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# ESSAY

## Theories of Poetry, Theories of Law

Lawrence Joseph\*

### I. INTRODUCTION

I write poetry.<sup>1</sup> Also, since 1976, when I was admitted to practice before a state bar, I have served as a law clerk for a justice of a state supreme court,<sup>2</sup> practiced, and mostly taught law. About the time that I began law school, while I was writing poems that would appear in my first book, an extraordinary change in jurisprudence began to occur, one which focused on legal language as something more than a medium for conveying singular meaning. This legal theory has become as important as any since legal realism. Because I also have written essays and reviews about literary and social issues,<sup>3</sup> I've followed it with wonder. Be-

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1. My books of poems are *Before Our Eyes* (Farrar, Straus & Giroux, 1993), *Curriculum Vitae* (U. of Pittsburgh, 1988), and *Shouting At No One* (U. of Pittsburgh, 1983).

2. I have written a memoir about my clerkship experience, and about Justice (later Chief Justice) G. Mennen Williams of the Michigan Supreme Court for whom I clerked, for an issue of the University of Detroit Law Review dedicated to Justice Williams' memory. See *Justice G. Mennen Williams: A Memoir*, 66 U. Detroit L. Rev. 339 (1989).

3. Some of my recent essays and reviews include *The Morning of the Poem*, 32 Poetry East 157 (1992) (an essay on James Schuyler's poetry); *The Real Thing*, 254 The Nation 531 (1992) (reviewing John Ashbery's book of poems, *Flow Chart* (Alfred Knopf, 1991), and Adrienne Rich's book of poems, *An Atlas of the Difficult World* (W.W. Norton, 1991)); *Union Dues*, 253 The Nation 306 (1991) (reviewing Thomas Geoghegan's book on labor unions, *Which Side Are You On?: Trying to Be for Labor When It's Flat on Its Back* (Farrar, Straus & Giroux, 1991)); *War Afterthoughts*, Hungry Mind Review 27 (Summer 1991) (an essay on the Gulf War); *Can't Forget the Motor City*, 251 The Nation 774 (1990) (an essay on Detroit, and review of Ze'ev Chafets's book on

cause I consider poetry to be, in part, an expression of a theory of language and meaning, and, as a lawyer, I look at legal texts as a profound source of political morality and economy, I've read it with scrutiny.

The difference between a literary and a legal text is fundamental. Legal texts include a language of wealth distribution, of rights, of whether to incarcerate or kill those who commit crimes. They result from, and in, socially institutionalized power. Literary texts, at most, express it. But law involves language. Legal texts must be interpreted. Theoretical intersections of language, interpretation, and meaning have become an integral part not only of twentieth century poetics, but of jurisprudence as well.

My first objective in this essay is to present certain theories of poetry that have developed this century as part of "modernism." In the introduction to *The Necessary Angel*, his *Essays on Reality and the Imagination*, Wallace Stevens (a modernist poet who doubled as a surety bond lawyer) said: "One function of the poet at any time is to discover by his [or her] own thought and feeling what seems . . . to be poetry at that time."<sup>4</sup> My focus will be on what poetry has to say about language at the end of the modernist century.

I then will talk about certain theories of law. My emphasis will be on those theories that involve the way lawyers think about language and meaning. In a practical context, I will explore these theories by analyzing opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court's recent landmark decision on a woman's constitutional right to choose to terminate a pregnancy.<sup>5</sup> I hope to show that much of the jurisprudential conflict and confusion about legal texts these days—even at the level of the Supreme Court—can be seen more clearly if juxtaposed against certain notions of poetic modernism.

I realize that my undertaking sounds ambitious. My hopes, however, are modest. The theoretical literature about law and language is

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Detroit, *Devil's Night: And Other True Tales of Detroit* (Random House, 1990)); *Men of Irony*, *The Village Voice* 78 (Mar. 20, 1990) (reviewing Tony Harrison's book of poems, *V. and Other Poems* (Farrar, Straus & Giroux, 1990), and Michael Hofmann's book of poems, *K.S. In Lakeland: New and Selected Poems* (Ecco, 1990)); *Poetry and Audience*, *Hungry Mind Review* 21 (Sept. 1989) (an essay on modernist poetry); *Against Joie de Vivre*, *Boston Review* 26 (Oct. 1989) (reviewing Phillip Lopate's book of essays, *Against Joie de Vivre* (Poseidon, 1989)).

4. Wallace Stevens, *The Necessary Angel: Essays on Reality and the Imagination* vii (Random House, 1951). Stevens adds: "Ordinarily [the poet] will disclose what he finds in his own poetry by way of the poetry itself. He exercises this function most often without being conscious of it, so that the disclosures in his poetry, while they define what seems to him to be poetry, are disclosures of poetry, not disclosures of definitions of poetry." *Id.*

5. 112 S. Ct. 2791 (1992).

vast, and writings about modernist poetics, even if limited to those that center on language and meaning, are endless. My observations are no more than that. A reader may imagine other kinds of theoretical talk about poetry, language, and law. I can too. But this is an essay.<sup>6</sup> My intention is to stay as close as I can to those complex points at which theories of poetry and theories of law intersect to tell us something about language and meaning. By looking at what poetry says about language, I hope to disclose what one of our society's most vital languages, the language of law, means at this time. The consequences involved are not esoteric. In this society, law affects everybody, everything. To paraphrase another modernist poet, the late Italian Nobel Laureate Eugenio Montale, law, too, must figure out what to do now that a language time bomb, set over a hundred years ago, has exploded.<sup>7</sup>

## II. THEORIES OF POETRY

Raymond Williams—in one of his last public lectures—took on the difficult task of defining modernism by asking when it “was.”<sup>8</sup> As a classification for a whole cultural movement and moment, modernism did not appear until the 1950s; until then, the meaning of “modern” in literature was roughly the same as “contemporary.”<sup>9</sup> Modernism is a critical construct, loaded with different notions. Modernist writers “are applauded for their denaturalizing of language, their break with the allegedly prior view that language is either a clear, transparent glass or a mirror, and for their making abruptly apparent in the texture of narrative the problematic status of the author and his authority.”<sup>10</sup> As the author appears in the text, “[t]he self-reflexive text assumes the cent[er] of the public and aesthetic stage, and in doing so declaratively repudiates the fixed forms.”<sup>11</sup> Modernism rejects the unquestioned premise of early and mid-nineteenth century romantic and realist writing that language is a transparent medium of authentic and authoritative truth-telling expression.<sup>12</sup> After modernism, “art is itself dragged into

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6. Because of the essay form, I have tried to resist the lawyer's temptation to cite other sources to comment on, explain, or justify every perception. The risk of not doing so is academic.

7. See Eugenio Montale, *Poet in Our Time* 70, 71 (Urizen, 1976).

8. Raymond Williams, *When Was Modernism?*, 175 *New Left Rev.* 48 (1989).

9. *Id.* at 48.

10. *Id.* at 49.

11. *Id.*

12. Williams argues, and I agree, that “[a]ny explanation of these changes and their ideological consequences must start from the fact that the late nineteenth century was the occasion for the greatest changes ever seen in the media of cultural production.” *Id.* at 50. Charles Taylor makes the same observation. See Charles Taylor, *Sources of the Self* 456, 457 (Harvard U., 1989). So does Stephen Kern. See Stephen Kern, *The Culture of Time and Space 1880-1918* 21-23, 72-81, 160-64 (Harvard U., 1983). When a society's media of cultural production changes, the ways in which artists think about and perceive art also must change—with equal intensity.

the process of alienation that separates subject and object."<sup>13</sup> In the context of a crisis first imagined by Nietzsche,<sup>14</sup> the romantic writer's belief in the self's power to shape reality through language, and the realist's sense of language as an accurate expression of factitious reality, are shattered. Something fundamentally new and complicated happens between subjective and objective expression: the subject loses its authority over the text, the text appears as an aesthetic object, while meaning exists in between.

