1985

Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory

Robin West
Georgetown University Law Center, west@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 11-06

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/facpub/496
http://ssrn.com/abstract=1738492

60 N.Y.U.L. Rev. 145-211 (1985)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: http://scholarship.law.georgetown.edu/facpub

Part of the Legal History, Theory and Process Commons, and the Public Law and Legal Theory Commons
JURISPRUDENCE AS NARRATIVE: AN AESTHETIC ANALYSIS OF MODERN LEGAL THEORY

ROBIN WEST*

Recent legal scholarship has engaged in a growing dialogue tying literary criticism to jurisprudence. In this article, Professor Robin West adds her voice by advocating the reading of legal theory as a form of narrative. Drawing from Northrop Frye’s Anatomy of Criticism, Professor West first details four literary myths that combine contrasting world visions and narrative methods. She then applies Frye’s categories to Anglo-American jurisprudential traditions and employs aesthetic principles to analyze influential legal theorists within these traditions. Finally, Professor West argues that recognizing the aesthetic dimension of legal debate frees us to realize our moral ideals.

INTRODUCTION

It is now a commonplace that lawyers and legal theorists have much to learn from literature.1 We surely can learn something about the law from great works of literature that deal with legal themes, such as Kafka’s The Trial and Melville’s Billy Budd.2 But apart from the law depicted in literature, legal theory itself contains a substantial narrative component that can be analyzed as literature. Modern legal theorists


persistently employ narrative plots at strategic points in their arguments, relating romantic sagas about mythical commanders and communities and saturating their writings with realistic anecdotes from lawyers' and judges' subjective experiences of law. Fictive protagonists also play an important role in legal theory: Dworkin's heroic "Herculean" judge and Holmes's one-dimensional "bad man," for example, are central devices by which these jurists convey their conceptions of the meaning of law.

It is not surprising that legal theory should rely so heavily upon narrative form. The subject matter of legal theory is the "nature of law." This nature is partly revealed by the content of law—its history and political and economic underpinnings. Examining law as a "fact" can help us understand what law is and what it has been in the past. But law is also an ever-present possibility, potentially bringing good or evil into our future. The nature of law is also revealed, then, by our aspirations for and our fear of law: fantasies and nightmares revolving around power, reason, and authority. When we discuss what is, we rely quite rightly upon description and analysis. But when we discuss what is possible, what we desire and what we dread, we quite naturally turn to stories about hypothetical communities and the legal actors and forms within those communities.

If legal theories are, in part, aesthetic objects, then we should be trying to understand them in that sense. This Article argues that the narrative plots, protagonists, and images of major legal theories do, in fact, fall into recognizable literary categories. It develops this thesis by applying to legal theory the insights of a classic work of literary criticism, Northrop Frye's Anatomy of Criticism. In this work, Frye, première

---


"formalist" literary critic, demonstrates that four discrete "aesthetic myths" recur in the common plots of poems, movies, novels, plays, comic strips, and other narrative forms. Two of the myths reflect contrasting methods of storytelling: romantic and ironic narrative modes. The other two reflect contrasting visions of the world: comic and tragic world views.

Two similar polarities dominate modern jurisprudence. The first polarity concerns conflicting theories of law as either an exercise of reason or an exercise of the will. The second involves conflicting images of law as either a liberating force serving the community or an oppressive tool serving the interests of the powerful. The two theories and the two images have generated four major jurisprudential traditions: natural law, positivism, liberalism, and statism. This Article establishes a correlation between these four major jurisprudential traditions and the four aesthetic myths that Frye identified as permeating great and popular literature. The natural lawyer's and the legal positivist's methods of analyzing law fit readily within Frye's descriptions of romantic and ironic narrative method. The liberal and the statist's contrasting visions of law can be read as instances of comic and tragic narrative visions.

Part I of this Article summarizes Northrop Frye's analysis of the role of myth in narrative literature and reviews his four "core myths" and their corresponding literary plots: romance, irony, comedy, and tragedy. Part II describes four corresponding jurisprudential traditions: natural law, legal positivism, liberalism, and statism. Parts III and IV argue that each of these jurisprudential traditions is unified by either a vision of the world or a narrative method that corresponds to one of Frye's four literary myths. The final section assesses the significance of this correspondence, demonstrating that it is fruitful to address conflicts in legal theory as reflecting aesthetic as well as political and moral differ-

5 Frye has been called "the leading theoretician of literary criticism among all those writing in English today." Bloom, A Study of the Structure of Romance (Book Review), N.Y. Times, Apr. 18, 1976, § 7, at 21; see also R. Denham, Northrop Frye and Critical Method vii (1978). Frye's books and essays on literature are discussed in Northrop Frye in Modern Criticism: Selected Papers from the English Institute (M. Krieger ed. 1966); see also R. Denham, supra. For a discussion of Frye's formalism, see Part V(B) infra.

Some critics have attacked Frye's analysis of literature in Anatomy of Criticism because of what they perceive to be the inconsistency with which Frye practices his general refusal to pass judgment on the quality of the works he discusses. Frye's work has also been criticized for its abstract treatment of literature, a treatment that is said to ignore the details of individual works and to pay little attention to their historical and social contexts. See Winsatt, Northrop Frye: Criticism as Myth, in Northrop Frye in Modern Criticism: Selected Papers from the English Institute, supra; Dickstein, U. and Non-U. (Book Review), 36 Partisan Rev. 153 (1969) (reviewing N. Frye, The Modern Century (1969)).

6 N. Frye, supra note 4, at 151-58.
7 Id. at 141-50.
ences in the way we view the world. By so doing, we may achieve a better understanding of who we are and why we disagree.

I

Frye’s Four Myths of Narrative Literature

Frye distinguishes four “organizations” of archetypal symbolism in literature. First, he describes two “unplaced” narrative myths reflecting visions of the world that are expressed in the comic and tragic poles of literature. These myths take the form of “two contrasting worlds of total metaphorical identification, one desirable and the other undesirable.” Frye calls these the “apocalyptic” and the “demonic,” and they can be illustrated by popular conceptions of heaven and hell. The second two organizations are literary methods by which the undisplaced myths are “analogized” to the actual human world; these methods find expression in romantic and ironic narrative forms. The first analogical method is that of “innocence.” By the “analogy of innocence,” the pure, undisplaced apocalyptic myth is changed into story by the medium of metaphor. The second analogical method is that of “experience.” By the “analogy of experience” the pure, undisplaced demonic myth is translated into story by the medium of realism.

In the apocalyptic undisplaced myth (the comic pole), human as well as divine civilizations flourish. The apocalyptic world is an idealized, indivisible unity, in which God is “One Christ,” the members of a political community are of “one body,” and lovers unite as “one flesh.” Community, in its various forms, is infinitely desirable, a natural good, as is the human transformation of nature through work.

---

8 Id. at 139.
9 “Undisplaced myths” are narratives that have retained their mythic subject matter and have not been made into “plausible, symmetrical, and morally acceptable” stories for a modern audience. See id. at 136-38.
10 Id. at 139.
11 Id.
12 Id.
13 Id. at 142-43.
14 See id. at 141.
In sharp contrast, the “demonic myth” (the tragic pole) presents “the world that desire totally rejects.” Although the demonic world also has divine, social, and sexual aspects, each aspect is divisive, menacing, and horrific. The “world that desire totally rejects” is a world in which we are divided and isolated.

Frye’s third and fourth “organizing forms” of myth are his two “analogies,” the narrative methods by which the undisplaced apocalyptic and demonic myths are translated into worldly, recognizable phenomena. The undisplaced apocalyptic myth is translated by the “analogy of innocence” into an idealized, romantic world. In this narrative method of romance, apocalypse is “made real” by the romantic idealization of reality. The undisplaced demonic myth is translated to the world via the “analogy of experience,” or the “method of realism.” Use of the

---

13 Id. at 147. Frye describes the demonic world as follows:

[T]he world of the nightmare and the scapegoat, of bondage and pain and confusion; the world as it is before the human imagination begins to work on it and before any image of human desire, such as the city or the garden, has been solidly established; the world also of perverted or wasted work, ruins and catacombs, instruments of torture and monuments of folly. And just as apocalyptic imagery in poetry is closely associated with a religious heaven, so its dialectic opposite is closely linked with an existential hell, like Dante’s *Inferno*, or with the hell that man creates on earth, as in *1984*, *No Exit* and *Darkness at Noon*, where the titles of the last two speak for themselves.

16 Id. at 147-48.

The demonic human world is a society held together by a kind of molecular tension of egos, a loyalty to the group or the leader which diminishes the individual, or, at best, contrasts his pleasure with his duty or honor. Such a society is an endless source of tragic dilemmas like those of Hamlet and Antigone. ... In the sinister human world one individual pole is the tyrant-leader, inscrutable, ruthless, melancholy, and with an insatiable will, who commands loyalty only if he is egocentric enough to represent the collective ego of his followers. The other pole is represented by the *pharnakes* or sacrificed victim, who has to be killed to strengthen the others. . . .

17 Id. at 151-54.

18 The mode of romance presents an idealized world: in romance heroes are brave, heroines beautiful, villains villainous, and the frustrations, ambiguities, and embarrassments of ordinary life are made little of. . . .

In the analogy of innocence the divine or spiritual figures are usually parental, wise old men with magical powers like Prospero, or friendly guardian spirits like Raphael before Adam’s fall. Among the human figures children are prominent, and so is the virtue most closely associated with childhood and the state of innocence—chastity, a virtue which in this structure of imagery usually includes virginity.

19 Id. at 151.

Cities are more alien to the pastoral and rural spirit of this world and the tower and the castle, with an occasional cottage or hermitage, are the chief images of habitation.
analogy of experience defines what may be called the "ironic mode." Frye generates from these four organizing myths—the apocalyptic, the demonic, the romantic, and the ironic—four thematic categories:

We have thus answered the question: are there narrative categories of literature broader than, or logically prior to, the ordinary literary genres? There are four such categories: the romantic, the tragic, the comic, and the ironic or satiric. . . . We thus have four narrative pregeneric elements of literature which I shall call mythoi or generic plots.

If we think of our experience of these mythoi, we shall realize that they form two opposed pairs. Tragedy and comedy contrast rather than blend, and so do romance and irony, the champions respectively of the ideal and the actual. On the other hand, comedy blends insensibly into satire at one extreme and into romance at the other; romance may be comic or tragic; tragic extends from high romance to bitter and ironic realism.

Frye’s four “pregeneric myths” can be schematized in the following way:

(Apocalyptic Myth of Unity and Community)

COMEDY

(Analogy of Innocence) (Analogy of Experience)

ROMANCE——— IRONY

TRAGEDY

(Demonic Myth of Disunity and Alienation)

[This] treatment of human society reflects . . . Wordsworth’s doctrine that the essential human situations, for the poet, are the common and typical ones. Along with this goes a good deal of parody of the idealization of life in romance, a parody that extends to religious and aesthetic experience. . . . Gardens . . . give place to farms and the painful labor of the man with the hoe, the peasant or furze cutter who stands in Hardy as an image of man himself, “s slighted and enduring.” Cities take of course the shape of the labyrinthine modern metropolis, where the main emotional stress is on loneliness and lack of communication.

Id.

21 Id. at 162.
Frye then distinguishes “phases” within each of his four categories. Because romance “blends” into comedy and tragedy, there are phases of romance that are also phases of tragedy or of comedy. Similarly, some of the borderline phases of irony are also phases of comedy at one extreme, and of tragedy at the other. Frye’s conception of the mythoi also can be schematized:

(Four Jurisprudential Traditions)

Frye’s categorization of literary traditions according to view of the world and method of narration can be easily fitted to Anglo-American jurisprudence. That jurisprudence can be divided into four traditions, rooted in polar responses to two recurrent questions in legal theory. The first question is philosophical, and competing answers have generated two methods of inquiry. The second question is empirical; the answers have formed two visions of our legal world.

The philosophical question has both an analytical and a methodological dimension: What is the analytical relationship between law and morality, and how methodologically do we distinguish legal from moral
norms? Natural law and legal positivist responses to this question bear a relation to each other comparable to the contrast Frye describes between the romantic and ironic modes of narrative literature, which are concerned respectively with the ideal and the actual.

For the natural lawyer, true "law," by definition, must meet some set of moral criteria: to St. Augustine, for example, laws that ignore the "eternal" law cannot be just and are therefore not true law. Law incorporates morality, and the "discovery" of law therefore requires the "discovery" of true morality as well. In aesthetic terms, the natural lawyer employs a "romantic" jurisprudential method. Only in an imaginary apocalyptic world is his ultimate hope realized: only in heaven, or apocalypse, do the legal "is" and the moral "ought" coincide perfectly. Like Frye's romantic, the natural lawyer "analogizes" this apocalyptic vision of a perfect convergence of law and morality to the imperfect world we inhabit through the ahistorical, "innocent" techniques of metaphor: idealization, reason, and faith. Thus, Plato teaches that the "discovery of law," like the discovery of truth and beauty, is the reasoned and nonexperiential grasping of a transcendent, ideal reality. The natural lawyer's philosophical method, like the romantic's narrative method, is theoretically pure and willfully counterfactual. Only moral law is "true" law. Experience does not ground the theory and method of the natural law tradition; innocence, faith, and reason do.

Legal positivists, conversely, propound an experiential method and a realistic theory. Law is a historical fact. As such, it can be discovered only by the study of worldly phenomena. Thus, Austin teaches that

22 The natural law tradition begins with Plato, who defines law as the "discovery of true reality." Plato, Meno, at 73d (M. Brown ed. 1971). Other natural lawyers have claimed that law must, in order to qualify as true "law," accord with moral norms derived from God's law (Augustine), human nature (Aquinas), rights (Dworkin), procedural fairness (Fuller), generality (Wechsler), neutrality (Ackerman), the human good (Finnis), or the community good (Aquinas and Aristotle). See B. Ackerman, supra note 3; T. Aquinas, Summa Theologica 75-151 (Questions 94-96) (T. Gilbey ed. 1964); R. Dworkin, supra note 3; J. Finnis, Natural Law and Natural Rights (1980); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). But see J. Finnis, supra, at 23-36 (the natural law tradition does not require denial of the separation of law from morality).
23 See H. Deane, The Political and Social Ideas of St. Augustine 89 (1963). During the last 40 years of his life, however, Augustine never addressed the proper response to "unjust" temporal laws. He did not suggest that such laws were invalid or that they could be disobeyed. Id. at 90-91.
24 Augustine's radical assertion is repeated in a milder form in T. Aquinas, supra note 22, at 130-33 (Question 96, Reply to Point 4).
25 Plato, supra note 22, at 73d.
law is the “command of the sovereign,” Holmes that law is “what the courts will do in fact.” The positivists’ jurisprudential method is comparable to Frye’s “ironic” narrative method; like Frye’s literary ironists, legal positivists “analogize” their demonic vision to our world by reference to contingent truths born of experience. Only that which is observable, is. Experience and skepticism, not faith and reason, ground positivist theory and method.

The second group of basic questions of concern to modern legal theory is empirical. What is the historical relationship between law and morality? Do legal systems tend to satisfy moral criteria or do they tend to be evil? Do they serve forces of liberation or forces of oppression? These are questions about history, human nature, and human societies. The extreme visions underlying the contrasting responses to these questions correlate with the apocalyptic and demonic myths that Frye argues underlie comic and tragic narrative plots.

One of these empirical views echoes Frye’s undisplaced demonic myth. In light of the brutality of modern history, it is certainly possible to conclude that positive legal systems more often than not fail to meet even minimal moral criteria, whether the criteria are Kantian, Augustinian, or utilitarian. Like Frye’s tragedian, the statist views this history of brutality and oppression as the “experiential analogue” of our demonic human predicament. The misery heaped upon human beings by human beings, through law and lawlessness both, makes perfect sense to the tragic legal theorist; it is hell on earth. Racial, religious, political, and sexual oppression and violence are not perversions of our nature; they are the foreseeable ends of our natural propensity for brutality.

