's consideration of Palmer? First we must describe these aspects. Stevens's opinion is not especially emotional in any obvious sense. Nor is it rhetorically and stylistically self-conscious; it is not "literary" in the sense of being stylistically impressive. It does, however, seem to me to embody some of the most important traits of the literary "judicious spectator" whom I have imagined. Consider the view of Palmer with which the opinion presents us. Like Louisa Gradgrind face to face with the individuality of one of the Coketown "Hands," Stevens confronts the separateness and individuality of Palmer the prisoner, imagining the significance of trivial items such as letters and photos for his humanity and his

hope of a better life. Rather than treating the prisoner simply as a body to be managed by institutional rules, he treats him as a citizen with rights and with a dignity that calls forth respect. He is able to enter into the existence of one who is (rightly) feared and loathed by society, seeing the interests and rights of the prisoner, and his special circumstances, without fully sharing his emotions and motives. Whereas the majority opinion showed no concern to imagine the prisoner's legitimate interest in his property, Stevens does imagine this interest, in a way that both takes cognizance of the difference between the prisoner and other citizens and, at the same time, recognizes the common human concerns that connect them—concerns for family, for reminders of home, for self-improvement. Stevens positions himself as a neutral and impartial spectator; he is careful to indicate that his reasoning is not ad hoc or tailored to an immediate political result. Indeed, he generalizes about the class of prisoners throughout, emphasizing the representative character of the case and thus the universalizable character of his judgment. In that way his opinion is closely linked, in literary terms, to the generalizing strategies of the ancient tragic chorus: one might compare Sophocles' depiction of the outcast Philoctetes, with his small sunless cave, his rudimentary cup, the disfiguring wound that revolted all normal citizens.

How are these "literary" aspects of the opinion relevant to the case? The majority claimed that institutional expediency took precedence over the prisoner's claims; in so arguing, they obscured from view the humanity of the prisoner, the interests and rights that link him to other constitutionally protected members of society. Stevens's depiction of those common interests gives vivid support to his contention that Palmer has legitimate possessory interests, that these have been invaded, and that the search is in that sense "unreasonable." He might have made the same argument without these vivid details, but they remind us forcefully of the general point that prisoners are citizens and do have rights, that they may not be treated as mere means. It is noteworthy that the majority opinion concurs in these general sentiments, insisting that a civilized society will not tolerate merely malicious searches. Stevens's imagining of the case gives those ideas a life that they lacked in the reflections of the majority and thus makes clear the depth of the problem of consistency in their opinion.

At the same time, the literary aspects of the opinion bear on the question of Hudson's malice. If we can imagine the items seized in the shakedown

search—a photograph, a letter—and imagine not only the fact that Palmer possessed these items legitimately but also the character of the interest he was likely to have in these fragile signs of his humanity, we are likely to appreciate more intensely the malicious nature of the intrusion of the guard, whose destruction of a photograph served no conceivable institutional goal other than intimidation and humiliation. The majority have said that intentional harassment and maliciously motivated searches “cannot be tolerated in a civilized society.” By imagining the case precisely, Stevens is able to make a strong argument that this case is of exactly that sort. In short, Stevens could have made his argument without the elements I have called “literary.” But these elements contribute to his argument that the search was unreasonable and that it constituted malicious intentional harassment of the sort that the majority had judged intolerable.

Stevens’s concluding general reflection grows out of, and is buttressed by, his way of imagining the prisoner’s dignity and humanity. He reflects that in general the Constitution stands between human beings and unfettered expediency, that the liberty interests protected in the Fourth Amendment are valued so highly that they are protected against expediency arguments as a matter of constitutional principle. This is no truism. It is an understanding of constitutional reasoning fundamentally at odds, for example, with Posner’s economic approach, according to which these liberty interests would in fact become a matter of expediency.¹⁷ Posner himself has more recently granted that liberty interests protected in the Constitution cannot be fully explained on his economic model.¹⁸ Stevens makes a case for the more traditional way of viewing liberty interests; the case derives support from his ability to see and describe the value of the liberty interests at issue and their connection with human individuality.

Mary J. Carr v. Allison Gas Turbine Division, General Motors Corporation, U.S. Court of Appeals for the Seventh Circuit, July 26, 1994.
[Opinion by Richard Posner.]

Mary Carr was the first woman to work in the tinsmith shop of the gas turbine division of General Motors at their plant in Indiana. Over a period of five years, she encountered sexual harassment from her male coworkers. During four of the five years she complained to her supervisor, to no

avail. In 1989 she decided that the situation had become unbearable and quit. She brought suit against General Motors, seeking back pay and other relief. After a bench trial, District Judge Larry J. McKinney ruled in favor of GM, accepting GM’s argument that the alleged harassment was merely sexual bantering of a type common in the workplace, and that GM was powerless to stop this bantering. On appeal, the court ruled in favor of Mary Carr.¹⁹

The case is relatively unusual in that the court overruled the district judge on the findings of fact. At the opening of the opinion, Posner remarks that Carr’s lawyers, concerned that the required “clear-error” standard would make such a result unlikely, attempted to persuade the court that there had been legal error in the district court opinion. Posner found no legal error, but he did find error in the findings of fact. The “clear-error” standard “requires us appellate judges to distinguish between the situation in which we think that if we had been the trier of fact we would have decided the case differently and the situation in which we are *firmly convinced* that we would have done so.” Posner thus announces at the start (referring to a usual standard) that his ruling is based on this sort of firm conviction. His account of the facts must now support that judgment.