Charles Taylor, in different terms, realizes a similar conclusion. Modernist writing differs from nineteenth century romanticism and realism in two substantial ways. First, modernist art turns more inward, tending to explore, even to celebrate, subjectivity: "[I]t has explored new recesses of feeling, entered the stream of consciousness, spawned schools of art rightly called 'expressionist.'"<sup>15</sup> Yet, at the same time, modernist art "at its greatest . . . has often involved a decent[e]ring of the subject," displacing "the cent[er] of interest onto language, or onto poetic transmutation itself, or even dissolving the self as usually conceived in favo[r] of some new constellation."<sup>16</sup> The paradox, aesthetically, is this: Although the subject is dissolved into the text's language—into the formal process itself, onto a new and separate aesthetic plane—modernism does not eliminate subjectivity. The modernist self is partly constituted by language. Subjectivity does not exist on the surface of mirror-like language, but in the recesses of meaning expressed by new forms. Language assumes an objectivity different from unquestioned objective authorial expression. The text in part becomes an object by which, and in which, the self is defined. Expressions of, and about, the self in language can be looked at separately. Though the self still exists, he or she no longer has complete authority over the work's language.

#### A.

Theories of language appear throughout modernist poetics. For example, as Sigurd Burckhardt notes in his profound and perceptive essay, "The Poet as Fool and Priest," "[t]he first purpose of poetic

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Williams's analysis of modernism implies that "post" modernism, as a construct, is defined by a further critical awareness of the critical existence of modernism. I agree.

13. Peter Burger, *Aporias of Modern Aesthetics*, 184 *New Left Rev.* 47, 50 (1990).

14. See *id.*

15. See Taylor, *Sources of the Self* at 456 (cited in note 12).

16. *Id.*

language . . . is the very opposite of making language more transparent."<sup>17</sup> If a language pure enough to transmit human experience without distortion existed, there would be no need for poetry. But not only does such a language not exist, it cannot; language, by its very nature as a social instrument, must be a convention, arbitrarily ordering the chaos of experiences, denying expression to some, allowing it to others.<sup>18</sup> Language must provide common denominators; so, it necessarily falsifies. These falsifications are more dangerous the more transparent language becomes—the more unquestioningly it is accepted as an undistorting medium.<sup>19</sup> “[Language] is not windowglass, but rather a system of lenses which focus and refract the rays of an hypothetical . . . vision.”<sup>20</sup>

By the early 1920s, poets (always the most astute critics of their art) already recognized the complicated refraction of the self in a poem. “[P]oetry: new form dealt with as a reality in itself,” William Carlos Williams wrote in *Spring and All* in 1923;<sup>21</sup> “poetry has to do with the dynamization of emotion into a separate form.”<sup>22</sup> Yet the self is never completely decentered. Burckhardt puts it well: “To attain the position of creative sovereignty over matter, the poet must first of all reduce language to something resembling a material. [But he or she] can never do so completely, only proximately.”<sup>23</sup> The poet “would be much safer if he [or she] did not commit himself [or herself] to the Word, but in ironic detachment exploited the infinite ambiguities of speech.”<sup>24</sup> But, as Michael Hamburger accurately points out, “[l]anguage itself guarantees that no poetry will be totally ‘dehumanized,’ regardless whether a poet attempts to project pure inwardness outwards . . . or to lose and find [herself or] himself in animals, plants and inanimate things.”<sup>25</sup> Words can never be totally severed from the ideas and meanings that exist in external reality; “one [does not] need to be a Marxist to recognize that all poetry has political, social and moral implications, regardless whether the intention behind it is didactic and ‘activist’ or not.”<sup>26</sup>

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17. Sigurd Burckhardt, *The Poet as Fool and Priest*, 23 ELH 279, 283 (1956).

18. Id.

19. Id.

20. Id.

21. William Carlos Williams, in 1 *The Collected Poems of William Carlos Williams, 1909-1939* 219 (New Directions, 1986).

22. Id.

23. See Burckhardt, *The Poet as Fool and Priest* at 280 (cited in note 17).

24. Id. at 297.

25. Michael Hamburger, *The Truth of Poetry* 31 (Harcourt, Brace & World, 1969).

26. Id. at 38.

Take, for example, Marianne Moore's poem,

WHEN I BUY PICTURES

or what is closer to the truth,  
 when I look at that of which I may regard myself as the imaginary possessor,  
 I fix upon what would give me pleasure in my average moments:  
 the satire upon curiosity in which no more is discernible  
 than the intensity of the mood;  
 or quite the opposite—the old thing, the mediaeval decorated hat-box,  
 in which there are hounds with waists diminishing like the waist of the hour-glass,  
 and deer and birds and seated people;  
 it may be no more than a square of parquetry; the literal biography perhaps,  
 in letters standing well apart upon a parchment-like expanse;  
 an artichoke in six varieties of blue; the snipe-legged hieroglyphic in three parts;  
 the silver fence protracting Adam's grave, or Michael taking Adam by the wrist.  
 Too stern an intellectual emphasis upon this quality or that detracts from one's  
 enjoyment.  
 It must not wish to disarm anything; nor may the approved triumph easily be  
 honoured—  
 that which is great because something else is small.  
 It comes to this: of whatever sort it is,  
 it must be "lit with piercing glances into the life of things";  
 it must acknowledge the spiritual forces which have made it.<sup>27</sup>

Note how Moore immediately decenters the poem's self. The simple opening declaration, "[w]hen I buy pictures," is transformed into a more complicated statement, "when I look at that of which I may regard myself as the imaginary possessor," which the self sees as "closer to the truth." This long, dense line—thickened by the dense accentuated jostling of its opening eight monosyllables—enmeshes the "I" in its language. It also relocates the "I" outside the self, in an aesthetic realm. Then, in a long and complicated sentence, syntactically refracted by closures demarcated by a colon, a dash, and a series of semicolons, the "I" is fixed (in the sense of adjusted?) to the imagined object. The effect is to make the self doubly removed from the actual act of buying, in a kind of perceptual reality that is no more "than the intensity of the mood" or (continuing the process of decentering) "quite the opposite—the old thing," which is first described, and then shifted back through layers of meaning into subjectivity, "literal biography perhaps." At this point, the reader already has felt the poem as an imaginary object: the poem has assumed the center of attention and aesthetic focus, beyond "[t]oo stern an intellectual quality." The imagined object—the picture turned into the poem—"must not wish to disarm anything." A poem includes wishes. It must be human. It cannot escape social or economic realities (those subtextually suggested by buying pic-

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27. Marianne Moore, *Selected Poems* (Macmillan, 1935).

tures, purchasing imagined enjoyment). It cannot ("perhaps") escape "literal biography." The poem in which the self chooses to imagine buying a picture "of whatever sort" has its own necessity. It must see "into the life of things." Yet it also must "acknowledge" (a word connoting objectivity) its subjectivity, "the spiritual forces" which—both separate and part of it—make the poem what it must be. As William Carlos Williams said about Moore's poetry: "Moore undertakes in her work to separate the poetry from the subject entirely—like all the moderns. In this she has been rarely successful and this is important . . . . There is no compromise. . . . Moore never falls from the place inhabited by poems. It is hard to give an illustration of this from her work because it is everywhere."<sup>28</sup>

### B.

Modernist poetry shows that language does not reflect transparent, authoritative truth. If language is accepted as an undistorting medium, it only misleads. Language reflects a self, a subject, which partly exists in the human and social realities it expresses. Language includes an aesthetic plane part of, yet simultaneously apart from, human and social experience. Christa Wolf has remarked that "[t]he reservoir writers draw on in their writing is experience, which mediates between objective reality and the authorial subject. . . . As Anna Seghers said, 'The writer is the curious crossing point where object becomes subject and turns back into object.'<sup>29</sup> "To my mind," Wolf continues in a passage worth quoting at length,