At the other aesthetic extreme, the liberal theorist concludes from

28 Holmes, supra note 3, at 461.
29 See Hart, Problems, supra note 26, at 272-73.
30 See, e.g., I. Kant, The Philosophy of Law (W. Hastie ed. 1887).
31 See, e.g., H. Deane, supra note 23.
34 The liberal state in our culture is distinguished from the conservative not by a neutral stance toward particular definitions of the good life, as Dworkin and Ackerman have suggested, but by the manner in which the “good life” is defined, ascertained, and pursued. Unlike conservatives, liberals are committed to a naturalistic, evolving conception of the good life, rather than a moralistic and static one. As a result, they are committed to an experimental, inductive method of understanding. Liberalism’s aim, then, is a naturalistic conception of the good life that is empirically understood and ultimately accessible to all members of the community. These “constitutive goals” sometimes imply a strategy of state neutrality toward the nature of that life and sometimes require the contrary. Whether or not state neutrality is required by liberal commitments depends upon contingent and temporal conditions. But liber-
history that legal systems and the societies they control tend to improve morally, not degenerate, over time. Auschwitz, El Salvador, and oppression are aberrational; community, progress, and altruism reveal our truer nature. Although imperfect, modern democratic governments do what they ought to do: promote the community’s happiness, treat people as ends rather than means, maximize individual freedoms, respect personal autonomy, and encourage community. Aesthetically, these optimistic assessments of recent history, human nature, and law share an “apocalyptic” vision of human potential and current reality. It follows naturally from the communitarian and progressive assumptions of liberalism that laws do, can, and will promote human welfare; if community is natural and good, then laws and legality are simply a natural and good feature of that human enterprise. The same kind of assumptions, Frye argues, underlies comedy. Liberal, democratic, and humane societies and legal systems appear natural from the aesthetic vantage point of the apocalyptic myth.

These four jurisprudential positions correlate, then, with Frye’s fundamental narrative plots. Romantic and ironic narrative modes mirror the natural law and positivist methods in jurisprudence. Comic and tragic narrative visions correspond to liberal and demonic or statist world views, respectively.

But just as narrators combine vision with method, legal theorists typically combine either a “romantic” or “ironic” theoretical method with either a “comic” or “tragic” vision of the world. Both the natural lawyer and the positivist may harbor either a demonic or an apocalyptic vision of history and of human society. Similarly, a liberal may employ either a romantic or an ironic jurisprudential method, as may a statist. The combinations of theoretical method and historical vision yield jurisprudential positions, which in turn correlate with the “phases” Frye finds within his narrative plots.

The natural lawyer who discovers that much of what currently operates as “law” does not morally qualify as such will be prompted to deny the law’s ultimate validity. As Ely notes, for example, our revolutionary Declaration of Independence, unlike the Constitution, is permeated with natural law concepts that deny the validity of the British law of its time. A romantic method coupled with an awareness of the tragic fail-

---

36 N. Frye, supra note 4, at 131-40.
ings of particular states, rulers, or laws is in fact the shared aesthetic stance of the eighteenth-century revolutionary, the twentieth-century civil disobedient, and the transcendentalist visionary. 38

Alternatively, the natural lawyer who sees in the present world a legal system that generally comports with moral criteria will be prompted to assert the essential morality of the law—the “rightness” of extant power. Romantic method coupled with a comic contentment with the present world is the aesthetic stance of the political reactionary. 39 Law becomes a moral good, which therefore ought to be obeyed, simply because it is law.

Like the natural lawyer, the positivist combines a method—an experiential insistence on the facts—with a view of the world. At the cost of symmetry, one can distinguish three jurisprudential and political positions. First, a positivist may combine an experiential historical method with an apocalyptic vision of the world, believing that our legal system is generally good, adequately reflecting both our tolerance of diversity and our social inclination to community. A positivist methodology coupled with a rational belief in human goodness and social progress forms the comic-ironic aesthetic position of the reformer. It underlies the optimism of liberal and progressive theorists, from the Benthamites through the New Deal lawyers and the American legal realists. 40 Second, the positivist may perceive a demonic reality but nevertheless harbor an apocalyptic vision of our potential for a communitarian future. Our social isolation and alienation are a consequence of changeable and perverse present institutions, not evidence of an essentially atomistic human personality. Because of the wide gap between present reality and social potential, however, radical action, not liberal progress, is all that can deliver us to the promised land. This aesthetic posture—dark, ironic comedy, tinged with awareness of the demonic—characterizes the critical legal studies movement. 41 Finally, at the most tragic extreme, the positivist method can combine with a thoroughly demonic assessment of the world, present and future: law is the will of the powerful and morality does not exist. The modern “law and economics” movement, despite its liberal window dressing, has its roots in this combination of scientific method with a tragic assessment of our communal potential. 42

Similarly, liberal and statist theorists may also tend toward either an ironic or romantic methodology. A liberal outlook coupled with a romantic methodology results in a reactionary acceptance of the status quo

---

38 See text accompanying notes 52-56 infra.
39 See text accompanying notes 57-72 infra.
40 See text accompanying notes 94-116 infra.
41 See text accompanying notes 117-32 infra.
42 See text accompanying notes 133-46 infra.
based upon idealized and static assumptions about human nature. By contrast, liberalism coupled with experiential realism yields an acceptance of our social world based upon changing facts of experience. Statism tending toward irony posits only relentless cruelty and suffering as the essence of human experience. Statism combined with a romantic methodology simultaneously posits a demonic present and an idyllic alternative world: either an afterlife or a postrevolutionary paradise on earth.

These positions can be correlated with Frye's literary categories:

<table>
<thead>
<tr>
<th>Liberalism</th>
<th>Conservative/Reactionary</th>
<th>Reformer/Radical</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comedy</td>
<td>Natural Law</td>
<td>Positivism</td>
</tr>
<tr>
<td>(Apocalyptic vision of a natural convergence of law and morality)</td>
<td>(Romantic vision of an analytic connection of law and morality)</td>
<td>(Ironic vision of an analytic separation of law and morality)</td>
</tr>
<tr>
<td>Romance</td>
<td>V visionary/Revolutionary</td>
<td>Resignation</td>
</tr>
<tr>
<td>(Demonic vision of a natural divergence of law and morality)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Just as Frye's literary themes blend at their boundaries with the themes they border, so these jurisprudential schools “blend” with each other in their more extreme phases. Natural law tends to embrace either a reactionary or a revolutionary plan of action, depending upon the

---

43 See text accompanying notes 175-86 infra.
44 See text accompanying notes 187-95 infra.
45 See text accompanying notes 198-207 infra.
46 See text accompanying notes 208-10 infra.
world view with which it is coupled. Positivism tends toward either a progressive or regressive stance. An apocalyptic view of human nature can be influenced by either a positivist insistence upon an experiential method, or a romantic insistence on an idealized methodology. Finally, a demonic vision of human society and legal institutions may be coupled with either a positivist resignation to the status quo or a revolutionary aspiration to a transcendental reality. The major strands of jurisprudential thought thus can be depicted:

(Liberalism)

COMEDY

Comic/Romantic

Individualism

Constitutionalism

Romantic/Comic

Social Pragmatism

Legal Realism

Critical Legal Studies

Ironic/Comic

ROMANCE

(Natural Law)

Revolution, Civil Disobedience

Romantic/Tragic

Sophocles

Tragic/Romantic

IRONY

(Legal Positivism)

Hobbes, Law & Economics

Ironic/Tragic

Sophistry

Tragic/Ironic

TRAGEDY

Statism

Thus, as romance blends with tragedy at one extreme and comedy at the other, natural law blends with revolutionary rhetoric on the one side and a reactionary constitutionalism and individualism on the other. As comedy blends into either romance or irony, liberalism blends with a romantic equation of the "is" and the "ought" on the one side, and a realistic insistence on their separation on the other. As irony borders upon comedy and tragedy, legal positivism borders upon liberalism and statism. Finally, as tragedy ranges from irony to romance, statism moves from an exhausted realism to inspiration and revolution, closing the circle.
The next two Parts of this Article discuss each of the four major jurisprudential categories, from the contrasting methods of romance and irony to the contrasting visions of comedy and tragedy. First, the “family resemblance” between the major jurisprudential commitments of each jurisprudential category and the dominant characteristics of its correlative narrative myth are examined. Then the central ambiguity of each jurisprudential category is identified, along with the two major subcategories that the ambiguity entails. Finally, each jurisprudential category is correlated with the “phases” Frye identifies within each narrative plot. The ambiguity within each philosophical tradition will be discussed in aesthetic terms, for these aesthetic differences have generated much of our modern jurisprudential debate.

III

NARRATIVE MODES AND JURISPRUDENTIAL METHODS

A. Romance and Natural Law: Good Guys, Bad Guys, and the Rule of Law

Romantic narrative, Frye explains, is characteristically dominated by the description of a mythic quest for an idyllic world. 47 In romance, heroes are triumphant and rewarded, villains are punished, the comfortable and impeccably moral status quo is restored, and all is right in the end—as it was at the start. The hero embodies moral virtue, and he and it emerge victorious. By the end of the narrative, power and right have inevitably converged. 48

47 N. Frye, supra note 4, at 186-87.
48 Id. at 187.

This major adventure, the element that gives literary form to the romance, is the quest. . . . A quest involving conflict assumes two main characters, a protagonist or hero, and an antagonist or enemy. . . . The enemy may be an ordinary human being, but the nearer the romance is to myth, the more attributes of divinity will cling to the hero and the more the enemy will take on demonic mythical qualities. The central form of romance is dialectical: everything is focused on a conflict between the hero and his enemy, and all the reader's values are bound up with the hero. Hence the hero of romance is analogous to the mythical Messiah or deliverer who comes from an upper world, and his enemy is analogous to the demonic powers of a lower world. The conflict however takes place in, or at any rate primarily concerns, our world. . . . The enemy is associated with winter, darkness, confusion, sterility, moribund life, and old age, and the hero with spring, dawn, order, fertility, vigor, and youth.

Id. at 187-88.

The characterization of romance follows its general dialectic structure, which means that subtlety and complexity are not much favored. Characters tend to be either for or against the quest. If they assist it they are idealized as simply gallant or pure; if they obstruct it they are caricatured as simply villainous or cowardly. Hence every typical character in romance tends to have his moral opposite confronting him, like black and white pieces in a chess game.

Id. at 195.
Frye explains that romance has both a “proletarian” and a “chivalric” aspect. These elements correlate, in turn, with romance’s tragic and comic phases. Tragic (proletarian) romance parallels tragedy’s theme of disunification: the hero is inevitably and irretrievably alienated from the community, despite the hero’s hope and the narrator’s promise of an ultimate communion. In the tragic phases of romantic narrative, heroic strength and moral virtue are pitted against the corrupt values of a dominant social group. Consequently, Frye explains, the tragic phases of romance explore revolutionary themes: tumultuous endings and new beginnings make room for at least the description, if not the fruition, of new utopias.

Comic romance, by contrast, celebrates the moral virtue of the dominant social group: the heroic and virtuous protagonist protects the group against assault from outsiders. Romance in these phases parallels comedy’s “unification” theme: the hero and his society are united in purpose and outlook. The identification of heroic strength and moral virtue serves to reinforce, not overthrow, the values and cohesion of the extant social group. In the most comic phases, the group to be defended is either the society as a whole or some slice of it.

Schematically, romantic narrative “blends” at one extreme with tragedy, and at the other with comedy:

---

49 The romance is nearest of all literary forms to the wish-fulfillment dream, and for that reason it has socially a curiously paradoxical role. In every age the ruling social or intellectual class tends to project its ideals in some form of romance, where the virtuous heroes and beautiful heroines represent the ideals and the villains the threats to their ascendancy. This is the general character of chivalric romance in the Middle Ages, aristocratic romance in the Renaissance, bourgeois romance since the eighteenth century, and revolutionary romance in contemporary Russia. Yet there is a genuinely “proletarian” element in romance too which is never satisfied with its various incarnations, and in fact the incarnations themselves indicate that no matter how great a change may take place in society, romance will turn up again, as hungry as ever, looking for new hopes and desires to feed on. The perennially childish quality of romance is marked by its extraordinarily persistent nostalgia, its search for some kind of imaginative golden age in time or space.

Id. at 186.

50 See id. at 201-02.
Natural law scholarship, like romantic narrative, is dominated by a moral quest. "Law" is the natural lawyer's romantic hero: it is morally virtuous and historically triumphant—it is "sovereign." "Law" embodies both virtue and power. Like the narrator's portrayal of the romantic hero, every natural lawyer defines "law" or "legality" so that the defining attributes of a truly "legal" sovereignty are themselves "moral" qualities. Such attributes then morally legitimate as well as define the sovereign's political power. Thus, the political monarch is both sovereign and moral, because divine anointment ensures the justice as well as the power of a monarchical regime. Similarly, the Constitution is both sovereign and moral because of its defining attribute; the "higher law" content of its substantive provisions, its history, and its traditions both morally legitimate and define a constitutional regime. The natural lawyer defines law in such a way as to ensure the moral worth of legal supremacy, just as the narrator of a romantic fiction describes the hero in such a way as to ensure the moral worth of his inevitable victory.

Romantic narrative, Frye explains, serves a "curiously paradoxical role" in society. Natural law scholarship exhibits the same "paradoxical" range found in romantic narrative, moving between a reactionary endorsement of the legal status quo and a revolutionary rejection of it. The natural lawyer's insistence that law, properly defined, incorporates the demands of morality entails either a "chivalric" conclusion—the necessary morality of the current regime—or the "revolutionary" conclusion—the immorality and hence illegality of the regime. Either the
Prince is necessarily good because of his divine anointment—the chivalric conclusion—or, if he is bad, he was not divinely anointed and therefore is necessarily not a Prince—the revolutionary conclusion. These conclusions correlate with the comic and tragic phases of the natural law tradition. Whereas the comic natural lawyer sees virtue in existing power relations, the tragedian finds such virtue only in his “dream” of an idealized or future world. The tragedian thus calls insistently for a revolutionary struggle toward an idyllic future paradise.

Both the chivalric and revolutionary traditions have heavily influenced American legal romanticism. The chivalric inference of morality from the fact of power is reflected in law reviews and constitutional literature, as well as popular thinking on law. At the other extreme, the revolutionary inference from the immorality of power to its illegality is a foundation of revolutionary literature. Schematically, American natural law literature covers the same substantive range as romantic narrative:

\[
\begin{array}{c|c|c}
\text{LIBERALISM} & \text{NATURAL LAW} & \text{STATISM} \\
(\text{Comedy}) & (\text{Romance}) & (\text{Tragedy}) \\
\text{Blackstone's Common Law,} & \text{Revolution, Civil} & \text{STATISM} \\
\text{Constitutionalism,} & \text{Disobedience,} & \text{(Tragedy)} \\
\text{Individualism} & \text{Transcendentalism} & \\
(\text{Ahistorical correlation} & \text{(Identification of} & \\
\text{of existing lawful power} & \text{counterfactual but} & \\
\text{with morality)—chivalric} & \text{ideal law with} & \\
\text{view} & \text{morality)—revolutionary} & \\
& \text{view} & \\
\end{array}
\]

I. Tragic Romance: Of Rebirth and Revolution

Law review scholarship only occasionally explores tragic-romantic themes. This absence is striking although not inexplicable. Legal scholars do not often seek tumultuous changes, new beginnings and endings, or transcendent utopias. Such scholarship lacks the preconditions of tragic romance: an apocalyptic vision of the future, a perception of the present as a living hell, and an innocent, idealistic, ahistorical insistence that we can somehow transcend history to achieve utopia. The perceptions of scholars are less epic and their goals more timid.

American legal literature more broadly defined, however, rests solidly on a tragic-romantic narrative base. The Declaration of Independence—our document of “tumultuous birth”—employs natural law logic profoundly tinged with tragic-romantic aesthetic imagery. The Declaration distinguishes true “law” from the commands of the existing sovereign or of the existing state, defining the former as a transcendent quality that can only be freed by revolutionary action. Law is the justice inherent in our power of reason, not in our will. As narrative, the document tells the romantic story of the “birth of a hero,” a tumultuous ending and a new apocalyptic beginning. The American Rule of Law is the hero that triumphs over English monarchical authority. The parental authority figures are overthrown and replaced by a lawful, nonparental, and freer political utopia, an orderly society of “desirable law” in which the free and the brave, through heroic and individual action, can exploit the apocalyptic land of milk and honey.

The narrative structure and the aesthetic imagery of apocalyptic writings are drawn upon heavily, if subconsciously, during every period of radical change. The civil rights movement provides the most recent instance of this reliance. Like the revolutionary, Martin Luther King, Jr. distinguishes law from power, defining the former as a transcendent quality released only by revolutionary action. King identifies law not with reason, however, but with love, emphatically echoing the heavenly identification of sovereignty with love that characterizes the undisplaced apocalyptic myth. Aesthetically, King relies almost exclusively on the tragic-romantic imagery of the Declaration of Independence and of the Bible. King’s dream, like Biblical narrative and the story told in the Declaration, is the story of a hero’s moral battle against the demonic world in which we presently live, and toward the “blessed community” of which we are capable. The American dream of freedom and brother-

34 King embraced the natural law arguments of both Aquinas and Augustine. See M.L. King, Letter from Birmingham City Jail, in Why We Can’t Wait 77-100 (1963).
hood is the reality our utopia must contain; alienation and racism are the reality from which we must be delivered.55

In King's "blessed world," as in every apocalyptic community, the anxieties of our real world have vanished: fertility is victorious over the wasteland; food, drink, bread, and wine are plentiful, the male and female are united, and body and blood are one:

The dream is one of equality of opportunity, of privilege and property widely distributed; a dream of a land where men will not take necessities from the many to give luxuries to the few; a dream of a land where men do not argue that the color of a man's skin determines the content of his character; a dream of a place where all our gifts and resources are held not for ourselves alone but as instruments of service for the rest of humanity; the dream of a country where every man will respect the dignity and worth of all human personality, and men will dare to live together as brothers. . . . Whenever it is fulfilled, we will emerge from the bleak and desolate midnight of man's inhumanity to man into the bright and glowing daybreak of freedom and justice for all of God's children. . . .