When we speak of “facts” in this case, we must be aware that these are not “facts” as distinct from values and evaluation. There is no dispute about the incidents that occurred in the tinsmith’s shop. What is in dispute is their human meaning—how intimidating they were, how adversely they affected the climate in which Carr worked. The relevant facts, then, are human facts of the sort the literary judge is well equipped to ascertain. The questions before Posner, he says, were two: “whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to affect adversely the conditions under which she worked”; and “whether, if so, the defendant’s response or lack thereof to its employees’ behavior was negligent” (1009). (A third question raised by the district judge, “whether it was unwelcome harassment,” is dismissed by Posner as a nonquestion: “‘Welcome sexual harassment’ is an oxymoron” [1008].) We may expect that to resolve such questions of “fact” will require a good deal of “fancy.” We should note that the relevance of these questions is dictated by Title VII, and not by Posner’s untethered imagining. If there had been no law authorizing him to look for human facts of this nature, he would

have had no basis for everything that follows. On the other hand, Title VII as written, clearly needs supplementation from the judge, who must ascertain human facts of this type.

Having given his view on the technical issue of "firm conviction," and having articulated the questions to be asked about the facts, Posner now tells Mary Carr's story:

Carr was a drill operator in GM's gas turbine division when, in August 1984, she entered the skilled trades in the division as a tinsmith apprentice. She was the first woman to work in the tinsmith shop, and her male coworkers were unhappy about working with a woman. They made derogatory comments of a sexual character to her on a daily basis (such as, "I won't work with any cunt"), continually referred to her in her presence by such terms as "whore," "cunt," and "split tail," painted "cunt" on her toolbox, and played various sex- or gender-related pranks on her, such as painting her tool box pink and (without her knowledge) cutting out the seat of her overalls. They festooned her tool box and work area with signs, pictures, and graffiti of an offensive sexual character, hid and stole her tools, hid her toolbox, hung nude pin-ups around the shop, and would strip to their underwear in front of her when changing into and out of their work clothes. One of them placed an obscene Valentine Day's card, addressed to "Cunt," on her toolbox. The card shows a man carrying a naked woman upside down, and the text explains that the man has finally discovered why a woman has two holes—so that she can be carried like a six-pack. A worker named Beckham twice exhibited his penis. The first time, during an argument in which Carr told him the exit door "swings both ways," meaning that he could leave as easily as she could, he replied that he had something that "swings," and he demonstrated. The second time, another male worker bet Beckham \$5 that he would not expose himself. He lost the bet, although it is unclear whether Carr was in front of Beckham or behind him. And it was Beckham who told Carr on another occasion that if he fell from a dangerous height in the shop she would have to give him "mouth to dick" resuscitation. Carr's male coworkers urinated from the roof of the shop in her presence, and, in her hearing, one of them accused a black employee who was only intermittently hostile to Carr of being "after that white pussy, that is why you want a woman here, you want some of that." A number of racist remarks and practical jokes of a racial nature were directed against this, the only black employee among the tinsmiths. A frequent remark heard around the shop was, "I'll never retire from this tinsmith position

because it would make an opening for a nigger or a woman." Another of Carr's male coworkers threw a burning cigarette at her. (1009–10)

Carr began complaining to her immediate supervisor, Jim Routh,

to no avail. He testified that even though some of the offensive statements were made in his presence, not being a woman himself he was not sure that the statements would be considered offensive by a woman. His perplexity was such that when he heard the statements he would just chuckle and bite down harder on his pipe. (1010)

This description is in one sense straightforward; but it manifests considerable literary selectivity and skill. Posner positions himself close to the scene—he narrates the facts in more detail than is strictly necessary. And yet his stance is that of a judicious observer whose attitude to the conduct of the male workers is highly critical. The sardonic use of words such as "festooned" and "the text explains," his insistence on the both offensive and threatening character of the workers' behavior to Carr, and especially his vivid satirical portrait of Routh ("his perplexity was such") tell us that he sees through the argument (made by GM throughout) that all this was merely a kind of joking or prank-playing in which workers of both sexes engaged. He positions himself as someone who (unlike Routh) can imagine the likely impact of this conduct on a female employee.

Posner now confronts the question of impact directly, addressing himself to the district judge's contention that the tinsmiths' behavior was not harassing, since offensive language is common in the workplace, and employers are not under a legal obligation to purify the workplace of this language just because some people find it offensive. We must, Posner argues, insist on the difference between the "merely vulgar and mildly offensive" and the "deeply offensive and sexually harassing." He attempts to articulate that distinction by considering Carr's situation:

For one thing, the words and acts of which she complains were, unlike what may have been the situation in [another relevant case] targeted on her, and it is a lot more uncomfortable to be the target of offensive words and conduct than to be merely an observer of them. Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* 129 (1991). For another thing, defacing a person's property (even if it is hers just to use while at work) and multi-

lating her clothing (even if it is hers just to wear while at work) are more ominous, more aggressive affronts than mere words. (1010)

Here we see a use of empathy in connection with judicious assessment. It is interesting that Posner, who is well known for using many fewer citations and footnotes than most judges, and who is personally responsible for the citations in his opinions,²⁰ cites the work of legal scholar Patricia Williams on race as a source for his conclusions in this paragraph. He seems to be suggesting that his complete assessment of Carr's contention requires comparison with other narratives from people in relevantly similar positions of social inequality. (The connection between sexual and racial harassment had already been made in the description of the tinsmiths' treatment of the black coworker who refused to join fully in their anti-Carr campaign.) It was perhaps not easy for a judge in Posner's position to decide, on the basis of his own judgment and experience, whether the intimidation reported by Carr was reasonably based in the objective facts of her situation. Part of his solution was to consider other stories of harassment. Viewed as a deliberately chosen literary device, the Williams reference demonstrates a determination to try to get close to the experience of people in positions of inequality, as if that is a factor relevant to the correct resolution of the legal question of fact.