. . . [I]t is much more useful to look at writing, not as an end product, but as a process which continuously runs *alongside life*, helping to shape and interpret it: writing can be seen as a way of being more intensely involved in the world, as the concentration and focusing of thought, word and deed. . . . This mode of writing is not 'subjectivist,' but 'interventionist.' It does require subjectivity, and a subject who is prepared to undergo unrelenting exposure—that is easy to say, of course, but I really do mean as unrelenting as possible—to the material at hand, to accept the burden of the tensions that inexorably arise, and to be curious about the changes that both material and the author undergo. The new reality you see is different from the one you saw before. Suddenly, everything is interconnected and fluid. Things formerly taken as 'given' start to dissolve, revealing the reified social relations they contain and no longer that hierarchically arranged social cosmos in which the human particle travels along the paths pre-ordained by sociology or ideology, or deviates from them. It becomes more and more difficult to say 'I,' and yet at the same time often imperative to do so. . . . I can only hope I have made it clear that this method not only does not dispute the existence of objective reality, but is precisely an attempt to engage with 'objective reality' in a productive manner.<sup>30</sup>

28. William Carlos Williams, *Imaginations* 310, 312 (New Directions, 1970).

29. Christa Wolf, *The Fourth Dimension: Interviews with Christa Wolf* 23-24 (Verso, 1988).

30. Id. at 21-22 (emphasis added).



An inexorable pressure in language exists between objective and subjective reality.

Wolf in effect echoes what Walter Benjamin said about modernist writing in the 1930s. In terms of the political ideologies of his time, Benjamin realized that fascism sought to aestheticize politics, while communism attempted to politicize art.<sup>31</sup> Benjamin intuited that reality exists aesthetically and politically. Peter Burger formulates what Benjamin foresaw and Wolf articulates this way: "Art," he says, "now knows what it is."<sup>32</sup> Although modernism has injected its aesthetic awarenesses deep into the public realm, it remains "a project that is in every respect impossible."<sup>33</sup> Yet "the individual still attempts [it]. It remains a mystery for theory that people should still write. . . . And yet it goes on regardless. Many stake their lives on it."<sup>34</sup> Because it, too, is part of the structure of modernist reality, making art constitutes "impossible gesture[s]," the continuous alienation of subject and object "forever enacted and then retraced."<sup>35</sup>

This is true for the art of poetry. At the end of the modernist century, it knows what it is. At the very least, poetry connotes a theory of language. It tells us, through constantly enacted, ever-deepening subjective and objective gestures—by its form and by its substance—how meaning and knowledge come to be in language.

### III. THEORIES OF LAW

#### A.

The modernist poets decentered the self's authority—the capacity of the self to speak with transparent objectivity—into the form and texture of the poem. The poem's authorial self was reformed. By being made part of the poem itself, the self became an object of critical and aesthetic attention.

Unlike pre-modernist poetry, legal language in the late nineteenth century projected no subjectivity whatsoever. Legal language was not romantic, but "classical" in the eighteenth century sense of the word. It was presumed objective, neutral, verifiable.<sup>36</sup>

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31. Walter Benjamin, *Illuminations* 242 (Harcourt, Brace & World, 1968).

32. See Burger, 184 *New Left Rev.* at 56 (cited in note 13).

33. *Id.*

34. *Id.*

35. *Id.*

36. For a critical and historical exposition of notions of objectivity and neutrality in "classical legal thought," see Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford U., 1992) ("Horwitz").

The first theoreticians to react to this classical sense of legal language were the legal realists.<sup>37</sup> "That something is radically wrong with our traditional legal thought-ways has long been recognized," Felix Cohen wrote in 1935, in his now-famous *Transcendental Nonsense and the Functional Approach*.<sup>38</sup> "Holmes, Gray, Pound, Brooks Adams, M.R. Cohen, T.R. Powell, Cook, Oliphant, Moore, Radin, Llewellyn, Yntema, Frank, and other leaders of modern legal thought in America, are in fundamental agreement in their disrespect for 'mechanical jurisprudence,' for legal magic and word-jugglery."<sup>39</sup> But—although intuiting the analogous decentering of objectivity in other disciplines (mathematics, philosophy, physics)<sup>40</sup>—the realists did not recognize, at least expressly, the problematic status of the author and the author's authority in legal language. Language, for the realist, was a side issue. The focus, instead, was on changing the status of legal *thought* from objectively based, formalized rules, onto a different doctrinal thought-plane premised, equally objectively, on "social policy" analysis.<sup>41</sup> The realists did not see that a language of policy also included complicated subjective dimensions (which their peers, the modernist poets, were aggressively exposing in poems).

By the early 1940s, realism had become mainstream legal thought;<sup>42</sup> by the 1960s, the realist critique had become the American legal education's primary pedagogical method.<sup>43</sup> But, in the early 1970s (well in the background of the jurisprudential quarrels of the time)<sup>44</sup> two books appeared, William Bishin's and Christopher Stone's *Law, Language and Ethics*,<sup>45</sup> and James Boyd White's *The Legal Imagination*,<sup>46</sup> which later proved to be the first signs of a transformation in jurisprudence itself. Both books employ realist methods, exploring, for example, the uncertainties of constructs such as "fact," "rule," and "is-

37. Id. at 169-92.

38. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 821 (1935).

39. Id. at 821.

40. Id. at 824-29.

41. See generally Horwitz at 169-246 (cited in note 36). Gary Peller has made similar conclusions in his strong critique of how knowledge and meaning have been viewed historically in American law. See Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1151, 1226-40 (1985). Peller also analyzes the "constructive" side of realism. Id. at 1259-74.

42. See generally Horwitz at 193-246 (cited in note 36).

43. Realism remains the favored pedagogical method. See Robin West, *Relativism, Objectivity and Law*, 99 Yale L. J. 1473, 1491 (1990).

44. See generally Horowitz at 247-68 (cited in note 36).

45. William R. Bishin and Christopher D. Stone, *Law, Language and Ethics* (Foundation, 1972).

46. James Boyd White, *The Legal Imagination* (Little, Brown, 1973).

sue."<sup>47</sup> Each book, in different ways, also requires the reader to remain on a critical plane, actively examining, through philosophical and literary texts, notions of authority and meaning.<sup>48</sup> White's working thesis, in fact, is that legal language exists socially between author and reader. Meaning arises through speech, and speech is communal. Lawyers are compelled to critique language; they must work in it, not through it. Through a series of questions, exercises, and interchanges between readers and writers, *The Legal Imagination* reveals that legal language, like any language, must be aware of itself. White posits the alternative—legal language unaware of its powers—as unreal, contrary to the liberal, democratic, and civil system he believes in.<sup>49</sup>

Neither *Law, Language and Ethics* nor *The Legal Imagination* uses modernist critical language. Yet each book is distinctly modernist. *The Legal Imagination*, in particular, by creating a method by which an individual reader injects herself or himself into the act of interpreting a legal text, forces a reconsideration of the meaning of legal language in subjective terms—the first place this is actively done in the history of legal thought.

By the early 1980s—only a decade after the Bishin and Stone and White books—legal theory had evolved significantly (one might say even radically) in its criticisms of objectivity. In 1983, for example, two ambitious and now landmark pieces were published in back-to-back issues of the *Harvard Law Review*: Roberto Unger's *The Critical Legal Studies Movement*,<sup>50</sup> and Robert Cover's *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*.<sup>51</sup> Over one hundred pages long, with only one footnote, *The Critical Legal Studies Movement* openly attempts to meld form and substance. Unger's critique of objectivist and formalist legal thought, coupled with the juxtaposition of philosophical, moral, theoretical, and political rhetoric in a dense yet informal style, give the piece the quality of a modernist essay on legal thought. A year later, in *Passion*,<sup>52</sup> a book-length essay, Unger's modernism is even more apparent. One of *Passion*'s expressed concerns is "a modernist criticism and restatement of the Christian-romantic image

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47. See Bishin and Stone, *Law, Language and Ethics* at 371-402, 413-538. See also White, *The Legal Imagination* at 566-727.