It is a dream of a land where men of all races, of all nationalities, and of all creeds can live together as brothers. The substance of the dream is expressed in these sublime words, words lifted to cosmic proportions: "We hold these truths to be self-evident—that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This is the dream.56

2. Comic Romance and Constitutionalism

To the comic-romantic, the identification of power and morality is neither a dream nor the future; it is our present reality. "Moral authority" is not just an object of desire; it is also the reality that we have and must struggle to preserve. In tragic romance, the hero struggles against the reigning power; in comic romance, the hero's virtue and power mir-

55 Jesus took over the phrase "the Kingdom of God," but He changed its meaning. He refused entirely to be the kind of Messiah that his contemporaries expected. Jesus made love the mark or sovereignty. Here we are left with no doubt as to Jesus' meaning. The Kingdom of God will be a society in which men and women live as children of God should live. It will be a kingdom controlled by the law of love. . . . Many have attempted to say that the ideal of a better world will be worked out in the next world. But Jesus taught men to say, "Thy will be done in earth, as it is in heaven." Although the world seems to be in a bad shape today, we must never lose faith in the power of God to achieve his purpose.

M.L. King, What a Christian Should Think About the Kingdom of God (unpublished manuscript deposited at Boston University Library), quoted in K. Smith & L. Zepp, Search for the Beloved Community: The Thinking of Martin Luther King, Jr. 129 (1974).

ror the community's dominant values. The hero's undertaking is to defend, not attack, the dominant social group and the values it embraces. As a result, Frye explains, the comic-romantic narrator tends to "hedge"—or identify—existing political power with divine or moral attributes. 57

Not coincidentally, the "hedging" of legal authority with divine authority is also a central aesthetic metaphor in comic-romantic jurisprudence. 58 Of course, the comic natural lawyer no longer sees the "fire of the angelic world blazing in the king's crown." 59 But he does still see—or seek—the "angelic blaze" of moral legitimacy in other sources of sovereignty. In American romantic jurisprudence, it is usually the constitutionalist who sees the "angelic blaze" in existing power. For the constitutionalist, unlike the revolutionary, legal authority is hedged with right; the romantic identification of law with right is characteristic both of the legal state of which we dream and of the legal state we must defend. As divine ascension both defines and morally legitimates monarchical power, so constitutionalism and the Rule of Law define and morally legitimate liberal, democratic, and constitutional power. 60

Romantic stories about how the Constitution came to embody moral right take two familiar forms in jurisprudence: substantive and procedural. The substantive story unambiguously romanticizes the document's content. The constitutional provisions themselves, by virtue of either some miracle or some highly improbable historical accident, embody true principles of morality. Corwin tells the story this way:

The attribution of supremacy to the Constitution on the ground

---

57 We find [in romance] the ... tendency to idealize the human representatives of the divine and the spiritual world ... . Divinity hedges the King and the Courtly Love mistress is a goddess; love or both is an educating and informing power which brings one into unity with the spiritual and divine worlds. The fire of the angelic world blazes in the king's crown and the lady's eyes.

N. Frye, supra note 4, at 153 (emphasis added).

58 For example, Dworkin uses a "super-smart" judge as his ultimate legal sovereign. See R. Dworkin, supra note 3, at 105-30.

59 See note 57 supra.

60 Constitutionalism's comic vision is in tension with the tragic mythology of the revolutionary. Unlike the revolutionary, the constitutionalist projects an explicit endorsement of the particular institutions that the document defines, and thus implicitly endorses the "integrated body" of individuals empowered by the Constitution. The constitutionalist employs not only the romantic form of the monarchist, but also the monarchist's optimistic faith in the good will of the powerful. The revolutionary theorist, or the civil disobedient, does not share the constitutionalist's comic contentment.

King's tragic-romantic justification of civil disobedience, for example, contrasts with the comic-romantic justification offered by Ronald Dworkin. King argues that an unjust law is not a law because it is not in accord with our nature or with God's will, whereas Dworkin argues that an unjust law is not a law, because it is unconstitutional. For Dworkin, the Constitution embodies political morality as well as positive legality; our sovereign is in fact the ideal. R. Dworkin, supra note 3, at 81-130.
solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice. The theory of law thus invoked . . . predicate[s] certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript and their enactment an act not of will or power but one of discovery and declaration.\textsuperscript{61}

Frye tells us that in comic romance, power accompanies moral right,\textsuperscript{62} and Corwin makes the point: “the \textit{legality} of the Constitution, its \textit{supremacy}, and its \textit{claim to be worshipped}, alike find common standing ground on the belief in a law superior to the will of human governors.”\textsuperscript{63}

Although the stories Dworkin tells in \textit{Taking Rights Seriously}\textsuperscript{64} have kept the “legend of justice” alive, substantive constitutionalism generally has not fared well in the last half of this century.\textsuperscript{65} The overtly romantic assertion that the Constitution somehow embodies objective moral truths—that constitutional power is the prerequisite of justice—does not square with a historical, realistic disposition. It is as hard to deny the humanity, and thus the fallibility, of the Constitution’s authors as to deny the humanity of the King.

But although this particular legend is now less popular, chivalric romance itself thrives in legal theory. The accepted modern constitutionalist story is that the \textit{procedures} the Constitution envisions, rather than its substantive content, ensure the moral legitimacy of constitutional authority. According to the procedural story, “law,” or constitutional sovereignty, is defined and legitimized not by particular constitutional provisions, but by \textit{processes governed by reason}—just as a monarch is defined and legitimated by the process of divine anointment. Although Lon Fuller explored the parameters of procedural, chivalric romance,\textsuperscript{66} it was

\textsuperscript{61} Corwin, The “Higher Law” Background of American Constitutional Law (pt. 1), 42 Harv. L. Rev. 149, 152 (1928) (emphasis omitted).
\textsuperscript{62} N. Frye, supra note 4, at 201.
\textsuperscript{63} Corwin, supra note 61, at 153 (emphasis added in part).
\textsuperscript{64} R. Dworkin, supra note 3.
\textsuperscript{65} For illustrations of constitutional lawyers’ movement away from the substantive model and toward the procedural model, see, e.g., L. Fuller, supra note 3; Wechsler, supra note 22.
\textsuperscript{66} See L. Fuller, supra note 3.
Herbert Wechsler who, as his use of statements by Justices Jackson and Frankfurter illustrates, elevated the argument and the imagery to the level of nearly pure myth:

"Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting underprivileged classes to power, nor is it the inevitable by-product of technological expansion. It is achieved only by a rule of law." Is it not also what Mr. Justice Frankfurter must mean in calling upon judges for "allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law"?67

As in the substantive story, Fuller and Wechsler's procedural constitutionalism, viewed as narrative, exudes a contentment with constitutional institutions as well as a romantic insistence that, through constitutionalism, power and right converge:

Having said what I have said, I certainly should add that I offer no comfort to anyone who claims legitimacy in defiance of the courts. This is the ultimate negation of all neutral principles, to take the benefits accorded by the constitutional system, including the national market and common defense, while denying it allegiance when a special burden is imposed. That certainly is the antithesis of law.68

The analytic difference between the substantive and procedural theories turns on the degree of generality each theorist finds crucial to a moral conception of law. The aesthetic difference between the two theories read as stories also turns on the degree of rationalist detachment from experience that each embraces. Wechsler's story, unlike Corwin's and perhaps unlike Dworkin's, falls in the most comic phases of romance. It is, to borrow Frye's terms, as "reflective, idyllic [a] view of experience from above" as is possible; its mood is one of complete "contemplative withdrawal."69 As in the later works of Shakespeare, Wechsler's narrative voice shows a pronounced tendency "to the moral stratification of characters."70 His "arrangement of characters"—with judges and legal thinkers on the top of the hierarchy—is "consistent with the detached and contemplative [rationalist] view of society taken in this phase."71 The judge is detached and contemplative; thus, in Wechsler's

68 Id. at 35 (emphasis added).
69 N. Frye, supra note 4, at 202.
70 Id.
71 Id.
narrative, the judge clearly embodies the Rule of Law.\textsuperscript{72}

3. The Appeal of Romance

Why does chivalric romanticism persist, either in narrative literature or in jurisprudence? Frye attributes its persistence partly to its political function—comic romance reinforces the chivalric morality of the socially powerful.\textsuperscript{73} The same is clearly true of jurisprudence: as Bentham noted, the natural lawyer’s identification of law with a higher morality almost always serves the ends of the powerful.\textsuperscript{74} The claim to virtue legitimates the claim to power. This accommodation no doubt accounts in part for the durability of the natural law tradition.

Shakespeare provides a lovely example of this phenomenon in \textit{Richard II}. As long as “Heaven guards the right,” and as long as King Richard is the deputy elected by the Lord, Richard cannot be deposed, nor is there any reason he should be. Richard himself makes the argument:

\begin{quote}
So when this thief, this traitor Bolingbroke,
Who all this while hath revel'd in the nigh
Whilst we were wand'ring with the Antipodes,
Shall see us rising in our throne, the east,
His treasons will sit blushing in his face,
Not able to endure the sight of day,
But self-affrighted tremble at his sin.
Not all the water in the rough rude sea
Can wash the balm off from an annointed King.
The breath of worldly men cannot depose
The deputy elected by the Lord.
For every man that Bolingbroke hath press'd
To lift shrewd steel against our golden crown,
God for his Richard hath in heavenly pay
A glorious angel. Then, if angels fight,
Weak men must fall, for heaven still guards the right.\textsuperscript{75}
\end{quote}

Similarly, in the romantic conception of sovereignty, moral and legal commitments to a particular rule or ruler are aligned: a law that is constitutional is therefore both valid and just, and a man divinely anointed will surely be just as well as powerful.\textsuperscript{76}

\textsuperscript{72} The criticism of Wechsler’s “neutral principles” thesis is extensive. For a summary, see J. Ely, supra note 37, at 54-55, 212-13 nn.58-60.

\textsuperscript{73} See note 49 and accompanying text supra.

\textsuperscript{74} J. Bentham, A Commentary on Humphreys’ Real Property Code, in 5 Works, supra note 3, at 389, 389.

\textsuperscript{75} W. Shakespeare, Richard the Second 76-77 (act 3, scene 2, lines 47-62) (M.W. Black ed. 1959).

\textsuperscript{76} Dworkin makes the astounding claim in \textit{Taking Rights Seriously} that every sincere moral objection to a law in our culture has a constitutional analogue. This argument seems peculiarly nostalgic and dated. R. Dworkin, supra note 3, at 206-19.
This political explanation, however, is not ultimately satisfying, because the logic of the natural lawyers’ claims is easily manipulated. As Bentham also noted, the identification of law and morality can serve the end of anarchy as well as the ends of the powerful.77 Shakespeare’s Richard II is finally history, not romance, and in that history, Richard’s invocation of romantic imagery eventually works against his sovereignty. If a Prince’s edict evidences a lack of morality, the prince is not a Prince and his edict not a law. Similarly, a properly passed statute that fails to accord “due process” is a bad law and ought not to be enforced. Natural law, like other forms of narrative romance, serves the revolutionary as well as it serves the reactionary.

And yet, the natural law movement in Western culture has yielded potent, often inspiring, and occasionally profound insights. When natural law is viewed as romantic narrative, this phenomenon is neither paradoxical nor troubling. The natural law traditions in jurisprudence and romantic narrative share deep human roots. The appeal of both is simply that we want power to be loving. The divinely anointed King embodies what not only natural lawyers, but to some extent all of us, still crave: a powerful sovereign who is moral and just; a powerful figure who loves us. Like romantic literature, natural law claims are childlike: they express our deeply felt needs for security, protection, and the perfect love of those who provide it. The quest of the romantic narrator and the constitutionalist is ultimately for a “nostalgic goal”: an “imaginative golden age in time and space,” when power and morality—law and justice—emanate from the same source.78 The persistence of that quest evidences the depth of our craving for assurance that the story of the community will have a happy ending and that we are being cared for, even if the evidence of our senses—our history—is very much to the contrary.

In reality, we know that we have not even adequately described, much less attained, a society that fulfills both our childlike needs and the demands of our more adult intellects. Perhaps our desire to see power and moral virtue converge will never be satisfied by a particular legal power. But unless and until that political, aesthetic, and primal desire is satisfied, natural law will continue to be a central force in jurisprudence, and romantic literature will continue to thrive.

B. Irony and Realistic Jurisprudence: The Positivist Separation of Law and Morality

Frye explains that the ironic narrative method, in contrast to the

77 J. Bentham, A Fragment on Government, in 1 Works, supra note 3, at 221, 287; see Hart, Positivism, supra note 26, at 597-98.
78 See N. Frye, supra note 4, at 186.
metaphoric and idealistic method of romance, is characterized by a radically empirical commitment: Do not expect anything or anyone to be other than he, she, or it appears. The world is as it is experienced—nothing less, but certainly nothing more. Abstractions are either ephemeral, and therefore unknowable, or false, and therefore misleading. The ironic narrator orders his hero's life pragmatically on the basis of experience, not on the basis of either pretended truths underlying that experience or promises regarding the future. Consequently, ironic narrative is typically dominated by skeptical, often satiric attacks on the purportedly complete characterizations of knowledge proffered by various forms of romanticism.

Like the romantic method, the ironic method merges with comedy at one extreme and with tragedy at the other. As a result, Frye explains, the ironic method encompasses a spectrum of realistic narrative visions, ranging from a gentle, generally benign skepticism to a horrific nihilism. In the first comic stages of irony the ironic narrator couples a comic, communitarian vision of society with his methodological insistence on experiential fact. He consequently employs a gentle, benign, satiric method to expose the shared, communal reality behind religious, moral, intellectual, and literary conventions. In the middle stages, social conventions are not just satirized but are stripped away, revealing a shared but often painful human community. Finally, the most tragic stages reveal the meaninglessness of suffering itself. All moral referents are completely lost; the world suffers, and there is neither relief from nor

---

79 Id. at 154-55.
80 Id. at 223.
81 Id.
82 Id.
83 Id. at 232-36.

---
sense in that ultimate experience. The visionary range of the ironic mode can be viewed as:

**COMEDY**

(Satirization of romantic delusions)

(Denunciation of romantic charade)

**ROMANCE**

**IRONY**

(The Method of Experience)

(Resignation to nihilism; the moral and aesthetic emptiness behind the romance)

**TRAGEDY**

Like the ironic storyteller, the legal positivist employs a radically empirical method that is saturated with experiential fact. The positivist's story of law's sovereignty is rigorously experiential: Law is the consequence of legislation and adjudication, both being real events caused by physical forces. Human beings, not disembodied "neutral principles," decide cases and enact statutes. Similarly, the practical person experiences jail sentences and damage remedies, not "general rules of

---

84 Id. at 236-39.
85 See, e.g., J. Gray, The Nature and Sources of the Law (1909); Bingham, What Is the Law? (pts. 1 & 2), 11 Mich. L. Rev. 1, 109 (1912); Holmes, supra note 3, at 459 ("If you want to know the law and nothing else, you must look at it as a bad man who cares only for the material consequences which such knowledge enables him to predict . . . ."); Hutcheson, Lawyer's Law and the Little, Small Dice, 7 Tulane L. Rev. 1 (1932).
law,” as the essence of law. To the legal pragmatist, whether narrator,
theorist, or actor, generalities have no function, no historical impact, no
experiential presence and therefore no meaningful existence. Law is the
story of history and experience. In Holmes’s famous formulation, law is
experience, not logic; it is the “story of a nation’s development.”