Posner now turns to the district judge's contention that the behavior, though harassing, was not unwelcome to Carr, who herself used words like "fuck head" and "dick head," who once placed her hand on the thigh of a male coworker, and, who, "when shown a pornographic picture and asked to point out the clitoris, obliged." She provoked misconduct, in short, because she was "unladylike," to use the district judge's word. Posner comments:

Even if we ignore the question why "unladylike" behavior should provoke not a vulgar response but a hostile, harassing response, and even if Carr's testimony that she talked and acted as she did in an effort to be "one of the boys" is (despite its plausibility) discounted, her words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate their employer. . . . The asymmetry of positions must be considered. She was one woman; they were many men. Her use of terms like "fuck head" could not be deeply threatening, or her placing a hand on the thigh of one of her macho coworkers intimidating; and it was not she

who brought the pornographic picture to the "anatomy lesson." We have trouble *imagining* a situation in which male factory workers sexually harass a lone woman *in self-defense* as it were; yet that at root is General Motors' characterization of what happened here. (1011)

This is a calm and entirely unsentimental paragraph. Posner is not wringing his hands or emoting in the manner of one personally caught up in the situation. In all respects, he is the judicious spectator. But he does seem to fulfill Smith's conception of that quasi-literary role. His test is, in effect, one of "fancy": try to imagine the situation as the male workers describe it, in which Carr was just as threatening to them as they to her, and you find you can't do it. (Note the italicization of *imagine*.) But picture the asymmetry of the situation as it was, picture Carr's isolation and her lack of support from the supervisor, and you come to the conclusion that she was the victim of a campaign of harassment of remarkable duration and intensity. (Discussing Carr's difficult personal situation in the following paragraph—her foster son was executed for murder—Posner takes the opportunity to mention that "one of the charming comments that Beckham, the coworker who had exposed himself to her, had made to her was that he would have been happy to pay the electrical bill for the execution.")

Did GM act improperly? Posner argues that negligence was proved, despite the fact that GM claims to have been the victim of "a conspiracy of silence among the tinsmiths"—a phrase that leaves the reader in no doubt of Posner's critical response. He concludes, "We do not find the picture of mighty GM helpless in the face of the foul-mouthed tinsmiths remotely plausible." Here, once again, appeal to the imagination yields the judicious spectator's sardonic response. Posner then comments, with respect to Carr's situation, that to obtain "remedy for constructive discharge" she need show simply "that the discrimination to which she was subjected was sufficiently serious to cause a reasonable person to quit"—a standard that in effect incorporates the responses of the judicious spectator into the resolution of the case.

We now arrive at Posner's conclusion:

It is difficult for an employer to sort out charges and countercharges of sexual harassment among feuding employees, but we are dealing here with a situation in which for years one of the nation's largest enterprises found

itself helpless to respond effectively to an egregious campaign of sexual harassment directed at one woman. No reasonable person could imagine that General Motors was genuinely helpless, that it did all it reasonably could have done. The evidence is plain that it (or at least its gas turbine division) was unprepared to deal with problems of sexual harassment even when those problems were rubbed in its face, and also incapable of improvising a solution. Its efforts at investigation were lackluster, its disciplinary efforts nonexistent, its remedial efforts perfunctory. The U.S. Navy has been able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop.

The judgment is reversed with instructions to enter judgment on liability for the plaintiff (since no other result would be consistent with the record . . .) and proceed to a determination of the remedy to which she is entitled. (1012-13)

Posner concludes with a direct appeal to the imaginings and responses of a "reasonable person"—a traditional common-law standard closely linked to Smith's judicious-spectator norm. He shows in his prose the well-founded indignation and contempt such a spectator feels at the behavior of GM. In literary terms, the paragraph seems to make reference to the traditional devices and emotions of the genre of satire, whether in its ancient Roman form (Juvenal) or in more recent exemplars such as the works of Swift. (The *saeva indignatio* mentioned in Swift's epitaph is, perhaps, the emotion Posner's prose is attempting to construct.) He denounces the pretense that GM was helpless and expresses his view of both GM and the tinsmiths in the metaphorical "even when those problems were rubbed in its face"—comparing GM to an incontinent dog who has to have its nose rubbed in its own shit. The rhetorically effective sentence beginning "Its efforts" expresses indignation in a tricolon of ascending condemnation; the following sentence uses the parallel "been able to integrate" to bring home the disparity between the task faced (and accomplished) by the Navy and the task refused by GM.

Posner carefully positions himself as a judge and a spectator, detached and neutral in the appropriate ways. But imagination and appropriate emotion are crucial in the reasoning of his opinion. His indignation is not capricious: it is solidly grounded in the facts, and he can make his reader feel it in his narration of the facts. Indeed, his opinion does what good satire of the

Juvenalian or Swiftian kind does: it inspires indignation through the mordant portrayal of human venality and cruelty. Here as in the Stevens opinion, the literary approach is closely connected with sympathetic attention to the special plight of people who are socially unequal and to a certain extent, therefore, helpless. Posner repeatedly draws attention to this aspect of his thinking, and to its relevance in answering the legal questions about intimidation and hostility. As Posner writes: "The asymmetry of positions must be considered."