48. See Bishin and Stone, *Law, Language and Ethics* at 403-538. See also White, *The Legal Imagination* at 3-342, 623-756.

49. See generally White, *The Legal Imagination* (cited in note 46). The method pervades *The Legal Imagination*.

50. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1983).

51. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

52. Roberto Mangabeira Unger, *Passion: An Essay on Personality* (Free Press, 1984).

of man that forms the central tradition of reflection about human nature in the West."<sup>53</sup> Written in the first person, frequently addressing a rhetorical "you" in a direct voice, the book contains no notes. By identifying modernism as "a specific movement of opinion and feeling . . . pioneered by the great novelists and poets of the early and mid-twentieth centuries—by writers like Proust, Joyce, and Virginia Woolf, Karl Kraus and Samuel Beckett, Bely, Kafka, Musil, and Céline, Eliot and Montale,"<sup>54</sup> Unger associates himself directly with the modernist critique.

Cover's *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative* employs a different strategy. Acknowledging James Boyd White "for the ways in which he has explored the range of meaning-constituting functions of legal discourse,"<sup>55</sup> Cover declares: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . It is the diffuse and unprivileged character of narrative in a modern world, together with the indispensability of narrative to the quest for meaning, that is a principal focus of this Foreword."<sup>56</sup> Cover connects what a person knows about law with how he or she talks about it—how narrative functions in a legal text. Law is "a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative."<sup>57</sup> Cover's use of biblical narratives as examples of imaginative constructs<sup>58</sup> was, at the time, for a *Harvard Law Review* Supreme Court Foreword, astonishing. His focus on legal language as secondary to narrated meaning forced legal criticism onto an entirely new plane: authorial objectivity is questioned by showing the subjective side of narrated language itself.<sup>59</sup>

The critical breakdown of legal language did not occur only in literary terms. In 1982, a year before the *Harvard Law Review* pieces, the *Texas Law Review* published a stellar symposium entitled "Law and Literature."<sup>60</sup> Its central question, in James Boyd White's words, was whether the written materials of the law "have determinable and objec-

53. Id. at 23.

54. Id. at 33. For a critique of the modernist form of Unger's *Passion* and other Critical Legal Studies writing, see David Luban, *Legal Modernism*, 84 Mich. L. Rev. 1657 (1986).

55. See Cover, 97 Harv. L. Rev. at 6-7 n.11 (cited in note 51).

56. Id. at 4 n.3.

57. Id. at 9.

58. Id. at 11-25.

59. Cover's emphasis on narrative and the position of the authorial self in critical jurisprudence greatly influenced what has come to be called "storytelling" or "narrative" jurisprudence. See note 76 and accompanying text.

60. Symposium, *Law and Literature*, 60 Tex. L. Rev. 373-586 (1982).

tive meanings, or is what we call their 'meaning' in fact created by a community of interpreters?"<sup>61</sup> The contributors also included Ronald Dworkin, Stanley Fish, Gerald Graff, Michael Hancher, Sanford Levinson, William E. Nelson, and G. Edward White.<sup>62</sup> As William Nelson pointed out,

[a]ll the authors in this Symposium reject the notion that law can have an objective meaning that is "reducible to a unitary and completely restatable message" obtained through a "disinterested, impersonal approach to legal analysis." Those who address the matter assume, instead, that meaning is created by a complex and subjective interaction between the readers and the writers of language.<sup>63</sup>

At this point, though,

the writers of the various essays in the Symposium, along with others who have thought about its central question, divide, one group fearing and the other hoping that exposure of the myth of objectivity will bring the rule of law crashing down. As Gerald Graff suggests, the difference between the two groups is one of tactics or political preference. The former group "would presumably keep the cat in the bag" and the latter "would let him out," but "both parties here" suppose that there is a 'radical consequence in letting the cat out.'<sup>64</sup>

The most controversial pieces were Stanley Fish's.<sup>65</sup> One of his generation's leading literary critics, Fish, in the early '80s, turned his formidable critical acumen toward legal texts. Fish argued against what he called the "institutional optimism" of Ronald Dworkin on the one hand, and the radical pluralism of Sanford Levinson on the other.<sup>66</sup> Fish did not dispute Dworkin's recognition that the authorial objectivity of legal language involved an individual interpreter's subjective "beliefs (or whims or desires)."<sup>67</sup> Instead, he (in effect) attacked that part of Dworkin's jurisprudence that neutralizes subjectivity by establishing political, economic, and moral precepts, arguing that Dworkin was not sufficiently candid about the communal—as opposed to natural—status of his doctrinal structures.<sup>68</sup> In *Interpretation and the Pluralist Vision*, Fish criticized Levinson, whose position, he claimed, locked the interpreter of a legal text in hopeless subjectivity, unable to decide which of

61. James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 Tex. L. Rev. 415, 416 (1982).

62. See Symposium, 60 Tex. L. Rev. 373-586 (cited in note 60).

63. See William E. Nelson, *Standards of Criticism*, 60 Tex. L. Rev. 447, 447 (1982).

64. *Id.* at 448.

65. See Stanley Fish, *Interpretation and the Pluralist Vision*, 60 Tex. L. Rev. 495 (1982). See also Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 Tex. L. Rev. 551 (1982).

66. See Fish, 60 Tex. L. Rev. at 495.

67. *Id.*

68. This is, admittedly, a simplified summary of Fish's argument against Dworkin in *Working on the Chain Gang: Interpretation in Law and Literature*. The entire argument is worth reading. See Fish, 60 Tex. L. Rev. at 551 (cited in note 65).

many beliefs, including his or her own, is the right one.<sup>69</sup> Fish stated his own position in distinctly relativistic terms:

[B]eyond historical and institutional perspectives there is nothing to know—no knowledge that is recognizably or apprehensibly human—and that, therefore, far from impeding the search for truth, the forceful and polemic urging of particular points of view is the means, and the only means, by which the truth is established.<sup>70</sup>

He then attacked what he called James Boyd White's "literary pluralism."<sup>71</sup> White's position—that an adjudicatory text, like literature, can never be "completely known" because it constitutes a complex interplay between its authors and readers—attempts to remove adjudicative interpretation from the "narrow concerns of particular times and places."<sup>72</sup> White "manages to do what every pluralist would like to do, to have it both ways. He acknowledges the unavailability of temporal and historical perspectives, but he has access to a body of words that transcends them."<sup>73</sup> The literary pluralist objectifies interpretation by displacing decentered authorial objectivity onto a literary plane, in which he "can assert the continual relevance of [the timeless literary] object to the issues of everyday life while at the same time asserting its independence from those very same issues."<sup>74</sup>

Both Dworkin and White felt patronized by Fish's representations.<sup>75</sup> Yet, regardless of their accuracy, Fish's essays impart at least this much: by the early 1980s legal analysis had been overcome by doubts about authorial objectivity. Legal theory no longer could evade considerations of subjectivity and objectivity in legal texts.

By the mid-1980s, the subjective strand in legal theory found its fullest expression in legal criticism. In recognition of the subjective side of language, legal criticism began to see itself, in Robin West's words, as "utopian," "visionary," or "aesthetic."<sup>76</sup> Yet, as West also perceived,

69. See Fish, 60 *Tex. L. Rev.* at 496.

70. *Id.* at 501.