What the natural lawyer purports to discover as “truth” or as “law”
are not, then, aspects of the real world, but merely the products of his
own introspection. In Justice Holmes’s colorful phrase, what we believe
as true and eternal is that collection of propositions which we “cannot
help” but believe. Just as the ironic narrator exposes the counterfactual
myths underlying romance, the positivist exposes the romantic delusions
underlying the natural lawyer’s convictions. Holmes’s attack on the cer­
titudes of the natural law tradition is a classic instance of the ironist’s
satirization of the abstractions of romanticism:

It is not enough for the knight of romance that you agree that his
lady is a very nice girl—if you do not admit that she is the best that
God ever made or will make, you must fight. There is in all men a
demand for the superlative, so much so that the poor devil who has no
other way of reaching it attains it by getting drunk. It seems to me
that this demand is at the bottom of the philosopher’s effort to prove
that truth is absolute and of the jurist’s search for criteria of universal
validity which he collects under the head of natural law.

The jurists who believe in natural law seem to me to be in that
naive state of mind that accepts what has been familiar and accepted
by them and their neighbors as something that must be accepted by all
men everywhere.

More recently, Professor Unger has mocked the modern variant of the
romantic’s insistent need to identify power as the prerequisite of justice—
or in Unger’s phrase, “power and perception as right”:

The legal academy . . . dallied in one more variant of the perennial
effort to restate power and perception as right. In and outside the

86 The life of the law has not been logic: it has been experience. The felt necessities of the
time, the prevalent moral and political theories, intuitions of public policy, avowed or
unconscious, even the prejudices which judges share with their fellow-men, have had a
good deal more to do than the syllogism in determining the rules by which men should
be governed. The law embodies the story of a nation’s development through many cen­
turies, and it cannot be dealt with as if it contained only the axioms and corollaries of a
book of mathematics. In order to know what it is, we must know what it has been, and
what it tends to become . . . . The substance of the law at any given time pretty nearly
corresponds, so far as it goes, with what is then understood to be convenient; but its
form and machinery, and the degree to which it is able to work out desired results,
depend very much upon its past.

O.W. Holmes, supra note 3, at 1-2.

87 Holmes, Ideals and Doubts, 10 Ill. L. Rev. 1, 2 (1915).

88 Holmes, Natural Law, 32 Harv. L. Rev. 40, 40-41 (1918).
law schools, most jurists looked with indifference and even disdain upon the legal theorists who, like the rights and principles or the law and economics schools, had volunteered to salvage and recreate the traditions of objectivism and formalism. These same anxious skeptics, however, also rejected any alternative to the formalist and objectivist view. Having failed to persuade themselves of all but the most equivocal versions of the inherited creed, they nevertheless clung to its implications and brazenly advertised their own failure as the triumph of worldly wisdom over intellectual and political enthusiasm. History they degraded into the retrospective rationalization of events. Philosophy they abased into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority.89

Just as natural law embraces the substantive range of romantic narrative, so legal positivism, the jurisprudential method of experience, covers the substantive range of ironic narrative. Depending upon the substantive vision with which it is coupled, the positivist method ranges from gentle satirization of the natural lawyer's theories, through angry denunciation of their deceptions, and finally to resigned acceptance of the finality of perceived "reality" and rejection of imaginative and spiritual alternatives. Most of the legal realist writings from the first part of this century, as well as the various contemporary forms of legal thinking that are their legacy, combine the ironist's insistence on fact and experience with a comic vision of the communitarian basis of law.90 That combination is central to comic irony. Most of the critical legal studies movement also combines an experiential or historical method with a communitarian vision of the possible. It differs from legal realism, however, in that it sees horror in the present and comic romanticism as not just delusion but outright deception.91 Such a combination characterizes Frye's mid-level irony: ultimately comic, but very much aware of its proximity to the demonic.92 Finally, the law and economics movement has inherited from Hobbes an experientialism coupled with a denial of the relevance, and perhaps even the existence, of morally superior imaginative worlds.93 These are the working assumptions of the tragic ironist. The range of visions our jurisprudential method of experience covers thus correlates tightly with the range of vision embraced by ironic narrative:

90 See, e.g., M. Cohen & F. Cohen, Readings in Jurisprudence and Legal Philosophy 369-526 (1951) (including an excellent collection of realist writings).
91 See, e.g., Unger, supra note 89, at 575.
92 See N. Frye, supra note 4, at 236-37.
1. Comic Irony: Reform and Satire

Just as the bulk of our romantic jurisprudence is comic in outlook, so the vast bulk of our ironic jurisprudence, from the reform-minded Benthamites through the American realists to much of the critical legal studies movement, falls within Frye’s comic stages of satire. Such positivist jurisprudence, like first-stage narrative irony, uses experience to rebut gently the romantic’s claim that law is a function of principled generality, rules themselves, higher moral truths, or the Rule of

---

95 See, e.g., R. Summers, Instrumentalism and American Legal Theory (1982).
96 See, e.g., Unger, supra note 89.
97 See J. Ely, supra note 37, at 54-60.
98 See Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931).
Law. These romantic mythologies mask the experiential fact that law is a function of the wishes, ends, will, or pathology of whoever is in power. The natural lawyer's romantic belief that through law we somehow negate the power basis upon which legal systems are built is an illusion. To expose the myths of formalism, the legal positivist, like the ironic narrator, is interested in "anything men do," including that which the romantic natural lawyer would ignore. Bentham's attack on Blackstone's "common law," the attacks of Llewellyn, Frank, and Pound on "mechanical jurisprudence," as well as Professor Hart's attack on the romantic constitutionalism of Fuller and Dworkin, all fit easily and obviously within this comic stage of irony. All employ facts—most often anecdotal descriptions of the judicial experience—to satirize and debunk the claimed generality and abstraction of law. Every first-year law school curriculum reflects the continuing dominance of comic irony in our legal culture; benign satire of entrenched authority is what the legal profession knows and teaches best.

In its comic phases, the experiential method and the debunking of idealism are coupled with a liberal, optimistic vision of society and of progress. As a consequence, jurisprudential comic irony is typically the province of the social democrat, at least in this country. The comic ironist wants the source of authority unveiled so that its communitarian basis may be clarified. In the first half of this century, the heyday of comic irony, this ground was occupied by the legal realists. As ironists, the realists criticized entrenched authority, advocating instead an active, highly visible judiciary that would freely discover and then pursue the true social interest. Thus, Holmes saw "public policy" behind the obfuscating rules of the common law; Cardozo looked to the "method of sociology" to account for judicial behavior; and Lasswell and McDougal looked to the new social sciences to provide the tools by which law

---

100 See generally the works of Mark Tushnet, particularly Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307 (1979).
101 See note 81 supra.
103 K. Llewellyn, The Bramble Bush (1930); Frank, Mr. Justice Holmes and Non-Euclidian Legal Thinking, 17 Cornell L. Q. 568 (1932); Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908). See generally R. Summers, supra note 95, at 136-56.
105 O.W. Holmes, supra note 3, at 35-36, 94-96.
and the lawyering professions could strengthen the communitarian bond. Holmes described the judicial role and the social context that an ironic method and comic vision imply:

[I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.

Thus, the legal realists were consistently both comic and ironic. Their realism led them to uncover the historical, actual grounding of law in the fact of judicial power—a potentially startling and disturbing insight. But their comic optimism reassured them that such power was not to be feared. In Holmes’s words again, judges are “able and experienced men” who can be trusted to shape the direction of American social policy.

Today it is a critic of an active judiciary, Dean John Ely, who is our ultimate first-stage satirist and thus our most eloquent democrat. This new development is in a sense a direct consequence of the success of the realist movement: the “public policy” basis of judicial opinions has indeed been laid bare. With the apparatus of formalism stripped away, judicial opinions now overtly rest on the moral authority of their authors. Just as the realists distrusted and debunked the moral authority of the academic and often invisible authors of “formalism,” preferring the conscious and immediate moral guidance of the courts, so Ely distrusts and debunks the judiciary’s claim to moral authority, preferring the even more immediate moral guidance gleaned from participatory democ-

---

108 O.W. Holmes, supra note 3, at 35-36 (emphasis added).
109 See, e.g., J. Ely, supra note 37, at 54-60 (satirizing constitutional theories based on neutral principles or reason).
racy. Thus, in practice, Ely and the realists are doing precisely the same thing, although their conclusions differ. It therefore is hardly surprising that Ely, like the realists he attacks, uses ironic, anecdotal narrative to make his point.

Ely's use of narrative is as skillful as Holmes's. Ely quotes the ironic narrator Philip Roth to refute the romantic natural lawyer's case for judicial supremacy:

“Well, what may seem like the truth to you,” said the seventeen-year-old bus driver and part-time philosopher, “may not, of course, seem like the truth to the other fella, you know.”

“THEN THE OTHER FELLOW IS WRONG, IDIOT!”

and the ironic historian Garry Wills to refute the romantic historian’s:

Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights.

But Ely does not stop with his realistic attack on the natural lawyer. He invokes the same arguments and the same narrative method against the oddly romantic myths that the realists themselves had created. Thus, against the realists’ inference of “ought” from “is,” Ely employs his most ironic narrative tone, and tells this story:

[[The explanation [for why one might think a judge ought to enforce her own values in adjudication] seems to involve what might be called the fallacy of transformed realism. About forty years ago people “discovered” that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasonings. From that earth-shattering insight it has seemed to some an easy inference that that is what judges ought to be doing. Two observations are in order, both obvious. The first is that such a “realist” theory of adjudication is not a theory of adjudication at all, in that it does not tell us which values should be imposed. The second is that the theory’s “inference” does not even remotely follow: that people have always been tempted to steal does not mean that stealing is what they should be doing. This is all plain as a pikestaff, which means something else has to be going on. People who tend to this extreme realist view must consciously or unconsciously be envisioning a Court staffed by justices who think as they do. That assumption takes care of both the problems I’ve mentioned. It tells you what values are to be imposed (the commentator’s own) and also explains (at least to the satisfaction of the commentator) why such a Court would be desirable. But it’s a heroic assumption, and the argument that seems to score most heavily against such a “realist” out-

110 Id. at 87-104.
111 Id. at 48 (quoting P. Roth, The Great American Novel 19 (1973)).
112 Id. at 60 (quoting G. Wills, Inventing America: Jefferson’s Declaration of Independence xiii (1978)).
look is one that is genuinely realistic—that there is absolutely no assurance that the Supreme Court's life-tenured members (or the other federal judges) will be persons who share your values.\footnote{Id. at 44 (emphasis in original).}

Viewed as a narrator, however, Ely is clearly aligned with the realists he attacks. Like them, he uses his stories to "[break] up the lumber of stereotypes, fossilized beliefs, superstitious terrors, crank theories, pedantic dogmatisms, oppressive fashions, and all other things that impede the free movement of . . . society."\footnote{See N. Frye, supra note 4, at 233.} Ely does to the moral authority of the active judiciary and the myths that surround it precisely what Bentham and the legal realists did to the moral authority of the "common law"\footnote{See note 102 supra.} and what historian Garry Wills later did to the moral authority of the Kennedy-era "Camelot."\footnote{See G. Wills, The Kennedy Imprisonment (1981).}

2. Black Comic Irony: Denunciation and Radicalism

With a slight shift of perspective from reliance on faith and reason to reliance on tangible sensual reality, Frye explains, "the solid earth [of realism] becomes an intolerable horror."\footnote{N. Frye, supra note 4, at 235.} This shift of perspective characterizes mid-level ironic narrative. With such a shift, the penetrating insights of legal realism become, to use Dean Pound's phrase, the "cult of the ugly."\footnote{R. Pound, Justice According to Law 90 (1959).} The persistent gaze of the realist eventually perceives not the fruits of the labor of wise and able men, but the fist of power behind a virtually unchecked judiciary. Dean Pound dramatizes the point through narrative and imagery in the following anecdote:

I suggest to you that so-called realism in jurisprudence is related to realism in art rather than to philosophical realism. Like realism in art it is a cult of the ugly. . . . An artist commissioned to paint the portrait of one of the outstanding judges of the recent past noted that he had a huge fist and a habit of holding it out before him. Accordingly, as a realist, he painted the fist elaborately in the foreground as the chief feature of the portrait, behind which, if one's gaze can get by the fist, one may discover in the background a thoughtful countenance. The judge did have such a fist and did hold it out in front of him on occasion. But having known him well for years, I doubt if anyone thought about it until the artist seized upon it and made it the main feature of his portrait. The fist existed. But was it the significant feature of the judge? Was reality in the sense of significance in the fist or in the countenance?\footnote{Id. at 90-91.}
Holmes's ideal judge, then, may be perceived and portrayed not as a tool of reason with a thoughtful countenance, but as a fist wielding the power of the legal sanction he controls. The realist judges are, in Professor Cover's telling phrase, "people of violence." With the same shift of perspective, however, Ely's empowered, participatory democracy is similarly transformed, not into a fist, but—perhaps worse—into a "bodily democracy paralleling the democracy of death in the danse macabre." Like modern literary irony, modern positivism tends not to be gentle.

Modern positivists share the realists' insistence on experientialism, but their substantive visions differ markedly. The liberal realist views the discovery of judicial power with a sense of liberation, whereas the critical legal scholar sees no such cause for enthusiasm. Ely views the empowerment of the governed with the democrat's faith in humanity, but the critical legal scholar insists upon the potential for majoritarian oppression such empowerment entails. The realists saw concentrated power as an opportunity for reasoned reform and ultimately for progress, but the critical scholar sees only cause for alarm. The contrast between their criticism of formalism and natural law is equally telling: where the realist saw folly in the romantic delusions of the natural lawyer, the critical scholar sees a demonic deception in the artificiality of formalism. These differences stem not from contrasting methods, but from divergent visions. Like the realist, the critical scholar harbors a passionate vision of an apocalyptic, communitarian potential. But the critical scholar has for the most part abandoned the realists' liberal, optimistic assessment of our history and their faith in our capacity for rational progress toward the future. The central narrative task of the critical legal studies movement, then, is to tell a story that will explain this profound contradiction. On the one hand, we have within our nature and presumably within our grasp the potential for a communitarian utopia, and yet on the other, what we have inherited—what we have in fact created—can only be described as "intolerable horror."

As is characteristic of the ironic mode, the critical legal scholar uses the analogy of experience to tell his story. To the critical scholar, a true understanding of the history of romantic jurisprudence illuminates the dilemma. The history of romanticism and faith in natural law is a history of deceit: the atomistic, alienated, bureaucratic hell in which we live

---

121 The phrase is Frye's. N. Frye, supra note 4, at 235.
122 J. Ely, supra note 37, at 181-83.
123 See, e.g., R. Unger, Law in Modern Society 69 (1976).
124 See id. at 238-39.
is not, after all, the best social world of which we are capable. Both conservative and liberal romanticism further this massive deception. Romantic descriptions of our social world mask a horrific reality just as legal doctrine masks the oppressive political reality of law. The romantic either misperceives or misrepresents as apocalyptic that which in fact is demonic: he misrepresents as consensus that which is in fact domination, and he misrepresents as inevitable a world that is in fact the product of contingent choices. The hypocrisies of which Holmes, Ely, and others make light are not simply theoretical musings; they are the devil’s disguise. In mid-level positivism, as in mid-level irony, awareness of the demonic is never far away. Consequently, denunciation replaces satire and trashing replaces mockery.

The major difference between the critical legal scholar’s debunking of formalism and the realist’s satirization of generality is not method, which they share, but vision, which leads the critical scholars to a very different agenda for social action. The critical scholar sees a far wider divergence than does the realist between our communitarian potential and our inherited hell. The critical scholar responds to this gulf in one of two ways. Mark Tushnet—like Huck Finn—makes his detachment from the contemporary legal community clear with the bald assertion that if he were a judge, he would, at least in theory, decide cases so as to promote socialism. Roberto Unger takes a more aggressive stance: If the formalist’s romantic agenda is not just delusion, but mean-spirited deception, then we must aggressively attack and then transform the institutions that the perverse choices of the powerful have created. We cannot gradually “peel away” the pretense of formalism. We cannot “slowly evolve” from something rotten at the core into something beautiful. Only radical change can alter that which has gone radically sour.

---

125 Unger, supra note 89, at 674.
126 Id. at 609-11.
127 Id. at 593-97.
128 Id. at 674-75.
131 Tushnet, supra note 130, at 424. Tushnet notes, however, that if he were to become a judge, the role itself would probably change him and cause him to decide cases in a way contrary to that which his theories would compel. Id. at 425.
132 The struggle over the form of social life, through deviationist doctrine, creates opportunities for experimental revisions of social life in the direction of the ideals we defend. An implication of our ideas is that the elements of a formative institutional or imaginative structure may be replaced piecemeal rather than only all at once. Between conserving reform and revolution... lies the expedient of revolutionary reform, defined as the substitution of one of the constituent elements of a formative context. Only an actual...
The critical legal scholar is in some ways the pure ironist, believing that the hell we have inherited is not the utopia of which we are capable. Though knowledge of history will inform our understanding of the former, only the will to undertake radical action and the courage to transcend and transform historically grounded norms will further our progress toward the latter.