Bowers v. Hardwick, U.S. Supreme Court. 1986.

[Opinions by Justices White and Burger.]

Both the case and the opinions are famous; I shall therefore do less summarizing than in the other cases.²¹ But let us set the stage briefly. Michael Hardwick was in a bedroom in his apartment engaged in fellatio with another man, when he was arrested by a police officer who had entered the apartment to serve an arrest warrant on Hardwick for drinking in public. Both men were arrested for violating the state's sodomy law, held in jail, and released without charges being lodged against them. Hardwick brought a suit to invalidate the law. The law itself was worded in terms of sexual acts, defining sodomy as either oral or anal intercourse. As is frequently the case in sodomy statutes, the offense was not restricted to homosexuals, and a heterosexual couple, "John and Mary Doe," later joined the suit, though their case never reached the Supreme Court. The district court held that they "had neither sustained, nor were in any immediate danger of sustaining, any direct injury from the enforcement of the statute." The Court of Appeals affirmed the district court's judgment, dismissing the Does' claim for lack of standing.²² In this way the record virtually acknowledged that the statute would not be enforced against heterosexuals.

The majority and concurring opinions in *Bowers* have been criticized often, and from many different points of view. In assessing the literary or nonliterary aspects of the opinions, we must first of all consider the case as a due process case, as it was actually argued. It will then be relevant to ask how aspects of the literary imagination would prove relevant to arguing this or a similar case as an equal protection case (a line of argument suggested in Justice Blackmun's dissent, and in recent legal scholarship on the topic).

The question before the Court, since the case was argued as a due process case, was whether the alleged right to consensual homosexual sodomy was in fact a privacy right entailed by previous Fourteenth Amendment privacy cases. The Court notes that the category of rights in question has been identified as including "those fundamental liberties that are 'implicit in the concept of ordered liberty' [and those that are] 'deeply rooted in this Nation's history and tradition.'"²² It is important to note these constraints on the result and the reasoning of the case. Any sympathy or imagination exercised by any of the opinions will be irrelevant unless it either illuminates the connection between this case and relevant precedents or helps us decide whether the case fits one or both of the two general descriptions deriving from earlier cases.

Concerning the precedents, Justice White reviews the privacy cases and finds

that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupported. (190-91)

This certainly offers a plausible reading of the privacy cases. It is indeed true that *Griswold* focuses on decisional privacy in the context of the marital relationship with reference to decisions about childbearing. Although *Eisenstadt* extends this right to unmarried individuals, and thus recognizes a decisional privacy right of individuals rather than couples, it still focuses on decisions involving whether or not to bear a child. The same is the case in *Roe v. Wade*. The majority in *Eisenstadt* hold that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This wording suggests that there might be other fundamental person-affecting rights in this area. But no other rights are named; and since *Eisenstadt* was tried as an equal protection case, its central line of argument was simply that whatever contraception rights married people have must belong to the unmarried as

well. The step from *Eisenstadt* and *Roe* to the acknowledgment of a right of consenting adults to engage in the sexual conduct of their choice is not long, but one must grant that this step had not previously been taken.²³

What could the relevance of literary imagining possibly have been to the determination whether this step should have been taken? What we find in the previous privacy cases is a consideration of the way in which the recognized privacy rights shield liberties of personal choice in intimate matters fundamentally affecting one's personhood. Given the unclarity about the range of this protection, one would expect that a thorough sifting of the question involved in *Bowers* should involve a close consideration of the person-affecting character of the privacy right claimed by Hardwick. The majority opinion maintains a lofty distance from the facts of Michael Hardwick's situation.²⁴ The distancing language ("the claimed constitutional right of homosexuals to engage in acts of sodomy") expresses a refusal to think about how Hardwick's personhood is affected by the issue, and even seems to express a somewhat sardonic attitude toward his suggestion that the right involved does deserve protection. Indeed, throughout the opinion there seems to be a marked effort to keep the human story at a distance, not to describe the events as if they happened to someone one might know or even be. A more empathetic consideration of the situation of someone whose chosen form of consensual sexual conduct is illegal might not have changed the judgment about how to read the precedents. But it would have promoted a full and thorough consideration of the question of the reach of the privacy right, which does not seem to have taken place here, so rapidly is Hardwick's contention dismissed.

Indeed, we may note that the relationship of this case to fundamental issues of personhood receives far less discussion than took place in a far more trivial case (at least in the dissenting opinion). In *Kelley v. Johnson* the issue concerned a police department regulation limiting the length of policemen's hair.²⁵ This was occasion for a substantial discussion (by the dissenters) of the relationship of personal appearance to integrity and personal identity, and all of these to the privacy right. Surely Hardwick's case, in addition to its greater human urgency, lay far closer to the precedents and involved a right that could with far more plausibility have been connected to them.

If we turn to the next question, whether the alleged right fits one or both of the two relevant general descriptions, we find again, in both the majority

and the concurring opinions, a detached and markedly non-narrative approach: "Proscriptions against that conduct have ancient roots," write the majority, dismissing the idea that a right to commit homosexual sodomy is either "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Chief Justice Burger's concurring opinion is even more severe. Burger states that "decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." He notes that "Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.' . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." The severity of Burger's language, as well as his lengthy enumeration of such historical condemnations, serves to distance the Court, and the reader, even further from the perspective and story of Michael Hardwick himself, a human being seeking to live a fully human life. We are encouraged to see Hardwick as a dangerous criminal, similar to a rapist, and nothing in the way the facts of his story are related informs us otherwise.