71. *Id.* at 502.

72. *Id.*

73. *Id.*

74. *Id.*

75. See James Boyd White, *Law and Literature: "No Manifesto,"* 39 *Mercer L. Rev.* 739 (1988). In his essay (one of the most important in the jurisprudential literature that deals with language), White declares: "A related mistake is to claim that the literary view of law fails to see that law is about power." *Id.* at 747. Although his elaboration on the point does not directly mention Fish's attack, it clearly addresses it. *Id.* at 747-49. Dworkin's response to Fish is direct. See Ronald Dworkin, *Pragmatism, Right Answers, and True Banality,* in *Pragmatism in Law & Society* 359-82 (Westview, 1991). His retort (also worth reading in full) begins with the declaration: "Professor Fish has been (as he might put it) on my case for almost a decade." *Id.* at 377-82.

76. Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory,* 60 *N.Y.U. L. Rev.* 145, 203 (1985). Since 1985, the kind of subjectively based critical writing described and envisioned by West has continued to be written, as Jane Baron recently observed,

the subjective, aesthetic language of legal criticism must be distinguished from the language required by the lawmaking process:

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. . . . 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.<sup>77</sup>

This is not to say that judges, legislators, and lawyers do not "also make methodological and visionary choices," or that they can escape from referring to their "personal histories when formulating a theory of human nature and social interaction upon which to ground their work."<sup>78</sup> The extent to which personal histories interact with the language of lawmaking defines still another side of the subjective and objective split in legal language:

[T]here 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.<sup>79</sup>

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"from a dizzying variety of directions." See Jane B. Baron, *The Many Promises of Storytelling in Law: An Essay Review of Narrative and the Legal Discourse: A Reader in Storytelling and the Law*, 23 Rutgers L. J. 79 (1991).

Sometimes the subject is the personal stories of individuals—law students, law professors, or litigants. The 'counter-stories' of groups provide the subject of other essays. Still other essays focus not on any person or group's story, but on narrative technique, famous literary works, and appellate opinions as works of literature in their own right. The authors of these essays come to a wide variety of conclusions as to the implications of attention to stories, ranging from suggestions that such attention will enable us to become better day-to-day practitioners of law to arguments that through stories we can change the law itself.

Id. at 80 (footnotes omitted). The "breadth and intensity of the legal academy's fascination with the telling of stories" has been expressed in writings also identified with "critical legal studies, feminist jurisprudence, law and economics, the new pragmatism, and critical race theory." Id. at 79 (footnotes omitted).

Mary Coombs has referred to this "explosion of writings" as "outsider scholarship." See Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683, 684 (1992).

Outsider scholarship is created and defined, in part, by contrast to traditional legal scholarship, which adopts a prescriptive approach, is grounded on normative positions, and is expressed in judicial discourse. Traditional scholarship assumes that neutrality and objectivity are achievable goals. The identity of the scholar should thus be irrelevant when assessing the work.

In contrast, outsider scholarship is characterized by . . . rejection of abstraction and dispassionate "objectivity," and by a preference for narrative and other engaged forms of discourse.

Id. at 684-85 (footnotes omitted).

77. See West, 60 N.Y.U. L. Rev. at 211 (cited in note 76).

78. Id.

79. Id.

At some point, however, the subjective realities stressed by the theorist become "objectified" by the political and social demands of lawmaking: issues of interpretation and narration are folded into institutional realms.

West's observations are crucial. Her analysis reveals how similar, at bottom, Fish's position is to both Dworkin's and White's. Dworkin and Fish both agree that a judicial decision is objective, at least in the sense that it requires subjectively determined institutional perspectives. And, contrary to Fish's criticism, White never completely frees the literary or aesthetic side of an adjudicative text from its institutional context: White's community of interpreters is bound by the same institutional concerns by which Fish binds his. West is the first theorist to point out that while legal criticism has entered into subjective realms, theories of adjudicative law, by necessity, must still take into account how subjectivity and objectivity are accommodated in decisionmaking texts.<sup>80</sup>

### B.

How much has the new jurisprudence affected the decisionmaking process? We are, not surprisingly, in a state of transition. Expressions of subjectivity in judicial opinions are non-programmatic; yet justices of the United States Supreme Court seem to be intuiting the transformations that have occurred in legal language and meaning. An intensely important example of the Supreme Court's struggle with the objective and subjective pressures in judicial language is *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>81</sup> the Court's recent decision on a woman's constitutional right to choose to terminate a pregnancy—one of the most striking judicial texts in the history of American constitutional law.

*Casey* opens with the plurality joint opinion co-authored by Justices O'Connor, Kennedy, and Souter. In its first sentence—"Liberty finds no refuge in a jurisprudence of doubt"<sup>82</sup>—the plurality proclaims its desire to establish a jurisprudence based on objective foundations. Authority is suggested, first of all, by style: the opinion's lack of footnotes and frequent use of the first person plural create a detached, objective tone. The opinion introduces its doctrine of due process liberty by citing Justice Brandeis's 1927 concurring opinion, joined by Justice Holmes, in *Whitney v. California*.<sup>83</sup> It then quotes extensively from

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80. See also Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 *Tenn. L. Rev.* 203 (1987).

81. 112 S. Ct. 2791 (1992).

82. *Id.* at 2803.

83. *Id.* at 2804 (citing *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).



Justice Harlan's 1961 dissenting opinion in *Poe v. Ullman*,<sup>84</sup> in particular his language that "'liberty' is not a series of isolated points pricked out" in terms of specified constitutional protections<sup>85</sup> but, rather, "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . ."<sup>86</sup> The judicial interpretation of liberty "also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."<sup>87</sup> With Harlan's aformalistic language as a baseline, the opinion notes "[t]he inescapable fact . . . that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule."<sup>88</sup> Reasoned judgment, an "inescapable fact" constrained by social and historical tradition, replaces simple rule formulation. Due process liberty becomes part of "a living thing," an objective reality bottomed not on formalized rules, but on social tradition.<sup>89</sup>

The opinion then discusses what "reasonable people" with "intimate views with infinite variations" might think about a woman's life and liberty when it comes to the "deep" and "personal" character of her choice to terminate a pregnancy out of conscience and belief.<sup>90</sup> The language is perspectivist—and social:

Abortion is a unique act. . . . That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>91</sup>

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84. 367 U.S. 497 (1961).

85. *Casey*, 112 S. Ct. at 2805 (citing *Poe*, 367 U.S. at 543 (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

86. *Casey*, 112 S. Ct. at 2805 (citing *Poe*, 367 U.S. at 543 (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

87. *Casey*, 112 S. Ct. at 2805.

88. *Id.* at 2806.

89. *Id.* (citing *Poe*, 367 U.S. at 542 (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

90. *Casey*, 112 S. Ct. at 2807-08.

91. *Id.* at 2807.

Similar language continues into an entire section used to discuss two lines of cases of "comparable dimension." One, beginning with *Lochner v. New York*,<sup>92</sup> was overruled in 1937 by *West Coast Hotel Co. v. Parrish*<sup>93</sup> because, the *Casey* joint opinion concludes, "[t]he facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced."<sup>94</sup> The other line of cases, beginning with *Plessy v. Ferguson*,<sup>95</sup> was overruled in 1954 by *Brown v. Board of Education*<sup>96</sup> for essentially the same reasons: "Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896."<sup>97</sup> An interpretive principle, grounded on time and place, and common knowledge about social, moral, and political facts of life, is formed into doctrine: "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty."<sup>98</sup>

The authors' objective-sounding language of policy, based on changing social and historical "facts of life," is, in its anti-formalism, clearly realist. Yet, like the language of realism, it is limited. Reasoned sensitive judgment cannot be determined with complete objectivity (the word "sensitive" alone connotes subjectivity). The joint opinion's interspersed rhetoric of changing notions of fundamental law, spoken in an objective tone, suggests that the Justices either do not see how their personal perceptions are part of their joint judgment, or choose not to say so.