3. Tragic Realism: Resignation as Method and Vision

In the final and illiberal phases of legal positivism, as in the final tragic phases of ironic narrative, the theorist posits a social world that precludes both the possibility and the intelligibility of either reformist or radical change. In tragic irony, experience instructs our normative alternatives, as in comedic irony, but what this experience teaches is that there is no shared human nature upon which to build a communitarian world. The English reformers, the legal realists, and the critical legal scholars are all simply wrong. We do not have an essentially social, communitarian nature, nor do we have a deeply hidden utopian potential; we truly are nasty and brutish.133 We have no greater inclination for a liberal, free world in which we enjoy both the differences and the commonalities of others than we have for our own self-destruction. Our present world is vicious, our future will be the same, and both are the result of an unchanging and unchangeable human nature.

Such an aesthetic sensibility is overtly espoused by very few modern theorists,134 but the covert influence of moral nihilism in the legal academy is pervasive, in both law school classrooms and law reviews.135 This nihilism is the implicit philosophical justification for the amorality of the law school classroom on both sides of the podium, and of the courtroom on both sides of the bench. It justifies the amorality of the profession and change in the recurrent forms of the routine activities—of production and exchange or of the conflict over the uses and mastery of governmental power—can show whether a replacement of some component of the formative context has in fact taken place. By affecting the application of state power, a programmatically inspired deviationist doctrine may provide opportunities for collective mobilization that in turn can lead directly or indirectly to revolutionary reform.

Unger, supra note 89, at 666-67.


134 Hobbes of course comes closest, and it is interesting how Hobbes, the archmonarchist and archstatist of his day, is increasingly invoked as the intellectual forefather of liberalism. See Tushnet, Legal Realism, Structural Review, and Prophecy, 8 U. Dayton L. Rev. 809, 809-11 (1983); Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205, 1206 (1981).

Some works of Bork also approach this sensibility. See, e.g., R. Bork, H. Krane & G. Webster, Political Activities of Colleges and Universities: Some Policy and Legal Implications 1-8 (1970); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

135 Professor David Richards takes up this issue in his article Terror and the Law, 5 Hum. Rts. Q. 171, 183-85 (1983); see also note 207 infra.
of the Code of Professional Responsibility.\textsuperscript{136} It provides some intellectual credibility for the claim of the legal profession and the legal academy that the lawyer in her professional role can responsibly refuse to take a stand on moral issues.\textsuperscript{137}

Perhaps more fundamentally, the modern prevalence of a positivistic moral nihilism provides a rationale for today’s fashionable commitment to individualism. This position differs markedly from, although it is often confused with, liberal narrative. As discussed in the next section, both nineteenth-century English liberals and early twentieth-century American radicals embraced individualism because of their optimistic, comic assumption that human nature is constituted such that state authority is \textit{unnecessary}.\textsuperscript{138} Today, by contrast, our “individualistic” distrust of authority is more often premised upon the tragic assumption that human nature is constituted such that moral authority is \textit{impossible}.\textsuperscript{139} The former assumption presupposes a communitarian human personality, whereas the latter presupposes an asocial, demonic world. The latter Hobbesian argument for individualism is grounded not in a love for and a liberal tolerance of the individual but in a demonic assessment of human nature, and a resignation to an alienated asocial coexistence.\textsuperscript{140} Through a gross bastardization of the term, this decidedly illiberal stance is today called “liberalism” by its proponents and its critics alike.

This ambiguity may account for the peculiarly schizoid aesthetic posture of members of the law and economics school.\textsuperscript{141} To the extent that their normative vision is derived from individualistic liberalism, it is romantic and comic: individual choice, like divine anointment, both defines and legitimates law.\textsuperscript{142} Their descriptive vision, however, is at the same time tragic-ironic: the individual whose choice is sovereign is isolated, ruled by arbitrary desire, and essentially selfish; this experiential fact defines one’s normative alternatives.\textsuperscript{143} Consequently, and confusingly, the tragic, dire convictions of the Hobbesian “law and economics”

\textsuperscript{136} See, e.g., Model Code of Professional Responsibility Canon 7 (1979) ("A lawyer should represent a client zealously within the bounds of the law.").


\textsuperscript{138} This idea may be traced to Adam Smith's identification of sympathy as the natural human sentiment holding community together. A. Smith, The Theory of Moral Sentiments 1-22 (6th ed. London 1790) (1st ed. London 1759).

\textsuperscript{139} The historical lineage of this assumption dates to Hobbes: hence the increasingly popular appellation of Hobbes as a father of modern liberalism. See note 134 supra.


\textsuperscript{141} See, e.g., id.; A. Polinsky, supra note 93.


\textsuperscript{143} See, e.g., R. Posner, supra note 140; A. Polinsky, supra note 93.
theorist are espoused with the optimism of the comic and the confidence of the romantic. That may, of course, be precisely because they have reached what Frye calls "the ironic aspect of tragedy." The purportedly impenetrable subjectivity of our values, like the last stages of literary irony, erases all aesthetic distinctions between the beautiful and the ugly, the sublime and the ridiculous, the comic and the tragic. We are what we are, and relief is not even necessary, much less imaginable or in sight. Human alienation is a fact of nature. In its last phase, legal positivism, as in the last phase of tragic irony generally, depicts human suffering as of absolutely no normative consequence.

4. The Appeal of Irony

The appeal of legal positivism as a method of jurisprudence is not difficult to explain. As Bentham first noted, and as Holmes, the realists, and most recently the critical legal scholars have reiterated, a realistic insistence on the separation of what is from what ought to be is essential to meaningful progress toward fulfilling our dreams. We must resist the impulse to romanticize the present—to fuse what is with what ought to be—if we intend to transcend or improve our given world. The positivist separation of law and morality—of what is from what ought to be and what could be—is indeed a prerequisite of legal reform, whether that reform be radical, liberal, individualist, or communitarian.

Yet positivism must come to grips with its central ambiguities. We might insist upon the separation of law and morality—of what "is" from what "ought to be"—because we want to understand our history better, demythologize it, and then work more directly toward normative goals. Alternatively, we might insist that law and morality be separate because of our conviction, or fear, that "morality" does not meaningfully exist, because moral norms are not as "real" as sanction-backed legal norms. Aesthetically, this can be described as the difference between tragic and comic irony. Jurisprudentially, it is the difference between a scientific approach to the law coupled with a vision of moral possibility, and a

---

144 See, e.g., R. Posner, supra note 140, at 362-63 (cheerful account of the benign nature of most race discrimination); A. Polinsky, supra note 93, at viii (joking, comic description of the antihistorical starting premises of economic theory).
145 N. Frye, supra note 4, at 236.
146 See Bork, supra note 134, at 28-29.
148 O.W. Holmes, supra note 3, at 168-76.
150 See R. Unger, supra note 123, at 48-58.
scientific approach to the law coupled with a nihilistic denial of the possibility of such a vision. Politically and humanistically, it is the difference between a historical sophistication that can provide the basis for progress toward our dreams, and a historical insistence that keeps our attention narrowly and exclusively focused on, and limited to, what has been tried, tested, and chosen.

Positivism in its comic phases provides the satire necessary to understand the delusions, the deceptions, and the apologetic core of formalism, as well as the knowledge of the world necessary for responsible striving toward alternative worlds. In its tragic phases, however, irony expresses itself not in healthy satire or unmasking of illusion, but in a dangerous and limiting cynicism; not an enthusiastic embrace of our possibilities, but a resigned insistence on the exclusivity of what has already been determined.

In both narrative and jurisprudence, then, tragic irony represents the death of imagination, and its ascendancy in so many fields of thought is a frightening phenomenon. Professor MacIntyre notes that it is not surprising, for example, that the dark ironist Franz Kafka failed to finish so much of his work: tragic irony, although a form of narrative, is in many ways antinarrative; it denies the possibility of a coherent future, so central to storytelling, and thus cannot be finished. The law and economics school is similarly antinarrative (as well as antihistorical) and is dangerous in the same way. By insisting upon the exclusivity of the instantaneous present, tragic irony deprives us of the precious opportunity to make moral stories of our own lives.

The allure and the danger of a mindless romanticism, however, are equally strong, and it is as a check against such a danger that positivism has the most to contribute. We need the check of experience against imagination. As storytellers, we combine these two capacities almost instinctively. We imagine a possible ending to our story and check its compliance with what we know. Extant law gives us the beginning paragraphs of narrative. The central moral of the positivist separation of law and morality may be that, to finish the story, we must first envision moral alternatives—employing imagination, knowledge, and moral discourse—before we can possibly pursue them.

151 Alasdair MacIntyre discusses the reasons for this development in intellectual history in A. MacIntyre, After Virtue: A Study in Moral Theory 46-113 (1981).
152 Id. at 198.
IV

NARRATIVE MYTHS AND JURISPRUDENTIAL VISIONS

A. Comedy and Liberalism: From Ritualistic Bondage to Pragmatic Freedom

Frye calls narrative comedy the “mythos of spring.” While tragedy envisions an inevitable conflict between the individual and the community, comedy posits the natural compatibility of men and women with each other and with their societies. If human beings are naturally social, then communities, whether they be marriages, families, parties, or states, will promote their members’ happiness. Particular societies may fail—some historical communities have undeniably crippled instead of enriched the human spirit—but such failures are exceptional and temporary. Comedy speaks to our awareness of the potential for happiness inherent in our communitarian associations. The faith of comedy, in direct contrast to that of tragedy, is that the natural inclination of people is toward happiness and sociability, and that the natural movement of social history is toward an expansion and not a diminution of our capacity for joy.

Literary comedy follows well-established story lines. Comic plots move their characters from old and arid social orders in which form, artifice, and chicanery conspire to suppress the healthy urges of youthful heroes, to young, fresh, and social worlds, in which the freed heroes live relatively happy and naturally harmonious lives. At the outset of comic action, the hero is almost invariably alone, unhappy, and “imprisoned” in some sort of outmoded, foolish, or evil bondage. By the end he or she is engulfed in a happy and freer society.

Frye describes the arbitrary, formalistic, legalistic, and stagnant world from which the comic hero breaks free in this way:

The humor in comedy is usually someone with a great deal of social prestige and power, who is able to force much of the play’s society into line with his obsession. Thus the humor is intimately connected with the theme of the absurd or irrational law that the action of comedy moves toward breaking. Often the absurd law appears as a whim of a bemused tyrant whose will is law... who makes some arbitrary decision or rash promise... Or it may take the form of a sham Utopia, a society of ritual bondage constructed by an act of humorous or pedantic will. ...
The social world toward which the dramatic action of comedy moves is described in this way:

Comedy usually moves toward a happy ending, and the normal response of the audience to a happy ending is “this should be,” which sounds like a moral judgment. So it is, except that it is not moral in the restricted sense, but social. . . . The society emerging at the conclusion of comedy represents . . . a kind of moral norm, or pragmatically free society. Its ideals are seldom defined or formulated: definition and formulation belong to the humors, who want predictable activity. We are simply given to understand that the newly-married couple will live happily ever after, or that at any rate they will get along in a relatively unhumorous and clear-sighted manner.159

Frye explains that comedy “blends into irony and satire at one end and into romance at the other.”160 At one extreme, comedy’s optimistic vision is conveyed by a narrative method which is ahistorical, “innocent,” and metaphorical. At the other, its method depends upon experience and fact. The romantic phases of comedy are characterized by a vision of an ideal, rural, “green,” and innocent world that occasionally collides with, but generally triumphs over, the real world of experience. As literary comedy moves away from romance and toward irony, its method becomes increasingly experiential and its optimism more tentative. Frye describes the ironic comic’s acceptance of society, in contrast to the romantic’s, as fragile, quixotic, and contingent.161

A passage from The Tempest encapsulates these two methodological extremes of the comedy’s optimistic vision. By the end of the play, both Miranda and Prospero embrace the “real” world of human society and reject their illusory and isolated island existence. The methods by which they reach their communitarian commitments, however, contrast sharply. Miranda, raised on an island

We notice how often the action of a Shakespearean comedy begins with some absurd, cruel, or irrational law: the law of killing Syracuseans in the Comedies of Errors, the law of compulsory marriage in A Midsummer Night’s Dream, the law that confines Shylock’s bond, the attempts of Angelo to legislate people into righteousness, and the like, which the action of the comedy then evades or breaks.

Thus the movement . . . from a society controlled by habit, ritual bondage, arbitrary law and the older characters to a society controlled by youth and pragmatic freedom is fundamentally . . . a movement from illusion to reality. Illusion is whatever is fixed or definable, and reality is best understood as its negation: whatever reality is, it’s not that. Hence the importance of the theme of creating and dispelling illusion in comedy: the illusions caused by disguise, obsession, hypocrisy, or unknown parentage.

159 Id. at 167-69.
160 Id. at 177.
161 Id. at 177-80.
and unqualifiedly embraces her newly discovered community of cocitizens:

Miranda: O wonder!
   How many goodly creatures are there here!
   How beauteous mankind is!
   O brave new world,
   That has such people in't!

Prospero: 'Tis new to thee. 162

Prospero's more sober preference for a concrete and real society over the isolation and illusion of island living follows a lifetime of experience with both worlds. Prospero's longing for real community is not nearly as exuberant or unqualified as Miranda's wide-eyed anticipation, but his appreciation for society is far better informed:

Prospero: Now my charms are all o'erthrown,
   And what strength I have's mine own,
   Which is most faint: now, 'tis true,
   I must be here confined by you,
   Or sent to Naples. Let me not,
   Since I have my dukedom got,
   And pardoned the deceiver, dwell
   In this bare island, by your spell,
   But release me from my bands
   With the help of your good hands. 163

Comedy's methodological range can be schematized in this way:

COMEDY
(Apocalyptic, Communitarian Vision)

Optimism based on the Analogy of Innocence (faith and reason)          Optimism based on the Analogy of Experience (skepticism and community)

ROMANTIC MODE—— IRONIC MODE

The political traditions loosely called "liberalism" share comedy's optimistic assessment that democratic societies progress through history from a stage of "ritual bondage" to a state of "pragmatic freedom." 164

163 Id. at 108 (epilogue, lines 1-10).
164 See text accompanying notes 174-86 infra.
At the heart of liberalism is the apocalyptic claim that it is an intrinsic part of our human nature to seek, profit from, and further the welfare of others. Moral government is therefore the norm, the end toward which history naturally moves, whereas antagonistic government is the world of bondage from which we break free. Community is our natural state; it is not a compact into which we enter to avoid the horrific conditions of the state of nature. Communities nurture and enhance the natural inclination and therefore the happiness of their individual members. Political liberalism, like literary comedy, assumes a world in which human nature is naturally good, so that morality need be neither prescribed nor posited. We simply are such that moral conduct is natural. In both the world of literary comedy and that of political liberalism, pragmatic freedom is made possible by the natural coincidence of the moral good, the community's good, and the individual's interest.

The apocalyptic comic myth also finds expression in liberal jurisprudence. Like political liberalism, liberal legal theory rests on a comic view of history and human nature: progress is an inherent good, unnecessarily retarded by outmoded dictates of positive morality and law. As literary comic narrative moves from "ritual bondage" and toward the idealistic, communal utopia of "pragmatic freedom," so political and legal liberalism insist that history and our legal institutions progress inevitably toward a happy ending. The world of "ritual bondage" is the artificially rule-bound world of legal science and formalistic jurisprudence. This stale old world of legal formalism suffers from an abundance of rules drawn with fetishistic precision, rules often substantively unrelated to the social world in which they operate. They stunt rather than further the

165 See text accompanying notes 182-85 infra.
166 See J.S. Mill, Utilitarianism, in Utilitarianism, Liberty, and Representative Government 32-53 (Everyman's Library ed. 1951). Adam Smith also firmly believed that our natural capacity for sympathy was at least as crucial to social living as our inclination to trade. See A. Smith, supra note 138. Evidence is mounting that the communitarian "moral sense" position of the Scottish Enlightenment heavily influenced Jefferson and the other thinkers of his era. See generally G. Will, Inventing America: Jefferson's Declaration of Independence 167-259 (1978).
167 This position can perhaps be more easily recognized when viewed in the following way. The legal realists' insight of the 1930's and 1940's was generally accompanied by the empirical claim that the envisioned judicial activism was not a bad thing. Holmes, Llewellyn, Frank, Lasswell, and McDougal all believed that judges wield considerable power, and with clearer thinking could do so more wisely; none suggested that their power be curtailed.