Closely connected to this distancing strategy, I believe, is the fact that we find in the opinions no argument concerning the all-important question of generality. Surely it is obvious that, described at a highly specific level as "a right to commit homosexual sodomy," the right in question is not traditional, and that it has not been traditionally considered to be implicit in the concept of ordered liberty. On the other hand, were the right in question understood generally, as a right to determine the course of one's own sexual life, provided that one does not harm others, it could at least be argued that such a right was recognized in a variety of previous cases, for example, those involving the right to marry a partner of one's choice. The dissenters do so argue, connecting sodomy laws to laws forbidding miscegenation. (Miscegenation described concretely—as "marriage to a partner of a different race"—rather than "marriage to a partner of one's choice"—was of course not a traditionally recognized fundamental right; described generally, it did involve such a right.) But there is no attempt here to discuss this vital issue, so evident does it seem to the majority that homosexual sex is unrelated to other liberty interests in the area of sex and marriage. This avoidance of argument is facilitated by treating the homosexual like a pariah, whom cen-

turies of history have concurred in condemning. If it seemed to Blackstone disgraceful even to mention such acts, it is easy to justify not dwelling on them very long in thought and argument, in order to work out properly their relationship to other acts.

What would one expect from the literary imagination here, and what relevance might it have? One would expect, I think, two things that were sorely lacking in the majority and concurring opinions: a careful attention to history and social context, and an empathetic consideration of the situation of the homosexual in American society. History first. The historical claims made in the opinions are imprecise and, to a great extent, false. Study of the history of sexual conceptions and practices is a burgeoning area of scholarship in many fields of the humanities and social sciences. Books that are not at all beyond the reach of a nonspecialist have by now exploded the simple picture of a history of condemnation on which the majority rely, in the case of Greco-Roman, Christian, Jewish, and English traditions.²⁶ The contemporary debate in each of the major religious and philosophical traditions of the world is complicated, and there is no major group in which there is not internal debate and ferment.²⁷ The literary judge would wish to "read" Michael Hardwick's case in its full historical and social context. This would entail getting the history right, if one appealed to it at all.

Getting the history right might or might not affect the result—for one could still argue that the right level on which to define the relevant rights was the most specific level and that the relevant Anglo-American legal traditions still would not uphold the classification of the right in question, specifically defined, as "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." But understanding how other times and places have viewed similar conduct would have provided a much-needed basis for considering the possible relevance of a more general level of description. This same process would have been very much advanced by considering in an empathetic manner what was actually at stake for Hardwick in the case. Such consideration—of which Forster's *Maurice* gives us one vivid example—would at least have raised, if not settled, the question of the relationship between this right and the traditionally protected rights to marry and to control one's own reproductive choices.

In these ways, the literary element in judging might have contributed to a fuller deliberation about aspects of the case, even as it was actually argued,

as a due process case. Had the case been argued as an equal protection case, the relevance of the imagination would have been clearer still. Justice Blackmun in dissent recognizes that the case has a serious equal protection aspect and might have been argued in this way. More recently, Cass Sunstein has argued that the equal protection route would have been preferable in the case, given his view that the due process clause is typically backward-looking and tradition-respecting, the equal protection clause forward-looking and reform-oriented.²⁸ Since *Bowers* as decided has now blocked the due process route, it is also important to note that similar cases might still be argued by appeal to equal protection. Equal protection argument typically requires consideration of the history of discrimination under which a group has labored, as well as its circumstances of political powerlessness. Consideration of a more detailed, empathetic, and concrete sort would have contributed to revealing a history of discrimination that brings this case into a close relation with other histories of the persecution of marginalized and despised groups.²⁹ Indeed, it would appear that this sort of inquiry is not only sufficient for that understanding, but necessary as well—for without it, it is difficult to make the all-important distinction between Michael Hardwick's situation and that of a violent criminal (the rapist mentioned by Burger), whose acts are subject to penalty for very good reasons. In order to think well about an equal protection argument, we have to be able to separate irrational discrimination from condemnation of what is genuinely dangerous. An understanding of the history of the prejudice against homosexuals in American society—combined with awareness of different attitudes in other cultures and with a sympathetic understanding of the aims and intentions of actual homosexuals—would, I believe, show that this group is relevantly similar to racial minorities, women, and national minorities, rather than to rapists or to child molesters. It would be difficult to get to this result without using the imagination, while treating homosexuals with the repugnance and distance shown in the majority and concurring opinions.

The constitutional issues bearing on this case are highly complex and are disputed at every point. A judge deciding such a case is constrained in many ways by text, history, and precedent. It would be foolish to claim that the literary imagination does all the work here, and inappropriate to recommend that it work outside these institutional constraints. On the other hand,

within these constraints it can supply insights that should prove valuable to a complete deliberation on the relevant issues.