Referring to its "feebly supported, post hoc rationalization[s],"<sup>99</sup> Chief Justice Rehnquist derides the joint opinion's half-submerged subjectivity, especially the social and historical interpretations of *West Coast* and *Brown*.<sup>100</sup> If by "feebly supported" the Chief Justice means that the opinion has no purely objective basis for its doctrinal interpretation, he is right. The joint opinion's sense of the jurisprudence underlying *West Coast* and *Brown* is, in part, an object of collective, subjective judgment. Yet, with no sense of apparent self-contradiction,

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92. 198 U.S. 45 (1905).

93. 300 U.S. 379 (1937).

94. *Casey*, 112 S. Ct. at 2812 (discussing *Lochner* and *West Coast Hotel*).

95. 163 U.S. 537 (1896).

96. 347 U.S. 483 (1954).

97. *Casey*, 112 S. Ct. at 2813 (discussing *Plessy v. Ferguson* and *Brown v. Bd. of Educ.*).

98. *Id.*

99. *Id.* at 2864 (Rehnquist, C. J., concurring in the judgment in part and dissenting in part).

100. See *id.*

the Chief Justice—while exposing the joint opinion's subjectivity—nevertheless assumes his own language is premised on access to objectifiable knowledge, on some transcendent source beyond social experience. Listen, for example, to his discussion of the joint opinion's analysis of *Brown*:

The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it was beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the *Plessy* Court had erred.<sup>101</sup>

The assertion that *Brown* simply expresses "a judgment that the Equal Protection Clause does not permit racial segregation" implies that the *Brown* Court's interpretive language was premised on an epistemological certitude outside history and society. "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution," the Chief Justice proclaims.<sup>102</sup> But what does it mean for a court to make a decision according to its "best lights"? Do these "lights" exist apart from society or a judge's own personal sensibilities? If so, how? Where? The Chief Justice says "[t]he doctrine of stare decisis . . . should be no more subject to the vagaries of public opinion than is the basic judicial task."<sup>103</sup> But this assumes that "the basic judicial task" is subject to a knowledge that exists somewhere outside its institutional context. The Chief Justice urges his readers to "assume instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition."<sup>104</sup> But what makes constitutional interpretation "faithful?" Is the Chief Justice "faithful" to "legitimacy" because he believes—irrespective of his own views of social and public policy—that he objectively can interpret constitutional meaning? "Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution."<sup>105</sup> But to say that constitutional adjudication "only" involves deciding whether challenged provisions comport with the Constitution implies that the inquiry can be answered objectively and verified institutionally without any subjective input.

On one plane the Chief Justice's reasoning resembles the joint opinion's. It is grounded on the realist critique that an objectively based

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101. *Id.* at 2865.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2873.

judicial thought process can be interpretively achieved. Yet the Rehnquist opinion also, confusedly, implies a pre-realist attitude. It assumes that constitutional liberty exists in a realm of objectifiable meaning beyond social and political concerns.<sup>106</sup>

Justice Scalia's opinion begins in the first person<sup>107</sup> and never abandons it. "Quite simply," he says in his introduction,

. . . the issue in this case [is] not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.<sup>108</sup>

The identifiable speaker does not call attention to himself, his subjectivity, or his emotions. Instead, he deflates his speaking self: "I reach that conclusion not because of anything so exalted as my views . . . I reach the conclusion . . . because of two simple facts." The opinion adopts a tone of complete objectivity. Justice Scalia's language contains no sense of self-reflection; it presents itself as capable of declaring objective truths. Note, for example, how the opinion describes the conflict of liberties presented by *Casey*. Unlike the opinions of Justice Stevens, Justice Blackmun, the joint opinion, and the line of decisional cases back to *Roe v. Wade*,<sup>109</sup> Justice Scalia's opinion analyzes a woman's constitutional right to terminate a pregnancy apart from the State's right to prohibit it. He asserts, instead, that the liberty clash "quite simply" exists between an "unborn child" and a woman's choice to overpower an "unborn child." But, although Justice Scalia claims the liberty issue is bottomed on a simple and factual interpretive foundation, in actuality, his opinion endows the fetus with a liberty right which, in effect, equates a woman's choice to terminate a pregnancy with murder. From what realm of verifiable knowledge does this "simple fact" come? Clearly, it originates in Justice Scalia's personal belief in a fetus's liberty right. The subjective side of his interpretation utterly escapes him. "*Roe* was plainly wrong," he claims, "even on the Court's methodology of 'reasoned judgment,' and even more so (of

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106. The fact that Chief Justice Rehnquist also signed Justice Scalia's opinion exacerbates this confusion. See *Casey*, 112 S. Ct. at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part).

107. "My views on this matter are unchanged. . . ." *Id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part).

108. *Id.* at 2874.

109. 410 U.S. 113 (1973).

course) if the proper criteria of text and tradition are applied."<sup>110</sup> But who decides the proper criteria of text and tradition? Justice Scalia's assertion implies that the criteria can be found objectively, and he is the one who has done so:

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in this and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.<sup>111</sup>

Yet Justice Scalia's own collection of adjectives, his "simple facts," are, necessarily, no less decorations of value judgments, or concealments of political choices, than those of his colleagues.

Justice Scalia's rhetoric is, in fact, riddled with interpretive contradiction. First, he openly employs a language of the first person, yet this language is spoken in completely objective terms. The opinion's first person language—which includes both non-reflexive subjectivity and complete objectivity at the same time—projects a strange and disturbing epistemological cast. The rhetorical flourishes are extraordinary. "The Imperial Judiciary lives"<sup>112</sup> is one retort. "It is instructive," the Justice says,

to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.<sup>113</sup>

This kind of philosophical and cultural language certainly is not typical judicial critique. Yet, for all its purported objectivity, Justice Scalia's legal, philosophical, and cultural perceptions are his own. It is Justice Scalia, not Nietzsche<sup>114</sup> nor the Justices who authored the joint opinion, who appears mystically and ecstatically bound up in a subjective knowledge of simple, objective facts:

How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think

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110. *Casey*, 112 S. Ct. at 2875 (Scalia, J., concurring in the judgment in part and dissenting in part).

111. *Id.*

112. *Id.* at 2882.

113. *Id.*

114. Nietzsche's vision included a recognition of the fundamental changes in the understanding of language and meaning that occurred during his time, and the realities that would be unleashed by them. See generally Sander L. Gilman, Carole Blair, David J. Parent, eds., *Friedrich Nietzsche on Rhetoric and Language* (Oxford U., 1989).

that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," . . . which turns out to be nothing but philosophical predilection and moral intuition.<sup>115</sup>

"Engaged . . . in ascertaining an objective law"—is that what Justice Scalia thinks the Court is doing? But, of course, that is not what the Court interpretively can do. Justice Scalia lambasts the joint opinion as imperious because it fails to acknowledge its subjectivity. Yet he is unable to fathom, or chooses not to see, that his sense of objective law is rooted also in predilection, intuition, and personal judgment. (I imagine Justices Souter, Kennedy, O'Connor, Stevens, and Blackmun might find Justice Scalia's self-righteous lack of self-reflection—in the words Justice Scalia uses to describe their judgment—too much to bear).