However, this faith in the essential integrity of non-elected political figures and the positive portrayal of human nature that faith entailed would be out of place in today's far more skeptical intellectual climate. The modern critical legal studies movement is considerably more explicit in its communitarian commitments. See, e.g., Tushnet, supra note 130, at 411-16.
168 N. Frye, supra note 4, at 169-70.
169 For a classic discussion of this claim, see Dewey, Logical Method and Law, 10 Cornell L.Q. 17, 20 (1924).
immediate happiness of the community, resting on an illusion of static certainty. Law in liberalism's new world, by contrast, embodies the “pragmatic freedom” which Frye describes as the resolution of dramatic comedy. Law in the new world abandons academic, formalistic thinking; it stems directly from the group or individual affected by the rule in question. The situs of such law making is either the democratic legislative assembly, where rules respond directly to the interests and demands of the governed, the courts, where rules are formed and reformed around immediate facts, fitted to shifting equities and free to change with changing policies, or the individual, where rules of conduct can respond to the changing values imposed by individuals themselves. Thus, the new community's laws reflect only the sense of the community and the spirit of the individual—nothing else. Liberal jurisprudence has the same methodological range as narrative comedy. At one extreme, the romantic liberal theorist embraces society through the “method of innocence”: he analogizes the apocalyptic, communitarian myth to the present world through an ahistorical, “neutral” version of the nature of the world. At the other extreme, the ironic liberal theorist embraces society through the “method of realism”: experience teaches that concrete community is more conducive to happiness than the isolated world of the imagination. Thus, the liberal's optimism is acquired either by an ahistoric, willful ignorance of history, or through an experienced understanding of the nature of community and its natural limitations:

170 See N. Frye, supra note 4, at 169-70.
171 See O.W. Holmes, supra note 3, at 1-2.
172 In addition to the work of the law and economics movement, which has made this principle its guiding light, see E. Ackerman, supra note 3. Ackerman proceeds from a similar assumption but then reaches dramatically divergent conclusions. Dworkin has also embraced a form of the thesis that we cannot evaluate the worth or goodness of plans of life chosen by others. Dworkin, Liberalism, in Public and Private Morality 113, 127-43 (S. Hampshire ed. 1978).
173 The ahistoricism of romantic liberalism has left it vulnerable to criticism from all ends of the political spectrum. See generally the essays from the critical legal studies movement collected in The Politics of Law (D. Kairys ed. 1983) and the more careful analysis of liberalism's neutrality principle in Shiffrin, Liberalism, Radicalism and Legal Scholarship, 30 UCLA L. Rev. 1103 (1983). From the conservative tradition, see the attack on liberalism's shunning of a community's contingent, shared morality in favor of individualistic relativism in P. Devlin, The Enforcement of Morals (1965).
174 Illustrations of this position include Mark Tushnet's adoption of socialist principles and Duncan Kennedy's "existential" embrace of altruism. See Tushnet, supra note 130, at 424; Kennedy, supra note 130, at 1717-22.
Method of Innocence: Ahistorical optimistic romanticization of legal institutions, e.g., the Constitution, the individual, or the courts

Method of Experience: Empirically based optimistic assessment of the grounding of our institutions, e.g., the perceived altruistic or communitarian nature of humanity

NATURAL LAW
(Romance)

POSITIVISM
(Irony)

I. Romantic Comedy: Liberalism and the Method of Innocence

Ronald Dworkin's Herculean jurisprudential construct rests quite overtly on the romantic side of liberalism. In this respect, it is representative of the narrative form of the vast bulk of our constitutional jurisprudence. In Taking Rights Seriously, Dworkin gives us not only a romantic-liberal narrative, but a romantic hero as well, the judge he calls Hercules. Dworkin's substantive view of society is clearly comic: Hercules's world is liberal, apocalyptic, and intensely communitarian. At the highest level, Hercules's "law" is simply the shared moral consensus of the community. In Frye's terms, Dworkin's narrative method is just as clearly romantic: Hercules rules over a dream world that occasionally "collides with the stumbling and blinded follies of the world of experience . . . with its idiotic marriage law . . . [its] plots and intrigues. . . ." By Herculean effort, Dworkin's hero manages to "impose the form of desire" on the inaccuracies and idiocies of law. This imposition elevates the reader "from a lower world of confusion to an upper world of order," enabling her to "see the action" from "the point of view of a higher and better ordered world." Dworkin's story is a highly formalized kind of American romantic and comic jurisprudence, less rule-bound and yet more orderly than other, less romantic comic visions.

175 R. Dworkin, supra note 3, at 105.
176 See, e.g., id. at 90-94.
177 See N. Frye, supra note 4, at 183-84.
178 See id. at 184.
179 See id.
180 Dworkin's heroic judge decides cases on the basis of enduring principles. By contrast,
Although Dworkin’s Hercules and his orderly legal world are representative of most romantic liberalism, it is the liberal’s heavily ritualized, romanticized story of the “individual”—the freely contracting, self-determining economic and political man—that lies on liberalism’s “last phase” romantic fringe. Again, Dworkin relies upon narrative to make the argument. To understand liberalism truly, Dworkin has recently argued, we must imagine, with help from the narrative hypothetical, how a group of shipwrecked, artificially equalized individuals would divide the resources that they have discovered on their luckily plentiful deserted island:

Suppose a number of shipwreck survivors are washed up on a desert island which has abundant resources and no native population, and any likely rescue is many years away. These immigrants accept the principle that no one is antecedently entitled to any of these resources, but that they shall instead be divided equally among them.

Now suppose some one immigrant is elected to achieve the division according to that principle.

Suppose the divider hands each of the immigrants an equal and large number of clamshells, which are sufficiently numerous and in themselves valued by no one, to use as counters in a market of the following sort. Each distinct item on the island is listed as a lot to be sold, unless someone notifies the auctioneer of his or her desire to bid for some part of an item, including part, for example, of some piece of land, in which case that part becomes itself a distinct lot. The auctioneer then proposes a set of prices for each lot and discovers whether that set of prices clears all markets, that is, whether there is only one purchaser at that price and all lots are sold. If not, then the auctioneer adjusts his prices until he reaches a set that does clear the markets. But the process does not stop there, because each of the immigrants remains free to change his bids even when an initially market-clearing set of prices is reached, or even to propose different lots. But let us suppose that in time even this leisurely process comes to an end, everyone declares himself satisfied, and goods are distributed accordingly.181

It is Dworkin’s story, not his ultimate argument, that is of interest here. The story sets the aesthetic parameters of the debate. Drawing upon a modern tradition rooted in the writings of John Rawls, Dworkin defines liberalism in terms of a mythic, radically ahistorical narrative. Shipwrecked islanders are uniquely disassociated from their past as well as the far more human judges of Hart and Sacks decide cases on the basis of “greener,” freely formed and temporary policies. H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 457-515 (tent. ed. 1958).

181 Dworkin, supra note 3, at 285-87 (footnotes omitted).
as uniquely bound together in purpose. Even more striking, Dworkin’s islanders have happened upon a plentiful island. Their problem really is one of fairness and not survival. Liberalism explicitly emerges as the most logical ending of a half-told story.

Bruce Ackerman’s imaginative construct takes the same narrative technique several steps further toward liberalism’s romantic fringe. Instead of “forests in moonlight, secluded valleys and happy islands,” Ackerman puts his liberal citizens in the twenty-first century equivalent—a spaceship. Ultimately, these fictive characters agree upon liberalism as a just principle of distribution. Like Shakespeare’s Miranda and like Dworkin, Ackerman analogizes his apocalyptic, imaginative myth to our own world by making romantic assumptions about the nature of the real world’s inhabitants and the physical world. But whereas Dworkin’s assumptions are consistently upbeat—Dworkin’s island is plentiful and its inhabitants cooperative—the physical world for Ackerman’s space travelers is characterized by scarcity. The spaceship’s inhabitants—even the relatively altruistic ones—are concerned with protecting their own interests. Thus Ackerman’s bleak starting image:

So long as we live, there can be no escape from the struggle for power. Each of us must control his body and the world around it. However modest these personal claims, they are forever at risk in a world of scarce resources. Someone, somewhere, will—if given the chance—take the food that sustains or the heart that beats within. Nor need such acts be attempted for frivolous reasons—perhaps my heart is the only thing that will save a great woman’s life, my food sufficient to feed five starving men. No one can afford to remain passive while competitors stake their claims. Nothing will be left to reward such self-restraint. Only death can purchase immunity from hostile claims to the power I seek to exercise.

Ackerman then introduces the most creative and optimistic component of his undisplaced myth to resolve the dilemma on the side of comic liberalism. In his imaginary, perfectly liberal state, romanticized, rational individuals exchange their ideas, arguments, and claims to goods in a neutral and orderly dialectic fashion, thereby increasing the rationality and fairness of the community, just as the exchange of goods and services increases its material wealth. Despite these thinly stretched resources, the citizens are ultimately as cooperative as Dworkin’s shipwrecked islanders. Ackerman’s narrative description of justice in his mythical, ahistoric, and morally neutral liberal state is, at root, a story

182 See N. Frye, supra note 4, at 185.
183 B. Ackerman, supra note 3, at 31.
184 Id. at 3.
about the appearance such a romantic and radically counterfactual world would have:

Even when our power is relatively secure, however, it is never beyond challenge in a world where total demand outstrips supply. And it is this challenge that concerns us here. Imagine someone stepping forward to claim control over resources you now take for granted. According to her, it is she, not you, who has the better right to claim them. . . . How can you justify the powers you have so comfortably exercised in the past?

. . . If I succeed in suppressing the questioner, I may hope to live as if my power had never been challenged at all.

It is a tempting prospect which becomes more seductive as my effective power increases. Power corrupts: the more power I have, the more I can lose by trying to answer the question of legitimacy; the more power I have, the greater the chance that my effort at suppression will succeed—at least for the time that remains before I die. Yet this is not the path I mean to follow . . . What would our social world look like if no one ever suppressed another’s question of legitimacy, where every questioner met with a conscientious attempt at an answer?185

As is typical of the romantic-comic norm, the characters imagined by Ackerman move from a claustrophobically fetishistic and formalistic society into the fresh air of a well-ordered “pragmatic freedom.” History, for Ackerman and other romantic liberals, moves inevitably toward a less rule-bound society, just as comedy moves inevitably toward a happy and free society.

2. Ironic Comedy: Liberalism and the Method of Experience

At its other methodological extreme, the liberal vision is coupled with the “method of experience.” The experiential liberal, like Shakespeare’s Prospero, asserts the empirical claim that, despite our failings, we have the potential to progress toward community. Consequently, the ironic liberal’s embrace of community is far more tentative than the romantic liberal’s: the ironist knows the contingency—and hence the fragility—of the social bond. For the ironic liberal it is our natural communitarianism, not an abstract and neutral “individualism,” that underlies our social transactions. The tentativeness, the sensitivity to the absurd, the knowledge that the demonic is never far away, the careful embrace of human nature, the insistence upon verifiable fact, the concern for the future, and finally the belief in the acceptability, sociability, and

185 Id. at 3-4 (emphasis added).
the rationality of desire all underlie both experiential liberalism and ironic-comic narrative.

On its most ironic fringe, comedy borders tragedy. Such ironic comedy rejects but is very much aware of the undisplaced demonic myth provided by the world of experience. As discussed above, most, but by no means all, of the critical legal studies scholarship as well as some legal realist literature corresponds to Frye's most ironic stage of realistic comedy.187 The critical theorist, such as Tushnet, either describes a humorous and potentially harmful world that ultimately triumphs over the proffered norm, or else describes such a world and then escapes from it,188 just as Jim escapes but does not conquer the slave society in *Huckleberry Finn*. In this phase of liberalism, as in this phase of comedy, the grounds for optimism are at their most tenuous. As Frye puts it, "the sense of the demonic world is never far away."189

Most of the legal realist writings and some of the critical legal scholarship, however, evince the realistic, liberal attributes of the ironic-comic narrative form despite both movements' avowed disaffection for "liberalism." First, the critical scholar and the realist both focus on the breaking up of fossilized, formalistic rules, a focus Frye describes as common to all of comedy.190 Second, both relentlessly insist on experience, an insistence which Frye describes as common to all of irony.191 And third, the realist and the critical legal scholar both assert the existence of a "true social community" underneath the formalized rules. The existence of such a community is crucial to the comic-ironic narrative norm. Duncan Kennedy explains this convergence when he notes the recurrent coupling of antiformalism with the discovery of communalism recurrent in realistic jurisprudential storytelling:

It may be useful to take, as a beginning text, the following passage from the Kessler and Gilmore *Contracts* casebook:

The eventual triumph of the third party beneficiary idea may be looked on as still another instance of the progressive liberalization or erosion of the rigid rules of the late nineteenth century theory of contractual obligation. That such a process has been going on throughout this century is so clear as to be beyond argument. . . . To the nineteenth century legal mind the propositions that no man was his brother's keeper, that the race was to the swift and that the devil should take the hindmost seemed not only obvious but morally right. The most striking feature of nineteenth century contract theory is the narrow scope of social duty

187 See text accompanying notes 79-132 supra.
188 Tushnet, supra note 130, at 416-26.
189 N. Frye, supra note 130, at 178.
190 Id. at 167-70.
191 Id. at 223.
which it implicitly assumed. In our own century we have wit­nessed what it does not seem too fanciful to describe as a sociali­zation of our theory of contract.

My purpose is to examine the relationship between the first and last sentences of the quoted passage. What is the connection between the “erosion of the rigid rules of the late nineteenth century theory of contractual obligation” and the “socialization of our theory of con­tract?”

From the standpoint of narrative, it is not surprising that the legal realist typically opposed not only the romanticists’ insistence upon doctrine, but also the rigid isolated individualism of romantic liberalism. This opposition correlates with the ironic-comic’s opposition to comic as well as tragic romance. The ironist methodologically opposes abstraction: law is grounded not in deduced, ahistorical, neutral-principled gener­ality, but in particular, contingent facts inductively drawn from experience. The comic ironist is also drawn to the comic vision of social unification: the foundation of law is not the abstract individual but the particular attribute of communitarianism; it is not the “Rule of Law” but our ability to build linguistic and evaluative bridges of shared meaning that makes community possible and desirable. Our shared moral world reinforces and reflects that interdependence. Therefore, we must understand our dependence upon each other before we can understand the “separateness” or the “otherness” upon which formalists and rights theorists mistakenly insist.

Pure liberalism is poised delicately between these jurisprudential methods of innocence and experience, just as pure comedy is poised between romance and irony. Liberalism in its simplest form paradoxically asserts a naive faith in experience—a nonscientific faith in science—coupled with a more specific experiential belief that communities exist and will progress precisely because we can trust our natural instincts. Morris Cohen eloquently explained and defended this liberal optimism about forty years ago. Cohen’s explication of the liberal’s insistence on a

192 Kennedy, supra note 130, at 1686-87.
193 Communities of understanding are painstakingly created by people who enter into cer­tain kinds of relations and share certain kinds of experiences. . . . [W]e must develop a shared system of meanings to make either interpretivism or neutral principles coherent. But in developing such a system, we will destroy the need for constitutional theory, predicated as that need is on liberal individualism; the problem identified by Hobbes, Locke, and liberal thought in general disappears in a society in which such a shared understanding exists. In the end we may decide to retrieve individualism in order to reaffirm its insistence on the otherness of other people, but we can do so only after we have thought through the implications of our dependence on each other.
connection between experientialism and faith in human nature—-the convergence of irony and romance through comedy—is in many ways an echo of Frye's description of the pure comedic norm.

B. Tragedy and Statism: The Inevitability of Conflict

Frye describes the tragic vision as dominated by an inevitable conflict between human inclination and the demands of natural law. The familiar tragic dilemma is a conflict between a protagonist's heroic will to

---

195 Cohen set forth the experiential focus of liberalism as follows:

"The aim of liberalism is to liberate the energies of human nature by the free and fearless use of reason. Liberalism disregards rules and dogmas that hinder the freedom of scientific inquiry and the questioning of all accepted truths. Prophets, priestly hierarchies, sacred books, and sanctified traditions must submit their claims to the court of human reason and experience. In this way mankind wins freedom from superstitious fears, such as that of magic or witchcraft, and from arbitrary and cruel restraints on human happiness."

Id. at 439. At the same time, he acknowledged that liberalism's decision to submit claims to the court of reason and experience rested on a faith in human progress and toleration. Through this faith, liberalism rebutted the view that "human nature is profoundly and radically sinful and corrupt," a view that led to an "excessive regulation of life by governments."

Id. at 449.

"The belief in progress was a reaction against such a point of view. The believers in progress said: "No, human flesh is not originally corrupt. To be sure, man commits sins and crimes. You cannot deny that. But that is due to the bad institutions under which we live. If you could only wipe out the evil institutions under which man has lived, human nature would assert itself."