Does literary judging make a difference? Not in all imaginable cases, obviously. Sometimes the legal issues tell clearly one way or another; sometimes the facts are so simple and uncontroversial that literary imagining is not important. In all cases, the law must first of all be there, or no judge can do anything. Justice Stevens's interest in Palmer's photos and letters goes nowhere without the text of the Constitution, a range of specific precedents, and the admission by the majority itself that merely malicious and harassing searches are intolerable. Judge Posner would have been powerless to rule on behalf of Mary Carr without Title VII, however much he abhorred sexual harassment. Legislators, too, and the citizens who elect them, need to exercise imagination. The notorious difficulties surrounding the scope and the very existence of the privacy right show how difficult it is for judges to rule innovatively, even to plug what might seem a gap in the explicit text of the Constitution; and even given that history of judicial intervention, no clear result in Hardwick's case is determined. Empathetic citizens should not rely on the judiciary alone to require what they think just.

But in these three cases—two of which involve highly contested constitutional questions and the third of which involves a deep disagreement about how to assess the facts—the full, precise, and judicious imagining of the human facts did make or would possibly make at least some difference to the result: in *Hudson*, by giving Stevens a sense of the importance for Palmer of the property interest Hudson had maliciously violated; in *Mary Carr*, by giving Posner a vivid sense of the harassment suffered by Carr and of the implausibility of GM's version of the facts; in *Bowers* as actually argued, possibly, by giving the hypothetical literary judge a sense of the fundamental nature of the rights and liberties involved and their relation to other fundamental liberties; in *Bowers* seen as an equal protection case, by giving the judge an understanding of the special disadvantages faced by gay and lesbian people, of the history of sodomy laws as instruments of discrimination, of the general social stigma associated with being the target of such laws.

In none of the cases do I suggest that ordinary legal reasoning, including prominently the consideration of precedent, should be subordinated to untethered sentiment. The judge is not a legislator, and his imagination must conform to tight institutional constraints. In the *Carr* and *Hudson* opinions, the sentiments of sympathy and indignation that are expressed are valuable precisely because they are connected to good legal reasoning of a traditional sort and to a solid grasp of the facts. But in both cases we can say, I think, that the literary judge has a better grasp of the totality of the facts than the nonliterary judge. My claim is, then, that literary judging is by no means sufficient for good judging, and could certainly be pernicious if not properly tethered to other purely institutional and legal virtues; but we should demand it in appropriate circumstances, whatever else we also demand.

Attesting Sympathy

I now return to Whitman, for I have come round to several themes that lie at the heart of his poetry: the pain of social exclusion; the relationship between the exclusion of the homosexual and other exclusions based on gender and religion and race; the interest all citizens have in liberty, erotic and otherwise; the importance of fostering a political rationality that can "see into" that interest, with what Whitman calls the poet's "Soul of love and tongue of fire! Eye to pierce the deepest deeps and sweep the world!" I have suggested, with Whitman, that a literary imagining of the importance of various liberty and equality interests for citizens offers valuable guidance in cases dealing with those interests. So I shall conclude by discussing a famous section of Whitman's *Song of Myself* in which all these themes are brought together with compression and poignancy. The passage comes about halfway through the poem, after a section in which the poet-speaker houses a runaway slave, tending the sores left by the irons on his legs and ankles, and after the parable "Twenty-eight young men bathe by the shore," a vivid lyrical description of the exclusion of the female from full inclusion and equality as a sexual being. "I am he attesting sympathy," summarizes the poet. He then announces that in and through his imagination the excluded find speech and their emotions find recognition:

Unscrew the locks from the doors!
Unscrew the doors themselves from their jambs!

Whoever degrades another degrades me,
And whatever is done or said returns at last to me . . .

I speak the pass-word primeval, I give the sign of democracy,
By God! I will accept nothing which all cannot have their counterpart of
on the same terms.

Through me many long dumb voices,
Voices of the interminable generations of prisoners and slaves,
Voices of the disease'd and despairing and of thieves and dwarfs,
Voices of cycles of preparation and accretion,
And of the threads that connect the stars, and of wombs and of the
father-stuff,
And of the rights of them the others are down upon,
Of the deform'd, trivial, flat, foolish, despised,
Fog in the air, beetles rolling balls of dung,

Through me forbidden voices,
Voices of sexes and lusts, voices veil'd and I remove the veil,
Voices indecent by me clarified and transfigur'd . . .
Dazzling and tremendous how quick the sun-rise would kill me,
If I could not now and always send sun-rise out of me.

Here Whitman summarizes his account of the poet's democratizing mission. It is a mission of imagination, inclusion, sympathy, and voice. The poet is the instrument through which the "long dumb voices" of the excluded come forth from their veils and into the light. To attend to the way things are with the excluded and the despised as well as the powerful, to insist on participating oneself, through sympathy, in the degradation of the degraded, to accept only what others can have on the same terms, to give voice to the pain of the excluded, the intimidation of the harassed—this is a norm of democratic judgment highly pertinent to the situation of Bigger Thomas, of Forster's Maurice, of Mary Carr, of the prisoner Palmer, of Michael Hardwick. Whitman is especially insistent that the poet's speech will remove the veil from the voices of those silenced by sexual exclusion and opprobrium. He claims that the light of the poetic imagination is a crucial agent of democratic equality for these and other excluded people, since only that imagination will get the facts of their lives right, and see in their unequal treatment a degradation of oneself.

I claim that it would be a good thing to have judges who could see into those lines. The imagination involved in them exemplifies a sort of public rationality we badly need at this time in this country, where increasingly we are refusing one another this sort of inclusive vision, closing the doors of sympathy that Whitman wished here to open. The sympathy of the judicious spectator does not by itself dictate any specific result in any particular legal case. It is constrained in many ways by statute and precedent. Nor, even as imagination, does it stand alone: it needs to be able to rely on imagination and compassion already exercised in the legislative sphere. But it does exemplify a type of thinking that should be involved in judicial reflection.