Perhaps the most striking opinion in *Casey* is Justice Blackmun's. Like Justice Scalia's, the opinion uses a language of intense, transparent subjectivity (made even sharper, textually, by the fact that Justice Blackmun authored the majority opinion in *Roe*).<sup>116</sup> Justice Blackmun's language is dramatically atypical. He immediately projects himself emotionally into *Casey's* discourse, connecting his opinion with earlier ones that he authored or signed; explicit references are made to his own feelings and to the feelings of other justices. "Three years ago, in *Webster v. Reproductive Health Services*," he reminds his readers, "four Members of this Court appeared poised to 'cast into darkness the hopes and visions of every woman in this country' who had come to believe that the Constitution guaranteed her the right to reproductive choice."<sup>117</sup> With unusual directness, he continues:

All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. . . . But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.<sup>118</sup>

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115. *Casey*, 112 S. Ct. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis in original).

116. 410 U.S. 113 (1973).

117. *Casey*, 112 S. Ct. at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). See Horwitz at 271 (cited in note 36).

118. *Casey*, 112 S. Ct. at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

"Make no mistake, the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle":<sup>119</sup> Justice Blackmun's subjectivity is raw. His use of the darkness and light metaphor, with its religious connotations, implies, without much interpretive interference, that the protections afforded and the jurisprudence expressed by *Roe* are morally and spiritually good. The almost apocalyptic directive to the reader to "[m]ake no mistake" about the personal courage of the named Justices is framed in a language of prophecy, in a voice resembling that of one who bears witness. The listener is asked to imagine not only the terrible moral, social, and political pressures placed personally on Justice Blackmun himself, but also those imposed on Justices O'Connor, Kennedy, and Souter.

Although the opinion turns to more objective-sounding realist talk in its second part, the voice in its third section switches back suddenly to the personal and direct:

At long last, THE CHIEF JUSTICE . . . admit[s] it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases." . . . If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE'S opinion.<sup>120</sup>

The use of the word "fear" in direct relation to the Chief Justice is intentionally striking. Fear of what? The subjective intensity continues: "In the CHIEF JUSTICE's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called 'sexual deviates.' Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts."<sup>121</sup> Then,

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental—for THE CHIEF JUSTICE, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of their decision . . . In short, THE CHIEF JUSTICE's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.<sup>122</sup>

It is difficult to imagine judicial language more emotionally direct. Patiently romantic, absorbed by subjectivity, Justice Blackmun uses lan-

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119. *Id.*

120. *Id.* at 2853.

121. *Id.*

122. *Id.* (emphasis in original).

guage as a transparent vehicle for the transfer of deep personal feelings. Justice Blackmun declares that the Chief Justice (and, by implication, the three Justices who signed his opinion) do not, or cannot, imagine (as he and Justices O'Connor, Kennedy, and Souter have, out of "personal courage") the realities faced by a woman who has to consider terminating a pregnancy. The consequences of their lack of feeling and imagination are socially, morally, and politically terrifying:

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.<sup>123</sup>

Make no mistake: Justice Blackmun openly exposes the real politics underlying the Court's liberty jurisprudence. The issue is not whether subjectivity or politics enter into decisionmaking: Justice Blackmun openly tells the entire body politic they do. The real question is which personal political vision must be chosen. Justice Blackmun makes it perfectly clear that his (and Justices Stevens, O'Connor, Kennedy, and Souter's) vision is "worlds apart" from that of Chief Justice Rehnquist, and Justices Scalia, White, and Thomas. Yet, remarkably, although Justice Blackmun discloses the personal and political realities that inform the decisions in *Casey*, his opinion includes no self-awareness of its subjectivity, no self-critique. Justice Blackmun's opinion never confronts how its subjectivity (to use Christa Wolf's phrase) "runs alongside" the opinion's objectivity.<sup>124</sup> No attempt is made to analyze the place that candidly personal, subjective responses have, or might have, in the context of a judicial opinion—especially one as socially, politically, and interpretively important and controversial as *Casey*.

What do the opinions in *Casey* tell us about legal language and meaning? The joint opinion, and the opinions of Justices Stevens and Rehnquist, premise their language on different forms of realist objectivity. Although Justice Blackmun's subjectivity is exceptional, it never comes to grips with its interpretive implications. Justice Scalia's opinion is also filled with the first person, but his subjectivity differs from Justice Blackmun's. The Scalia opinion (signed by the Chief Justice and Justices White and Thomas) uses subjective language to assert transcendent objective law—a position pre-realist in its expression of certain, verifiable, neutral doctrine, yet post-realist in its subjectivity.

123. Id. at 2854-55.

124. See Wolf, *The Fourth Dimension* at 21 (cited in note 29).



The Justices who signed Justice Scalia's opinion would appear to have no sense of the self-reflective character of language. Though correctly pointing out that the five Justices who signed the joint opinion use a reasoning premised, in part, on real politics, the Scalia opinion, hypocritically, assumes that its interpretive position is based on epistemological certitude beyond subjectivity and politics. Justice Scalia makes a big deal about the public's disbelief in the authority of the Court. He says that this "distressing phenomenon"<sup>125</sup> is a result of opinions like the joint opinion, which are out of touch with the ordinary citizen's philosophical and moral intuitions. Constitutional adjudication, he asserts, merely involves ascertaining objective law. But not only does this assume an objectivity that does not exist, it also presumes that ordinary citizens do not have any philosophical or moral sense of a century-old change in how language determines meaning. As Eugenio Montale observed over twenty years ago: "[T]hose who organize public life—politicians, administrators, business men" (one can add lawyers and judges)—

cannot appear with impunity to have . . . no opinions. . . . Nor could matters be otherwise since language—the vehicle of every opinion—is in a state of crisis. . . . The philosopher is aware of his [or her] ignorance, but it is essential to prevent the [person] in the street from discovering the ignorance of the intellectuals.

Can we prevent this? There was a time when we could . . . because uneducated men [and women] were kept outside the realm of thought. Only very few . . . were authorized to think. The bomb of thought was guarded by a handful of specialists who did not have any interest in setting it off. Today, however, the bomb has exploded, and even the individual who is completely illiterate suspects that his [or her] ignorance is as valuable as the most sophisticated doctrine. Consequently, that collective figure, which is always somewhat hypothetical but which is composed of real figures and calls itself "the public," has disappeared. . . . [T]here is simply a spontaneous convergence of created interests.<sup>126</sup>

The myth of completely objective legal language has converged in a language of subjectively and objectively created interests—whether we believe it has, or should have.

### C.

The opinions in *Casey* exemplify what many legal theorists have known for at least a decade: legal language contains objective and subjective sides, both of which affect how meaning is made and known.

What does this mean for legal theory? First, writings specifically identified as critical undoubtedly will continue to inquire into, and de-

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125. *Casey*, 112 S. Ct. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part).

126. Montale, *Poet in Our Time* at 70-71 (cited in note 7).

velop, different notions and forms of subjectivity.<sup>127</sup> Meanwhile, those theorists who probe how issues of interpretation and meaning reveal themselves in adjudicative texts will confront a more complicated and crucial task. The fundamental jurisprudential question at the end of this century, and in the beginning of the next, will revolve around how to incorporate subjectivity and objectivity of decisionmaking texts into a theory of adjudicative law.<sup>128</sup>

Some legal theorists—whose work can be loosely defined as part of a “new” pragmatism—seem to have intuited a way into, or out of, the problem.<sup>129</sup> One of the critical cores of pragmatism is, as Louis Menand has succinctly stated,

. . . what follows from the view that there is nothing external to experience—no World of Forms, City of God, independent cogito, a priori category, transcendental Mind, or far-off divine event to which the whole creation moves, but only the mundane business of making our way as best as we can in a universe shot through with contingency. “All ‘homes’ are in finite experience,” said [William] James; “finite experience as such is homeless. Nothing outside the flux secures the issue of it.”<sup>130</sup>

Pragmatism is at least realist in its rejection of transcendent meaning and truth: social experience must be taken into account.<sup>131</sup> But in re-

127. See notes 59, 76 and accompanying text. For a recent critique of subjectivity and objectivity, and the effects that subjectivist interpretation might have on legal theory, see James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. Colo. L. Rev. 489 (1991).