Id. at 449-50.

196 N. Frye, supra note 4, at 208.

As for the something beyond, its names are variable but the form in which it manifests itself is fairly constant. Whether the context is Greek, Christian, or undefined, tragedy seems to lead up to an epiphany of law, of that which is and must be. It can hardly be an accident that the two great developments of tragic drama, in fifth-century Athens and in seventeenth-century Europe, were contemporary with the rise of Ionian and of Renaissance science. In such a world-view nature is seen as an impersonal process which human law imitates as best it can, and this direct relation of man and natural law is in the foreground.

Id.

It is the admixture of heroism that gives tragedy its characteristic splendor and exhilaration. The tragic hero has normally had an extraordinary, often a nearly divine, destiny almost within his grasp, and the glory of that original vision never quite fades out of tragedy. The rhetoric of tragedy requires the noblest diction that the greatest poets can produce, and while catastrophe is the normal end of tragedy, this is balanced by an equally significant original greatness, a paradise lost.

Id. at 270.

And just as comedy often sets up an arbitrary law and then organizes the action to break or evade it, so tragedy presents the reverse theme of narrowing a comparatively free life into a process of causation. The discovery ... which comes at the end of the tragic plot is ... the recognition of the determined shape of the life . . . [the hero] has created for himself, with an implicit comparison with the uncreated potential life he has forsaken.

Id. at 212.
power and the hierarchy mandated by a felt natural order.197

Like comedy, tragedy has received both idealistic and realistic treatment from literary narrators. Frye explains that in the romantic stages of tragedy, the hero's innocence, faith, or reason is pitted against, and ultimately transforms, a decadent, evil, or fetishistic dominant group. By contrast, in the ironic phases of tragedy, the hero's attributes fail to sway the antagonists. The "hero" occupies the same debased level as the other characters of the social group, all of whom are lower than the audience. These phases parallel irony's themes of loss of freedom, relentless determinism, and hopelessness.

Tragedy's methodological range can be pictured in the following way:

<table>
<thead>
<tr>
<th>ROMANCE</th>
<th>IRONY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Method of Innocence</td>
<td>Method of Experience</td>
</tr>
</tbody>
</table>

TRAGEDY

One recurrent, although never dominant, body of jurisprudential narrative presupposes the tragic character of our social world. Because of a flawed human nature, the commands of positive law and the dictates of morality are more likely to diverge than to converge. Like the apocalyptic myth of liberalism, this demonic, tragic view of human nature and the state has received both realistic and idealistic treatment from legal thinkers; however, unlike the liberal vision, very little of the tragic vision can be found in traditional legal literature. The statist who employs a positivist method is confined by his experiential premises: law is as it is, and it is power. By contrast, the tragedian who embarks methodologically on the romantic quest is free to deny the pressing reality of suffering, and may assert instead the deeper reality of dimly perceived alternative apocalyptic worlds. The pain we feel is temporal. What is permanent is another world—either an afterlife or a postrevolutionary

197 Id. at 214-15.

Anyone accustomed to think archetypally of literature will recognize in tragedy a mimesis of sacrifice. Tragedy is a paradoxical combination of a fearful sense of rightness (the hero must fall) and a pitying sense of wrongness (it is too bad that he falls) . . . [J]ust as the literary critic finds Freud most suggestive for the theory of comedy, and Jung for the theory of romance, so for the theory of tragedy one naturally looks to the psychology of the will to power, as expounded in Adler and Nietzsche. Here one finds a "Dionysiac" aggressive will, intoxicated by dreams of its own omnipotence, impinging upon an "Apollonian" sense of external and immovable order.

Id. (emphasis added).
apocalyptic utopia—in which positive and natural law converge. To feel suffering, whether revolutionary or spiritual, and still to insist upon the romantic myth that ultimately all is as it ought to be, is to deny the present and to affirm a transcendent reality.

The methodological range of jurisprudential tragedy can be diagrammed in this way:

\[
\begin{array}{c|c}
\text{NATURAL LAW} & \text{POSITIVISM} \\
\text{(Romance)} & \text{(Irony)} \\
\hline
\text{(Method of Transcendental Pessimism)} & \text{(Method of Experiential Pessimism)} \\
\text{The antihistorical insistence} & \text{The deterministic insistence} \\
\text{upon a future utopia;} & \text{upon the necessity of the} \\
\text{Civil Disobedience;} & \text{status quo; nihilism;}
\text{Revolution} & \text{sophistry; professionalism}
\end{array}
\]

\[\text{STATISM}
\text{(Tragedy)}\]

1. Visions of Hopelessness: Ironic Tragedy

Viewed as narrative, ironic-tragic jurisprudence, like ironic-tragic literature, harbors an aesthetic mood of hopelessness. Society is and will always be the penal colony, whose inhabitants are both the condemned and the officers. One might think that salvation from the knowledge that our true potential is for cruelty and our true destiny to suffer could be religious: St. Augustine's natural law thesis, for example, which is based upon the tragic but intensely romantic Biblical myth of the Fall.\(^{198}\) An ironic, positivist, experiential methodology, however, removes the option of religious salvation. Assuming a relentlessly tragic world view and a realistic method, there is literally no exit from the tragic insight that the actual purpose of positive law is not to liberate but to oppress.

Franz Kafka best expresses the nature of law from an ironic-tragic point of view. In *The Problem of Our Laws,\(^{199}\) Kafka describes a legal world in which the "nobles"—the lawmakers and administrators—have

---


“privileged access” to the laws. The “nobles” have no reason to manipulate law to advance their own interest, however, for the simple reason that the laws have always favored this interest:

Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless, it is an extremely painful thing to be ruled by laws that one does not know. I am not thinking of possible discrepancies that may arise in the interpretation of the laws, or of the disadvantages involved when only a few and not the whole people are allowed to have a say in their interpretation. These disadvantages are perhaps of no great importance. For the laws are very ancient; their interpretation has been the work of centuries, and has itself doubtless acquired the status of law; and though there is still a possible freedom of interpretation left, it has now become very restricted. Moreover the nobles have obviously no cause to be influenced in their interpretation by personal interests inimical to us, for the laws were made to the advantage of the nobles from the very beginning, they themselves stand above the laws, and that seems to be why the laws were entrusted exclusively into their hands.200

In such a world, “tradition” has it that the laws exist and “are a mystery confided to the nobility.”201 A small minority of dissenting legal theorists, however, occasionally deny the existence of true “law,” seeing instead only the arbitrary actions of the nobility. Kafka’s “minority of dissent” propounds both the method and the central experiential insight of the American legal realist and critical legal studies movements:

Some of us . . . have attentively scrutinized the doings of the nobility since the earliest times and possess records made by our forefathers—records which we have conscientiously continued—and claim to recognize amid the countless number of facts certain main tendencies which permit of this or that historical formulation; but when in accordance with these scrupulously tested and logically ordered conclusions we seek to orient ourselves somewhat toward the present or the future, everything becomes uncertain, and our work seems only an intellectual game, for perhaps these laws that we are trying to unravel do not exist at all. There is a small party who are actually of this opinion and who try to show that, if any law exists, it can only be this: The Law is whatever the nobles do. This party see everywhere only the arbitrary acts of the nobility, and reject the popular tradition, which according to them possesses only certain trifling and incidental advantages that do not offset its heavy drawbacks, for it gives the people a false, deceptive, and over-confident security in confronting coming events. . . . [B]ut the overwhelming majority of our people

---

200 Id.
201 Id.
account for it by the fact that the tradition is far from complete and must be more fully enquired into, that the material available, prodigious as it looks, is still too meager, and that several centuries will have to pass before it becomes really adequate.\textsuperscript{202}

If a party were to denounce the existence of the nobility, Kafka concludes, it would have the support of the people. And yet—and here the tragic implications of Kafka's irony far exceed those of the irony employed by even critical legal scholars—such a movement can never truly come to fruition, for no one can truly denounce the nobility. To do so would be to denounce the one unquestionable law we do have—the law of the nobility—and we cannot deprive ourselves of that one reliable law. Following Kafka's logic, it is a part of our nature to submit, not to a loving authority, as the romantic natural lawyer has it, but to a cruel one:

This [traditional] view, so comfortless as far as the present is concerned, is lightened only by the belief that a time will eventually come when the tradition and our research into it will jointly reach their conclusion... when everything will have become clear, the law will belong to the people, and the nobility will vanish. This is not maintained in any spirit of hatred against the nobility; not at all, and by no one. We are more inclined to hate ourselves, because we have not yet shown ourselves worthy of being entrusted with the laws. And that is the real reason why the party which believe that there is no law have remained so small... for it unequivocally recognizes the nobility and its right to go on existing.

Actually one can express the problem only in a sort of paradox: Any party that would repudiate, not only all belief in the laws, but the nobility as well, would have the whole people behind it; yet no such party can come into existence, for nobody would dare to repudiate the nobility... The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?\textsuperscript{203}

It is one thing, of course, to describe our legal world in tragic-ironic tones, another entirely to endorse the laws such a mythology inspires. Few, if any, modern American theorists would overtly justify oppression with the straightforward assertion that human nature is at root unavoidably sadistic and complementarily masochistic. The unrecognized and unacknowledged presence of an ironic-tragic sensibility may, however, be precisely what has left our legal community so habitually unaccustomed to forming normative judgments of good and evil. In the name of "law" and "legalism" we tolerate much evil: Nazis marching in a town of Holocaust survivors; literature, film, and speech depicting the violent and

\textsuperscript{202} Id. at 119-21.
\textsuperscript{203} Id. at 121-23.
graphic degradation of women; the continuing creation of an ever more firmly entrenched economic subterranean underclass. The danger we must face is that our tolerance of evil will blind us to it.

In the middle of this century, the German legal philosopher Gustav Radbruch warned his colleagues that legal positivism, though the sword of the English legal reformer, often becomes the protective shield of the coward when the positive law it analyzes ought to be not merely reformed, but denounced and defied. The Germanic positivism Radbruch feared embraced state supremacy and exclusivity in much the same way that modern positivist legal practitioners in America embrace political and economic individualism. For the German positivist and increasingly for this American legal nobility, the world of law exhausts the formal, objective normative universe. For both, then, there is no normative ground upon which the legal world can be judged as good or bad: law is what is real and law is all that is real. Radbruch warned that in this moral nihilism and resignation could be found a partial explanation for the German legal profession's failure to condemn the totalitarianism of the Nazi state. Our own legal profession, although not faced with a similarly clear-cut moral crisis, at times exhibits a similar moral paralysis and resigned moral relativism.

2. Romantic Tragedy: Transcendental Jurisprudence and the Tragedian's Jurisprudential Contribution

The tragedian who undertakes the romantic quest is freed from both the lessons of experience and from the habit of moral impotence. A familiar body of classic tragic narrative centers on the dilemma of the citizen subjected to the demands of a legal order that conflict with a higher moral or divine imperative. The romantic tragedian transcends both the contingent constraints of history and the moral stagnation it entails, either through thought, prayer, death, or, ultimately, resurrection. Sophocles's Antigone expresses both her tragic dilemma and its romantic resolution in this passage:

I did [transgress the law] for such
Commands came not from Zeus and have no force
With me, nor was it Justice, dweller with
The god below, who issued them. For they
Were verily the gods who, for all time
Established on the earth the very laws

204 See Radbruch, supra note 33, at 78-87.
205 See id. at 201-07.
206 Id. at 219-26.
In strict accord with which I act. Nor are
Your proclamations of such power that you
Of mortal birth, can hope to nullify
Th' unwritten and unerring laws of Heaven,
For not alone today nor yesterday
Are these unfailing laws in force. In all
Past time they lived and to eternity
Will they endure, nor knoweth anyone
Where came they into being, nor did I,
Through fear of any mortal's stubborn will
And arrogance, desire to bring upon
Myself a punishment forth from the Gods'
Stern hands for breaking these their laws. Yea true,
I knew full well I must die. Why not,
Tho' you had not proclaimed it and if I
Should die before my time I count it gain,
For how could death be other than a gain
To one who lives as I do in the midst
Of multitudes of woes? Thus it is that
To me at least it is no grief to chance
Upon this fate, but, had I let my own
Dear mother's son in death unburied lie
Most sore distress would then have overwhelmed
My troubled mind but this disturbs me not
Nor causes me to feel one whit of pain.
But if I seem to you to act the part
Of folly, then may I say that the man
Who charges me with folly acts himself
With greater foolishness. 208

Viewed as narrative, at least a part of the natural law tradition born
of tragedy shares the assumptions of this literature. When faced with an
immoral state and a tragic dilemma, the modern romantic actor tests the
legality or constitutionality of the law through disobedience to dramatize
and urge the correction of its evil content; he may even foment revolution
in order to purge society of the evil. The classically tragic response is
quite different, however: the classic tragic hero might disobey the flawed
legal system, but she does so through allegiance—obedience—to a higher
moral command. Unlike the romantic, the tragedian perceives her illegal
conduct not as a freely chosen means of dramatizing and ultimately cor-
recting a flawed legal order, but as the sole moral alternative; for her,
there is no truly human choice. The tragedian is not engaging in a free
political act, thereby affirming the reformed future of the flawed system
within which the act occurs. She is engaging in a necessary moral,

human act, and thereby affirming a higher morality and her own obedience to it. Tragedy tending toward romance aims us toward the rearticulation of a vision of utopia after having experienced hell. It does not, however, claim to deliver us.

The tragic extremes of our civil rights and civil disobedience movements provide us with some modern examples of this sort of tragic heroism. Unlike her romantic counterpart, the tragic civil disobedient has little faith that the disobedient act will ultimately reform or even revolutionize the flawed present system. The tragic disobedient, like the tragic hero, claims instead obedience to a higher order or ideal as her purpose, and freedom from history, pain, suffering, and even death as her method of action.

With the major exceptions of the literature that emerged from the civil disobedience movement209 and the briefs written in the Nuremberg trials,210 however, visions for civilization born of felt conflicts between legal and higher commands have not proven to be an aesthetic sensibility that has sparked the imagination of modern legal theorists. One could reach the curiously false impression from legal literature that the story of our modern legal development has been one of almost uninterrupted convergence of moral and legal orders. This is our loss: we need to understand the utopian visions of those who have suffered at the hands of law while remaining true to a higher ideal. We need to understand, for example, the centrality of the command of love to the utopian jurisprudence of the civil rights tradition—and how it differs from the eighteenth-century revolutionary’s faith in reason. More generally, we need to understand the societies envisioned as well as remembered by Holocaust victims and survivors, Vietnam veterans, Hiroshima and Nagasaki survivors, political prisoners, abused family members, and the victims of crime, war, torture, and poverty. The future of community depends not just upon political or even revolutionary action. It also depends upon our imaginative, rational, spiritual, and moral freedom to break free of our present, and to conceive of other ideal worlds.

What we might learn from this overlooked jurisprudential literature is that we must do more than simply decide that we are naturally communitarian or individualistic, selfish or altruistic. We must envision our true, ideal nature, and then prove the viability as well as the beauty of those visions, by living the lives we profess. Only then will we have begun the work of transforming our dreams into reality.

LEGAL THEORY AS NARRATIVE: CONCLUSIONS

The correlation established in this Article between jurisprudential traditions and aesthetic myths supports two separate theses. First, and most generally, it demonstrates that our legal theory has an aesthetic dimension which can be separately and meaningfully studied. It is an increasingly common observation that our legal theory is in some important sense "utopian," "visionary," or "aesthetic." We should begin to take this aesthetic dimension of legal theory seriously. Traditional, fictive narration—storytelling—plays a curiously central role in jurisprudence. The stories that theorists such as Holmes, Fuller, and Dworkin tell are not simply ornamental; they are central to—they even constitute—each writer's conception of law. By reading these jurisprudential stories systematically and critically as stories, we may achieve a richer understanding of the philosophical arguments those anecdotes are meant to convey. Jurisprudence is part history, part vision, and part method, as is literary narrative. As such it has aesthetic components, including plot, that can and should be understood separately. This Article has attempted to bring those overtly narrative components of legal theory—plot, characterization, imagery, and mood—into the foreground.

Second, and more particularly, the correlation suggests that Northrop Frye's formalistic theory of narrative categories can shed new light on the substantive debates that presently dominate jurisprudential literature. Each of our four jurisprudential traditions expounds a story with a "plot" closely mirroring Frye's description of either the comic, tragic, romantic, or ironic myths. Legal theorists, as storytellers, combine narrative method with vision in precisely the way Frye describes. That aesthetic combination of method and vision may account for our most persistent jurisprudential ambiguities. Thus, Frye demonstrates that a narrative romance might reveal either a comic or tragic leaning, as might an ironic narrative, while both tragedy and comedy may tend toward either a romantic or ironic method. As a result, romantic and tragic narratives move through successive "phases" ranging from comic to tragic extremes, and comedy and tragedy, in turn, each range methodologically from romantic to ironic extremes. The ambiguities in legal theory may be a function of these same tendencies: a natural lawyer...
combines romantic method with either a liberal or statist vision of the world, whereas the ironist combines realistic method with the same. A liberal combines optimistic vision with either a positivist or natural methodology, whereas the statist combines either methodology with a pessimistic vision.