Standing by Blue Ontario's shore, Whitman moves on from his general call for the poet-judge and interrogates prospective candidates for that role. To the person who "would assume a place to teach or be a poet here in the States," he poses a remarkable series of questions:

Who are you indeed who would talk or sing to America?
 Have you studied out the land, its idioms and men? . . .
 Have you consider'd the organic compact of the first day of the first year
 of Independence, sign'd by the commissioners, ratified by the States,
 and read by Washington at the head of the army?
 Have you possess'd yourself of the Federal Constitution?
 Have you sped through fleeting customs, popularities?
 Can you hold your hand against all seductions, follies, whirls, fierce con-
 tentions? are you very strong? are you really of the whole People?
 Are you not of some coterie? some school or mere religion?
 Do you hold the like love for those hardening to maturity? for the last-
 born? little and big? and for the errant?

I claim that the standard of judgment constructed in my conception of "poetic justice" passes these tests. Intimate and impartial, loving without bias, thinking of and for the whole rather than as a partisan of some particular group or faction, comprehending in "fancy" the richness and complexity of each citizen's inner world, the literary judge, like Whitman's poet, sees in the blades of grass the equal dignity of all citizens—and more mysterious images, too, of erotic longing and personal liberty. She combines these vi-

sions in judgments that are in many respects different from those recommended by the Gradgrind school. Nor do they achieve abstraction by standing at a lofty remove from the human facts of cases. Nor, finally, are they skeptical, despairing of good reasons.

As Whitman indicates, "poetic justice" needs a great deal of nonliterary equipment: technical legal knowledge, a knowledge of history and precedent, a careful attention to proper legal impartiality. The judge must be a good judge in these respects. But in order to be fully rational, judges must also be capable of fancy and sympathy. They must educate not only their technical capacities but also their capacity for humanity. In the absence of that capacity, their impartiality will be obtuse and their justice blind. In the absence of that capacity, the "long dumb" voices that seek to speak through their justice will remain silent, and the "sun-rise" of democratic judgment will be to that extent veiled. In the absence of that capacity, the "interminable generations of prisoners and slaves" will dwell in pain around us and have less hope of freedom.

"Socrates is one of the most important people in the world to me," then only that one will experience grief; but for that one, the belief-set will be sufficient for grief. See my *Upheavals of Thought*.

16. For valuable critiques along these lines, see James Rachels, *Created from Animals* (New York: Oxford University Press, 1990), Jonathan Glover, *Causing Death and Saving Lives* (Harmondsworth: Pelican, 1976); and Richard Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992).
17. Indeed, we might say that Louisa is attracted to Harthouse precisely because her attachment-world has previously been so empty and uncultivated: she knows how to embrace only the emptiness she feels.
18. Lionel Trilling, *The Liberal Imagination: Essays on Literature and Society* (New York: Charles Scribner's Sons, 1950).
19. Lukács calls *The Home and the World* (which is intensely critical of the early Indian nationalist movement) "a petit bourgeois yarn of the shoddiest kind" (quoted in Anita Desai's introduction to the 1985 Penguin edition of the novel, p. 7). For the case of *The Princess Casanovissa*, see Trilling, *The Liberal Imagination*, and my discussion in "Perception and Revolution" in *Love's Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990).
20. As the impoverished trader Panchu says to Nikhil, "I am afraid, sir . . . while you big folk are doing the fighting, the police and the law vultures will merrily gather round, and the crowd will enjoy the fun, but when it comes to getting killed, it will be the turn of only poor me." We see the commitments of the genre, as well, in Nikhil's refusal to dismiss the English governess: "I cannot . . . look upon Miss Gilby through a mist of abstraction, just because she is English. Cannot you get over the barrier of her name after such a long acquaintance? Cannot you realize that she loves you?" This is a self-referential moment: for it is evident that the vision of the novel as a whole is this sort of particularized vision.
21. Raymond Williams, *The Politics of Modernism: Against the New Conformists* (London and New York: Verso, 1989), 116.
22. Williams would certainly agree: see his valuable account of the novel in *Culture and Society, 1780-1950* (London: Penguin, 1958), part 1, chap. 5.
23. This device, in which circumstantial and informational restrictions are used to model the moral point of view, was in many respects the origin of John Rawls's device of the Original Position in *A Theory of Justice* (Cambridge: Harvard University Press, 1971).
24. Smith would include the love we have for friends and fellow citizens, as well as the love of humanity; he excludes only erotic love, which he takes to be based on morally irrelevant particularities and to be inexplicable by any kind of public reason-giving process.

25. On the need for reflective criticism, see also the title essay in *Love's Knowledge*.

26. *California v. Brown*, 538.

27. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

4. Poets as Judges

1. *Nicomachean Ethics* 5, 1137b27-32.
2. For related accounts of nondeductive practical judgment, see Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989); and with respect to literary readership, Wayne C. Booth, *The Company We Keep: An Ethics of Fiction* (Berkeley and Los Angeles: University of California Press, 1988). On Aristotle's similar view, see my essay "The Discernment of Perception," in *Love's Knowledge: Essays on Philosophy and Literature*.
3. Stanley Fish, especially *Doing What Comes Naturally* (Durham: Duke University Press, 1989), and *There's No Such Thing as Free Speech and It's a Good Thing Too* (Cambridge: Harvard University Press, 1993).
4. See my "Skepticism about Practical Reason in Literature and the Law," *Harvard Law Review* 107 (1994): 714-44. Fish does not accept the label "skeptical," since he holds that we are caused by our traditions and our psychology to have and act on certain definite beliefs, and in that sense we are not free to play or even to question. I argue that this was, in fact, exactly the view of the ancient Greek skeptics, and their solution to the question of how and why the skeptic would act. Once we give up on good reasons for action, we are left with causes of action that may move us with necessitating force.
5. Benjamin Cardozo, *The Nature of the Judicial Process* (New York, 1921), 166-67.
6. Christopher Columbus Langdell, speech of 1887, quoted in William Twining, *Karl Llewellyn and the Realist Movement* (Norman: University of Oklahoma Press, 1985), 11.
7. For further discussion of this, see my "The Discernment of Perception," in *Love's Knowledge*, and "Equity and Mercy," *Philosophy and Public Affairs* 22 (1993): 83-125. For an excellent discussion of these issues in the law, see Cass Sunstein, *Political Conflict and the Rule of Law* (New York: Oxford University Press, forthcoming).
8. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959).
9. See Raoul Hilberg, *The Destruction of the European Jews*, student edition (New York: Holmes and Meier, 1985).
10. Richard Wright, *Native Son* (New York: Harper, 1993), 1. All quotes are from this unexpurgated edition of the novel.
11. See my "Equity and Mercy," reprinted in *Punishment*, A. John Simmons et al. (Princeton: Princeton University Press, 1994), 145-87.

12. E. M. Forster, "Terminal Note" to *Maurice* (New York: W. W. Norton, 1971), 250. All page numbers are from this paperback edition.
13. *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), 393ff.
14. The officers found a ripped pillowcase in the waste basket and as a result brought charges against Palmer for destroying state property; he was ordered to reimburse the state, and a reprimand was entered on his record.
15. In a curious sentence at the beginning of this section, Stevens uses the name "Hudson" where he should have said "Palmer": "Even if it is assumed that Hudson had no reasonable expectation of privacy in most of the property at issue . . ." (413). The literary judge should not confuse one character with another, but perhaps this was some sort of error in transcription!
16. Stevens adds arguments deriving from the Eighth and the First Amendments, which I shall not consider here.
17. Richard Posner, *The Economics of Justice* (Cambridge: Harvard University Press, 1981).
18. Richard Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), and "The Economic Approach to Homosexuality," in *Laws and Nature: Shaping Sex, Preference, and Family* ed. David Estlund and Martha Nussbaum, (Oxford: Oxford University Press, forthcoming 1996).
19. *Mary Jane Carr v. Allison Gas Turbine Division, General Motors Corporation*, 32 F. 3d 1007 (7th Cir. 1994).
20. A large proportion of judicial opinions are written by law clerks, and citations are especially likely to be chosen by clerks.
21. *Boiers v. Hardwick*, 478 U.S. 186 (1986).
22. A peculiarity of the situation discussed by Posner in his excellent treatment of the case (*Sex and Reason*, 341-50) was that in common law, sodomy did not include fellatio but was limited to anal intercourse; the extension took place late in the nineteenth century. On the heterosexual issue, the plaintiffs at one point introduced a motion asking that all members of the Georgia prosecutor's office who had ever committed sodomy disqualify themselves; the motion was denied.
23. See Posner, *Sex and Reason*, 342: "Had he noted that besides being about family, marriage, and procreation, [these] cases had been about sex, he could not have polished them off so easily." Also Thomas Grey, "Eros, Civilization, and the Burger Court," *Law and Contemporary Problems* 43 (1980): 83ff.
24. For another example of Justice White's distancing tactic, see Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988), 308-9, discussing the statement of facts in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 (1975), a case holding that a state may not allow the family of a rape victim, killed by the rapists, to get damages for the invasion of privacy caused by broadcasting the victim's name. White begins: "In August 1971, ap-

- pellee's 17-year-old daughter was the victim of a rape and did not survive the incident." As Posner points out, the Court "shied away from stating the blunt truth" (that the victim was murdered).
25. *Kelley v. Johnson*, 425 U.S. 238 (1976).
26. On the Greek world, see K. J. Dover, *Greek Homosexuality*, 2d ed. (Cambridge: Harvard University Press, 1986); for connections to the contemporary issues, see Dover's autobiography, *Marginal Comment* (London: Duckworth, 1994). See also my "Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies," *Virginia Law Review* 80 (1994) 601-738; (appendix 4 is coauthored by me and Kenneth Dover). On Christian traditions, see, among other works, John Boswell, *Christianity, Social Tolerance, and Homosexuality* (Chicago: University of Chicago Press, 1980); for a detailed argument concerning interpretation of the relevant passages from Leviticus, see Saul Olyan, "And with a Man You Shall Not Lie the Lying Down of a Woman," *Journal of the History of Sexuality* 5 (1974): 179ff.
27. The issues on both sides, in four leading American religious traditions, were presented at a conference at Brown University, April 7-8, 1995, and will be published in a book to be edited by Saul Olyan and me. For one impressive example of recent rethinking of traditional norms, see the statements by theologians and various groups within the Norwegian Lutheran Church collected in the preamble to the recent domestic-partner legislation for same-sex couples passed by the Norwegian parliament in 1993.
28. Cass Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection," *University of Chicago Law Review* 55 (1988): 1161ff. Equal protection arguments have been used in lower court gay-rights cases, although so far all decisions using such arguments have been overturned.
29. See Posner, *Sex and Reason*.