One scholar-theorist-writer, Patricia Williams, has taken critical legal thought and language forthrightly into forms of expression beyond those considered unorthodox even in legal scholarship. See Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard U., 1991). The essays that comprise *The Alchemy of Race and Rights* project a conscious sense of their formal ambition, which is to try “to create a genre of legal writing to fill the gaps of traditional legal scholarship.” *Id.* at 7. As Linda Greene has observed about Williams’s project:

She uses numerous techniques to hold the reader’s attention: stories relating her own and others’ experiences, multidisciplinary analyses, fantasy, allegory, and prose intertwined with poetry. . . . In keeping with her central critique of the false objectivity of American law, Williams reminds us early and often that “[s]ubject position is everything in . . . [her] analysis of the law.” Abandoning the disembodied “neutral” and “objective” voice of traditional scholarship, she injects autobiographical accounts in an attempt to convey the complexity of her identity and existence.

Linda S. Greene, “*Breaking Form*,” 44 *Stan. L. Rev.* 909, 909 (1992) (footnotes omitted). *The Alchemy of Race and Rights* also has been praised in the critical world beyond legal academia. See, for example, Henry Louis Gates, *Contract Killer*, 252 *The Nation* 776 (1991).

128. This, of course, is a reenactment, after the injection of modernist concepts of language into legal thinking, of the fundamental jurisprudential problem of incorporating theory into practice.

129. See generally *Pragmatism in Law & Society* (Westview, 1991).

130. Louis Menand, *The Real John Dewey*, *The New York Rev. of Books* 50, 52 (June 25, 1992).

131. As Morton Horwitz concludes his *The Transformation of American Law, 1870-1960* at 271 (cited in note 36):

Only pragmatism, with its dynamic understanding of the unfolding of principle over time and its experimental appreciation of the complex interrelationship between law and politics and

cent years, legal pragmatism has shifted its focus. It now looks—as the modernist poets do—at language. As Richard Rorty has observed: “Everybody seems now to be a legal realist. Nobody wants to talk about a ‘science of law’ any longer. Nobody doubts what Morton White called ‘the revolt against formalism’ was a real advance, both in legal theory and in American intellectual life generally.”<sup>132</sup> The new pragmatism is different because “new pragmatists talk about language instead of experience or mind or consciousness, as the old pragmatists did.”<sup>133</sup> The new pragmatists recognize the critical quality of language, the constant interplay between subjectivity and objectivity—along with the need to bring these perceptions into the process of making adjudicative decisions. Issues of legal language and meaning must be probed as completely as possible. The new pragmatism seems to envision an adjudicative process in which personal and social perspectives on, and candor about, meaning and language become part of the practical process of making law.<sup>134</sup>

The theoretical contours of this approach do not yet exist. Its procedural and substantive expressions, its form and language, have not yet been determined. But the sense of a legal text as a created object that includes personal, political, and cultural perspectives is, now, how our most astute legal critics and legal practitioners think about legal language and meaning.<sup>135</sup> To deny this critical reality falsifies not only the authority of decisionmaking texts, but the legal system itself.

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theory and practice, has stood against the static fundamentalism of traditional American conceptions of principled jurisprudence.

132. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *Pragmatism in Law & Society* at 89 (cited in note 129).

133. *Id.* at 91.

134. Among legal theorists who have written on issues of legal language, interpretation, and meaning, and who either have claimed (or not disclaimed) some degree of identification with pragmatism, are Lynn Baker, Stanley Fish, Thomas Grey, Allan Hutchinson, Mari Matsuda, Martha Minow, Richard Posner, Margaret Jane Radin, Richard Rorty, Joseph William Singer, Elizabeth Spelman, Catherine Wells, and Cornell West.

135. It appears that United States Supreme Court justices also have become more aware of subjective influences. In the Stanford Law Review's Summer 1992 issue, “A Tribute to Justice Thurgood Marshall,” both Justice O'Connor and Justice Kennedy remark on Justice Marshall's powers of persuasion as a storyteller during discussions of cases in conference. See Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992), and Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 Stan. L. Rev. 1221 (1992). Justice O'Connor's and Justice Kennedy's perceptions received front-page newspaper attention. See Linda Greenhouse, *Liberal Giants Inspire Three Centrist Justices*, N.Y. Times 1 (Oct. 25, 1992). The comments of Justice O'Connor and Justice Kennedy—made in a public forum and picked up by the media—reveal that Justice Marshall's personal experiences, and the ways in which he narrated them, sometimes influenced their (and, by implication, Justice Marshall's own) decisions. One might ask why these subjective realities, discussed outside the adjudicative process, were not mentioned expressly in the opinions in which they may have played a part. One might also imagine

## IV. CONCLUSION

In the late nineteenth century changes in public media forced corresponding changes in the nature of language and meaning. Writers who intuited these transformations responded by reforming their art. Language viewed as unmediated expression was rejected. The status of the author and the author's authority became problematic, a point of critical inquiry and aesthetic focus.

The construct used to describe these transformations is modernism. But even before modernism took on its own critical reality, poets began to intuit the aesthetic transposition that had taken place, recognizing the changing role of the author, or the self, in poetry. The complicated process of decentering the authorial self became central to the act of writing. The continuous and self-conscious blurring of a poem's subjective and objective dimensions aesthetically represented the ceaseless separation between subject and object both in language and reality, with radical implications about knowledge and meaning. Modernist poetry recognizes that language is never wholly subjective or objective. Although absorbed by the text, the self is never eliminated; language can never completely exist without personal, human dimensions.

Legal language was not immune to these changes. But legal theory realized the objectivity and subjectivity of legal language only after considerable resistance. Nineteenth century jurisprudence considered legal language transparent and objective. Consequently, the first substantial change in thinking about legal meaning—legal realism—broke down authorial objectivity. Legal language was rooted, instead, in a different objectivity—historical experience, human affairs, social morality, political economy. The realists, however, did not break legal language down into its subjective side. This critical process did not actively occur in legal theory until the 1970s, in the work of William Bishop, Christopher Stone, and James Boyd White. By the early 1980s, legal criticism had become increasingly aware of its subjective dimensions; by the late '80s, subjectivity had surfaced fully in legal thought. Meanwhile, a different awareness emerged in critical writings about adjudicative texts. Robin West first recognized that the subjectivity inherent in interpreting the meaning of an adjudicative text conflicts with the institutional necessity of making a textual decision that ultimately must order rights, liabilities, or, possibly, incarceration or penalty of death. A theory of adjudicative law must consider how subjectivity—in Christa Wolf's words—"runs alongside" the decisionmaking text.

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what kinds of opinions would have been written if the actual effect of first person experience on the adjudicative process had been made explicit, rather than omitted.

One conclusion about poetry at the end of the modernist century is that it reflects—in forms of language more intense and concentrated than those of other verbal arts—what language and meaning are. Poetry connotes a theory of language.

A corresponding conclusion can be made about law. Legal theorists have come to know the boundaries of legal language, both critical and adjudicative. This knowledge, I think, explains the attraction a new pragmatism has had for legal writers who confront, or have been confronted by, the subjective and objective sides of legal language. A pragmatist realizes that adjudicative language must be brought closer to the realities of language itself. This is not to say that decisionmaking will then attain true results. We cannot know that. As the Supreme Court's opinions in *Planned Parenthood of Southeastern Pennsylvania v. Casey* reveal, however, an adjudicative language that fails to take into account what we have learned about legal language over the past twenty years is less knowing, less true. Nor can we know what effect, political or ideological, different forms of subjectivity and objectivity might have on the social reality necessarily ordered by adjudication. We do know, though, that the meaning of legal language—like the language of poetry—is something many stake their lives on. It is the truest resemblance between poetry and law.