Three separate inferences regarding the way we read legal theories emerge from our analysis of such theories as narrative. First, if legal theories owe something to our literary imagination, they cannot be fully understood and ought not be read as pure philosophical analysis. Second, if legal theories owe something to our literary imagination, they cannot be properly understood solely as a product of our will. Therefore, legal theories cannot be understood and ought not be read simply as a branch of political rhetoric. Third, because legal theories are in part a product of our literary imagination, they must be read and understood, in part, as art. Each of these inferences will be discussed in turn.

A. Contributions to Philosophical Analysis

An aesthetic reading of legal theory can sensitize us to similarities and distinctions we could not see by reading jurisprudence solely for its philosophical content. If we are sensitive to the aesthetic dimension of jurisprudence, we can understand better some long-standing jurisprudential disputes. The debates among major jurisprudential traditions can be viewed as aesthetic contrasts among competing narrative methods and visions, and some debates within major jurisprudential traditions can be viewed as contrasting aesthetic mixtures of vision and method within major narrative categories.

Such debates not only can be viewed aesthetically, but should be. A narrative account of the debate between the natural law and positivist traditions in jurisprudence, for example, reveals why this otherwise analytically sterile debate continues to generate passion and interest. Strictly speaking, the crux of the philosophical conflict between the positivist and natural law traditions is a transparent and comparatively trivial definitional ambiguity as to the meaning of the word “law.” The word can surely have either a broad (positivist) meaning or a narrow (natural law) meaning. The positivists define law as a sociological fact, in which case bad commands or unjust rules may qualify as law. Alternatively, natural law theorists see law as those rules or commands which meet some specified moral criterion. The word “law” is clearly ambiguous, and the competing definitions could in theory both be tolerated.

But it is not the technical, definitional component of the ongoing debate between legal positivism and natural law that keeps it alive. The natural law tradition in jurisprudence is not just a particular way of de-
fining words—it is a manifestation of a romantic literary impulse. Similarly, the legal positivist tradition is a manifestation of the ironic impulse. The compelling differences between natural law and positivism arise because of the deep contrast between those narrative tendencies that romanticize the ideal and those that insist ironically upon the real. The natural lawyer and the positivist are not then just differing over the meaning of the word “law.” They are engaging in contrasting aesthetic projects. The natural lawyer, like the romantic generally, is on a moral quest: he is determined to idealize, often through metaphor, the actual. The positivist is engaged in a different and opposed mission. As an ironist, the positivist is determined to actualize, often through satire, the idealized delusions, illusions, and deceptions of the romantic, and to expose the contingency of our ideas, the particularity of our generalizations, and the historical grounding of our indulgent romanticizations of our world. It is what these theorists are doing, not what they are saying, that accounts for the polarization of their positions.

A narrative approach to jurisprudence also helps us see that aesthetic themes, and not philosophical commitments, truly unify the collection of positions within what we call liberalism, positivism, natural law, and statism. The current debate over the nature of liberalism provides the most timely example. Philosophical attempts to identify the essence of liberalism have been peculiarly unavailing. For example, the fashionable Dworkinian identification of “liberalism” with state neutrality toward competing definitions of the good life fails to account for historical liberals who have advocated state sponsorship of a well-defined account of the good life, from Mill’s and later Dewey’s vision of the role of state-sponsored public education in creating a cultured citizenry, to the state-sponsored abolition of poverty envisioned by the liberal advocates of the New Deal and the Great Society. The identification of liberalism with “individualism” or the “free market” or communitarianism fails similarly. There does not appear to be a single core of philosophical beliefs unifying liberalism; there are instead a multitude of “liberal” groups, each with its own core beliefs. This does not mean that liberalism is incoherent, or unsound, or dead, or that it fails. It only

213 See text accompanying notes 47-78 supra.
214 See text accompanying notes 79-116 supra.
217 See, e.g., J. Dewey, Liberalism and Social Action (1935); Dworkin, supra note 172.
suggests that what ties the strands of liberalism together is not a shared philosophy.

A common aesthetic thread and narrative outlook unify the diverse positions we call liberalism. As a form of comedy, liberalism exudes an optimistic vision of history, our present culture, and our future. Liberalism is the mode of political narrative that insists upon a comic, communal ending. The liberal’s quintessential commitment to and faith in progress reveals his aesthetic insistence upon that ending. Like all comic narrators, liberals portray human nature as profiting from the evolution of human interaction. To the liberal, restraints on human inclinations, whether those restraints be legal or moral, are consequently only as “good” as they are “natural.” Liberals whose methods and political commitments diverge radically share this comic, apocalyptic narrative vision, from Ackerman and Dworkin’s insistence on principled neutrality,218 to the New Deal liberals’ belief in reasoned reform and progress,219 to the critical legal scholars’ radical insistence on contingent communitarianism.220 Thus, the philosophical divisions within liberalism become less bewildering when liberalism is viewed as part of the literature of comedy. All comedy ranges from romance through irony. Consequently, at one methodological extreme liberals insist on historical fact, yet at the other they rely on idealized metaphor. This range does not detract, however, from the unity of the central liberal vision. In all of liberalism as in all of comedy, we progress toward a happy resolution, toward a celebration of life, community, and nature.

A search for the philosophical core of the diverse philosophical positions that fall under the “natural law” rubric is similarly futile. Saint Thomas Aquinas flatly rejected a facile identification of legal with moral norms.221 A total association of natural law with objective morality has been disclaimed similarly by Dworkin, who more often identifies natural law with the norms of a cross-generational community.222 Most if not all modern American natural lawyers reject the equation of natural law with the Blackstonian “common law.”223 Again, it does not follow from this diversity that there is no natural law position, or that natural law is dead or incoherent. It simply means that the diverse strands of the natural law tradition are unified more by aesthetic tendencies than by philosophi-

---

218 See text accompanying notes 174-86 supra.
219 See text accompanying notes 94-116 supra.
220 See text accompanying notes 117-32 supra.
221 See T. Aquinas, supra note 22, at 75-151 (Questions 94-96). Aquinas’s modern interpreter, John Finnis, also insists upon the separability of law and morality. See J. Finnis, supra note 22, at 23-49.
222 R. Dworkin, supra note 3, at 160-83.
cal commitments. The full range of the natural law tradition shares with literary romance the romantic quest for an ideal, an insistence upon a sharp differentiation between good and evil, a methodological reliance upon ahistorical metaphor, and a willingness to derive from the substance of our desires a description of the apocalyptic goal of history.

Legal positivism similarly reveals an aesthetic unity in the face of extreme philosophical disunity. Legal positivists are variously moral objectivists, moral relativists, nihilists, utilitarians, deontologists and political radicals, liberals, and conservatives. Again, the aesthetic features of legal positivism unify it as a jurisprudential tradition: a search for contingent, historical truth, a concern for history, a reliance upon factual anecdote, and an interest in the less than heroic. These shared features are the aesthetic attitudes, not the philosophical commitments, of the legal positivist tradition.

B. Contributions to Political Discourse

Whether the narrative component in legal theory supplements or masks the theorist's political commitments, as opposed to her philosophical orientation, is a far more difficult question. If legal theory suggests literary categories that ultimately reflect political divisions, the separate study of the aesthetics of legal theory may be a needless detour; if the underlying causes of literary differences are political, one could reveal more efficiently the fundamental divisions of legal thought by moving directly to the political underpinnings.

Frye assumes that though literature, like politics, is a product of our fundamental fears and desires, the literary narrator, unlike the political actor, is relatively autonomous. Our desires and revulsions—the undisplaced myths—motivate both activities, but it is in literature that our desires and fears are realized in antihistorical dreams. Political theory describes the world as the theorist sees it. For Frye, the literary forum for our desires is thus sharply distinguishable from the historical and the political. Although a part of the world, literature is not strictly about the world. Knowing the literary component of something is not a way of knowing historical reality. As the formalist insists that legal categories transcend particular cases, Frye insists that literature is ultimately “about” something other than the momentary, contingent world. Although it evidences our desires and arises from them, ultimately it is about and only responsible to itself.224

This formalistic characterization of the relationship of political history and literature is as controversial to modern literary theorists as is legal formalism to modern legal theorists. The modern literary “realist”

224 N. Frye, supra note 4, at 3-29, 350-54.
is inclined to see narrative literature not as a self-contained metaphor, but as essentially as much a description of the world and our place within it as any historical tract or sociological study. On such a view, there is no meaningful distinction between literary narrative and any nonfictional prose. Thus, Terry Eagleton criticizes Frye's *Anatomy of Criticism* for, among other things, portraying literature as "not a way of knowing reality but a kind of collective utopian dreaming which has gone on throughout history, an expression of those fundamental human desires which have given rise to civilization itself, but which are never fully satisfied there."\(^{225}\) Eagleton goes on to speculate as to why literature is distinguished from history in Frye's theory:

Frye's work emphasizes as it does the utopian root of literature because it is marked by a deep fear of the actual social world, a distaste for history itself. In literature, and in literature alone, one can shake off the sordid "externalities" of referential language and discover a spiritual home... Actual history is for Frye bondage and determinism, and literature remains the one place where we can be free. It is worth asking what kind of history we have been living through for this theory to be even remotely convincing... In one sense it is scornfully "anti-humanist," decentering the individual human subject and centering all on the collective literary system itself; in another sense it is the work of a committed Christian humanist (Frye is a clergyman), for whom the dynamic which drives literature and civilization—desire—will finally be fulfilled only in the kingdom of God.\(^{226}\)

But Eagleton's recapitulation of Frye's vision of literature, intended critically, is actually revealed in the narrative that appears in legal theory. Jurisprudence surely evidences a profound "distaste for history" and a "deep fear of the actual social world," and also seems to represent, at least to the theorist, the forum in which we can be free. The persistent use of the narrative hypothetical highlights the legal theorist's antihistorical view of theory. Ackerman's Commander and Dworkin's Hercules are nonexistent and ahistoric. They are not descriptions of reality, signs for that reality or even a "way of knowing reality." Dworkin's Hercules is not a "sign" for a Supreme Court Justice; Hercules is the romantic hero of a romantic story. Holmes's "bad man" is no more referential than is Hercules. The bad man is not a sign for a pathological criminal, but a figure in Holmes's ironic rendering of legality. The narrative component of jurisprudence, like Frye's description of literature, seems driven by the "fundamental human desires" that have made civilization possible, but that have "never been fully satisfied there" and may not be

\(^{225}\) T. Eagleton, Literary Theory 93 (1983).
\(^{226}\) Id.
fully realizable there. It seems to share with literature the attempt to articulate both the utopian and the demonic alternatives to history.

Frye’s insistence upon the distinctive autonomy and ahistoricity of literature is strengthened, in fact, by the similarity between narrative and jurisprudential categories. The narrative in jurisprudence does serve a peculiarly autonomous function: it uniquely allows the theorist to transcend history through imagination and speculation. The correlation also indicates, of course, that this state of autonomy is not sufficient to bring forth what we have traditionally called “narrative literature.” The same ahistorical bent, and even the same generic plots, are found in our theoretical writings on the nature of law. We surely can conclude from this correlation that literature, like legal theory, is merely a branch of political rhetoric. But we are equally free to infer that legal theory, like literature, is not a product of our political will alone. In that case, an understanding of narrative may add a new dimension to our understanding of the values, both political and nonpolitical, underlying legal theory.

C. Imaginative Autonomy and Our Moral Experience of Law

Legal theory is a product not only of our philosophical commitments and political will, but also of our narrative imagination. The relatively autonomous world of narrative provides the legal theorist with moral freedom to translate dreams and nightmares into narrative stories of moral choices set in fictive worlds. Reading legal theory as narrative forces us to focus upon our imaginative choices—our responsibility for the worlds we, as theorists, create with words.

Narrative vision, more autonomous than philosophical and political vision, poses choices not open to the empiricist. Similarly, narrative method poses a choice that philosophical and political analysis often lacks. Only in recognizing this role of narrative vision and method can we appreciate the moral significance of our legal theory. The narrative in legal theory, like all narrative, brings us face to face with our moral selves, our moral options and our capacity for moral action.

The legal theorist’s narrative visions, unlike empirical descriptions of reality, do not aim for mere accuracy. The comic and tragic undisplaced myths which are the core of narrative do not try to describe the world accurately. We are not compelled to accept or reject an aesthetic vision of human nature that appears in a novel or in a legal theory; we need not accept Dworkin’s or Holmes’s aesthetic premises any more than we need accept D.H. Lawrence’s depiction of human sexuality. Dworkin’s apocalyptic, principled legal heaven is not a world we judge by its descriptive accuracy. Although based on a more or less articulable de-

---

227 Eagleton expresses this view. See id. at 1-16.
scription of human nature, the description is a part of narrative, not fact. Dworkin’s Hercules is a romantic hero, not a description of ideal judicial conduct. He is a romanticization of the reasonableness of authority, and his world romanticizes reason itself. The accuracy of Hercules and his world is beside the point: rather, we must ask whether the imaginative vision Dworkin presents is attractive or repulsive, whether it is “true” not to this world, but to our hopes for the world.

Is Hercules genuinely heroic? Do we find his legal world desirable? Our answers to these questions reveal something about us and the role of law, authority, and reason in our dreams and nightmares. The narrative visions that recur in legal theory lead us to focus upon ourselves and the possibilities we envision for ourselves in a way that strict empiricism does not allow. The narrative vision in legal theory helps us understand our own internal experience of the real world and our idealistic hopes for it. At its best, the descriptive component of the narrative in legal theory can lead us to reexamine our initial experiences of authority, to reassess our early reactions to relationships based on reason and power, and to formulate a wiser, more self-reflective vision of the future moral possibilities of the law.

Similarly, the methodological component of legal theory, read as narrative, reveals a moral choice that a purely analytical reading will often obscure. We are not “driven” in any sense to choose between romantic and ironic narrative modes. The choice between irony and romance is a free choice between a “method of discovery” of the actual and a “moral quest” for the ideal. What choice we make depends not on our philosophical commitments, but on whether we trust the world, whether we have hope for it, whether we find it interesting and are comfortable in it, and which method we find more useful, more compelling, more strategic, and even more fun. The theoretical methods to which we subscribe or with which we feel ourselves in agreement reveal a range of nonintellectual, affective human experiences and autonomous human choices.

Our choice of vision and method in legal theory thus reflects our hopes for the world and our vision of our own role within it. The various protagonists created by legal theorists are not signs for the virtues and dangers of legality, any more than a landscape is a roadmap. They are not about our world—they, like the law itself, are a part of our artificial world. Like law itself, they are creations of our desires, fears, and imagination. To the extent that legal theory is narrative, however, it is also art. Therefore we must decide not whether the worlds we envision are true or false, right or wrong. Rather, we must decide whether they are attractive or repulsive, beautiful or ugly. Our acceptance or rejection of these aesthetic visions will in turn influence the historical choices we
must make. The aesthetic quality of our art, like the quality of our play, deeply affects our lives: our imaginings are not only a part of our present, but a way of determining the limits of our future. This effect can be quite immediate, for although the literary narrator has a detached relation to his hero, we have a pronounced habit of quickly becoming the legal actors we like to imagine.

Of course, not only legal theorists need to be more sensitive to the aesthetic dimension of their thinking on law. Judges, legislators, and lawyers also make methodological and visionary choices, and must refer to their personal histories when formulating a theory of human nature and social interaction upon which to ground their work. However, there is an important difference between the legal theorist and the legal actor: judges, legislators, and lawyers, if acting responsibly, keep these narrative instincts separate from the act of lawmaking, or at least weigh them against other institutional concerns.

Legal theorists, on the contrary, can and should give full rein to their imaginative, utopian instincts. Legal theorists do not make law: they do not decide cases, vote on bills, or undertake the representation of clients and hence the furtherance of those clients' interest. Consequently, they have the freedom which institutional responsibility does not allow; they are a step further removed from history than judges or legislators. In lieu of the present world, however, theorists can and must be responsible to the future, imaginable world. They must exercise the freedom that their positions allow; they must acknowledge that legal theory and narrative, unlike politics and law, ultimately are forms of artistic play. The theorists, and we, will more fully understand the moral significance of our legal theory once its true nature is acknowledged.